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INTERJURISDICTIONAL PRECLUSION

*Howard M. Erichson**

Res judicata is hard enough already. Consider it at the interjurisdictional level, and we are asking for headaches. But consider it at that level we must, because litigation trends make interjurisdictional preclusion¹ more important than ever. Lawyers, judges, litigants, and other litigation participants increasingly must contemplate the possibility that a lawsuit will have claim-preclusive or issue-preclusive effect in a subsequent suit in another jurisdiction.

With great frequency, multiple lawsuits arise out of single or related transactions or events. Mass tort litigation and complex commercial litigation provide the most emphatic examples, but the phenomenon of multiple related lawsuits extends to every corner of litigation, including intellectual property,² matrimonial,³ criminal,⁴

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1. By "interjurisdictional preclusion," I am referring to the binding effect of a judgment on subsequent judicial proceedings in other jurisdictions. My focus is on the binding effect of a judgment as a matter of claim preclusion and issue preclusion. This article seeks to build on important work done by others concerning interjurisdictional preclusion. Especially, it tries to build on the work started by Ronan E. Degnan in *Federalized Res Judicata*, 85 *YALE L.J.* 741 (1976), and continued by Stephen B. Burbank in *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 *CORNELL L. REV.* 733 (1986).

2. See, e.g., *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313 (1971) (involving multiple patent infringement actions brought by a purported patentholder); *Stevenson v. Sears, Roebuck & Co.*, 713 F.2d 705 (Fed. Cir. 1983) (same).

3. See, e.g., *Brennan v. Orban*, 678 A.2d 667 (N.J. 1996) (involving a divorce proceeding and separately filed marital tort complaint alleging domestic violence).

4. See, e.g., *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987) (involving a private civil RICO litigation following a criminal RICO conviction); *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967) (involving parallel civil and criminal proceedings); *Rufo v. Simpson*, No. SC036876, 1997 WL 45143 (Cal. Super. Ct. Feb. 4, 1997) (involving a wrongful death tort suit following a murder acquittal).

antitrust,⁵ personal injury,⁶ securities,⁷ commercial,⁸ products liability,⁹ environmental,¹⁰ and civil rights.¹¹

The participants in those multiple related lawsuits, moreover, increasingly find themselves litigating in far-flung forums. With continuing advances in transportation and communication, growing nationalization and internationalization of commerce, and an increasingly mobile society resulting in geographically dispersed family and business networks, it is hardly surprising that related lawsuits crop up in multiple jurisdictions. Furthermore, related lawsuits frequently are filed in both state and federal courts. Thus, controversies become multijurisdictional across two dimensions — “horizontally” among different state courts and “vertically” between state and federal courts.

The problem of related lawsuits in multiple forums is exacerbated by our legal system’s failure to provide adequate aggregation mechanisms for consolidating widespread litigation.¹² A recent spate of reversals of mass tort class certifications¹³ drives home the point that litigants often must endure multiple closely related lawsuits, rather than resolving the entire controversy in one action. Proposed aggregation mechanisms that would allow the consolida-

5. See, e.g., *Landis v. North Am. Co.*, 299 U.S. 248 (1936) (involving parallel civil and criminal antitrust proceedings); *Battle v. Liberty Natl. Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989) (involving parallel federal and state antitrust suits).

6. See, e.g., *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993); *Childers v. F.A.F. Motor Cars, Inc.*, 319 S.E.2d 90 (Ga. Ct. App. 1984) (involving a motor vehicle accident).

7. See, e.g., *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 568 F. Supp. 1250 (J.P.M.L. 1983); *Mirkin v. Wasserman*, 858 P.2d 568 (Cal. 1993).

8. See, e.g., *Circle Chevrolet v. Giordano, Halleran & Ciesla*, 662 A.2d 509 (N.J. 1995) (involving an action to reform a car-dealership lease and a separate attorney-malpractice suit for negligence in preparing the lease).

9. See, e.g., *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1993); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992); *In re Swine Flu Immunization Prod. Liab. Litig.*, 464 F. Supp. 949 (J.P.M.L. 1979).

10. See, e.g., *In re The Exxon Valdez*, No. A89-0095-CV, 1994 U.S. Dist. LEXIS 20555 (D. Alaska Jan. 26, 1994).

11. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989) (involving successive race discrimination suits by groups of firefighters).

12. See Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 *FORDHAM L. REV.* 989, 1010-12 (1995).

13. See *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); see also *Flanagan v. Ahearn*, 117 S. Ct. 2503 (1997) (vacating the asbestos settlement class action approval in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), and remanding it for reconsideration in light of *Amchem Products Inc. v. Windsor*, 117 S. Ct. 2231 (1997)).

tion of dispersed litigation appear destined for failure, at least in the near term.¹⁴

This article examines the problem of interjurisdictional preclusion, and, in particular, the problem of choice of preclusion law. Choice-of-preclusion law cannot be appreciated in the abstract, but rather must be considered in light of litigation realities. Thus, the article considers the following series of questions: First, how does preclusion law affect litigation behavior, and what policy implications result from these effects? Second, to what extent does preclusion law actually vary among jurisdictions? Third, what is the legal foundation for interjurisdictional preclusion, and what law ought to govern interjurisdictional preclusive effect? Fourth, how are courts in fact dealing with interjurisdictional preclusion, and what implications does that empirical information carry for choice of preclusion law?

Part I of the article considers the effect of preclusion law on the behavior of litigation participants and concludes that preclusion law can affect many of the most significant strategic decisions in litiga-

14. The most ambitious recent proposal appeared in the ALI Complex Litigation Project, an elegant and thorough presentation of a comprehensive system for aggregating multiparty, multiforum actions. The ALI proposals would allow intersystem consolidation — that is, consolidation involving transfer from state court to federal court, from federal court to state court, or from one state to another. See *COMPLEX LITIGATION: STATUTORY RECOMMENDATION AND ANALYSIS* (1994). The project's ambitiousness, however, may prove to be its downfall. Some of those most familiar with the problem have expressed skepticism that the ALI proposals will become law. See Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 977 (1994) (“[T]he Complex Litigation Project seems destined to represent a massive, engaging intellectual exercise rather than a pragmatic blueprint that Congress will enact for the conduct of complex litigation.”); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1699 (1992) (“Congress . . . is not likely to enact [the Complex Litigation Project proposals] in the foreseeable future.”).

A more modest proposal, the Uniform Transfer of Litigation Act (UTLA), would allow consolidation of related cases pending in multiple state courts. One UTLA proponent has suggested that the UTLA stands a better chance than the ALI Complex Litigation Project. See Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897, 898 (1994). The Act has been adopted by the National Conference of Commissioners on Uniform State Laws, but to become law it must be adopted by the individual states. It has been enacted in South Dakota and is under consideration in Kansas, Nebraska, Virginia, and West Virginia. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 268 & n.287 (1994).

In 1988, a bill introduced by Representative Kastenmeier would have eased federal jurisdiction over aggregated multiparty, multiforum litigation. See H.R. 4807, 100th Cong. §§ 301-07 (1988). That part of the bill did not become law, nor did it succeed when modified and reintroduced several years later. See H.R. 2450, 102d Cong. (1991); see also *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* ch. 2, cmt.a, reporter's note 3 (1994) (discussing the Kastenmeier bill); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 9 (1987) (proposing multiparty, multiforum jurisdiction).

tion. Its impact on litigation behavior, however, is not felt primarily at the forum of the subsequent action (F_2), where the parties present their arguments on claim preclusion or issue preclusion. Rather, the impact is felt at the forum of the prior action (F_1), where the parties and other participants make decisions based in part on their expectation of the preclusive effect a judgment will have. Thus, preclusion law matters to F_1 's policy choices concerning judicial economy, settlement, lawsuit size, litigant zeal, and other litigation-related values.

To determine whether and how *choice* of preclusion law matters, Part II examines the extent to which preclusion law varies from one jurisdiction to another. Preclusion rules vary much more than most lawyers would suspect, and they vary in ways that implicate the strategic incentives discussed in Part I.

Given the importance of preclusion-law variations to strategic incentives at the initial forum, the choice of preclusion law must not turn on where the subsequent suit is filed. Rather, as Part III shows, interjurisdictional preclusion requires a "pure F_1 referent" and should nearly always be governed by F_1 's own preclusion law. This applies not only to the state-state and state-federal configurations, which are governed by the full faith and credit statute,¹⁵ but also to the federal-state configuration.

Part IV moves from the normative to the empirical. What, in fact, do courts do when presented with a potentially preclusive judgment from another United States jurisdiction? Of course, they acknowledge the judgment's binding effect. But whose law do they use to determine the nature and extent of the judgment's effect? The article presents the results of my study of several hundred interjurisdictional preclusion cases, focusing on the federal-state configuration. Most often state courts apply their own preclusion law, rather than the law of the rendering jurisdiction. Generally, this appears to be done reflexively, as decisions rarely offer any analysis of choice of preclusion law.

In light of this finding, recommending a complex rule involving a nuanced balancing of the interests of multiple jurisdictions appears futile. Moreover, given the significance of preclusion law's effect on litigation behavior, litigation participants need to know at the outset what preclusion law will ultimately govern, regardless of where subsequent cases are brought. When it comes to choice of

15. The federal full faith and credit statute, 28 U.S.C. § 1738 (1994), requires state and federal courts to give state judicial proceedings "the same full faith and credit" as those proceedings would be given in the jurisdiction where they occurred.

preclusion law, what the courts and litigation participants need is a clear rule determinable at the time of the original action. The preclusive effect of a judgment, with rare exceptions, should be governed by the preclusion law of the rendering jurisdiction.

I. PRECLUSION LAW'S EFFECT ON LITIGATION BEHAVIOR

Litigation is not a purely rational activity, but that should not stop us from considering the law's effect on rational actors. It is true that litigators, litigants, and interested others sometimes act based on fear, pride, anger, and a host of other emotions. Moreover, even if all participants always attempted to make rational decisions, they often would fail to do so simply for lack of tactical insight.¹⁶ Nevertheless, enough litigation participants behave rationally and intelligently to make it worthwhile to examine how such participants would behave¹⁷ — in other words, to examine the strategic significance of preclusion law.

16. Economists refer to this as the concept of *bounded rationality*. Even if a lawyer, litigant, witness, or other participant seeks to act purely in her own self-interest, that participant can see only so many steps into the future, only so many branches up the decision tree. Rational decisionmaking is bounded by limits on cognitive ability and incomplete or imperfect information. See HERBERT A. SIMON, *Theories of Bounded Rationality*, in 2 *MODELS OF BOUNDED RATIONALITY* 408, 410-11 (1982).

17. Litigators frequently make correct strategic decisions by careful preparation and calculation. Moreover, litigators' intuition, experience, and collective wisdom can replace pure deductive rationality as a means of rational decisionmaking. Renowned litigator John W. Davis spoke of "a sixth sense" on which he relied when making trial decisions. See WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 59 (1973). Louis Nizer has written of waking in the middle of the night with a hunch that proved decisive at trial. See LOUIS NIZER, *MY LIFE IN COURT* 54-56 (1961).

In chess — one of the better analogies for litigation strategy — intuition and experience have proved powerful substitutes for pure calculation. Human chess champion Garry Kasparov has competed ably against the powerful chess computer Deep Blue notwithstanding Deep Blue's vastly superior intellectual brute force. In 1996, Kasparov defeated Deep Blue four games to two, despite Deep Blue's ability to evaluate at least 100 million positions per second. "If Kasparov's victory proves anything, it is the superiority of creative intuition — the human talent for seeing remote possibilities before calculating all the steps toward them." Joseph McLellan, *Kasparov Tactics Outfox Computer's 'Brute Force'; Intuition Strangles Calculation in Chess Match*, WASH. POST, Feb. 18, 1996, at A8. In their 1997 rematch, with Deep Blue's brain power boosted to 200 million positions per second, the computer beat Kasparov by a score of 3½-2½. See Bruce Weber, *Swift and Slashing, Computer Topples Kasparov*, N.Y. TIMES, May 12, 1997, at A1; Robert D. McFadden, *Inscrutable Computer*, N.Y. TIMES, May 12, 1997, at A1. Again, commentators noted the strategic power of human experience and intuition. As one physicist noted, "What is amazing is that the machine had to be able to see more than 10 moves ahead and analyze millions of moves a second to match the intuition (based on long experience) of a fallible person who could analyze maybe one or two moves a second." Daniel Greenberger, Letter to the Editor, N.Y. TIMES, May 13, 1997, at A20. In the chess game of litigation, even when litigators lack the time, inclination, or brain power to consider a strategy's logical implications 10 moves ahead, litigators can use intuition, experience, and collective wisdom to reach rational strategic decisions on behalf of their clients.

First, where does preclusion law affect litigation behavior? At F_2 , the impact of preclusion law on behavior is obvious but limited. Preclusion law affects behavior at F_2 inasmuch as the litigants there may raise and argue the question of preclusion, and preclusion may determine the outcome of the case. A party who believes that she can benefit from claim or issue preclusion will make a motion to that effect, and her opponent will attempt to fend off adverse preclusion. Further, parties at F_2 may try to tailor pleadings to maximize or minimize the chance of claim preclusion or issue preclusion.

But more significant than the effect of preclusion law on litigation behavior at F_2 is its effect on litigation behavior at F_1 . In any lawsuit in which there is a risk of further related litigation, the careful litigator must take into account the preclusive effect a judgment might have in such future litigation and must calculate accordingly. Others have noted preclusion law's strategic significance,¹⁸ but no one has given it the sustained attention required if we are to understand interjurisdictional preclusion in light of the realities of litigation practice.

A. *Zeal and Appeal*

Preclusion law affects the vigor with which a party litigates. Consider the position of any litigant who anticipates future related litigation with persons who are not parties to the current lawsuit. The rational litigant will expend resources on the lawsuit in proportion to the stakes of the suit. The more that is at stake, the more tenaciously the parties will fight. Traditionally, mutuality was required for issue preclusion, and it is still required in a number of jurisdictions.¹⁹ With a mutuality requirement, issue preclusion applies only between parties, or those in privity with parties, to the initial lawsuit. Under such a regime, a rational litigant will consider only the stakes between the current parties, either in the immediate lawsuit or in foreseeable further lawsuits between the same parties. By contrast, when nonmutual issue preclusion is allowed, a rational litigant will consider the stakes not only between the current parties, but also the stakes in foreseeable lawsuits with others. Thus, wherever a litigant can foresee related litigation with nonparties,

18. See, e.g., Burbank, *supra* note 1, at 767, 797; Stephen B. Burbank, *Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine*, 28 RUTGERS L.J. 87, 100-01 (1996); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 311-13 (1993). Some of the strategic concerns discussed below are also addressed in Howard M. Erichson, *Dealing with Issue Preclusion in Complex Cases*, 148 N.J. L.J. 204 (1997).

19. See *infra* text accompanying notes 76-95.

nonmutual issue preclusion produces incentives to invest greater resources into winning in order to prevent adverse determinations that may carry a damaging issue-preclusive effect in subsequent suits.²⁰ As one litigator puts it, "The lesson is clear — never lose the prior case."²¹

The burden of this incentive can be particularly dire for mass tort defendants, but only if the applicable law allows offensive nonmutual issue preclusion.²² If offensive nonmutual issue preclusion is allowed, a mass tort defendant — or any defendant facing a large number of lawsuits growing out of a single incident or related series of incidents — correctly perceives the first trial as a "must win" situation. If the defendant loses the first trial and the essential liability issues are decided in favor of the plaintiff, then the defendant faces the significant risk that each future plaintiff will avail himself of issue preclusion to establish liability. If, on the other hand, the defendant wins the first trial by prevailing on the essential liability issues, then in all likelihood no future plaintiff will be able to use issue preclusion against the defendant, even if the defendant loses the second trial. This is because offensive nonmutual issue preclusion is generally disallowed when there have been inconsistent judgments.²³ Thus, a defendant must place enormous emphasis on prevailing in the first case that goes to trial.²⁴

20. See Charles R. Bruton & Joseph C. Crawford, *Collateral Estoppel and Trial Strategy*, LRRIG., Summer 1981, at 30, 30-32, 50; Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 971 (1984) ("[T]he possible collateral use of a decision by nonparties inevitably 'ups the stake' of the first action, thereby providing incentives for parties to invest heavily in the first round."). This strategic incentive is not limited to the mutuality doctrine but applies to any rule that expands preclusive effect. "[A]ny tendency to extend the conclusive effects of matters previously adjudicated might easily tend to intensify the effort expended in the initial litigation and might increase the probability of resort to appeal . . ." Alan N. Polasky, *Collateral Estoppel — Effects of Prior Litigation*, 39 IOWA L. REV. 217, 220 (1954).

21. Bruton & Crawford, *supra* note 20, at 30.

22. "Offensive nonmutual issue preclusion refers to a new claimant's assertion of issue preclusion to inflict liability against a defendant who previously lost on that issue, in contrast to defensive issue preclusion, where a party asserts issue preclusion to shield itself from liability to a claimant who previously lost on that issue."
Erichson, *supra* note 18, at 204.

23. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-32 (1979); *State Farm Fire & Cas. Co. v. Century Home Components*, 550 P.2d 1185, 1191 (Or. 1976); RESTATEMENT (SECOND) OF JUDGMENTS § 29(4) (listing inconsistent determinations as a circumstance that may justify allowing relitigation of an issue). See generally Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). The rule, however, is not absolute. See, e.g., *Batson v. Lederle Lab.*, 674 A.2d 1013, 1014-15 (N.J. Super. Ct. App. Div. 1996) (applying issue preclusion despite differing prior determinations), *cert. granted* 147 N.J. 261 (1996).

24. See Bruton & Crawford, *supra* note 20, at 32 (observing that offensive nonmutual issue preclusion makes it critical to the defendant to prevail in the first case, thus making the question of which case gets tried first of utmost importance).

Differences in the preclusive effect of alternative holdings provide another example of how preclusion law affects zealotry of advocacy. Consider a case in which the court gives two or three alternative factual explanations in support of the judgment, each one sufficient to support the judgment. If the applicable preclusion law holds that none of the alternative holdings is "essential to the judgment" and entitled to issue-preclusive effect,²⁵ then a party with a strong case on one theory may not allocate much effort to the other theories.²⁶ If, on the other hand, each alternative holding is considered "essential to the judgment" and entitled to issue-preclusive effect, then a party concerned about future related lawsuits will litigate each theory to the hilt.²⁷

Litigants may also decide whether or not to appeal adverse decisions based on the governing law of issue preclusion. If nonmutual preclusion is allowed, then parties anticipating related litigation with nonparties will allocate greater resources to winning and thus will more likely appeal from adverse determinations. Likewise, in jurisdictions that grant issue-preclusive effect to each alternative holding, parties may appeal adverse determinations even if they know that reversal is impossible because of the other alternative holdings.²⁸

Decisions to appeal can flow even more directly from preclusion law. In some jurisdictions, a judgment is not considered final for purposes of claim preclusion and issue preclusion until after appeal.²⁹ Under this view of finality, a losing litigant afraid of a judgment's potential preclusive effect, and looking to buy some time, can attempt to forestall the judgment's preclusive effect by filing an appeal.

B. Delay

Variations in preclusion law affect litigants' incentives to speed up or slow down the pace of a lawsuit.³⁰ This is particularly true

25. See *infra* text accompanying notes 103-05.

26. A plaintiff in such a jurisdiction should consider holding back all but the strongest theory, if the plaintiff wishes to ensure that a later court will give the winning theory issue-preclusive effect.

27. See *Halpern v. Schwartz*, 426 F.2d 102, 106 & n.3 (2d Cir. 1970).

28. See *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 453-54 (8th Cir. 1997); *Halpern v. Schwartz*, 426 F.2d 102, 105-06 (2d Cir. 1970).

29. See *infra* text accompanying notes 126-34.

30. Ethical and procedural rules limit the extent to which litigators may permissibly seek to delay litigation. See, e.g., 28 U.S.C. § 1927 (1994) (allowing the court to impose costs and fees on an attorney who "multiplies the proceedings in any case unreasonably and vexatiously"); FED. R. CIV. P. 11(b)(1) (providing that by presenting a paper to the court, the

when a single litigant is involved in multiple simultaneous lawsuits, such as a mass tort defendant, a multi-infringed patent plaintiff, or a party defending against parallel civil and criminal proceedings. The first-tried case in such situations inevitably carries significant weight, even without preclusion. In the mass tort context, for example, the first jury verdict weighs heavily in subsequent settlement negotiations between the defendant and remaining plaintiffs. Where mutuality is not required for issue preclusion, however, the result of the first-tried case takes on enormous strategic significance far beyond its persuasive value in settlement talks. Because an adverse determination may bind the party in all future lawsuits, a concerned litigant will seek to use procedural machinations in order to try a winner first. By delaying less favorable cases and expediting more favorable cases, a party can try to maximize the chance of a victory in the first trial.³¹

Consider also the position of a plaintiff in a civil action against a defendant who faces criminal charges arising out of the same event or transaction.³² Depending on the applicable law concerning the preclusive effect of a criminal judgment in a subsequent civil suit,³³ the plaintiff faces an incentive to delay his lawsuit in order to await

attorney certifies that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1996) (prohibiting frivolous proceedings, assertions, or controvertions); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1996) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1982) (stating that zealous advocacy is not violated "by being punctual in fulfilling all professional commitments"). Perhaps the most explicit antidelay provision belongs to Texas: "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." TEX. R. CT. 3.02.

Nevertheless, there remains ample room for practitioners to retard or expedite the process. Delay comes not only from ethically questionable stalling tactics and does not require explicit adjournments. Delay comes, for example, from each nonfrivolous but nonessential motion. It comes from full relevant discovery when partial discovery might suffice. Delay comes from demanding a jury rather than bench trial, from forum-shopping for a crowded docket, and any of a host of other litigation maneuvers. As California's attorney general once put it, "An incompetent attorney can delay a trial for years or months. A competent attorney can delay one even longer." THE QUOTABLE LAWYER § 132.16 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting Evelle J. Younger).

31. See Bruton & Crawford, *supra* note 20, at 32, 50.

32. The most prominent recent example of a defendant facing both criminal and civil proceedings arising out of the same event is O.J. Simpson, who faced murder charges for the death of his ex-wife and another and also faced a wrongful death and survivorship lawsuit filed by the decedents' families. See *Rufo v. Simpson*, No. SC036876, 1997 WL 45143 (Cal. Super. Ct. Feb. 4, 1997) (civil); *People v. Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995) (criminal).

33. See *infra* text accompanying notes 106-17 (discussing the preclusive effect of guilty pleas); see also *infra* text accompanying notes 76-95 (discussing nonmutual issue preclusion).

a helpful outcome in the criminal proceeding.³⁴ Similarly, in states with a compulsory party joinder preclusion doctrine,³⁵ a defendant sued in one of multiple lawsuits by a single plaintiff may seek to delay its case until a case against another defendant is tried.³⁶

C. Joinder

Preclusion law's impact on joinder of claims and parties can be direct and overwhelming. Before deciding what claims to assert in a lawsuit, a party must know whether it will have another opportunity to assert potential claims. This requires knowing the applicable preclusion rules, and, in particular, the definition of a "claim" for purposes of claim preclusion.

The broader the definition of "claim," the more that will be precluded in a subsequent action.³⁷ The effect on joinder is clear. If a narrow definition applies, a plaintiff can decide whether to assert several "different claims" together or separately, based on any number of strategic considerations. But if a broad definition applies, then a plaintiff may have no practical choice but to join the claims in a single lawsuit.

A defendant considering a counterclaim faces a very similar situation. A compulsory counterclaim rule³⁸ that later will preclude

34. See Jonathan C. Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical, and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079, 1119-20 (1982) [hereinafter Thau, *Collateral Estoppel*]; Jonathan C. Thau, *How Lawyers Can Benefit from Trend in Collateral Estoppel*, NATL. L.J., Nov. 7, 1983, at 22 [hereinafter Thau, *Lawyers*].

This strategic reasoning applies as well to a plaintiff suing a defendant who faces parallel civil lawsuits by other plaintiffs. If offensive nonmutual issue preclusion is allowed, each plaintiff has an incentive to wait and see the result of the other plaintiffs' cases. If another plaintiff loses, the defense verdict does not bind the waiting plaintiff, but if the other plaintiff wins, then the waiting plaintiff can attempt to use nonmutual issue preclusion against the defendant. Courts have addressed this "wait and see" problem by holding that offensive nonmutual issue preclusion is generally unavailable if the plaintiff easily could have joined in the prior action. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) cmt. e (1982) ("A person in such a position that he might ordinarily have been expected to join as plaintiff in the first action, but who did not do so, may be refused the benefits of 'offensive' issue preclusion where the circumstances suggest that he wished to avail himself of the benefits of a favorable outcome without incurring the risk of an unfavorable one.").

35. See *infra* text accompanying notes 181-202 (regarding the New Jersey entire controversy doctrine and the Kansas one-action rule).

36. See James D. Griffin & Chris Reitz, *A Review of the Kansas Comparative Fault Act*, KAN. B. ASSN. J. June-July 1994, at 26, 27-28 (asserting that under the one-action rule, when there are multiple lawsuits, "[d]efendants will try to have their case delayed until the other case is tried").

