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Allan D. Vestal
University of Iowa

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RES JUDICATA/PRECLUSION BY JUDGMENT: THE LAW APPLIED IN FEDERAL COURTS

*Allan D. Vestal**

I. INTRODUCTION

RES judicata/preclusion by judgment is an important principle of judicial administration. In both of its aspects—issue preclusion (collateral estoppel) and claim preclusion (bar and merger)¹—the principle is used to achieve certain socially desirable ends.² First, it protects litigants from harassment through the litigation of the same claim or issue. Second, the principle helps to preserve the prestige of the courts by avoiding inconsistent judgments; having the same issue decided in different ways can only undermine the general public's esteem for the legal system. A third end served by preclusion by judgment is the saving of the courts' time by avoiding repetition of litigation. If there were no such principle as preclusion by judgment, some litigants might relitigate matters several times.³ Losing plaintiffs might bring additional suits on the same causes of action in the hope of finding a court or jury which would decide in their favor; even winning plaintiffs might sue a second time hoping to get larger recoveries. Parties losing on a fact issue in one suit could relitigate the matter in any subsequent suit. Without a doubt, our presently overloaded courts would find themselves swamped with additional litigation of highly questionable value. This, it would seem, is a very important justification for the principle of preclusion of judgment.

There has been a great increase in the use of the principle of res judicata/preclusion in the federal courts. Although it is difficult to document a statement such as this, one who has done a great deal

* John F. Murray Professor of Law, University of Iowa. A.B. 1943, DePauw University; LL.B. 1949, Yale University.—Ed.

1. Res judicata/preclusion is a generic term which encompasses both claim preclusion/bar and merger and issue preclusion/collateral estoppel. For examples of the use of this terminology, see *Towle v. Boeing Airplane Co.*, 364 F.2d 590 (8th Cir. 1966); *Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967); *Vincent v. Peter Pan Bakers Inc.*, 182 Neb. 206, 153 N.W.2d 849 (1967); *Clark v. Clark*, 80 Nev. 52, 389 P.2d 69 (1964).

2. See Vestal, *Rationale of Preclusion*, 9 Sr. Louis U.L.J. 29 (1964).

3. Examples of this desire to relitigate are easy to find and many litigants today attempt to relitigate claims and issues even though we do have the doctrine of preclusion. See, e.g., *Fiumara v. Sinclair Refining Co.*, 385 F.2d 395 (3d Cir. 1967); *Rhodes v. Jones*, 351 F.2d 884 (8th Cir. 1965), *cert. denied*, 383 U.S. 919 (1966); *Heasley v. United States*, 348 F.2d 40 (8th Cir. 1965).

of research in the area senses that more litigants and courts are recognizing the availability of res judicata/preclusion to reach certain ends which the courts accept as socially desirable. However, the development of the scope of the principle is more easily documented. The extension of preclusion from criminal to civil litigation is one example of this.⁴ The breakdown in the requirement of mutuality is another, allowing a party to claim preclusive effect even though he was not a party to the first suit.⁵ The expansion of the scope of the definition of "claim" in connection with bar and merger/claim preclusion might also be considered an expansion of the scope of preclusion.⁶

All of these developments, it is suggested, result from a felt need on the part of the courts. Judges, overwhelmed by docket loads, are looking for devices to expedite their work. Preclusion offers an opportunity to eliminate litigation which is not necessary or desirable. Thus, it seems reasonable to conclude that the use of preclusion will increase as does the docket load of the courts. Finally, if preclusion/res judicata is a desirable principle, and it seems to be, the federal courts should be at the forefront in establishing and promoting it. In fact, an examination of recent federal cases seems to support the idea that federal courts are leading the way in the use and development of preclusion by judgment.⁷

II. THE LAW OF PRECLUSION IN FEDERAL COURTS

A. Problem

Preclusion is not a simple principle; it is a multifaceted concept affected by a number of relevant variables. A discussion of the principles is meaningful only if specific situations are discussed; to talk in generalities is not profitable. Therefore, for the sake of clarity, this Article will consider several typical situations.

Example A. Judgment is rendered in forum I in a case between

4. See *Moore v. United States*, 360 F.2d 353 (4th Cir. 1965), cert. denied, 385 U.S. 1001 (1967); Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683 (1966).

5. See *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), aff'd sub nom. *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

6. See Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357 (1967).

7. See, e.g., *Moore v. United States*, 360 F.2d 353 (4th Cir. 1965), cert. denied, 385 U.S. 1001 (1967); *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), aff'd sub nom., *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), cert. denied, 379 U.S. 951 (1964); *Mathews v. New York Racing Ass'n, Inc.*, 193 F. Supp. 293 (S.D.N.Y. 1961).

X and Y, with a fact adjudication necessary for the decision against Y. In forum II there is subsequent litigation between Y and Z, and the question arises whether Z can assert the earlier fact adjudication against Y as preclusive on that issue. If forum I and forum II are state courts, certain considerations deserve attention; if either forum is a federal court, however, there are other elements which may be pertinent.

It must be recognized that the law may vary on this problem. At the present time one jurisdiction may require mutuality of preclusion. Another may say that the losing party, Y, is bound by the adjudication since he has had the opportunity and the incentive to litigate in the first action.⁸

Example B. Forum I has a rather narrow definition of "cause of action." In an automobile accident suit, it holds that the plaintiff has two causes of action: one for personal injuries and the other for property damages.⁹ Suppose that X sues Y in forum I for personal injury and recovers a judgment. If X then sues Y in forum II for property damages, what law will be applied to Y's assertion of claim preclusion? Could forum II apply its own definition of "claim" when the definition is broad enough to encompass both personal injury and property damages? Could forum II decide that *res judicata*/claim preclusion applies? What law should be applied in forum II if it is a federal court? These questions are part of the problem being considered.¹⁰ It also must be understood that example A is one of

8. For cases repudiating the doctrine of "mutuality," see *Adriaanse v. United States*, 184 F.2d 968 (2d Cir. 1950), *cert. denied*, 340 U.S. 932 (1951); *Bruszewski v. United States*, 181 F.2d 419; *United States v. United Air Lines*, 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd sub nom. United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1964); *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

See also *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298, 301 (D. Mass. 1960), where the court stated:

[I]nquiries should be made as to whether plaintiff had a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.

. . . He has had his day in court on the issue in a forum of his own choosing and against a party of his own choosing who was closely related to the present defendant.

9. A minority of states adhere to the rule that damage to goods and injury to the person, although the result of the same act, are infringements of different rights, and give rise to two causes of action. See, e.g., *Clancey v. McBride*, 338 Ill. 35, 169 N.E. 729 (1929); *Smith v. Fischer Baking Co.*, 105 N.J. 567, 147 A. 455 (1929).

10. The possible situations may be charted as follows:

<i>Forum I</i>	<i>Forum II</i>	<i>Subject Matter Jurisdiction of Forum II</i>
1. Federal Court	Federal Court	Federal Question
2. State Court	Federal Court	Federal Question
3. Federal Court	Federal Court	Diversity
4. State Court	Federal Court	Diversity

issue preclusion while example B is one of claim preclusion.¹¹ These are separate and distinct legal concepts, although they are grouped together for the purpose of discussion under some circumstances.

At this point, it is also helpful to identify other significant variables in the situations under consideration. These variables are (1) the court handing down the judgment which is supposedly preclusive, and (2) the subject-matter jurisdiction of the forum II federal court. These two factors, along with the claim-issue dichotomy, are elements which must be considered in determining the law to be applied in preclusion cases in the federal courts.

B. Possible Sources of Applicable Law

A federal court faced with an assertion of preclusion arising from an earlier decision must consider a number of different possible sources of law and relevant variables before a final conclusion is reached. First, the concept of full faith and credit as found in the federal Constitution and the implementing federal statute must be considered.¹² Second, in cases involving nonfederal subject-matter jurisdiction, the *Erie* doctrine and its ramifications need to be examined to see whether resort must be had to the law of the state in which the federal court is sitting.¹³ Third, the interest of the federal court system in the adjudication must be considered, since under the principle of *Hanna v. Plumer*, and possibly other rationales, the federal interest is a factor which may affect the law to be applied.¹⁴

An examination of the federal court decisions on preclusion reveals that there is a lack of consistency or rationality in the law being applied. Courts often present different principles as applicable;¹⁵ some present no justification, in terms of the source of the law

11. For a good discussion of res judicata/claim preclusion by Judge Goodrich, see *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

12. See notes 41-59 *infra* and accompanying text.

13. See notes 23-40 *infra* and accompanying text.

14. See notes 62-82 *infra* and accompanying text. This balancing is similar to the current trend in conflicts-of-laws cases which hold it appropriate to consider the possible impact of the law "of the place which is most significantly related to the occurrence or issue before the Court." H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* 165 (4th ed. 1964).

