The Opportunity to Be Heard and the Doctrines of Preclusion: Federal Limits on State Law

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THE OPPORTUNITY TO BE HEARD AND THE
DOCTRINES OF PRECLUSION: FEDERAL LIMITS
ON STATE LAW

WILLIAM V. LUNEBUG†

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I would like to thank Professor Stephen Burbank of the University of Pennsylvania Law School and Professor Carl Tobias of the University of Montana School of Law for their helpful comments on earlier drafts of this article. I argue in part herein that the Supreme Court has seemingly misinterpreted the dictates of 28 U.S.C. § 1738 by failing to consider the potential existence of a federal common law of preclusion operating to limit state preclusion law. See infra text accompanying notes 308-347 & 440-471. While we may differ on matters of detail, Professor Burbank has expressed somewhat similar views, first in Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach, 70 CORNELL L. REV. 625 (1985) and then more elaborately in Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 CORNELL L. REV. 733 (1986).

I would also like to thank Mary Jo Ruschak and Teresa Svidro for their assistance in the research for and editing and proofreading of earlier drafts. The University of Pittsburgh School of Law also provided a stipend that assisted in the completion of this article.

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I. INTRODUCTION

Our previous decisions have not specified the source or defined the content of the requirement that
the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound
by the statutory directive of [28 U.S.C.] § 1738,1 state proceedings need do no more than satisfy the minimum
procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full
faith and credit guaranteed by federal law.2

The Supreme Court's opinion in Kremer v. Chemical Construction Corp.5 is but one of twenty-one4 handed down since 1979 where it

1. 28 U.S.C. § 1738 (1982). The statute provides in pertinent part:
The records and judicial proceedings of any court of any such State,
Territory or Possession, or copies thereof, shall be proved or admitted
in other courts within the United States and its Territories and Posses-
sions by the attestation of the clerk and seal of the court annexed, if a
seal exists, together with a certificate of a judge of the court that the
said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so
authenticated, shall have the same full faith and credit in every court
within the United States and its Territories and Possessions as they
have by law or usage in the courts of such State, Territory or Possession
from which they are taken.

Id.


3. Id. In Kremer, the Court addressed the issue of whether a federal court in
a title VII case should give preclusive effect to a decision of a state court uphold-
ing a state administrative agency's rejection of an employment discrimination
claim, when the state court's decision would be res judicata in that state's own
courts. Id. at 463.

4. Parsons Steel, Inc. v. First Alabama Bank, 106 S. Ct 768 (1986); Marrese
has grappled with the doctrines of issue and claim preclusion,\(^5\) both in the intra- and intersystem contexts.\(^6\) During the 1983 Term alone, no less than seven full-dress opinions were written on one aspect or another of this area.\(^7\) While in some instances the Court has rejected efforts to preclude litigation of matters,\(^8\) on balance the trend has been in favor of preclusion,\(^9\) which is not


5. See infra text accompanying notes 142-45. “Claim preclusion,” or res judicata, is present where a final judgment on the merits bars further claims by parties or their privies on the same cause of action. Restatement (Second) of Judgments §§ 17-29 (1982). “Issue preclusion,” or collateral estoppel, is present where, once a court has decided an issue of fact or law that is necessary to its judgment, the decision is conclusive in a subsequent suit based on a different cause of action involving any party to the prior litigation. Id. But see infra note 12 (“res judicata” used to refer to both claim and issue preclusion).

6. As used in this article, intersystem preclusion refers to preclusion by judgment when the second or subsequent actions are brought in the courts of the same jurisdiction that rendered the initial judgment. Intersystem preclusion refers to preclusion by judgment when the second or subsequent actions are brought in the courts of a jurisdiction different from that rendering the initial judgment, such as when the first suit is in state court and the second in the court of another state or in federal court.


surprising given the concerns expressed both in formal opinions\textsuperscript{10} and in other contexts\textsuperscript{11} by various members of the Court regarding docket congestion.

While the recent decisions range over many of the disparate problems encompassed within the broad areas of res judicata\textsuperscript{12} and full faith and credit,\textsuperscript{13} a very large proportion of them focus in significant degree, though in different contexts, on the concept of "opportunity to be heard."\textsuperscript{14} As a general proposition, "due process," whether embodied in the fifth amendment\textsuperscript{15} or the fourteenth amendment,\textsuperscript{16} guarantees a civil litigant at least one opportunity to litigate all matters that are relevant to his claim or defense.\textsuperscript{17} Once that opportunity is given, however, a further attempt to litigate that claim or defense, or issues relating thereto, may in many instances be foreclosed without contravention of federal constitutional or federal nonconstitutional standards.\textsuperscript{18}

\textsuperscript{10} See, e.g., Patsy v. Board of Regents, 457 U.S. 496, 517 (1982) (O'Connor & Rehnquist, JJ., concurring) (acknowledging increasing number of § 1983 actions and effect on courts that are already heavily burdened).

\textsuperscript{11} See, e.g., Rehnquist, Overdelegation of Authority, Proliferation of Judges Could Harm the Judiciary, 14 Third Branch, Oct. 1982, at 2.

\textsuperscript{12} The term "res judicata" has been used to refer to both claim and issue preclusion. See A. Vestal, RES JUDICATA/PRECLUSION V-13 to 14 (1969).

\textsuperscript{13} U.S. Const. art. IV, § 1, provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

\textit{Id.} This constitutional provision is implemented through 28 U.S.C. § 1738 (1982). For the pertinent language of § 1738, see \textit{supra} note 1.

\textsuperscript{14} See, e.g., MacDonald v. City of West Branch, 466 U.S. 284, 285 (1984) (at issue was whether federal court can base preclusion on unappealed arbitration award in case brought under 42 U.S.C. § 1983); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (at issue was whether party that has had issues of fact decided against it in equitable proceeding is precluded from relitigating same issues in subsequent legal proceeding instituted by another party).

\textsuperscript{15} U.S. Const. amend. V.

\textsuperscript{16} Id. amend. XIV, § 1.

\textsuperscript{17} See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Mullane Court noted:

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

\textit{Id.} at 313.

\textsuperscript{18} See, e.g., Sherrer v. Sherrer, 334 U.S. 343 (1948). In \textit{Sherrer}, a Massachusetts woman filed her husband and established residency in Florida with the intention of getting a divorce. \textit{Id.} at 345. After meeting the Florida residency requirement, she filed a complaint. \textit{Id.} Her husband received notice and appeared at the divorce hearing with counsel. \textit{Id.} The husband's attorney neither cross-examined nor introduced any evidence and a divorce decree was entered.
In other instances, an additional opportunity to be heard might be required by these standards.19

The analysis that follows focuses on the extent to which and the manner in which federal law dictates the opportunity to be heard as a prerequisite to a state's ability to invoke the doctrines of merger,20 bar,21 and issue preclusion,22 whether against the parties to the original litigation23 or in favor of non-parties.24 These limits have their origin in both constitutional and nonconstitutional sources. They constitute the principal federal procedural control over the parameters of state preclusion law.25 They operate "internally" on the law of each state; that is, they condition the effect of a state court judgment in the courts of the state which rendered it. Moreover, under the full faith and credit clause26 and its implementing statute,27 when an attempt is made to rely on the judgment of a sister state, those limits generally circumscribe the preclusive effect of the judgment in the courts of other states and the federal courts.

In this way the pertinent federal definition of "opportunity to be heard" operates similarly in both the intra- and intersystem

Id. at 346. At a subsequent probate proceeding in Massachusetts, the ex-husband collaterally attacked the Florida decree on jurisdictional grounds. Id. at 347. Relying on the doctrine of preclusion, the Supreme Court upheld the decree. Id. at 348. It saw "nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate." Id.

19. For a discussion of circumstances in which an additional opportunity to be heard may be required, see infra notes 220-347 and accompanying text.

20. For a statement of the general rule of merger, see infra notes 142-45 and accompanying text.

21. For a statement of the general rule of bar, see infra note 144 and accompanying text.

22. For a statement of the general rule governing issue preclusion, see infra text accompanying note 220.

23. For a discussion of the application of merger and bar to parties to the original action, see infra notes 140-65 and accompanying text. For discussion of issue preclusion as it relates to parties to the original action, see infra notes 220-70 and accompanying text. For discussion of federal nonconstitutional limitations on state preclusion law as they pertain to parties to the original action, see infra notes 308-347 and accompanying text.

24. For discussion of issue preclusion as it applies to non-parties, see infra notes 271-306 and accompanying text. For a discussion of federal nonconstitutional limitations on state preclusion law as they pertain to non-parties, see infra notes 308-347 and accompanying text.


26. U.S. Const. art. IV, § 1. For the text of the full faith and credit clause, see supra note 13.

27. For the pertinent language of § 1738, see supra note 1.
contexts. 28 Certain circumstances may arise, however, in which the rendering state’s internal application of its preclusion doctrine, although otherwise within applicable federal constraints, may be inconsistent with the federal law of “opportunity to be heard” as it operates in the intersystem context. In such circumstances, as we shall see, other courts, state and federal, may be permitted to disregard what would appear to be their full faith and credit obligations with respect to the judgment of the rendering state. 29

The Supreme Court’s opinion in the Kremer case 30 purports to deal with only a limited aspect of the complex interaction of federal and state law in the area of intra- and intersystem preclusion. 31 The excerpt quoted above 32 attempts to put to rest one question, though as we shall see, the answer may be based on mistaken assumptions. 33

The following discussion will focus on the federal controls that impinge on state domestic preclusion law and upon problems encountered when recognition or enforcement of a state judgment is attempted in a federal court in the state of rendition or elsewhere, or in a court of a sister state. It should be noted, however, that much of the same general analysis applies in those instances where all courts involved are federal, and also where a federal judgment is relied upon in a later state court proceeding. 34

In order to supply necessary background, the introductory section of this article will discuss the constitutional parameters of the opportunity to be heard in the initial adjudication. This material is also relevant to the topic under examination because, absent compliance with the applicable constitutional procedural

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28. For the distinction between intersystem and intrasystem preclusion as employed in this article, see supra note 6.
29. See, e.g., Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (notwithstanding Virginia award of workers’ compensation to plaintiff under state law excluding “all other rights and remedies,” District of Columbia was entitled to award additional relief in subsequent supplemental action). For a more detailed analysis of Thomas and a discussion of federal exceptions to intersystem preclusion, see infra notes 484-534 and accompanying text.
31. For an analysis of Kremer, see infra notes 453-83 and accompanying text.
32. See supra text accompanying note 2.
33. For discussion of the apparent basis of the Kremer decision, see infra notes 459-71 and accompanying text.
34. For discussion of the preclusive effects of federal judgments, see infra notes 577-83 and accompanying text.
constraints in the original proceeding, any judgment resulting from that proceeding may be invalid in the state of rendition and not entitled to recognition or enforcement elsewhere. That is, no preclusive effects would attach to the original judgment.\textsuperscript{35}

II. INTRASTATE PRECLUSION

A. The Opportunity to be Heard in the Initial Adjudication

1. The Relation of Substantive Law and Procedure

Generally, nonconstitutional federal and state law, statutory and common, defines the "substantive"\textsuperscript{36} elements necessary to obtain the various judicial remedies. Many of the "procedural"\textsuperscript{37} limitations on or conditions for obtaining relief from a particular judicial tribunal, such as venue and subject matter jurisdiction, are similarly of nonconstitutional origin.\textsuperscript{38}

However, once the relevant body of federal or state law makes a particular element in a cause of action essential to recovery or lays down a particular procedural restriction, the due process clauses of the federal Constitution ensure the parties an adequate opportunity to be heard.\textsuperscript{39} The plaintiff, in such a case, may attempt to establish that the necessary substantive and proce-

\textsuperscript{35} See, e.g., Restatement (Second) of Conflict of Laws § 104 & comment a (1971). See also Hanson v. Denckla, 357 U.S. 235 (1958) (because Florida court had no in rem jurisdiction over corpus of trust, and no personal jurisdiction over trust company, its judgment as to validity of trust was invalid and sister state was under no obligation to afford such judgment full faith and credit).

\textsuperscript{36} "Substantive" is a chameleon-like adjective that draws its meaning from context. Unless otherwise indicated, during the course of this article it is generally employed in the common sense fashion defined by Professor, now Dean, John Hart Ely:

We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes . . . . The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the [Rules Enabling] Act [28 U.S.C. § 2072 (1982)] refers to—is a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.


\textsuperscript{37} Indeed, a rule may be both procedural and substantive. See Ely, supra note 36, at 726.

\textsuperscript{38} But see U.S. Const. art. III, § 2 (enumeration of cases and controversies within federal judicial power).

\textsuperscript{39} See U.S. Const. amend. V (due process clause applicable to federal government requires that "[n]o person shall be deprived of life, liberty, or property without due process of law"); id. amend. XIV, § 1 (due process clause applicable to states provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law").
dural preconditions have been met and the defendant may seek to counter the plaintiff’s presentation. State law may require more protection than this federal constitutional minimum but may not mandate less.

The case law is replete with the efforts of the courts to define the constitutional adequacy of the “opportunity to be heard” in the context of challenges by one or the other of the litigants in the initial litigation. In recent years, starting with Goldberg v. Kelly, most of the Supreme Court’s opinions dealing with this problem

40. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The Logan Court noted:

Each of our due process cases has recognized, either explicitly or implicitly, that because “minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.”

Id. at 432 (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)). The Logan Court reasoned:

Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: “‘While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.’”

Id. (quoting Vitek v. Jones, 445 U.S. at 490-91 n.6 (quoting Arnett v. Kennedy, 416 U.S. 154, 167 (1974) (Powell & Blackmun, JJ., concurring in part))). The Logan Court added:

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that “some form of hearing” is required before the owner is finally deprived of a protected property interest.

455 U.S. at 433 (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972) (emphasis in original)). See also Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1492-93 (1985). For discussion of the circumstances in which due process protection attaches and the extent of such protection, see infra notes 41-55 and accompanying text.

41. See, e.g., Parratt v. Taylor, 451 U.S. 527, 538-40 (1981) (availability of post-deprivation remedies can satisfy due process in some circumstances); Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (three factors should be considered in determining whether due process is satisfied: private interests implicated; risk of erroneous deprivation and probable value of additional safeguards; and public interests and administrative burdens the added procedures would involve); Fuentes v. Shevins, 407 U.S. 67, 82 (1972) (opportunity to be heard must be provided before deprivation takes effect); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (opportunity to be heard must be afforded “at a meaningful time and in a meaningful manner”); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (due process requires that hearing be “appropriate to the nature of the case”).

have come in the area of nonjudicial decision-making.\textsuperscript{43} However, this modern “due process explosion” had its counterpart in the civil litigation context with \textit{Sniadach v. Family Finance Corp.}\textsuperscript{44} as the first case, predating \textit{Goldberg} by one year. In \textit{Fuentes v. Shevin},\textsuperscript{45} perhaps the most radical of the cases following \textit{Sniadach}, Justice Stewart noted:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . \textsuperscript{46}

In deciding challenges to the adequacy of the opportunity to be heard in both the judicial\textsuperscript{47} and nonjudicial contexts,\textsuperscript{48} the Court has adopted a two-level approach. The Court first considers whether the interest at stake is “life, liberty, or property” within the meaning of the fifth or fourteenth amendments.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{43} \textit{See, e.g.,} Barry v. Barchi, 443 U.S. 55 (1979) (suspension of horse trainer license); Goss v. Lopez, 419 U.S. 565 (1975) (suspension of students from high school).
\item \textsuperscript{44} 395 U.S. 337 (1969) (summary wage garnishment).
\item \textsuperscript{46} 407 U.S. at 80-81.
\item \textsuperscript{47} \textit{See, e.g., id.} at 84-87.
\item \textsuperscript{48} \textit{See, e.g.,} Goss v. Lopez, 419 U.S. 565, 572-74 (1975) (students facing temporary suspension from a public high school pursuant to Ohio statute have property and liberty interests that qualify for protection under due process clause of fourteenth amendment).
\item \textsuperscript{49} \textit{See} Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 595 (1972). Decided the same day, \textit{Roth} and \textit{Perry} are seminal cases dealing with this first level. Both of these cases involved the non-renewal of college teaching contracts. In \textit{Perry}, the plaintiff alleged that his failure to be rehired was in retaliation for his public criticism of administration policies. \textit{Id.} at 595. He further alleged that the administration’s failure to provide him with an opportunity for a hearing violated his fourteenth amendment guarantee of due process. \textit{Id.} The Court noted that a person’s interest in a benefit such as re-employment is a “property” interest for due process purposes if there are rules or mutually explicit understandings with his employer that support his claim to entitlement to the benefit. \textit{Id.} at 601. The Court remedied the case to the district court to enable the plaintiff to demonstrate that the denial of re-employment implied such a property interest. \textit{Id.} at 602-03.
\end{itemize}
protections of the due process clauses attach only if the Court determines that the interest meets this qualification.\(^{50}\) The parameters of that protection vary depending on the results of a tri-factor balancing analysis which, for both judicial\(^ {51}\) and nonjudicial proceedings,\(^ {52}\) considers: the weight or importance of the (1) private and (2) public or governmental interests at stake, along with (3) the risk of an erroneous deprivation of protected interests through the procedures actually utilized and the probable value of added or substitute procedural safeguards.\(^ {53}\)

In the typical judicial proceeding, where either a monetary award or an order prohibiting or mandating the taking of certain action is sought, there is generally no question that constitutionally protected liberty or property interests are at stake.\(^ {54}\) Presumptively, the balancing analysis to determine the type of process due in the initial adjudication would at a minimum mandate: notice of the proceeding and the grounds asserted for it; an impartial decision-maker; the opportunity for each side to present effectively evidence favorable to it and to know and rebut the evidence against it, including the right to cross-examination where it might elicit relevant information; and a decision based solely on the evidence except where judicial notice is appropriate.\(^ {55}\)

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50. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Before due process requirements are held applicable the court must make a threshold determination of whether the nature of the interest at stake is within the realm of due process protection. *Id.* In *Roth*, the lower court had mistakenly appraised the weight of the interests at stake in deciding whether due process requirements applied in the first place. *Id.* at 570. The Supreme Court opinion pointed out that consideration of the weight of the interest involved is relevant to the form of the hearing required by due process, but only after it has first been established that the nature of the interest is one protected by due process. *Id.* at 570-71 & n.8.


53. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 341 (1976); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). For a discussion of the important distinction between the "weight" and "nature" of the interests at stake, see *supra* note 50.


2. The Opportunity to be Heard as it Relates to Various Aspects of the Initial Adjudication

With respect to the initial adjudication, the Supreme Court has dealt with the requirement that there be an "opportunity to be heard" in several discrete contexts.

a. Territorial Jurisdiction

The fourteenth amendment, through its due process clause, regulates the location of litigation among the fifty states. It insures that the forum chosen for the litigation is a minimally "fair" one for both parties. The constitutional test for territorial jurisdiction is whether the defendant has sufficient "minimum contacts" with the forum state. Absent actual or constructive waiver by the defendant, federal constitutional law makes establishment of territorial jurisdiction a condition precedent to the maintenance of a suit in the courts of a particular state, notwithstanding state law to the contrary.

Both parties, therefore, must have an opportunity to be heard on the issue of territorial jurisdiction. However, because the constitutional limitations on state territorial jurisdiction are

56. Territorial jurisdiction has been defined as "the connection between the territorial authority of the court and the action that has been brought before the court." Restatement (Second) of Judgments ch. 2 introductory note, at 22 (1982).

57. U.S. Const. amend. XIV, § 1.


62. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982). Because the requirement of personal jurisdiction flows from the due process clause rather than from article III, it is a personal right that can be expressly or constructively waived. Id. at 702-05.

63. A state's law, statutory or common, may more restrictively limit the territorial jurisdiction of its courts. See, e.g., R. Crampton, D. Currie & H. Kay, Conflict of Laws Cases—Comments—Questions 523-25 (3d ed. 1981) (discussing limitations on exercise of jurisdiction, such as doctrine of forum non conveniens).

64. For a discussion of the constitutionally mandated safeguards of the "opportunity to be heard," see supra notes 39-41 and accompanying text.
intended in part to protect the defendant "against the burdens of
litigating in a distant or inconvenient forum", the defending
party is given the choice of either appearing in the original pro-
ceeding to raise and litigate the jurisdictional issue or waiting,
for example, until an action is brought in another state seeking
the enforcement or recognition of a default judgment. In the
later proceeding the defendant can contend that it did not have
minimum contacts with the original forum and that the judgment
is therefore void. In some cases this choice can adequately pro-
tect the defendant's interest in avoiding the burden of litigating in
the courts of a distant state. This is the case where, for instance,
the judgment is a money award that can be enforced only in the

The Woodson Court noted:

[The Due Process Clause "does not contemplate that a state may make
binding a judgment in personam against an individual or corporate de-
fendant with which the state has no contacts, ties, or relations." . . .
Even if the defendant would suffer minimal or no inconvenience from
being forced to litigate before the tribunals of another State, even if the
forum State has a strong interest in applying its law to the controversy,
even if the forum State is the most convenient location for litigation,
the Due Process Clause, acting as an instrument of interstate federal-
ism, may sometimes act to divest the State of its power to render a valid
judgment.

Id. at 294 (citations omitted). The sovereignty/federalism element was no
sooner rediscovered than almost immediately interred. See Burger King Corp. v.
Rudzewicz, 105 S. Ct. 2174, 2181-82 & n.13 (1985); Insurance Corp. of Ireland,
66. See RESTATEMENT (SECOND) OF JUDGMENTS § 10(1) (1982). The common
law mechanism for objecting to territorial jurisdiction was the "special
appearance." Id. comment b. The "special appearance" entailed an appearance
by the defendant at the threshold of litigation solely to contest the validity of
jurisdiction of form of process. Id. If the defendant objected to anything fur-
ther, his appearance was termed a "general appearance" thereby subjecting him
to the court's jurisdiction. Id. While all states now provide at least for special
appearance, many go further and adopt a procedural scheme similar to that
prescribed by Federal Rule of Civil Procedure 12(b). Id. See FED. R. CIV. P. 12(b).
67. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 introductory
note, topic 2 (1971). The introductory note provides:

A foreign judgment is recognized, as the term is used in the Restate-
ment of this Subject, when it is given the same effect that it has in the
state where it was rendered with respect to the parties, the subject mat-
ter of the action and the issues involved. A foreign judgment is en-
forced when, in addition to being recognized, a party is given the
affirmative relief to which the judgment entitles him.

Id.
68. See RESTATEMENT (SECOND) OF JUDGMENTS § 81 (1982). For the modern
rationale for the permissibility of collateral attack in the state of recognition, see
id. comment b at 254.
69. Id. § 81 & comment a at 251-53. See also RESTATEMENT (SECOND) OF
CONFLICT OF LAWS § 104 (1971) (judgment rendered without in personam jurisdic-
tion will not be recognized or enforced in other states).
defendant's home state because that is where the defendant's only property is located.

However, the defendant may, for example, own property in the original forum. If a default judgment is rendered there, the only way the defendant can protect its interest in that property is either to make a post-judgment motion in the original proceeding or to utilize whatever collateral proceedings are available in that state to set aside the judgment. Either way, the defendant must appear in what may be an inconvenient forum for it to litigate the territorial jurisdiction issue. The existence of the property might be considered, however, in a balance of the constitutionally relevant factors, of which inconvenience to the defendant is only one, as a sufficient constitutional nexus to the forum to justify requiring a defendant to appear to litigate at least the issue of jurisdiction in the enforcement proceeding.

It is also true that the choice given the defendant of attacking a court's territorial jurisdiction directly or collaterally may not in all instances be necessary to further the concerns of the due process clause regarding litigation burden. For instance, the burden of litigating the jurisdictional issue in the plaintiff's chosen forum may not be substantial in some cases.

As long as the opportunity to be heard on the issue of constitutional territorial jurisdiction satisfies constitutional standards and is made available at "a meaningful time," and in an appro-

70. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Other relevant factors include the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient relief—at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining efficient dispute resolution; and the shared interest of the states in furthering substantive social policies. Id.


72. For a discussion of these constitutional standards, see infra notes 76-96 and accompanying text.

73. See, e.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (opportunity to be heard in adoption proceeding must be granted at meaningful time and in meaningful manner). For purposes of this article a "meaningful time" refers to: 1) the period before liberty or property is taken by the governmental instrumentalities of the judgment-rendering state; or 2) where the person or property of the defendant is not present in the rendering state and defendant does not appear in the initial proceeding, before liberty or property is taken by the instrumentalities of the enforcement or recognition state.
appropriate forum the failure to take advantage of that opportunity can be deemed to be a valid constructive waiver of any otherwise sustainable objection to territorial jurisdiction.

Regardless of whether the defendant chooses to utilize it, however, the Supreme Court requires that the opportunity to be heard be a "full" one. Unfortunately, the Court has not elaborated on what procedures are constitutionally required in the usual case where the territorial jurisdiction defense is raised.

In the area of divorce jurisdiction, however, the Court has been more explicit. Arguably, the same dictates apply generally to matters of territorial jurisdiction, whether constitutional or statutory in origin. In *Sherrer v. Sherrer*, for instance, where it was successfully contended that Massachusetts had failed to ac-

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74. For discussion of the defendant's options with respect to the appropriate forum, see supra notes 65-71 and accompanying text.

75. Cf. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703-05 (1982) (requirement of personal jurisdiction is individual right and therefore may be expressly waived or treated as such in variety of circumstances).

76. See, e.g., Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 526 (1931) (res judicata should apply "where one voluntarily appears, presents his case and is fully heard").

77. See generally Restatement (Second) of Judgments § 7 & comment b at 80-81 (1982) (discussing jurisdiction to terminate marital status with respect to "migratory divorce," that is, divorce by one who establishes temporary residence in jurisdiction with liberal rules of domicile and permissive grounds for divorce).

78. See, e.g., Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948). *Coe* and *Sherrer* involved collateral attacks on migratory divorce decrees rendered in Nevada and Florida respectively. *Coe*, 334 U.S. at 381-82; *Sherrer*, 334 U.S. at 346-48. In both cases, the defendant spouses appeared at the divorce proceedings. *Coe*, 334 U.S. at 380; *Sherrer*, 344 U.S. at 346. The Court in *Sherrer* noted that

the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.

334 U.S. at 351-52 (citation and footnote omitted). The Court applied its reasoning in *Sherrer* in *Coe*. See *Coe*, 334 U.S. at 384 (citing *Sherrer*, 334 U.S. 343).

79. Where state law restricts the exercise of territorial jurisdiction more than required by the fourteenth amendment, there is a right to be heard in the initial action with regard to compliance with those limits. For discussion of state law requirements in conjunction with federal due process requirements, see supra notes 39-41 and accompanying text.

However, the availability of a collateral attack on a default judgment based on these state limitations is purely a question of the law of the rendering state. See Restatement (Second) of Judgments § 4 comment d at 59-60 (1982).

80. 394 U.S. 343 (1948).
cord full faith and credit to a Florida divorce decree, the defendant in the initial divorce proceedings had in a perfunctory fashion contested and lost in the original forum on the issue of the plaintiff’s domicile.81 The Court noted at the outset of its discussion that the proceedings in Florida prior to the entry of the divorce decree had been consistent with the dictates of procedural due process in all respects.82 Had the defendant not been given a constitutionally adequate opportunity to be heard on the issue of domicile, the original Florida decree would have been invalid in Florida and not entitled to full faith and credit in any other state.83

However, in examining the proceedings in Florida, the Court noted: “It is not suggested that [defendant’s] rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court.”84 In these circumstances, the due process clause did not require a second opportunity to litigate.85 Furthermore, the full faith and credit clause86 did not permit relitigation of the issue of domicile where the requisite “full opportunity to


82. Sherrer, 334 U.S. at 346. Sherrer has been classified as a case involving an issue of subject matter jurisdiction. See Durfee v. Duke, 375 U.S. 106, 112 (1963). However, it is more appropriately seen as presenting an issue of territorial jurisdiction. For discussion of the appropriate classification of Sherrer and Durfee, see infra note 118.