37. See *infra* text accompanying notes 135-41.

38. See *infra* text accompanying notes 160-77.

the counterclaim gives the defendant a trumping reason to assert the counterclaim, regardless of what tactical considerations might otherwise have impelled the defendant to save the claim for another day, another forum, or another lawsuit. If no compulsory counterclaim rule or defense preclusion applies, then the counterclaim will not be precluded later, and the defendant might well choose not to assert the claim in the same lawsuit.³⁹

Decisions concerning joinder of parties, too, can depend on preclusion law. In most jurisdictions, failure to join a party has no claim-preclusive effect. A plaintiff can sue one defendant now and another defendant in a separate lawsuit later, unless that other defendant was in privity with a party, based on a number of strategic considerations.⁴⁰ In two jurisdictions, however, the subsequent law-

39. As a matter of strategy or efficiency, the defendant nevertheless might assert the counterclaim, perhaps on the theory that the best defense is a good offense. On the other hand, if the defendant's affirmative claim is weighty, it may be wasted as a counterclaim. By asserting the claim as a counterclaim rather than as a separate lawsuit, a defendant forfeits the choice of forum and timing. A defendant also may be concerned that a judge or jury will perceive the assertion as "merely a counterclaim" and will view it more as a tactical maneuver than as a legitimate claim.

40. A plaintiff may prefer to join all potential defendants in a single lawsuit for many reasons. Strategically, joinder may encourage divisive finger-pointing among the defendants. Joinder of defendants often enhances litigational efficiency by allowing the plaintiff to focus resources on a single lawsuit rather than several. Discovery rules make discovery easier to obtain from parties than from nonparties, thus a potential defendant provides greater informational value as a joined defendant than as a nonparty. *See, e.g.*, FED. R. CIV. P. 33 (allowing interrogatories only of parties).

On the other hand, strategy and other factors may lead a plaintiff to exactly the opposite conclusion. A plaintiff may choose not to join an additional defendant with the expectation that truthful, helpful testimony may be more forthcoming from a nonparty than from a party. In a medical malpractice case, for example, a plaintiff's decision to sue only the doctors may have been motivated by the hope

that, by not joining the hospital and auxiliary staff people, the plaintiff might obtain less hostile testimony from the people at the hospital who were in a position to observe how the doctors had handled the operation. That would have helped prove a case in a kind of litigation where a claim is hard to prove, partly because a 'conspiracy of silence' often enshrouds the doctors.

Geoffrey C. Hazard, Jr., *An Examination Before and Behind the "Entire Controversy" Doctrine*, 28 RUTGERS L.J. 7, 21 (1996). As Professor Hazard explains:

[T]he plaintiff's lawyer has to make a calculated judgment: Should I join all the potential defendants and hope at least one of them will point the finger? Or should I omit some of them and hope that, being thus implicitly exonerated, they will tell what I think is the truth?

Id. at 22.

Depending on circumstances, litigational efficiency may persuade a plaintiff either to join or not to join additional defendants. Although joinder of multiple defendants in one lawsuit often makes efficient sense, sometimes a plaintiff would rather seek relief in a simple action against the primary defendant and sue others only in the event that adequate relief cannot be obtained from that initial defendant. *See* Symposium, Circle Chevrolet: *Pitfalls in Legal Malpractice*, 145 N.J. L.J. 1, 10 (1996) [hereinafter *Circle Chevrolet Symposium*] ("Forcing litigants to join additional parties, when some of those claims otherwise would never be asserted, complicates and delays the underlying litigation by adding layers of unnecessary complexity to discovery and other pretrial proceedings." (quoting Howard M. Erichson)).

suit may be claim precluded if the plaintiff's claims against the various defendants form part of the same controversy,⁴¹ and the plaintiff faces a powerful incentive to join the additional defendants in the initial proceeding. The same reasoning applies to a defendant contemplating whether to implead a potential third-party defendant, such as a joint tortfeasor, who may be liable for contribution.

D. Settlement

Given that the majority of lawsuits are resolved by negotiated settlement rather than by adjudication, settlement incentives and disincentives deserve careful attention. They matter to the litigants, because the outcome of a lawsuit generally turns on settlement. They also matter to the courts because the courts could not maintain a manageable docket without a high settlement rate.

As with several other strategic issues, the critical aspect of preclusion law here is mutuality of issue preclusion. If nonmutual preclusion is allowed, parties are more likely to settle. Any litigant concerned about future related litigation with other parties should be willing to pay more — or accept less — in order to reach settlement. As a matter of issue preclusion, a favorable judgment cannot help the party in future litigation with others, because those others are not bound by the judgment in the absence of privity. An unfavorable judgment, however, can harm the party in future litigation with others, because if mutuality is not required, then others can use the judgment to their advantage even though they were not parties to the prior lawsuit. Thus, a litigant facing potential related litigation with others attributes extra value to avoiding a judgment.⁴²

Finally, plaintiffs may prefer not to join an additional defendant for valuable reasons unrelated to tactics. Many potential claims go unasserted simply because the plaintiff chooses not to fight that fight, especially if the potential defendant is someone with whom the plaintiff has a valued relationship, and especially if the plaintiff can attempt to obtain adequate relief from other defendants. *See id.* (observing that a client with a potential legal malpractice claim may prefer to seek recovery from other defendants, rather than from the client's own lawyer).

41. The jurisdictions are New Jersey, with its "entire controversy doctrine," and Kansas, with its "one-action rule." *See infra* text accompanying notes 181-202.

42. In economic terms, the issue determination in the initial lawsuit can be viewed as a *public good* for other litigants. A litigant in the initial lawsuit may be willing to pay money to prevent the public good from being created. The major problem with public goods is that each potential beneficiary of the good would prefer to be a *free rider*, waiting for someone else to produce the good and then accepting the benefit without having accepted the concomitant cost or risk. *See* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 14-16 (1965). This problem arises under preclusion law only if nonmutual issue preclusion is permitted, and especially if offensive nonmutual issue preclu-

This settlement incentive may affect the parties unequally, changing the settlement dynamic and creating a more favorable settlement for one of the parties, ordinarily the plaintiff. Consider, for example, an alleged monopolist facing antitrust challenges from a number of would-be competitors. If the law permits offensive nonmutual issue preclusion, each early plaintiff gains a bargaining advantage over the defendant, because a judgment can hurt the defendant more than it can help the plaintiff. A determination that the defendant engaged in price fixing or unreasonable restraint of trade may bind the defendant in subsequent antitrust suits, so the defendant may be willing to sweeten the settlement pot in order to avoid the risk of an adverse judgment. Similarly, a manufacturer facing product liability claims by a number of plaintiffs may prefer to pay additional money to avoid the risk of an issue-preclusive determination of a product defect.⁴³ If the first case to reach trial is weak for the defendant — for example, if the plaintiff is especially sympathetic or plaintiff's counsel especially well prepared — the defendant will be even more inclined to settle, so that a stronger defense case will be the first to reach judgment.⁴⁴

Perhaps some lawyers take these strategic incentives too far. In the first Prozac liability case to go to trial, the defendant, manufacturer Eli Lilly, reportedly paid twenty-eight plaintiffs for a secret deal. According to news reports, the plaintiffs in return agreed not

tion is permitted. See Steven M. Crafton, Comment, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857, 865 n.50 (1983).

The law of preclusion deals with this free riding by generally prohibiting the use of offensive nonmutual issue preclusion when the plaintiff could have joined easily in the initial lawsuit. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-30 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. e (1982). If a private plaintiff prosecutes the first case, other potential plaintiffs generally can benefit from the judgment only if they absorb part of the cost (especially attorneys' fees) and risk (especially the risk of being bound by an unfavorable judgment). If the government prosecutes the first case, however, private plaintiffs may benefit from the judgment via offensive nonmutual issue preclusion. For example, in *Parklane Hosiery*, 439 U.S. at 331-32, a private plaintiff was permitted to use offensive nonmutual issue preclusion to benefit from a favorable judgment in an enforcement action brought against the defendant by the Securities and Exchange Commission, because the plaintiff could not have joined in the SEC action. In economic terms, the two scenarios provide a sensible response to the public good-free rider problem. In order for a private plaintiff to benefit from the public good of a favorable judgment on a particular issue, either the plaintiff must have absorbed its share of the cost and risk by joining the action, or the public good must have been created by the government funded with tax dollars.

43. Cf. *Middleborough Horizontal Prop. Regime Council of Co-owners v. Montedison S.p.A.*, 465 S.E.2d 765, 769 (S.C. App. 1995) (precluding a polyvinylchloride manufacturer from relitigating a finding of product defect from an earlier plaintiff's products liability action).

44. See *Bruton & Crawford*, *supra* note 20, at 50.

to introduce certain damaging evidence at trial and not to appeal. The case resulted, as Eli Lilly had hoped, in a defense verdict.⁴⁵ Such a deal, in my opinion, plainly violates ethical norms. What the defendant hoped to purchase with its settlement dollars was both the favorable press coverage of a defense verdict in order to discourage future potential plaintiffs, and an elimination of the risk of offensive nonmutual issue preclusion. A defense judgment not only avoids the damaging issue-preclusive effect of a liability determination; it also protects against issue preclusion in the future, because even if the next plaintiff wins, that plaintiff's judgment probably will not be given nonmutual effect in the face of a prior inconsistent determination.

These incentives can apply to plaintiffs as well. A risk-averse patent holder pursuing infringement actions against multiple alleged infringers may prefer to settle each case rather than risk an adverse judgment. A single determination that the holder's patent is invalid may bind the plaintiff as a matter of defensive nonmutual issue preclusion, thus guaranteeing the plaintiff's failure in subsequent actions.⁴⁶

In criminal proceedings, preclusion law can affect plea negotiations. If a guilty plea has issue-preclusive effect in parallel or subsequent civil litigation,⁴⁷ then a defendant is less likely to plead guilty. Conversely, if a guilty plea has no issue-preclusive effect but a conviction at trial does have issue-preclusive effect,⁴⁸ then a defendant is more likely to plead guilty in order to avoid the damaging preclusive impact of a trial conviction. This is particularly true in situa-

45. See *Potter v. Eli Lilly & Co.*, 926 S.W.2d 449, 451-52 (Ky. 1996); Maureen Castellano, *The Secret Deal That Won the Prozac Case*, 140 N.J. L.J. 377 (1995).

46. See *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313 (1971). In some cases, such as some complex commercial litigation, both the plaintiff and the defendant may face potential related litigation with others. Examples would include major construction disputes and litigation concerning corporate mergers and acquisitions. In such situations, the availability of nonmutual issue preclusion encourages both the plaintiff and the defendant to seek settlement. The defendant should be willing to pay more to avoid an adverse judgment, and the plaintiff should be willing to accept less. Thus, the parties' true settlement positions — that is, the range within which the parties genuinely would prefer to settle rather than to proceed to trial — are more likely to overlap, and settlement is more likely to result. Overlapping settlement positions make settlement possible, but of course that is no guarantee that settlement will result.

47. Guilty pleas carry issue-preclusive effect under federal law and the law of a minority of states. See *infra* text accompanying notes 107-12.

48. Guilty pleas carry no issue-preclusive effect — although they nevertheless may be admissible in evidence — under a majority of states' laws and according to the RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (1982). See *infra* text accompanying notes 113-17.

tions in which the criminal penalties pale in comparison to the potential civil liability.⁴⁹

E. Other Litigation Decisions

Issue preclusion creates incentives for parties to support consolidation,⁵⁰ compulsory joinder,⁵¹ or class certification.⁵² Nonparties cannot be bound by a judgment. When nonmutual issue preclusion is permitted, however, nonparties can benefit from a judgment. The best way to recreate mutuality of estoppel is to turn nonparties into parties, by moving to consolidate with other lawsuits, by seeking an order to join necessary parties, or by moving for or supporting class certification. Thus, a defendant facing numerous separate lawsuits, contrary to traditional common wisdom,⁵³ may favor class action treatment.

Preclusion law also may affect the choice between a bench trial and a jury trial, and between a general verdict and a special verdict. In general, the easier it is to determine precisely what was decided, the more likely it is that the decision will carry issue-preclusive effect. Thus, a party hoping to reduce the risk of issue preclusion in subsequent litigation, all else being equal, will prefer a jury trial to a bench trial and will prefer a general jury verdict to either a special verdict or general verdict with interrogatories.⁵⁴

49. See Thau, *Collateral Estoppel*, *supra* note 34, at 1095-98 (discussing criminal-civil issue preclusion against "deep-pocket defendants").

Another effect of issue preclusion law is that a criminal defendant's decision whether to plead guilty or to plead *nolo contendere* may depend upon which plea will have issue-preclusive effect in subsequent civil litigation. See Thau, *Lawyers*, *supra* note 34. In some jurisdictions, a guilty plea carries issue-preclusive effect, but a *nolo* plea does not. In general, a plea of *nolo contendere* establishes guilt solely for the purpose of the present criminal proceeding and carries no issue-preclusive effect. See FED. R. CRIM. P. 11(e)(6) (stating that evidence of *nolo contendere* plea is not admissible against a defendant in any civil or criminal proceeding); C.T. Drechsler, Annotation, *Plea of Nolo Contendere or Non Vult Contendere*, 89 A.L.R.2D 540, 600 (1963). But see ARIZ. REV. STAT. ANN. § 13-807 (West 1989) ("A defendant convicted in a criminal proceeding is precluded from subsequently denying in any civil proceeding the essential allegations of the criminal offense of which he was adjudged guilty, including judgments of guilt resulting from no contest pleas."). A defendant facing both criminal and civil liability thus prefers to plead *nolo contendere* in the criminal case, but the government may find itself pressured by interested citizens — including potential civil plaintiffs — not to accept a *nolo* plea.

50. See generally FED. R. CIV. P. 42.

51. See generally FED. R. CIV. P. 19.

52. See generally FED. R. CIV. P. 23.

53. See Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 679-80 (1979) (noting the history of the defense bar's staunch opposition to class certification).

54. See Bruton & Crawford, *supra* note 20, at 50.

F. *Non-Party Participants*

Not only does preclusion law affect the behavior of litigants and litigators, it also affects the behavior of interested nonparties. For example, a nonparty with an interest in a lawsuit may have a right to intervene.⁵⁵ If the nonparty does not intervene, then the judgment cannot legally bind the nonparty.⁵⁶ A nonparty hoping to use a judgment for its issue-preclusive effect in subsequent litigation may choose not to intervene, in order to have the benefit of using nonmutual issue preclusion without the detriment of being legally bound by the judgment.⁵⁷ The nonparty's strategic position is very different, however, if a nonparty is likely to be deemed in privity with a party and therefore bound by the judgment. In that situation, the nonparty is more likely to intervene, because it may prefer to have more direct control over the litigation. Thus, intervention decisions can be guided both by the law concerning nonmutual issue-preclusion and by the law concerning privity.

Closely related to notions of privity is the rule that a judgment can bind a nonparty if the nonparty controls the litigation.⁵⁸ Interested nonparties, who otherwise might be tempted to exert influence over the parties' litigation decisions, must temper their involvement if they wish to avoid being bound by the judgment. Interested nonparties thus are advised to maintain some distance between themselves and the parties' strategic decisionmaking, and to be wary of financing the litigation of others.⁵⁹

Witnesses, too, face incentives based on preclusion law. Non-mutual issue preclusion means that nonparty witnesses have reason to cooperate — and perhaps to testify in a particular manner — when they stand to benefit from the nonmutual issue-preclusive effect of a judgment. For example, if a defendant faces criminal charges and also potential civil liability, a potential civil plaintiff has a self-interest in testifying against the defendant in the criminal trial. If the defendant is convicted, that conviction may benefit the plaintiff through issue preclusion in the civil litigation.⁶⁰ The same incentive that may make a witness more inclined to testify against a

55. See, e.g., FED. R. CIV. P. 24.

56. See *Martin v. Wilks*, 490 U.S. 755 (1989).

57. This strategy may be constrained, however, by the general rule disallowing offensive nonmutual issue preclusion for plaintiffs who intentionally bypassed the prior action. See *supra* note 34.

58. See *Montana v. United States*, 440 U.S. 147 (1979).

59. See *Bruton & Crawford*, *supra* note 20, at 50.

60. See *United States v. Frank*, 494 F.2d 145, 158-61 (2d Cir. 1974); Thau, *Collateral Estoppel*, *supra* note 34, at 1118 & n.214.

defendant also may make that person more inclined to press charges, to alert the government to the problem, or to pressure the government to prosecute.⁶¹

G. *Litigation Behavior and F₁'s Policies*

We have examined the significance of claim preclusion and issue preclusion to litigation behavior. What does this have to do with interjurisdictional preclusion and choice of preclusion law? Preclusion law's impact on litigation behavior should drive the analysis of choice of preclusion law, because the most significant interests at stake in choice of preclusion law are the litigation-related interests of the initial forum. In cases in which the initial lawsuit occurs in one jurisdiction (F₁) and the subsequent suit occurs in another jurisdiction (F₂), the more significant impact of preclusion law on litigation behavior is at F₁.

As we have seen, preclusion-sensitive decisions at F₁ can include joinder of claims, joinder of parties, resource allocation, appeals, efforts to delay or expedite, settlement, guilty pleas, consolidation, class certification, jury demands, intervention, nonparty involvement in litigation control, and witness testimony. The strategic choices made by participants at F₁ matter not only to the litigants and their lawyers, but to F₁ itself. Preclusion law is based on policy determinations and value choices, with the understanding and intent that preclusion law will affect litigation behavior.⁶² Each jurisdiction's preclusion rules flow from the procedural opportunities available in that jurisdiction as the F₁ forum⁶³ and reflect the extent to which that jurisdiction chooses to encourage litigants to avail themselves of those procedural opportunities.

For example, the definition of *claim* for purposes of claim preclusion determines the extent to which joinder is encouraged. By defining *claim* broadly, a jurisdiction encourages joinder of related

61. For example, criminal and civil antitrust enforcement actions pursued by the Department of Justice or the Federal Trade Commission sometimes are prompted by private entities — potential antitrust plaintiffs — who are harmed by the defendant's alleged antitrust violations. See, e.g., Steve Lohr, *Defying the Juggernaut: Netscape Maneuvers for Position in a Microsoft-Ruled World*, N.Y. TIMES, Nov. 10, 1997, at D1 (noting that Netscape president James Barksdale "has prodded Washington to take antitrust action against Microsoft").

62. Cf. Resnik, *supra* note 20, at 981-82 (discussing "genuine value choices" made by the U.S. Supreme Court in its preclusion decisions and suggesting that values rejected by the Court include differentiation, diffusion of power, deliberate norm enforcement, additional persuasion opportunities, and revisionism).

63. See RESTATEMENT (SECOND) OF JUDGMENTS introduction at 10 (1982) (discussing "the relationship between rules of original procedure and rules of res judicata" and noting that "when the rules of original procedure constrain the first opportunity to litigate, the rules of res judicata are adjusted reciprocally").

claims, with the goal of enhancing litigation efficiency.⁶⁴ The broad transactional definition of *claim* applied by federal courts and many state courts flows from the generosity of pleading and joinder available under the Federal Rules and similar state rules.⁶⁵ A narrower definition of *claim* may reflect a choice to emphasize party autonomy over judicial economy. Similar considerations apply to the decision whether to make certain counterclaims compulsory: a compulsory counterclaim rule implies a greater emphasis on efficiency than on litigant autonomy.

Similarly, by extending claim preclusion to claims against nonparties, a jurisdiction can encourage joinder of parties. The federal courts and most state courts permit the joinder of related parties but neither encourage nor discourage such joinder through preclusion law.⁶⁶ Other jurisdictions, however, strongly encourage party joinder by precluding related claims against nonparties that could have been raised in a prior suit. These states assert that their enforcement of mandatory party joinder through claim preclusion is designed to enhance efficiency, fairness, and consistency.⁶⁷ The experience of these jurisdictions bears out the assertion that preclusion rules profoundly affect litigation decisions,⁶⁸ and the sometimes heated controversy among lawyers⁶⁹ confirms the significance of preclusion rules to litigation-related policy.

64. See *Hagee v. City of Evanston*, 729 F.2d 510, 514 (7th Cir. 1984) (asserting that claim preclusion is intended to impel "parties to consolidate all closely related matters into one suit"); *Bronstein v. Kalcheim*, 467 N.E.2d 979, 983 (Ill. App. Ct. 1984) (asserting that "the doctrine of res judicata serves to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts").

65. See RESTATEMENT (SECOND) OF JUDGMENTS introduction at 9 (1982).

66. See, e.g., FED. R. CIV. P. 19, 20.

67. See, e.g., *DiTroliv v. Antiles*, 662 A.2d 494, 502 (N.J. 1995) ("The purposes of the [entire controversy] doctrine are threefold: (1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3) efficiency and the avoidance of waste and the reduction of delay."); *Eurich v. Alkire*, 579 P.2d 1207, 1208 (Kan. 1978) (noting that the one-action rule of the Kansas comparative negligence act "provides machinery for drawing all possible parties into a lawsuit to fully and finally litigate all issues and liability arising out of a single collision or occurrence").

68. See *Griffin & Reitz*, *supra* note 36, at 27-28 (discussing tactical considerations based on the one-action rule and noting that when there are multiple lawsuits "[d]efendants will try to have their case delayed until the other case is tried"); *id.* at 32 ("The best single piece of advice to parties in a negligence action is to bring in all potentially responsible parties into one lawsuit."); *Editorial: Time to Reconsider Circle Chevrolet*, N.J. LAW., Nov. 4, 1996, at 6 ("New suits filed since *Circle Chevrolet* [(applying the entire controversy doctrine to legal malpractice)] bring in prior counsel so long as there is the smallest possibility of a finding of legal malpractice. Simple cases involving two attorneys now become complex multi-party litigation.").

69. See, e.g., *Circle Chevrolet Symposium*, *supra* note 40 (debating the wisdom, fairness, and efficiency of the entire controversy doctrine as applied to legal malpractice cases); *Editorial: Entire Controversy*, 147 N.J. L.J. 406 (Jan. 27, 1997) ("The current dimension of the

The decision as to whether to allow nonmutual issue preclusion — and the further decision whether to allow *offensive* nonmutual issue preclusion — raises serious questions concerning litigation policy at F_1 . Some attribute the decline of the mutuality rule to expanded opportunities to join multiple parties in a single lawsuit.⁷⁰ By allowing nonmutual preclusion, a jurisdiction encourages parties to take advantage of those opportunities to bring additional parties into the lawsuit.⁷¹ Reasonable policymakers may differ as to whether such party joinder helps judicial economy, by avoiding multiple related lawsuits or multiple litigation of a single issue, or hurts judicial economy, by making each lawsuit more complex.

As a last illustration of the F_1 policy choices inherent in preclusion rules, a jurisdiction's choice concerning finality pending appeal reflects that jurisdiction's balancing of the value of reliability (not basing preclusion on judgments that may yet be reversed) against the value of efficiency (not encouraging excessive appeals). In sum, although preclusion questions are fought out at the time of a subsequent lawsuit, the law of claim preclusion and issue preclusion reflects procedural policies that matter to the jurisdiction in which the initial action takes place.

II. PRECLUSION LAW DIVERGENCES

Having explored the policy significance of preclusion law's effect on litigation behavior, we turn to differences in preclusion law among U.S. jurisdictions. Despite preclusion law's policy significance, *choice* of preclusion law matters only if preclusion law varies from one jurisdiction to another. Which it does. In fact, preclusion law varies much more than most lawyers would suspect. Moreover, it varies in ways that trigger the strategic considerations discussed in Part I.

entire controversy doctrine is an unmitigated abomination. . . . If the bar has a common prayer, it is that the bane and affliction of the [current] version of the entire controversy be lifted").

70. See RESTATEMENT (SECOND) OF JUDGMENTS introduction at 8 (1982).

71. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979) ("[D]efensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. . . . [If offensive nonmutual issue preclusion is allowed], the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. . . . Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action." (citations omitted)); see also *Hunter v. City of Des Moines*, 300 N.W.2d 121, 124 (Iowa 1981) (quoting *Parklane Hosiery*).

A. Preclusion Law Commonalities

Many lawyers and judges assume that *res judicata* is what it is and that there is little difference from one jurisdiction to another.⁷² As to much of preclusion law, they are correct. The essential elements of both claim preclusion and issue preclusion look similar across jurisdictions. Claim preclusion in all fifty states as well as in the federal courts can be summed up reasonably well as follows: a valid, final judgment on the merits precludes relitigation of the same claim between the same parties or their privies.⁷³ Similarly, the following description of issue preclusion works reasonably well, as far as it goes, for all United States jurisdictions: “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties.”⁷⁴ In interjurisdictional preclusion cases, courts occasionally point out that the result would be the same under the preclusion law of F₁ or F₂.⁷⁵

72. Cf. RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. a (1982) (“[Prior to adoption of the Federal Rules of Civil Procedure,] there was little difference in the doctrine of *res judicata* as expounded in state and federal courts. Indeed, that is still true, so that it is still usually a moot question whether the effect of a federal judgment is determined by federal law or state law.”).

73. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982).

74. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

75. See, e.g., *Wright v. Chicago Mun. Employees Credit Union*, 639 N.E.2d 203, 205 (Ill. App. Ct. 1994) (federal-Illinois); *Billiot v. LeBoeuf Bros. Towing Co.*, 640 So. 2d 826, 828 (La. Ct. App. 1994) (federal-Louisiana); *Jones v. State Farm Mut. Auto. Ins. Co.*, 509 N.W.2d 829, 835 n.3 (Mich. Ct. App. 1993) (Kentucky-Michigan); *Upjohn Co. v. Freeman*, 906 S.W.2d 92, 101 n.7 (Tex. App. 1995) (federal-Texas); *Kuhlman v. Thomas*, 897 P.2d 365, 368 n.3 (Wash. Ct. App. 1995) (federal-Washington).