15. Compare *Gramm v. Lincoln*, 257 F.2d 250 (9th Cir. 1958) and *Friedenthal v. Williams*, 271 F. Supp. 524 (E.D. La. 1967) with *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962) and *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960).

For an example of an unusual rationale, see *Newport News Ship. & Drydock Co. v. Seaboard Maritime Corp.*, 174 F. Supp. 446, 468 (D. Del. 1958). The court, in deciding the impact of a judgment rendered by a federal court, stated, "It would therefore appear that pleading the Florida judgment ceases to be a matter solely of res judicata but also one of enforceability and effect to be accorded a foreign judgment." The

being applied, for the conclusion reached;¹⁶ and, some courts recognize the problem but refuse to face up to it. The latter approach is typified by the courts which indicate that they are uncertain about the source of the law applicable—whether one state or another or the federal law—but conclude that it makes no difference since the various laws are all the same.¹⁷

In part, this lack of consistency or rationality is due to a failure on the part of attorneys to recognize the complex choice-of-law problems involved. In a discussion of the full faith and credit clause, which is part of the total picture being considered, Justice Jackson remarked: "The practicing lawyer often neglects to raise questions under it, and judges not infrequently decide cases to which it would apply without mention of it."¹⁸ Furthermore, according to Justice Jackson, full faith and credit problems are difficult to resolve even when they are properly raised:

Indeed, I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.¹⁹

Court then looked to see what a Delaware court would do in the situation and how it would treat the "foreign" interstate judgment. No reference was made to full faith and credit, and the court specifically limited federal court recognition of a federal judgment because the federal courts "are many members but one body" to cases involving "matters peculiarly cognizable in a Federal forum." 174 F. Supp. at 468 n.8.

16. See, e.g., *Peevyhouse v. Garland Coal & Mining Co.*, 356 F.2d 979 (10th Cir.) cert. denied, 383 U.S. 919, rehearing denied, 383 U.S. 963 (1966). *Rhodes v. Jones*, 351 F.2d 884 (8th Cir. 1965); *Mathews v. New York Racing Ass'n*, 193 F. Supp. 293 (S.D.N.Y. 1961).

17. See, e.g., *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966); *Maryland v. Capital Airlines*, 267 F. Supp. 298 (D. Md. 1967) (suit under the Federal Torts Claims Act). The *Capital Airlines* court stated, "[I]t is not necessary for this court to determine this conflict of laws question because the law of the District of Columbia and the law of the State of Maryland on the issue of mutuality is the same." 267 F. Supp. at 303. In *Sherman v. Jacobson*, 247 F. Supp. 261, 266 (S.D.N.Y. 1965), the court stated:

In determining the effect to be given the Iowa judgment, neither party has explicitly considered the conflicts question of what law is applicable. Some of the conflicts problems lurking in the record are formidable in the abstract; i.e., does New York law, Iowa law or federal law apply in resolving each of the three issues stated above? . . . However, resolution of the choice of law question is not crucial because there do not appear to be material differences between the Iowa, New York, or federal decisions affecting the issues raised here. [Footnotes omitted.] See also *Rohm & Haas Co. v. Chemical Insecticide Corp.*, 171 F. Supp. 426, 430 (D. Del. 1959), where the court stated:

It is to be hoped that if the res judicata defense is again advanced, the parties will be prepared to supply the Court with their views on the question of the applicability of state as against federal law as it related to the privity question. This is the "interesting intellectual question" which was posed in *Caterpillar Tractor Co. v. International Harvester Co.* . . .

18. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 3 (1945).

19. *Id.* at 16.

Similar confusion exists as to the impact of the *Erie* doctrine, and an examination of cases decided in the federal courts within the past several decades shows that, in nonfederal cases, a sizeable number of courts did not mention *Erie Railroad Co. v. Tompkins* or obviously apply state law. On the other hand, a number of cases did mention the possible application of the concept of full faith and credit, either constitutional or statutory.

These considerations may tend to pull in different directions. On the one hand, *Erie* considerations, such as avoidance of forum shopping and affording equal treatment to litigants,²⁰ may suggest that state law is controlling and that a federal court should be required to resort to the law of the state in which it is sitting to get an answer concerning a claim of preclusion. On the other hand, full faith and credit considerations may suggest a direct reference to the law of the forum handing down the first, or precluding, judgment.²¹ In a more indirect and historical sense, the full faith and credit concept should be recognized as an attempt to integrate and unify the country. Its application in the federal courts should be consistent with this underlying goal. The distinct federal interests in actions being adjudicated in federal courts might suggest the creation of a federal law of preclusion/res judicata. If the law to be applied is that of the place "which is most significantly related to the . . . issue before the court,"²² this might well suggest the application, in the area of preclusion, of a federal body of law. This is simply to say that when the technicalities of the law are examined, the underlying principles should not be forgotten. The ultimate decision should reflect the underlying interests of society.

C. *Erie Railroad Co. v. Tompkins* and State Law

When preclusion by judgment is asserted in a federal court exercising nonfederal subject-matter jurisdiction,²³ it may be urged that the federal court is required to apply the law of the state in which it is sitting because of the *Erie* doctrine. Under that doctrine, as developed in the decade following its promulgation, a federal court

20. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

21. *Doggrell v. Southern Box Co., Inc.*, 208 F.2d 310 (6th Cir. 1953), suggests the possibility of conflict between the *Erie* doctrine and full faith and credit; dissenting Judge Martin would find the constitutional full faith and credit controlling in that situation. This case did not involve preclusion by judgment.

22. H. GOODRICH & E. SCOLES, *supra* note 14, at 165. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

23. *Erie* is not limited to diversity cases. See *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939); *Vestal, Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 257 (1963).

was required to follow the law of the state in which it was sitting in any matter which might "significantly affect" the outcome of the litigation.²⁴ Although this articulation of law applicable to non-federal matter was generally accepted for a long time, it was not precisely accurate.²⁵ Moreover, within the last decade the Supreme Court has rendered several decisions which have indicated a movement away from the absolutism of *Erie* and *Guaranty Trust Co. v. York*²⁶ toward a more reasonable middle ground where the significant considerations—both federal and state—are weighed before a decision is made concerning the law to be applied. Actually, this recent development should be recognized as a shift in emphasis; the contrapuntal nature of the interplay has been present since the *Erie* decision.²⁷ Once a transition is made from abstract consideration of the generic *Erie* rule to a specific consideration of its possible application in a preclusion case in a federal court, difficulties are encountered. Immediately, one recognizes that the countervailing federal considerations must be weighed and that there are other relevant factors which must be noted.

The possible application of the *Erie* doctrine in a preclusion case can arise in a federal court, forum II, regardless of whether forum I was a state or federal court. The *Erie* doctrine is invoked because of the nonfederal subject-matter jurisdictional base of the federal court, forum II. The *Erie* problem can also arise whether there is a single state involved or several states. Obviously, if there is only a single state involved, there will be no interstate conflicts problem and no full faith and credit difficulty in possibly not giving the proper effect to a foreign judgment. In *Heiser v. Woodruff*,²⁸ the Supreme Court of the United States skirted the issue of the possible application of *Erie* to questions of preclusion, stating:

We need not consider whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of *res judicata* applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie R. Co. v. Tompkins* . . . can be other than that of the state in which the federal court sits.²⁹

24. See *Guaranty Trust Co. v. York*, 326 U.S. 99, *rehearing denied*, 326 U.S. 806 (1945); see also *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, *rehearing denied*, 338 U.S. 839 (1949).