83. See Restatement (Second) of Conflict of Laws § 25 & comments b, h (1971); id. § 104. At the least, adjudication of the issue of domicile would not prevent further litigation of that issue even if relitigation of the merits would be foreclosed.

84. 334 U.S. at 348.

85. Id. If there were an adequate opportunity to raise, litigate, and obtain appellate correction of any constitutional defects in the trial court procedures, an argument could be made that a collateral attack on the judgment need not be permitted within or without the forum state. But cf. Restatement (Second) of Conflict of Laws § 95 (1971) (issues determined by valid judgment are determined by law of state where judgment is rendered, subject to constitutional limitations).

86. U.S. Const. art. IV, § 1. For the text of the full faith and credit clause, see supra note 13.
litigate” previously had been afforded.\textsuperscript{87} As to this latter holding, the Court largely reiterated what it had said in connection with the due process clause,\textsuperscript{88} though it omitted reference to the right of review and added that “[t]here is nothing to indicate that the Florida court would not have evaluated fairly and in good faith all relevant evidence submitted to it.”\textsuperscript{89} In concluding, the Court noted that where “findings of jurisdictional fact [are] made by a competent court in proceedings . . . consistent with . . . due process,” full faith and credit does not permit relitigation.\textsuperscript{90} Recently, the Court confirmed that\textit{Sherrr}er stands for the proposition that an opportunity to be heard on the issue of territorial jurisdiction which satisfies the requirements of due process is all that is necessary to trigger the full faith and credit obligations of other states.\textsuperscript{91}

In sum, the constitutional opportunity to litigate the issue of territorial jurisdiction appears to include at least these rights:

1. the right to introduce relevant evidence and effectively counter that of the other side;
2. the right to an impartial tribunal; and
3. the right to appeal.\textsuperscript{92}

There are no surprises here,\textsuperscript{93} except perhaps with respect to the

\textsuperscript{87} \textit{Sherrr}er, 334 U.S. at 352. The Court added that the defendant’s “dereliction” should not be a basis for a subsequent attack on the valid decree. \textit{Id.}

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{Id.} at 356. The Court added: “That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation.” \textit{Id.} (footnote omitted). \textit{But cf. supra} text accompanying note 78 (constitutional procedures required in divorce litigation arguably apply to matters of territorial jurisdiction in general).


\textsuperscript{92} The fact that due process is satisfied by a certain procedural scheme, of course, does not necessarily suggest that due process requires all the procedures which comprise that scheme. However, the language of the\textit{Sherr}er opinion is, on balance, more susceptible to this interpretation. For a discussion of the\textit{Sherr}er Court's opinion, see \textit{supra} notes 80-92 and accompanying text.

\textsuperscript{93} \textit{See supra} notes 54-55 and accompanying text. The procedures constitut-
last right, which the Court has not in other circumstances seen as required by due process.\textsuperscript{94}

This is not an overly specific statement of the constitutional requisites for a hearing, but it does clear away some of the fog. As long as such an opportunity to litigate jurisdiction is afforded, it is irrelevant whether the defendant takes full advantage of it, if he does appear to contest the issue.\textsuperscript{95} The determination of the issue can be valid for domestic purposes, and enforcement and recognition of the judgment may not be resisted by means of a collateral attack on the finding of the original forum.\textsuperscript{96}

The commentary to section 10 of the \textit{Second Restatement of Judgments},\textsuperscript{97} which adopts the traditional position that a determination of an objection to territorial jurisdiction precludes later re-litigation of the issue,\textsuperscript{98} suggests at one point that such preclusion might be subject to the general exceptions to issue preclusion found in section 28 of the \textit{Restatement}.\textsuperscript{99} At least with regard to the matter of territorial jurisdiction, these exceptions appear intentionally required in order to afford an opportunity to litigate the territorial jurisdiction issue are largely the same as those which appear to be required by due process for litigating the merits of a case. For discussion and analysis of the Court's appraisal of an "opportunity to be heard," see supra notes 47-55 and accompanying text. As resolution of the issue of territorial jurisdiction in favor of the party invoking the judicial authority of a tribunal is a condition precedent to a judgment, validly disposing of the plaintiff's and defendant's stakes in the original proceeding, the later discussion of the due process tri-factor calculus, as it applies to issue preclusion generally, confirms that this equivalence is not coincidental. For an analysis of those instances in which this due process tri-factor calculus seems to limit application of issue preclusion, see infra notes 239-64 and accompanying text.

\textsuperscript{94} See, e.g., Scott, \textit{Two Models of the Civil Process}, 27 Stan. L. Rev. 937, 945-47 (1975) (analysis of proposition that right to appellate review is not constitutionally guaranteed).

\textsuperscript{95} See, e.g., Sherrer v. Sherrer, 354 U.S. 343, 352 (1948) ("If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own.").

\textsuperscript{96} Id. See also \textit{Restatement (Second) of Conflict of Laws} § 96 (1971) (law of state where judgment was rendered, subject to constitutional limitations, determines whether judgment may be collaterally attacked for want of personal jurisdiction). Of course, forum state law could require more than due process and a failure to comply with those requirements could render the judgment subject to collateral attack in the state of rendition, in other states and in federal courts. \textit{Id.} ch. 3 introductory note b at 101; \textit{id.} § 25 & comment c; \textit{id.} § 105 & comment b.

\textsuperscript{97} \textit{Restatement (Second) of Judgments} § 10 (1982).

\textsuperscript{98} \textit{Id.} § 10(2). The \textit{Second Restatement of Judgments} purports to "restate" largely, though not entirely, the law of res judicata as it operates within a single legal system, that is, the internal law of preclusion. \textit{Id.} ch. 1 introduction at 2-3.

\textsuperscript{99} \textit{Id.} § 10 comment d. Section 28 provides:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-
tended to apply not when an attempt is made to upset a judgment but when the same issue arises in a suit based on a different cause of action or in another entirely separate proceeding. However, if in fact it was contemplated that these exceptions might apply to attempts to upset judgments, some exceptions do relate to the matter under examination here since preclusion may be avoided where appellate review has been precluded as a matter of law or there has not otherwise been an opportunity for a full and fair adjudication in the initial action. Even if these provisions were not intended by the drafters to reflect only constitutional concerns, they do, at least in part, track existing due process constraints. The origin and effect of the other exceptions as they

litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

1. The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

2. The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

3. A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

4. The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

5. There is a clear and convincing need for a new determination of the issue

   (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action,

   (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or

   (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Id. § 28.

100. Id. § 28 & illustration 5.

101. Id. § 28(1).

102. Id. § 28(5)(c).

103. Compare id. § 28 with infra text accompanying notes 239-41 (Restatement exceptions may reflect constitutional concerns even when original judgment is valid and binding for some purposes) and infra notes 249-70 and accompanying text (in addition to due process requirements, preclusion exceptions as stated in § 28 reflect nonconstitutional policy concerns).
apply to the issue of territorial jurisdiction is more problematic.

b. Territorial Jurisdiction from Another Perspective

The constitutional limitations on state territorial jurisdiction, as they have been explained by the Supreme Court in and subsequent to International Shoe Co. v. Washington, incorporate a concern regarding the opportunity to be heard. In Chief Justice Stone's now famous words,

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The Chief Justice added that "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' . . . is relevant in this connection." Thirty-five years later Justice White noted that the concept of minimum contacts "protects the defendant against the burdens of litigation in a distant or inconvenient forum." In part, the Court appears to be concerned with the fact that if litigation in a particular state is "burdensome" from the defendant's point of view, then the opportunity to be heard on the merits of the plaintiff's claim may not be a real or at least a fully adequate one. While the Court's opinions over the years have not elaborated to any great degree what types of "burdens" are relevant, certainly the cost of travel for the defendant and witnesses favorable to defendant's

104. 326 U.S. 310 (1945).
105. Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940).)
106. Id. at 317 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 129, 141 (1930)).
107. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Recently, the Court has indicated that, where the defendant has "purposefully directed" its activities at residents of the forum and the litigation results from alleged injuries arising out of those activities, the burdens on the defendant of litigating in the plaintiff's chosen forum may play only a modest part in the minimum contacts analysis, although they are important where the plaintiff's choice of forum may "make litigation 'so gravely difficult or inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2182-85 (1985) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957)).
109. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 97 (1978) ("substantial
case, the ability to subpoena unwilling favorable witnesses, and the location of immobile evidence must be considered. These factors may counsel against any appearance by the defendant or prevent defendant from putting on an adequate case at the trial on the merits.

The distinction between notice and territorial jurisdiction purportedly drawn by the Court in Mullane v. Central Hanover Bank & Trust Co. is, therefore, not quite as clear as is generally supposed. Both serve quite similar purposes. Notice of the commencement of a proceeding is essential in order to ensure that affected parties can take advantage of their right to be heard. Location of the litigation in a minimally convenient forum assures that an adequate opportunity to be heard is realistically available.

Moreover, the Court's concerns in this regard are not limited to defendants. In World-Wide Volkswagen Corp. v. Woodson, Justice White noted that "the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the plaintiff's interest

financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away").


Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel . . . and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom. Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

Id. (citation and footnote omitted).


112. Id. at 311-13. The issue in Mullane was the constitutional sufficiency of the notice given to the beneficiaries by the trustee on settlement of a common trust fund. Id. at 307.

113. Id. at 314. Adequate notice "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Id. (citing Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914); Roller v. Holly, 176 U.S. 398 (1900)). The Court added that "when notice is a person's due, process which is a mere gesture is not due process." Id. at 315.

in obtaining convenient and effective relief."\(^{115}\) Earlier, in McGee \textit{v. International Life Insurance Co.},\(^{116}\) one of the factors favoring jurisdiction in California, the plaintiff's chosen forum, was that "[w]hen claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof."\(^ {117}\) In short, in deciding issues of territorial jurisdiction the Court is concerned that plaintiffs have a realistic opportunity to have their claims heard on the merits.

c. Subject Matter Jurisdiction

Limitations on the subject matter jurisdiction of the state courts are generally\(^ {118}\) the creation of state constitutional or statutory law\(^ {119}\) or federal statutory law.\(^ {120}\) As a precondition to the power of a court to deal with a particular dispute, litigants have a right to a hearing on the existence of subject matter jurisdiction.\(^ {121}\) Since these limits, unlike those relating to territorial jurisdiction, do not have their origin in constitutional concerns regarding the fairness of the forum for litigation of the dispute,\(^ {122}\)
there should be no federal constitutional requirement that the defendant be permitted to attack collaterally a default judgment on the basis of lack of subject matter jurisdiction. This is so whether the attack is launched in the courts of the state rendering the judgment,\textsuperscript{123} in another state, or in federal court where enforcement or recognition of the original judgment is sought.\textsuperscript{124} If the defendant appears in the action, whether or not the issue is in fact litigated at the trial or appellate level, generally state law can, but does not necessarily have to, foreclose further litigation domestically.\textsuperscript{125} If it does, however, the full faith and credit clause will prevent other states and the federal courts from permitting the issue to be raised to invalidate the judgment.\textsuperscript{126} The foregoing discussion assumes, of course, that the opportunity to litigate the issue of subject matter jurisdiction in the original action meets due process requirements.\textsuperscript{127}

\textsuperscript{123} See generally Restatement (Second) of Conflict of Laws § 105 & comments a-b (1971) (judgment subject to collateral attack in state of rendition for want of competence by rendering court will not be recognized or enforced elsewhere). However, if the limitation on the state court's subject matter jurisdiction is based on federal law, the federal law of preclusion, statutory or common, may permit a collateral attack whether or not the issue is litigated in the first action. See, e.g., Kalb v. Feuerstein, 308 U.S. 435, 438-40 (1940) (effect of filing of petition for extension of time under § 75 of Bankruptcy Act on state court's jurisdiction over pending proceeding to foreclose mortgage on petitioner's property). See also Restatement (Second) of Judgments § 12(2) (1982) (parties can litigate subject matter jurisdiction after judgment has been rendered if "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government"). For a discussion of the effect of federal nonconstitutional limitations on state preclusion law, see infra notes 308-47 and accompanying text.

\textsuperscript{124} See Restatement (Second) of Judgments § 12 & comments c-d (1982). But see supra note 124 (if limitation on state court's subject matter jurisdiction is based upon federal law, relitigation may be permitted—whether or not state law would otherwise allow it).

\textsuperscript{125} If consistent with due process limitations, a state may insist that parties protest subject matter jurisdiction in the original court or on appeal from the initial judgment. Restatement (Second) of Conflict of Laws § 97 comment b (1971). If the parties are precluded from collaterally attacking the subject matter jurisdiction in the rendering state, they will "[a]lmost invariably . . . be [so] precluded by full faith and credit from . . . attacking the judgment in sister states." Id. But see supra note 124 (if limitation on state court's subject matter jurisdiction is based on federal law, collateral attack may be permitted—regardless of state law).

\textsuperscript{126} For discussion of the procedural protections necessary to meet due process, see supra note 91 and accompanying text.
Section 12 of the Second Restatement of Judgments advocates preclusion of collateral attacks on the subject matter jurisdiction of the rendering court—subject to certain exceptions. The only exception relevant for current purposes appears, at least in part, to track the constitutional requirement that there be a full and fair opportunity to litigate the issue in the initial action. Section 28, which sets forth the general exceptions to issue preclusion, may also be applicable to issues of subject matter jurisdiction, but as in the case of territorial jurisdiction, the exceptions relevant here either seem duplicative of constitutional procedural requirements for preclusion or appear problematic in effect.

The procedural opportunity to litigate issues of subject matter jurisdiction, which is required to satisfy constitutional due process concerns and to entitle a judgment to full faith and credit, is arguably the same as that applicable to issues of territorial jurisdiction. In the most recent Supreme Court opinions dealing with collateral attacks on judgments for what was classified as lack

128. Restatement (Second) of Judgments § 12 (1982). Section 12 provides:
   When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation except if:
   (1) The subject matter of the action was so plainly beyond the court’s jurisdiction that its entertaining the action was a manifest abuse of authority; or
   (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
   (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court’s subject matter jurisdiction.

Id.

129. See infra text accompanying notes 239-70 (examination of nonconstitutional policy based, as well as constitutionally based reasons for allowing exceptions to general preclusion rule).

130. See Restatement (Second) of Judgments § 12(3) & comment c (1982) (stressing ability of original judge to “grasp the intricacies of jurisdictional issues” and opportunity for appellate review). Compare id. with infra text accompanying notes 239-70.

131. For the text of § 28, see supra note 99. For an analysis of the exceptions to the general rule of issue preclusion set forth in § 28, see infra notes 248-70 and accompanying text.

132. See Restatement (Second) of Judgments § 12 comment c (1982).

133. For a discussion of the general exceptions to preclusion of the issue of territorial jurisdiction adopted in the Second Restatement of Judgments, see supra notes 97-103 and accompanying text.

134. For a discussion of the procedural requirements necessary to provide an opportunity to litigate issues of territorial jurisdiction, see supra notes 93-94 and accompanying text.
of subject matter jurisdiction, the Court has reemphasized the need for a full and fair opportunity to litigate the issue. In one instance subject matter jurisdiction had in fact been contested, while in the other this was not the case. What was important was that an adequate opportunity to litigate was made available in the first forum, irrespective of whether the interested party took advantage of that opportunity.

B. The Opportunity to be Heard and the Doctrines of Merger and Bar

1. The Effects on Parties

Since the direct effect on the defendant of the successful

135. See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) (North Carolina court's refusal to treat as res judicata Indiana rehabilitation court's adjudication of rights to insurance company's deposit in North Carolina held to be violative of full faith and credit clause); Durfee v. Duke, 375 U.S. 106 (1963) (full faith and credit required for state judgment quieting title to land where there was dispute over the land's location as between two states). For an assertion that Durfee v. Duke was incorrectly viewed as involving subject matter jurisdiction, see supra note 118.

136. Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706-07 (1982); Durfee v. Duke, 375 U.S. 106, 111-14 (1963). In Underwriters, the Court stated the general rule that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." 455 U.S. at 706 (citing Durfee, 375 U.S. at 111 (footnote omitted)).

137. See Durfee v. Duke, 375 U.S. 106, 107-09 (1963). The respondent in Durfee made an appearance in the Nebraska court, contested the court's jurisdiction over the subject matter, and fully litigated the issue. Id. at 108.

138. Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 707 (1982). When approving the rehabilitative Plan in 1976 the rehabilitative court in Underwriters clearly stated that it was asserting subject matter jurisdiction over all pre-rehabilitation claims against Underwriters, including those of the North Carolina Association. Id. The North Carolina Association intervened and was therefore obliged to advance its argument to the rehabilitative court concerning lack of subject matter jurisdiction. Id. at 709-10. The Association, however, failed to advance any such argument. Id.

139. Id. at 710. The law of the rendering state might require more than due process. For a discussion of such requirements concerning territorial jurisdiction, see supra notes 91 & 96 and accompanying text. Failure to observe those more rigorous procedures could under state law render the judgment subject to collateral attack both within and without the state.

Moreover, where a federal statute imposes limitations on state subject matter jurisdiction, federal law, statutory or common, could require more than due process or purely state law as a condition of preclusion. Compare infra notes 308-47 and accompanying text (discussing federal nonconstitutional limits on state preclusion law) with supra note 124 and accompanying text (there should be no federal constitutional limits on state's ability to preclude collateral attack of default judgment on basis of lack of subject matter jurisdiction).
prosecution of a lawsuit may be the taking of his possessions or the ordering of his activities in a particular way, it is not difficult to see why the due process clause applies and mandates an opportunity to be heard in the initial action. However, there are other consequences of litigation, including the effects of the preclusion doctrines.

The general rule of merger is that where a valid and final judgment is rendered in favor of the plaintiff, he or she cannot thereafter maintain an action on the original claim or any part thereof. The defendant is precluded from reliance, in any subsequent action on the judgment, upon defenses which he or she might have interposed or did interpose in the first action. The general rule of bar is that a valid and final personal judgment in favor of the defendant bars another action by the plaintiff on the same claim. Because of the broad definition of "claim" employed by many courts today, the effects of merger and bar may be even more extensive than was traditionally the case.

140. For a discussion of guidelines concerning the application of the due process clause, see supra notes 47-50 & 54 and accompanying text.

141. For a discussion of the ramifications of the due process clause's mandate of an opportunity to be heard in the initial action, see supra notes 39-40 & 54-55 and accompanying text.

142. Restatement (Second) of Judgments § 18(1) (1982).

143. Id. § 18(2).


145. In the nineteenth century, a fairly narrow definition of "claim" or "cause of action" was used, reflecting the policy then extant of limiting joinder of causes of action. F. James & G. Hazard, supra note 144, at 541. For example, a definition of claim for purposes of preclusion involved whether the party to an action was pleading the same "substantive right." Id. at 541-42. Thus, in a car accident there would be individual substantive rights to recovery for physical injury, pain and suffering, and property damage. Id.

The modern definition of "claim" is much broader. The new Restatement provides the following definition of "claim" for purposes of merger or bar:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (§§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and what groupings constitute a "series" are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1982). Given the breadth of this
First in *Mullane v. Central Hanover Bank & Trust Co.*,\(^{146}\) and again recently in *Logan v. Zimmerman Brush Co.*,\(^{147}\) the Supreme Court confirmed that a state-created cause of action or part thereof is property within the meaning of the fourteenth amendment's due process clause.\(^{148}\) Accordingly, if state law, statutory or common, purports to extinguish all or part of a claim, there is a deprivation of property that must comport with due process of law.\(^{149}\) Thus, in order for the doctrines of merger and bar to apply, the party asserting the claim in the later proceeding must have had a prior adequate opportunity to be heard on the merits.\(^{150}\)

In *Mullane,* where the Court confronted a challenge to a state law that provided for the settlement of common trust fund accounts, the effect of the proceeding was to terminate "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund."\(^{151}\) This allegedly deprived the beneficiaries of property by, for example, "cut[ting] off their rights to have the trustee an-

\(^{146}\) 339 U.S. 306 (1950). For a discussion of the Court's holding in *Mullane,* see *supra* notes 111-13 and accompanying text. For an analysis of the holding, see infra notes 151-54 and accompanying text.

\(^{147}\) 455 U.S. 422 (1982). In *Logan,* an employee was discharged by his employer allegedly because his short left leg made it impossible for him to properly perform his job as a shipping clerk. *Id.* at 426. The employee filed a charge with the Illinois Fair Employment Practices Commission alleging that his employment had been unlawfully terminated because of his physical handicap. *Id.* However, the Commission scheduled a statutorily mandated factfinding conference on a date five days after the expiration of the 120-day statutory period. *Id.* The Commission denied the employer's motion to dismiss for failure to hold a timely conference but the Illinois Supreme Court reversed and granted the motion to dismiss. *Id.* at 427. The Supreme Court reversed and held that the employee was deprived of his rights under the fourteenth amendment. *Id.* at 937-38.

\(^{148}\) *Mullane,* 339 U.S. at 313; *Logan,* 455 U.S. at 428-29. The same analysis would apply under the fifth amendment with regard to federally created causes of action. See *Societe Internationale v. Rogers,* 357 U.S. 197 (1958) (dismissal of complaint because of plaintiff's inability to comply with pretrial production order raises fifth amendment due process question).

\(^{149}\) For a discussion of the parameters of the due process requirement, see *supra* notes 39-40 & 50-53 and accompanying text.


\(^{151}\) 339 U.S. at 311.
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swer for negligent or illegal impairments of their interests." 152
Thus, the beneficiaries were entitled to the protections of the due
process clause, specifically the opportunity to be heard. 153 The
efficacy of this opportunity, however, presupposed reasonable no-
tice of the commencement of the proceeding conveyed reason-
ably to the affected parties. In Mullane, such notice was not ade-
quately given to certain of these affected parties. 154

The doctrines of merger and bar preclude litigation not only of
matters previously litigated, but of unlitigated matters as well. 155 However, these doctrines can constitutionally apply to
the latter only to the extent that in the initial action there was a
sufficient opportunity to raise and litigate those matters purpor-
dedly precluded. 156 In other words, the permissible breadth of
merger and bar is tied directly to the parameters of the proce-
dural framework applicable to the original proceeding. 157 If, for
example, the applicable procedural scheme did not authorize the
plaintiff in the first action to plead and prove a particular theory
of the case or to ask for a particular remedy, then the doctrine of
merger could not constitutionally operate to preclude the plaintiff
in a subsequent action—where the same procedural constraints
did not apply—from relying on that theory or seeking to obtain
that remedy. This, of course, assumes that applicable state sub-
stantive law recognizes the existence of the theory as a valid basis

152. *Id.* at 315. Many beneficiaries in *Mullane* were also deprived of their
property rights in another sense when the New York court appointed a special
guardian and attorney for all beneficiaries who did not appear at the settlement
of accounts. *Id.* at 310. The interests of the beneficiaries were "presumably sub-
ject to diminution in the proceeding by allowance of fees and expenses to one
who, in their names but without their knowledge, may conduct a fruitless or
uncompensatory contest." *Id.* at 313.

153. *Id.* at 315.

154. *Id.* at 314-20.

155. A defendant, for example, cannot assert defenses in a subsequent pro-
ceeding that he or she could have raised in the initial action. See *Restatement
(Second) of Judgments* § 18(2) (1982). The plaintiff cannot "split" his claims
so that one right is asserted in the initial action, and a second right arising from
the same "transaction" or "series" is asserted in a subsequent action. See *id.*
§ 24. The *Restatement* also provides:
The rule of § 24 applies to extinguish a claim by the plaintiff against the
defendant even though the plaintiff is prepared in the second action
(1) To present evidence or grounds or theories of the case not
presented in the first action, or
(2) To seek remedies or forms of relief not demanded in the first
action.

*Id.* § 25.

156. *Cf., e.g., Mullane*, 339 U.S. at 313-14.

157. See *Restatement (Second) of Judgments* § 24 comment a at 198
(1982); *id.* § 26 comment c at 236.
for relief or affords the type of remedy sought.\textsuperscript{158}

While not expressly relying on a constitutional rationale, the Second Restatement of Judgments acknowledges this limitation in its exceptions to the general rule of bar\textsuperscript{159} and to the rule against splitting a cause of action,\textsuperscript{160} noting that it is "unfair to preclude [plaintiff] from a second action in which he can present those phases of the claim which he was disabled from presenting in the first."\textsuperscript{161}

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the relationship between substantive law and procedure in this context, see supra notes 39-40 and accompanying text.
\item Section 20 of the Restatement provides in relevant part:
\begin{enumerate}
\item A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
\item When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties...
\end{enumerate}
\end{enumerate}
\end{footnotesize}

\begin{footnotesize}
\textit{Restatement (Second) of Judgments} § 20 (1982). See Hughes v. United States, 71 U.S. (4 Wall.) 232 (1866) (decree dismissing suit on any ground which did not go to merits is no bar to subsequent suit); American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528 (11th Cir. 1983) (dismissal of damages action for lack of subject matter jurisdiction does not constitute final judgment on merits and therefore res judicata does not apply to bar claims that were or should have been raised in initial action); Schiff v. Kennedy, 691 F.2d 196 (4th Cir. 1982) (state court action brought for violation of state wiretap statute was not res judicata on merits of subsequent claim brought under federal wiretap statute since state action was dismissed for lack of jurisdiction); Lindy v. United States, 546 F.2d 371 (Ct. Cl. 1976) (order dismissing plaintiff's claim not on merits, but rather without prejudice to renew in proper forum, has no res judicata effect).

\item Section 26 provides in relevant part:
\begin{enumerate}
\item When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
\item The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief...
\end{enumerate}

\end{footnotesize}

\begin{footnotesize}
\textit{See Sekaquaptewa v. MacDonald}, 575 F.2d 239 (9th Cir. 1978) (since claims were split in Indian land dispute due to statutory restriction on court's jurisdiction in initial action, res judicata does not apply to foreclose litigation of remaining claim in subsequent action); United States v. Pan-American Petroleum Co., 55 F.2d 753 (9th Cir.) (rule against splitting causes of action applies only to claims then capable of resolution in initial action), cert. denied, 287 U.S. 612 (1932); Lower Sioux Indian Community v. United States, 626 F.2d 828 (Cl. Ct. 1980) (res judicata does not bar subsequent action for accounting of claims due to Indian tribe which could not have been raised in previous action because of jurisdictional restrictions in force at time).

\item Restatement (Second) of Judgments § 26 comment c at 236 (1982).

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These observations should be qualified in one particular, however. If the procedural limitations applicable to the first action could have been avoided by the plaintiff by suing in another tribunal in the same jurisdiction where all aspects of the claim could have been adequately pursued, then of course preclusion of further suits would be permissible.\textsuperscript{162} Constitutionally, the plaintiff then does have a full opportunity in some forum to litigate all his contentions and this is what counts.\textsuperscript{163}

Whether the purported effect of the merger and bar doctrines in a particular instance is to prevent contest of previously litigated matters or rather to foreclose unlitigated matters, the focus of the constitutional due process inquiry is the same: What, if any, barriers existed in the original proceeding to the effective presentation of whatever was put forth in the initial action or now is sought to be raised for the first time? In this sense a restriction on the type of evidence that can be introduced or on the manner of its presentation is analogous, for example, to statutory limitations on the subject matter jurisdiction of a particular local tribunal. There would seem to be, however, a difference in the type of due process analysis that would be employed to determine if there has been a sufficiently adequate opportunity for a hearing in these instances. As to certain limitations or barriers the courts can easily employ the tri-factor balancing analysis previously discussed.\textsuperscript{164} This would be the case, for example, if no cross-examination were permitted in the original action. If, on the other hand, the specific barrier in the initial action was a statutory limit on the subject matter jurisdiction, or a restriction on the type of remedies the original court could award, it seems unlikely that a court would engage in this type of analysis. Rather, it would note the existence of the restriction and find that since the plaintiff did not have an opportunity to request all the relief to which he was entitled under the applicable substantive law in one tribunal, he is

\textsuperscript{162} Id. at § 24 comment g. See F. JAMES \& G. HAZARD, supra note 144, at 556; Bestal, Res Judicata/Claim Preclusion: Judgment for the Claimant, 62 Nw. U.L. Rev. 357, 374-86 (1967).