The *Restatement (Second) of Judgments*, published by the American Law Institute in 1982, can be credited with enhancing uniformity of preclusion law. In “restating” the law of preclusion, the *Second Restatement* set forth a coherent vision of claim preclusion and issue preclusion, widely followed by courts around the country. “It is difficult to overstate its influence.” GENE R. SHREVE & PETER RAVEN-HANSEN, *UNDERSTANDING CIVIL PROCEDURE* § 106(B)(1) (1994). “Even in draft form, the work’s treatment of the law of *res judicata* shaped many judicial decisions. . . . Some of its provisions are more controversial than others, yet there is no question that it is the most authoritative and influential writing on *res judicata* in the legal literature.” *Id.*

It is tempting to say that certain “leading cases” also have contributed to the uniformity of preclusion law, because those cases have been widely followed. The great cases of *Bernhard v. Bank of America*, 122 P.2d 892 (Cal. 1942) (Traynor, J.) (allowing nonmutual issue preclusion), *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971) (same), and *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (allowing offensive nonmutual issue preclusion), come especially to mind. Although many courts have indeed followed these cases, it would be incorrect to credit these cases with creating uniformity. In fact, they have done exactly the opposite. What made these cases significant was their rejection of traditionally accepted preclusion doctrine; their success is reflected in their holdings having become the majority view. Far from creating uniformity, these cases took what was uniform — the strict mutuality requirement — and replaced it with either permanent or

It is not in the basic definition of claim preclusion and issue preclusion where jurisdictions differ. It is rather in the details. How is "same claim" defined? Who can assert issue preclusion? What constitutes a final judgment? What are the bounds of privity? When is a judgment "on the merits"? When is a determination essential to the judgment? In the law of preclusion, the details are many, and they matter.

B. *Preclusion Law Divergences*

1. *Mutuality*

The most important split in preclusion law concerns mutuality. Mutuality traditionally was required for the assertion of issue preclusion.⁷⁶ In other words, a litigant could not assert issue preclusion from a judgment unless she was bound by the same judgment — that is, unless she was a party or in privity with a party to the initial action. Under the traditional rule, issue preclusion applied only when the parties to the subsequent lawsuit were the same as the parties to the prior lawsuit.

In 1942, Justice Roger Traynor of the California Supreme Court wrote the opinion in *Bernhard v. Bank of America*⁷⁷ that rejected the mutuality requirement under California preclusion law. Nearly thirty years later, the United States Supreme Court followed suit, rejecting mutuality as a matter of federal law in *Blonder-Tongue Laboratories v. University of Illinois Foundation*.⁷⁸ Following *Bernhard* and *Blonder-Tongue*, most of the states rejected the strict mutuality requirement for issue preclusion.⁷⁹ Most, but not all.

transitional disaccord. That, of course, is the price of common law development in a multi-jurisdictional system.

76. See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); RESTATEMENT (FIRST) OF JUDGMENTS § 93 (1942) ("[A] person who is not a party . . . is not bound by or entitled to claim the benefits of an adjudication . . .").

77. 122 P.2d 892 (Cal. 1942).

78. 402 U.S. 313 (1971).

79. See E.H. Schopler, Annotation, *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3d 1044 (1970 & 1996 Supp.) (citing cases); RESTATEMENT (SECOND) OF JUDGMENTS § 29 reporter's note (1982) (same).

A number of states cling to the traditional mutuality requirement. Alabama,⁸⁰ Florida,⁸¹ Georgia,⁸² Kansas,⁸³ Mississippi,⁸⁴ North Dakota,⁸⁵ and Virginia⁸⁶ require mutuality. Louisiana, which only recently adopted the doctrine of issue preclusion, appears to

80. See *Jones v. Blanton*, 644 So. 2d 882, 886 (Ala. 1994) ("Although many courts, including the Federal courts, have dispensed with the mutuality requirement, it remains the law in Alabama.").

81. See *Stogniew v. McQueen*, 656 So. 2d 917, 919-20 (Fla. 1995) ("[W]e are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel."); *Jones v. Upjohn Co.*, 661 So. 2d 356, 357 (Fla. Dist. Ct. App. 1995) (denying defensive nonmutual issue preclusion in a criminal-civil configuration); *Newport Div., Tenneco Chems., Inc. v. Thompson*, 330 So. 2d 826, 828 (Fla. Dist. Ct. App. 1976) (declining to abandon the mutuality requirement). *But see* *Zeidwig v. Ward*, 548 So. 2d 209 (Fla. 1989) (allowing defensive nonmutual issue preclusion in a criminal-civil configuration).

82. See GA. CODE ANN. § 9-12-40 (1993); *Farrad v. Hicks*, 915 F.2d 1530, 1533-34 (11th Cir. 1990) (applying Georgia law to require mutuality); *Gilmer v. Porterfield*, 212 S.E.2d 842, 843 (Ga. 1975); see also *Stiltjes v. Ridco Exterminating Co.*, 399 S.E.2d 708, 709 (Ga. Ct. App. 1990) ("[I]dentity of parties or their privies is required in order to act as bar to second lawsuit [under collateral estoppel doctrine]."), *affd.*, 409 S.E.2d 847 (Ga. 1991).

83. See *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199, 1208-09 (Kan. 1986) (rejecting the offensive use of nonmutual issue preclusion); *Keith v. Schiefen-Stockham Ins. Agency*, 498 P.2d 265, 273 (Kan. 1972) (rejecting the defensive use of nonmutual issue preclusion and stating that "a litigant may invoke the bar of the prior judgment only if he would have been bound by it had it gone the other way"); see also *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214 (Del. Super. Ct. 1991) (applying Kansas preclusion law to require mutuality). *But see* *Crutsinger v. Hess*, 408 F. Supp. 548, 554 (D. Kan. 1976) (applying Kansas law to allow defensive nonmutual issue preclusion and stating that Kansas had rejected only offensive use of nonmutual issue preclusion).

84. See *Hurst v. Metro Ford Sales & Service, Inc.*, No. 3:95CV55-B-A, 1996 WL 671384, at *2-3 (N.D. Miss. Sept. 23, 1996) (applying Mississippi law to require strict mutuality); *Walker v. Kerr-McGee Chem. Corp.*, 793 F. Supp. 688, 695-96 (N.D. Miss. 1992) (same); *McCarty v. Johns-Manville Sales Corp.*, 502 F. Supp. 335, 338 (S.D. Miss. 1980) (same); *Magee v. Griffin*, 345 So. 2d 1027, 1030 (Miss. 1977) (same).

85. See *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992); *Armstrong v. Miller*, 200 N.W.2d 282, 287-88 (N.D. 1972).

86. See *Angstadt v. Atlantic Mut. Ins. Co.*, 457 S.E.2d 86, 87 (Va. 1995) ("For collateral estoppel to apply . . . the parties to the prior and subsequent proceedings, or their privies, must be the same [T]here . . . must be 'mutuality'"); *Dual & Assocs., Inc. v. Wells*, 403 S.E.2d 354, 356 (Va. 1991) (rejecting the defensive use of nonmutual issue preclusion); *Selected Risks Ins. Co. v. Dean*, 355 S.E.2d 579, 581 (Va. 1987) ("As recently as 1980, this Court made a considered, unanimous decision to resist the so-called 'modern trend' and not to abrogate the mutuality requirement. . . . We perceive no error [in this decision]."); *Norfolk & W. Ry. Co. v. Bailey Lumber Co.*, 272 S.E.2d 217, 219 (Va. 1980) ("In Virginia, the established rule is that collateral estoppel requires mutuality . . . especially when the estoppel is used 'offensively.'").

require mutuality as well.⁸⁷ Ohio provides a limited public policy exception but generally adheres to the mutuality requirement.⁸⁸

The states that require mutuality are fully aware that they are in the minority; their decision to retain the requirement is deliberate. The Virginia Supreme Court, for example, asserted that "this Court made a considered, unanimous decision to resist the so-called 'modern trend' and not to abrogate the mutuality requirement."⁸⁹ Similarly, the Florida Supreme Court stated in 1995, "[W]e are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel."⁹⁰

Among the jurisdictions that have abandoned the traditional mutuality requirement, most not only allow defensive nonmutual issue preclusion, but under certain circumstances allow offensive as well,⁹¹ following the lead of the United States Supreme Court in

87. Louisiana adopted issue preclusion in 1991 by statute. See LA. REV. STAT. ANN. § 13:4231 (West 1991). Prior to that, Louisiana rejected any use of issue preclusion, whether mutual or nonmutual. See LA. REV. STAT. ANN. § 13:4231 cmt. b (stating that this statute changed the law by formally adopting issue preclusion); *Oliver v. Department of Pub. Safety & Corrections*, 669 So. 2d 570, 572 (La. Ct. App. 1996) (stating that "issue preclusion [was] a principle heretofore rejected by our civilian system"). The language of the new issue preclusion statute appears to require mutuality, but it remains to be seen how Louisiana courts will treat the statute. Few cases filed since the statute's effective date of January 1, 1991, have made their way into published Louisiana decisions, and none of them have presented the issue of nonmutual issue preclusion. For further discussion of preclusion in Louisiana, see *infra* text accompanying notes 119-24.

88. See *Cashelmara Villas Ltd. Partnership v. DiBenedetto*, 623 N.E.2d 213, 215 (Ohio Ct. App. 1993) ("Inherent in the concept of collateral estoppel is the requirement of mutuality of parties. However, the requirement is waivable 'upon the basis of serving justice within the framework of sound public policy.'" (citation omitted)); *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 982-84 (Ohio 1983) (emphasizing the limited nature of the public policy exception to the mutuality requirement); *cf. McAdoo v. Dallas Corp.*, 932 F.2d 522, 524-25 (6th Cir. 1991) (acknowledging Ohio's rejection of offensive nonmutual issue preclusion but concluding that Ohio courts would allow defensive nonmutual issue preclusion under certain circumstances).

89. *Selected Risks*, 355 S.E.2d at 581.

90. *Stogniew v. McQueen*, 656 So. 2d 917, 919-20 (Fla. 1995).

91. See *supra* note 22 (defining offensive and defensive nonmutual issue preclusion).

Parklane Hosiery v. Shore.⁹² Michigan⁹³ and Tennessee,⁹⁴ however, have chosen to allow defensive but not offensive nonmutual issue preclusion. Illinois allows offensive nonmutual issue preclusion, but apparently under more limited circumstances than allowed under federal preclusion law.⁹⁵

Cases involving nonmutual preclusion illustrate the importance of choice of preclusion law. The mutuality split mattered, for example, in *Columbia Casualty Co. v. Playtex FP, Inc.*⁹⁶ A woman died from toxic shock syndrome in 1983, and her widower sued Playtex in federal court in Kansas.⁹⁷ The jury awarded compensatory and punitive damages based on its finding that by 1983 Playtex knew or should have known of the risks of its super-absorbent tampons.⁹⁸ Playtex then sued its liability insurer in Delaware state court, seeking reimbursement. The insurer, arguing that the policy should be rescinded because Playtex fraudulently misrepresented the risk associated with its tampons when it obtained coverage in 1984,

92. 439 U.S. 322 (1979).

93. Compare *Knoblauch v. Kenyon*, 415 N.W.2d 286, 290 (Mich. Ct. App. 1987) (allowing defensive nonmutual issue preclusion) and *Braxton v. Litchalk*, 223 N.W.2d 316 (Mich. Ct. App. 1974) (same) with *Warda v. Commissioner*, 15 F.3d 533, 537-38 (6th Cir. 1994) ("Where a party attempts offensive use of a previously litigated issue, Michigan law will give preclusive effect to the prior determination only between those who were parties or their privies to the previous suit."). The law in Michigan concerning mutuality is rather cloudy, however, and a strand of Michigan cases appears to cling to the traditional mutuality rule, especially in cases involving the preclusive effect of agency determinations. See *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813, 820-21 (6th Cir. 1996) (applying Michigan law to require mutuality for the issue-preclusive effect of an agency determination), *vacated on other grounds*, 106 F.3d 146 (6th Cir. 1997) (en banc); *Nummer v. Treasury Dept.*, 533 N.W.2d 250, 253 (Mich. 1995) (requiring mutuality for issue preclusion based on an agency determination); *Couch v. Schultz*, 439 N.W.2d 296, 297 (Mich. Ct. App. 1989) (stating that mutuality is "a necessary element of collateral estoppel" in a case involving the effect of an agency determination); see also *Lichon v. American Universal Ins. Co.*, 459 N.W.2d 288, 298 & n.16 (Mich. 1990) (requiring mutuality but noting certain exceptions); *Alterman v. Provizer*, 491 N.W.2d 868, 869-70 (Mich. Ct. App. 1992) (applying an exception to the mutuality rule); *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4068 (U.S. Jan. 13, 1998) (Kennedy, J., concurring) (citing *Nummer* and *Lichon* as requiring mutuality under Michigan law).

94. See *Beaman Bottling Co. v. Bennett*, No. 03A01-9103-CV-00091, 1991 Tenn. App. LEXIS 843, at *4 (Tenn. Ct. App. Oct. 29, 1991) ("While Tennessee courts have relaxed the mutuality requirement in cases involving defensive collateral estoppel, they have not yet adopted the federal practice of allowing offensive collateral estoppel."); *Carroll v. Times Printing Co.*, 14 Media L. Rep. (BNA) 1210, 1212 (Tenn. Ct. App. 1987) ("While the Restatement of Judgments, § 29, sanctions both offensive and defensive use of collateral estoppel by parties not involved in the previous determination, this jurisdiction has uniformly refused to permit offensive application of the doctrine.").

95. See *Herzog v. Lexington Township*, 657 N.E.2d 926, 930 (Ill. 1995) (strongly cautioning against allowing offensive nonmutual issue preclusion and declining to permit it under the circumstances); *Van Milligan v. Board of Fire & Police Commrs.*, 630 N.E.2d 830, 835-36 (Ill. 1994) (same); *In re Owens*, 532 N.E.2d 248, 251-52 (Ill. 1988) (same).

96. 584 A.2d 1214 (Del. 1991).

97. See 584 A.2d at 1215-16.

98. See 584 A.2d at 1216.

asserted that the prior jury determination precluded Playtex from relitigating the issue of Playtex's knowledge of the risk.⁹⁹ Because the insurer was not a party to the Kansas federal action, it sought to use nonmutual issue preclusion. Both Delaware and federal law permitted nonmutual preclusion, but Kansas law required mutual-ity. The Delaware court chose to apply Kansas preclusion law and thus rejected the use of nonmutual issue preclusion.¹⁰⁰ Had it applied its own law, as many courts would have done,¹⁰¹ or federal law, as I argue it should have done,¹⁰² the court could have given nonmutual issue-preclusive effect to the Kansas federal court's decision.

2. *Alternative Holdings*

Issue preclusion only applies to issues that are "essential to the judgment."¹⁰³ If a court offers alternative holdings to explain the result in a particular case, is each alternative holding essential to the judgment and thus entitled to issue-preclusive effect in subsequent cases? Many, and perhaps most, federal courts give issue-preclusive effect to each alternative ground.¹⁰⁴ Other courts and the *Restatement (Second) of Judgments*, however, take the view that each alternative holding is not essential to the judgment and therefore generally not entitled to issue-preclusive effect.¹⁰⁵

99. See 584 A.2d at 1216.

100. See 584 A.2d at 1217-19.

101. See *infra* text accompanying notes 316-31.

102. See *infra* text accompanying notes 301-15, 340-49.

103. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

104. See, e.g., *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *In re Westgate-Calif. Corp.*, 642 F.2d 1174, 1176-77 (9th Cir. 1981); *Winters v. Lavine*, 574 F.2d 46, 66-67 (2d Cir. 1978); *Sheldon Co. Profit Sharing Plan & Trust v. Smith*, 858 F. Supp. 663, 669-70 (W.D. Mich. 1994); *Clarke v. Carlucci*, 834 F. Supp. 636, 641 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 622 (2d Cir. 1994); *FDIC v. Continental Cas. Co.*, 796 F. Supp. 1344, 1348 (D. Or. 1991). The *First Restatement* espoused this view. See RESTATEMENT (FIRST) OF JUDGMENTS § 68 cmt. n (1942). On the continuing vitality of this position in federal decisions despite the *Second Restatement's* contrary view, see *General Dynamics Corp. v. American Tel. & Tel. Co.*, 650 F. Supp. 1274, 1285 (N.D. Ill. 1986) ("The majority view is that all alternative, independent grounds upon which a court may base its decision should be regarded as necessary for purposes of collateral estoppel."); *Glictronix Corp. v. American Tel. & Tel. Co.*, 603 F. Supp. 552, 566 (D.N.J. 1984) ("The clear majority view is that a judgment is conclusive as to all issues that support all independent grounds on which the judgment may be based."); 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4421, at n.20 (1981 & Supp. 1997).

105. See, e.g., *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 453-54 (8th Cir. 1997); *Lisa Lee Mines v. Director, Office of Workers' Compensation Programs*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 763 (1997); *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir. 1994) (applying North Dakota law); *Arab African Intl. Bank v. Epstein*, 958 F.2d 532, 535 (3d Cir. 1992) (applying New Jersey law), *revd. on other grounds*, 10 F.3d 168 (3d Cir. 1993); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993 (4th Cir.

3. Guilty Pleas

A criminal conviction can carry issue-preclusive effect in a subsequent civil case. But what if the conviction was based on a guilty plea, rather than trial and verdict? The issue can arise in an intentional tort personal injury or wrongful death suit following a defendant's plea of guilty to assault or homicide. It also can arise in a civil fraud suit following a criminal fraud guilty plea. But it arises most often in insurance coverage litigation; an insurer denies coverage based on a "criminal act" or "intentional act" exclusionary clause in the insurance policy, and the insurer asserts that a guilty plea already has conclusively established the criminal act.¹⁰⁶

In the federal courts, guilty pleas carry issue-preclusive effect.¹⁰⁷ A number of states agree, including Colorado,¹⁰⁸ Iowa,¹⁰⁹ Michigan,¹¹⁰ New York,¹¹¹ and Oregon.¹¹² Other states, however, follow the *Second Restatement*¹¹³ in refusing to give issue-preclusive effect to a guilty plea, reasoning that issue preclusion applies only to issues that have been actually litigated. These include Califor-

1987); *Marathon Oil Co. v. Babbitt*, 938 F. Supp. 575, 579 & n.9 (D. Alaska 1996); *Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524, 526 (N.D. 1989); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982).

106. See, e.g., *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374 (5th Cir. 1997); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289 (Iowa 1982); *Aetna Cas. & Sur. Co. v. Niziolek*, 481 N.E.2d 1356 (Mass. 1985); *State Farm Fire & Cas. Co. v. Sallak*, 914 P.2d 697 (Or. Ct. App.), review denied, 920 P.2d 551 (Or. 1996).

107. See *Fullerton*, 118 F.3d at 384; *Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983); *Fontneau v. United States*, 654 F.2d 8, 10 (1st Cir. 1981); *United States v. Bejar-Matecios*, 618 F.2d 81, 83-84 (9th Cir. 1980).

108. See *Colorado Farm Bureau Mut. Ins. Co. v. Snowbarger*, 934 P.2d 909, 911 (Colo. Ct. App. 1997).

109. See *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 291-96 (Iowa 1982).

110. See *State Farm Fire & Cas. Co. v. Johnson*, 466 N.W.2d 287, 289 (Mich. Ct. App. 1990).

111. See *Merchants Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97 (App. Div. 1984); *Drexel Burnham Lambert Group v. Vigilant Ins. Co.*, 595 N.Y.S.2d 999, 1007-09 (Sup. Ct. 1993).

112. See *State Farm Fire & Cas. Co. v. Sallak*, 914 P.2d 697, 700 (Or. Ct. App.), review denied, 920 P.2d 551 (Or. 1996).

113. RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (1982) (noting that issue preclusion "does not apply where the criminal judgment was based on a plea of *nolo contendere* or a plea of guilty"). But see *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 379 (5th Cir. 1997) (noting that the *Second Restatement* explicitly leaves open the possibility of "evidentiary estoppel" to prevent defendant from later contesting elements underlying guilty plea).

nia,¹¹⁴ Massachusetts,¹¹⁵ New Jersey,¹¹⁶ and many others.¹¹⁷ Because this divergence pits federal preclusion law against much state law and the *Second Restatement*,¹¹⁸ it is particularly ripe for federal-state interjurisdictional preclusion problems.

4. Louisiana

Louisiana historically took an exceedingly narrow view of claim preclusion and simply did not recognize issue preclusion. In keeping with its Napoleonic civil law tradition, Louisiana's codified "civilian *res judicata*" provided for claim preclusion only when the plaintiff sought the same relief and asserted the same cause of action.¹¹⁹ In other words, a plaintiff could not reassert the very same lawsuit, but otherwise claim preclusion and issue preclusion were essentially nonexistent. Naturally, interjurisdictional cases arose in which the outcome depended on choice of preclusion law.¹²⁰

In 1991, a new statute went into effect in Louisiana that substantially broadens Louisiana's doctrine of claim preclusion and establishes the doctrine of issue preclusion in that state for the first time. The statute establishes a transactional test for claim preclusion, along the lines of federal law and the *Restatement (Second) of Judgments*.¹²¹ As to issue preclusion, the statute provides that: "A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment."¹²² Because issue preclusion is so new in Louisiana,¹²³ it is difficult to predict whether it will develop along the lines

114. See *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 375 P.2d 439, 441 (Cal. 1962).

115. See *Aetna Cas. & Sur. Co. v. Niziolek*, 481 N.E.2d 1356, 1362-64 (Mass. 1985).

116. See *Eaton v. Eaton*, 575 A.2d 858 (N.J. 1990); *Prudential Property & Cas. Ins. Co. v. Kollar*, 578 A.2d 1238 (N.J. Super. Ct. App. Div. 1990).

117. See *Niziolek*, 481 N.E.2d at 1363 n.6 (citing cases from 39 states holding that guilty pleas, while admissible in evidence, are not conclusive as a matter of issue preclusion).

118. See *Fullerton*, 118 F.3d at 378, 381 (noting that case law from other jurisdictions "is divided roughly evenly on the question" and that "nothing approaching a consensus has emerged").

119. See, e.g., *Mitchell v. Bertolla*, 340 So. 2d 287, 289-90 (La. 1976); *Fitch v. Vintage Petroleum, Inc.*, 608 So. 2d 286, 288-89 (La. Ct. App. 1992).

120. See, e.g., *Williams v. Divittoria*, 760 F. Supp. 564, 566-67 (E.D. La. 1991) (applying pre-1991 Louisiana law to reject claim preclusion and issue preclusion); *Pilié & Pilié v. Metz*, 547 So. 2d 1305, 1308-09 (La. 1989) (applying federal law to preclude).

121. See LA. REV. STAT. ANN. § 13:4231(1)-(2) (West 1991); *infra* text accompanying notes 135-37.

122. LA. REV. STAT. ANN. § 13:4231(3).

123. The statute applies only to cases filed after January 1, 1991. See 1990 La. Acts 521, § 5; *Steptoe v. Lallie Kemp Hosp.*, 634 So. 2d 331, 335 (La. 1994). Only a handful of issue preclusion cases invoking the statute have made their way into reported decisions. See, e.g.,

of federal preclusion law and the *Second Restatement* or will develop with Napoleonic idiosyncrasies. The early cases under the new statute suggest that some Louisiana judges may be reluctant to use their new preclusion tools.¹²⁴ On the question of mutuality, the statutory language — “in any subsequent action *between them*”¹²⁵ — appears to require strict mutuality for issue preclusion, but that too remains to be seen.

5. Finality

Finally, both issue preclusion and claim preclusion require that the initial action have resulted in a final judgment.¹²⁶ How final is final, however, is a point of disagreement. Federal preclusion law provides that judgments are final pending appeal.¹²⁷ The *Second Restatement* agrees with the federal position that judgments are entitled to claim-preclusive and issue-preclusive effect upon entry of the judgment, regardless of whether the time to appeal has run, and even if an appeal is pending.¹²⁸ Several states, however, disagree.

First Natl. Bank v. Smith, 691 So. 2d 355, 357-58 (La. Ct. App. 1997); Goodman v. Spillers, 686 So. 2d 160, 166-67 (La. Ct. App. 1996), *writ denied*, 692 So. 2d 393 (La. 1997), *writ denied*, 692 So. 2d 400 (La. 1997); Oliver v. Department of Pub. Safety and Corrections, 669 So. 2d 570, 572 (La. Ct. App.), *writ denied*, 674 So. 2d 262 (La. 1996). None of the cases has raised the question of nonmutual issue preclusion.

124. In *Brouillard v. Aetna Casualty & Surety Co.*, 657 So. 2d 231, 232-33 (La. Ct. App. 1995), the court relied on a statutory “exceptional circumstances” exception to deny claim preclusion in a second suit by an injured party against the premises insurer. The court explained, “The doctrine of *res judicata* is interpreted *stricti juris*, and any doubt regarding compliance with its requirements is to be resolved in favor of the plaintiff.” 657 So. 2d at 233; *see also* *Jenkins v. Louisiana*, 615 So. 2d 405, 406-07 (La. Ct. App. 1993) (relying on the exceptional circumstances exception to deny claim preclusion, over a persuasive dissent that no exceptional circumstances were presented). Another Louisiana court apparently was not even aware of the new statute adopting issue preclusion. In a case filed after the statute’s effective date, the court held that collateral estoppel cannot apply because “Louisiana law, for whatever reason, has steadfastly refused to accept that doctrine.” *Diez v. Daigle*, 686 So. 2d 966, 969 (La. Ct. App. 1996); *see also* *Spillers*, 686 So. 2d at 167 (La. Ct. App. 1996) (declining to apply issue preclusion on the facts presented and stating that “[t]he doctrine of *res judicata* cannot be invoked unless *all essential elements are present and established beyond all question*”).

125. LA. REV. STAT. ANN. § 13:4231(3) (emphasis added).

126. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 & cmt. k (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

127. *See* *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983) (“Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.”); *see also* *Reed v. Allen*, 286 U.S. 191, 199 (1932) (“[W]here a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata*, although the first judgment be subsequently reversed.”).

128. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982) (“The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial *de novo*.”).