25. See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), *rehearing denied*, 312 U.S. 655 (1941).

26. *Guaranty Trust Co. v. York*, 326 U.S. 99, *rehearing denied*, 326 U.S. 806 (1945).

27. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Co-operative, Inc.*, 356 U.S. 525, *rehearing denied*, 357 U.S. 933 (1958); *Vestal*, *supra* note 23, at 48.

28. 327 U.S. 726 (1946), *rehearing denied*, 328 U.S. 879 (1946).

29. 327 U.S. at 731-32.

Some lower federal courts, however, when faced with claims of preclusion in diversity cases, have referred to the *Erie* doctrine and have applied it. In *Gramm v. Lincoln*,³⁰ for example, the Court of Appeals for the Ninth Circuit indicated that an earlier decision by a state court precluded a second state court proceeding seeking "the same relief on the same ground." From this proposition, the Court of Appeals reasoned that "the federal district court is also precluded from relitigating that question." In a footnote the court stated that "since this is a diversity case, the federal court is required to follow the law of the state This includes the law pertaining to res judicata."³¹ *Gramm* involved the estate of a decedent who had died in Idaho. The first suit had been in an Idaho court and the federal court hearing the second suit was also sitting in Idaho. It also should be noted that the case involved claim preclusion rather than issue preclusion.

The *Erie* doctrine was applied to a question of issue preclusion in *Friedenthal v. Williams*,³² where the Federal District Court for the Eastern District of Louisiana was faced with a diversity suit brought by a spouse-passenger in one car against the driver of a second car. The spouse-driver had brought an earlier action against the driver of the second car claiming negligence in the same accident, and judgment had been rendered for the defendant. In the federal court the defendant asserted that the action was barred by "res judicata and/or judicial estoppel," and to resolve this issue the federal court applied Louisiana law. Here the accident happened in the same state in which were sitting both the state court hearing the first suit and the federal court hearing the second suit. There was no conflicts problem.

It might be urged persuasively that when a federal court is acting simply as another court of a state, as in *Gramm* and *Friedenthal*, and when no other state has an interest in the litigation, it is reasonable for the federal court to apply the preclusion law of the state in which it is sitting.³³ When two or more states have an

30. 257 F.2d 250 (9th Cir. 1958).

31. 257 F.2d at 255 & n.6.

32. 271 F. Supp. 524 (E.D. La. 1967).

33. See *McConnell v. Travelers Indemnity Co.*, 346 F.2d 219 (5th Cir. 1965); *Boulter v. Commercial Standards Ins. Co.*, 175 F.2d 763 (9th Cir. 1949); *Hornstein v. Kramer Bros. Freight Lines*, 133 F.2d 143 (3d Cir. 1943); *Deaton v. Gay Trucking Co.*, 275 F. Supp. 750 (D.S.C. 1967); *Forrester v. Southern Ry. Co.*, 268 F. Supp. 194 (N.D. Ga. 1967); *Centennial Ins. Co. v. Mileer*, 264 F. Supp. 431 (E.D. Cal. 1967); *Hassenplug v. Victor Lynn Lines*, 71 F. Supp. 70, 71 (E.D. Pa. 1947):

The question of whether the rule of res judicata applied in the federal courts, in diversity of citizenship cases, under *Erie R. Co. v. Tompkins* . . . can be other than that of the state in which the federal court sits was specifically left open in *Heiser v. Woodruff* To do otherwise than apply Pennsylvania law in this situation would be anomalous. The former judgment relied upon by defendant

interest in a diversity case, however, some federal courts have applied—or at least paid deference to—the *Erie* doctrine.³⁴ But it might be argued that when the federal court is acting truly as a federal court, resolving conflicting interests among several states, there is some justification for a different approach to the question of what law of preclusion should be applied. An example of this situation is *Wayside Transportation Co. v. Marcell's Motor Express*,³⁵ wherein forum I was a state court in Vermont. In a subsequent diversity action in the Federal District Court for the District of Massachusetts, it was urged that the Vermont judgment was preclusive on the issue of personal jurisdiction over the defendant in the Vermont court. The Court of Appeals for the First Circuit decided that the first judgment was preclusive and stated:

The constitutional and statutory provisions requiring full faith and credit articulate and implement the dictate of public policy "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." . . . And the principle that there shall be but one adjudication of an issue between the same parties covers the issue of jurisdiction over a defendant's person, provided the court first deciding that issue, in this case the Vermont court, did not make so gross a mistake as to be impossible "in a rational administration of justice." . . . From our

was obtained in a federal court sitting in Pennsylvania. The court, for the substantive issues of that case, was sitting as a state court, when it rendered its judgment. . . . Certainly Pennsylvania law should now be used to determine the effect of that judgment in a case in the same state, where federal jurisdiction is once again based on diversity.

Cf. Mathews v. New York Racing Ass'n, 193 F. Supp. 293 (S.D.N.Y. 1961). Both suits were in the same federal court; both claims arose in New York; neither judge mentioned state law or cited state cases. *But see* the pair of cases: *Reiser v. Baltimore & O.R.R.*, 123 F. Supp. 44 (1954), and *Koblitz v. Baltimore & O.R.R.*, 164 F. Supp. 367 (S.D.N.Y. 1958). Both suits were in federal courts; there was diversity jurisdiction but no reference to *Erie*.

Although the precise holding of *Angel v. Bullington*, 330 U.S. 183 (1947) (a 5-4 decision), is not clear, the Court referred to the federal district court as "another North Carolina court, albeit a federal court." The Supreme Court, nonetheless, seemed to adhere to the idea that it was applying a general principle of law on the *res judicata* question. The important consideration seemed to be the federal interest in avoiding a conflict with the state.

34. *See, e.g., Behrens v. Skelly*, 173 F.2d 715 (3d Cir. 1949), *cert. denied*, 338 U.S. 821 (1949); *Schmitt v. Jacobson*, 272 F. Supp. 301 (D. Mass. 1967) (reference to Massachusetts law and "the trend of judicial decision generally in this area of the law"); *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298 (D. Mass. 1960) (reference to law of state in which the court was sitting, no controlling case found, invocation of an expanding concept of collateral estoppel, holding of preclusion); *Newport News Ship. & Drydock Co. v. Seaboard Maritime Corp.*, 174 F. Supp. 466 (D. Del. 1958) (Delaware conflict-of-laws rules followed to apply Florida law on effect of judgment of that state).

35. 284 F.2d 868 (1st Cir. 1960).

statement of the case we think it too clear for discussion that the Vermont court made no outrageous mistake in applying its own law. This being so, its judgment is *res judicata* under established principles of federal law.³⁶

It is noteworthy that the court of appeals nowhere spoke of the *Erie* case or of how a Massachusetts state court would decide the problem. Apparently the First Circuit felt that the applicable law of preclusion was to be found other than in the substantive law of the state in which the federal trial court was sitting.

The problem of *Erie's* applicability was treated more directly by the Court of Appeals for the Second Circuit in *Kern v. Hettinger*,³⁷ a diversity case involving claim preclusion. Forum I, the Federal District Court for the Northern District of California, had entered a dismissal for lack of prosecution. When the plaintiff attempted to sue on the same claim in New York, the District Court for the Southern District of New York granted summary judgment dismissing his complaint as to several defendants.³⁸ On appeal, the Second Circuit held that the suit was precluded by the judgment in the California federal district court. In response to the plaintiff's contention that California law controlled the effect of the judgment in forum I and that under California law a dismissal for lack of prosecution would be without prejudice, the Court of Appeals for the Second Circuit stated:

One of the strongest policies a court can have is that of determining the scope of its own judgments. Cf. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* . . . It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The *Erie* doctrine . . . is not applicable here . . .³⁹

36. 284 F.2d at 871.

37. 303 F.2d 333 (2d Cir. 1962). It is interesting to note that in this same case, the court considered the claim of collateral estoppel made by a second defendant who had not been served and who had not appeared in the California suit. The court stated at 340, "Regardless of which law we turn to to decide this question, the result is the same," and then referred to California and New York cases. This would suggest that at this point state law might be applicable.

38. 303 F.2d at 334.

39. 303 F.2d at 340.