\textsuperscript{163} The same general approach applies where there are both federal and state grounds for relief. Compare Restatement (Second) of Judgments § 25 comment e (concurrent jurisdiction) with id. § 26(c)(1) comment e(1) and id. § 86(1) comment f (exclusive federal jurisdiction). For a discussion of the application of federal exceptions to intersystem preclusion, see infra text accompanying notes 508-59, infra note 537, and infra text accompanying notes 540-71.

\textsuperscript{164} For a discussion of the tri-factor balancing analysis used to decide challenges to the adequacy of the opportunity to be heard, see supra notes 47-53 and accompanying text.
entitled to seek any available additional relief in a court of competent jurisdiction of the state, assuming of course that there was no one court where all the relief was available at the outset.\footnote{165}

In short, as to matters that have been previously litigated, the court would apply the functional due process analysis to determine the adequacy of the opportunity to be heard in the initial action and thus the constitutionality of the application of merger and bar principles. Such an approach would appear to be less than satisfactory where matters were not previously litigated because they could not have been given certain procedural restrictions.

2. The Effects on Non-Parties

Generally speaking, state law doctrines of merger and bar can have no legal effect within the rendering state on non-parties to the original litigation.\footnote{166} Neither does the full faith and credit clause\footnote{167} command enforcement of these doctrines in other states against non-parties.\footnote{168} Since the non-party has never had an opportunity to be heard, it would be violative of due process to hold the non-party bound by a judgment in the original litigation.\footnote{169} Where, however, the non-party is adequately represented by a party to the litigation, the preclusion doctrines may be applied because the person is vicariously afforded the opportunity to be heard.\footnote{170} \textit{Hansberry v. Lee}\footnote{171} recognized this proposition.\footnote{172} Fed-

\footnote{165. For a discussion of the problem arising where the plaintiff brings separate actions based on the same "claim" in separate courts, see supra notes 155-63 and accompanying text. Compare id. with infra notes 508-39 and accompanying text (discussing the application of federal exceptions to intersystem preclusion).}

\footnote{166. See, e.g., Sea-Land Serv., Inc. v. Gaudit, 414 U.S. 573, \textit{reh'g denied}, 415 U.S. 986 (1974) (wife's wrongful death action not barred by decedent's recovery for personal injury damages during his lifetime); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (defendant not bound by judgment in personam resulting from litigation in which he was not designated as party); Hansberry v. Lee, 311 U.S. 32 (1940) (defendant not bound by judgment in personam in litigation to which he is not party). For a discussion of Hansberry, see infra notes 172-77 and accompanying text. See also \textit{Restatement (Second) of Judgments} § 34(3) (1982).}

\footnote{167. U.S. CONST. art. IV, § 1.}


\footnote{170. See \textit{Restatement (Second) of Judgments} § 41 comment a (1982); \textit{Federal Practice}, supra note 25, §§ 4408-4409.}
eral constitutional standards determine the adequacy of the representation\textsuperscript{173} as well as the adequacy of the procedural opportunities afforded the representative party to present its case.\textsuperscript{174} Failure to meet either standard prevents the application of the merger and bar doctrines both within and without the state of rendition.\textsuperscript{175}

\textsuperscript{171} 311 U.S. 32 (1940).

\textsuperscript{172} Id. at 41-43. \textit{Hansberry} involved a suit brought to enjoin the breach of a restrictive covenant against selling land to black persons. \textit{Id.} at 37-38. The covenant by its terms was not effective unless it had been signed by 95% of the owners of the land to which the covenant would apply. \textit{Id.} at 38. The defense to the suit to enjoin the breach was that the required 95% had not signed. \textit{Id.} The plaintiffs argued \textit{judicata} based on an earlier suit against four lot owners in which an Illinois state court had held that the covenant was enforceable. \textit{Id.} The defendants, who had purchased the land from an owner who had signed the agreement, were not parties to the earlier suit. \textit{Id.} However, in the later action to enjoin the breach, the Supreme Court of Illinois held that the earlier suit was a "class" or "representative" suit and that all members of the class were bound by the decree. \textit{Id.} at 39-40. The Supreme Court of the United States reversed, holding that under the facts of the case there was no "class" since all persons concerned did not have the same interest. \textit{Id.} at 44. However, the Court recognized that "there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is \textit{res judicata} as to members of the class who are not formal parties to the suit." \textit{Id.} at 42.

In a recent Supreme Court case, the question was left open as to whether due process demands both notice to class members and adequate representation in order for binding effect to attach to a class judgment. See \textit{Eisen v. Carlisle Jacquelin}, 417 U.S. 156, 176-77 (1974). During the 1984-1985 Term the Court handed down an opinion that could be interpreted to suggest that due process requires both notice and adequate representation in class actions. See \textit{Phillips Petroleum Co. v. Shutts}, 105 S. Ct. 2965 (1985). \textit{Shutts}, however, was a multi-state plaintiff class action, and the focus of the Court was on the question of territorial jurisdiction. See \textit{id}. The right to "opt out" of the action was relied upon, in part, to sustain the assertion of jurisdiction there. See \textit{id.} at 2975-77. The Court presumably considered notice to class members as crucial to their ability to exercise this option. \textit{Id.}

For a discussion asserting that notice to a party represented is unnecessary, see \textit{Note, Collateral Attack on the Binding Effect of Class Action Judgments}, 87 HARV. L. REV. 589, 605 (1974). \textit{But see Comment, Can Due Process Be Satisfied by Discretionary Notice in Federal Class Actions?}, 4 CREIGHTON L. REV. 268 (1971) (notice is necessary).

\textsuperscript{173} \textit{See, e.g., Hansberry}, 311 U.S. 32. State law may be more demanding and thus may condition the effect of the judgment both within and without the state of rendition. \textit{See Restatement (Second) of Conflict of Laws} ch. 3 introductory note, § 25 comment c, § 94 (1971).

\textsuperscript{174} For a discussion of the analysis used to decide the adequacy of the procedural opportunities afforded a party to the original litigation, see \textit{supra} notes 47-53 and accompanying text.

State law may be more demanding in this regard and thus may impact upon the effect of the judgment both within and without the state of rendition. \textit{See Restatement (Second) of Conflict of Laws} ch. 3 introductory note at 101, § 25 comment c, § 105 comment b (1971).

\textsuperscript{175} \textit{See Restatement (Second) of Conflict of Laws} §§ 25, 94, 95, 104 (1971); \textit{Restatement (Second) of Judgments} § 42 reporter's note (1982). \textit{Cf.}
In *Hansberry*, a conflict of interest between the class representative and members of the class prevented state law from ascribing a binding effect to the original judgment.\(^{176}\) The conflict made the representation inadequate and therefore deprived the non-parties of a constitutionally sufficient opportunity to be heard.\(^{177}\) In other cases the representative’s failure to prosecute or defend the action with due diligence may result in a finding of inadequate representation and therefore a conclusion that the opportunity to be heard did not satisfy constitutional standards.\(^{178}\)

On the one hand, it is easy enough to see why the conflicting loyalties of the representative or its failure to fully utilize all available procedures might be conceptualized as resulting in the lack of a sufficient opportunity to be heard. At the same time, outside the context of expressly representative litigation, it would seem unlikely that any conflict of interest of the party’s representative (his attorney), with respect to the matter at issue, would be seen as a constitutional ground for refusing to ascribe binding effect to any resulting judgment. Similarly, the attorney’s failure to utilize all available procedural opportunities in support of the claim or defense of the client would not be seen as raising any barrier to the binding effect of the judgment.\(^{179}\) The client’s recourse,

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\(^{176}\) *Hansberry*, 311 U.S. at 42, 43 (suggesting that inadequate representation of non-party class members’ interests or adoption of procedures which do not fairly insure protection of their interests will prevent judgment against party class members from being res judicata as to such non-party class members). *But see infra* note 185 (once constitutional right to be heard regarding adequacy of representations is exercised, that issue may not be open to further litigation).

\(^{177}\) 311 U.S. at 44-45. For a discussion of the facts of *Hansberry*, see *supra* note 172.

\(^{178}\) 311 U.S. at 44-45. In addressing the conflict between owners of lots who wanted to enforce the agreement and owners who did not, the Court stated that “[t]hose who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance.” *Id.* at 44. *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 42(d) (1982).

\(^{179}\) *See* e.g., Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) (although representative’s actions at trial were adequate up to time of final order, his failure to prosecute appeal on behalf of class rendered his representation inadequate). *Compare id.* with RESTATEMENT (SECOND) OF JUDGMENTS § 42(e) & comment f (1972) (suggesting that adversary of class action must have been on notice of such inadequacy).

\(^{179}\) *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 71(2)(c) & comment g (1972) (conditioning relief in such a way as to suggest that this section is not based on constitutional consideration). *Compare id.* with notes 75, 95 & 139 and accompanying text (failure of parties to take advantage of available procedures may result in waiver). *See generally Note, supra* note 172, at 594 n.37 (party to non-class action suit is bound by any gross error).
other than possible post-judgment motions for relief, would be confined to a suit for malpractice against the attorney.

This apparent distinction between the treatment of expressly representative suits and other actions might be explained by the fact that the party consents to the attorney's representation and has some control, theoretical though it may be, over the attorney's activities. With regard to some representative actions there may be de facto consent to the representation, though effective control is probably absent. Alternatively, the availability of a tort claim against the attorney, which affords the client an opportunity to remedy the damages caused by the judgment of the first adjudication, insures that no property is irrevocably taken without some opportunity for hearing. The Supreme Court has held in various contexts that the requisite opportunity to be heard can be postponed and due process requirements satisfied by a later tort action that can substantially undo the effects of the action with respect to which an adequate hearing was not initially given.

180. See, e.g., Fed. R. Civ. P. 23(c)(2)(A) (opting out permitted in certain class actions after notice is given).

181. Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (dismissal of action overturned). In Logan the agency responsible for the failure to comply with the statutory time limitations was not under the control of the complainant whose claim was extinguished. For a discussion of the facts in Logan, see supra note 147.

182. But see Fuentes v. Shevin, 407 U.S. 67, 82 (1972) ("no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred").


Recently the Court overruled Parratt to the extent that the case found a mere negligent act of an official causing loss of or injury to life, liberty, or property constituted a "deprivation" within the meaning of the due process clause. See Daniels v. Williams, 106 S. Ct. 662 (1986); Davidson v. Cannon, 106 S. Ct. 668 (1986).

Since entry of the judgment against the party represented by an attorney is intentional, though perhaps traceable to the negligence of the attorney, there would apparently be a "deprivation" within the meaning of the Fourteenth Amendment. See Daniels, 106 S. Ct. at 666. But see Logan, 455 U.S. at 435-36 (suggesting that post-deprivation remedies do not satisfy due process where deprivation of property is caused by negligent conduct implicating "established
When it comes to representative litigation, however, the alternative of a subsequent tort action generally may not be seen as sufficient.\textsuperscript{184} For example, any remedy against the representative may be purely illusory or otherwise substantially inadequate to undo the damage caused by the first judgment. The constitutional mandate of an opportunity to be heard requires, therefore, disregard of the preclusive effect of the judgment.\textsuperscript{185}

It is clear, however, after Nevada v. United States,\textsuperscript{186} that an apparent conflict of interest may not be sufficient to foreclose application of the merger and bar effects of a judgment in a representative action. A suit was brought by the United States in federal court in 1913 to adjudicate water rights to the Truckee River in Nevada for the benefit of the Pyramid Lake Indian Reservation and the then-planned Newlands Reclamation Project.\textsuperscript{187} In 1944 the district court finally entered its decree, pursuant to a settlement agreement, regarding various water rights of the Reservation and the Project.\textsuperscript{188} Thirty years later, the United States filed another action in the same district court on behalf of the Reservation seeking additional rights to the Truckee River. The Pyramid Lake Tribe was permitted to intervene in support of the plaintiff.\textsuperscript{189} The defendants relied on the doctrine of merger.\textsuperscript{190}

\textsuperscript{184} For a discussion of recognized constitutional protections available to the non-party subject to potential claim preclusion, see supra notes 173-75 and accompanying text. \textit{But see} Federal Practice, supra note 25, § 4454, at 470 n.84; infra note 202 and accompanying text (suggesting that subsequent tort remedies against representative may ensure that non-party class has sufficient recourse; preclusive effect of prior judgment should therefore attach).

\textsuperscript{185} There is a constitutional right to be heard regarding the adequacy of the representation, but once it is exercised, that issue, like others, may not be open to further litigation. \textit{See} Restatement (Second) of Judgments § 42 comment b (1982). Where a later tort action is seen as sufficient to warrant preservation of the preclusive effect of a judgment in a representative action, that judgment would be valid within and without the state of rendition.

\textsuperscript{186} 463 U.S. 110 (1983).

\textsuperscript{187} Id. at 113-15.

\textsuperscript{188} Id.

\textsuperscript{189} Id. The issue was whether res judicata prevented the Tribe from litigating their claim, given the 1944 decree. Id.

\textsuperscript{190} Id. at 114-21. The district court on the basis of the doctrine of merger held that all parties to the present action were parties or in privity with parties to the original action in 1913. Id. The Ninth Circuit concluded, however, that even though the causes of action were the same and the United States and the original defendants could not relitigate this cause of action, the original decree did not conclude any dispute between the Tribe and owners of the Newlands Project land. Id.
The Supreme Court in *Nevada* held that the Tribe, whose interest was allegedly represented in the first litigation by the Government, was bound by the merger effects of the earlier decree. The Tribe attempted to rely on *Hansberry* to avoid this result, arguing that the Government's primary interest in the earlier litigation was to obtain water rights for the Newlands Reclamation Project and that by definition any water rights given the Tribe would conflict with the interest. The Court rejected that contention, reasoning, in part at least, that "the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest." The Court added that "[w]hen the Government performs such duties it does not by that reason alone compromise its obligation to any of the interests involved." In short, the mere fact that the interests might, in some circumstances, conflict in practice was not sufficient to justify an exception to the ordinary merger rules, at least here where the Court was reluctant to impose limitations on Congress' allocation of decision-making authority.

In this case the Secretary of the Interior, who had been vested with potentially conflicting duties, had been represented in the original litigation by the Department of Justice. In looking closely at the actual representation of the Tribe's interest, the Court seemed to find that in fact the Indians had received representation through the Bureau of Indian Affairs and that the Bureau's decisions in connection with the litigation were not influenced by other conflicting interests. Moreover, to the extent the ultimate settlement in the first case represented a

191. *Id.* at 125, 145.

192. *Id.* at 135 n.15. For a discussion of *Hansberry*, see *supra* notes 171-72 and accompanying text.

193. 463 U.S. at 136 n.15.

194. *Id.*. Accord Arizona v. California, 460 U.S. 605, 627-28 (1983) (United States has full authority to bring water rights claim for Indians and bind them to results of litigation despite Government interest in reserving water rights for other federal property); Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805-06 (1976) (United States pursued adjudication of United States and non-Indian water rights concurrently with its assertion of rights on behalf of certain Indian tribes).

195. *See* 463 U.S. at 127-29, 135 n.15, 139-43.

196. *Id.* at 127-29. The potential conflict of interest involved the Secretary of the Interior being "responsible for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands." *Id.* at 128.

197. *Id.* at 136-37 n.15.

198. *Id.* at 137-38 n.15. Accord Arizona v. California, 460 U.S. 605, 628.
compromise within the executive branch of the various conflicting interests, the resulting agreement was perhaps nothing more than the type of policy decision which Congress routinely delegates (and in this case de facto delegated) to administrative agencies. Representation in the initial action was, therefore, acceptable in the limited context of governmental litigation. If the fifth amendment due process clause was not violated in the circumstances presented in \textit{Nevada}, presumably the fourteenth amendment would not be violated if litigation involving the state courts presented analogous alleged conflicts of interest.

(1983) (Secretary of Interior retained broad power to represent rights of Indian tribe in water dispute).

199. 463 U.S. at 136-38 n.15. It is this type of analysis concerning governmental representation that the Court relied on to distinguish \textit{Hansberry} from \textit{Nevada}. For a discussion of the Court's treatment of the applicability of \textit{Hansberry} in the instant case, see supra notes 192-96 and accompanying text.

200. U.S. \textit{Const. amend. V}. The fifth amendment applied in \textit{Nevada} because only the federal courts were involved.

201. U.S. \textit{Const. amend. XIV}.

202. There is an interesting sidelight to the decision in \textit{Nevada}. After the conclusion of the first suit and long before the institution of the second, the Pyramid Lake Tribe sued the United States before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water than it was entitled to. 463 U.S. at 135 n.14. In the course of its opinion in \textit{Nevada}, the Supreme Court indicated that the Tribe was bound by the merger effects of the prior decree because in the original litigation it had been given, vicariously by reason of the Government's representation, adequate notice and a full and fair opportunity to be heard. \textit{Id.} at 144 n.16. The Court indicated, however, that "[i]f, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties." \textit{Id. See also Arizona v. California}, 460 U.S. 605, 627-28 nn.20-21 (1983) (Court was unwilling to express any view as to whether Government's representation should be subject to attack in Court of Claims and indicated that in \textit{Nevada} the Government did not breach any alleged duty to Tribe).

In the course of its discussion, the \textit{Nevada} Court distinguished two cases refusing to permit preclusion where "the complaining party would be left without recourse." 463 U.S. at 144 n.16 (citing \textit{Logan v. Zimmerman Brush Co.}, 455 U.S. 422 (1982)); \textit{Mullane v. Central Hanover Bank & Trust Co.}, 399 U.S. 306 (1950). For a discussion of \textit{Logan}, see supra notes 147-48 and accompanying text. For a discussion of \textit{Mullane}, see supra note 146 and accompanying text.

Justice Brennan concurred in the result in \textit{Nevada} on the basis that while the mere existence of a formal conflict of interest did not deprive the United States of authority to represent the Indians in litigation and bind them, if the Government breached its trust obligations, the Indians should have a remedy against it. 463 U.S. at 145-46 (Brennan, J., concurring).

All this can be taken to indicate that at least in some cases as long as there is a subsequent adequate tort remedy against the representative for failure to vigorously prosecute the case, there is no constitutional basis for refusing to apply merger principles on the basis of the lack of an adequate opportunity to be heard.

For a discussion of the merits of the proposition that availability of a tort
While some non-parties receive their opportunity to be heard through the medium of a representative and are thus subject to the effects of the preclusion doctrines, in other instances a non-party may itself "control" the actual litigation and in this way receive the opportunity to be heard. Due process concerns may thus be satisfied and the controlling person or persons may be legally bound.

What constitutes sufficient control is not an easy issue to resolve. In Montana v. United States the Government's participation in the first lawsuit (in state court) included: requiring the filing of the lawsuit; reviewing and approving the complaint; paying the attorneys' fees and costs; directing the appeal to the state supreme court; appearing and submitting a brief as amicus in that court; directing the filing of a notice of appeal to the Supreme Court; and effecting the abandonment of that appeal. The Supreme Court concluded that the United States, though not a

remedy justifies imposing preclusion on the non-party to a representative action, see supra notes 179-85 and accompanying text.

It should be noted that the Nevada Court's retention of the preclusive effect of a judgment where representation in the initial action may have been inadequate is a departure, though perhaps of limited applicability, from the general treatment of judgments where there was no constitutionally adequate opportunity to be heard in the original action. See, e.g., supra note 175 and accompanying text.

203. See Drummond v. United States, 324 U.S. 316, 318 (1945) (non-party may be bound by prior judgment if it has "laboring oar" in controversy); American Postal Workers Union v. United States Postal Serv., 736 F.2d 317 (6th Cir. 1984) (where non-parties' involvement in previous action is at least as great as expected from co-party, res judicata will apply); Inland Seas Boat Co. v. Buckeye Union Ins., 534 F.2d 85 (6th Cir. 1976) (insurer's substantial participation in prior suit by insured could result in application of res judicata in subsequent suit); Kreager v. General Elec. Co., 497 F.2d 468 (2d Cir.) (president and sole stockholder who exercised control over suit by corporation was bound by judgment against corporation), cert. denied, 419 U.S. 861 (1974). See also RESTATEMENT (SECOND) OF JUDGMENTS § 39 comment a (1982). Compare id. with supra notes 95, 139 & 179 and accompanying text (as long as interested person is afforded opportunity to be heard, it is irrelevant whether he actually took full advantage of it if he does appear to contest the issue).

204. RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982). The Restatement provides: "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Id.


206. Id. at 155. In Montana, a state tax imposed on public contractors caused a Montana contractor to file suit in state court claiming tax discrimination against the United States in violation of the supremacy clause. Id. at 150-51. While this state case was being litigated and directed by the United States, the United States initiated the present action in federal court. Id. at 151. After the state court upheld the tax law, the district court in the second suit found that the Government was not bound by the state court decision and struck down the tax as a violation of the supremacy clause. Id. at 151-52. The Supreme Court
formal party, had a sufficient “laboring oar” in the conduct of the first litigation to justify application of estoppel principles. In doing so the Court did not indicate which, if any, of these various acts it deemed particularly crucial.

In its attempt to clarify what is required to constitute “control,” the Second Restatement of Judgments notes:

To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review . . . . Whether his involvement in the action is extensive enough to consider control is a question of fact, to be resolved with reference to these criteria . . . . It is not sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to that party, or appeared as amicus curiae.

In addition, while the Court in Montana may be taken as suggesting that the allegedly controlling person must have a “direct financial or proprietary interest” in the dispute, the Restatement rejects this notion. It finds that the existence of such an interest may be a factor evidencing whether control has been assumed, but it is not dispositive. In short, under both the Restatement and federal case law, the totality of circumstances must be considered; no single fact is necessarily determinative.

Since it is through the “control” of the litigation that the non-party is deemed to have received its opportunity to be heard, federal constitutional law must limit the ability of state law to define control for purposes of its preclusion doctrine.

reversed and held the Government bound by the results in the original suit. Id. at 152-53.

207. Id. at 155.
208. Restatement (Second) of Judgments § 39 comment c. For the text of § 39, see supra note 204.
209. 440 U.S. at 154.
210. See Restatement (Second) of Judgments § 39 comment c (1982).
211. Id. For example, the person assuming control may be motivated by the fact that he or someone he wished to protect is in a situation similar to the party actually litigating an issue. Id. Thus, he assumes control to make a test case out of that litigation. Id.
212. See Restatement (Second) of Judgments § 39 reporter’s note to comment c. See also Del Mar Avionics v. Quinton Instruments Co., 645 F.2d 832 (9th Cir. 1981) (whether non-party controlled earlier litigation is question of fact for trial court and depends on variety of factors).
213. See supra notes 203-04 and accompanying text.
However, neither *Montana* nor the cases it cites\textsuperscript{214} purport to give a clear indication of the scope of any such limits.

Moreover, neither the Supreme Court in *Montana*\textsuperscript{215} nor the Restatement\textsuperscript{216} purport to apply the doctrines of merger and bar to the controlling person; only issue preclusion and its exceptions are applicable.\textsuperscript{217} Allegedly this is "because the person controlling the litigation, as a non-party, is by definition asserting or defending a claim other than one he himself may have."\textsuperscript{218} Analytically this may be true. However, constitutionally, as long as the controlling non-party could have asserted his own claims in the proceeding along with the others, he had the opportunity to be heard and can be precluded.\textsuperscript{219}

C. Issue Preclusion and Its Effects on Parties to the Initial Litigation

Section 27 of the Second Restatement of Judgments states the general rule with respect to collateral estoppel, or what is now called issue preclusion:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determin-


To the extent that the Supreme Court in *Montana* never refers to the Montana state law of preclusion, it disregards the command of 28 U.S.C. § 1738 (1982). For a discussion of the application of this statute, see infra notes 339-45 and accompanying text. However, the Court seemed independently, as a matter of federal law, to determine if there was preclusion in a case where the substantive issue allegedly precluded was federal. For a discussion of federal nonconstitutional limitations on state preclusion law, which the approach in *Montana* may to some extent support, see infra notes 308-37 and accompanying text. See also Brown v. Felson, 442 U.S. 127 (1979) (when debtor asserts new defense of bankruptcy, res judicata will not bar creditor from offering evidence of fraud, even though this issue was raised in earlier state court allocation suit).

\textsuperscript{215} See 440 U.S. at 154.

\textsuperscript{216} See Restatement (Second) of Judgments § 39 comment b (1982).

\textsuperscript{217} See Montana, 440 U.S. at 155, 158-64; Restatement (Second) of Judgments § 39 comment b (1982) (referring specifically to lack of adequate opportunity to litigate). For a discussion of issue preclusion and its effect on parties to the initial litigation, see infra notes 220-70 and accompanying text.

\textsuperscript{218} Restatement (Second) of Judgments § 39 comment b (1982). See Montana, 440 U.S. at 154-55.

\textsuperscript{219} See Restatement (Second) of Judgments § 39 reporter's note to comment b (1982). Compare id. with supra notes 155-58 & 164-65 and accompanying text (when procedural format of first action meets due process requirements, doctrines of merger and bar preclude litigation of matters not litigated).
nation is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim.\textsuperscript{220}

Section 28 of the Restatement lists various exceptions which purport to authorize relitigation of an issue disposed of by a valid and final judgment, including the following:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;

\ldots

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them \ldots

\ldots

(5) There is a clear and convincing need for a new determination of the issue \ldots

(c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.\textsuperscript{221}

On their face, these exceptions, particularly (5), arguably reflect federal constitutional concerns having roots in the due process opportunity to be heard. On the other hand, they may be intended to represent only what the drafters of the Restatement believed to be good policy. If the federal Constitution imposes no restrictions on the doctrine of issue preclusion as it applies in the intrastate context, it is likely that the latter is the case. These matters, therefore, require some examination at the outset.\textsuperscript{222}

Generally the legal effects of issue preclusion are more lim-


\textsuperscript{221} Restatement (Second) of Judgments § 28 (1982).

\textsuperscript{222} The discussion that follows applies whether or not the initial litigation is expressly representative or not. See supra notes 170-75 and accompanying text.

With respect to preclusion invoked against controlling persons, see supra notes 203-19 and accompanying text. Note, however, that the fact that the controlling person exercised free choice in being associated with the initial action
Neglected

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ited than those of merger and bar. Preclusion under this doctrine applies only to matters that have in fact been litigated\textsuperscript{223} and then only to issues that were essential to the first judgment.\textsuperscript{224} The second suit in which preclusion is raised generally involves a different cause of action than that involved in the first.\textsuperscript{225} This second proceeding may, for example, result in a judgment cutting off the interest of one of the parties in certain property or in the issuance of a writ of execution or injunction. Therefore, the liberty or property interests of the parties are directly at stake in the second proceeding,\textsuperscript{226} the protections of the due process clauses\textsuperscript{227} may militate against application of the due process analysis set forth \textit{infra} at notes 242-51 and accompanying text.

\textsuperscript{223} See, \textit{e.g.}, Allen \textit{v.} Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982) (even though issue was submitted to jury in prior action it was not clear whether it was litigated and lack of proof by parties asserting issue preclusion resulted in denial of preclusion); Community Nat'l Bank \textit{v.} Fidelity & Deposit Co., 569 F.2d 1919 (9th Cir. 1977) (no preclusion of issue that was not litigated).