In California,¹²⁹ Georgia,¹³⁰ Oklahoma,¹³¹ Tennessee,¹³² Utah,¹³³ and Washington,¹³⁴ a judgment is not final for purposes of preclusion until either resolution of the appeal or expiration of the time for appeal. Thus, if a judgment has been appealed, it will have preclusive effect under the law of certain jurisdictions but not under the law of other jurisdictions.

6. *Same Claim*

The essential tenet of claim preclusion is that one cannot litigate the same claim twice. But what does "same claim" mean? Courts have developed various tests for determining whether the claim a litigant seeks to assert in the second lawsuit is the same as the claim asserted in the initial lawsuit.

The modern trend, supported by the *Second Restatement*, is to apply a broad transactional test: a claim is precluded by a prior judgment if the actions arise out of the same underlying transaction or series of transactions.¹³⁵ The federal courts¹³⁶ and many state courts¹³⁷ apply transactional tests along these lines.

129. See CAL. CIV. PROC. CODE § 1049 (West 1980) (providing that "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied"); *Kuykendall v. State Bd. of Equalization*, 27 Cal. Rptr. 2d 783, 789 (Ct. App. 1994); *Sandoval v. Superior Court*, 190 Cal. Rptr. 29, 32 (Ct. App. 1983) ("California law is settled that pending appeal a trial court judgment is not final and will not be given *res judicata* effect.").

130. See GA. CODE ANN. § 9-12-19 (1993); *Reid v. Reid*, 411 S.E.2d 754, 756 (Ga. Ct. App. 1991); *Lexington Developers, Inc. v. O'Neal Constr. Co.*, 238 S.E.2d 770, 771 (Ga. Ct. App. 1977) ("In Georgia a judgment is suspended when an appeal is entered within the time allowed. And the judgment is not final as long as there is a right to appellate review." (citations omitted)).

131. See *Grider v. USX Corp.*, 847 P.2d 779, 784 n.1 (Okla. 1993) ("[A]n order is not 'final' . . . for *res judicata* purposes, if a timely appeal of its correctness still pends."); *Benham v. Plotner*, 795 P.2d 510, 512 (Okla. 1990).

132. See *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn. Ct. App. 1991) ("It is generally agreed that a judgment is not final and *res judicata* where an appeal is pending.").

133. See *Chavez v. Morris*, 566 F. Supp. 359, 360 (D. Utah 1983); *Young v. Hansen*, 218 P.2d 674, 675 (Utah 1950) ("[A] judgment is not final pending appeal and hence not admissible as a bar to another action."). But see *Sandy City v. Salt Lake County*, 827 P.2d 227, 230-31 (Utah 1992) (recognizing a split concerning finality pending appeal but declining to decide the issue because it was unnecessary to the court's holding).

134. See *Chau v. City of Seattle*, 802 P.2d 822, 825 (Wash. Ct. App. 1990) ("Normally, finality [for purposes of issue preclusion] is conclusively established by a judgment on the merits either by affirmation on appeal, or by expiration of the time to appeal.").

135. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

136. See, e.g., *Apparel Art Intl., Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (1st Cir. 1995); *Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir. 1990); *Inre Energy Coop. Inc.*, 814 F.2d 1226, 1230-31 (7th Cir. 1987).

137. See, e.g., *Aldape v. Akins*, 668 P.2d 130, 134-35 (Idaho Ct. App. 1983); *Beegan v. Schmidt*, 451 A.2d 642, 644-46 (Me. 1982).

Some state courts, however, have not adopted the broad definition of a claim urged by the *Second Restatement*. Using various phrasings, these courts have required a more particular connection between the current claim and the prior claim than the connection that the claims arose out of the same underlying factual circumstances. Some look to whether the "same evidence" would suffice to prove the prior and current claims.¹³⁸ Others ask whether the same "primary rights" are involved in the two actions.¹³⁹ While these phrasings allow ample room for reaching different conclusions in particular cases, and courts sometimes apply them much like the transactional test, in general these phrasings suggest a narrower view of claim preclusion than the transactional test of the *Second Restatement*.

The classic example comparing the broad and narrow definition of a claim involves a plaintiff's assertion of personal injury and property damage in separate lawsuits, usually following a motor vehicle accident. Under federal and majority law, the later suit is precluded because the claims arise out of the same transaction.¹⁴⁰ A few states, however, treat personal injury and property damage as separate claims and thus allow their assertion in separate lawsuits.¹⁴¹

7. *On the Merits*

Claim preclusion also generally requires the prior judgment to have been "on the merits."¹⁴² No one disputes that a judgment

138. See, e.g., *Benetton S.p.A. v. Benedot, Inc.*, 642 So. 2d 394, 399-402 (Ala. 1994); *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-30 (Ill. 1993) (denying claim preclusion under the "same evidence" test); *Agriserve, Inc. v. Belden*, 643 N.E.2d 1193, 1194 (Ill. App. Ct. 1994) (granting claim preclusion under the "same evidence" test); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 441-45 (Iowa 1996) (denying claim preclusion under the "same evidence" test); see also RESTATEMENT (FIRST) OF JUDGMENTS § 61 (1942) (generally adopting the "same evidence" test).

139. See, e.g., *Takahashi v. Board of Educ.*, 249 Cal. Rptr. 578, 584-85 (Ct. App. 1988).

140. See, e.g., *Parrell v. Keenan*, 452 N.E.2d 506 (Mass. 1983); *Rush v. City of Maple Heights*, 147 N.E.2d 599 (Ohio 1958); *Peterson v. Temple*, 918 P.2d 413 (Or. 1996).

141. See, e.g., *Holmes v. David H. Bricker, Inc.*, 452 P.2d 647, 649 (Cal. 1969); *State Farm Mut. Auto. Ins. Co. v. Davis*, 176 Cal. Rptr. 517, 520 (App. Dept. Super. Ct. 1981); *American States Ins. Co. v. Walker*, 477 S.E.2d 360, 364 (Ga. Ct. App. 1996) (relying on a Georgia statute defining motor vehicle personal injuries and property injuries as separate causes of action); *Childers v. F.A.F. Motor Cars, Inc.*, 319 S.E.2d 90, 91 (Ga. Ct. App. 1984) (same); *Stephan v. Yellow Cab Co.*, 333 N.E.2d 223, 226 (Ill. App. Ct. 1975); see also *Olsen v. Breeze, Inc.*, 55 Cal. Rptr. 2d 818, 826-27 (Ct. App. 1996) (holding that under California's "primary rights" definition, personal injury and property damage are separate causes of action); *Andrea G. Nadel, Simultaneous Injury to Person and Property as Giving Rise to Single Cause of Action — Modern Cases*, 24 A.L.R.4TH 646 (1983 & Supp. 1997).

142. The *Second Restatement* avoids the phrase "on the merits" because it may be misunderstood to refer only to judgments passing directly on the substance of a claim. Judgments

entered after a full trial is on the merits. Nor would anyone dispute that a dismissal for lack of personal jurisdiction is not on the merits.¹⁴³ In borderline cases, however, jurisdictions diverge.

The leading “on the merits” divergence concerns dismissals for failure to state a claim. Under federal law, a dismissal for failure to state a claim¹⁴⁴ is treated as a judgment on the merits, unless the court specifies otherwise.¹⁴⁵ Many states agree,¹⁴⁶ but other states take the contrary position that such dismissals generally are not on the merits. Demurrers or dismissals for failure to state a claim are not on the merits — and therefore are not entitled to claim-preclusive effect unless the court specifies that the dismissal is with prejudice — in the states of California,¹⁴⁷ Connecticut,¹⁴⁸ Georgia,¹⁴⁹

not passing on the substance of a claim, such as default judgments or dismissals for failure to prosecute, may nevertheless carry claim-preclusive effect. See RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982).

143. Thus, if a Texas court dismisses a case against a New York defendant because Texas lacks personal jurisdiction over the defendant, the plaintiff can sue the defendant on the same claim in New York without fear of claim preclusion based on the Texas dismissal. Of course, this does not mean the plaintiff simply could sue again in Texas. If the plaintiff were to sue the defendant on the same claim again in Texas, the prior determination of lack of personal jurisdiction would be given binding effect under the doctrine of direct estoppel.

144. See FED. R. CIV. P. 12(b)(6).

145. See FED. R. CIV. P. 41(b) (“Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”); *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). To indicate that a dismissal is not on the merits, the court can label it “without prejudice” or grant leave to amend.

146. See RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d & reporter’s note (1982); 18 WRIGHT ET AL., *supra* note 104, § 4439.

147. Although California courts state the general rule that dismissals for failure to state a claim are on the merits, the exceptions in California appear to have displaced the rule. In *Kanarek v. Bugliosi*, 166 Cal. Rptr. 526 (Ct. App. 1980), for example, a California court stated that “a demurrer which is sustained for failure of the facts alleged to establish a cause of action, is a judgment on the merits. However, this is true only if the same facts are pleaded in the second action, or if, although different facts are pleaded, the new complaint contains the same defects as the former.” 166 Cal. Rptr. at 530 (citations omitted); *cf.* *Keidatz v. Albany*, 249 P.2d 264, 265 (Cal. 1952) (“If . . . new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint.”); *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806-07 (Cal. 1939) (stating that although a demurrer is on the merits, it does not bar a subsequent action where sufficient facts are alleged in the second suit). It thus appears that California gives only direct estoppel effect — rather than claim-preclusive effect — to dismissals based on a complaint’s insufficiency.

148. See *Gottlob v. Connecticut State Univ.*, No. CV 930521148S, 1996 WL 57087 (Conn. Super. Ct. Jan. 19, 1996); *Gupta v. New Britain Gen. Hosp.*, No. CV92 517506S, 1995 WL 216835 (Conn. Super. Ct. Apr. 3, 1995), *affd.*, 687 A.2d 111 (Conn. 1996).

149. See *Buie v. Waters*, 74 S.E.2d 883, 884-85 (Ga. 1953) (“[W]here a general demurrer that does not go to the merits of the cause of action is sustained, the judgment will not be res adjudicata in a subsequent suit between the same parties on the same cause of action.”); *Keith v. Darby*, 122 S.E.2d 463, 463 (Ga. Ct. App. 1961).

Illinois,¹⁵⁰ Maryland,¹⁵¹ Massachusetts,¹⁵² Minnesota,¹⁵³ New York,¹⁵⁴ and Oregon.¹⁵⁵ Whenever a court dismisses a complaint for failure to state a claim and does not specify whether the dismissal is with prejudice, the claim-preclusive effect depends upon whether the applicable preclusion law is that of the nine states mentioned above¹⁵⁶ or the preclusion law of some other jurisdiction.¹⁵⁷

150. See *In re Estate of Cochrane*, 391 N.E.2d 35, 36 (Ill. App. Ct. 1979) (holding that where the dismissal could have been based on either a pleading defect or a substantive lack of claim, "the respondents bear the burden of proving that the order dismissing the petition was based on the merits"). But see ILL. S. CT. R. 273 (following the language of FED. R. CRV. P. 41(b)).

151. See *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721, 726 (Md. 1972) ("A judgment or decree of dismissal after demurrer sustained because the plaintiff's pleading does not state a cause of action does not bar a new action on sufficient pleadings." (quoting 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 748 (5th ed. 1925))).

152. In Massachusetts, a demurrer is deemed on the merits only if the plaintiff is granted leave to amend and then fails to amend; otherwise, a demurrer generally is not on the merits and does not bar a second action for the same claim. See *Hacker v. Beck*, 91 N.E.2d 832, 834 (Mass. 1950); *Sullivan v. Farr*, 309 N.E.2d 508 (Mass. App. Ct. 1974); see also *O'Brien v. Hessman*, 114 N.W.2d 834 (Wis. 1962) (following a similar rule).

153. See *H. Christiansen & Sons, Inc. v. City of Duluth*, 31 N.W.2d 277, 279-80 (Minn. 1948) ("Judgment of dismissal on the merits based upon the trial court's order sustaining defendant's general demurrer of course does not constitute a bar to a subsequent action by plaintiff based upon a complaint for the same cause, but alleging facts which . . . set forth a valid cause of action."); *Rost v. Kroke*, 262 N.W. 450, 451 (Minn. 1935) ("[I]f the plaintiff fails on demurrer in his first action from the omission of an essential allegation . . . the judgment in the first suit is no bar to the second . . . for the reason that the merits of the cause . . . were not heard and decided in the first action.").

154. See *Amsterdam Sav. Bank v. Marine Midland Bank*, 528 N.Y.S.2d 184 (App. Div. 1988); *Allston v. Incorporated Village of Rockville Centre*, 267 N.Y.S.2d 564, 565-66 (App. Div. 1966) ("[D]ismissal . . . for failure to state facts sufficient to constitute a cause of action . . . is not on the merits and does not bar another action brought for the same cause." (citations omitted)).

155. See *Briggs v. Bramley*, 177 F. Supp. 599, 600 (D. Or. 1959) (relying in part on Oregon preclusion law and holding that "[a] judgment rendered because of defective pleadings is not considered to be a judgment on the merits within the operation of the *res judicata* doctrine"); *O'Hara v. Parker*, 39 P. 1004, 1005 (Or. 1895).

156. Although these states adhere to the "minority view," they do not represent a trivial component of U.S. law practice. These nine states contain over 40% of the nation's active lawyers. See AMERICAN BAR ASSN., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 15-16 (1992) (listing the estimated total number of active resident attorneys in each jurisdiction as of December 1990-January 1991).

157. In *Gottlob v. Connecticut State University*, No. CV 930521148S, 1996 WL 57087 (Conn. Super. Ct. Jan. 19, 1996), for example, the plaintiff first sued in federal court on a First Amendment claim, and the complaint was dismissed for failure to state a claim. See *Gottlob*, 1996 WL 57087, at *4. The plaintiff, undaunted, sued in Connecticut state court. The state court, following Connecticut preclusion law, held that the federal dismissal was not on the merits and therefore no bar to the subsequent action. See *Gottlob*, 1996 WL 57087, at *4.

Dismissals for failure to prosecute are treated as "on the merits" under federal law unless the dismissal order specifies otherwise,¹⁵⁸ but some states do not give preclusive effect to such dismissals.¹⁵⁹

8. Counterclaims

In the federal courts, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the opposing party's claim.¹⁶⁰ If a party fails to assert a compulsory counterclaim, the party is precluded from asserting that claim in a separate lawsuit.¹⁶¹ Most states have adopted compulsory counterclaim rules virtually identical to the federal rule.¹⁶²

Nine states, however, have no compulsory counterclaim rule.¹⁶³ They are Connecticut,¹⁶⁴ Illinois,¹⁶⁵ Maryland,¹⁶⁶ Nebraska,¹⁶⁷ New

158. See FED. R. CIV. P. 41(b); *Horwitz v. Alloy Automotive Co.*, 992 F.2d 100, 104 (7th Cir. 1993); *Landon v. Hunt*, 977 F.2d 829, 832-33 (3d Cir. 1992).

159. See, e.g., *McCarter v. Mitcham*, 883 F.2d 196, 199-200 (3d Cir. 1989) (applying Pennsylvania law); *Harl v. City of La Salle*, 679 F.2d 123, 125-28 & n.4 (7th Cir. 1982) (applying Illinois law). In *Harl*, the federal courts allowed a subsequent claim after an Illinois state court dismissal for failure to prosecute, because Illinois law does not deem such dismissals to be on the merits. See 679 F.2d at 125-28 & n.4 (citing *O'Reilly v. Gerber*, 420 N.E.2d 425 (Ill. App. Ct. 1981)). In *Jenkins v. State*, 615 So. 2d 405 (La. Ct. App. 1993), the plaintiff's action was removed from Louisiana state court to federal court, the plaintiff's motion to remand failed, and the suit ultimately was dismissed from federal court for failure to prosecute. The plaintiff refiled in Louisiana state court. The state court held that the federal dismissal did not bar the subsequent state court action, under Louisiana's "exceptional circumstances" statutory exception to *res judicata*. See 615 So. 2d at 405-06. Under federal preclusion law, it seems likely that the second suit would have been precluded.

160. See FED. R. CIV. P. 13(a).

161. See *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974). It is questionable whether the Rules Enabling Act, 28 U.S.C. § 2072 (1994), permits federal rules directly to govern preclusive effect. The claim-preclusive effect of the compulsory counterclaim rule can be understood as common law "defense preclusion" that incorporates the requirement of the compulsory counterclaim rule. See RESTATEMENT (SECOND) OF JUDGMENTS § 22(2) (1982); *Burbank*, *supra* note 1, at 771-75. For a discussion of the interjurisdictional treatment of compulsory counterclaim rules, see Rochelle Cooper Dreyfuss & Linda J. Silberman, *Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 123, 160-61 (1996).

162. See, e.g., CAL. CIV. PROC. CODE § 426.30 (West 1980); OHIO REV. CODE ANN. CIV. R. 13(A); TEX. R. CIV. P. 97. See generally John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

163. It is important to note that even without a specific rule governing compulsory counterclaims, some counterclaims can be subject to the common law of claim preclusion. See *Martino v. McDonald's Sys., Inc.*, 598 F.2d 1079, 1083 (7th Cir. 1979); *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-30 (Ill. 1993); *Henry Modell & Co. v. Minister*, 502 N.E.2d 978, 980 (N.Y. 1986).

164. See CONN. R. SUPER. CT. CIV. 116.

165. See ILL. CODE CIV. P. 5/2-608(a).

166. See MD. R. CIV. P. 2-331(a).

167. See NEB. R. CIV. P. 25-812, 25-813.

York,¹⁶⁸ Oregon,¹⁶⁹ Pennsylvania,¹⁷⁰ Virginia,¹⁷¹ and Wisconsin.¹⁷² Michigan has adopted a unique twist: No counterclaims are compulsory initially, but if a counterclaim is asserted, then the counterclaim pleader must join all other claims that arise out of the same transaction or occurrence as the original action.¹⁷³

Seven states have largely adopted the federal compulsory counterclaim rule but have added important exceptions. In Tennessee, tort counterclaims are not compulsory.¹⁷⁴ In Alabama, Mississippi, and Vermont, counterclaims are not compulsory if the plaintiff's claim is for damage covered by liability insurance and the insurer is entitled or obliged to conduct the defense.¹⁷⁵ Presumably, these three states reason that when a liability insurer handles the defense on behalf of the defendant, it is unfair to penalize the defendant for failing to assert a counterclaim because the defendant may have little involvement in the conduct of the litigation. In Maine and Rhode Island, counterclaims are not compulsory if the plaintiff's claim is for damages involving a motor vehicle.¹⁷⁶ Finally, a Massachusetts counterclaim is not compulsory if it is "based upon property damage arising out of a collision, personal injury, including actions for consequential damages, or death."¹⁷⁷

168. See N.Y. C.P.L.R. 3019(a) (McKinney 1991). The New York courts have emphasized, however, that res judicata sometimes can apply despite New York's lack of a compulsory counterclaim rule. See *Modell*, 502 N.E.2d at 980 ("While New York does not have a compulsory counterclaim rule, a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory." (citation omitted)).

169. See OR. R. CIV. P. 22(A)(1).

170. See PA. R. CIV. P. 1031(a), 1510(a); *Hunsicker v. Brearman*, 586 A.2d 1387, 1390 (Pa. Super. Ct. 1991) ("In Pennsylvania, unlike the federal system, there is no compulsory counterclaim rule." (quoting *Martin v. Poole*, 336 A.2d 363, 366 (Pa. Super. Ct. 1975))).

171. See VA. R. S. CT. 3:8.

172. See WIS. STAT. § 802.07(1) (1975). *But see Green Spring Farms v. Spring Green Farm Assocs.*, 492 N.W.2d 392, 395 (Wis. Ct. App. 1992) (holding that the "common-law compulsory counterclaim rule" applies if the second action would nullify the initial judgment).

173. See MICH. CT. R. 2.203(A)(1); see also *Oakley & Coon*, *supra* note 162, at 1403 n.208. Even in states without a compulsory counterclaim rule, a defendant who asserts a permissive counterclaim thereby subjects herself to the ordinary rules of claim preclusion, and must assert or forgo whatever else forms part of the "same claim" as the permissive counterclaim. But Michigan's rule differs from the other states in that Michigan's rule apparently requires a defendant, upon asserting a permissive counterclaim, to assert claims related to the *plaintiff's* original claim.

174. See TENN. R. CIV. P. 13.01.

175. See ALA. R. CIV. P. 13(a)(3); MISS. R. CIV. P. 13(a)(3); VT. R. CIV. P. 13(a)(3).

176. See ME. R. CIV. P. 13(a)(1); R.I. SUPER. CT. R. CIV. P. 13(a).

177. MASS. R. CIV. P. 13(a).

9. *Preservation of Objection to Claim-Splitting*

In Michigan, claim preclusion generally applies only if the party asserting preclusion objected to the omission of the claim in the original action. Michigan achieves this by a court rule establishing compulsory joinder of claims. Specifically, Michigan Court Rule 2.203(A) (“Compulsory Joinder”) provides that a pleading asserting a claim must assert every claim the party has against the opposing party arising out of the same transaction or occurrence,¹⁷⁸ and then states:

Failure to object in a pleading, by motion, or at a pretrial conference to improper joinder of claims or failure to join claims required to be joined constitutes a waiver of the joinder rules, and the judgment shall only merge the claims actually litigated. This rule does not affect collateral estoppel or the prohibition against relitigation of a claim under a different theory.¹⁷⁹

This unique rule makes explicit what is implicit everywhere else — that claim preclusion functions as a rule of compulsory joinder. It also puts the burden on the defendant to decide, at the time of the initial lawsuit, whether the plaintiff has transactionally related claims that should be asserted at the same time.¹⁸⁰

10. *The Entire Controversy Doctrine and the One-Action Rule*

The most peculiar state variation of res judicata is a bundle of New Jersey claim preclusion rules known as the “entire controversy doctrine.” The gnarly tree of the entire controversy doctrine grew from an acorn in New Jersey’s 1947 Constitution, which allowed the Superior Court’s Law and Chancery Divisions to grant both legal

178. See MICH. CT. R. 2.203(A)(1).

179. MICH. CT. R. 2.203(A)(2).

180. The rule’s effect may be described as hastening the moment of waivability of the defense of claim preclusion. In general, res judicata is an affirmative defense, waivable by the defendant at the time of the second action. See, e.g., FED. R. CIV. P. 8(c). Under the Michigan rule, waiver by the defendant can occur during the first action. See *Rogers v. Colonial Fed. Sav. & Loan Assn.*, 275 N.W.2d 499, 504 (Mich. 1979) (“The only innovative aspect of the rule’s waiver provision is that a defendant must now assert his or her objection during the first suit when there exists an opportunity for plaintiff to cure the non-joinder defect.”). Another way to describe the rule’s effect — probably more in line with litigators’ perceptions — is that at the time of the first action, it shifts the burden from the plaintiff to the defendant to decide what claims need to be asserted.

With this waiver rule — little known outside the state — Michigan has taken a sensible step toward reducing the unfairness and surprise that sometimes accompany claim preclusion. The waiver rule may be less significant than it appears, however, because Michigan courts have relied on the final sentence of Rule 2.203(A)(2) in applying claim preclusion to prevent “relitigation of a claim under a different theory.” See, e.g., *Falk v. State Bar*, 631 F. Supp. 1515, 1521-22 (W.D. Mich. 1986), *affd.*, 815 F.2d 77 (6th Cir. 1987); *Board of County Rd. Comms. v. Schultz*, 521 N.W.2d 847, 852 n.5 (Mich. Ct. App. 1994); *Jones v. State Farm Mut. Auto. Ins. Co.*, 509 N.W.2d 829, 836 n.5 (Mich. Ct. App. 1993).

and equitable relief "so that all matters in controversy between the parties may be completely determined."¹⁸¹ The doctrine has evolved into a broad set of claim preclusion rules that require a litigant to assert all transactionally related claims in a single action. As to joinder of claims or counterclaims among present parties, the doctrine largely mirrors federal claim preclusion doctrine and the federal compulsory counterclaim rule. The entire controversy doctrine, however, goes further. Not only are related counterclaims compulsory, but so are related *cross-claims* against coparties.¹⁸² More significant, if a plaintiff fails to assert a related claim against a nonparty, that claim later may be precluded.¹⁸³ Thus, the entire controversy doctrine imposes mandatory party joinder, enforced through claim preclusion.

The entire controversy doctrine has figured prominently in interjurisdictional preclusion cases. Consider the case of *Mortgagelinq Corporation v. Commonwealth Land Title Insurance Company*.¹⁸⁴ Plaintiffs Mortgagelinq, a mortgage lender, and the Federal Home Loan Mortgage Corporation (Freddie Mac), the as-

181. N.J. CONST. art. VI, § 3, ¶ 4.

182. See N.J. CR. R. 4:7-5(a) (making cross-claims "subject to the mandatory joinder provisions of R. 4:30A"); *Wm. Blanchard Co. v. Beach Concrete Co.*, 375 A.2d 675, 684 (N.J. Super. Ct. App. Div. 1977). Under the federal rules, by contrast, there are compulsory counterclaims but no compulsory cross-claims. Compare FED. R. CIV. P. 13(a) (compulsory counterclaims) with FED. R. CIV. P. 13(g) (permissive cross-claims).

183. See *Cogdell v. Hospital Ctr.*, 560 A.2d 1169, 1178 (N.J. 1989) ("[W]e now hold that to the extent possible courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces not only joinder of related claims between the parties but also joinder of all persons who have a material interest in the controversy."). The entire controversy doctrine's mandatory party joinder component has since been codified as a civil practice rule, but its development is left largely to case law. See N.J. CR. R. 4:30A ("Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . ."). This preclusion-based mandatory party joinder doctrine supplements a more familiar mandatory party joinder rule for necessary parties along the lines of Federal Rule of Civil Procedure 19. See N.J. CR. R. 4:28-1.