Consideration of these and other recently decided federal cases on preclusion in which jurisdiction was based on diversity seems to suggest that there is no uniformity of judicial attitude toward the *Erie* doctrine. Certainly there are a number of cases which have implicitly or explicitly rejected the doctrine in favor of a more general principle of federal law regarding preclusion. This approach seems consistent with the Supreme Court's decision in *Hanna v. Plumer*,⁴⁰ which indicates that it is necessary to consider the principles underlying *Erie* in deciding whether state or federal law should be applied. When preclusion is examined from this point of view, it can be decided whether the *Erie* rationale requires that the federal courts follow the law of the state. It can also be determined whether the possibility of forum shopping and inequitable treatment of litigants forecloses the use of different laws by federal and state courts of the same jurisdiction. Along with these factors, the federal courts should balance other considerations—such as the concept of full faith and credit and the nature of any countervailing federal interests—in determining from what source the law concerning preclusion is to be drawn.

D. Full Faith and Credit

When the Constitution of the United States was adopted, one of the underlying motivations of its Framers was the economic and political integration of the country.

By the full faith and credit clause [the founding fathers] sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence⁴¹

Whenever the impact of the full faith and credit concept is examined it is necessary to consider the goal which this provision sought to attain. The constitutional "full faith and credit" provision, found in article IV, states: "Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."⁴²

40. 380 U.S. 460 (1965).

41. Jackson, *supra* note 18, at 17 (footnote omitted). For an excellent discussion of the background of the full faith and credit clause, see Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944).

42. U.S. CONST. art. IV, § 1.

There is little doubt that this clause applies solely to the courts of the states; it directs the state courts to recognize—give full faith and credit—to decisions of other state courts. The constitutional provision thus has no effect in the federal courts of the United States.⁴³ However, supplementing the constitutional provision is section 1738 of the Judicial Code, which is broader in scope.⁴⁴ The direction of this statutory provision is given not just to the courts of the states, but rather to “every court within the United States and its Territories and Possessions,” which would seem to include the federal courts. It instructs the second court to give judgments “the same full faith and credit . . . as they have . . . in the courts of such State, Territory or Possession from which they are taken.”

In applying the constitutional clause and implementing statute to questions of preclusion in federal courts, two situations must be considered. The first involves a state court judgment which is later drawn into question in a second proceeding in a federal court. The statutory provision, on its face, would seem to apply to this situation.⁴⁵ The second possibility arises when a federal court hands

43. See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960).

44. 28 U.S.C. § 1738 (1964) provides:

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

The language of the statutory provision is not that of the Constitution, but there is no reason to believe that a difference in application was intended by the difference in the language.

Congress first effectuated the full faith and credit clause by the act of May 26, 1790, 1 Stat. 22. This act provided that authenticated records, judicial proceedings and acts should have “such 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.” This initial act did not include the territories, but “[o]n March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the territories of the United States and countries subject to the jurisdiction thereof. 2 Stat. 298, ch. 56.” *Atchison, Topeka & Santa Fe Ry. v. Sowers*, 213 U.S. 55, 64 (1909).

In 1948 Congress changed the language, concerning the effect of authenticated acts, records, and judicial proceedings in other jurisdictions, from “such faith and credit” as given them in the rendering jurisdiction. However, no indication is found in the Revisor's notes that the change in language had any significance. 28 U.S.C. § 1738 (1966).

45. *Durfee v. Duke*, 375 U.S. 106 (1963); *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932); *Wayside Transp. Co. v. Marcell's Motor Express, Inc.*, 284 F.2d 868 (1st Cir. 1960); *United States v. Silliman*, 167 F.2d 607 (3d Cir.), *cert. denied*, 335 U.S. 825 (1948). *But see Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959) (no mention made of full faith and credit; apparently federal law of res judicata applied); *Behrens v. Skelly*, 173 F.2d 715 (3d Cir.), *cert. denied*, 338 U.S. 821 (1949) (applied *Erie* and conflict-of-laws rules rather than full faith and credit; referred to forum law); *Kaufman v. Shoenberg*, 154 F. Supp. 64 (D. Del. 1954) (no mention of full faith and credit; apparently federal law of res judicata applied).

down a judgment which is then drawn into question in a subsequent proceeding in another federal court.⁴⁶ In this situation it may also be argued that the statutory provision applies. The Court of Appeals for the Third Circuit was faced with the latter situation in *Caterpillar Tractor Co. v. International Harvester Co.*,⁴⁷ and concluded that:

[T]he federal statute requires faith and credit "in every court within the United States." The credit which this judgment must receive is that to which it is entitled "by law or usage" in the courts of the place where rendered. That is a matter of the common law of [the state where the federal court sat], but is a matter which has not, so far as we have been able to find, been dealt with by [such] courts. In the absence of contrary local decisions the rules [of preclusion] set out above are the ones we believe to be sound and to which we give our approval.⁴⁸

It is to be noted that the court, in fact, went on to make its own decision about the weight to which the prior judgment was entitled. Moreover, the language concerning full faith and credit loses much of its force in light of the following discussion in the opinion:

On the other hand, the matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as the head of the judicial system of the United States, would compel it to do so because "they are many members yet but one body." . . .

Whichever route one travels he reaches the same destination. . . . Judge Biggs believes that the problem discussed in the preceding paragraphs presents no problem of faith and credit and that the recognition in one federal court of the decrees of another comes through the fact that both courts are arms of the same sovereignty.⁴⁹

46. See, e.g., *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

Another possibility, which is not within the ambit of this Article, involves a federal judgment which was handed down and then was drawn into question in a subsequent proceeding in a state court. The constitutional provision would not cover this, but the possible application of the statutory provision is apparent. This is very close to the example given in the text of federal first and then federal second. If the statute, contrary to its apparent language, applies to a federal judgment handed down, it would not seem to matter whether the second proceeding is in a federal or state court since the statute refers to "every court within the United States and its Territories and Possessions." Compare *Knights of Pythias v. Meyer*, 265 U.S. 30 (1924); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900); *Embry v. Palmer*, 107 U.S. 3 (1882); *In re Bailleaux*, 47 Cal. 2d 258, 302 P.2d 801 (1956), *cert denied*, 353 U.S. 975 (1957); and *Shell Oil Co. v. Texas Gas Transmission*, 176 S. 2d 692 (Ct. App. La. 1965) with *Stoll v. Gottlieb*, 305 U.S. 165, *rehearing denied*, 305 U.S. 675 (1938); *Superior Distributing Corp. v. White*, 146 Colo. 595, 362 P.2d 196 (1961); and *Gunsberg v. Cantor*, 24 App. Div. 2d 999, 220 N.E.2d 796, 266 N.Y.S.2d 343 (1965), *motion for leave to appeal denied*, 18 N.Y.2d 711, 220 N.E.2d, 274, N.Y.S.2d 148 (1966).

47. 120 F.2d 82 (3d Cir. 1941).

48. 120 F.2d at 85-86 (footnote omitted).

49. 120 F.2d at 86.

The full faith and credit argument concerning the applicable law in the federal courts can be understood only if it is recognized that the content of the preclusion law of the court handing down the judgment which is supposedly preclusive is a significant variable. In considering possible preclusive effect, there are three possibilities which might occur. First, the law concerning preclusion might be the same in both jurisdictions, in which case the court in forum II is not forced to make any decision concerning the source of the law; it simply applies the law, perhaps noting in passing that the law is the same.⁵⁰ Second, the law of preclusion in forum II may be narrower in scope than that of forum I: forum I might hold for preclusion while forum II would not. Given these facts, the full faith and credit concept would be undermined if forum II applied its own standards, since the forum I judgment is being given lesser effect in forum II than it would have received in forum I. The full faith and credit concept requires the judgment to have as much effect in forum II as it would have in forum I.

The third possibility is that forum II might have a broader concept of preclusion than does forum I. Could forum II then give greater preclusive effect to the forum I judgment than does that forum? This problem raises a fundamental question concerning the full faith and credit concept; that is, whether the constitutional clause, and by analogy the statutory provision, requires *precisely* the same treatment of the judgment in forum II as that which would be given in forum I.