An issue is actually litigated when it is properly raised in pleadings or otherwise, is submitted for determination, and is determined. \textit{See} \textit{Restatement (Second) of Judgments} \textsection{27}, comment \textit{d} (1982). An issue may be submitted and determined on a motion to dismiss for failure to state a claim, for judgment on the pleadings, for summary judgment, for directed verdict or their equivalents. \textit{Id}.

While traditionally preclusion only occurs when the issue “actually” has been litigated, some authorities have suggested that the issue precluded has only to relate closely to the original controversy. Under this approach the right of the litigant is adequately protected while judicial economy is served. \textit{See} \textit{Restatement (Second) of Judgments} \textsection{27}, comment \textit{c} (1982); Currie, \textit{Res Judicata: The Neglected Defense}, 45 U. Chi. L. Rev. 317, 342 (1978).

\textsuperscript{224} See Insurance Co. of North America \textit{v.} Norton, 716 F.2d 1112 (7th Cir. 1983) (party will be prevented from relying on argument by collateral estoppel only where argument was ruled on and was essential to judgment in prior action); NLRB \textit{v.} W.L. Rives Co., 328 F.2d 464 (5th Cir. 1964) (statements made in prior litigation concerning construction of collective bargaining agreement were not necessary to decision, therefore collateral estoppel did not apply).

\textit{See also} \textit{Restatement (Second) of Judgments} \textsection{27} & comment \textit{h} (1982) (if issues are determined but judgment is not dependent upon determinations, re-litigation of those issues in subsequent action between the parties is not precluded); \textit{id.} \textsection{27} comment \textit{i} (if judgment of court of first instance is based upon determination of two issues, either of which standing independently would be sufficient to support the result, judgment is not conclusive with respect to either issue standing alone); \textit{id.} \textsection{27} comment \textit{j} (even when determination is necessary step in formulation of decision and judgment, such determination will not be conclusive between the parties if it does not relate to “ultimate fact” or issue of law).

\textsuperscript{225} \textit{Restatement (Second) of Judgments} \textsection{27} (1982). \textit{But see id.} comment \textit{b} (issue preclusion where second action is brought on same claim as first is sometimes referred to as direct estoppel as opposed to collateral estoppel).

\textsuperscript{226} For a discussion of the threshold requirement of a liberty or property interest in due process analysis, \textit{see supra} notes 47-49 and accompanying text.

\textsuperscript{227} U.S. Const. amends. V, XIV.
attach to the suit, and there is a requirement for an adequate opportunity to be heard on all relevant matters. Accordingly, if issue preclusion purports to bar litigation of a relevant issue of fact or law, there must have been an adequate chance in the prior litigation to be heard on the issue. If there was, the fact that the litigation of the issue occurred in a different proceeding is and should be irrelevant from a constitutional point of view.

Although it has not examined the matter exactly in these terms, the Supreme Court has long taken the position that application of the doctrine of issue preclusion is subject to the requirements of the due process clauses. First in Hansberry v. Lee, and later in dicta in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, the Court indicated that precluding litigation of an issue in subsequent suits is contingent on the existence of a prior adequate opportunity to be heard. The Hansberry Court focused on a conflict of interest in the first suit which rendered inadequate the representation of the interests of the defendants involved in the second action and deprived them of their constitutionally required opportunity to be heard. Hansberry has been viewed as relevant outside the context of representative litigation

228. See supra note 50 and accompanying text.
230. Cf. Sherrr v. Sherrer, 334 U.S. 343, 348 (1948) (in collateral attack on out-of-state divorce decree, Massachusetts was required to give full faith and credit to prior decree where the husband appeared through counsel in original proceeding, even though husband presented no evidence in his favor and did not appeal). For a discussion of Sherrer, see supra notes 78-91 and accompanying text.
231. 311 U.S. 32 (1940).
232. 402 U.S. 313 (1971). See also Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). The Court in Kremer found the due process clause applicable, even on the assumption that a matter of issue preclusion was presented. Id. at 481-82 n.22.
233. Hansberry, 311 U.S. at 40-41; Blonder-Tongue, 402 U.S. at 329. In Blonder-Tongue, the plaintiff originally brought a patent infringement suit against the first defendant in an Iowa federal court. 402 U.S. at 314. After losing the suit on the ground that the patent was invalid, the plaintiff brought another patent infringement suit in an Illinois federal court against Blonder-Tongue Laboratories. Id. at 314-15. The district court in Illinois held that the patent was valid and made a finding of infringement. Id. at 316. After this decision was affirmed by the Court of Appeals, the United States Supreme Court held that the plaintiff was estopped from asserting the validity of the patent that had been declared invalid in the first suit, unless he could demonstrate on remand that he had not had a full and fair opportunity to litigate the validity of the patent in the first suit. See id. at 350. For a discussion of the facts of Hansberry, see supra note 172 and accompanying text.
234. For a discussion of the Court's analysis in Hansberry, see supra notes 176-78 and accompanying text.
and has been applied to instances wherein the lack of the opportunity to be heard arises from defects other than the existence of a conflict between a non-party and its representative.\textsuperscript{235} In \textit{Hansberry}, moreover, the impact of the second proceeding on the protected interests of the persons sought to be bound would have involved depriving them of the ability to acquire certain property.\textsuperscript{236} However, the applicability of due process protections also extends to cases where the effect of the second judgment is of a different nature, such as imposing personal liability on the defendant.\textsuperscript{237} Finally, it should be noted that in \textit{Hansberry} the parties to the initial proceeding arguably had a constitutionally adequate opportunity to be heard. As to these individuals, therefore, the original judgment was not invalid on due process grounds. Unnamed members of the purported plaintiff class, however, who were actually defendants in the subsequent action, lacked an adequate opportunity to be heard, and were not bound by the prior judgment. Thus, \textit{Hansberry} represents an instance wherein the initial opportunity to be heard was constitutionally adequate for some purposes and inadequate for others.\textsuperscript{238}

Since, as we have seen, the application of issue preclusion is subject to the constitutional constraints of due process, the \textit{Restatement} exceptions\textsuperscript{239} may similarly reflect, at least in part, constitutional concerns, even where the original judgment is valid and binding for some purposes.\textsuperscript{240} Since the drafters do not ex-

\textsuperscript{235} For example, in \textit{Blonder-Tongue}, questions concerning opportunity to be heard arose where the plaintiff in a subsequent suit was a party to the first suit. For a discussion of the facts of \textit{Blonder-Tongue}, see supra note 233 and accompanying text. The Court in \textit{Blonder-Tongue}, citing \textit{Hansberry}, stated that due process prevents litigants who have not had a chance to present evidence and argue their claim from being estopped despite one or more existing adjudications of the identical issue which stand against the litigants' position. 402 U.S. at 329 (citing \textit{Hansberry}, 311 U.S. at 37-38).

\textsuperscript{236} 311 U.S. at 37-38.

\textsuperscript{237} See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (subsequent judgment would impose personal liability on defendant for issuing false and misleading proxy statements).

\textsuperscript{238} Cf., e.g., \textit{Restatement (Second) of Judgments} § 64 comment a (1982) (describing variety of circumstances in which valid judgment, or issue resolved in valid judgment, may not have preclusive effect).

\textsuperscript{239} For a discussion of these \textit{Restatement} exceptions, see supra note 221 and accompanying text.

\textsuperscript{240} For example, § 28 of the \textit{Restatement} applies even where the original judgment is valid. See \textit{Restatement (Second) of Judgments} § 28 (1982). Where the procedural format of the original action is constitutionally deficient in view of the claims there presented, the judgment will be considered invalid and no issue preclusion may attach. See, e.g., \textit{Restatement (Second) of Conflict of Laws} § 25 comment b (1971).

If, however, the person against whom preclusion is sought to be used could
plicitly discuss the extent to which these exceptions are constitutionally mandated, the manner in which due process limits the application of issue preclusion remains to be ascertained. The results of this examination will suggest the extent to which the Restatement exceptions are or should be thought of as based purely upon policy considerations.

As indicated previously, the courts currently employ a tri-factor analysis, which directs attention to the risk of error along with the public and private stakes in a proceeding, to determine the adequacy of judicial and non-judicial procedural formats under the due process clauses. The private stakes involved in actions affected by issue preclusion may be substantially different (and greater) than those presented in the first adjudication. To the extent that the stakes at issue in the second or subsequent proceedings are considered much greater in weight or importance than those in the first action, this should affect the due process calculus for determining whether the procedural format applicable to the original action afforded an adequate opportunity to be heard and therefore a basis on which to preclude further litigation of the issue. A rather elementary procedural framework such as exists in some small claims courts might be considered constitutionally adequate to finally dispose of the first claim but inadequate to dispose of the second, weightier claim had it been presented in the original proceeding.

However, the viability of this argument may differ depending upon whether the party against whom preclusion is sought to be used could reasonably have chosen, prior to the first action, a court in the forum state with a procedural format constitutionally adequate to accommodate the larger claim it now presents. If it

241. See Restatement (Second) of Judgments § 28 reporter's notes to comments a, d, j at 284-85, 287-88, 290-91 (1982).

242. For a discussion of the tri-factor analysis used to determine the parameters of the protection of the due process clauses, see supra notes 51-53 and accompanying text.

243. For a discussion of the concern that the litigant have an opportunity to be heard where the second suit raises a different cause of action than that involved in the first, see supra notes 225-30 and accompanying text.

244. Of the three constitutionally relevant factors only the private stake is implicated in the proposed analysis. The same analysis in the text applies where the stake in the second action is qualitatively more significant than that in the first.
could have, the party arguably had an adequate opportunity to litigate the issue and due process should not prevent the application of issue preclusion.\textsuperscript{245} An example might be helpful here to illustrate the proposed analysis.

Assume that in the first suit the plaintiff sues for $100 for property damage suffered when his motorcycle collided with the defendant's car. Under the procedural rules applicable in the court where the property damage action is filed, evidence must be presented in written form rather than orally, and cross-examination is rarely permitted. The plaintiff may also have suffered serious personal injuries for which a reasonable jury verdict might exceed $50,000.

Assuming merger does not apply, if the plaintiff wins the first action by satisfying the trier of fact that the defendant was negligent, and if he then sues for personal injuries in a court offering the full array of procedural opportunities, he will presumably rely on issue preclusion to foreclose the defendant from again litigating the issue of negligence. If successful, the plaintiff will have gone a long way toward obtaining a personal judgment against the defendant, though he will still need to establish the extent of his injuries.

Another situation may arise as well. Assuming again that the defendant has lost the first action because the trier finds that he was negligent, he may bring suit against the former plaintiff for his own personal injuries arising out of the accident. The former defendant alleges in this second action that his damages amount to $100,000. The former plaintiff will presumably attempt to rely on issue preclusion which, if applied, will foreclose any recovery by the former defendant.\textsuperscript{246}

\textsuperscript{245} Compare text with Restatement (Second) of Judgments § 24 comment g (1982) and supra notes 162-63 and accompanying text. If it was not foreseeable at the time of the original litigation that the issue would be relevant to future actions, this choice of forum argument may be irrelevant. Compare Restatement (Second) of Judgments § 28(5)(b) (1982) with infra notes 254-55 and accompanying text.

The nature of the tri-factor analysis may make it difficult for a party to ascertain on its own what due process demands as to each claim. But as long as the party sought to be precluded had the option of suing where it was afforded the full panoply of constitutional procedures, the argument in the text has considerable weight. Where this choice-of-forum argument applies, any exception to issue preclusion for the party with the choice that is based on lack of full and fair opportunity for a hearing must be based on nonconstitutional policy. For examples of this type of exception, see Restatement (Second) of Judgments § 28(1), (3), (5)(c) (1982).

\textsuperscript{246} This discussion assumes that there is no compulsory counterclaim rule applicable to the first action. See, e.g., Fed. R. Civ. P. 13(a) ("A pleading shall
In these and similar cases there is more at stake in the first litigation than explicitly appears in view of the collateral effects under ordinary preclusion principles of the initial determination of certain issues. Arguably, therefore, the first litigation may satisfy due process to the extent that a judgment, valid for certain purposes, results. It is not as clear, however, that when it comes to applying issue preclusion in the later suit, the tri-factor due process analysis will lead to the conclusion that, given the now apparently greater stakes of the parties, there was in fact a sufficiently full and fair opportunity to be heard in the first action. More precisely, a due process balancing analysis based on the private stakes at issue in the second proceeding might result in the conclusion that procedural protections beyond those available in the first suit are required. At least in the case where the plaintiff sues the defendant a second time and the party sought to be precluded had no choice of forum in the first action, it can be argued that the first opportunity to be heard was inadequate to justify preclusion. However, this is not necessarily true in the second case presented, where the defendant could arguably have sued first on his claim and perhaps chosen a forum offering a procedural format adequate under the tri-factor constitutional analysis. 247

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247. In the first case there is no incentive for the plaintiff to inflate his or her claim on account of the balancing approach set forth in the text. The larger the claim is, the more likely preclusion, which favors plaintiff, would be denied. This is not true in the second case, where the former defendant might try to artificially inflate his claim to escape preclusion. This problem could perhaps be effectively dealt with by requiring a prima facie showing by the former defendant regarding the scope of his injuries early in the suit.

In practice, it would seem unlikely that issue preclusion would be relied upon in more than one or two subsequent actions between the original parties. The assumption of the analysis in the text is that during the second action there will generally be a private stake at issue far in excess of that presented in the initial proceeding. It might very well be, however, that in some instances there is a possibility of many actions in which the same issue will be presented. While the stakes involved in each are about the same and relatively modest in size, the total amount at issue in all the suits may be very substantial and dwarf the stake at issue in the first proceeding. To the extent that issue preclusion is applied based on a finding that the procedural format of the original action is sufficient under the tri-factor analysis to dispose of cases where the private stake directly presented in each later proceeding is about the same as that at issue in the first, the stake at issue in the first action in fact amounts to the sum of all the private

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In fact, the Second Restatement of Judgments relies on similar reasoning in discussing the applicability of one of its exceptions to the doctrine of issue preclusion. With respect to section 28(3), the commentary notes:

In other cases, however, there may be compelling reasons why preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim.

While they did not invoke the prevailing due process analysis to reach this conclusion, the drafters of the Restatement may have been unconsciously directed by a similar calculus of consider-

stakes presented in all the actions. To dispose of such a large private interest under the tri-factor analysis could demand a procedural format much more elaborate than involved in the first action, thus suggesting that issue preclusion should not be applied. Preclusion should be denied at that point where the stake at issue in the present proceeding, combined with the stakes at issue in the initial and later preceding proceedings (where recovery was itself permitted based in part on issue preclusion) requires a finding under the tri-factor analysis that the procedural format of the initial action was insufficient to dispose of a private interest of that combined amount.

Even if preclusion is disallowed under the analysis proposed in the text, this does not mean that due process will necessarily demand more than the elemental procedures that might be available in the later action. The tri-factor analysis used to determine what process is required to validly dispose of the claim there presented will be conducted on the basis of the stake actually at issue there.

The exceptions to preclusion are based in part on a concern over perpetuating incorrect decisions. See, e.g., Standefer v. United States, 447 U.S. 10, 23 n.18 (1980) ("The estoppel doctrine, however, is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct."). Cf. Restatement (Second) of Judgments § 29, comments f, g (1982). Implicit in such exceptions is the recognition that given the application of issue preclusion, there is much more at stake in the first proceeding than appears, and where there is a significant likelihood of error inherent in the original procedural format, preclusion should not perhaps be applied. As the above analysis demonstrates, this result is not simply good policy, but also may be constitutionally mandated. The risk of error inherent in the original procedural format is, of course, a factor in due process analysis. See supra note 53 and accompanying text.

248. Restatement (Second) of Judgments § 28(3) (1982). For a discussion of provisions of § 28 that purport to authorize relitigation of an issue which has been disposed of by a valid and final judgment, see supra note 221 and accompanying text.

249. Restatement (Second) of Judgments § 28 comment d (1982).

250. See id. See also infra notes 258-62 and accompanying text (§ 28's refusal to give preclusive effect emphasizes differences in procedures in initial and subsequent action while due process emphasizes difference in private stakes at issue in initial and subsequent actions).
tions in drawing the parameters of the doctrine of issue preclusion.251

In sum, in the case of issue preclusion the due process requirement for an adequate opportunity to be heard may prevent preclusive effects in the second or subsequent proceedings despite the validity of the first judgment. If the procedural framework applicable to the original proceeding meets due process requirements even as to those claims that are later sued upon, the federal Constitution does not interfere with the ordinary operation of the doctrine of issue preclusion, at least where the parties fully utilized the available procedures in the first action. State law may, of course, sometimes permit an exception to preclusion on the basis that certain procedures available in the second action were not available in the first.252 Any such exceptions, however, should be based purely on nonconstitutional policy considerations.253

A more difficult problem arises where the first action was brought in a court offering all the procedural protection constitutionally required to dispose of both the explicit and implicit stakes presented but the parties failed to fully utilize available procedures because of their focus on the relatively small stakes immediately at issue. Absent incentive to litigate to the hilt initially, it can be argued that it is unfair to preclude the parties from later relitigating issues that relate to a much larger claim.254 However, unless it is not reasonably foreseeable at the time of the original suit that the larger claim might later be sued upon raising the same issues as those involved in the first suit, there is a strong argument that there should be no exception to preclusion on con-

251. See infra notes 263-70 and accompanying text.


Any such exception must be based at least in part on a nonconstitutional concern for fairness to the party who lacked choice as to the forum in which the first action was brought and the possibility that it might be able to escape the same outcome if the additional or different procedures are made available to it in the second proceeding. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 n.15 (1979) (application of collateral estoppel may be unwarranted where defendant in first action was forced to defend in inconvenient forum and therefore was unable to engage in full-scale discovery or call witnesses); RESTATEMENT (SECOND) OF JUDGMENTS § 29, reporter's note to comment d (1982) (differences between procedures available in first and second actions may warrant refusal to carry over preclusion to action involving another party). See also infra notes 399-404 and accompanying text.

253. See infra notes 258-62 and accompanying text.

stitutional grounds, though an exception might be justified on pure policy grounds.\footnote{255}{Compare text with Restatement (Second) of Judgments \$ 28(5)(b) (1982). Section 28 provides in pertinent part: Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(5) There is a clear and convincing need for a new determination of the issue . . .
(b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action . . . .

\textit{Id.} See also id. \$ 28 comment i (exception might be justified purely on policy grounds).}{\footnote{256}{See supra note 221 and accompanying text.}{\footnote{257}{See Restatement (Second) of Judgments \$ 28(5)(c) comment j (1982). Perhaps the commentary here is unintentionally ambiguous. "Discretion" as used here may mean not power to choose whether to preclude but mere ability to permit an exception from preclusion if circumstances warrant. This would include instances in which due process demands an exception. The commentary does not expressly mention lack of certain procedures in the first action as an example of an instance where this exception applies, but there does not seem to be any reason to believe that the exception was intended to be inapplicable in that instance.

Even if the second proceeding does not offer procedural opportunities in addition to or different from those available in the first action; compare id. \$ 28(3); the available procedures in the first action may present a sufficient risk of producing an "incorrect" result that preclusion may not be allowed as a matter of policy or constitutional law. Cf., e.g., Standefer v. United States, 447 U.S. 10, 22-24 (1980) (because of restrictive rules of evidence and lack of opportunity to appeal as well as other elements involved in criminal prosecution, it may be unfair to preclude previously litigated issues). For an illustration of this problem, see supra note 247.}{\footnote{258}{For a discussion of \$ 28(3) and its relationship to due process analysis, see supra notes 248-51 and accompanying text.}{\footnote{259}{For the text of \$ 28(3), see supra text accompanying note 221.}{\footnote{260}{For a discussion of \$ 28(3) and the ability to refuse preclusive effect

Section 28(5)(c) of the Second Restatement of Judgments uses language suggestive of constitutional limitations,\footnote{256}{Though the reporter's commentary indicates that denial of preclusive effect based on this exception is a matter of judicial discretion.}{\footnote{257}{While the commentary to section 28(3) mirrors constitutional analysis to some degree, the wording of that provision suggests that the drafters were basing it largely, if not entirely, on nonconstitutional policy concerns.}{\footnote{259}{Section 28(3) makes the differences in the procedures in the initial and subsequent actions a basis for refusing preclusive effect.}{\footnote{260}{But this is not the focus of constitutional due process analysis, which, rather, emphasizes the differences in the private

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stakes at issue in the first and later actions.\textsuperscript{261} The nature of the procedural framework applicable to the second action is beside the point when dealing with whether preclusive effect can be properly given to an issue based upon the first judgment. Instead, the relevant constitutional inquiry is whether, given the interests at stake in the subsequent action, the procedures in the initial action were adequate to dispose of the issues under the tri-factor due process calculus.\textsuperscript{262}

Section 28(1) of the \textit{Restatement} emphasizes the importance of the right to appellate review.\textsuperscript{263} While the commentary does not suggest a constitutional basis for this exception,\textsuperscript{264} at least with respect to issues of subject matter and territorial jurisdiction, the Supreme Court appears to regard the opportunity for appellate review in the original action as an important factor in determining if preclusion of relitigation of those issues should constitutionally be permitted.\textsuperscript{265}

According to the Supreme Court, one of the principal purposes of the due process opportunity to be heard is to minimize mistaken or arbitrary deprivations of protected interests.\textsuperscript{266} Therefore, the more likely it is that a given procedural framework will lead to mistaken decisions by the tribunal, the more vulnerable it is to invalidation on constitutional grounds under the tri-factor analysis.\textsuperscript{267} Appellate review is designed to reduce the likelihood of substantive errors in the disposition of cases.\textsuperscript{268} Under

based on differences in procedures, see \textit{supra} notes 221 & 252 and accompanying text.

\textsuperscript{261} \textbf{For discussion of the prevention of issue preclusion based on differences in the private stakes at issue in the first and later actions, see \textit{supra} notes 242-47 and accompanying text.}

\textsuperscript{262} \textit{Id.} Of course, if it is found that the procedural format applicable to the first action was insufficient to justify issue preclusive effect, attention will turn to whether the applicable procedures in the second action satisfy due process standards in the context of the claim there presented. For a discussion of due process requirements in the subsequent action where issue preclusion is disallowed because of deficient procedure in the original action, see \textit{supra} note 247.

\textsuperscript{263} For the relevant text of § 28(1), see \textit{supra} text accompanying note 221.

\textsuperscript{264} See \textit{Restatement (Second) of Judgments} § 28 comment a (1982).

\textsuperscript{265} For a discussion of Sherrr v. Sherrer, 334 U.S. 343 (1948), regarding the importance of the availability of appellate review in order to preclude relitigation, see \textit{supra} notes 84-94 and accompanying text.

\textsuperscript{266} For Justice Stewart's discussion of the purposes of the constitutional right to be heard in Fuentes v. Shevin, 407 U.S. 67 (1972), see \textit{supra} text accompanying note 46.

\textsuperscript{267} For a discussion of the tri-factor analysis used to determine the parameters of due process protection, see \textit{supra} text accompanying notes 51-53.

\textsuperscript{268} \textit{See}, e.g., Standefer v. United States, 447 U.S. 10, 23 n.18 (1980) (in
this analysis it may very well be that the private interests at stake in the second proceeding may be such that the unavailability of appellate review in the first proceeding should prevent attribution of issue preclusive effects to the first adjudication even if the initial judgment is valid for purposes of disposing of the first suit.\textsuperscript{269} Section 28(1) may thus have a constitutional basis, whether or not the draftsmen considered this analysis.\textsuperscript{270}

D. Issue Preclusion and Non-Parties to the Initial Litigation

As indicated before, non-parties are generally not bound by the rules of res judicata.\textsuperscript{271} However, in some circumstances they can take advantage of a prior adjudication. With respect to issue preclusion, section 29 of the \textit{Second Restatement of Judgments} provides in relevant part:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in § 28 and also whether:

\ldots

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined. . . .\textsuperscript{272}

Subsection 2 bears a clear family resemblance to subsection 3 of section 28.\textsuperscript{273} The reference in section 29 to "full and fair opportu-

\begin{footnotesize}
\textsuperscript{269} Cf., e.g., \textit{Kremer v. Chemical Constr. Corp.}, 456 U.S. 461, 483-84 (1982) (availability of administrative and judicial review was factor in determination that procedures were sufficient under the due process clause). \textit{But see Standefer v. United States}, 447 U.S. 10, 23 n.18 (1980) (availability of appellate review is not always essential predicate of estoppel).

\textsuperscript{270} Of course, the unavailability of appellate review in the first proceeding may also render the first judgment invalid based on a tri-factor analysis. Section 28, however, assumes that the initial judgment is valid but issue preclusive effect may still be refused.

\textsuperscript{271} \textit{See supra} text accompanying notes 166-69.

\textsuperscript{272} \textit{Restatement (Second) of Judgments} § 29 (1982).

\textsuperscript{273} \textit{Compare supra} text accompanying note 272 (provisions of § 29(2)) with
\end{footnotesize}
portunity to litigate” mirrors to some degree subsection (5)(c) of section 28 with changes in phraseology which appear insignifi-

274 However, the commentary to section 29 implies that it is referring here to constitutional limitations.275 Moreover, the express adoption in section 29 of the provisions of section 28 assures that the right of appeal is an important precondition to the application of issue preclusion276 in a situation where mutualy is absent.277 This cross-reference also incorporates exceptions to preclusion founded on section 28(5)(c) where nonconstitutional policy is the motivating factor.278

There are two basic types of non-mutual collateral estoppel—offensive and defensive. In the former situation issue preclusion is used to establish one of the elements necessary for recovery in the second action. In the latter, issue preclusion is used to establish one of the elements of the defense in the later proceeding. Each in turn encompasses two sub-categories, one where the prior adjudication is used against the party who brought the first action and the other where it is used against the

supra text accompanying note 221 (provisions of § 28(3)). However, § 29(2), unlike § 28(3), requires that the differences between the procedures available in each action be likely to cause a different result. Despite this difference, it is suggested that the foregoing analysis of § 28(3) applies with equal force to § 29(2). See supra notes 252-53 & 258-62 and accompanying text.

274. For the relevant text of § 28(5)(c), see supra text accompanying note 221.

275. Comment b to § 29 begins by stating that “[a] party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process.” RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment b (1982).

276. See supra notes 263-70 and accompanying text. The Second Restatement indicates that relitigation of an issue in a subsequent action between the same parties is not precluded when “[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.” RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982).

277. Historically, the use of collateral estoppel was limited by the mutuality doctrine, which provided that a prior judgment could not be used as an estoppel against one party unless both parties were bound by the judgment. See, e.g., Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912) (“It is a principle of general elementary law that the estoppel of a judgment must be mutual.”). Criticism of the doctrine culminated with the Supreme Court’s pronouncement that “it is apparent that the uncritical acceptance of the principal of mutuality of estoppel...is today out of place.” Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 315, 350 (1971). The decline of the doctrine of mutuality is chronicled in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-28 (1979). For a discussion of Blonder-Tongue, see supra notes 280-309 and accompanying text. For a discussion of Parklane, see supra notes 281-309 and accompanying text.

278. For a discussion of the policy underlying § 28(5)(c), see supra notes 245 & 256-57 and accompanying text.
defendant to the original proceeding. An example will be helpful here.