The New Jersey Supreme Court recently indicated a willingness to reconsider the merits of such mandatory party joinder and asked the state's Civil Practice Committee to make recommendations concerning the doctrine. See *Olds v. Donnelly*, 696 A.2d 633, 643-46 (N.J. 1997).

184. 662 A.2d 536 (N.J. 1995). The *Mortgagelinq* case has spawned a significant body of commentary, most of it — appropriately, in my view — highly critical. See, e.g., Burbank, *supra* note 18, at 90-91; Dreyfuss & Silberman, *supra* note 161, at 137; Jonathan Neal Marcus, Survey, *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 26 SETON HALL L. REV. 485, 489-90 (1995). Even in a wholly domestic context, the entire controversy doctrine's mandatory party joinder has been widely criticized by the bar, the bench, and the academy. See, e.g., *Editorial: Entire Controversy*, *supra* note 69. The most compelling argument against it was offered by Professor Allan Stein. See Allan R. Stein, *Commentary: Power, Duty and the Entire Controversy Doctrine*, 28 RUTGERS L.J. 27 (1996).

signee of some of the loans,¹⁸⁵ sued several Pennsylvania defendants for fraud in federal court in the Eastern District of Pennsylvania. While that federal action was pending, the plaintiffs filed an action in New Jersey state court against several New Jersey title insurers who allegedly were involved in the fraudulent scheme.¹⁸⁶ The New Jersey court applied the entire controversy doctrine and dismissed *Mortgagelinq's* and Freddie Mac's claims against the New Jersey defendants. The dismissal was upheld by the New Jersey Supreme Court.¹⁸⁷ Had the second action been filed in federal court, or had the New Jersey courts applied federal preclusion law, the claims against the New Jersey defendants would not have been precluded, because federal preclusion law does not include mandatory party joinder.¹⁸⁸

The only other state to incorporate mandatory party joinder into its preclusion law¹⁸⁹ is Kansas. Kansas's version — known as the “one-action rule”¹⁹⁰ — is milder than the New Jersey version, in that the Kansas one-action rule applies only in comparative negligence cases.¹⁹¹ In fact, the one-action rule is the Kansas Supreme Court's interpretation of the Kansas comparative negligence statute.¹⁹² In the absence of a prior comparative fault determination, the rule does not apply.¹⁹³ Like New Jersey's entire controversy doctrine, the Kansas one-action rule includes not only mandatory

185. Freddie Mac was not an original plaintiff, but intervened as a plaintiff in the Eastern District of Pennsylvania suit. See *Mortgagelinq*, 662 A.2d at 538.

186. See 662 A.2d at 538.

187. See 662 A.2d at 539-42.

188. For other interjurisdictional preclusion cases raising the entire controversy doctrine, see *Giudice v. Drew Chem. Corp.*, 509 A.2d 200 (N.J. Super. Ct. App. Div.), *cert. granted and summarily remanded on other grounds*, 517 A.2d 448 (N.J. 1986); *Gross v. Cohen DuFour & Assocs.*, 642 A.2d 1074 (N.J. Super. Ct. Law Div. 1993); *Kimmins Abatement Corp. v. Cones-toga-Rovers & Assocs.*, 601 A.2d 256 (N.J. Super. Ct. Law Div. 1991).

189. One might question whether New Jersey's entire controversy doctrine and Kansas's one-action rule are truly rules of “preclusion” rather than rules of “joinder” or some other label. This article's discussion encompasses any rule — regardless of label — by which consideration of claims or issues may be foreclosed based on a prior adjudication.

190. Some refer to it as the “one-trial rule.” See, e.g., *Griffin & Reitz*, *supra* note 36, at 27; see also *Mick v. Mani*, 766 P.2d 147, 156 (Kan. 1988) (asserting that “the one-action rule should, perhaps, more accurately be described as the one-trial rule”).

191. See *Mick*, 766 P.2d 147; *Albertson v. Volkswagenwerk Aktiengesellschaft*, 634 P.2d 1127 (Kan. 1981).

192. See KAN. STAT. ANN. § 60-258a (1987); *Mick*, 766 P.2d at 150-51 (reviewing the one-action rule's development as a reading of the Kansas legislature's intent in enacting § 60-258a).

193. See *Mick*, 766 P.2d at 156 (“[A] plaintiff may pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault.”).

joinder of parties, but also mandatory cross-claims among co-parties.¹⁹⁴

*Tersiner v. Gretencord*¹⁹⁵ provides an example of an interjurisdictional application of the one-action rule. Plaintiff Tersiner slipped and fell at a service station while on the job.¹⁹⁶ He sued his employer, Union Pacific Railroad, in a Federal Employers' Liability Act claim in federal court.¹⁹⁷ The federal court did not allow Tersiner to assert a pendent party claim against Gretencord, the owner of the service station, but it allowed Union Pacific to maintain a third-party claim against Gretencord for comparative implied indemnity under Kansas law.¹⁹⁸ The jury apportioned fault among Tersiner (66%), Union Pacific (17%), and Gretencord (17%).¹⁹⁹ The court entered judgment for Tersiner against Union Pacific but rejected Union Pacific's comparative indemnity claim against Gretencord.²⁰⁰ Subsequently, Tersiner sued Gretencord for negligence in Kansas state court. The Kansas court dismissed the claim under the one-action rule, holding that despite Tersiner's inability to pursue his claim against Gretencord in the federal action, that claim now was precluded because there had been a comparative fault determination.²⁰¹ "Tersiner had a strategic election to make," the appellate court explained in affirming the dismissal; rather than

194. See KAN. CIV. PROC. CODE ANN. § 60-213(g) (West 1994) ("Compulsory Cross-Claim Against Co-party. In an action involving a claim governed by K.S.A. 60-258a and amendments thereto, a party shall state as a cross-claim any claim that party has against any co-party arising out of the transaction or occurrence that is the subject matter of the claim governed by K.S.A. 60-258a and amendments thereto."); *Teepak, Inc. v. Learned*, 699 P.2d 35 (Kan. 1985).

195. 840 P.2d 544 (Kan. Ct. App. 1992).

196. For underlying facts, see *Tersiner v. Union Pac. R.R. Co.*, No. 90-3361, 1991 WL 225897 (10th Cir. Oct. 30, 1991) (unpublished opinion).

197. See *Tersiner v. Union Pac. R.R. Co.*, 754 F. Supp. 177 (D. Kan. 1990), *affd.*, 947 F.2d 954 (10th Cir. 1991).

198. See 754 F. Supp. at 177-78. Tersiner's state law claim against Gretencord was dismissed for lack of subject matter jurisdiction. See 754 F. Supp. at 177-78.

199. See 754 F. Supp. at 178.

200. See 754 F. Supp. at 178-79.

201. See *Tersiner v. Gretencord*, 840 P.2d 544, 546-47 (Kan. Ct. App. 1992). The court emphasized that "Gretencord is not contending Tersiner's claim is barred by res judicata or collateral estoppel, but by the provisions of the Kansas Comparative Negligence Act." 840 P.2d at 546. It nevertheless appears that issue preclusion (collateral estoppel) would have provided an alternative basis for defeating Tersiner's claim against Gretencord. Tersiner and Gretencord were both parties to the prior federal action and thus were bound by the jury's determination of fault. If that factual determination, as a matter of issue preclusion, were taken as conclusive in the subsequent suit, then Tersiner's claim would fail under Kansas comparative fault law, which allows recovery only if the plaintiff is less than 50% at fault. See KAN. STAT. ANN. § 60-258a (1987) ("The contributory negligence of any party in a civil action shall not bar such party . . . from recovering damages for negligence . . . if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made . . ."). Because the federal jury found Tersiner 66% at fault, issue preclu-

lose his claim against Gretencord, “[h]e could have dismissed his federal action and instituted a claim against both the railroad and Gretencord in state court.”²⁰²

III. CHOICE OF PRECLUSION LAW: LEGAL ANALYSIS

In light of the preclusion law divergences discussed above, we now turn to an analysis of whose preclusion law ought to apply in interjurisdictional preclusion cases — that is, cases in which F_2 , the forum of the lawsuit in which preclusion is asserted, differs from F_1 , the forum of the initial lawsuit in which the potentially preclusive judgment was rendered. Plausible sources of preclusion law might include the preclusion law of F_1 ,²⁰³ the preclusion law of F_2 ; the preclusion law of the jurisdictions whose substantive law governed at F_1 or at F_2 ; or the preclusion law of the state in which F_1 or F_2 sits, if either is a federal court sitting in diversity. It is my contention that the appropriate choice in nearly every circumstance is the preclusion law of F_1 . Before exploring these options, I briefly examine the legal foundation for interjurisdictional preclusion.

A. *Legal Foundation for Interjurisdictional Preclusion*²⁰⁴

The root of American interjurisdictional preclusion is the Full Faith and Credit Clause of the United States Constitution, which provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²⁰⁵ The Full Faith and Credit Clause, by referring to “judicial Proceedings,” requires each state to respect judgments rendered by other state courts. Pursuant to this constitutional clause, Congress in 1790 enacted the full faith and credit statute, requiring respect for the acts, records, and judicial proceedings of states, territories, and possessions of the United States.²⁰⁶

sion would destroy his subsequent state court claim, even in the absence of the one-action rule.

202. *Tersiner*, 840 P.2d at 547.

203. By “the preclusion law of F_1 ,” I am referring to F_1 ’s domestic preclusion law, and not, in conflict of laws parlance, to F_1 ’s “whole law,” which might incorporate by reference some other jurisdiction’s preclusion law.

204. This background has been covered well by others, see Burbank, *supra* note 1, at 739-40, 797-805; Degnan, *supra* note 1, at 742-45; a brief rendition should suffice for our purposes.

205. U.S. CONST. art. IV, § 1; see also *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4063 (U.S. Jan. 13, 1998) (describing the purpose of full faith and credit as to alter the status of the states as independent sovereigns “and to make them integral parts of a single nation” (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935))); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (emphasizing the importance of full faith and credit as a “nationally unifying force”).

206. The current version of the statute is codified at 28 U.S.C. § 1738.

In the state-state interjurisdictional configuration — in which F_1 is one state court and F_2 is a different state court — a judgment's binding effect is founded both on the Full Faith and Credit Clause and on the corresponding statute. In the state-federal configuration — in which F_1 is a state court and F_2 is a federal court — a judgment's binding effect is based on the statute alone, because the constitutional clause, by its terms, applies only to the effect of state court judgments in other state courts.²⁰⁷

What about the federal-state configuration? Are state courts obligated to give preclusive effect to the judgments of federal courts? The Full Faith and Credit Clause and statute do not impose such an obligation, but commentators have offered compelling arguments that state courts have a federal obligation to respect federal court judgments.

The Full Faith and Credit Clause speaks only of the judicial proceedings “of every other state” and mandates that full faith and credit be given “in each State.”²⁰⁸ By its terms, the constitutional clause does not address federal courts at all. The full faith and credit statute brings federal courts into the picture, but only as F_2 , the forum of the subsequent action, and not as F_1 , the forum of the prior action. The statute provides that

judicial proceedings [of any State, Territory, or Possession of the United States] . . . 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.²⁰⁹

Because federal courts are included in “every court within the United States,” the full faith and credit statute requires them to give full faith and credit to judicial proceedings. The judicial pro-

Aficionados of criminal procedure may wonder about the contrast between full faith and credit and double jeopardy. Full faith and credit mandates interjurisdictional preclusion, but there is no interjurisdictional double jeopardy. Under the “dual sovereignty doctrine,” the federal government can prosecute a defendant who has already been tried by a state for the same crime. Likewise, a state can prosecute despite a prior prosecution by the federal authorities. *See* *Abbate v. United States*, 359 U.S. 187 (1959) (state-federal); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (federal-state). Although the dual sovereignty doctrine appears to contradict the policy of full faith and credit, it can be understood simply as an instance of not binding a nonparty, rather than as a refusal to give interjurisdictional effect to judicial proceedings. The second prosecuting sovereign is not the same party as, nor in privity with, the first prosecuting sovereign. Under standard *res judicata* and full faith and credit principles, the second prosecuting government therefore would not be bound. Alternatively, the dual sovereignty doctrine can be understood as analogous to the *res judicata* principle that claim preclusion generally does not apply to claims that could not have been adjudicated in the prior forum.

207. *See* U.S. CONST. art. IV, § 1.

208. U.S. CONST. art. IV, § 1.

209. 28 U.S.C. § 1738 (1994).

ceedings to which full faith and credit must be given, however, include only those "of any State, Territory, or Possession of the United States," and not, according to the statutory language, judicial proceedings of the United States itself. Thus, the statute applies by its terms to state-state interjurisdictional preclusion and to state-federal preclusion, but not to federal-state preclusion.

Despite the clear language of the Full Faith and Credit Clause and its implementing statute, some early cases point to those authorities as the basis for federal-state preclusion.²¹⁰ Modern commentators uniformly discredit these cases, not for their result, but for their apparently unthinking misreading of the terms of the Full Faith and Credit Clause and statute.²¹¹ But still the cases stand, with their references to full faith and credit not yet overruled. If, on grounds of *stare decisis*, *Hancock National Bank* and the other early full faith and credit cases are treated as good law, problems of federal-state interjurisdictional preclusion are simplified somewhat. On the other hand, it is difficult to defend a statutory reading so

210. See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 129 (1912) (considering federal-state preclusion under the Full Faith and Credit Clause and statute and holding that a federal judgment "is entitled to the same sanction which would attach to a like judgment of a court of the State"); *Hancock Natl. Bank v. Farnum*, 176 U.S. 640, 645 (1900) (asserting, after invoking the constitutional and statutory full faith and credit rule for state-state preclusion, that "[t]he fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial"); *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U.S. 174, 185 (1896) (explaining that "the Constitution provides that full faith and credit shall be given" to federal court judgments); *Embry v. Palmer*, 107 U.S. 3, 9-10 (1883) (looking to the statute alone as a basis for federal-state preclusion); see also *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924) (citing *Hancock National Bank* and *Embry* for the rule of federal-state preclusion); *National Foundry & Pipe Works v. Oconto Water Supply Co.*, 183 U.S. 216, 233 (1902) (holding that a state tribunal's failure to give due effect to a federal court decree raised a federal question, citing, among other things, a state-state case in which preclusion was founded on the Full Faith and Credit Clause (citing *Jacobs v. Marks*, 182 U.S. 583, 587 (1901))).

More recently, a Louisiana court reluctantly gave issue-preclusive effect to a federal judgment because, in the court's view, that result was compelled by section 1738: "[U]nder the federal full faith and credit statute we are bound to follow collateral estoppel in the instant case. The statute, 28 U.S.C. § 1738, requires each state to give the same effect to the judgments of state and federal courts as those judgments have in the jurisdiction where rendered." *Shell Oil Co. v. Texas Gas Transmission Corp.*, 176 So. 2d 692, 696 (La. Ct. App. 1965); see also *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 n.1 (5th Cir. 1974) (noting that courts have read "into § 1738 a requirement that state courts extend full respect to the judgments of federal judicial tribunals within the states"); *Transamerica Trade Co. v. McCollum Aviation, Inc.*, 424 N.E.2d 740, 742 (Ill. App. Ct. 1981) ("Valid judgments of Federal courts, just as valid judgments of state courts, must be given full faith and credit" (citing U.S. CONST. art. IV and 28 U.S.C. § 1738 (1980))).

211. See, e.g., 18 WRIGHT ET AL., *supra* note 104, § 4466, at 621; *id.* § 4468, at 651 ("On the face of the statute, this conclusion is preposterous."); *Burbank*, *supra* note 1, at 740-47; *Lilly*, *supra* note 18, at 291, 315 ("On its face, Section 1738 applies only when the initial judgment is given in a state court. . . . [I]t is difficult to believe that if the question were squarely put today, the Supreme Court would find that the statute controlled federal judgments.").

plainly contrary to the text, particularly given the lack of attention to statutory or constitutional interpretation in the cases. While the cases stake out a clear and defensible legal position that state courts are bound to give due effect to federal court judgments, their reliance on full faith and credit takes the form of offhand cites to the clause and statute rather than careful attention to constitutional or statutory construction.²¹²

If the constitutional and statutory full faith and credit provisions do not apply, should federal-state preclusion be considered simply a matter of state law? No doubt each state tribunal, left to its own devices, ordinarily would choose to give due effect to federal judgments.²¹³ If a state court ever failed to do so, however, it is inconceivable that the United States Supreme Court would be powerless to reverse,²¹⁴ and commentators have offered sound explanations

212. See *Bigelow*, 225 U.S. at 129; *Hancock Natl. Bank*, 176 U.S. at 645; *Phoenix Fire & Marine*, 161 U.S. at 185; *Embry*, 107 U.S. at 9-10. One cure for the confusion surrounding state courts' obligation to respect federal judgments would be to amend 28 U.S.C. § 1738 to cover the federal-state configuration. See *infra* text accompanying note 350 (proposing such an amendment).

213. State courts take it as axiomatic that they must accord preclusive effect to federal court judgments. See, e.g., *Younger v. Jensen*, 605 P.2d 813, 822 (Cal. 1980); *Watkins v. Resorts Intl. Hotel & Casino*, 591 A.2d 592, 598 (N.J. 1991); *Bardo v. Commonwealth Dept. of Pub. Welfare*, 397 A.2d 1305, 1307 (Pa. Commw. Ct. 1979); see also *Degnan*, *supra* note 1, at 744-45 n.17 (citing early cases reciting this rule). Some states establish the binding effect of federal judgments by statute. See, e.g., CAL. CIV. PROC. CODE §§ 1908-1909 (West 1980); N.Y. C.P.L.R. 5401 (McKinney 1991) (defining "foreign judgment," for purposes of enforcement proceedings, as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state"). Interestingly, the New York provision appears to be based on an assumption that "full faith and credit" encompasses federal judgments.

214. In fact, despite the Court's unclear and unconvincing explanations in the early cases based on the Full Faith and Credit Clause and statute, the Court in those cases made one thing perfectly clear: a state court's failure to give preclusive effect to a federal judgment was reviewable by the U.S. Supreme Court and would result in reversal. See *Hancock Natl. Bank*, 176 U.S. at 645 ("We are of the opinion, therefore, that the Supreme Court of Rhode Island has failed to give to the judgment in the Circuit Court of the United States for the District of Kansas that force and effect which it has within the limits of the State of Kansas, and that the failure so to do is an error available in this court. *The judgment of the Supreme Court of Rhode Island must, therefore, be reversed . . .*"); *Embry*, 107 U.S. at 19 ("In restraining further proceedings upon [the federal judgment], the Supreme Court of Errors of [Connecticut] have not given it that due effect to which, under the authority of the Constitution and laws of the United States, it is entitled. In that respect there is manifest error in its decree, to the prejudice of the plaintiff in error, for which it must be reversed . . ."). If the U.S. Supreme Court has power to reverse a state court failure to respect a federal judgment, then federal-state preclusion must be an obligation under federal law, because the Supreme Court's jurisdiction to review state court decisions is limited to issues of federal law. See 28 U.S.C. § 1257 (1994); *Hagen v. Utah*, 510 U.S. 399, 409 (1994) (noting that the issue-preclusive effect of a federal judgment in a subsequent state court proceeding presents a federal question); *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499, 514-15 (1903) ("[W]hether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court . . ."). While I find the Court's reading of full faith and credit indefensible, I agree with the Court's implicit understanding that federal-state preclusion presents a federalism issue of constitutional dimensions.

for imposing a federal-state preclusion obligation on the states as a matter of federal law.

In his 1976 article, *Federalized Res Judicata*,²¹⁵ Professor Ronan Degnan powerfully advanced the argument that Article III of the United States Constitution obligates state courts to respect federal judgments, because the judicial power over cases and controversies implies the power to render a judgment that carries binding effect. "To decide a case or controversy implies some binding effect," Degnan argued; "[a] judgment or decree that lacked finality would constitute something other than an exercise of the judicial power."²¹⁶ He concluded that federal-state preclusion "will have to be placed forthrightly on the ground that the integrity of the federal judicial power is at stake."²¹⁷ Professor Charles Alan Wright, drawing on Degnan's ideas, summarizes the argument this way:

Article III limits the federal judicial power to cases and controversies. To decide a case or controversy implies some binding effect. Proceedings that do not have at least the potential effect of precluding later relitigation of the same claims and issues would constitute something other than the exercise of the judicial power. Once it is accepted that Article III and its implementing legislation have created courts with the power to issue judgments that will have preclusive effects in other litigation, the Supremacy Clause of Article VI mandates that those preclusive effects are binding on state courts.²¹⁸

Professors Degnan and Wright see the obligation of state courts to respect federal judgments as having its roots in the federal laws that give judicial power to the federal courts. The argument has attracted adherents,²¹⁹ and it finds support in at least one Supreme Court opinion. Even before the string of Supreme Court opinions relying inexplicably on the Full Faith and Credit Clause and statute,²²⁰ the Court, albeit somewhat cryptically, adopted the theory that Article III and the federal jurisdictional statutes imply an obli-

215. Degnan, *supra* note 1.

216. *Id.* at 768-69.

217. *Id.* at 772-73.

218. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 736-37 (5th ed. 1994) (citing Degnan, *supra* note 1, at 742-49, 768-69).

219. See RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. a (1982) (suggesting that the obligation derives from Article I and Article III); *Watkins v. Resorts Intl. Hotel & Casino*, 591 A.2d 592, 597 (N.J. 1991) (relying in part on Article III in finding an obligation to accord preclusive effect to a federal judgment); WRIGHT ET AL., *supra* note 104, § 4468, at 649 (accepting Article III as a basis for state courts' obligation to respect federal judgments); see also *Burbank*, *supra* note 1, at 753-55 & n.92 (acknowledging Article III's relevance "in imposing a basic obligation to respect federal judicial proceedings" but disagreeing with Degnan's reliance on Article III as a grant of power to federal courts to determine fully the preclusive effects of their judgments).

220. See *supra* text accompanying notes 210-12.

gation on state courts to give preclusive effect to federal judgments. In *Dupasseeur v. Rochereau*,²²¹ the Court held that a state court's failure to give effect to a federal court judgment constituted a federal question and thus triggered the jurisdiction of the Supreme Court:

Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which . . . may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction²²²

The *Dupasseeur* Court understood that the Full Faith and Credit Clause did not apply to a federal-state configuration and pointed out where it does apply: "The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to wit, the first section of article four"²²³

Professor Degnan's Article III argument might be challenged for failing to account for the preclusive effect of judgments rendered by non-Article III federal tribunals, such as U.S. Bankruptcy Courts,²²⁴ military courts,²²⁵ and the U.S. Tax Court.²²⁶ But

221. 88 U.S. (21 Wall.) 131 (1875).

222. 88 U.S. (21 Wall.) at 134.

223. 88 U.S. (21 Wall.) at 134.

224. See *Abdallah v. United Sav. Bank*, 51 Cal. Rptr. 2d 286, 290 (Ct. App. 1996) (giving claim-preclusive effect to a bankruptcy court order), *cert. denied*, 117 S. Ct. 746 (1997); *Williams v. Gerstenfeld*, 514 A.2d 1172, 1179 (D.C. 1986) (applying claim preclusion to bar claims that could have been asserted in prior bankruptcy court proceeding and stating that "[t]he ordinary principles of *res judicata* are applicable to bankruptcy decrees"); *Hochstadt v. Orange Broad.*, 588 So. 2d 51, 52-53 (Fla. Dist. Ct. App. 1991) (applying federal law to determine the issue-preclusive effect of a bankruptcy court determination that a debt had been fully paid).

225. See *Commonwealth v. Thompson*, 133 A.2d 207, 218 (Pa. 1957) (holding a military court conviction admissible in state court criminal trial and stating, "[w]e have no authority to inquire into or review the record of a court-martial; its judgment is conclusive on this and other civil courts"); *Commonwealth v. Smith*, 563 A.2d 905, 910-11 (Pa. Super. Ct. 1989) (upholding the use of a court-martial conviction for sentence enhancement but noting that several state courts disagree), *aff'd*, 598 A.2d 268 (Pa. 1991).

226. See *United States v. Bizanes (In re Estate of Bizanes)*, 109 N.W.2d 823, 825-26 (Mich. 1961) (holding a state probate court bound by U.S. Tax Court determination of tax deficiencies and explicitly rejecting the argument that *res judicata* does not apply because the tax court "is not a court, but an independent agency in the executive branch of the government"); *Tarutis v. Commissioner of Revenue*, 393 N.W.2d 667, 669 (Minn. 1986) (allowing a state court assertion of issue preclusion based on a U.S. Tax Court determination of the deductibility of farm losses); *Kostelanetz, Ritholz, Tigue & Fink v. Himmelwright*, 603 A.2d 168, 169-70 (N.J. Super. Ct. Law Div. 1991) (giving issue-preclusive effect, in a state court legal malpractice counterclaim, to a U.S. Tax Court determination of the unreliability of tax-

Degnan's logic extends to all tribunals established or empowered by federal law. Any federal law establishing tribunals and authorizing them to adjudicate implies some binding effect and thus obligates states to respect such adjudications.²²⁷

Federal law establishing and empowering tribunals gives those tribunals' judgments some binding effect. Federal law of claim preclusion and issue preclusion, as a matter of federal common law,²²⁸ governs the scope of that binding effect. Further, this bundle of federal law, governing the effect of federal judgments, binds the state courts under the Supremacy Clause.²²⁹

B. Choice of Preclusion Law

Finding an interjurisdictional obligation to respect judgments does not end the inquiry. To know the source of an obligation is not the same as knowing the content of that obligation. Whose law of claim preclusion and issue preclusion governs the interjurisdictional effect of a judgment?