Although full faith and credit has been considered in a number of cases involving preclusion, the impact of the concept has never been spelled out. Apparently, the initial judgment must, at a minimum, be given at least as much effect in the second forum as it would be given in the rendering forum.⁵¹ On the other hand, the decisions have not clearly spelled out whether the court in forum II can give *more* effect to the judgment than is demanded by the full faith and credit provision. The language in a recent decision by the Supreme Court certainly suggests that the second court could give more effect to the first judgment than would forum I: "Full faith and credit . . . *generally* requires every State to give to a judgment at least the *res judicata* effect which the judgment would be ac-

50. See cases cited note 17 *supra*.

51. See *In re Potts*, 142 F.2d 883, 888-89 (6th Cir. 1944), *cert. denied*, 324 U.S. 868 (1945); *Maager v. Hoyer*, 122 F. Supp. 932, 934 (E.D.N.C. 1954); *Butler v. Butler*, 253 Iowa 1084, 1106, 114 N.W.2d 595, 608 (1962); *Phillips v. Cooper*, 253 Iowa 359, 363, 122 N.W.2d 317, 319 (1961).

corded in the State which rendered it."⁵² This statement was dictum in the case; nevertheless it does suggest that the door is open for forum II to give greater effect to a judgment than would the rendering state.⁵³

Probably the best analogy to the situation under consideration is the statute of limitations problem. In a long line of cases, both federal and state courts have decided that they will enforce a judgment of forum I even though the statute of limitations governing enforcement of judgments has run in forum I if the statute of limitations has not run on the action on the judgment in forum II when the action is brought there.⁵⁴ Justice Jackson has criticized this line of authority and its underlying distinction between pleas to the merits and pleas to the remedy, the latter of which are governed by the law of the forum: "Distinguishing between denial of a right and denial of a remedy is a rather academic enterprise and not a thoroughly satisfying one. But on that basis it is held that a suit upon a judgment is subject to the statute of limitations of the forum state, rather than to that of the rendering state."⁵⁵

Broadly speaking, however, the problem under consideration is simply whether a court can give more effect to a judgment than is required by the Constitution or the statute. This question has been answered affirmatively in other factual contexts. In *Allis v. Allis*⁵⁶ the Court of Appeals for the Fifth Circuit, exercising diversity

52. *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (emphasis added).

53. The same suggestion is found in Jackson, *supra* note 18, at 30, where the Justice stated:

Private international law and the law of conflicts extend recognition to foreign statutes or judgments by rules developed by a free forum as a matter of enlightened self-interest. The constitutional provision extends recognition on the basis of the interests of the federal union which supersedes freedom of individual state action by a compulsory policy of reciprocal rights to demand and obligations to render faith and credit. *States under their voluntary policy may extend recognition when they could not constitutionally be required to do so.* . . . [Emphasis supplied.]

54. See *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 46 (1949) (Frankfurter, J., dissenting in part):

[W]here the enforcement of a judgment by State A is sought in State B, which has a longer limitation period than State A, State B is plainly free to enter its own judgment upon the basis of State A's original judgment, even though that judgment would no longer be enforceable in State A. If enforcement of State B's new judgment is then sought in State A, State A cannot refuse to enforce it without violating the principle that the State where enforcement of a judgment is sought cannot look behind the judgment. That was the situation in *Roche v. McDonald*, 275 U.S. 449, and so we there held.

Accord, *Webb v. Webb*, 222 N.C. 551, 23 S.E.2d 897 (1943); *Fanton v. Middlebrook*, 50 Conn. 44 (1882); *Miller v. Brenham*, 68 N.Y. 83 (1877); *Taylor v. Joor*, 7 La. Ann. 272 (1852); *Succession of Ducker*, 10 La. Ann. 758 (1855); *Estes v. Kyle*, 19 Tenn. 35 (1838).

55. Jackson, *supra* note 18, at 9 (footnote omitted).

56. 378 F.2d 721 (5th Cir.), *cert. denied*, 389 U.S. 953 (1967).

jurisdiction, was faced with a preclusion argument involving a Nevada divorce decree which purportedly affected certain real property in Texas. The federal court considered the problem of a court attempting to affect real property in another state and examined the Texas law on the point, noting that:

[A] number of state courts have chosen to recognize the validity of unexecuted equitable decrees, apparently upon the theory that the situs state is no more deprived of exclusive jurisdiction over its realty by implementing such decrees than by according Full Faith and Credit to deeds actually executed under foreign court orders.⁵⁷

The court quoted a Texas decision concerning this problem:

Comity, in the absence of a controlling decision by the United States Supreme Court under the "Full Faith and Credit" clause, seems the preferable basis for a state court decision.

....

Our holding therefore is that as a matter of comity we will enforce the equitable decrees of a sister state affecting Texas land so long as such enforcement does not contravene an established public policy in this State.⁵⁸

Thus, the final conclusion was that the court would recognize the binding effect of the Nevada decree although this was not required by the Constitution.

As noted earlier, it seems reasonable to predict that federal courts will wish to apply the doctrine of preclusion as broadly as possible in the future. This means that the concept of full faith and credit, even if applicable, will have no effect on the actions of the federal courts unless it requires precisely the same treatment which would be given to a judgment in the rendering court. If the clause establishes only a minimum, which seems to be the case, its impact on the problem under consideration will be minimal.⁵⁹

It must be recognized, however, that there may be serious constitutional objections to extending the preclusive effect of a judgment beyond that which would be given in the rendering forum. In the matter of claim preclusion,⁶⁰ for example, it might be argued very persuasively that the litigant suing in forum I had no reason

57. 378 F.2d at 724.

58. 378 F.2d at 724.

59. Federal courts have held a state judgment preclusive under a very liberal concept of the doctrine without considering the law of preclusion of the state where the judgment was rendered. In such cases it would seem that the federal court may well be giving more preclusive effect than would the courts of the rendering state. *See, e.g.,* *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298 (D. Mass. 1960); *Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

60. *See* example B *supra*.

to believe that he would subsequently be unable to litigate a matter which was only a related claim in that forum. To hold that he cannot recover in forum II because he is splitting his claim seems to be highly questionable and could be viewed as depriving the litigant of his related claim without due process of law.⁶¹ On the other hand, this argument would have little force when applied to a question of issue preclusion if the losing party had the opportunity and incentive to litigate the issue fully in the first action. Due process considerations should not prevent forum II from holding the losing party bound on the issue when its public policy leads to this result.

E. Federal Interest

A federal interest apart from full faith and credit may obviously be controlling in certain cases involving preclusion, and the law applied in such cases will be that established by federal courts. A classic example of this situation is *The Evergreens v. Nunan*,⁶² decided by the Court of Appeals for the Second Circuit. In that case forum I was the Tax Court and forum II was the Court of Appeals on appeal from a different suit in the Tax Court. The controversy involved only federal taxation; by no stretch of the imagination could it be said that state law was controlling. Another case in which the federal interest was clearly dominant is *Williamson v. Columbia Gas & Electric Corp.*,⁶³ where both forums were federal and the litigation involved the antitrust law. The court properly applied its own concept of preclusion/res judicata in ruling that the first judgment barred the second suit because of claim preclusion.⁶⁴

61. However, in the analogous situation in which the repeal or amendment of a statutory provision forecloses a claim that has not been reduced to judgment, the courts have generally held that retroactive application of the statute is not a denial of due process. *E.g.*, in *Fisch v. General Motors Corp.*, 169 F.2d 266, 270-71 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949), the court stated:

Plaintiffs contend that their causes of action are founded upon rights vested in them and protected by the due process clause of the Fifth Amendment, which cannot be disturbed. We think plaintiffs' rights were not "vested rights" in the sense contended. . . .

The plaintiffs' causes of action are not founded altogether simply upon contract executed by the free consent and agreement of the parties thereto. The contracts were based upon subject matter in respect to which Congress had authority to legislate; and did not establish fixed rights of either present or future enjoyment. . . . The proposition that their rights granted by the Congress under the commerce clause could not be taken away by congressional legislation under the same clause, is self-contradictory.

See also *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, *rehearing denied*, 325 U.S. 896 (1945); *Western Union Telegraph Co. v. Louisville & Nashville R. Co.*, 258 U.S. 13 (1922).