A train collides with a truck. Ten passengers on the train, along with the driver of the truck, are injured.

a. A passenger sues the railroad and wins, establishing that the train engineer was negligent. A second passenger then sues the railroad relying on the prior adjudication of negligence. This is offensive issue preclusion against a former defendant.

b. Following the first suit described above, the railroad sues the truck driver for property damage to the locomotive. The defendant here relies on the prior adjudication to establish the contributory negligence of the railroad. This is defensive issue preclusion against a former defendant.

c. Assume, however, that the railroad brings the first suit arising out of the accident and the defendant is the truck driver. The latter raises the defense of contributory negligence and prevails on that ground. A passenger then sues the railroad relying on the prior finding to establish its case in part. This is offensive issue preclusion against a former plaintiff.

d. Finally, after the railroad’s loss against the truck driver in (c) above, the railroad sues the employer of the driver on a theory of vicarious liability. The latter relies on the prior adjudication of the railroad’s negligence. This is defensive issue preclusion against a former plaintiff.\(^{279}\)

In at least certain types of cases, the Supreme Court in the recent past has approved the use of the first and fourth instances of non-mutual estoppel in federal courts. Defensive use against a former plaintiff was involved in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,\(^{280}\) a patent infringement suit. Offensive use against a former defendant was sanctioned in *Parklane Hosiery Co. v. Shore*,\(^{281}\) which dealt with an action based on an allegedly false and misleading proxy statement. In both cases, the Court conditioned the application of preclusion on there having

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\(^{279}\) See generally *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 862-65 (1952) (discussing mutuality requirements in offensive and defensive use of judgments against former defendants and plaintiffs).


\(^{281}\) 439 U.S. 322 (1979). For a discussion of *Parklane*, see supra notes 281-309 and accompanying text.
been a "full and fair opportunity to litigate" the issues in the original proceeding. Following these cases the Court refused to permit defensive collateral estoppel in *Standefer v. United States*, a prosecution of an alleged aider and abettor after the principal had been acquitted of the offense charged. One of the reasons given for this refusal was that in a criminal case the Government is often without the kind of full and fair opportunity to litigate that is a prerequisite to issue preclusion.

Since in *Standefer* it was the Government against which preclusion was attempted, there was no basis for a contention that the perceived lack of an adequate opportunity to litigate implicated constitutional concerns, though the analysis in that opinion may shed light on what the federal constitution requires in other contexts. In private litigation such as *Blonder-Tongue* and *Parklane*, however, where constitutionally protected interests were clearly at stake, the due process clauses guarantee an adequate opportunity to be heard to the parties. Therefore, the question

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282. See *Blonder-Tongue*, 402 U.S. at 333; *Parklane*, 439 U.S. at 332-33.

283. 447 U.S. 10 (1980). In *Standefer*, the petitioner, who was the head of a corporation's tax department, had been convicted of aiding and abetting an Internal Revenue Service (IRS) agent in accepting unlawful compensation. *Id.* at 11. Prior to petitioner's indictment, the IRS agent was acquitted on several counts of the charged violations. *Id.* at 13. Petitioner appealed his subsequent conviction to the United States Court of Appeals for the Third Circuit, arguing that the Government should not be allowed to relitigate the issue of whether the principal had accepted unlawful compensation. *Id.* at 14. The court of appeals affirmed the conviction and petitioner appealed to the Supreme Court. *Id.* at 25. The Supreme Court affirmed as well, reasoning that the criminal case before it involved " 'competing policy considerations' that outweigh[ed] the economy concerns that undergird the estoppel doctrine." *Id.* at 25 (citations omitted).

284. *Id.* at 22-24. Specifically, the Court noted that the constitutionally and prudentially limited discovery rights, the unavailability of a directed verdict or judgment notwithstanding the verdict, and the inability of the Government to obtain appellate review after an acquittal, all of which are limits on the prosecution in criminal cases, may effectively deny the Government an opportunity to litigate. *Id.* at 22.

285. There was arguably no interest on behalf of the Government in "life, liberty or property" presented in the case and thus no due process protections attached. See *supra* text accompanying notes 47-50. Moreover, since the suits at issue were both in federal court, any due process limit on preclusion had to be rooted in the fifth amendment; the purpose of that amendment was to protect against the federal government, not to provide protection for the federal government.

286. See 447 U.S. at 22. For a discussion of *Standefer* with respect to this issue, see *supra* notes 283-84 and accompanying text. The factors outlined by the Court as relevant to a determination of the opportunity to litigate in the criminal law context may have some significance in the determination of the opportunity to litigate afforded in a civil context as well.


288. For a discussion of issue preclusion and the due process requirement
arises regarding the extent to which the exception to non-mutual estoppel in these or other instances has constitutional roots.

It is true that where mutuality has been abolished the impact of issue preclusion is substantially magnified. However, the mere fact that the subsequent litigation involves non-parties, rather than parties to the original proceeding who are relying on the determinations reached in the earlier adjudication, should not change the constitutional analysis set forth in the preceding section.\footnote{289} Without repeating all that was argued there, suffice it to say that even when mutuality has been abolished, constitutionally protected interests will be at stake in subsequent actions, triggering the right to an adequate opportunity to be heard. If there is more at stake in the subsequent proceeding than in the original, the due process tri-factor calculus\footnote{290} may suggest that the original hearing procedures were insufficient to justify preclusion of further litigation of issues.\footnote{291} This analysis is applicable at least to offensive use of issue preclusion against a former defendant. However, where the party to the first action, against whom preclusion is sought, could reasonably have sued in a court in the forum state which did not suffer from the alleged procedural defects, and effected this choice prior to the adjudication on which issue preclusion is based, there is an argument for permitting issue preclusion to be invoked against the party.\footnote{292}

The result of the proposed constitutional analysis may be that while the initial judgment in some instances is valid for some

\footnote{289. For an analysis of constitutional limitations on issue preclusion when parties to the initial litigation are involved, see supra text accompanying notes 242-44. \textit{Cf. Restatement (Second) of Judgments} § 29 comment b (1982) (“If issue preclusion is inappropriate as between the original parties, it is likewise ordinarily inappropriate when invoked by a non-party.”).}

\footnote{290. For a discussion of the due process tri-factor analysis, see supra text accompanying notes 51-53.}

\footnote{291. For a variation of this analysis in certain types of cases, see supra note 247. This variation may be more likely to exist where mutuality has been abolished.}

\footnote{292. For a discussion of the adequacy of due process when the party seeking to avoid issue preclusion could have chosen a more favorable forum for the initial litigation, see supra note 244 and accompanying text and supra text accompanying note 245. In some instances of attempted use of issue preclusion against a former plaintiff, the choice-of-forum argument might fail, for example, where the original plaintiff had to bring the first suit in a particular court (given subject matter jurisdiction limitations) which lacked certain procedures, and issue preclusion is later used offensively against it. Yet here it could be argued that the plaintiff could have refrained from suing and waited for the larger claim to be brought.}
purposes and entitled to issue preclusive effect in subsequent suits between the original parties, issue preclusion may not be invoked in some instances where mutuality is absent. Finally, the same constitutional analysis applies to both federal and state judgments in the intrasystem and intersystem context.293

While the references in \textit{Blonder-Tongue} and \textit{Parklane} to the need for a full and fair opportunity to be heard\textsuperscript{294} invoke language reminiscent of constitutional considerations, neither opinion expressly suggests that an exception of this nature to issue preclusion in the case of non-parties may be mandated by the due process clauses when the original judgment is valid for purposes of disposing of the original controversy. In \textit{Blonder-Tongue} the Court noted that “[i]n the end, [the] decision will necessarily rest on the trial courts’ sense of justice and equity.”\textsuperscript{295} It thus appears that the Court may have believed that when the initial judgment is valid, the exception is largely discretionary and based on nonconstitutional policy analysis.\textsuperscript{296} Earlier in its opinion the Court noted that there were no due process problems presented in the case.\textsuperscript{297} However, this was in the context of its observation that \textit{Blonder-Tongue} was not an instance in which non-parties were sought to be bound without having had any opportunity to be heard.\textsuperscript{298} In fact, according to the Court, the patent holder had been afforded the “opportunity for full and fair trial.”\textsuperscript{299} This may be taken to further suggest that the Court assumed that if the initial litigation could validly dispose of the matters raised there for certain purposes, due process did not further limit the application of issue preclusive effect to that adjudication. Moreover, in \textit{Parklane} the Court indicated that the requirement for “full and fair” opportunity to litigate may not be satisfied if, \textit{inter alia}, “the

\begin{itemize}
  \item \textsuperscript{293} This is true even where mutuality has not been abolished.
  \item \textsuperscript{294} See supra text accompanying note 282.
  \item \textsuperscript{295} 402 U.S. at 434.
  \item \textsuperscript{296} \textit{Compare} text with supra text accompanying note 245 (if party initially could have chosen forum adequate to accommodate the larger claim, it arguably had opportunity to litigate the issue, and due process should not prevent preclusion; supra text accompanying note 254 (unless reasonably unforeseeable at the time of the original suit that larger claim subsequently might be sued upon, there is strong argument against exception to issue preclusion on constitutional grounds, though exception might be justified on pure policy grounds); and supra text accompanying note 257 (reporter’s commentary to § 28(5)(c) of Second Restatement of Judgments indicates that denial of preclusive effect based upon this exception is matter of judicial discretion).
  \item \textsuperscript{297} 402 U.S. at 330.
  \item \textsuperscript{298} Id. at 329-30. For the facts of \textit{Blonder-Tongue}, see supra note 233.
  \item \textsuperscript{299} 402 U.S. at 330.
\end{itemize}
second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." 300 As noted before, such an approach is not based upon constitutional analysis. 301

However, because it is difficult to see how any viable due process argument could have been made in either Blonder-Tongue or Parklane, the Court did not have to confront that constitutional issue. While the stake for the defendant in the second (class) action in Parklane may have been significantly greater than that involved in the earlier SEC injunctive proceeding, and even though the plaintiff in Blonder-Tongue did not have a free choice of forum in bringing the first suit, 302 all the litigation involved took place in the federal courts. Given the elaborate procedural protections of the Federal Rules of Civil Procedure and other applicable federal procedural statutes, it is difficult to conceive of a case in which such a procedural format could be deemed constitutionally defective for insufficiency regardless of the size or type of stakes presented.

In Standefer, Blonder-Tongue, and Parklane the Supreme Court pointed to certain procedural mechanisms, which if inadequate or lacking in the initial litigation, might justify a finding of lack of a full and fair opportunity to litigate, and thus a denial of issue preclusive effect in later litigation with non-parties. Specifically, preclusion might be denied where there existed in the original proceeding:

   a. lack of mechanisms for discovery; 303
   b. restriction on the type of evidence that could be received; 304
   c. restriction on the ability to obtain a directed verdict or a new trial; 305 or
   d. lack of access to appellate review. 306

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301. See supra text accompanying notes 248-53 & 258-62.
302. See 28 U.S.C. § 1338(a) (1982). This statute vests exclusive jurisdiction over patent cases in the federal district courts. Id. But see Blonder-Tongue, 402 U.S. at 332 (Court noted that patentee was plaintiff in first litigation and chose time and place of first litigation).
303. See Standefer, 447 U.S. at 22; Parklane, 439 U.S. at 331 n.15; Blonder-Tongue, 402 U.S. at 332-33.
305. Id. at 22-23.
306. Id. See also supra text accompanying notes 263-70 (discussing § 28(1) of Second Restatement of Judgments and its emphasis on importance of right to appellate review, and suggesting that § 28(1) may be constitutionally based).
While the Court may have based its conclusions in these cases on nonconstitutional policy analysis,\textsuperscript{307} arguably such gaps in the procedural scheme applicable to the original action might in some instances preclude a finding that, considering the private stakes involved in later suits, there was a constitutionally adequate opportunity for hearing in the first case sufficient to justify issue preclusion in subsequent actions. This is so regardless of whether the doctrine of mutuality has been abolished.

E. Federal Nonconstitutional Limitations on State Preclusion Law

As the foregoing discussion demonstrates, the due process clause of the fourteenth amendment\textsuperscript{308} limits the operation of state preclusion law in various respects through the requirement that there have been an adequate opportunity to litigate in the initial action. Federal law here controls the effects of judgments in the courts of the original forum state itself. Moreover, given the full faith and credit clause\textsuperscript{309} and its implementing statute,\textsuperscript{310} constitutional limitations accompany such judgments when their recognition or enforcement is sought in sister states.\textsuperscript{311} Beyond these constitutional limits, of course, a state may on policy grounds impose additional procedural prerequisites to the merger, bar, and collateral estoppel effects of the judgments of its courts.\textsuperscript{312} These prerequisites likewise have extraterritorial appli-

\textsuperscript{307} For a discussion of the nonconstitutional policy analysis involved in Blonder-Tongue, see supra notes 294-303 and accompanying text. For a discussion of the nonconstitutional policy analysis involved in Parklane, see supra notes 294 & 300-03 and accompanying text. For a discussion of nonconstitutional policy analyses involved in Stander, see supra note 285 and accompanying text.

\textsuperscript{308} U.S. CONST. amend. XIV, § 1.

\textsuperscript{309} Id. art. IV, § 1. For the text of the full faith and credit clause, see supra note 13.


\textsuperscript{311} There is no reason the "law" referred to in § 1738 should not be taken to encompass constitutional, statutory, and common law, both state and federal. Compare Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Erie interpreted the word "laws" as used in the Rules of Decision Act, 28 U.S.C. § 1652 (1982), to include common law. The latter Act refers to the "laws of the states" while § 1738 refers to "law" without specification as to its source, federal or state. Both statutes were originally enacted at about the same time (1789-1790).

Where the due process clause limits the preclusive effect of a judgment domestically, it likewise, of its own force, limits the preclusive effect of that judgment in other states. See Restatement (Second) of Conflict of Laws § 104 comment a (1971).

\textsuperscript{312} For an example of such an additional procedural requirement, see supra text accompanying notes 253-55. The states may grant rights to individuals that are greater than those established by the federal Constitution. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (although federal
cation in view of the full faith and credit obligations of other states.\textsuperscript{313} It is also true that federal nonconstitutional law, statutory or common, can impose limitations on state domestic preclusion law.\textsuperscript{314}

If, in the initial litigation in state court, one of the parties raised or could have raised contentions that its federal statutory or constitutional rights were violated, such contentions may be relevant to subsequent suits in the courts of the same state. In five recent cases, Allen v. McCurry,\textsuperscript{315} Kremer v. Chemical Construction Co.,\textsuperscript{316} Haring v. Prossie,\textsuperscript{317} Migra v. Warren City School District Board of Education,\textsuperscript{318} and Marrese v. American Academy of Orthopaedic Surgeons,\textsuperscript{319} the Supreme Court dealt with questions regarding the effect of state court adjudications on the ability to litigate federal constitutional and statutory issues and claims in later proceedings. The Court, however, limited its discussion to the intersystem context, specifically where the subsequent action was filed in federal court. Accordingly, no mention was made of the effects of

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Constitution does not guarantee individual right to distribute leaflets at shopping center, state's constitution may expand right of free speech to protect this activity); Cooper v. California, 386 U.S. 58, 62 (1967) (fact that search of automobile was not unreasonable under fourth amendment does not affect states' power to impose more stringent search and seizure standards than those imposed by federal Constitution).

\textsuperscript{313} See supra note 311. See also, e.g., Restatement (Second) of Conflict of Laws §105 & comment b (1971) (when procedural requirement of judgment-rendering state has not been complied with, court of enforcement will look to local law of rendering state to determine whether judgment is void for lack of competence or merely erroneous). But see Restatement (Second) of Judgments §86 comment g (1982) (suggesting that sister state may give more preclusive effect than accorded under law of state of rendition in some situations). For a discussion of the proposition that a state may accord more preclusive effect to a judgment than the state of rendition would accord, see infra note 355-57 & 377-80 and accompanying text.


\textsuperscript{315} 449 U.S. 90 (1980).
\textsuperscript{316} 456 U.S. 461 (1982).
\textsuperscript{318} 456 U.S. 75 (1984).
\textsuperscript{319} 105 S. Ct. 1327 (1985).
state court adjudications on the ability to litigate or relitigate federal issues and claims where the subsequent action is filed in a court of the same state. Pursuant to the explicit language of the statute implementing the full faith and credit clause, the Court explicitly examined the law of the rendering state in *Kremer*, *Haring* and *Migra*, though not in *McCury*. In *Marrese*, it directed the trial court to undertake its responsibility of initially considering the preclusion law of the state rendering the judgment. The state law referred to in these cases dealt almost exclusively with preclusion where the parties to the second litigation were litigating or attempting to litigate nonfederal claims and issues. Where, however, there is a federal issue or claim raised in the second or later actions in the courts of the rendering state, there are federal interests at stake which in some contexts should be seen as justifying limits on that state's ability to apply its merger, bar, and collateral estoppel doctrines.

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321. For discussion of this aspect of *Kremer*, see infra text accompanying notes 446-49.
322. For discussion of this aspect of *Haring*, see infra text accompanying notes 428-29.
323. For discussion of this aspect of *Migra*, see infra text accompanying notes 435-36 & 439.
324. For discussion of this aspect of *McCury*, see infra text accompanying notes 405 & 405-06. But see infra text at 453-57 (suggesting that *McCury* Court assumes that imposition of federal limitations upon preclusive effect of state court judgments would operate as implicit amendments to dictates of § 1738).
325. 105 S. Ct. at 1335.
326. A "federal issue" of fact is one which is relevant to a claim governed by federal law. The state law examined by the Court in *Kremer*, *Haring*, and *Migra* arose from cases involving, for example, the competency of a testatrix, *Haring*, 462 U.S. at 315 (citing *Eason* v. *Eason*, 204 Va. 347, 131 S.E.2d 280 (1963)), and the malpractice of an attorney, *Migra*, 465 U.S. at 86 (citing *Henderson* v. *Ryan*, 13 Ohio St. 2d 31, 233 N.E.2d 506 (1968)), and therefore did not deal with preclusion of federal claims and issues.

The federal character of an issue may appear in the initial adjudication or only in later actions. For instance, in *Blonder-Tongue*, the first litigation was a patent infringement act so that the federal character of the fact issues litigated was obvious at the outset. 402 U.S. at 314. However, in *Migra*, the first action was for breach of contract. 465 U.S. at 78. Assuming no claim preclusion, the federal character of issues of fact adjudicated there would become obvious only when the second suit, a constitutional claim under 42 U.S.C. § 1983 (1982), was brought, assuming the relevancy of those fact issues to the constitutional claim.

327. There is a "federal interest" in the sense used in the text where, *inter alia*, a federal substantive policy or purpose exists whether of constitutional or statutory origin. For a definition of "substantive" policy or purpose, see supra note 34. Cf. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 178. This may require protection by the fashioning of federal common law exceptions to state preclusion law.
328. See Burbank, *A General Approach*, supra note 314, at 808, 809, 812-13,
In other words, even outside the intersystem context,\textsuperscript{329} preclusion in the courts of a state of federal issues and claims must be seen as raising federal questions subject to the determination of the United States Supreme Court, and governed in some instances by the principles of federal common (or statutory) law that differ from state domestic preclusion law. Operative within the rendering state, this nonconstitutional federal law limits the recognition and enforcement of judgments in other states, and in the federal courts, under the statute implementing the full faith and credit clause.\textsuperscript{350} Such federal common law has its sources in federal statutes and in some instances in the federal Constitution.\textsuperscript{351} The \textit{Second Restatement of Judgments} appears to implicitly acknowledge this type of restriction on domestic preclusion law.\textsuperscript{332} These federal nonconstitutional limitations can be of various kinds.\textsuperscript{333} For present purposes, however, it is important to note

\begin{quote}
\textsuperscript{820.} Cf. Kalb v. Feuerstein, 308 U.S. 433 (1940). In \textit{Kalb}, the judgment of a state court was subject to collateral attack because of a peremptory prohibition by Congress that no state court had jurisdiction over a petitioning farmer-debtor or his property. \textit{id.} at 438-39. The Court noted that "[s]tates cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." \textit{id.} at 439. For a further discussion of \textit{Kalb}, see \textit{supra} notes 124 & 139.

\textsuperscript{329.} For definitions of intersystem and intrasystem preclusion as used in this article, see \textit{supra} note 6.

\textsuperscript{330.} For a discussion of the effect of nonconstitutional federal law on the recognition and enforcement of judgments in federal courts and the courts of other states, see \textit{supra} note 311 and accompanying text.

\textsuperscript{331.} See \textit{supra} note 327.

\textsuperscript{332.} See, e.g., \textit{Restatement (Second) of Judgments} § 26(1)(d) (1982) (exempting from general rule barring splitting of claim those cases in which "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme"); \textit{id.} § 29(1) (in deciding whether to apply issue preclusion in subsequent litigation with third party, court should consider whether doing so would undermine applicable scheme of remedies devised for such actions); \textit{id.} § 86(1) (litigation of claim in state court does not preclude litigation in federal court of related federal claim arising from same transaction, if federal claim arises under scheme of federal remedies which contemplates that federal claim should not be precluded by prior state court adjudication).

\textsuperscript{333.} An example might resemble § 28(2) of the \textit{Restatement}: Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

\textsuperscript{2.} The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. . . .
only that if preclusion is to apply in the second action, these limitations may mandate a more elaborate procedural framework in the first action than would otherwise be necessary. That is to say, the first opportunity for hearing may have to be fuller and fairer than required by due process in order for certain claim or issue preclusive effects to attach to the judgment. The additional or different procedures may be judged necessary in order to improve the accuracy or trustworthiness of the fact-finding or law-applying process, and in this way relevant federal interests are protected. While the states have interests in judicial efficiency and consistency of decisions and perhaps in the merits, even where federal matters are presented, these state interests may be outweighed in many instances by the federal interests at stake.

A comparison with the approach to issue preclusion found in Parklane Hosiery Co. v. Shore is illuminating here. While approving offensive issue preclusion in the federal courts in certain types of cases, the Parklane Court indicated that, as a matter of policy discretion, the district courts could deny issue preclusion if they believed that the defendant had not been given a sufficient opportunity to be heard in the initial action, even if the due process clause itself did not demand this result. The Parklane approach constitutes federal common law which applies in the federal courts. That particular nonconstitutional limit on preclusion is based largely on concerns about fairness to the party against


334. Both due process and the analysis underlying the creation of the type of federal common law discussed in the text are concerned with the accuracy of the fact-finding process. See supra text accompanying note 46 and supra text following note 58. However, while the risk of error inherent in a certain procedural format may be acceptable for constitutional purposes, it may not be considered acceptable as a matter of policy, in view of the federal interests at stake. But see infra note 404.

335. For a discussion of federal interests and their protection when conflicts of laws arise, see infra note 404. See generally Burbank, A General Approach, supra note 314, at 808, 810, 812-13, 820.

336. Compare text with R. CRAMPTON, D. CURRIE & H. KAY, supra note 63, at 985 ("Is it correct to say that the question in a case like Dice [v. Akron, C. & Y. R.R., 342 U.S. 359 (1952)] is the extent to which state interests in the efficient administration of state courts should be allowed to impinge upon federal policy?").


338. For the reasoning of the court in Parklane, see supra text accompanying notes 294-303.
whom preclusion is invoked.\textsuperscript{339} To the extent there is a federal common law that limits state preclusion law based on notions of “full and fair opportunity to litigate,” it must find its source not merely in concerns regarding fairness to the parties but in the need to advance or protect distinctive federal interests.

If the existence of these nonconstitutional federal limitations on domestic state law is overlooked, the only way to assure protection of federal interests is to carve out exceptions to the mandate of section 1738\textsuperscript{340} and to permit litigation of the federal claims or issues in the federal district courts following state court adjudication regardless of the preclusive effects mandated by state domestic preclusion law. This approach has been suggested by language in some recent Supreme Court opinions.\textsuperscript{341} It is not satisfactory for a number of reasons. It implicitly adopts an unnecessarily restrictive reading of the language of section 1738\textsuperscript{342} and on this basis requires the finding of an implied repeal\textsuperscript{343} of that statute in order to protect federal interests. Discovering an “implied repeal” is in most cases a purely fictional exercise with few accurate guideposts.\textsuperscript{344} Moreover, original federal subject matter jurisdiction may not be sufficient to encompass later suits raising federal issues where preclusion is urged.\textsuperscript{345} Even where

\textsuperscript{339} See 439 U.S. at 330-31 & n.15. See also supra text accompanying notes 252-53 & 300-301 (discussing nonconstitutional policy-based exception to preclusion based upon availability of certain procedures in second action which were not available in first); infra text accompanying note 402 (noting that Second Restatement of Judgments suggests that it would be unfair to preclude party who did not have original choice of forum from enjoying procedural advantages available in second forum which were unavailable in the first).


\textsuperscript{341} See, e.g., Haring v. Prosise, 462 U.S. 306 (1989); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980). For a further discussion of the Court’s reasoning in Haring, see infra text accompanying notes 423-29. For a further discussion of the Court’s reasoning in Kremer, see infra text accompanying notes 448-452. For a further discussion of the Court’s reasoning in McCurry, see infra text accompanying notes 405-07.


\textsuperscript{344} See O. HETZEL, LEGISLATIVE LAW AND PROCESS 291, 294-96 (1980).

\textsuperscript{345} For a discussion of original federal subject matter jurisdiction, see generally C. WRIGHT, supra note 144, §§ 17-18 (discussing federal courts’ jurisdiction over federal questions and requirement that federal question must appear on face of complaint).
the federal courts have jurisdiction to consider the issues and claims raised in later suits, however, it is certainly consistent with the respect due the ability of the state judicial systems to safeguard federal rights and the desire to relieve the federal courts of some of their docket load to have a federal nonconstitutional common law limiting the intrastate effect of state preclusion law in matters of concurrent jurisdiction. In this way, parties will not seek a federal forum merely to take advantage of what is seen as a more favorable law.

Further insight into these matters is gained by an examination of recent decisions dealing with the full faith and credit clause and its implementing statute. It is, therefore, appropriate to turn attention to the opportunity to be heard in the context of intersystem claim and issue preclusion.

III. INTERSTATE PRECLUSION: FULL FAITH AND CREDIT AND THE OPPORTUNITY TO BE HEARD

A. Introduction

The constitutional obligation of each state to give "full faith and credit" to the judgments of the sister states of the federal union is much more inflexible than the obligation to give "full faith and credit" to the laws of those same states. Rarely can the enforcement or recognition of a valid sister state judgment be resisted outside the state of rendition. Section 1738 of the Ju-


348. U.S. Const. art. IV, § 1. For the text of the full faith and credit clause, see supra note 13.


350. The strength of the full faith and credit clause when the enforcement of a judgment of the courts of a sister state is at issue is illustrated by the language of the Supreme Court in Milwaukee County v. M.E. White Co.: The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

296 U.S. 268, 276-77 (1935). See also Fauntleroy v. Lum, 210 U.S. 230 (1908) (judgment of Missouri court on cause of action arising in Mississippi must be given full faith and credit in Mississippi, despite fact that underlying claim was
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dicial Code\textsuperscript{351} is the statutory implementation of the constitutional provision.\textsuperscript{352} It also extends to the federal courts the same obligations that apply to the state courts.\textsuperscript{353} By the terms of the statute the judgment of the court of one state is to have "the same full faith and credit in every court within the United States . . . [as it has] by law or usage in the courts of . . . [the rendering state]."\textsuperscript{354} Despite some arguments\textsuperscript{355} and dicta to the contrary,\textsuperscript{356} there is substantial case law to the effect that "the same" means "the same and no more preclusive effect."\textsuperscript{357} Thus, both the purely state and the federal components of the law of preclusion\textsuperscript{358} of the state of rendition become, by the force of federal law, the body of governing law that determines the preclusive effect of a judgment in every other state and in the federal

based on gambling debt and would not have been enforced by Mississippi courts); \textsc{Restatement (Second) of Conflict of Laws} § 103 comments a, b (1971) ("[full faith and credit requires, almost invariably, that a valid State judgment be recognized in sister States").