In interjurisdictional preclusion cases, courts could plausibly consider applying the preclusion law of:

payer's income tax returns), *affd.*, 625 A.2d 488 (N.J. Super. Ct. App. Div. 1993); *Hanson v. Oregon Dept. of Revenue*, 653 P.2d 964, 967-69 (Or. 1982) (upholding a state tax court's application of issue preclusion based on a U.S. Tax Court judgment); *cf.* *Estate of Ravetti v. United States*, 37 F.3d 1393, 1395-96 (9th Cir. 1994) (explaining that a state court need not give preclusive effect to a U.S. Tax Court judgment if a state court litigant was not a party to the tax court's "innocent spouse" adjudication); *M.A. Crowley Trucking, Inc. v. Moyers*, 665 A.2d 1077, 1080 (N.H. 1995) (denying collateral estoppel effect of a U.S. Tax Court judgment because the issue was not actually litigated).

227. Analogously, the U.S. Supreme Court's jurisdiction to review certain state court judgments implies that the state courts are bound by the Supreme Court's determinations in those cases. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *see also* 28 U.S.C. § 1257 (1993) (granting the Supreme Court jurisdiction to review certain judgments rendered by "the highest court of a state").

228. *See Lilly*, *supra* note 18, at 316 & n.100; *cf.* *Burbank*, *supra* note 1, at 753-78 (analyzing the federal common law obligation to respect federal judgments but contending that state preclusion rules may sometimes provide the content of that obligation).

229. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Professor Burbank would break this Supremacy Clause analysis into two steps — source of obligation and source of rules: "A federal common law obligation to respect [federal court] judgments is binding under the supremacy clause. Moreover, to the extent that they provide the measure of that federal obligation, the rules adopted to govern the preclusive effects of federal judgments, whether furnished by federal or state law are also binding under the supremacy clause." Burbank, *supra* note 1, at 763; *see also* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEXAS L. REV. 1551, 1565-71 (1992). I contend that federal preclusion rules *do* furnish the measure of the federal obligation to respect federal judgments, an obligation made binding on the states through the Supremacy Clause.

- (1) F_1 ;
- (2) F_2 ;
- (3) the source of substantive law at F_1 ;
- (4) the source of substantive law at F_2 ;
- (5) the state in which F_1 sits, if F_1 was a federal court sitting in diversity; and
- (6) the state in which F_2 sits, if F_2 is a federal court sitting in diversity.

These options naturally divide into two sets: those that refer to F_1 and thus render choice of preclusion law determinable at the time of the initial action (the odd-numbered options), and those that refer to F_2 and thus make choice of preclusion law determinable only at the time of the subsequent action (the even-numbered options). As between these two sets of options, the essential question, discussed below in section III.B.1, is this: Is F_2 relevant at all, or should choice of preclusion law be determinable at F_1 ? If, as I argue, the answer is that F_2 is irrelevant and choice of preclusion law should follow purely an F_1 referent, then the next question, discussed below in section III.B.2, is whether a pure F_1 referent requires application of F_1 's preclusion law.

1. *A Pure F_1 Referent*

Should choice of preclusion law be determinable by looking solely at the initial lawsuit? The full faith and credit statute seems to say so. It requires all state, territorial, and federal courts to give state and territorial court judicial proceedings "the same full faith and credit" that those proceedings "have by law or usage in the courts of such State, Territory or Possession from which they are taken."²³⁰ Justice Story declared as early as 1813 that the full faith and credit statute required a federal court to apply New York preclusion law to determine the effect of a New York judgment.²³¹ As Professor Stephen Burbank has shown, the statute does not point directly to F_1 's preclusion law but rather indicates an F_1 referent — that is, application of whatever preclusion law the rendering jurisdiction itself would use to determine the judgment's effect.²³² F_2 's irrelevance, however, has by no means been universally accepted.

230. 28 U.S.C. § 1738 (1994). The full faith and credit statute specifically refers to "judicial proceedings of any court of any such State, Territory or Possession [of the United States]." 28 U.S.C. § 1738. This article often refers to configurations of state and federal courts. State courts, as used in this context, should be understood to include U.S. territorial courts as well.

231. See *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813) (Story, J.).

232. See Burbank, *supra* note 1, at 797-800.

a. Arguments Against a Pure F₁ Referent. Various arguments have been advanced against a pure F₁ referent in state-state and state-federal preclusion cases, notwithstanding the language of the full faith and credit statute. The same arguments have been asserted against a pure F₁ referent in federal-state preclusion cases, where they carry more force because of the full faith and credit statute's inapplicability. Some of the arguments focus on F₂ qua forum, urging that F₂ has interests at stake and should be empowered to apply its own preclusion law, at least to some extent. Other arguments focus on the interests of the source of law at F₂ or, in federal court diversity cases, on the state in which F₂ sits.

The two most important arguments against a pure F₁ referent — what I call the “greater preclusion” argument and the “core preclusion” argument — both concern the policy interests of F₂ as the forum. The forum of the second lawsuit has genuine interests at stake in claim preclusion and issue preclusion decisions. The second forum, by applying claim preclusion, preserves its judicial resources by refusing to adjudicate a claim that has already been decided.²³³ Similarly, by applying issue preclusion, the second forum preserves resources by taking certain already litigated issues as conclusively determined. The finality-based interests of claim and issue preclusion other than efficiency, such as repose for litigants and respect for the judicial system, belong more to F₁ than F₂. But F₂'s interest in its preclusion rules transcends judicial economy. Inasmuch as preclusion rules limit the availability of adjudication at F₂, they raise concerns about justice and access.²³⁴

i. Greater Preclusion. Based on these forum interests, some commentators have argued that F₂ is permitted to give a judgment *greater* preclusive effect than F₁ would give.²³⁵ The full faith and

233. Courts thus sometimes address the public interest in finality in terms of the particular docket-control concerns of F₂. Chief Judge Kaufman of the Second Circuit, for example, justified *res judicata* on grounds of “the interest of society and the courts in the final resolution of disputes. The explosion of federal dockets in recent years is so notorious as to require no comment. Judicial resources today are an increasingly scarce commodity, and it is of the utmost importance that litigants use them wisely.” *Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976). Cf. *United States v. Throckmorton*, 98 U.S. 61, 65 (1878) (“[I]nterest rei publicæ, ut sit finis litium”; it concerns the public that there be an end of litigation.).

234. These concerns primarily involve situations where F₂ would give *less* preclusive effect than F₁. Therefore, while they may support the core preclusion argument, they do not support the greater preclusion argument.

235. See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326-27 (1978); Eugene F. Scoles, *Interstate Preclusion by Prior Litigation*, 74 NW. U. L. REV. 742, 749-53 (1979); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEXAS L. REV. 1209, 1228-29, 1265 (1986); Allan D. Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 41, 52 (1963); Gregory S. Getschow, Comment, *If at First You Do Succeed:*

credit statute's insistence that courts give "the same full faith and credit" that the rendering court would give, according to this argument, means only that courts may not give *less* preclusive effect than the rendering court would give.

Courts occasionally act in explicit or tacit agreement with this argument. For example, in *Finley v. Kesling*,²³⁶ an Illinois court gave nonmutual issue-preclusive effect to a prior Indiana judgment despite Indiana's adherence to the mutuality requirement.²³⁷ Thus, the Illinois court gave the judgment greater preclusive effect than the rendering forum would have given. The Illinois court adopted the greater preclusive effect argument — that F₂ does not violate full faith and credit as long as it gives at least as much preclusive effect as F₁ would give.²³⁸

The *Mortgagelinq* case²³⁹ provides another example. There, the New Jersey state courts dismissed claims pursuant to the entire controversy doctrine,²⁴⁰ even though the rendering forum — the Federal District Court for the Eastern District of Pennsylvania — would not have held the claims precluded.²⁴¹ Again, the greater preclusive effect argument supports New Jersey's application of its own preclusion doctrine, because the New Jersey courts gave more, not less, binding effect to the judgment.

The greater preclusion argument should be rejected, however, as it wrongly assumes that greater preclusion is none of F₁'s con-

Recognition of State Preclusive Laws in Subsequent Multistate Actions, 35 VILL. L. REV. 253, 265, 276-80 (1990); see also 18 WRIGHT ET AL., *supra* note 104, § 4467, at 644-48 (discussing but only partly endorsing the greater preclusion argument). The Supreme Court has used language supportive of this argument. See *Durfee v. Duke*, 375 U.S. 106, 109 (1963) ("Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it."). More recently, however, the Supreme Court seems to have rejected the greater preclusion argument. See *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4067-68 (U.S. Jan. 13, 1998) (Kennedy, J., concurring); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984).

236. 433 N.E.2d 1112 (Ill. App. Ct. 1982).

237. See 433 N.E.2d at 1114. The Illinois court questioned whether Indiana would continue to cling to the mutuality requirement but considered itself free to give nonmutual preclusive effect even if Indiana adhered to mutuality. See 433 N.E.2d at 1116-17.

238. See 433 N.E.2d at 1116-17 (explaining that the second state cannot reduce the effect of the judgment, but can expand its effect); see also *In re Transocean Tender Offer Sec. Litig.*, 455 F. Supp. 999, 1005-06 (N.D. Ill. 1978) ("[E]ven if Delaware courts would not permit the offensive use of collateral estoppel, this court would give the Delaware judgment greater preclusive effect than Delaware courts.").

239. *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536 (N.J. 1995).

240. The entire controversy doctrine includes New Jersey's rule of mandatory party joinder enforced through claim preclusion. On the entire controversy doctrine and *Mortgagelinq*, see *supra* text accompanying notes 181-88.

241. See *Mortgagelinq*, 662 A.2d at 537, 540-41.

cern. The argument ignores the impact of preclusion law on litigation behavior at F_1 . In *Finley*, the Illinois court (F_2) failed to appreciate that participants in the Indiana lawsuit (F_1) based their conduct on the understanding that the judgment could not later be invoked by nonparties. Indiana legitimately may expect and desire its litigants to conduct themselves on that understanding. For example, Indiana may prefer to avoid the aggressive litigation conduct, delay tactics, and expansive joinder that nonmutual preclusion can engender.²⁴² In *Mortgagelinq*, the New Jersey court (F_2) apparently was untroubled by the possibility that the plaintiffs in the Pennsylvania federal court lawsuit (F_1) made joinder decisions based on the federal courts' legitimate choice not to mandate joinder of all possible defendants.²⁴³

Some commentators have suggested that cases involving the interjurisdictional application of statutes of limitations support the greater preclusion argument, but only when F_2 merely closes its own doors to the claim and does not purport to extinguish any substantive rights.²⁴⁴ If a state dismisses an action under its statute of limitations, a second state generally may apply its own longer statute of limitations and allow the claim.²⁴⁵ In other words, some shorter statutes of limitations are treated as "door-closing rules" that bar the assertion of claims in a particular state but have no effect elsewhere.²⁴⁶ If states are allowed to bar claims based on their own idiosyncratic statutes of limitations, the argument goes,

242. Professor Graham Lilly makes this point persuasively by emphasizing the uncertainty for litigants if F_2 may apply its own greater preclusion rule: "Since it is uncertain where the next suit will be filed, the parties will have an incentive to conduct the first suit as if the stakes are high. In this context, the public and private resources invested in the initial suit are apt to be disproportionately large Familiar pretrial skirmishing such as motion practice, discovery, and jury selection will expand to reflect the added risk of future litigation." Lilly, *supra* note 18, at 312-13.

243. See Burbank, *supra* note 18, at 100-01.

244. See Perry Dane, *Sovereign Dignity and Glorious Chaos: A Comment on the Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 173, 185-86, 188 (1996); Dreyfuss & Silberman, *supra* note 161, at 159-60, 168. Professor Dane uses the statute of limitations analogy to suggest that New Jersey's entire controversy doctrine, although generally perceived as a rule of preclusion, should be treated as a mere procedural door closer that can be applied by New Jersey courts as F_2 to dismiss claims based on prior litigation elsewhere. See Dane, *supra*, at 185-86, 188.

245. See Dreyfuss & Silberman, *supra* note 161, at 145-46, 159-60 & n.176, 168 & n.219. Moreover, a state may invoke its own statute of limitations to refuse enforcement of another state's judgment, even if the state that rendered the judgment would not time-bar the enforcement. See Dane, *supra* note 244, at 186 n.40.

246. In this regard, they are analogous to dismissals on grounds of forum non conveniens or for lack of personal jurisdiction.

they should be allowed to invoke their own idiosyncratic preclusion rules to disallow relitigation of claims in their own courts.²⁴⁷

The statute of limitations analogy is unpersuasive. Courts applying preclusion rules virtually never purport to be applying mere "door-closers."²⁴⁸ Moreover, statutes of limitations do not create the pervasive strategic incentives engendered by preclusion law, in particular by those preclusion rules on which U.S. jurisdictions diverge.²⁴⁹ If F_2 applies its own preclusion law rather than F_1 's, it undermines the litigation-related policies of F_1 and betrays the legitimate expectations of the participants at F_1 on which they may have based significant litigation decisions.²⁵⁰

ii. Core Preclusion. In addition to the "greater preclusion" argument, there is the "core preclusion" argument. Some commentators contend that F_2 only need respect the "core" preclusion values of F_1 and may apply its own preclusion law as to matters outside that core.²⁵¹ The argument, in essence, is that full faith and credit or other interjurisdictional preclusion obligations should apply only

247. Professors Dreyfuss and Silberman advance the statute of limitations analogy to show that New Jersey's entire controversy doctrine can be considered a "housekeeping" doctrine designed primarily to prevent relitigation within the New Jersey courts and that it therefore may be permissible for New Jersey to apply the doctrine based on its interest as F_2 . See Dreyfuss & Silberman, *supra* note 161, at 159-60, 168. They conclude, however, that the doctrine should apply only when both F_1 and F_2 are New Jersey state courts, because only in that situation are New Jersey's resources burdened twice. See *id.* at 170-71; see also Dane, *supra* note 244, at 185-86 & n.40 (articulating a version of this argument to suggest that New Jersey courts may apply the entire controversy doctrine to bar claims based on prior litigation elsewhere).

The "door-closing" argument for allowing F_2 to apply its own greater preclusion rules depends in part on characterizing those preclusion rules as "procedural" rather than "substantive." In this regard, it is interesting to note Professor D. Michael Risinger's argument that the core *res judicata* rule prohibiting double recovery is substantive, but most of the rules of issue preclusion and claim preclusion are procedural. See D. Michael Risinger, "Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions," 30 UCLA L. REV. 189, 210-11 (1982). Note, however, that for interjurisdictional preclusion problems, it will not suffice to label preclusion rules "procedural"; we still must determine whether we are talking about F_1 's procedural concerns or F_2 's. The main point of this article is that even if preclusion rules can be characterized as largely "procedural," the most important procedural concerns implicated are those of F_1 .

248. The only contrary example of which I am aware is *Mortgageling*, in which the New Jersey Supreme Court barred the plaintiff's claim under the entire controversy doctrine but asserted that its dismissal should not preclude the plaintiff from asserting the same claim elsewhere. See *Mortgageling Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536, 541-42 (N.J. 1995).

249. See *supra* Part I (discussing strategic incentives); *supra* section II.B. (discussing preclusion law divergences).

250. Although F_2 mitigates the problem inasmuch as its dismissal does not extinguish substantive rights, it still betrays the policies of F_1 if litigants at F_1 made decisions based on an expectation of access to a particular state's courts.

251. See 18 WRIGHT ET AL., *supra* note 104, § 4467, at 625.

to the extent necessary to protect the rendering forum's interest in its own judgment. While a rendering jurisdiction has an interest in safeguarding the validity of its judgments, the argument goes, it has much less of an interest in such details as whether its judgments are given nonmutual issue-preclusive effect.²⁵² This "core preclusion" argument is advanced in the leading treatise on federal procedure:

The central core of [res judicata] rules must of course be followed to support the finality, repose, and reliance values that are common to res judicata policy in all states. Many other rules should be followed to support the first court's power to control its own procedures. Nonetheless, it is not desirable to suppose that every last variation of preclusion policy is so far part of the judgment that full faith and credit commands obedience. To the contrary, there are many situations in which the res judicata effects of a state court judgment are properly controlled by the domestic rules of a second state. The key to understanding the scope of full faith and credit lies not in a monolithic view that all res judicata rules are indistinguishable but in a careful appraisal of the purposes that underlie different rules.²⁵³

The argument has been attributed to Professor Edward Cooper.²⁵⁴ Professor Cooper's application of the core preclusion view to mutuality is instructive. If F_1 requires mutuality, he argues, F_2 should not allow nonmutual preclusion even if F_2 has abandoned the mutuality requirement. On the other hand, if F_1 would allow nonmutual preclusion, then F_2 need not follow F_1 's preclusion law and can apply its own mutuality requirement to disallow issue preclusion. According to Professor Cooper, F_2 should respect F_1 's mutuality rule because

[a]ssertion of nonmutual preclusion in such circumstances would make it impossible for the first court to give effect to policies that may include broad freedom in selecting parties, freedom to litigate a particular case according to its own needs without concern about the impact on other cases, and acceptance of results that seem just between particular parties even though a new trial or directed verdict would be required if the stakes were greater.²⁵⁵

But Professor Cooper does not see the same concerns in the reverse situation and would allow F_2 to disregard F_1 's nonmutual preclusion rule:

252. See *id.* § 4467, at 642-43 ("[A] court that prefers to deny nonmutual preclusion should not be required to follow the rules of another court. Nonmutual preclusion is simply not so central a component of res judicata as to be swept into full faith and credit." (footnote omitted)).

253. *Id.* § 4467, at 625.

254. See Burbank, *supra* note 18, at 95.

255. 18 WRIGHT ET AL., *supra* note 104, § 4466, at 617.

The major values served by nonmutual preclusion lie in the public costs of relitigation and the fear of inconsistency. A later court should be free to assume the costs of relitigation. And a first court should not be able to inflict on others its timorous fears of being proved wrong.²⁵⁶

Compare Cooper's view with the greater preclusion argument, which leads to exactly the opposite conclusion. The greater preclusion argument would allow F_2 to disregard F_1 's mutuality requirement — that is, to give greater issue-preclusive effect to the judgment than F_1 would give — but would not allow F_2 to disregard F_1 's rule allowing nonmutual preclusion.²⁵⁷

Professor Cooper's core preclusion argument has drawn criticism for ignoring the full faith and credit "policy of unifying and integrating the several states"²⁵⁸ and for violating the litigation policies inherent in F_1 's preclusion rules.²⁵⁹ My earlier discussion of preclusion law divergences and litigation incentives underscores that criticism by showing that the points of preclusion law on which jurisdictions vary create powerful litigation incentives at F_1 . The core preclusion argument fails to give enough respect to F_1 's interest in the litigation policies fostered by its preclusion rules. Professor Cooper correctly demonstrates that F_1 's litigation policies are implicated by F_2 's disregard of F_1 's mutuality rule. But he does not recognize that F_1 's litigation policies are equally implicated by F_2 's disregard of F_1 's nonmutuality rule. A rule allowing nonmutual preclusion seriously affects litigation incentives in the first forum. Among other things, it makes parties more likely to settle, more likely to join additional parties to achieve a complete resolution of the controversy, and more likely to litigate zealously.²⁶⁰ While F_1 need not foster these incentives, F_1 's choice to foster them should not be disregarded by other jurisdictions.

iii. The F_2 Law Supplier. In addition to arguments concerning F_2 's interests as forum, some have argued that preclusion law should give way based on the interests of the source of substantive law in the subsequent lawsuit.²⁶¹ This argument has arisen espe-

256. *Id.*; see also *id.* § 4467, at 647-48.

257. See Getschow, *supra* note 235, at 277-79 (arguing that issue preclusion — especially greater effect — is merely a matter of F_2 's policy choices and that full faith and credit therefore does not apply).

258. Burbank, *supra* note 18, at 96.

259. See *id.* at 97.

260. See *supra* Part I.

261. See, e.g., Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 368 (1990); Donald W. Nierling,

cially in cases where F_2 is a federal court hearing a federal question claim. Giving preclusive effect to a prior state court judgment raises concerns about divesting the federal courts of power to address civil rights violations and other federal matters.

The Supreme Court has rejected this argument against preclusion, leaving open only the narrowest possibility of such substantive law exceptions to full faith and credit. In *Allen v. McCurry*,²⁶² for example, a state court in a criminal trial had ruled against a criminal defendant on certain Fourth Amendment search and seizure issues.²⁶³ The criminal defendant subsequently brought a civil section 1983 claim in federal court based on the same alleged Fourth Amendment violations.²⁶⁴ The Supreme Court ruled that issue preclusion could be used against the criminal defendant turned plaintiff, thus preventing relitigation of the Fourth Amendment issues.²⁶⁵ Federal law would displace the full faith and credit obligation, the Court held, only if Congress specifically intended to create an exception to full faith and credit by legislating a partial repeal of the full faith and credit statute.²⁶⁶ This has proved to be a narrow loophole indeed; the Supreme Court has yet to find a federal statute that displaces full faith and credit under this "partial repeal" analysis.²⁶⁷ To the extent that a federal statute can effect a partial repeal of section 1738, that establishes a narrow exception to a pure F_1 referent in state-federal preclusion cases.²⁶⁸

Note, *The Role of Preclusion Rules in Title VII: An Analysis of Congressional Intent*, 71 IOWA L. REV. 1473 (1986).

262. 449 U.S. 90 (1980).

263. See 449 U.S. at 92.

264. See 449 U.S. at 92.

265. See 449 U.S. at 103-05.

266. See 449 U.S. at 97-99; see also *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 881 (1996); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 381 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468-72 (1982); RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. e (1982) (recognizing the possibility of a legislative policy exception); Andrea Catania, *Access to the Federal Courts for Title VII Claimants in the Post-Kremer Era: Keeping the Doors Open*, 16 LOYOLA U. CHI. L.J. 209, 224-25 (1985).

267. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.12, at 681 (2d ed. 1993) ("[T]he Supreme Court has yet to identify any federal statute as embracing an exclusivity principle that would prevent the normal operation of collateral estoppel."). Actually, the federal habeas corpus statute can be viewed as an exception to full faith and credit. See 28 U.S.C.A. § 2254(d) (West Supp. 1997) (permitting federal court habeas corpus relief from state court adjudications that are "contrary to . . . clearly established Federal law, as determined by the Supreme Court" or that are "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"); see also *Brown v. Allen*, 344 U.S. 443 (1953).

268. The federal constitutional requirement of minimal due process provides another aspect of federal law that limits the application of either intra- or interjurisdictional preclusion doctrine. For example, except in narrowly defined situations, the due process requirement does not allow a nonparty to be bound by a judgment. See *Richards v. Jefferson County*, 116

iv. Misplaced Erie. Finally, some courts have taken the position that where F_2 is a federal court hearing state law claims, that court should apply the preclusion law of the state in which it sits. For example, in *Itzkoff v. F&G Realty of New Jersey, Corp.*,²⁶⁹ F_1 was a New York state court, and F_2 was the federal court for the District of New Jersey, sitting in diversity. The federal court applied New Jersey's entire controversy doctrine to determine the preclusive effect of the New York judgment because it treated the situation as an *Erie* problem and looked to the law of the state in which it sits.²⁷⁰ The court's *Erie* concerns, however, were misplaced. As Professor Degnan ably demonstrated, even where F_2 is a federal court sitting in diversity, F_2 's preclusion decision should be guided not by *Erie* but rather by the full faith and credit statute.²⁷¹

Some courts have wandered even further astray and have conducted *Erie* analyses to conclude that F_2 's preclusion law should apply when F_2 is a state court and F_1 was a federal court sitting in diversity. For example, in *Douglas v. First Security Federal Savings Bank*,²⁷² a Maryland state court grappled with the claim-preclusive effect of a judgment of the federal court for the Eastern District of Virginia. The claim-preclusive effect of the prior judgment depended on whether Douglas was in privity with a party to the prior federal suit. The Maryland court, relying on the *Erie* doctrine, chose to apply its own Maryland preclusion law to determine privity.²⁷³ *Douglas*'s *Erie* analysis is even more misplaced than *Itzkoff*'s, because in *Douglas* the only state in which a relevant federal court sat was Virginia. Thus, if any *Erie* analysis were appropriate, it would have been to protect uniformity between the Virginia state and federal courts. Maryland has nothing to do with it.

S. Ct. 1761, 1765 n.4 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940). Also, no full faith and credit is due a judgment rendered by a court that lacked personal jurisdiction, *see Pennoyer v. Neff*, 95 U.S. 714, 729-31 (1877), or a decree that exceeds the authority of the issuing court, *see Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4065 (U.S. Jan. 13, 1998).

269. 890 F. Supp. 351 (D.N.J. 1995).

270. *See* 890 F. Supp. at 355-59.

271. *See* Degnan, *supra* note 1, at 750-55. Because the full faith and credit statute mandates an F_1 referent, no F_2 *Erie* analysis is warranted. But even if the court conducts an *Erie* inquiry at F_2 , the appropriate inquiry, under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), would ask whose preclusion law the F_2 state courts would apply. *See* 313 U.S. at 496. As argued in this article, the answer to that question should point to F_1 's preclusion law.

272. 643 A.2d 920 (Md. Ct. Spec. App. 1994).

273. *See* 643 A.2d at 924-25.

b. Arguments in Favor of a Pure F₁ Referent. Neither the greater preclusion argument, the core preclusion argument, the law supplier argument, nor *Erie* provides a sound reason to abandon a pure F₁ referent. At least for the state-state and state-federal configurations, statutory language demands a pure F₁ referent. The full faith and credit statute does not say that courts must give “at least as much faith and credit” to judgments as the rendering jurisdiction would give. Nor does the statute say that courts must give “a central core of faith and credit” to judgments. It most assuredly does not say that a court must give full faith and credit except when it is applying its own substantive law, or except when it is a federal court hearing a state law claim. Rather, the statute says that courts must give “the *same* full faith and credit” that the rendering jurisdiction would give.²⁷⁴ Despite the statute’s clarity on this point, we should venture beyond “the statute says so.” Not only is a deeper resolution more satisfying, but in the federal-state configuration, in which it is doubtful that the full faith and credit statute applies,²⁷⁵ a resolution based on more than statutory language is essential.