62. 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). *But see* *Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

63. 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

64. Similar results have been reached in *Jones v. United States*, 228 F.2d 52 (D.C.

Regardless of the basis of jurisdiction in the second federal court action, some courts have indicated that an earlier judgment by a federal court raises a federal question concerning the preclusive effect of the prior decision.⁶⁵ This theory was rather tentatively advanced by the district court for the Southern District of New York in *Sherman v. Jacobson*.⁶⁶ The court asked:

Thus, is the effect to be given the judgment of a federal court in Iowa determined by the full faith and credit concept or by the fact that all federal courts are components of a single judicial system? . . . If full faith is to be given, must the res judicata effect of the Iowa judgment be determined by federal or Iowa law? What law governs on the question of election of remedies?⁶⁷

When this case was cited in a later opinion, the question marks had been dropped. In *Miller v. Steinbach*,⁶⁸ the same court stated:

Whether the effect to be given the Pennsylvania District Court dismissal is based upon the full faith and credit clause . . . or upon the doctrine that "all federal courts are components of a single judicial system," *Sherman v. Jacobson* . . . the decision . . . must be recognized if valid.⁶⁹

This statement is a recognition of the involvement of the federal system in the law of preclusion to be applied by the federal courts. This analysis, of course, applies only to the federal court-federal court situation.

Cir. 1955); *Bruszewski v. United States*, 181 F.2d 419 (3d Cir.), *cert denied*, 340 U.S. 865 (1950); *Sarelas v. Sheehan*, 353 F.2d 5 (7th Cir. 1965) (claim preclusion); *Adriaanse v. Aetna Casualty and Surety Co.*, 384 F.2d 718 (5th Cir. 1967) (same federal court in both proceedings; the first was criminal prosecution); *Brotherhood of R.R. Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 380 F.2d 605 (D.C. Cir.), *cert. denied*, 389 U.S. 928 (1967). *See also* *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, *rehearing denied*, 347 U.S. 931 (1954).

In *Zdanok v. Glidden Co.*, 327 F.2d 944, 956 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), the court stated:

Since both the *Zdanok* and *Alexander* actions present questions of federal law, we are free to follow our own conceptions as to the effect of the judgment in the former on the latter . . . and need not decide whether this would also be true if federal jurisdiction in either or both actions rested on diversity alone.

This statement was made although the federal courts in both cases were exercising diversity jurisdiction.

65. *See* *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Mathews v. New York Racing Ass'n*, 193 F. Supp. 293 (S.D.N.Y. 1961) (apparent application of some federal principle of res judicata/preclusion; no reference made to the law of the state); A. EHRENZWEIG, *CONFLICT OF LAWS*, 167 (1962): "As between federal courts sitting in different states an apparently extraconstitutional doctrine of res judicata has been held to apply with the same effect."

66. 247 F. Supp. 261 (S.D.N.Y. 1965).

67. 247 F. Supp. at 266 n.21.

68. 268 F. Supp. 255 (S.D.N.Y. 1967).

69. 268 F. Supp. at 283.

In both federal and nonfederal litigation in the federal courts since *Erie*, there has been a recognized line of authority demanding the recognition of a federal interest in deciding the law to be applied. *Sibbach v. Wilson & Co.*,⁷⁰ the *Byrd* case,⁷¹ and *Hanna v. Plumer*⁷² all emphasize an overriding federal interest in the administration of the federal judicial system. It should be noted in passing that each of these cases was a diversity action which supposedly required the application of the substantive law of the states, and in each case the Supreme Court held that federal law should be applied.

One of the countervailing federal considerations which was attacked in the courts and emerged victorious is the right to trial by jury as established by the long practice in the federal courts. Where there is a clash between the gloss of *Erie*—conformance in all outcome-affecting matters, even if traditionally labeled procedural—and the federal concept of trial by jury, the former must give way to the latter. This is the lesson of the *Byrd* case. Beyond this, there are other countervailing considerations which, it is suggested, might require a federal court to forgo conformance with the law of the forum state and apply federal case law. Since the mode of analysis seems to be a weighing process, these countervailing considerations are simply factors to be considered. They are not absolutes that determine conclusively the law to be applied.

The dominance of federal concepts—in discovery matters, in docket control, in the rules of evidence, in the right of the judge to comment on the evidence, in the matter of trial by jury—suggests a broad undergirding federal policy. All of these aspects of the federal trial process seem to reflect a desire to provide a speedy adjudication on the merits in the best possible manner. These factors suggest that “trial according to federal standards” and the best federal traditions is a countervailing consideration to be weighed by the federal courts in choosing the law that will decide a controversy. The concept of federal trial standards includes a desire to reach a decision based not on a technicality, but rather on the rights of the parties. It also includes a wish to move forward in the matter of procedural reform. In the classical analysis, each of these considerations is a procedural matter or one that might properly be labeled a matter of judicial administration. None could be called substantive.

The Supreme Court of the United States in the *Hanna* case

70. 312 U.S. 1, *rehearing denied*, 312 U.S. 655 (1941).

71. *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, *rehearing denied*, 357 U.S. 933 (1958).

72. 380 U.S. 460 (1965).

indicated an analytical process for deciding the law to be applied. The Court stated:

It is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome-determination" analysis was never intended to serve as a talisman. *Byrd v. Blue Ridge Cooperative* . . . Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule. . . .

The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.⁷³

For the purposes of this balancing process, it would seem that another federal interest, possibly overriding, might well be the best use of the time of the federal judges. In view of the enormous docket loads of the federal courts,⁷⁴ one might well conclude that the federal courts must consider the wise use of the judges' time to be of paramount importance. If this is true, the law of preclusion, which serves to bar unnecessary litigation, would be of great concern to the federal courts and this particular federal interest may be overriding regardless of whether the court handing down the first judgment was a state or federal court.⁷⁵

A similar means of reaching the same result is suggested by the cases which indicate that preclusion/res judicata is a matter of "judicial administration" in the federal courts. Justice Frankfurter, dissenting in *Hoffman v. Blaski*, restated this concept:

A general principle of judicial administration in the federal courts is at stake.

. . . I am at a loss to appreciate why all the considerations bearing on the good administration of justice which underlie the technical doctrine of *res judicata* did not apply here to require the Court of Appeals . . . to defer to the previous decision. . . . One would suppose that these considerations would be especially important in enforcing comity among federal courts of equal authority.⁷⁶

73. 380 U.S. at 466-68.

74. There were 6,227 more civil cases pending in federal district courts in the United States on June 30, 1965, than on June 30, 1958. See 1965 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 174, Table C-1 (1966); 1958 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 158, table C-1 (1959).

75. See *Penn v. Rinaldi*, 323 F.2d 913 (2d Cir. 1963); *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962); notes 37-39 *supra* and accompanying text.

76. 363 U.S. 335, 345, 348-49 (1960) (dissent).

Arguing for preclusion/res judicata, Justice Frankfurter continued: "Nor does such a view of right and wise judicial administration depend upon the nature of the procedural or even jurisdictional issue in controversy. Technically, *res judicata* controls even a decision on a matter of true jurisdiction."⁷⁷ There seems to be general agreement that matters of judicial administration do not fall under the *Erie* rule and that the federal courts can articulate their own rules in such matters.⁷⁸ This may be simply another way of saying that the federal interests are overriding.

It should also be noted that *federal* judgments can be registered in districts other than that in which the judgment was rendered. Under section 1963 of the Judicial Code,⁷⁹ the registered judgment has "the same effect as a judgment of the district court of the district where registered." The precise effect of registration is not clear; certainly the preclusive/res judicata effect of a registered judgment has not been considered.⁸⁰ It seems, however, that the right of regis-

77. 363 U.S. at 350.

78. 1A J. MOORE, FEDERAL PRACTICE ¶ 0.317[8] (2d ed. 1961):

There are numerous other areas . . . which have traditionally been considered to be matters of procedure or to involve judicial administration and would, therefore, fall outside the scope of the *Erie* doctrine. . . .

The weight of federal decisions indicates that labels are not determinative and that the application of the *Erie* doctrine depends on whether the matter under consideration will substantially affect the outcome of the litigation. But in the interest of uniform procedure and in preventing a whittling away of that uniformity, he who would challenge the validity of a particular provision in the Federal Rules should bear the burden of clearly showing that its application could prevent him from obtaining the same substantial treatment that he would obtain in the same court.