352. U.S. Const. art. IV, § 1.

353. See generally R. Crampton, D. Currie & H. Kay, supra note 63, at 661 (suggesting that 28 U.S.C. § 1738 exceeded authorization of full faith and credit clause in requiring federal courts to respect state judgments).


355. See, e.g., Casad, \textit{Interterritorial Issue Preclusion and the Restatement (Second) of Judgments}, 66 \textsc{Cornell L. Rev.} 510, 521-24 (1981) (considering whether state court violates full faith and credit requirements when it accords judgment of court of sister state greater preclusive effect than it would have had in state of rendition).

356. See, e.g., Durfee v. Duke, 375 U.S. 106, 109 (1963) (full faith and credit requires states to give judgment "at least the \textit{res judicata} effect which the judgment would be accorded in the State which rendered it").

357. See, e.g., Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1334-35 (1985) (Supreme Court refused to allow federal court to give more preclusive effect to state court judgment than would be given by state rendering judgment); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring) (citing Union & Planters' Bank v. Memphis, 189 U.S. 71, 75 (1903) for proposition that "federal court can accord \textit{[a state judgment]} no greater efficacy\textsuperscript{3} than would the judgment rendering State"); Oklahoma Packing Co. v. Oklahoma Gas Co., 309 U.S. 4, 7-8 (1939) (application of \textit{res judicata} determined by state law rather than federal statute); Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 429 (Supreme Court accords no more effect to state court judgment than that accorded it by court of state in which it was rendered); City of Covington v. First Nat'l Bank, 198 U.S. 100, 107-109 (1905) (federal courts can accord state judgments no greater preclusive effect than would the rendering state). \textit{See also Restatement (Second) of Judgments} § 86 comment g (1982) (state judgment is to have "the same" faith and credit as would be accorded by rendering state, no more or less). \textit{See also infra} text accompanying notes 561-69.

358. For a discussion of the state and federal components of state preclusion law, see supra notes 311 & 314-47 and accompanying text. \textit{See also} Burbank, \textit{A General Approach}, supra note 314, at 800.
courts,\textsuperscript{359} notwithstanding the peculiarities of the preclusion law that otherwise applies in those courts.\textsuperscript{360}

Obviously section 1738 does not represent the only defensible approach that could have been devised. For example, the language of the constitutional provision\textsuperscript{361} leaves sufficient leeway for Congress itself to create or perhaps to authorize the federal courts to create\textsuperscript{362} a body of purely federal preclusion principles without any reference to state law. Such principles would control the effect of state court judgments in the courts of other states.\textsuperscript{363}

The approach in fact adopted in 1790 with the predecessor of section 1738\textsuperscript{364} had the apparent advantage, however, of building upon existing state preclusion law and thus avoiding the delay and confusion which would have accompanied the formulation of an independent body of federal rules in this area. More importantly, the requirement that the law of the rendering state govern the preclusive effect of its judgments in other states and federal courts was necessary in order to protect the sovereignty of each state, acting in its judicial capacity, in those cases and controversies preserved for its jurisdiction by the federal Constitution\textsuperscript{365} or federal statute.\textsuperscript{366} That sovereignty is undercut to the extent that purely federal principles or the law of other states determines the effect of a judgment of a sister state.\textsuperscript{367}

\textsuperscript{359} See, e.g., Restatement (Second) of Judgments § 86 comment b (1982) (discussing preclusive effect of state court judgments and certain narrow exceptions).

\textsuperscript{360} But see Federal Practice, supra note 25, § 4467, at 626 (questioning whether all details of preclusion law of judgment-rendering state need be honored); infra text accompanying notes 381-85 (discussing situations where second state has strong countervailing substantive interest that weighs against enforcement of valid judgment of sister state).

\textsuperscript{361} U.S. Const. art. IV, § 1.

\textsuperscript{362} Unlike the federal common law previously discussed, see supra text accompanying notes 314-37, which applies even in the intrasystem context, the federal common law created pursuant to such a delegation would not have to be related to substantive federal policies because it would be founded on the distinct grant of power in § 1 of article IV.

\textsuperscript{363} Section 1 of article IV of the United States Constitution authorizes Congress to prescribe the effect of sister state judgments. See generally Federal Practice, supra note 25, § 4467 (discussing full faith and credit clause and its implementing statute).

\textsuperscript{364} See generally Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 153-55 (1949) (discussing history of full faith and credit).

\textsuperscript{365} See U.S. Const. art. III, § 2.

\textsuperscript{366} Most of federal jurisdiction is concurrent rather than exclusive. See, e.g., 28 U.S.C. §§ 1331, 1332 (1982) (governing federal question and diversity jurisdiction, respectively).

\textsuperscript{367} Cf. Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 768-69 (1976)
These considerations create a very strong presumption in favor of looking to the law of the judgment-rendering state to determine preclusive effect. Section 1738 embodies this presumption though it is not phrased as such. The case law and commentary indicate, however, that this presumption can be overcome in at least some instances by a strong showing of countervailing federal or even state interests. On the other hand, to ensure that the assertion of judicial power by one state will not unduly infringe on the judicial authority of others, section 1738 has been interpreted to refer to the purely internal law of preclusion of the judgment-rendering state. That is to say, the principles adopted by reference are those developed by a state’s law-making authorities for its courts without direct reference to the extraterritorial effect of its judgments. If a state is willing

(suggesting that federal judgments should be given same full faith and credit in state courts as they have in rendering court). See also Marrrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1334 (1985) (concerns of comity reflected in § 1738 generally favor states’ determination of preclusive scope of their own courts’ judgments). A further rationale for the reference to rendering state law is provided in FEDERAL PRACTICE, supra note 25, § 4467, at 367 (“As to some matters, there might be significant variations in state law that could undermine any certainty if preclusion must be determined by the law of whatever court should hear the second case.”). In some cases, however, federal substantive interests may require a limit on state preclusion law and thus a limit on state sovereignty. See supra text accompanying notes 314-37.

368. For examples of such situations, see infra notes 535-39 and accompanying text. Compare id. with supra text accompanying notes 314-37 (dealing with instance where federal interests operate to condition judgment in intrasystem context, as opposed to intersystem context).

369. For a discussion of when the state of recognition or enforcement can disregard the effect of a valid judgment of a sister state, see supra notes 381-85 and accompanying text; infra notes 484-534 and accompanying text; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).


371. Cf., e.g., Sumner, Full Faith and Credit for Judicial Proceedings, 2 UCLA L. REV. 441, 446-51 (1955) (suggesting that state of recognition or enforcement should look to domestic law of state that rendered judgment). I would agree with Professor Burbank, however, that the reference directed by § 1738 is to whatever preclusion rules would be applied by the courts of the rendering state, whether those rules are similar to those applied in wholly domestic controversies or modelled on the preclusion law of other states where multi-state elements exist in the transaction or occurrence at issue. See Burbank, A General Approach, supra note 314, 798-99.

372. See Thomas v. Washington Gas Light Co., 448 U.S. 261, 270-71 (1980) (state may not directly determine extraterritorial effect of its own workmen’s compensation awards). See also infra note 469 (presenting argument that where subsequent litigation raising claim could not be brought in state court because of exclusive jurisdiction, there cannot be relevant state law of preclusion).
to live at home with a particular rule of preclusion, then it can export it with its judgments to other states.

With respect to limitations on the preclusive effect of state court judgments based on the need for a "full and fair opportunity to litigate," several situations involving the full faith and credit obligations of the states can arise:

1) The relevant federal constitutional and federal nonconstitutional principles may eliminate entirely, or reduce to some degree, the permissible preclusive effects of the judgment within the state that rendered it. In this situation, all other states are similarly restricted in assigning preclusive effect to that judgment even if in other contexts section 1738 were to be interpreted to permit a state to give more preclusive effect to a sister state judgment than allowed by the law of the forum of rendition. That this is the case should be obvious where the due process clause acts as a limit on the preclusive effect of the judgment. The procedural inadequacy of the initial action remains regardless of the forum of the second suit. Where some federal interest requires relitigation of a particular claim or issue, this interest can be fully served only if no state can attach the prohibited preclusive effect to the judgment.

2) If the limitation on the preclusive effect of the initial judgment is grounded solely in the policy of the rendering state, it is arguable that the interest of the state where recognition or enforcement is attempted in terms of, inter alia, judicial efficiency can justify application of the latter state's more preclusive principles, assuming there is no unfair surprise to the parties. As before noted, however, the language of section 1738

373. For a discussion of the power of states to accord greater preclusive effect to a judgment than the rendering state would have accorded, see supra notes 355-57 and accompanying text.


375. For a discussion of the limiting effect of the due process clause on state preclusion law, see supra note 311 and accompanying text.

376. For examples of situations where there is a federal interest in relitigating of a claim, see supra notes 314-37 and accompanying text.

377. For a discussion of the effect of preclusion limitations grounded solely in the policy of the rendering state, see supra text accompanying notes 252-62 & 312-13.

378. For example, under the law of the rendering state, lack of discovery in the first action may prevent preclusion. This may not be the case under the law of the state of recognition.

379. See, e.g., Casad, supra note 355, at 517-28 (suggesting that enforcement state may afford greater preclusive effects to judgment than rendering state, but recognizing that it would be unfair to do so when such preclusive effects were
and existing case law may prevent this result. 380

3) Preclusion may be required by the internal law of the rendering state and may be consistent with existing federal constitutional and federal nonconstitutional requirements for an "adequate opportunity to be heard." Can the state of recognition or enforcement refuse to follow the law of the state of rendition on the basis that this second state believes as a policy matter that still more of an opportunity to be heard is appropriate? Probably not, or at least not in all cases. The instances in which the state of recognition or enforcement can disregard the effect of a valid judgment under the law of the rendering state are relatively few. 381 These might include situations wherein the second state possesses a strong countervailing substantive interest which may very well not be implicated by the situation posed. 382 What is likely involved here is merely a difference of opinion between the states regarding the merits or demerits of certain procedural devices in arriving at a correct decision. 383 Arguably this disagreement alone should not overcome the interests of repose and finality sought to be advanced by the full faith and credit clause. 384 If, however, the substantive law of the second state was applied in reaching the decision in the first forum, there is a more compelling case that the second state's preclusion law should prevail. The argument here is similar to that presented where federal interests limit the effects otherwise attributed to a judgment under state law. 385

Let us now turn to several recent cases in which the Supreme

not reasonably foreseeable during first litigation and might deny party due process).

380. See supra notes 355-57 and accompanying text and infra notes 561-79 and accompanying text.

381. For a discussion of the inflexible nature of the obligation of each state to give full faith and credit to the judgments of sister states, see supra note 350 and accompanying text. But see supra note 360 (questioning whether all details of preclusion law of rendering state need be honored).

382. Cf. Yarborough v Yarborough, 290 U.S. 202, 213 (1933) (Stone, J., dissenting) (nothing in first state's award of child support suggested intention to regulate or control duties flowing from parent-child relationship outside that state).

383. Compare text with Ely, supra note 36, at 723 (discussing conflicting rules of procedure when rules are designed not to further substantive goals, but to promote process of finding truth).

384. Compare supra notes 373-77 and accompanying text (where interest vindicated by state of recognition is consistent with concerns underlying full faith and credit clause).

385. For a discussion of issue preclusion under state law where federal interests are involved, see supra notes 333-36 and accompanying text. Compare id. with infra text accompanying notes 506-34 (where lack of opportunity in first
Court has dealt with preclusion law in the full faith and credit context. While the decisions involve the effect of state judgments in federal courts, much of what is discussed below applies where only state courts are involved.386

B. Preclusion in Civil Rights Cases

1. Allen v. McCurry387

The plaintiff in Allen sued local police officers for damages in federal district court arguing that his fourth amendment rights had been violated.388 He had previously been convicted in the state court of Missouri for possession of heroin and assault with intent to kill.389 In that earlier proceeding he had raised the search and seizure issue by suppression motion and lost.390

The opinion of the Supreme Court in Allen is almost as remarkable for what it does not say as for what it does say.391 It is, in fact, no mean task to formulate the exact holding of the case. Taken by itself, the case seems to stand for the proposition that as a general matter there is no reason to consider actions in the federal courts brought under the Civil Rights Act of 1871392 and commenced after state proceedings that did deal or could have dealt with the same issues or claims at issue in the federal suits as necessarily exempt from the “normal rules”393 of preclusion.

Since the second action in Allen was brought in federal court, section 1738 was applicable and the Court’s opinion acknowledges as much.394 The majority attempts to make the point that

386. For a discussion of the constitutional obligations of each state to give full faith and credit to the judgment of sister states, and the extension of that obligation to the federal courts, see supra notes 348-53 and accompanying text.

388. Id. at 91-94.
389. Id. at 92.
390. Id.
391. For example, the Court stated that only the broad question of the applicability of collateral estoppel to suits brought by similar plaintiffs under 42 U.S.C. § 1983 was before the Court. Id. at 95 n.2. It expressly declined to rule on “the scope of collateral estoppel with respect to the particular issues in this case,” or on “whether any exceptions or qualifications [to the doctrine of collateral estoppel] might ultimately defeat a collateral estoppel defense in this case.” Id. at 92, 95 n.7. Nor did the Court rule on “how the body of collateral-estoppel doctrine or 28 U.S.C. § 1738 should apply in this case.” Id. at 105 n.25 (emphasis supplied).
393. 449 U.S. at 95 n.7.
394. Id. at 96.
an exception from the dictates of section 1738 requires a clear statement from Congress, which apparently would be satisfied by a showing of a substantial federal interest based upon a federal statute. The Court then seems to suggest that there might be a basis in nonconstitutional federal law for permitting an “exception” to the “usual rules of preclusion” in the case of section 1983 actions:

In reviewing the legislative history of § 1983 in Monroe v. Pape, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.

The reference here to the absence of a “full and fair opportunity to litigate” in the state courts as a reason to disregard the preclusive effect of a state court judgment is apparently not solely, if at all, a reference to constitutional defects in the procedures in the original action. An exception to res judicata and collateral estoppel, if there were such defects, would not be a matter of legislative grace and statutory intent. However, the latter is

395. Id. at 99.
396. Id. at 99-101. For a discussion of “federal interests,” see supra note 327. The legislative policy or purpose of a statute, if reliably ascertainable, may be helpful in ascertaining legislative intent. See R. Dickerson, The Interpretation and Application Of Statutes 86-102 (1975).
397. 449 U.S. at 100-01 (citations omitted).
398. See supra text accompanying notes 373-75.
suggested by the quoted language from the opinion as the basis
of a possible exception to preclusion in section 1983 cases.

What the Court in Allen seems to be saying is this: Congress
intended that where state procedures were inadequate to protect
federal rights, even though they might meet constitutional stan-
dards, the reliability and trustworthiness of the procedures appli-
cable in the federal courts could guarantee the adequate
vindication of such rights. In determining the inadequacy of state
procedures for the purpose of determining whether preclusive ef-
fect should be attributed to a state judgment, presumably an in-
dependent federal standard would apply so that federal rights
would be fully protected.

It is interesting to compare the approach to the "full and fair
opportunity" test here and in the Parklane case. In Allen there is
no express suggestion that in determining the adequacy of the
procedural format of the first action, the federal court should use,
as a point of comparison, the procedures available in federal
court. The Parklane approach to exemption from preclusion,
on the other hand, calls explicitly for a comparison of the proce-
dures available in the first and second actions. So, too, does
the Second Restatement of Judgments with respect to issue preclusion
in sections 28(3) and 29(2). The Restatement approach seems to
be rooted, at least in part, in the perception that it would be un-
fair, regardless of the correctness of the initial judgment, to pre-
clude a party which did not have the original choice of forum, if in
the second action such party could likely reap some benefit from
procedures unavailable in the first forum. The approach in Al-
len is not so motivated, though it may lead to similar results in
practice. Its focus is on the adequacy of the first proceeding,
viewed independently, in assuring reliable vindication of federal
rights. As to that inquiry, while the risk of error inherent in the
state procedures may be acceptable for due process purposes, it

399. See 449 U.S. at 100-05. Ultimately, however, that determination
might, as a practical matter, turn in some degree on such a comparison.
400. For a discussion of the Parklane approach, see supra text accompanying
notes 300-301.
401. For a discussion of the approach set forth in Restatement (Second)
of Judgments §§ 28(3), 29(2) (1982), see supra text accompanying notes 221 &
272.
402. See supra note 252. An aversion to enshrining incorrect findings also
seems implicit in the Restatement approach. See Restatement (Second) of Judg-
ments §§ 28 comment d, 29 comment d (1982); supra text accompanying notes
248-51.
403. Compare text with supra text accompanying notes 333-36 (suggesting
that in some cases federal interest may require more elaborate procedural pro-

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might not be deemed acceptable as a matter of federal policy, though distinctions of this nature may be subtle indeed.\textsuperscript{404}

The internal law of the judgment-rendering state may, on policy grounds alone, fashion exceptions to the ordinary rules of preclusion, more stringent than constitutionally mandated, based on the lack of a full and fair opportunity to litigate.\textsuperscript{405} The Supreme Court does not expressly acknowledge this in \textit{Allen} despite the reference in section 1738 to state law of preclusion.\textsuperscript{406} This, in conjunction with other parts of the opinion, gives the impression that the Court envisioned these federal nonconstitutional limitations on state preclusion law as exceptions to section 1738 and operative only when suit is brought in federal court.\textsuperscript{407}

Since the case arose in the intersystem context, the Court's language in \textit{Allen} unnecessarily and perhaps unwittingly obscured the fact that where these federal nonconstitutional limitations on state preclusion law exist, they apply generally in both the federal courts and state courts possessing concurrent jurisdiction over the second or subsequent proceedings.\textsuperscript{408} Such is the case, for example, in section 1983 actions.\textsuperscript{409} There is no need to talk in terms of exceptions to the commands of section 1738 because these limitations are part and parcel of "the law" of the rendering state and, according to the express terms of that statute, control the effects of a state judgment in the courts of other states and in federal tribunals.\textsuperscript{410}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{404} See \textit{supra} text accompanying note 334. If the federal character of the interests at stake is relevant to due process analysis and makes the private stakes "weightier" in the tri-factor balance, a matter which is not clear, the distinction in the text may evaporate entirely.
\item \textsuperscript{405} For an example of such an exception to preclusion, see \textit{supra} text accompanying notes 253-55. For a discussion of the effect of such exceptions, see \textit{supra} notes 312-13. See also \textit{Restatement (Second) of Judgments} \S\ 28 (1982).
\item \textsuperscript{406} See 449 U.S. at 96. With respect to the "full and fair opportunity exception," the Court referred only to federal case law. \textit{Id.} at 95. For a discussion of the Court's treatment of this issue in \textit{Kremer}, see \textit{infra} notes 453-57 and accompanying text.
\item \textsuperscript{407} For example, the Court's discussion regarding the limitation on the rules of preclusion based on a "full and fair opportunity to litigate" in the prior action, see \textit{supra} text accompanying note 397, follows soon after the Court's suggestion that repeals by implication are disfavored. See 449 U.S. at 99-101.
\item \textsuperscript{408} See \textit{supra} text accompanying notes 327-47.
\item \textsuperscript{409} \textit{See}, e.g., \textit{Martinez v. California}, 444 U.S. 277, 283-84 n.7 (1980) (act of Congress creating cause of action without specifying remedy for enforcement may be sued upon in state court).
\item \textsuperscript{410} For a discussion of what constitutes "the law" referred to in \S\ 1738, see \textit{supra} note 313 and text accompanying note 376.
\end{itemize}
\end{footnotesize}
Of course, if state procedures applicable to a second or subsequent suits are also inadequate under federal standards, a federal forum may be the only one in which the claims and issues can be adequately litigated. In this circumstance, it is accurate to focus, as did the Allen Court, on the preclusive effect of the state court judgment in later federal proceedings. In the Allen case itself, however, the "unfairness" justifying an exception from preclusion may have rested largely on the attempted use of preclusion there against a former defendant, who had not had the opportunity to choose the initial forum and who, when he initially raised the issue of unlawful search and seizure, was faced with institutional pressures to rule against the contention that would not exist in a suit for damages. In other words, a suit in the state courts for damages based upon the Civil Rights Act of 1871 could remedy the perceived lack of a full and fair opportunity for hearing in the first proceeding. In this instance, federal common law could, if due process of the first judgment in order to ensure full protection in the forum of choice of the substantive federal consti-

411. There is, however, the possibility that in some cases where preclusion is disallowed on federal principles, federal common law will mandate that the state courts follow the additional procedures deemed necessary to fully vindicate federal interests, even where those procedures are not otherwise available under state law. Cf. Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952); Brown v. Western Ry., 338 U.S. 294 (1949).

412. While federal common law may eliminate or reduce the legal effect of the first judgment on the basis of the lack of sufficient procedures, the parties to the second or subsequent suit may choose (in the case of concurrent jurisdiction) or be forced (in the case, for example, where the federal courts lack original jurisdiction) to litigate the federal issue in a state forum lacking the procedure(s) whose absence resulted in the denial of preclusive effect. The argument in favor of the existence of a federal common law which mandates that the state courts follow additional procedures deemed necessary by federal standards, see supra note 411, is stronger in the latter instance.

413. See 449 U.S. at 115-16 (Blackmun, J., dissenting).


415. There is no suggestion in the majority opinion that due process would prevent issue preclusion in Allen and, in fact, some discussion in the opinion suggests that the Court, if directly confronted with the issue, would find due process satisfied. See 449 U.S. at 103-04.

416. See supra text accompanying notes 340-47; Haring v. Prosise, 462 U.S. 306 (1983). In Haring, the Court rejected, in a § 1983 action in federal court, an argument that it preclude issues not precluded under the law of the rendering state. The Court wanted to preserve the option of suing to vindicate federal rights in federal court. Id. at 322-23. If such a rule were adopted, arguably it should not bind the state courts because the impact of additional litigation would be felt by them and no substantive federal interest would be undermined in most cases. See infra note 429.
tutional rights, the violation of which gave rise to the claim.\(^{417}\)

2. Allen's Progeny

Since Allen, the Supreme Court has handed down three decisions in which it has wrestled with preclusion issues in civil rights cases in the intersystem context. The first was Kremer v. Chemical Construction Corp.,\(^{418}\) followed by Haring v. Prosise\(^{419}\) and Migra v. Warren City School District Board of Education.\(^{420}\) For the purpose of this article, the significance of the latter two cases is more limited and easily stated than that of the first. Moreover, in discussing Kremer last, various difficulties with the Court's current approach to intersystem preclusion can be highlighted. Haring and Migra will, therefore, be examined first.

In Haring, a Virginia trial court accepted a plea of guilty to one count of manufacturing a controlled substance. The lawfulness of the search leading to the discovery of the incriminating evidence was not litigated in this proceeding.\(^{421}\) Thereafter, the former criminal defendant brought a section 1983 action in federal court against the officers who conducted the search.\(^{422}\) Relying on what it saw as the holding of Allen, the Supreme Court noted that the federal court was bound by section 1738 to apply Virginia's law of preclusion except where the party raising the federal claim had not had a full and fair opportunity to litigate in the state courts, or other federal policies required a limit on the preclusive effect of the state court judgment.\(^{423}\) As in Allen, the Court glossed over the fact that state preclusion law might itself contain a full and fair opportunity limitation not based on due process considerations.\(^{424}\) As in Allen, the Court seemed to assume, unnecessarily, that federal nonconstitutional limitations on state preclusion law, where they exist, must be seen as exceptions

\(^{417}\) However, the majority in Allen did not say that it would find preclusion improper in the circumstances here presented. See supra note 415. The Court refused to rule expressly on this issue. See 449 U.S. at 93 n.2, 95 n.7, 105 n.25.

\(^{418}\) 456 U.S. 461 (1982).


\(^{421}\) 462 U.S. at 316. Resolution of the fourth amendment issue was not necessary in light of the defendant's guilty plea. Id.

\(^{422}\) Id. at 308.

\(^{423}\) Id. at 313-14 (citing Allen, 449 U.S. at 95, 96, 101). Compare Haring with infra text accompanying note 458 (Kremer, decided before Haring, does not approve concept of federal nonconstitutional limitations that are based on notions of "full and fair opportunity to be heard").

\(^{424}\) See 462 U.S. at 313-14. For a discussion of this aspect of Allen, see supra notes 405-06 and accompanying text.
to the commands of section 1738.425

The Court never had to rely on such federal exceptions to state preclusion in Haring because Virginia law did not attribute any issue preclusive effect to the first court proceeding; the lawfulness of the search had not, after all, been litigated, decided, and necessary to the result there.426 Moreover, mutuality was still the rule in Virginia.427 It would seem to be clear from Haring, therefore, that in section 1983 cases as in others, to the extent that state preclusion law limits the issue preclusive effect of a judgment on the basis of lack of a full and fair opportunity for a hearing in instances where due process does not demand this result,428 the federal courts as well as the courts of other states may and perhaps must429 likewise accept, under section 1738, the state judgment as thus limited.

In Migra, a supervisor of elementary education was rehired and then terminated by a local board of education.430 The supervisor first sued in state court in Ohio for breach of contract, which resulted in a judgment in her favor.431 She then brought a section 1983 action in federal court arguing that the termination violated her federal constitutional rights. Claim preclusion was raised as a defense.432 Again relying both on what it perceived to be the holding in Allen and on section 1738, the Court announced that Ohio law governed whether the federal claim was precluded.433 Since it was not clear whether the district court had in fact applied

425. See 462 U.S. at 313-14.
426. Id. at 314-16. The federal plaintiff had pleaded guilty in the state action before such time as the suppression had been litigated. Id. at 308.
427. Id. at 316 n.10.
428. For a discussion of the forum state's power to limit the preclusive effect of its judgments, see supra notes 312-13 and accompanying text.
429. For a discussion of whether a state may give more preclusive effect than the rendering state, see supra notes 355-57 & 377-80 and accompanying text. For a discussion of the operation of this notion in federal courts, see infra notes 561-69 and accompanying text. The Court in Haring also rejected the option of adopting a federal rule of preclusion to the effect that since the issue could have been litigated in the first action, litigation of it in a subsequent action would be foreclosed. See 462 U.S. at 317-23. While the Court cited authority indicating that it would be improper to give more preclusive effect to a judgment than that accorded by the law of the rendering state, id. at 313 n.6 (citing Union & Planter's Bank v. Memphis, 189 U.S. 71, 75 (1903)), that authority was not the express basis for refusing to fashion a federal rule of preclusion. See supra notes 404-16.
430. 465 U.S. at 78.
431. Id. The Ohio Court of Appeals affirmed the decision in favor of the supervisor in an unreported opinion. Id. at 79.
432. Id. at 80.
433. Id. at 80-85. The Court held that state preclusion law governs whether
Ohio law, the case was remanded for additional proceedings. Migra thus established that in the section 1983 context, as in other types of cases, the Court will generally not distinguish, for purposes of section 1738, between claim and issue preclusion. State law applies as to both including, presumably, limitations to preclusion related to the lack of a full and fair opportunity for a hearing not derived from the fourteenth amendment due process clause. The Ohio decisions on preclusion referred to in the Court's opinion dealt predominantly with suits raising state issues and claims. The Migra Court did not ascertain, nor did it necessarily have to at this stage of the proceeding, the existence of any federal nonconstitutional limitations on state preclusion law, though on its face the opinion might be interpreted to suggest erroneously that none exist.


The Supreme Court in Kremer was confronted with a suit in federal court based upon a title VII employment discrimination claim which followed the dismissal by the New York State Divi-

the effect is to foreclose litigated or unlitigated matters; that is, whether the effect is issue or claim preclusion. Id.

434. Id. at 87.
435. Id. at 83.
436. See U.S. Const. amend. XIV, § 1. The propriety of a court's giving more preclusive effect to a judgment than is accorded by the law of the original forum is the subject of some debate. See supra notes 355-57, 377-80 & 429 and accompanying text.