As a matter of litigation policy, the applicable preclusion rules must be determinable at F₁ and must not depend on where the subsequent case is filed. At F₁, practitioners and their clients make critical decisions concerning joinder of claims, joinder of parties, resource allocation, appeal, delay, settlement, criminal pleas, consolidation, class certification, jury trial, and other matters. Preclusion law affects these decisions.²⁷⁶ At the same time, nonparties make critical decisions concerning intervention, involvement, and testimony. Preclusion law affects these decisions as well.²⁷⁷ These actors cannot wait until a subsequent action is filed before they know whose preclusion rules will apply.

Moreover, in all of these litigation decisions, F₁’s policies are at stake. As discussed in Part I, each jurisdiction makes “genuine value choices”²⁷⁸ in selecting among preclusion law possibilities. For example, a broad definition of “same claim” induces joinder of

274. See 28 U.S.C. § 1738 (1994) (emphasis added). I may be criticized for emphasizing the word “same,” because that word arrived in 1948 with legislative history calling it a change “in phraseology.” See Burbank, *supra* note 18, at 99-100 & n.63. But even the statute’s original 1790 language indicates a pure F₁ referent: “judicial proceedings . . . shall have such full faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.” Act of May 26, 1790, ch. 11, 1 Stat. 122.

275. See *supra* text accompanying notes 208-12.

276. See *supra* text accompanying notes 19-54.

277. See *supra* text accompanying notes 55-61.

278. Resnik, *supra* note 20, at 981-82.

related claims, yielding fewer separate lawsuits but rendering each lawsuit more complex. A jurisdiction may choose to encourage joinder in order to reduce the number of independent lawsuits and to make each adjudication as complete as possible. Alternatively, a jurisdiction may choose not to encourage such joinder, in order to avoid unnecessarily complex multicclaim lawsuits and to avoid pressuring litigants into asserting claims they might otherwise forgo. Each jurisdiction's law of claim preclusion and issue preclusion reflects a balancing — albeit not necessarily a skillful balancing — of competing interests. These competing interests include judicial economy, completeness of adjudicative resolution, zealously of advocacy, litigant autonomy, and public reliance on the finality of adjudication.²⁷⁹

This is not to say that the second forum lacks any legitimate interest. F_2 's application of claim and issue preclusion advances F_2 's interest in judicial economy and reflects a balancing between truth-seeking and efficiency. While there is no denying the judicial economy power of a dismissal based on claim preclusion, it is hard to sympathize with F_2 's judicial economy concerns in the context of interjurisdictional preclusion, where by definition F_2 has not expended any judicial resources in the first lawsuit.²⁸⁰ Nor can one deny F_2 's interest in the integrity of its own adjudications, especially where F_2 would allow the assertion of claims or the relitigation of issues by giving less preclusive effect than would F_1 .

But for purposes of articulating a sound rule for choice of preclusion law, F_2 's interests pale in comparison to those of F_1 . This is not because F_2 's interests are small, but because they come into play so infrequently. F_2 's interests come into play only in cases in which a party actually asserts claim preclusion or issue preclusion at F_2 . Preclusion-sensitive decisions at F_1 , by contrast, come into play whenever there is a *possibility* of a future assertion of claim preclusion or issue preclusion. Whenever that possibility exists, as it does in an enormous range of lawsuits,²⁸¹ it may affect the litigation behavior of participants at F_1 . Litigators handling F_1 lawsuits with a possibility of related litigation elsewhere will make strategic decisions based on the preclusion law that they expect will be applied. If litigators in a mutuality jurisdiction expect the mutuality rule to govern, then they will make joinder and settlement decisions on that basis. If they expect that other jurisdictions will ignore F_1 's

279. See *supra* text accompanying notes 62-71.

280. See Dreyfuss & Silberman, *supra* note 161, at 168.

281. See *supra* text accompanying notes 2-14.

mutuality rule and allow nonmutual preclusion based on F_2 's own preclusion law, then they may decide differently. Likewise, if litigators in federal court in Kansas expect federal preclusion law to govern the effect of the judgment even if a subsequent action is brought in Kansas state court, they will make strategic decisions on that basis; if they expect Kansas's one-action rule to apply, they will make very different decisions, such as joining additional parties. Thus, F_2 's interests arise with only a fraction of the frequency with which F_1 's interests arise. By the sheer number and significance of litigation decisions affected by preclusion law,²⁸² and the breadth of cases in which such considerations arise,²⁸³ F_1 's concerns should dominate. In sum, F_2 's undeniable interests cannot overcome the litigation participants' need to determine the applicable preclusion rules at the time of the initial action and F_1 's interest in controlling litigation behavior in its courts.

2. *Probing the F_1 Referent*

Thus far, I have argued that F_2 generally should be disregarded for purposes of determining applicable preclusion law and that the governing preclusion law should be determinable at F_1 . In other words, I have argued in favor of a pure F_1 referent. But a pure F_1 referent does not necessarily require the application of F_1 's own preclusion law. Using our F_1 referent, whose preclusion law should apply?

a. The F_1 Law Supplier. Even with F_2 out of the picture, F_1 is not the only sovereign with genuine interests at stake. In addition to F_1 and F_2 , the jurisdiction that supplied the substantive law at F_1 , if the applicable law was neither F_1 's nor F_2 's, may claim an interest. If substantive rights determined at F_1 are jeopardized by the preclusion law applied at F_2 , that may impinge on the interests of the law-supplying jurisdiction.²⁸⁴ On this reasoning, some courts apply the preclusion law of the F_1 law supplier.²⁸⁵

282. See *supra* text accompanying notes 19-71.

283. See *supra* text accompanying notes 2-14.

284. See Burbank, *supra* note 1, at 808-09; Dreyfuss & Silberman, *supra* note 161, at 139-52.

285. See *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th Cir. 1994) (applying Louisiana's statutory claim-preclusion exception to determine the effect in an Arkansas federal court of a prior Louisiana federal court diversity judgment and explaining that "[w]hen a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment"); *Philadelphia Indem. Ins. Co. v. Carco Rentals, Inc.*, 923 F. Supp. 1143, 1157 (W.D. Ark. 1996) (applying Oklahoma preclusion law to determine the effect of an Oklahoma federal court diversity judgment, upon an explicit finding that the prior court applied Oklahoma rather than Arkansas substantive law). Although the *Follette* and *Philadel-*

For example, suppose a dispute involving a New York contract and governed by New York law is litigated in New Jersey state court. The court finds that New York contract law does not provide a remedy on the facts pleaded and dismisses for failure to state a claim but does not state whether the dismissal is with prejudice. Subsequently, the plaintiff refiles in Connecticut state court, and the defendant asserts that the action is claim precluded. Under New Jersey (F_1) preclusion law, the dismissal is “on the merits” and therefore claim preclusive; under Connecticut (F_2) preclusion law, the dismissal is not “on the merits” and therefore not claim preclusive.²⁸⁶ But what about New York? Doesn’t New York — the F_1 law supplier — have an interest in the finality of adjudications concerning New York contracts, and therefore shouldn’t the Connecticut court consider New York preclusion law?

The law supplier’s interest should not govern choice of preclusion law for at least two reasons. First, the substantive law interests of the law-supplying jurisdiction, just like F_2 ’s judicial economy and fairness interests,²⁸⁷ are at stake only in the lawsuit in which claim or issue preclusion is asserted. F_1 ’s litigation-behavior interests, by contrast, are at stake in *every* F_1 litigation that might involve subsequent related suits in other jurisdictions. For each case in which the F_1 law supplier’s interest matters, there may be dozens in which F_1 litigators behave differently based on anticipated choice of preclusion law.

Second, the law supplier’s interest in the preclusion outcome bears no relationship to its adoption of particular preclusion rules. In our hypothetical contract dispute, the outcome may matter to New York because it involves rights under New York contract law. New York therefore has an interest in whether the New Jersey dismissal is given preclusive effect in Connecticut. But New York’s interest in the dispute has nothing to do with New York’s preclusion rule that dismissals for failure to state a claim are not on the merits.²⁸⁸ New York’s preclusion rule derives from New York’s relatively technical pleading requirements.²⁸⁹ If New York pleading

phia Indemnity decisions could be understood as *Erie* applications, see *infra* text accompanying note 301, the opinions speak about the provider of the substantive law at F_1 , not about the state in which the federal F_1 sat.

286. See *supra* text accompanying notes 142-57.

287. See *supra* text accompanying notes 280-81.

288. See *supra* note 154 and accompanying text.

289. See N.Y. C.P.L.R. 3013 (McKinney 1991). As one observer put it, “New York’s ties to the Field Code remain strong and its flirtation with notice pleading has not yet ripened into commitment.” Oakley & Coon, *supra* note 162, at 1411; see also *id.* at 1411 n.280 (citing

rules render complaints more likely to be dismissed for technical defects than for substantive shortcomings, then it makes sense for New York to deem such dismissals nonpreclusive unless the judge specifies otherwise.²⁹⁰ There is no reason for New York's preclusion rule, derived from pleading and practice in New York courts, to govern preclusion in a dispute involving only New Jersey and Connecticut courts.

This analysis suggests a possible exception. When a preclusion rule is clearly linked to a substantive right of action, then perhaps that rule should accompany the right of action, regardless of the litigation's locus.²⁹¹ It is an exception in search of an application, however, as nearly all preclusion rules are transsubstantive.²⁹² With the possible exception of the Kansas one-action rule, which is an interpretation of the Kansas comparative negligence statute,²⁹³ rules of claim and issue preclusion are not linked to, and do not depend on, the substantive rights asserted.

Of course, the law supplier need not be a third sovereign. Very often either F_1 itself or F_2 will supply the applicable law at F_1 . When F_1 is applying its own substantive law, that only adds to what I contend are the already dominant interests of F_1 . But what if the F_1 law supplier is F_2 ? In our hypothetical contract dispute, suppose the second action were filed in New York state court. Should the combined interests of New York as law supplier and New York as second forum overcome the interests of New Jersey as initial forum?

Note that to arrive at this configuration of interests, the F_1 law-supplying jurisdiction need not be F_2 . The same configuration of interests presents itself whenever the F_1 law-supplying jurisdiction and F_2 share a preclusion rule that differs from that of F_1 . In our original hypothetical, neither New York (law supplier) preclusion law nor Connecticut (F_2) preclusion law would treat the dismissal as

New York cases "demand[ing] specificity as to the particular elements of the cause of action being pleaded").

290. See *Potter v. Emerol Mfg. Co.*, 89 N.Y.S.2d 68, 70 (App. Div. 1949) ("As the merits are not considered on [a demurrer], a determination dismissing the complaint for insufficiency on its face would not bar a second suit based on a sufficient complaint.").

291. See Dreyfuss & Silberman, *supra* note 161, at 139-52 (discussing this theory under the label "embedded rights").

292. *Transsubstantive* rules apply across all substantive areas of law, as opposed to *non-transsubstantive* rules, which apply only to specifically defined areas of law or rights of action. The Federal Rules of Civil Procedure, for example, are mostly transsubstantive. See Lowenthal & Erichson, *supra* note 12, at 994 n.17.

293. See *supra* text accompanying notes 190-94; see also Dreyfuss & Silberman, *supra* note 161, at 140 & n.90 (mentioning the one-action rule as a possible application of embedded rights theory).

claim preclusive. Thus, the question is whether the combined interests of the law supplier and F_2 — whether or not the same jurisdiction — should trump the interests of F_1 . As explained above, the F_1 law supplier's interest merits little concern, because with few exceptions, the law supplier's interest in the outcome is entirely unconnected to its own preclusion rules.²⁹⁴ Allowing choice of preclusion law to depend on F_2 raises serious concerns about preclusion rules that are not determinable at the time of the first action — that is, by a pure F_1 referent.²⁹⁵ With the rare exception of preclusion rules linked explicitly to substantive rights, the law supplier's attenuated interest in the preclusion rules applied to the dispute, whether or not paired with the interest of F_2 , does not alter the soundness of choosing F_1 's preclusion law.²⁹⁶

b. The Meaning of a Judgment. Moreover, it makes sense that the meaning of a judgment ought to be construed according to the renderer's rules. When a court enters a judgment, that judgment carries various meanings, including its stare decisis value and its narrative value to those involved in the dispute and to the community at large.²⁹⁷ In general, though, with the exception of litigation pursued purely for symbolic import, a judgment's primary meaning is its binding effect. That meaning cannot be ascertained by looking at the judgment alone. Rather, the meaning of a judgment depends upon the rendering jurisdiction's rules for construing its meaning — that is, the rendering jurisdiction's law of judgments.²⁹⁸ Just as the meaning of legislation should be defined by the legislating sovereign's rules of statutory construction, including any relevant statu-

294. See *supra* text accompanying notes 288-93.

295. See *supra* text accompanying notes 276-83.

296. For another analysis reaching the same conclusion, see Lilly, *supra* note 18, at 325-26 (arguing that all approaches to choice of law analysis point to F_1 's preclusion law). *But see* Burbank, *supra* note 1 (arguing that federal interests sometimes should trump in the state-federal configuration if federal substantive rights are at stake).

297. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (“[A judge’s] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755 (1982) (“[T]he judge . . . gives meaning and expression to the values embodied in [a legal] text.”).

298. Justice Ginsburg nicely captured this idea in her phrasing of a recent full faith and credit decision in which she noted that preclusive effects “travel with the sister state judgment.” *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4064 (U.S. Jan. 13, 1998). In tying a judgment’s meaning to its source, I do not mean to suggest that a judgment’s meaning depends on the subjective intent of the rendering judge. As Justice Kennedy emphasized in his *Baker* concurrence, “The question . . . is not what a trial court intended in a particular case but the preclusive effect its judgment has under the controlling legal principles of its own State.” *Baker*, 66 U.S.L.W. at 4068 (Kennedy, J., concurring).

tory definitions and applicable "Dictionary Act,"²⁹⁹ the meaning of a judgment should be defined by the rendering jurisdiction's rules of judgment construction, including the law of claim preclusion and issue preclusion.³⁰⁰

c. Erie. If the interjurisdictional preclusion problem arises in the federal-state configuration and the federal court's subject matter jurisdiction was based on diversity of citizenship, then choice of preclusion law presents an *Erie*³⁰¹ question. A number of commentators have written on this issue and reached differing conclusions.³⁰² Federal courts, too, have split on the issue.³⁰³ Although the *Erie* analysis is essential for understanding one slice of federal-state interjurisdictional preclusion, it should be noted that *Erie* is irrelevant to other interjurisdictional configurations, and also that

299. See, e.g., 1 U.S.C. §§ 1-7 (1994) (federal Dictionary Act); N.Y.C.L.S. GENL. CONSTR. LAW §§ 1-121 (McKinney 1951 & Supp. 1997-1998) (New York General Construction Law). The federal Dictionary Act includes, among other things, provisions that "words importing the plural include the singular," 1 U.S.C. § 1, that "[t]he word 'company' . . . shall be deemed to embrace the words 'successors and assigns of such company . . .,'" 1 U.S.C. § 5, and the controversial 1996 addition specifying that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife," 1 U.S.C. § 7.

300. The problem of discerning "the meaning of a judgment" can be viewed as a subset of the more general problem of interpreting texts. In this regard, it is worth considering the hermeneutics work of French philosopher Paul Ricoeur. Ricoeur has described certain characteristics of written work that he collectively calls "distanciation." One aspect of distanciation is the separation of meaning from the author's intent: "[W]riting renders the text autonomous with respect to the intention of the author. What the text signifies no longer coincides with what the author meant; henceforth, textual meaning and psychological meaning have different destinies." PAUL RICOEUR, *The Hermeneutical Function of Distanciation*, in *HERMENEUTICS & THE SOCIAL SCIENCES* 139 (J. Thompson ed. & trans., Cambridge Univ. Press 1981). Distanciation's counterpart, according to Ricoeur, is "appropriation (*Aneignung*) of the text, its application (*Anwendung*) to the present situation of the reader." *Id.* at 143.

For interjurisdictional preclusion, Ricoeur's distanciation thesis packs a certain amount of explanatory power. F_1 renders a judgment, which by the act of writing is rendered independent of F_1 's intended meaning. When that judicial text is read in the context of a subsequent proceeding in another jurisdiction, F_2 treats the judgment as an autonomous text and "appropriates" the judgment to its own situation, much as a reader of a novel understands the work in light of the reader's circumstances. In fact, although I disagree with its normative implications in this context, Ricoeur's model describes well the findings discussed in Part IV of this article — that many state judges reflexively apply their own jurisdiction's preclusion law, with little or no attention to the source of the judgment. See *infra* text accompanying notes 316-37.

301. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

302. See Burbank, *supra* note 1, at 747-62; Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 635-37 (1985); Degnan, *supra* note 1, at 753-73; Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 643-47 (1985); Lilly, *supra* note 18, at 322-27; Shreve, *supra* note 235, at 1211 n.3.

303. Compare, e.g., *Austin v. Super Valu Stores*, 31 F.3d 615 (8th Cir. 1994) (applying the preclusion law of the state in which the first federal diversity court sat) with *Apparel Art Intl, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576 (1st Cir. 1995) (applying federal preclusion law). See also 18 WRIGHT ET AL., *supra* note 104, § 4472.

the *Erie* argument applies equally to intramural federal-federal preclusion. If the initial forum was a federal court adjudicating a state law claim, then the subsequent forum faces the *Erie* question whether that subsequent forum is a state court or another federal court.

Erie analysis offers no fully satisfying answer to whether, if F_1 is a federal court sitting in diversity, F_2 should apply the preclusion law of the state in which F_1 sits.³⁰⁴ The stronger argument is that, even in the *Erie* context, F_2 should apply F_1 's (federal) preclusion law. First, under *Hanna v. Plumer*,³⁰⁵ we must ask whether any federal rule or statute governs.³⁰⁶ In some cases involving the claim-preclusive effect of nonjoinder of claims or parties, Federal Rules of Civil Procedure 13(a), 18, 19, and 20 arguably apply, just as Rule 41(b) informs the "on the merits" determination. To that extent, the federal rules would trump state preclusion law unless the rules exceed the rulemaking authority granted by the Rules Enabling Act.³⁰⁷ In most situations, however, no federal rule or statute directly governs claim and issue preclusion; federal res judicata is largely federal common law.

Second, the analysis proceeds to examine what the Supreme Court has called "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."³⁰⁸ On these points, the argument for state preclusion law gains force. Inequitable administration of the laws — significantly different outcomes based on whether a case is decided in state or federal court — could follow from a decision that federal preclusion law applies when F_1 is a federal court sitting in diversity. Moreover, perspicacious practitioners might well forum shop on that basis. On the other hand, one can hardly characterize preclusion as rules that "substantially affect those primary decisions respecting human con-

304. Because courts have exhibited confusion about this, I should emphasize that the *Erie* question is whether to apply federal preclusion law or the state preclusion law of the state where federal F_1 sits. The question is *not* whether to apply the preclusion law of the state of F_2 . Compare *Columbia Cas. Co. v. Playtex FP Inc.*, 584 A.2d 1214 (Del. 1991) (addressing the correct *Erie* question) with cases cited in *Lilly*, *supra* note 18, at 322 n.117 (incorrectly using *Erie* to apply F_2 's state preclusion law). See *supra* text accompanying notes 269-73.

305. 380 U.S. 460 (1965).

306. See 380 U.S. at 471.

307. 28 U.S.C. § 2072 (1994). See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988); *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 4-8 (1987); see also *Hanna*, 380 U.S. at 471-74. Professor Burbank argues persuasively that under the Rules Enabling Act, the Federal Rules of Civil Procedure cannot directly govern preclusive effect, but the rules can create a context in which federal common law legitimately governs preclusive effect. See Burbank, *supra* note 1, at 772-75.

308. *Hanna*, 380 U.S. at 468.

duct which our constitutional system leaves to state regulation.”³⁰⁹ While preclusion rules affect behavior, their impact on behavior *outside of litigation* is virtually nil. The impact of preclusion at F_1 is not on the primary conduct of citizens of the state in which F_1 sits, but rather on F_1 's policies as a litigation forum — that is, on the federal court's power to control its own procedures.

It is analytically useful to separate the interests of the state in which F_1 sits from the interests of the law supplier. Very often, of course, the federal diversity court applies the substantive law of the state in which it sits. In those normal circumstances, the F_1 state is also the law supplier, and therefore may appear to have a substantive interest in the outcome of preclusion questions. But as explained above, because the law supplier's interest in the outcome generally has no connection to the law supplier's adoption of particular preclusion rules, it should be discounted for purposes of choice of preclusion law.³¹⁰

Even if concerns of forum-shopping and vertical uniformity might lead one to consider application of state law under *Erie*, that does not end the analysis. If there is a countervailing federal interest, then courts must consider whether that federal interest overrides application of the state rule.³¹¹ In the case of federal-state preclusion, the countervailing federal interest includes all of the federal forum's interests in controlling litigation behavior through preclusion rules. Weighing this interest requires a consideration of both the strategic incentives created by those aspects of preclusion law that diverge and the value choices inherent in those litigation incentives.³¹² The federal judicial system has a legitimate interest in the litigation incentives created by federal preclusion law. By contrast, the state in which the federal court sits has limited legitimate interest in the litigation behavior of actors in federal court.³¹³

309. 380 U.S. at 475 (Harlan, J., concurring).

310. See *supra* text accompanying notes 288-93.

311. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-38 (1958); see also *Gasperini v. Center for the Humanities, Inc.*, 116 S. Ct. 2211 (1996) (balancing federal and state interests but concluding that both sets of interests could be accommodated). If the accommodationist aspect of *Gasperini* prevails, it might lend support to Professor Cooper's "core preclusion" approach to interjurisdictional preclusion cases. See *supra* text accompanying notes 251-59 (discussing and criticizing the core preclusion argument). Professor Cooper's approach seeks to accommodate the interests of both F_1 and F_2 , but it could conceivably be adapted to the *Erie* context to require application of the state's "core" rules while allowing application of federal preclusion rules outside the core.

312. See *supra* Part I.

313. One exception is the federal jury burden on a state's citizens.

Admittedly, the *Erie* question is a close one. If we emphasize the federal interest in federal court litigation procedures, as I suggest is appropriate given this article's demonstration of the significance of F_1 's interest, federal law prevails. If we emphasize forum-shopping concerns and vertical uniformity, state law prevails. Ultimately, the answer need not depend on *Erie*, because it is achievable by legislation. If this article is correct that a clear rule for interjurisdictional preclusion is essential and the better rule is that F_1 's preclusion law governs,³¹⁴ then to whatever extent *Erie* stands in the way, the answer is to amend section 1738 to mandate application of F_1 's preclusion law in federal-state cases.³¹⁵

IV. CHOICE OF PRECLUSION LAW: EMPIRICAL ANALYSIS

In all the literature discussing how courts *ought* to handle interjurisdictional preclusion problems, there has not been any broad examination of how courts in fact *do* handle interjurisdictional preclusion problems. I set about this task, focusing primarily on the most interesting configuration — federal-state.³¹⁶ The findings in the federal-state configuration can be summed up as follows:

- (1) F_2 usually applies its own preclusion law rather than federal preclusion law.
- (2) F_2 rarely pays any attention to choice of preclusion law.
- (3) It often does not matter whether F_2 applies its own or federal preclusion law, because the preclusion result would be the same.
- (4) It sometimes does matter, however, whether F_2 applies its own or federal preclusion law, and even in those cases F_2 often applies its own law.

Of the 286 federal-state preclusion cases examined, the state court relied solely on its own state preclusion law in 169 cases (59%). The state court relied on federal preclusion law in 62 cases (22%). In an additional 36 cases (13%), the court appeared to rely on both its own and federal preclusion law.³¹⁷ In 16 cases (6%), the court cited neither state nor federal law in support of its preclusion

314. See *infra* text accompanying notes 340-50.

315. See *infra* text accompanying note 350 (proposing such an amendment).

316. The research was conducted on Westlaw, searching all state court cases between January 1, 1991, and August 5, 1996, for preclusion terms and for references to federal court. The search produced 703 cases, of which 286 proved on examination to involve the preclusive effect of a federal judgment in a subsequent state court proceeding. Those 286 cases were examined to determine whose law the court used in addressing the preclusive effect of the federal judgment.

317. In some of these cases, courts cited both state and federal cases without any analysis of whose law applied. In others, courts stated explicitly that the same result would follow from either state or federal preclusion law.

determination; presumably these judges relied on their own understanding of preclusion law — presumably, their own state's preclusion law. Thus, in a substantial majority of federal-state preclusion cases, state courts looked wholly or primarily to their own state law of preclusion, rather than to the preclusion law of the jurisdiction that rendered the judgment.

Certain state courts are more sensitive than others to interjurisdictional responsibilities. The courts of Texas and Louisiana usually apply federal preclusion law in the federal-state configuration,³¹⁸ and the courts of California and Florida apply federal preclusion law about half the time.³¹⁹ If these four states are excluded from the sample, the remaining states relied solely on their own state preclusion law in seventy percent of the cases and relied on federal law in only twelve percent.³²⁰

Few of the cases show any serious analysis of choice of preclusion law. In fact, not many show any analysis whatsoever of choice of preclusion law. For the most part, the state courts appear to apply their own preclusion law reflexively. They see a question of claim preclusion or issue preclusion, and they address the question just as they would if the original case had been in their own state courts.³²¹

Moreover, the courts fare no better in the sixteen federal-state cases in which it appears likely that choice of preclusion law determined the preclusion outcome. Of those cases, F₂ applied its own state preclusion law twelve times,³²² applied federal preclusion law

318. See, e.g., *Vergne v. Lamaze*, 670 So. 2d 599 (La. Ct. App. 1996); *Fernandez v. Memorial Healthcare Sys.*, 896 S.W.2d 227 (Tex. App. 1995).