In *Zaroff v. Holmes*, 379 F.2d 875 (D.C. Cir. 1967) the court was faced with the question of the preclusive effect to be given a dismissal under local rule for failure to appear at a pretrial hearing. The court considered this a matter under its control and held that dismissal would not be given preclusive effect.

79. 28 U.S.C. § 1963 (1964).

80. In *Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965), the court considered a registered judgment and concluded that the statute of limitations of the state where registered controlled rather than that of the originally rendering state. In the course of the opinion the court stated:

We have concluded that § 1963 is more than "ministerial" and is more than a mere procedural device for the collection of the foreign judgment. We feel that registration provides, so far as enforcement is concerned, the equivalent of a new judgment of the registration court. . . .

. . . If registration is to "have the same effect as a judgment," it must, for our present enforcement purposes, mean just that and not something else. . . .

....

We note by way of caveat that § 1963 presents much to be answered in the future. Does the statute's "same effect" language apply for all purposes and embrace no exception? Does the registration court have power, under Rule 60, F.R. Civ. P., to correct the registered judgment? . . . Is a registered judgment itself subject to registration elsewhere? May a registered judgment be revived by a later reregistration? Is a registered judgment subject to every attack which could be raised in an action on that judgment, such as fraud, lack of jurisdiction, and the like? Is § 1963 the equivalent of the Uniform Enforcement of Foreign Judgments Act even though the latter is much more detailed in its provisions? Must full faith and credit be given to a registered judgment? The presence of these and

tration suggests the existence of federal power over judgments rendered by the federal courts. By analogy, it can be urged that the federal government should have similar power over the preclusive/res judicata effect of such judgments.

Another argument in favor of federal standards can be derived from the current trend in conflicts of law, which indicates that the law to be applied is that of the forum which has the most significant relationship to the issue before the court.⁸¹ This is simply another way of recognizing that the applicable law can be derived from different sources according to the interests of the various jurisdictions in the matter before the court. When one recognizes the great interest which a forum has in the size of its docket load and in the use of its judges' time, and when the effect which the law of preclusion has on these matters is considered, it is easy to conclude that the forum's law should be applied to matters of preclusion, or at least that a federal court should seriously consider applying some federal rule unless there is a constitutional limitation which bars such application.⁸²

F. Summary

There are thus a number of factors which must be weighed in determining the law to be applied to a claim of preclusion in a federal court. It is impossible to look to a single factor to decide the question; there must be a weighing process involving various considerations. This synthesis includes pursuit of the goals enunciated in *Erie*—avoidance of inequitable administration of the law and the prevention of forum-shopping. It also necessitates consideration of

undoubtedly many other questions prompts us to emphasize that the conclusion we reach here is one having application to the fact situation of this case. We do not now go so far as to say that registration effects a new judgment in the registration court for every conceivable purpose; neither do we say that it fails to do so for any particular purpose.

Id. at 268, 270-71.

This provision for registration of judgments suggests that Congress intends that any federal judgments may be given "the same effect" as a judgment rendered in the court of registration. This seems to be "full faith and credit" in reverse. Instead of having the effect that would be given in the state of rendition, this provision equates foreign federal court judgments with judgments rendered by the local federal court. Although the preclusive effect of registration has not been considered, it would seem that the statutory provision is another attempt to unify the federal courts and thus militates in favor of a uniform law of preclusion throughout the federal system.

81. See H. GOODRICH & E. SCOLES, *supra* note 14.

82. A distinction should be drawn between deciding the law to be applied and a determination of the jurisdiction of the court over persons. As the Supreme Court stated in *Hanson v. Denckla*, 357 U.S. 235, 254 (1958), the Florida court "does not acquire that jurisdiction [over the person] by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law."

the desire for a meaningful federalism which is promoted by full faith and credit and of the interest in a federal court system operating at maximum efficiency. Moreover, the federal courts in deciding the law to be applied obviously must act within the framework of the Constitution. They cannot apply a preclusive rule that would deprive a litigant of his property without due process; and, they must give litigants equal protection.⁸³ Within these limitations, the federal courts have a great deal of freedom to decide cases in the manner that will maximize the return which society gets from the judicial system. The following illustrative applications of the foregoing analysis serve to demonstrate how these various factors may be employed to reach a decision in specific cases.

III. SPECIFIC APPLICATIONS

A. Courts and Jurisdiction

In deciding the preclusive effect of a judgment in a federal court, it is necessary to consider the adjudicating bodies involved and the nature of the subject-matter jurisdiction of the federal court. These variables may be charted as follows:

<i>Forum I</i>	<i>Forum II</i>	<i>Subject Matter Jurisdiction of Forum II</i>
1. Federal Court	Federal Court	Federal Question
2. State Court	Federal Court	Federal Question
3. Federal Court	Federal Court	Diversity Jurisdiction
4. State Court	Federal Court	Diversity Jurisdiction

For purposes of discussion, it will be assumed the use of preclusion would not violate due process or deny any litigant equal protection of the laws.

In the first listed situation, there is no need to consider *Erie Railroad Co. v. Tompkins* since the federal court in forum II is exercising federal question jurisdiction. As the Supreme Court has noted, "It has been held in non-diversity cases, since *Erie R. Co. v. Tompkins*, that the federal courts will apply their own rule of *res judicata*."⁸⁴ There is no full faith and credit problem since the first court is a federal court and it is reasonable to conclude that the relationship of federal courts involves something other than full faith and credit,⁸⁵ even though there is some authority to the contrary.⁸⁶ Here

83. See Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 47-56 (1963).

84. Heiser v. Woodruff, 327 U.S. 726, 733, rehearing denied, 328 U.S. 879 (1946).

85. Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941).

86. See, e.g., Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524, 526 (1931):

the federal interests are clearly controlling, and the federal courts should apply federally created law regarding preclusion.⁸⁷

In the second listed possibility, *Erie* again has no application. The federal full faith and credit statute may have some application in establishing the minimum effect to be given the judgment rendered by the state court, but apparently it does not limit the preclusive effect to be given.⁸⁸

In the third situation, injecting diversity jurisdiction poses a problem. At this point it may be argued that *Erie* controls and that the law of the state in which the federal court is sitting should govern.⁸⁹ As in the first hypothetical, statutory full faith and credit does not apply; moreover, there are—as this Article has suggested—countervailing considerations which militate in favor of the application of federal law. The courts involved are both federal and therefore it is logical to say that the relationship between the two should be governed by federal law.⁹⁰

In the fourth situation, *Erie* again is an important consideration. There is a possibility that only a single state may have an interest in the litigation. If this is so, it can be argued that the federal court is sitting as another court of the state, and thus that the federal involvement is minimal.⁹¹ On the other hand, the judgment claimed to be preclusive may have been rendered by a court sitting in a state other than that in which the federal court is sitting. When this occurs there are definite multi-state involvements, and more reason for looking to the federal courts for the law to be applied.⁹² The statutory full faith and credit provision probably does apply, but in any event the statute apparently does not limit the federal court if it wished to go further than the rendering state in giving preclusive effect to the earlier judgment.⁹³

Assuming that all of the considerations discussed to this point have been properly weighed, the court must examine the nature of

[T]he full faith and credit required by that (Constitutional) clause is not involved since neither of the courts concerned was a state court.

....

While this Court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. . . . And we are in accord with this view.

87. See notes 62-64 *supra* and accompanying text.

88. See text accompanying notes 51-59 *supra*.

89. See text accompanying notes 23-40 *supra*.

90. See notes 65-69 *supra* and accompanying text.

91. See note 33 *supra* and accompanying text. The interest of the federal courts in docket control should not be forgotten.