438. State law itself might not have precluded litigation of the matters here. See 465 U.S. at 86-87 (suggesting that question of what constituted "cause of action" for purposes of claim preclusion was unsettled in Ohio courts).

439. See id. at 80-87 (suggesting that rule requiring application of judgment state's law is without exception); id. at 81 ("in the absence of federal law modifying the operation of § 1738, the preclusive effect in federal court of petitioner's state-court judgment is determined by Ohio law").

sion of Human Rights for lack of probable cause of a similar claim under state law.\textsuperscript{442} This dismissal was upheld by the Appellate Division of the New York Supreme Court.\textsuperscript{443} New York statutory law endowed the dismissal with claim preclusive effect.\textsuperscript{444} Discovering no clear statement of congressional intent to the contrary,\textsuperscript{445} the Court found that section 1738 required the federal district court to hold that the title VII claim was barred,\textsuperscript{446} despite the possible exclusive subject matter jurisdiction of the federal courts over these suits.\textsuperscript{447}

It was argued that the New York proceeding was so seriously flawed that it should be denied recognition even if section 1738 otherwise applied.\textsuperscript{448} Acknowledging that it had utilized the concept of "full and fair opportunity to be heard" in various cases, including \textit{Allen v. McCurry} and \textit{Blonder-Tongue},\textsuperscript{449} the Court noted that the prior decisions had not specified the source or defined the content of this requirement.\textsuperscript{450} The Court continued:

But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common

\textsuperscript{442} 456 U.S. at 464.  
\textsuperscript{443} \textit{Id}.  
\textsuperscript{444} \textit{Id}. at 466-67 (citing N.Y. EXEC. LAW § 300 (McKinney 1972) (final determination, via state statute, excludes any other civil or criminal action based on same grievance of concerned party).  
\textsuperscript{445} 456 U.S. at 468-76. For a discussion of the effect of a federal statute indicating congressional intent to modify the operation of § 1738, see supra notes 394-96 and accompanying text.  
\textsuperscript{446} 456 U.S. at 476-80.  
\textsuperscript{447} \textit{Id}. at 479 n.20. For a discussion of the relevance of exclusive federal subject matter jurisdiction in cases involving § 1738 questions, see infra notes 468-71 and accompanying text.  
\textsuperscript{448} 456 U.S. at 480. The plaintiff argued that administrative proceedings followed by judicial review are per se insufficient to merit recognition under § 1738. \textit{Id}.  
\textsuperscript{449} \textit{Id}. at 480-81. The Court indicated that this requirement, at least where constitutionally based, applied to both claim and issue preclusion and therefore the characterization of which was involved in the case at bar was irrelevant. \textit{Id}. at 481 n.22. For a discussion of the Court's holding with respect to this issue, see infra text accompanying notes 478-79.  
\textsuperscript{450} 456 U.S. at 481.
law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.451

The Court then went on to find that the New York proceeding had fully satisfied the demands of due process.452 For present purposes, four things are significant about Kremer:

1) On its face the Supreme Court's opinion rejects, at least in title VII litigation, the notion that there is a federal nonconstitutional law of "full and fair opportunity to be heard" that can be relied upon to limit the preclusive effects otherwise attributed to a state court judgment under state law in those instances where section 1738 applies.453 This is apparently based on the assumption found in Allen that imposing federal limitations would operate as an amendment to the dictates of section 1738, which requires a clear statement from Congress.454 This is in turn premised on the mistaken belief that section 1738 refers solely to those principles of claim and issue preclusion that, within the restrictions imposed by the due process clause, find their source in the law-making branches of the states. That assumption is found rather clearly in both Haring455 and Migra456 and implicitly in Allen.457

451. Id. at 481-82 (citing McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 326 (1839); Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813)).
452. Id. at 483-85. For a discussion of the Court's due process analysis, see infra text accompanying notes 474-86.
453. See supra text accompanying note 451. Since § 1738 applies to state as well as federal courts, the opinion in Kremer, as an interpretation of that provision, presumably was intended to apply to both federal and state tribunals and in fact relies on cases where the second suit was brought in state court. See 456 U.S. at 483 n.24. By the same token, since § 1738 is not limited to particular types of cases, the Kremer approach could be taken to apply to all types of litigation, not just title VII litigation, absent an implied repeal of § 1738. See infra note 472. In Haring, a § 1983 case decided after Kremer, the Court suggested that federal nonconstitutional limitations on state preclusion law, including those based on a "full and fair opportunity to be heard," may exist in some circumstances, presumably where a federal substantive interest suggests an implied repeal of § 1738. For a discussion of this aspect of the Haring decision, see supra text accompanying notes 423-25.
454. For a discussion of this assumption in the Allen opinion, see supra notes 394-96 and accompanying text. See also Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985) (even where second action is within exclusive subject matter jurisdiction of federal court, refusal to give preclusive effect to state court judgment should be seen as "exception" to § 1738). For a discussion of Marrese, see infra note 469.
455. For a discussion of relevant aspects of Haring, see supra note 423 and accompanying text.
456. For a discussion of relevant aspects of Migra, see supra note 430 and accompanying text.
457. But see supra notes 405-06 (with respect to "full and fair opportunity
While both *Allen*\(^{458}\) and *Haring*\(^{459}\) (the latter decided after *Kremer*) seem to approve the concept of federal nonconstitutional limitations in principle, *Kremer* does not where those limitations are based on notions of "full and fair opportunity to be heard."\(^{460}\)

Just as federal constitutional law can act to limit the operation of state law\(^{461}\) within the state, as the Court in *Kremer* conceded, so can federal statutory and common law.\(^{462}\) As previously noted, it is the body of law thus fashioned by which the express terms of section 1738 accompany a state judgment to federal and other state courts.\(^{463}\) Let us assume, for a moment, that the Supreme Court did not proceed in *Kremer* on the mistaken assumption that section 1738 refers only to purely state law. If it wanted to be taken as saying that there should be no federal common law of preclusion (at least in title VII cases) operating within the states, would not the Court have made this point more expressly than it did in *Kremer*?\(^{464}\) It should be noted, moreover, that in support of the proposition that compliance with the due process clause of the fourteenth amendment is all that is required for full faith and credit,\(^{465}\) the Court cited a variety of precedents which involved preclusion of nonsubstantive federal or state is-

\(^{458}\) For a discussion of relevant aspects of *Allen*, see *supra* notes 394-98 and accompanying text. Both *Allen* and *Haring* were *§* 1983 cases.

\(^{459}\) For a discussion of relevant aspects of *Haring*, see *supra* notes 423-25 and accompanying text.

\(^{460}\) See *supra* text accompanying note 451.

\(^{461}\) For a discussion of the operation of *§* 1738 on state preclusion law, see *supra* notes 358-60 and accompanying text.

\(^{462}\) For a discussion of "the law" referred to in *§* 1738, see *supra* note 311. See also Burbank, *A General Approach*, *supra* note 314, at 805.

\(^{463}\) For a discussion of the effect of federal constitutional standards on the law of preclusion in the states, see *supra* notes 308-11 & 358-60 and accompanying text.

\(^{464}\) For a discussion of the *Kremer* Court's treatment of *§* 1738 where federal jurisdiction is arguably exclusive, see *infra* note 469. The *Kremer* Court did disclaim the existence of a federal common law limiting state judgments when that operated as an exception to *§* 1738. *See* 456 U.S. at 481-82.

The recent case of *Marrese v. American Academy of Orthopaedic Surgeons* did not have to address the matter of federal common law of preclusion operative in the state courts. 105 S. Ct. 1327 (1985). The second action there was within the exclusive subject matter jurisdiction of the federal courts. *Id.* Nevertheless, the language of the opinion indicates that the Court is still under the impression that the reference in *§* 1738 is to purely state law principles as long as they are consistent with due process. *Id.* at 1332.

\(^{465}\) For a discussion of the Court's holding with respect to this issue, see *supra* notes 451-58 and accompanying text.
sues—cases wherein there was arguably less of a federal interest in the creation of nonconstitutional controls on state law. The Court’s mistaken reasoning in *Kremer* will, hopefully, be corrected or qualified in the future and the specific result in *Kremer* may then be rejected.

If the federal courts had exclusive jurisdiction to hear title VII claims, a matter the Court in *Kremer* expressly refused to clarify, it might be argued that it makes little sense to talk in terms of federal controls on domestic state preclusion law that bind under section 1738 in the title VII context since the subsequent litigation in which the preclusion defense would be raised may be brought only in federal court. Nevertheless, even if any federal limitations that would be created here are considered “exceptions” to section 1738, the strong federal substantive interest


467. For a discussion of the *Kremer* Court’s reasoning in regard to the application state preclusion law where federal jurisdiction is exclusive, see infra note 469.

468. See 456 U.S. at 479 n.20.

469. Where the subsequent litigation raising the federal issue or claim could not be brought in state court because of the exclusive jurisdiction of the federal courts, it might be argued that there can be no relevant state law of preclusion covering a situation that cannot, as a matter of law, arise. Thus, refusal to accord preclusive effect to a prior state court judgment does not require the disregard of applicable state law and thus there is no exception to the literal commands of § 1738. See, e.g., Burbank, *A General Approach*, supra note 314, at 829-25. But cf. Morris v. Jones, 392 U.S. 545 (1947); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 444-46 (1943). See generally Sumner, supra note 371, at 449-51. Compare id. with infra text accompanying notes 506-29.

Even if this argument is rejected, the substantive federal interest at issue may perhaps be deemed fully protected only by the procedural format available in the federal court. The perceived ability of federal procedures to insure an accurate result may in fact be the reason or a reason for the exclusive nature of the jurisdictional grant. See C. Wright, A. Miller & E. Cooper, supra note 314, § 4470.

Recently, in Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327 (1985), the Court indicated that even if the second action is within the exclusive subject matter jurisdiction of the federal courts, a refusal to accord preclusive effect to a state court judgment should generally be seen as an “exception” to § 1738. *Id.* at 1332-33. This is because the reference in § 1738 is to the general principles of preclusion that exist under the law of the rendering state. *Id.* Their operation, however, usually assumes the applicability of forum state substantive law with respect to the claim or governing issues and does not
at issue should not be undermined, as the *Allen* and *Haring* cases recognized.\(^{470}\)

It should be noted that even if federal subject matter jurisdiction over title VII claims is exclusive, the discrimination issue litigated in the state court in *Kremer*\(^{471}\) might later arise in other New York proceedings that present state or perhaps even federal claims. If the latter, there might in fact be a federal common law rule relating to preclusion that does apply in the state courts and that might be relied upon in title VII litigation.

2) *Kremer* reiterates one of the fundamental principles of full faith and credit law: a violation of federal due process limitations in the rendition of a judgment deprives it of preclusive effect in the rendering state.\(^{472}\) Since the court of recognition or enforcement, federal or state, need only give (under section 1738) the same effect to the judgment as would the rendering court, refusal of the recognition or enforcement court to attribute preclusive effect to the judgment is entirely consistent with the statutory language.\(^{473}\)

directly address intersystem situations. *See also infra* text accompanying notes 371-72.

The Court in *Kremer* never determined whether title VII jurisdiction was exclusive. Thus it did not expressly ascertain whether the exclusive nature of the jurisdiction, if such it was, suggested a repeal of § 1738. Since it must have dealt with the preclusion issue on the assumption that the jurisdiction might be exclusive, the *Kremer* opinion can be taken as determining that even if there is exclusive federal jurisdiction in title VII cases, no implied repeal exists in the circumstances presented in *Kremer*. *Accord Marrrese*, 105 S. Ct. at 1335.

Along the way, however, the majority in *Kremer* acknowledged the doubts expressed in Congress concerning the adequacy of state remedies. Then it noted, in apparent contradiction of the clear reasoning of *Allen*: "It does not follow, however, that an implied repeal of § 1738 has been demonstrated. . . . Similar expressions of congressional concern with state remedies were unsuccessfully mustered in *Allen* . . . ." 456 U.S. at 472 n.10. This statement is inconsistent with the later reasoning of *Haring* and its view of *Allen*. *See supra* text accompanying notes 423-25.

In short, *Kremer* did not find an implied partial repeal of § 1738 on the basis of the evidence mustered regarding concern over adequacy (nonconstitutional) of state remedies. Moreover, whether or not federal jurisdiction over title VII actions is eventually found to be exclusive, this part of the opinion may be taken to suggest that the Court may not impose in title VII, and perhaps in other cases, common law restrictions on state preclusion law based on full and fair opportunity to be heard even if its misreading of § 1738 is eventually corrected.

\(^{470}\) For a discussion of the *Allen* and *Haring* Courts' concern for the protection of federal interests, see *supra* notes 394-98 & 423-25 and accompanying text.

\(^{471}\) *See supra* notes 440-452 and accompanying text.

\(^{472}\) *See* 456 U.S. at 482-83. For a discussion of this limitation on preclusion, *see supra* note 17 and accompanying text.

\(^{473}\) *See* 456 U.S. at 482-83. For a discussion of the operation of § 1738
3) The Court determined that the New York proceeding was procedurally adequate under the due process clause of the fourteenth amendment for the purpose of determining the existence of statutorily proscribed determination,\textsuperscript{474} noting that “no single model of procedural fairness, let alone a particular form of procedure is dictated by the Due Process Clause”\textsuperscript{475} In so doing it cited prior cases in which a balancing analysis similar to the one previously discussed\textsuperscript{476} was applied.\textsuperscript{477}

Characterization of the applicable preclusion doctrine as claim or issue preclusion was not deemed crucial in the context of\textsuperscript{Kremer}.\textsuperscript{478} In fact, the Court suggested that the constitutional “full and fair opportunity” test, whatever it might entail, applied to both claim and issue preclusion.\textsuperscript{479}

From all appearances, the stakes at issue in both the first and second proceedings were basically the same. This was not a case where there was a small stake at risk in the first case and a very large one in the second that would impact on the tri-factor balancing analysis.\textsuperscript{480} To the extent, therefore, that the procedures utilized in the first proceeding met the due process requirement for a valid judgment, they also met the due process requirement necessary to attribute preclusive effect to the same type of claim or issue when raised in the later federal proceeding.\textsuperscript{481}

4) The opinion in\textsuperscript{Kremer} overlooks or at least fails to expressly acknowledge the fact that the nonconstitutional law of the

\textsuperscript{474} 456 U.S. at 483-85.
\textsuperscript{475} Id. at 483 (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974); Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945)).
\textsuperscript{476} For a discussion of this balancing analysis, see supra notes 51-53 and accompanying text.
\textsuperscript{477} See 456 U.S. at 483 (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974) (no due process violation because “the State [had] reached a constitutional accommodation of the respective interests of [the parties]”); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (due process analysis “must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action”)).
\textsuperscript{478} See 456 U.S. at 481 n.22.
\textsuperscript{479} Id.
\textsuperscript{480} For a discussion of the tri-factor balancing analysis, see supra notes 242-51 & 289-95 and accompanying text.
\textsuperscript{481} Even though Mr. Kremer might be classified as a plaintiff in the first action, arguably he lacked free choice of the initial forum, given the federal requirement that a title VII claimant first invoke state remedies. See 42 U.S.C. § 2000e-5(c) (1982). For a discussion of the relevance of choice of forum to the issue of preclusion, see supra text accompanying notes 245.
state of rendition may require more than the due process clause with respect to the opportunity to be heard in order for certain preclusive effects to follow.\textsuperscript{482} To the extent it does, those limitations may accompany the judgment to other state and federal courts by the very terms of section 1738 that \textit{Kremer} so stressed.\textsuperscript{483}

\begin{quote}
\textbf{C. Federal Exceptions to Intersystem Preclusion}
\end{quote}

We have already discussed the federal constitutional and nonconstitutional limitations based on full and fair opportunity to litigate that operate internally on domestic state preclusion law and are operative extraterritorially by virtue of the Full Faith and Credit Clause and its statutory implementation. We have yet to examine whether there are any federal limits of that kind that operate solely in the intersystem context. To this end let us consider: Are there instances where federal law imposes limits on state domestic law of preclusion only when the judgment is enforced or recognition of it is sought in another state or federal court? Arguably there are. The plurality opinion of Justice Stevens in \textit{Thomas v. Washington Gas Light Co.}\textsuperscript{484} purported to recognize one such instance, though a majority of the Court rejected his reasoning.\textsuperscript{485} It is a truly fascinating case and deserves examination here.

The petitioner, a resident of the District of Columbia and an employee there, was injured at work in Arlington, Virginia.\textsuperscript{486} He received an award of disability benefits under the Virginia Workmen’s Compensation Act, which award under the domestic law of Virginia excluded “all other rights and remedies . . . at common

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{482} For a discussion of the operation of nonconstitutional state preclusion rules, see \textit{supra} note 312 and accompanying text.
\item \textsuperscript{483} For a discussion of the extraterritorial operation of state rules of preclusion under \textsection 1738, see \textit{supra} notes 313 & 377-80 and accompanying text.
\item \textsuperscript{484} 448 U.S. 261 (1980).
\item \textsuperscript{485} Justices Brennan, Stewart, and Blackmun joined in the Stevens’ opinion. \textit{Id.} at 263. Justice White concurred in an opinion joined by Chief Justice Burger and Justice Powell. \textit{Id.} at 286 (White, J., concurring). Justice Rehnquist wrote a dissent joined by Justice Marshall. \textit{Id.} at 290 (Rehnquist, J., dissenting). An approach similar to that of the \textit{Thomas} plurality is found in Justice Stone’s famous dissent in \textit{Yarborough v. Yarborough}. \textit{See} \textsuperscript{486} 290 U.S. 202, 222-23 (1933) (Stone, J., dissenting) (even though Constitution does not deny Georgia power to foreclose all inquiries into child maintenance, “it by no means follows that it gives to Georgia the privilege of prescribing that policy for other states in which the child comes to live”). \textit{See also} Reese & Johnson, \textit{supra} note 364, at 171-78. \textit{See generally} R. CRAMPTON, D. CURRIE & H. KAY, \textit{supra} note 63, at 672-75.
\item \textsuperscript{486} 448 U.S. at 264.
\end{itemize}
\end{footnotesize}
law or otherwise." He then sought a supplemental award in the District of Columbia. The administrative law judge of the United States Department of Labor, which administers the District's program, found that further recovery was not precluded in Virginia and thus the requirement of section 1738 to give the same effect in the District as the first award had in Virginia did not forbid supplemental relief. Not only did the Virginia award by its terms appear to contemplate further awards in Virginia, but the statutory merger doctrine of that state was construed as merely covering "common law and other remedies under Virginia law." When the case reached the Supreme Court, seven members agreed with the proposition that the District could, in the circumstances of this case, award additional relief.

Prior to Thomas, it should be noted, the Court had handed down two decisions dealing with this type of case. In Magnolia Petroleum Co. v. Hunt, the Court had held that the Full Faith and Credit Clause barred a supplemental workmen's compensation award in Louisiana when Texas law attributed merger effect to the first award in Texas. Then three years later, in Industrial Commission of Wisconsin v. McCartin, the Court refused to find an Illinois award preclusive of further relief in Wisconsin absent "some unmistakable language by [the Illinois] state legislature or judiciary" to the effect that the first state's law was "designed to preclude any recovery by proceedings brought in another state."

Both the administrative law judge and three members of the Supreme Court in Thomas basically adopted the McCartin approach, though the concurring Justices appeared to agree with the Thomas plurality that McCartin departed from accepted full faith and credit principles to the extent it permitted the state of rendition to directly determine the preclusive effect of its judg-

488. 448 U.S. at 264-65.
489. Id. at 265.
490. 448 U.S. at 277-86.
491. These included Chief Justice Burger and Justices Blackmun, Brennan, Powell, Stevens, Stewart, and White. For a list of the various opinions filed in Thomas, see supra note 485.
492. 320 U.S. 430 (1943).
494. Id. at 627-28.
495. 448 U.S. at 265-66.
496. Id. at 289-90 (White, J., concurring).
497. Id. at 289 (White, J., concurring).
ments in another state. To Justice White, who wrote this concur-
currence, *Magnolia* represented a sounder approach, but *McCartin* had been on the books for over thirty years and he was not willing to overrule it.

The plurality opinion authorized by Justice Stevens rejected both the approach in *Magnolia*, for reasons to be discussed presently, and also the part of *McCartin* which allowed a state to fashion its preclusion doctrine in such a way as to directly control the extraterritorial effect of its judgments. Instead, the plurality reached the same result as in *McCartin*, but by utilizing in part reasoning rarely found in credit-to-judgment cases (though at one time found in the constitutional choice-of-law area). Specifically, the plurality balanced the interests of Virginia and the District of Columbia and concluded that the latter had a sufficient interest to ignore whatever preclusive effect attached to the award in Virginia under Virginia law. Along the way, the opinion employed a method of analysis of particular significance for current purposes.

First, the plurality noted that the supplemental award gave full effect to the factual determinations of the first tribunal and allowed full credit for payments pursuant to the earlier award. It did not undermine the obligation of the employer to pay the Virginia award. Thus Virginia's interest in the integrity of its award was protected. Justice Stevens then observed:

To be sure, . . . the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court. But the critical differences between a court of general jurisdiction and

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498. *Id.* at 269-70 (Stevens, J., plurality opinion).
499. *Id.* at 289 (White, J., concurring).
500. *Id.*
501. *Id.* at 272-77, 286 (Stevens, J., plurality opinion).
502. *See infra* text accompanying notes 506-34.
503. 448 U.S. at 269-72.
505. 448 U.S. at 277-86.
506. *Id.* at 281. For this reason, the plurality noted that "[t]here is neither inconsistency nor double recovery." *Id.*
507. *Id.* at 284.
508. Although the plurality recognized that Virginia had a "separate interest" in limiting the liability of employers doing business in the state, it reasoned that this interest "would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers." *Id.* at 284-85.
an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

A final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability. A traditional application of res judicata principles enables either party to claim the benefit of the judgment insofar as it resolved issues the court had jurisdiction to decide. Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Commission of Virginia does not have that power. Its jurisdiction is limited to questions arising under the Virginia Workmen's Compensation Act. Typically, a workmen's compensation tribunal may only apply its own State's law. In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.\textsuperscript{509}

At this point in the opinion, Justice Stevens cited what is now section 26(1)(c) of the Second Restatement of Judgments,\textsuperscript{510} which provides various exceptions to merger, including the situation where, in the first proceeding, the court lacks authority to give the plaintiff all of the relief to which he deems himself entitled.\textsuperscript{511}

Nowhere did the Thomas plurality try to establish that this section of the Restatement or a similar approach represented Vir-

\textsuperscript{509} Id. at 281-83 (citations omitted).

\textsuperscript{510} Id. at 283 n.29. See Restatement (Second) of Judgments § 26(c)(1) (1982). For the text of § 26(c)(1), see supra note 160. The commentary to that section refers to several intersystem instances (e.g., lack of personal jurisdiction over the defendant) as well as purely domestic instances, where merger exceptions may be applicable. See Restatement (Second) of Judgments § 26(c)(1) comment c & reporter's note at 246-47 (1982).

\textsuperscript{511} For a discussion of the relevance of the first court's competence to adjudicate all theories of recovery, see supra notes 156-60 and accompanying text.
Virginia domestic preclusion law. The plurality therefore seemed to be saying that, regardless of the merger effect of the first award under Virginia law and the substantive compensation policy adopted by Virginia, section 26 reflects a federal exception to claim preclusion that operates in the intersystem context. This exception allows someone in the petitioner's position to obtain an opportunity to be heard on all aspects of his claim. It allows him to obtain "full recovery" to the extent, of course, that other states have laws that might provide him with additional relief. The Stevens opinion is not clear whether this approach, operating solely in the intersystem context, has constitutional or nonconstitutional sources. Justice Stevens expressly acknowledges the power of Congress acting under the Full Faith and Credit Clause "to increase the measure of faith and credit that a State must accord to the laws or judgments of another state," suggesting perhaps that the plurality approach could be rejected by Congress. The only substantive interests relied upon during the course of the opinion, it must be remembered, are state and not federal.

The plurality's reasoning clearly applies to judicial judgments since, had there been an appeal in Virginia, the court reviewing the administrative decision also would have had to apply Virginia law. It would, moreover, make little sense to have the merger effect of a judgment turn on whether the employer exercised his right to judicial review. Nor is the reasoning neces-

512. See 448 U.S. at 283 n.29 (citing Restatement (Second) of Judgments § 61.2(c) (Tent. Draft No. 5 1978) (current version at § 26(c)(1))).
513. 448 U.S. at 285-86. The plurality stated:

[It] is for each State to formulate its own policy whether to grant supplemental awards according to its perception of its own interests. We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause . . . .

Id. at 285.
514. The exception apparently is designed to vindicate state, not federal, substantive policies. See infra text accompanying note 517. The exception itself, however, must be deemed federal in origin, since the plurality does not look to the law of preclusion of any state to support it. See 448 U.S. at 285-86.
516. 448 U.S. at 272 n.18.
517. Id. at 277.
518. See, e.g., id. at 286 (White, J., concurring). Justice White noted: If the employer had exercised its statutory right of appeal to the Supreme Court of Virginia and the Court upheld the award, I presume that the plurality's rationale would nevertheless permit a subsequent
sarily relevant only in the workmen’s compensation context, since it is conceivable that a legislature could require in other cases that the courts of the state apply domestic forum law whenever constitutionally permissible.

Moreover, the emphasis on the ability of the parties in a court of general jurisdiction to argue for, and the court to choose, the application of other than forum domestic law is somewhat deceptive even where the choice of law is not dictated directly by statute. Certainly a court can change its approach to choice of law and the parties can argue for such a change. But, outside of that unlikely prospect, in most cases the parties’ arguments and the ultimate court decision must operate within parameters already established. These parameters limit, to a greater or lesser degree, the court’s choice of law. The applicable choice rules or approach may in fact point to forum domestic law in many cases. In fact, once the choice of applicable law has been made, in many cases, though perhaps not in all, the court will be applying the law of one jurisdiction and the measure of recovery thereunder. Ultimately, therefore, the authority of a court, like the agency in *Thomas*, is limited in many cases in its ability to award relief.

award in the District of Columbia. Otherwise, employers interested in cutting off the possibility of a subsequent award in another jurisdiction need only seek judicial review of the award in the first forum.

*Id.*

519. *See, e.g.*, Reese & Johnson, *supra* note 364. The authors note:

In the ordinary choice-of-law case, the interests of each state involved are protected by the opportunity afforded it, through the parties, of having the merits of its own particular law considered by the tribunal before which the suit is brought. In the typical workmen’s compensation case, however, neither state nor litigant is afforded a day in court on the question of which of two or more competing laws should most appropriately be applied.

*Id.* at 176-77.

520. *Thomas*, 448 U.S. at 282-83 (plurality opinion). The plurality noted that courts of general jurisdiction, unlike administrative agencies with limited statutory authority, may choose to apply the law of the state that has a paramount interest in the dispute. *Id.*


524. In fact, the forum may choose to apply non-forum law that might be less generous than forum law.
For this reason alone the plurality approach seems to have far-reaching impact where the laws of several states can constitutionally apply, at least when the merger doctrine is at issue.