319. See, e.g., *Abdallah v. United Sav. Bank*, 51 Cal. Rptr. 2d 286 (Ct. App. 1996) (applying federal law); *Wimsatt v. Beverly Hills Weight Loss Clinics Intl.*, 38 Cal. Rptr. 2d 612 (Ct. App. 1995) (applying California law); *Andujar v. National Prop. & Cas. Underwriters*, 659 So. 2d 1214 (Fla. Dist. Ct. App. 1995) (applying federal law); *West v. Kawasaki Motors Mfg. Corp.*, 595 So. 2d 92 (Fla. Dist. Ct. App. 1992) (applying Florida law).

320. In the remaining 18% of cases, the court either cited no precedent to support its preclusion decision, or cited both state and federal preclusion law.

321. See, e.g., *City of Rolling Meadows v. National Adver. Co.*, 593 N.E.2d 551, 556-57 (Ill. App. Ct. 1991); *Trammell v. State*, 622 So. 2d 1257 (Miss. 1993); *American Home Assurance Co. v. International Ins. Co.*, 641 N.Y.S.2d 241 (App. Div. 1996), *revd. on other grounds*, 661 N.Y.S.2d 584 (N.Y. 1997).

322. See *Benetton S.p.A. v. Benedot, Inc.*, 642 So. 2d 394, 399-400 (Ala. 1994) (denying claim preclusion under the Alabama "same-evidence" test, when on the facts of the case, the federal transactional test may have resulted in claim preclusion); *Wimsatt*, 38 Cal. Rptr. 2d at 614-17 (refusing to give preclusive effect to a California federal court's determination of the enforceability of a Virginia forum selection clause, when under federal law of issue preclusion or direct estoppel, the determination probably would have been considered conclusive); *Gottlob v. Connecticut State Univ.*, No. CV 930521148S, 1996 WL 57087, at *4 (Conn. Super. Ct. Jan. 19, 1996) (under Connecticut law, denying claim preclusion on the ground that federal rule 12(b)(6) dismissal was not on the merits, when federal law would give dismissal

three times,³²³ and once applied the preclusion law of the state in which F_1 sat.³²⁴ The cases in which choice of preclusion law mattered involved a wide variety of preclusion law divergences, including mutuality,³²⁵ same claim,³²⁶ entire controversy doctrine,³²⁷

claim-preclusive effect); *Gupta v. New Britain Gen. Hosp.*, No. CV92 517506S, 1995 WL 216835, *4 (Conn. Super. Ct. Apr. 3, 1995) (same, *affd.*, 687 A.2d 111 (Conn. 1996)); *Rolling Meadows*, 593 N.E.2d at 556-57 (denying claim preclusion primarily under the Illinois "same evidence" test, when on the facts of the case, the federal "transactional" test may have resulted in claim preclusion); *Jenkins v. State*, 615 So. 2d 405, 406-07 (La. Ct. App. 1993) (relying on the "exceptional circumstances" exception under the Louisiana *res judicata* statute, LA. REV. STAT. ANN. 13:4232(A)(1) (West 1983), to deny claim-preclusive effect to a federal court dismissal for failure to prosecute, when under federal preclusion law, dismissal would have been claim preclusive); *Douglas v. First Sec. Fed. Savings Bank*, 643 A.2d 920, 924-29 (Md. Ct. Spec. App. 1994) (applying Maryland law of privity and nonparty preclusion to a judgment of the Eastern District of Virginia and finding a nonparty bound based on the nonparty's involvement in litigation, when under federal law, the involvement may not have risen to level of control required for nonparty preclusion under *Montana v. United States*, 440 U.S. 147 (1979)); *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536, 539-42 (N.J. 1995) (applying New Jersey's entire controversy doctrine to a prior proceeding in the Eastern District of Pennsylvania and precluding claims against defendants not joined in the federal action, when under federal law, claims against nonjoined defendants can be pursued separately); *Evans v. Cowan*, 468 S.E.2d 575, 576-77 (N.C. Ct. App.) (denying claim preclusion under the North Carolina "identity of causes of action" test, when the factual basis for the suits was identical, so the federal transactional test would have deemed the state suit to be the same claim as the federal suit, although preclusion may have been unwarranted because the federal court remanded the state claims), *affd.*, 477 S.E.2d 926 (N.C. 1996); *Lamontagne v. Board of Trustees*, 583 N.Y.S.2d 838, 840-41 (App. Div. 1992) (applying New York law to find state law claims not claim precluded by a federal court judgment on a federal ERISA claim based on the same facts, on the theory that "implicit" state claims are not precluded by federal dismissal of federal claims); *Moldovan v. Lear Siegler, Inc.*, No. C.A. 92CA005375, 1993 WL 46656, at *2-3 (Ohio Ct. App. Feb. 24, 1993) (denying claim preclusion under Ohio precedent holding that an intentional tort claim is not the same claim as a worker's compensation claim, because the tort claim raises "additional issues," when it may have been considered the same claim under the federal transactional test); *Dual & Assocs. v. Wells*, 403 S.E.2d 354, 356 (Va. 1991) (applying the Virginia mutuality requirement to deny issue preclusion asserted defensively by a nonparty to a federal action, when under federal law, defensive nonmutual issue preclusion would have been permitted, although issue preclusion may have failed under the identical issue requirement).

323. See *Hochstadt v. Orange Broad.*, 588 So. 2d 51, 52-53 & n.3 (Fla. Dist. Ct. App. 1991) (applying federal law to allow defensive nonmutual issue preclusion, when under Florida law mutuality probably would have been required, although the court suggests that the result would be the same under Florida law); *Reeder v. Succession of Palmer*, 623 So. 2d 1268, 1271-75 (La. 1993) (applying federal claim preclusion law to preclude state law claims based on the same Ponzi scheme as prior federal securities law claims, when under Louisiana civilian *res judicata*, state claims would not have been precluded); *Vergne*, 670 So. 2d at 600-03 (granting claim preclusion under federal law, when if filed before 1991, the claims would not have been precluded under Louisiana civilian *res judicata*).

324. See *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216-19 (Del. 1991) (applying the Kansas mutuality requirement to deny issue preclusion based on the diversity judgment of a Kansas federal court, when under either federal law or Delaware law, non-mutual issue preclusion would have been permitted).

325. See *Columbia Cas.*, 584 A.2d at 1216-19; *Dual & Assocs.*, 403 S.E.2d at 356.

326. See *Benetton S.p.A.*, 642 So. 2d at 399-400; *Rolling Meadows*, 593 N.E.2d at 556-57; *Evans*, 468 S.E.2d at 576-77; *Moldovan*, 1993 WL 46656, at *2-3.

327. See *Mortgagelinq*, 662 A.2d at 539-42.

Louisiana's idiosyncracies,³²⁸ and treatment of Rule 12(b)(6) dismissals as not on the merits.³²⁹

F₂'s propensity to apply its own preclusion law in the federal-state configuration is overwhelming. Could the explanation be that F₂ looks to its own state preclusion law because F₁ was a federal court sitting in diversity in that state? No. Many of the cases in which F₂ applied its own state preclusion law were federal question cases at F₁.³³⁰ Moreover, in cases in which F₁ was a federal court sitting in diversity in a different state from F₂, F₂ generally applied its *own* preclusion law rather than the law of the state in which F₁ sat.³³¹ The results thus do not turn on state courts' conducting silent, sophisticated *Erie* analyses to determine whose preclusion law F₁ would apply.

Although I have not undertaken a similarly thorough analysis of state-state interjurisdictional preclusion cases, it is clear that state courts sometimes apply their own preclusion law rather than the

328. See *Reeder*, 623 So. 2d at 1271-75 (under "civilian res judicata" prior to new statute); *Vergne*, 670 So. 2d at 601-03 (same); *Jenkins v. Louisiana*, 615 So. 2d 405, 406-07 (La. Ct. App. 1993) (under new statute).

329. See *Gottlob v. Connecticut State Univ.*, No. CV 9305211485, 1996 WL 57087, at *4 (Conn. Super. Ct. Jan. 19, 1996); *Gupta v. New Britain Gen. Hosp.*, No. CV92 517506S, 1995 WL 216835, at *4 (Conn. Super. Ct. Apr. 3, 1995), *affid.*, 687 A.2d 111 (Conn. 1996). The *Gupta* court applied Connecticut preclusion law in deciding that the federal dismissal was not on the merits and therefore was not entitled to claim-preclusive effect. See *Gupta*, 1995 WL 216835, at *4. The court, however, ought never to have reached that issue. The plaintiff initially filed both state claims and a federal section 1983 claim in state court. The defendant removed the case to federal court, where the section 1983 claim was dismissed for failure to state a claim. Having dismissed the federal claim, the federal court declined to continue to exercise supplemental jurisdiction over the state claims and remanded those state claims to state court. See *Gupta*, 687 A.2d at 114 n.7. On remand, the state court was not hearing a new action, but rather the original action that had been bounced into federal court and back. Thus, claim preclusion should not have applied. In any event, claims are not precluded if the initial court lacked or declined jurisdiction to hear those claims. See *Keystone Builders, Inc. v. Floor Fashions of Va., Inc.*, 829 F. Supp. 181, 185 (W.D. Va. 1993); *First Interstate Bank of Denver v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 858-59 (Colo. App. 1996); *RESTATEMENT (SECOND) OF JUDGMENTS* § 25 cmt. e (1982).

330. See, e.g., *Gottlob*, 1996 WL 57087 (First Amendment claim); *Gupta*, 1995 WL 216835 (Title VII, ERISA, and other federal statutory claims); *Jenkins*, 615 So. 2d 405 (section 1983 claim); *Lamontagne v. Board of Trustees*, 583 N.Y.S.2d 838 (App. Div. 1992) (ERISA and Taft-Hartley Act claims).

331. See, e.g., *Putnam Resources v. Frenkel & Co.*, No. CV 123838 S, 1995 WL 416194 (Conn. Super. Ct. July 10, 1995) (applying Connecticut law to determine the issue-preclusive effect of a District of Rhode Island diversity judgment); *Douglas v. First Sec. Fed. Sav. Bank*, 643 A.2d 920 (Md. Ct. Spec. App. 1994) (applying Maryland law to determine the claim-preclusive effect of an Eastern District of Virginia diversity judgment); *Morgan Guar. Trust Co. of New York v. Staats*, 631 A.2d 631 (Pa. Super. Ct. 1993) (applying Pennsylvania law to determine the claim-preclusive effect of a Southern District of New York diversity judgment). The sole exception is *Columbia Casualty Co. v. Playtex FP Inc.*, 584 A.2d 1214 (Del. 1991), in which the Delaware court applied Kansas issue preclusion law to determine the effect of a judgment from the District of Kansas.

law of the rendering state.³³² Other courts, however, have referred to the full faith and credit statute and applied the preclusion law of the rendering jurisdiction.³³³ Some courts, though applying their own preclusion law rather than the rendering state's, nevertheless demonstrate sensitivity to interjurisdictional concerns.³³⁴

Federal courts, on the whole, appear more attuned to interjurisdictional concerns than state courts. In the state-federal configuration, federal courts regularly acknowledge that the full faith and credit statute governs the effect they must give to state court judgments.³³⁵ When federal courts fail to apply F₁'s preclusion law, it is not out of the reflexive application of their own law that is common among the state courts in the federal-state configuration. Rather, it is through misapplication of *Erie* analysis, through reliance on the *Rooker-Feldman* doctrine,³³⁶ or through use of federal standards

332. See, e.g., *Ditta v. City of Clinton*, 391 So. 2d 627, 629 (Miss. 1980) (relying on Mississippi issue-preclusion law to determine the effect of a Louisiana judgment); *Giudice v. Drew Chem. Corp.*, 509 A.2d 200 (N.J. Super. Ct. App. Div.) (applying New Jersey's entire controversy doctrine to preclude a New Jersey action for failure to join claims in prior New York action), cert. granted and summarily remanded on other grounds, 517 A.2d 448 (N.J. 1986); *Middleborough Horizontal Prop. Regime Council v. Montedison S.p.A.*, 465 S.E.2d 765, 769 (S.C. Ct. App. 1995) (relying on South Carolina's adoption of offensive nonmutual issue preclusion to determine the effect of a Minnesota judgment).

333. See, e.g., *Speed v. Speed*, 341 So. 2d 156, 159-60 (Ala. Civ. App. 1976); *Miller v. Kingsley*, 230 N.W.2d 472, 474-75 (Neb. 1975); see also *Jones v. State Farm Mut. Auto. Ins. Co.*, 509 N.W.2d 829, 835-36 (Mich. Ct. App. 1993) (relying primarily on Michigan claim preclusion law but declining to apply Michigan's claim preclusion waiver rule to a litigant's failure to object to nonjoinder in a prior Kentucky proceeding).

334. For example, in *Erenberg v. Cordero*, 683 A.2d 567, 569 (N.J. Super. Ct. App. Div. 1996), the court looked to New Jersey's entire controversy doctrine to determine whether product liability claims against General Motors were precluded by a prior wrongful death suit in New York state court. The court allowed the claims by relaxing the entire controversy doctrine based on "equitable considerations," including that the only basis for preclusion would be New Jersey's idiosyncratic doctrine. The concurring judge, especially, was reluctant to apply New Jersey's preclusion law based on proceedings in another state. See *Erenberg*, 683 A.2d at 573-74 (Stern, J., concurring).

335. See, e.g., *State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374 (5th Cir. 1997) (carefully examining Texas law to determine the issue-preclusive effect of a Texas guilty plea); *Warda v. Commissioner*, 15 F.3d 533, 537 (6th Cir. 1994) (applying Michigan law to determine the claim-preclusive and issue-preclusive effect of a Michigan probate court decree); *Albertson v. Volkswagenwerk Aktiengesellschaft*, 634 P.2d 1127, 1128-29 (Kan. 1981) (responding to a certified question from a U.S. district court concerning the effect of a prior Kansas state court judgment under the Kansas one-action rule). Recent Supreme Court cases involving state-federal preclusion have emphasized that 28 U.S.C. § 1738 requires federal courts to apply the preclusion law of the state that rendered the judgment. See *Baker v. General Motors Corp.*, 66 U.S.L.W. 4060, 4064-66 (U.S. Jan. 13, 1998) (noting that preclusive effects "travel with the sister state judgment," but holding that a Missouri federal court need not give full faith and credit to a Michigan state court injunction that exceeded the authority of the Michigan court); *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996); *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982).

336. The *Rooker-Feldman* doctrine, named after *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), prevents

while purporting to apply state preclusion law. First, instead of applying F_1 's preclusion law, some federal courts in diversity cases mistakenly apply the preclusion law of the state in which they sit.³³⁷ Second, at least one federal court has cited the federal *Rooker-Feldman* doctrine to support dismissal of a claim that would not have been precluded under state preclusion law.³³⁸ Third, some federal courts, while purporting to apply state preclusion law, have in fact applied something more closely resembling their own federal preclusion law.³³⁹

Federal courts in general have treated interjurisdictional preclusion problems with greater sophistication than many state courts. But in all three U.S. interjurisdictional configurations — federal-state, state-state, and state-federal — courts too often fail to give prior judgments the respect that they deserve.

CONCLUSION: A CLEAR RULE

Excessive procedural debate only tends to make courts burdened, lawyers rich, and everybody else confused. Particularly in areas in which predictability matters, such as when litigators must make strategic decisions based on the anticipated effect of a judg-

lower federal courts from reviewing state court judgments. See 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 133.30[3][a] (3d ed. 1997).

337. See, e.g., *First Fed. Sav. & Loan Assn. v. Fidelity & Deposit Co. of Md.*, 895 F.2d 254, 262 (6th Cir. 1990) (applying the Ohio mutuality requirement to determine the issue-preclusive effect of a New Jersey judgment in a subsequent Ohio federal court proceeding); *Leckoff v. F&G Realty of N.J.*, 890 F. Supp. 351, 359 (D.N.J. 1995) (applying the New Jersey entire controversy doctrine to determine the preclusive effect of a New York judgment in a subsequent New Jersey federal court proceeding); see also *supra* text accompanying notes 269-73.

338. See *Port Auth. Police Benevolent Assn. v. Port Auth. of New York & New Jersey Police Dept.*, 973 F.2d 169, 177 (3d Cir. 1992).

339. In *Frier v. City of Vandalia*, 770 F.2d 699 (7th Cir. 1985), for example, the Seventh Circuit held a section 1983 claim to be claim precluded based upon an Illinois state court judgment denying replevin. The court cited the full faith and credit statute, recited the rule that Illinois law governs the preclusive effect of the replevin judgment, and even cited Illinois claim preclusion cases. See 770 F.2d at 701-02. Nevertheless, the court's ultimate decision favoring claim preclusion made sense only under the broad federal definition of a claim and not under the narrower Illinois test, as the concurring Seventh Circuit judge convincingly demonstrated. See 770 F.2d at 703-06 (Swygert, J., concurring). Compare *Salaymeh v. St. Vincent Meml. Hosp. Corp.*, 706 F. Supp. 643, 646-47 (C.D. Ill. 1989), in which the federal court lamented that it was unable to dismiss on grounds of claim preclusion, because although the claim arose out of the same transaction as an earlier Illinois lawsuit, it was not the same cause of action under Illinois preclusion law.

In *FDIC v. Continental Casualty Co.*, 796 F. Supp. 1344 (D. Or. 1991), a federal court, addressing the effect of a Wisconsin state court judgment, cited the full faith and credit statute and looked to Wisconsin case law on nonmutual issue preclusion. See 796 F. Supp. at 1348. But on the critical question of whether alternative holdings warrant issue-preclusive effect, the court relied solely on its own Ninth Circuit federal law and did not consider how Wisconsin courts would treat the issue. See 796 F. Supp. at 1348 (citing *In re Westgate-Calif. Corp.*, 642 F.2d 1174, 1176 (9th Cir. 1981)).

ment, we should prefer a simple rule to a more intricate or indeterminate one.

Moreover, we should aim for the possible. Given the finding that courts rarely pause to analyze choice of preclusion law at all, it would be futile to expect most courts to subscribe to a subtly nuanced analysis of choice of preclusion law even if it were a good idea. It may be possible, however, to establish this: courts should not reflexively apply their own preclusion law to determine the binding effect of another court's judgment, but they instead nearly always should apply the preclusion law of the jurisdiction that rendered the judgment.

A decade ago, Professor Stephen Burbank demonstrated the nuanced treatment that could be applied to interjurisdictional preclusion. In particular, he showed that an F_1 referent need not require application of F_1 's preclusion law, because federal common law, *Erie* analysis, and the Rules of Decision Act³⁴⁰ may point to the preclusion law of the state in which federal F_1 sits or to the preclusion law of the jurisdiction that supplied the substantive law at F_1 .³⁴¹ Professor Burbank cautioned us not to ignore the inherent complexity: "We need a law of interjurisdictional preclusion that is sensitive to the complexity of our federal system . . ."³⁴² No court has reliably adopted such a nuanced approach to choice of preclusion law, however, and there is no reasonable prospect that courts will do so in the future. Making choice of preclusion law dependent upon the source of the applicable substantive law leads to non-transsubstantive preclusion.³⁴³ If courts have been largely unwilling to apply another jurisdiction's preclusion law even on the simplest analysis of looking to the jurisdiction that rendered the judgment, then they are unlikely to apply various other jurisdictions' preclusion law depending upon the substantive interests at stake in each case.³⁴⁴

340. 28 U.S.C. § 1652 (1994).

341. See Burbank, *supra* note 1.

342. *Id.* at 739; see also Burbank, *supra* note 302, at 641.

343. See *supra* note 292.

344. Professor Burbank's argument has the most bite in the state-federal configuration, in cases implicating substantive federal rights. Because the federal courts generally have shown greater sensitivity to interjurisdictional concerns in this area, see *supra* text accompanying notes 335-39, the state-federal configuration raises less need for judges to have a clear, simple rule. But litigants and practitioners need a predictable rule in every configuration. Moreover, the litigation policies of F_1 as embodied in F_1 's preclusion rules are equally at stake in the state-federal configuration. The Supreme Court's repeal analysis, see *supra* text accompanying notes 262-68, provides a suitably narrow safety valve for the protection of federal substantive interests by federal courts at F_2 .

Courts should adopt the following approach to interjurisdictional preclusion: F_2 should nearly always apply F_1 's preclusion law, regardless of the configuration — state-state, state-federal, or federal-state — and regardless of the source of the substantive law. With the two very narrow exceptions of federal partial repeal of section 1738³⁴⁵ and preclusion rules explicitly linked to particular substantive rights of action,³⁴⁶ the effect of a judgment should be governed by the preclusion law of the rendering jurisdiction. Professor Ronan Degnan proposed such a rule more than twenty years ago:

A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.³⁴⁷

The intervening years have seen Degnan's proposal dismembered by commentators³⁴⁸ and ignored by too many courts. But it is as sound now as it was in 1976 — sounder, in fact, and for reasons that Professor Degnan only began to uncover.

The need for a clear, reliable rule of interjurisdictional preclusion has grown with the phenomenal growth of multiparty, multiform litigation. The unpredictability of choice of preclusion law and the tendency of many courts unthinkingly to apply their own preclusion law to other courts' judgments highlight the need for a clear rule. At this point, the question should not be whether to have a clear rule, but rather what that rule should be. The answer follows from an examination of the strategic implications of preclusion law. Each jurisdiction possesses strong interests in litigation behavior in its courts, and the manifold strategic implications of preclusion law allow each jurisdiction to use preclusion rules to guide litigation behavior in accordance with that jurisdiction's value choices. This works reliably, however, only if practitioners facing interjurisdictional litigation can count on the applicability of the rendering court's preclusion law.

This article's analysis of interjurisdictional preclusion suggests that any court deciding the preclusive effect of a judgment from

345. See *supra* text accompanying notes 262-68.

346. See *supra* text accompanying notes 291-93.

347. Degnan, *supra* note 1, at 773 (emphasis deleted).

348. See WRIGHT ET AL., *supra* note 104, § 4466, at 618; Burbank, *supra* note 1, at 736-39; Shreve, *supra* note 235, at 1254 n.250. But see Lilly, *supra* note 18, at 328-29 (favoring application of the rendering jurisdiction's preclusion law).

another U.S. jurisdiction³⁴⁹ ought to apply the preclusion law of the rendering jurisdiction. This result need not await case-by-case acceptance. Congress has the power to achieve this result by amending the full faith and credit statute.³⁵⁰ That statute should be amended in three ways. First, the statute should be changed to refer to “judicial proceedings of any court of the United States or of any State, Territory or Possession of the United States,” in order to bring federal judgments within its ambit. Second, to remove any doubts about the statute’s authority as a federal choice of law rule for interjurisdictional preclusion, the statute should require that such judicial proceedings receive “the same full faith and credit — including the identical claim preclusive and issue preclusive effect” as they have in the jurisdiction from which they are taken. Third, the statute should explicitly choose F_1 ’s preclusion law, rather than merely an F_1 referent, by stating that judicial proceedings receive the identical claim preclusive and issue preclusive effect “as they have under the law of the jurisdiction from which they are taken.”

Choice of preclusion law matters because preclusion law varies, sometimes dramatically. The predominant interests at stake in interjurisdictional preclusion are the litigation-related interests of the forum that rendered the initial judgment. Those interests — unlike the interests of the later forum that will decide whether to preclude — are implicated whenever a litigator anticipates the *possibility* of future related litigation across jurisdictional lines. Interjurisdictional differences in preclusion law matter to the initial forum, because the details of preclusion law rationally affect litiga-

349. Many of the arguments advanced in this article apply with nearly equal force to the problem of interjurisdictional preclusion in international litigation. Whether preclusion is applied internationally, or interjurisdictionally within the United States, F_1 has significant interests at stake that point to application of F_1 ’s preclusion law, and the meaning of a judgment should be understood in light of the rendering jurisdiction’s view of the judgment’s binding effect. Preclusion in the international context, however, raises issues beyond those that arise domestically and is beyond the scope of this project. For an example of a court treating international preclusion differently from domestic interjurisdictional preclusion, see *Alfadda v. Fern*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) (applying U.S. law to determine the issue-preclusive effect of a French judgment, noting that “[n]either the Full Faith and Credit Act nor the principles of federalism apply to the recognition of foreign country judgments,” and concluding that “[i]t is thus not clear that federal courts should defer to foreign countries’ issue-preclusion rules”).

350. 28 U.S.C. § 1738 (1994). Congress’s power to achieve this result flows from the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1 (authorizing Congress to prescribe the interjurisdictional effect of state judicial proceedings); the judiciary article, U.S. CONST. art. III, §§ 1-2 (in conjunction with U.S. CONST. art. I, § 8, authorizing Congress to establish lower federal courts with judicial power over certain cases and controversies); the Interstate Commerce Clause, U.S. CONST. art. I, § 8 (authorizing Congress to regulate commerce among the states); and the Necessary and Proper Clause, U.S. CONST. art. I, § 8 (authorizing Congress to make all laws necessary and proper for executing the various powers of the United States).

tion behavior in that forum. While reasonable arguments can be advanced for applying a multilayered approach to choice of preclusion law, state courts not only never apply such nuanced analysis, they rarely pay any attention to choice of preclusion law and instead apply their own preclusion law reflexively. This makes it impossible for practitioners to predict, at the time of the initial lawsuit, whose preclusion law will govern the judgment, and leaves practitioners to make litigation decisions in the dark. For the sake of predictability — and to give consistent effect to the value choices implicit in each jurisdiction's preclusion law — interjurisdictional preclusive effect should be governed by the preclusion law of the jurisdiction that rendered the judgment. More intricate choice of preclusion law analysis is unnecessary, unwise, and in any event, unachievable.