92. See notes 35-39 *supra* and accompanying text.

93. See notes 45-58 *supra* and accompanying text.

the adjudicating bodies which are involved in greater detail. It has been concluded that when a party urges issue preclusion, the body ruling on the matter should consider (1) the nature of the body handing down the decision which supposedly precludes consideration and (2) the nature of the body then hearing the controversy. Under some circumstances a court may not be bound by another court's earlier adjudication of a fact issue, and the reason given is that the second court has a special competency with regard to the issue involved.⁹⁴ It is said that the legislature has granted certain judicial power—including the sole authority to make certain decisions—to the specific court and that that court should not be bound by an adjudication made by another court which could not rule on the litigation involved. The second adjudicating body must examine its own status to assess whether this argument is applicable to the case before it. While this sort of argument may be persuasive in the case of special federal question jurisdiction,⁹⁵ or when the federal court is acting with its special competency to determine constitutional questions in habeas corpus proceedings,⁹⁶ it is hard to see any special justification for relitigation of matters in an ordinary diversity case.

The first adjudicating body must also be examined to see what decisional processes were used. The second court must be satisfied that the interests of the party being precluded were adequately protected; specifically, there must have been adequate incentive and opportunity to litigate the issue fully before a body which used acceptable procedures. If these requirements are met, then preclusive effect may be given to the decision. There are

cases in which the courts have declined to apply the doctrine because of certain deficiencies in the earlier proceedings. The common factor in most of those cases seems to have been that the second court was of the opinion that the first court and the proceedings in it were of such a character that it could not be reasonably said that the parties had been afforded a full and fair hearing of the issues. The desirability for such a limitation in the application of the doctrine seems obvious⁹⁷

Only if the involved adjudicating bodies are discriminatingly

94. See Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 885-89 (1966).

95. See *Lyons v. Westinghouse Elec. Co.*, 222 F.2d 184 (2d Cir.), cert. denied, 350 U.S. 825 (1955).

96. See *Fay v. Noia*, 372 U.S. 391, 422-23 (1963); *Coley v. Alvis*, 381 F.2d 870 (6th Cir. 1967).

97. *William Whitman Co. v. Universal Oil Products*, 92 F. Supp. 885, 889 (D. Del. 1950).

considered along with other variables will the forum be able to make the correct ruling on a claim of preclusion.⁹⁸

B. *Claim Preclusion and Issue Preclusion*

One of the significant variables which should affect the choice of law to be applied is whether claim or issue preclusion is being urged. Claim preclusion arises, for example, when the defendant asserts that the claim which the plaintiff is attempting to bring in forum II has previously been litigated to a final result by the same parties in forum I. Forum II must then decide whether the claim now being asserted is different from the claim in the first suit.⁹⁹ The nature of the problem can be illustrated by a simple automobile accident. If the plaintiff sues for personal injury damages in an Illinois state court and recovers, he can then sue for property damages suffered in the accident and recover. In Illinois there are two causes of action arising from the automobile accident.¹⁰⁰ If we assume that the first suit was in an Illinois state court and the second is in a federal court, the source of preclusive law to be applied becomes important. Assuming diversity jurisdiction, if the second suit is in an Illinois federal court it would seem that that court would be required to apply Illinois law on the point. Any other conclusion would be an outrage. If the federal court hearing the second suit is in another state—such as Iowa—where there is only one cause of action arising from an automobile accident, then there are different considerations. Could the federal court in Iowa conclude that the plaintiff is barred because of the earlier suit in Illinois? It would seem that the answer should be no, and two reasons might be given. First, it would be unreasonable to bar the plaintiff from recovery for the property loss suffered, since the action could be brought in Illinois and the plaintiff had no reason to believe that the first judgment would bar the second recovery. Second, barring the plaintiff may deprive him of his property claim—which was not involved in the first suit under the Illinois law—without due process of law.¹⁰¹

Issue preclusion, where the party had the incentive and opportunity to litigate the issue fully, seems to be a different matter. If the litigant was aware of the seriousness of the litigation, he can hardly claim that he has been misled or surprised. It would thus

98. See Vestal, *supra* note 94 at 890.

99. See, e.g., *Towle v. Boeing Airplane Co.*, 364 F.2d 590 (8th Cir. 1966).

100. See note 9 *supra*.

101. Obviously the plaintiff had an opportunity to litigate the entire controversy in the Illinois court and did not take it. This, however, would not seem to be controlling.

seem reasonable to allow forum II to apply its own rules concerning issue preclusion.

C. Substantive Law

If the analysis thus far is accepted, the federal courts will have many opportunities to decide preclusion questions according to their own concepts of what is right and proper. The analysis also suggests that under certain circumstances the federal courts will not have this freedom; specifically, this will be true in the one-state diversity cases¹⁰² and in those situations involving claim preclusion which may be controlled by constitutional concepts.¹⁰³ In addition, the weighing process which is suggested may result in a court's deciding to apply the law of a specific state. Generally, however, it seems that the federal courts have the freedom to create their own law in the area of preclusion. This means that the federal courts will have to consider the parties involved,¹⁰⁴ the issues involved,¹⁰⁵ the caliber of the court rendering the first decision,¹⁰⁶ and whether some egregious error has been committed.¹⁰⁷ In the case of claim preclusion, the possible justification for bringing the second suit will have to be examined.¹⁰⁸ These and many other matters of preclusion will have to be faced and decided. These problems, however, may be decided in federal terms with federal factors being considered.

IV. PROJECTION

The law of preclusion is in a state of flux at the present time. Principles which could be stated with assurance a decade ago are

102. See note 33 *supra* and accompanying text.

103. See text accompanying notes 41-61 *supra*.

104. See Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

105. See Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L. REV. 158.

106. See Vestal, note 94 *supra*.

107. The courts have considered this matter only rarely. Obviously, if a fraud has been perpetrated on a court by a litigant, then relief is available in the rendering court. A somewhat different problem is posed when the litigants have not been party to the fraud and the court has handed down an erroneous ruling. Can the litigants rely on the adjudication, or is it subject to attack? A classic case is the disappearing husband whose wife collects on an insurance policy claiming that her husband is dead. When the husband then reappears, is the insurance company bound or will the court note that the husband is alive? See *New York Life Ins. Co. v. Nashville Trust Co.*, 178 Tenn. 437, 159 S.W.2d 81 (1942) (successful action against the insurance company) and the later case, *New York Life Ins. Co. v. Nashville Trust Co.*, 200 Tenn. 513, 292 S.W.2d 749 (1956) (allowing the insurance company relief; two concurring opinions and two dissenting opinions).

108. See Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357 (1967).

subject to attack at the present time, and many of these principles will be rejected almost unanimously by the turn of the century.¹⁰⁹ The public is getting impatient with game-playing in the courts. The extensive use of discovery procedures to minimize gamesmanship in the trial of law suits is similar to the developments in the area of preclusion.

In the federal courts there has been uncertainty about the law of preclusion to be applied. At the same time, there has been almost a total unawareness of the confusion, or at least a failure to acknowledge the existence of the confusion. Individual federal courts have simply adopted one theory and applied it without recognizing competing theories.

In the next decade the federal courts must face up to the question of the law to be applied and recognize that what is required is a weighing process through which a number of different considerations are examined. There is no single governing criterion. Certainly the federal courts are not tied completely to the law of the states; other sources can be considered.

In the long run, it would seem highly probable that the federal courts will recognize the overriding interests of the federal judiciary in the doctrine of preclusion/*res judicata*. The expeditious handling of the business of the federal courts requires the use of a vital, growing concept of preclusion. This would suggest that the federal courts should maximize the use of this concept. Second, the federal courts traditionally have been in the forefront of the fight for better judicial administration; this also calls for the extensive use of preclusion.¹¹⁰ Anything less would be an abdication of the federal courts' leadership role. In sum, the next phase of the development of the law of preclusion in the federal courts should see an expansion of its use, a recognition of the great federal interest in the preclusive law applicable in the federal courts, and, as a consequence, the creation or recognition of a uniform law of preclusion generally applicable in the federal courts.

109. For a more liberal approach to the problems of preclusion, *see, e.g.*, *Maryland v. Capital Airlines*, 267 F. Supp. 298, 303 (D. Md. 1967) ("This court looks with favor on the modern trends in this area."); *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298 (D. Mass. 1960).

110. In at least two cases, the courts have inferentially warned litigants that the rules of *res judicata*/preclusion may be changing, *Technograph Printed Circuits, Ltd. v. United States*, 372 F.2d 969, 979 (Ct. Cl. 1967), and *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 540-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966).