In the purely domestic context, with no multistate complications, if a state provides for a certain measure of relief in its "substantive" law, it may not constitutionally enact subject matter or other "procedural" limitations applicable to its courts to deny a forum or fora for attempting to collect all the relief thus made available.\textsuperscript{525} If the law creates a substantive interest in liberty or property, due process operates as an independent federal restriction on how that interest can be extinguished; it requires an adequate opportunity to be heard.\textsuperscript{526} This is the constitutional basis for section 26 of the Second Restatement of Judgments in the purely domestic context.\textsuperscript{527} However, where a transaction touches two or more states in such a manner as to give each a sufficient interest to permit it to apply its own (perhaps different) law,\textsuperscript{528} the same situation is not presented. When the forum state applies its own or another law via its choice-of-law methodology and, as a result, the claimant's relief is more limited than that available under the law of another interested jurisdiction, it is not taking away without appropriate procedural protections what it explicitly seems to grant. The forum state has allowed an opportunity to be heard on the matters which the applicable substantive law makes relevant and no more. The \textit{Thomas} plurality's emphasis on the lack of authority of the Virginia agency to provide "full" recovery is an implicit rejection of the notion long accepted in the full faith and credit area that the policies enforced by a valid judgment rendered by a sister state (whether those policies are embodied in the substantive law or the choice-of-law methodology applied by the original forum) cannot be disregarded by sister states by reason of their differing policies.\textsuperscript{529}

The claimant in \textit{Thomas} could have obtained all the relief he wanted merely by suing first in the District, whose more generous law could be constitutionally applied.\textsuperscript{530} This makes the result

\textsuperscript{525} See supra text accompanying notes 155-58.
\textsuperscript{526} See supra text accompanying notes 39-40.
\textsuperscript{527} See supra notes 159-61 and accompanying text.
\textsuperscript{528} See Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 (1981) ("a set of facts giving rise to a lawsuit . . . may justify, in constitutional terms, application of the law of more than one jurisdiction").
\textsuperscript{529} See, e.g., Fauntleroy v. Lum, 210 U.S. 230, 237 (1908). This is true regardless of whether or not the forum court is restricted in its ability to choose the applicable law.
\textsuperscript{530} The \textit{Thomas} plurality recognized that the plaintiff initially had a choice.
reached by the plurality in this case, and the reasoning it employed along the way, seem even more unjustifiable as departures from traditional full faith and credit principles.

The plurality thus fell back on its recognition that this claimant, and perhaps workmen's compensation claimants in general, possess less than a free or fully informed choice of initial forum. Here again is found an implicit emphasis on the lack of a full and fair opportunity to be heard, with a somewhat different twist. For a variety of reasons the claimant might have felt compelled to file, or was tricked or misled into filing his Virginia claim first. Thus, he did not have a full and fair opportunity for a hearing governed by the more generous law. This reasoning is also not necessarily limited to workmen's compensation claims. If the initial choice of forum is inhibited to such an extent and in a manner found unacceptable, then the federal limit on the merger effect under state law may come into effect.

There are, moreover, other instances in the intersystem context, involving lack of authority of the first tribunal, wherein the plurality's reasoning regarding the opportunity to be heard may apply. For instance, the first suit may raise a state law claim in a state court that lacks authority to deal with federal claim because it is within the exclusive subject matter jurisdiction of the federal courts. Moreover, pendent jurisdiction in the latter tribunals over the state claim may not be available. Given the federal policy underlying the federal claim and the purposes of the grant

of forum. 448 U.S. at 279-80. However, the plurality reasoned that "[a] rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement of benefits may be essential." Id. at 285. Compare id. with Restatement (Second) of Judgments § 24 comment g (1982). See infra note 555.

531. See 448 U.S. at 284-85. See generally C. Wright, A. Miller & E. Cooper, supra note 314, at 639-42.

532. See 448 U.S. at 284-85 & n.31 (plurality opinion).

533. Compare text with Restatement (Second) of Judgments § 28(5)(c) comment j (1982).

534. Compare text with supra text accompanying notes 104-17 (in deciding issues of constitutional limitations upon state territorial jurisdiction, Court is concerned that plaintiffs have realistic opportunity to have their claims heard on merits).


536. This may be because of lack of constitutional nexus or statutory authority, or as a matter of discretion. See Luneburg, supra note 535, at 233-52.
of exclusive jurisdiction, there seems to be in many instances a
well-nigh conclusive argument to disregard,\(^{537}\) in the intersystem
context, whatever merger doctrine exists under state law.\(^{538}\) Con-
versely, when a federal court enters a judgment in a case based on
a federal claim, where pendent jurisdiction over a state law claim
would or could not be exercised, the state courts should generally
be allowed to hear that cause of action.\(^{539}\)

In its recent opinion in *Marrese v. American Academy of
Orthopaedic Surgeons*,\(^{540}\) the Supreme Court purported to resolve
some full faith and credit issues presented by exclusive federal
subject matter jurisdiction. Several orthopaedic surgeons, ex-
cluded from membership in the Academy, first filed actions in
state court in Illinois alleging that the defendant’s action violated
associational rights protected by Illinois common law.\(^{541}\) These
suits were dismissed on the basis of failure to state a cause of ac-
tion.\(^ {542}\) A federal antitrust suit followed in the federal district
court in Illinois in which it was claimed that the defendant Academy
possessed monopoly power, that the plaintiffs had been de-
ied membership in order to discourage competition, and that
their exclusion constituted a boycott in violation of section 1 of
the Sherman Act.\(^ {543}\) The Supreme Court reversed the Seventh

\(^{537}\) See Restatement (Second) of Judgments § 25(1) comment e (1982):
id. § 26 comment c(1); id. § 86 comment f (1982). Compare Brown v. Felsen, 442
U.S. 127 (1979) (impliedly finding repeal of § 1738) with Kremer v. Chemical
involving at least issue but perhaps also claim preclusion). See also infra text
accompanying note 561 (suggesting that no repeal of § 1738 was found in
Kremer in part because the federal and state remedies at issue were equivalent).

In this situation, federal law prevents the application of federal law in the
state courts. This is in contrast to the situation in *Thomas*, where forum state law
prohibited the application of other state law in the initial forum. The principle
of federal supremacy applies in the situation discussed in the text; it was not
present in *Thomas* to justify the result there. The Restatement appears to suggest
that there is no preclusion, even where pendent jurisdiction would have existed
in the federal court over both claims, where the first action is brought in state
court. See Restatement (Second) of Judgments § 26 comment c reporter’s
note (1982). See also infra note 555.

\(^{538}\) For a detailed discussion of this argument, see supra note 467.

\(^{539}\) See Restatement (Second) of Judgments § 25 comment e (1982).

\(^{540}\) 105 S. Ct. 1327 (1985).

\(^{541}\) Id. at 1329.

\(^{542}\) See Treister v. American Academy of Orthopaedic Surgeons, 78 Ill.
App. 3d 746, 396 N.E.2d 1225 (1979), appeal denied, 79 Ill. 2d 630 (1980).

Act provides:

Every contract, combination in the form of trust or otherwise, or con-
spiracy, in restraint of trade or commerce among the several States, or
with foreign nations, is hereby declared to be illegal. Every person who
shall make any contract or engage in any combination or conspiracy
Circuit, which had held that claim preclusion operated to bar the federal action.544

The principal ground for reversal was the failure of the lower courts to consider Illinois preclusion law in determining whether preclusion was called for.545 As in other recent cases involving a suit filed in federal court following an earlier state court proceeding,546 the opinion for the Court stressed that given section 1738, the initial reference on the matter of preclusion must be to the law of the judgment-rendering state.547 If that body of law does not suggest preclusion of the federal claim, the federal court is not required to give the state judgment claim or issue preclusive effect.548 Given the exclusive subject matter jurisdiction over the Sherman Act claim,549 clearly there could be no state law directly dealing with the matter of preclusion of the federal antitrust claim. Nevertheless, the general principles of preclusion of Illinois law, to which reference is apparently made in section 1738,550 might embody an exception to preclusion similar to section 26(c)(1) of the Second Restatement of Judgments:551 Claim preclusion does not follow where the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of

hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

544. 105 S. Ct. at 1330.
545. Id. at 1335.
546. For discussion of these cases, see supra text accompanying notes 387-483.
547. 105 S. Ct. at 1332. If the federal courts could generally attribute more preclusive effect to a state judgment than required by state law, initial reference to rendering state law might seem superfluous in many instances. However, the Court in Marrese indicated its general disapproval of the federal courts' giving more preclusive effect to a state court judgment than required by the rendering state's law. Id. at 1333. Moreover, initial reference to state law, if it indicates no preclusive effect, obviates the difficult problem of determining an implied repeal of § 1738. See id. For a discussion of the propriety of a federal court giving more preclusive effect than the rendering state court would, see infra text accompanying notes 561-69.
548. 105 S. Ct. at 1332-33. See infra notes 561-69 and accompanying text.
550. For a discussion of the "law" to which § 1738 applies in this context, see supra notes 468-70 and accompanying text.
551. Restatement (Second) of Judgments § 26(c)(1) (1982). For the text of § 26(c)(1), see supra note 160.
the limitations on the subject matter jurisdiction of the court rendering the first judgment.\(^{552}\) If domestic Illinois law so provided, and would be found by the Illinois courts applicable in the case of a claim within the exclusive subject matter jurisdiction of a particular court, no claim preclusion would follow in the federal antitrust action by virtue of section 1738.\(^{553}\) Unlike the Thomas plurality,\(^{554}\) therefore, the Court concerned itself in Marrese with the preclusion law of the rendering state and the extent to which it reflected a jurisdictional competency limitation.

In his concurrence, Chief Justice Burger pointed out that even if the law of Illinois did embody an exception to claim preclusion similar to section 26(c)(1), a state court in Illinois might hold that as long as the plaintiff could have in the original action sought a remedy based on a particular statute, he should be foreclosed from seeking a remedy based on a different statute if the elements necessary to recovery and remedies available under both statutes were largely the same.\(^{555}\) If this was in fact the law in

\(^{552}\) For a discussion of this exception, see supra notes 155-63 and accompanying text.

\(^{553}\) See 105 S. Ct. at 1393.

\(^{554}\) For a discussion of the relevant reasoning of the Thomas plurality, see supra text accompanying notes 512-15.

\(^{555}\) 105 S. Ct. at 1396 & n.3 (Burger, C.J., concurring). Alternatively, if Illinois preclusion law adopted the general preclusion principle that a party cannot split a cause of action between a court of limited jurisdiction and one of more general jurisdiction, preclusion of the antitrust claim might be called for to the extent that the plaintiff in Marrese could have initially sued in the federal court on the federal claim, joining the state claims under pendant jurisdiction. This assumes there is no diversity. Id. Compare id. with supra text accompanying notes 162-63 (discussing Restatement (Second) of Judgments § 24 comment g (1982)). The majority opinion in Marrese notes that this principle is usually applied when the plaintiff could have sued in the same system of courts for all the relief requested. But as long as § 1738 directs attention to the general principles of the rendering state's domestic law of preclusion (which the majority does accept), Illinois' adoption of the general principle embodied in § 24, comment g, is dispositive absent a federal exception to § 1738.

It is interesting to note how the Second Restatement of Judgments often fails to explore (or ignores) the significance of § 1738 in its comments regarding instances where there are both federal and state theories of recovery but only the state theory is relied upon in the first suit. Section 25, comment e, poses two situations of relevance here: (1) where the first action is in state court that has concurrent jurisdiction over the state and federal claims and (2) where the federal claim is within the exclusive subject matter jurisdiction of the federal courts. It suggests that preclusion should follow in the former situation since there was a full opportunity to be heard in the initial action on all theories and that no preclusion should occur in the second, presumably on the basis of a lack of such an opportunity. Id. § 25 comment e. While the second action in both instances may, or must, be brought in federal court, the commentary fails expressly to mention the relevance of the law of preclusion of the judgment-rendering state. The same omission occurs in § 26, comment c(1), which also deals with the case
Illinois, preclusion would follow in the federal court under section 1738.

Where the state and federal causes of action are so substan-

where the first action is in state court and the second in federal where there is exclusive federal subject matter jurisdiction. See id. § 26(c)(1) reporter's note. But see id. § 86 commentary (discussing situations in which state adjudicatory proceedings are challenged in federal court).

Where the state courts have concurrent jurisdiction over the federal and state claims, it is conceivable that there might be directly relevant state preclusion law to which reference can be made under the terms of § 1738 if the second action is in federal court or the court of a sister state. See supra notes 308-47 and accompanying text. There may be instances where the first suit was filed on the state claim in state court and then, later, a second suit was filed in a court of the same state on the federal claim. In those circumstances, state law may or may not seek to preclude the second suit. Whether that preclusion is effective depends on federal constitutional and nonconstitutional law, which is operative both in the courts of the judgment-rendering state, in the federal courts, and in the courts of sister states. See supra text accompanying notes 308-47.

Where the second action is within exclusive federal jurisdiction, the state courts will never have specifically addressed the relevant problem of preclusion, so that there will be no state preclusion law directly on point. Moreover, as the majority in Thomas recognized, the law of the rendering state may not, as a general matter, directly specify the preclusive effect of the judgment of its courts in the courts of other sovereigns. For a discussion of the rule limiting a state court's power to directly determine the preclusive effects of its judgments in foreign courts, see supra notes 370-72 & 497-503 and accompanying text.

Therefore, as the Court in Marrese correctly assumed, the reference directed by § 1738 must in these circumstances be to the general principles of preclusion of the judgment-rendering state. See 105 S. Ct. at 1392-93; id. at 1395-96 (Burger, C.J., concurring). These principles might in fact provide for preclusion in instances where a claim is split between courts of limited and general jurisdiction. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment g (1982).

Yet, as noted above, both the Restatement and the majority in Marrese expressly indicate that the approach of comment g to § 24 applies "in the same system of courts," suggesting that it was not intended to apply when the second suit is initiated in a different system. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment g & reporter's note at 209 (1982); id. § 26(c)(1) & reporter's note at 246. See also Marrese, 105 S. Ct. at 1333 n.3. Accordingly, these sources suggest no preclusion even if suit could originally have been commenced in the federal court based on state and federal theories. But this may ignore the teaching of Thomas, and the balance of the Marrese decision, to the effect that the reference in § 1738 is to the general principles of domestic preclusion law of the judgment-rendering state and that a state may not directly determine the extraterritorial effect of its judgments.

Of course, there may be some room left by the Thomas plurality, where the rendering state wants to eliminate the claim preclusive effect of its judgment extraterritorially. But the state of original suit may adopt the general principle that where a party has a forum in which all the relief desired is available and it nevertheless brings suit in a forum where less than full relief can be given, preclusion should follow. For a discussion of this rule, see supra notes 163-65 and accompanying text. In that circumstance § 1738 would seem to dictate preclusion unless an exception along the lines proposed by the Thomas plurality applies.

The plurality in Thomas ignored any approach to this problem that Virginia may have adopted domestically. See supra notes 512-15 and accompanying text. This confirms that the Thomas plurality's suggested exception to claim preclu-
tially the same that success on one would provide the same relief as success on the other, and where the likelihood of success in the first (state) action is not, as a matter of substantive or procedural law, less than the likelihood of success in the second (federal) action, there is no need to call into play the federal exception to state claim preclusion law suggested by the Thomas plurality even if federal jurisdiction is exclusive. In such circumstances there is arguably a full and fair opportunity to be heard, according to Chief Justice Burger, who suggested this as the appropriate federal approach where state preclusion law is unclear. While the majority in Marrese did not indicate whether it would fashion an exception to preclusion where that approach was clearly state law, it indicated it would not, as a matter of federal law, impose preclusion on this theory where the rendering state rejects this approach, and perhaps even where it is not clear whether or not the state would adopt it. The majority observed, however, that where claim preclusion is suggested by state law, an “exception” to section 1738 will be fashioned where the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of section 1738. The primary consideration here will be the intent of Congress. At least where the federal and state claims substantially overlap, the Court might adopt the Burger approach and find no partial repeal on the theory that there was a full and fair opportunity to be heard and that any federal interests have been fully served.

The Court in Marrese further observed that, to the extent that state law did not call for preclusion, the federal courts should not generally give the judgment more preclusive effect. Preclusion was intended to be applicable regardless of Virginia law, and to operate, if necessary, as an exception to the dictates of § 1738.

556. For a discussion of the Thomas plurality’s creation of a federal exception to state preclusion law, see supra notes 506-17 and accompanying text. The procedural equivalence is necessary to protect federal substantive interests in the way they are protected by federal common law where there is concurrent jurisdiction and in order to fulfill the purposes of the congressional grant of exclusive jurisdiction. See supra note 469. See also supra notes 308-47 & 411-12 and accompanying text.

558. Id. at 1333 n.3.
559. Id. at 1335.
560. Id.
561. See supra notes 535-38 and accompanying text. This might be the case whether or not there could have been pendent jurisdiction over the state claims in federal court.
562. 105 S. Ct. at 1334-35.
of the federal antitrust claim might be justified on the theory that the plaintiff could have sued first in federal court, joining the Sherman Act claim with state claims within the pendent jurisdiction of the federal courts. Having failed to do so, the plaintiff should be foreclosed on the federal claim.\footnote{563}{Id. at 1334.} In short, there was or might have been one forum where all the desired relief was available and where there was, accordingly, a full opportunity to be heard. The Court, however, rejected such an approach\footnote{564}{Id.} (as does the Restatement\footnote{565}{RESTATEMENT (SECOND) OF JUDGMENTS § 26 reporter's note at 246 (1982).} of Judgments), reasoning that "the concerns of comity reflected in § 1738 generally allow States to determine the preclusive scope of their own courts' judgments."\footnote{566}{105 S. Ct. at 1334.} In indicating that, at least in the type of case at bar,\footnote{567}{The reasoning of the Court here is phrased in general terms and therefore seemingly applies whenever § 1738 applies.} the federal courts should not give preclusive effect to a judgment as to which the rendering state would not give such effect as a matter of policy, the Court was acting consistently with some older precedents\footnote{568}{For cases holding that federal courts may afford no greater preclusive effect to a state court judgment than would the rendering court, see, e.g., Union & Planter's Bank v. Memphis, 189 U.S. 71, 75 (1903). The same rule is applied when the second court is a state court. See, e.g., Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 529 (1873). Both of these cases are based at least in part upon the statute (§ 1738), which suggests that this may not be the result required by article IV, § 2 of the Constitution. But see Durfee v. Duke, 375 U.S. 106, 109 (1963) (dictum suggesting that courts must give at least the res judicata effect that judgment would be accorded in rendering state). Given the constitutional language and the power of Congress to prescribe the effect of state court judgments, it would be hard to believe that Congress itself could not change the statute, if need be, to permit the court of recognition or enforcement (federal or state) to give more preclusive effect to the judgment of another state.} that have been cited in recent full faith and credit cases.\footnote{569}{See, e.g., Migra, 465 U.S. at 86-88 (White, J., concurring) (citing Union & Planter's Bank v. Memphis, 189 U.S. 71 (1903); Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873)); Haring, 462 U.S. 306 at 313 n.6 (citing Union & Planter's Bank v. Memphis, 189 U.S. 71 (1903)). The logic of interpreting § 1738 to read "the same and no more" rather than "at least the same" preclusive effect was questioned by Justice White in Migra. See 465 U.S. at 88 (White, J., concurring). However, because of the case law interpreting § 1738 in the former way, even he would leave to Congress the job of changing the rule. See id. Interestingly, however, Justice White's concurrence did not even cite Durfee v. Duke, which uses the phrase "at least" in interpreting § 1738. See Durfee v. Duke, 375 U.S. 106, 109 (1963) (federal courts must give "at least the res judicata effect which the judgment would be afforded in the state which rendered it") (dictum).}
ing state may suggest that a plaintiff may not split a claim between
courts of limited and general jurisdiction when the latter could
grant all the relief desired. \(^{570}\) In this situation, section 1738
would require preclusion where the claimant pursued the state
claim first in state court, instead of initially suing in federal court
on the federal claim within exclusive federal subject matter juris-
diction and joining as pendent the state claim. \(^{571}\) This would be
the case even if the federal remedy were different or more gener-
os than the state remedy. Unlike the situation in *Thomas*, \(^{572}\) it
would in most circumstances be difficult to argue that the plaintiff
lacked a free choice of initial forum. Therefore, the Supreme
Court might find that there had been a sufficient full and fair
opportunity to be heard and that federal interests were sufficiently
protected. Thus, there would be no implied repeal of section
1758. \(^{573}\) That the majority in *Marrese* was not willing to adopt the
availability of pendent jurisdiction as the basis for a federal rule of
preclusion more stringent than that of the judgment-rendering
state does not necessarily suggest that it would not permit preclusion
where a state did adopt this general approach. \(^{574}\)

The refusal of the Court in *Marrese* to adopt a federal rule of
preclusion is consistent, at any rate, with emphasis on the lack of
authority of the initial forum to provide relief under all applicable
law, which is one of the important elements in the plurality’s rea-
soning in *Thomas*. \(^{575}\) Indeed, since it is difficult in most instances
to argue that a plaintiff’s choice of state over federal court for the
first suit is restricted to any substantial degree, the majority in

\(^{570}\) For a discussion of the rule against splitting a cause of action between
courts of limited and general jurisdiction, see supra note 555.

\(^{571}\) Pendent jurisdiction is a doctrine of discretion as well as of statutory
Whether or not pendent jurisdiction can be exercised in a particular case, there-
fore, may not be clear to litigants. See Luneburg, supra note 535, at 233-38. See
generally Restatement (Second) of Judgments § 25 comment e & reporter’s
note at 228 (1982). But even if in a particular case it is not clear that the court’s
discretion would have been exercised to hear the state claim, it may be argued
(and in fact, state law preclusion principles may suggest) that the plaintiff
should have at least tried to obtain a federal adjudication of both claims. Had it done so
and been rebuffed as to the state claim, the claimant could have proceeded in
state court on the state claim on conclusion of the suit on the federal matter. See
supra text accompanying note 549. See generally Federated Dept. Stores, Inc. v.
Moitie, 452 U.S. 394, 404 (1981) (Blackmun, J., concurring); id. at 411 (Bren-
nan, J., dissenting).

\(^{572}\) For a discussion of relevant aspects of *Thomas*, see supra notes 530-34.

\(^{573}\) Compare text with supra text accompanying notes 535-38.

\(^{574}\) See 105 S. Ct. at 1333 n.5.

\(^{575}\) For a discussion of relevant aspects of the *Thomas* plurality opinion,
see supra text accompanying notes 509-29.
Marrese might be construed as extending the plurality's logic in Thomas, albeit under the felt compulsion of the language and case law interpreting section 1738.\textsuperscript{576}

D. The Effects of Federal Judgments

Neither the Full Faith and Credit Clause nor its statutory implementation appears to apply to federal judgments.\textsuperscript{577} It has been argued, however, that federal law should determine the preclusive effects of federal judgments in state courts.\textsuperscript{578} Accepting that argument as a correct statement of what the law should be, how does the discussion in this article relate to recognition and enforcement problems of federal judgments? The short answer is that, as a general matter, the same constraints apply to federal and state judgments. The federal constitutional requirements for a full and fair opportunity to be heard may either invalidate the judgment,\textsuperscript{579} limit merger\textsuperscript{580} or limit issue preclusive effects\textsuperscript{581} in the second proceeding, whether federal or state. To the extent federal nonconstitutional limitations based on the opportunity to be heard apply in the federal courts, the state court should likewise be bound,\textsuperscript{582} at least where the limits are traceable to federal substantive interests and federal issues or claims are raised in the subsequent state proceedings.\textsuperscript{583}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{576} See supra text accompanying notes 567-69.
\item \textsuperscript{577} See generally Degnan, supra note 367, at 742-50.
\item \textsuperscript{578} Id. at 768-69, 773. See also Delaware Valley Citizen's Council for Clean Air v. Pennsylvania, 762 F.2d 272 (3d Cir. 1985), cert. granted, 106 S. Ct. 57 (1985).
\item \textsuperscript{579} See supra text accompanying note 35 (absent compliance with applicable constitutional procedural constraints in original proceeding, any judgment resulting from that judgment may be invalid in state of rendition and not entitled to recognition elsewhere).
\item \textsuperscript{580} For a discussion of the effects of merger and bar upon parties, see supra text accompanying notes 140-65.
\item \textsuperscript{581} For a discussion of issue preclusion and its effect upon parties to the initial litigation, see supra text accompanying notes 220-306.
\item \textsuperscript{582} Compare text with supra text accompanying notes 373-76 (relevant federal constitutional and nonconstitutional principles may eliminate entirely or reduce to some degree permissible preclusive effects of judgment within state that rendered it).
\item \textsuperscript{583} Compare text with supra text accompanying notes 314-47 (discussing federal nonconstitutional limitations on state preclusion law).
\end{itemize}
\end{footnotesize}
IV. Conclusion

The notion of full and fair opportunity to be heard limits the preclusive effects of both state and federal judgments based upon constitutional and nonconstitutional premises. To date the Supreme Court has not clearly distinguished the due process requirements for a valid judgment and the perhaps more demanding constitutional requirements for issue preclusion.584 Nor has it directly explored to any degree the extent to which and the circumstances under which federal nonconstitutional common law

res judicata defense was rejected by the state court. Id. The bank then returned to federal court to obtain an injunction against the successful plaintiff’s further prosecution of the state action. Id. See 28 U.S.C. § 2283 (1982) (“A court of the United States may not grant an injunction to stay proceedings in state court except . . . to protect or effectuate its judgments.”). The injunction was granted by the district court, which found that the state claims should have been included as pendent claims in the initial suit, and that the state judgment nullified the earlier federal judgment. This result was affirmed by the Eleventh Circuit. 106 S. Ct. at 770.

The Supreme Court reversed and remanded, directing that the courts below must first consider the preclusive effect under Alabama state law of the Alabama state court’s rejection of the res judicata defense. Id. at 773. If Alabama law precluded relitigation of the issue of the preclusive effect of the federal judgment, § 1738 commanded that the federal court give it the same effect and, therefore, that court would have to refuse the issuance of an injunction. In other words, the Anti-Injunction Act, 28 U.S.C. § 2283 (1982) was not an exception to 28 U.S.C. § 1738. 106 S. Ct. at 772.

Since the first federal judgment was based on a federal cause of action, the preclusive effect of that judgment should have been determined by federal common law, see supra text accompanying note 577, and the Supreme Court appeared to agree. See 106 S. Ct. at 773 (“Challenges to the correctness of a state court’s determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.”) (emphasis added). Since the preclusive effect of the initial federal judgment was a matter of federal law, the preclusive effect of state court determination of that issue could be governed by federal common law which might limit the preclusive effect otherwise attributed under state domestic law to a state court determination of the federal issue regarding the preclusive effect of the federal judgment. See supra text accompanying notes 308-47. If so, the reference in 28 U.S.C. § 1738 is to both the state and federal components of the preclusion law of the judgment-rendering state, not solely to state law principles, as the Court has again in this case assumed incorrectly. See supra text accompanying notes 453-67.

With regard to the state court’s determination of the preclusive effect of the federal judgment, federal review via writ of certiorari from the Supreme Court might be theoretically available to assure its correctness. However, practical limitations on the Court’s ability to review all such determinations might argue in at least some instances for a federal common law rule eliminating in the state courts any preclusive effect which might otherwise attach to the state court’s determination of the preclusive effect of the federal judgment, thereby ensuring that the federal courts could independently determine the preclusive effect of their judgments and protect them from being undermined by the state courts.

584. See supra notes 294-306 and accompanying text (discussing nonconstitutional analysis of opportunity to be heard in Parklane & Blonder-Tongue).
limits the intrastate effect of state judgments.\textsuperscript{585} The potential scope of the federal exception to merger illustrated by the plurality opinion in \textit{Thomas} remains unclear.\textsuperscript{586} It is hoped that the Supreme Court will, over the next few years, aggressively undertake to clarify the law in these areas.

\textsuperscript{585} See \textit{supra} notes 453-67 and accompanying text (discussing and criticizing \textit{Kremer} Court's analysis of \$ 1738, and suggesting that \textit{Kremer} Court did not reject notion of federal common law of preclusion).

\textsuperscript{586} See \textit{supra} text following notes 418, 524 & 533 (suggesting that approach of \textit{Thomas} plurality to preclusion has effects beyond area of workmen's compensation).