NEW JERSEY EDUCATION ASSOCIATION v. BURKE: RES JUDICATA, THE *YOUNGER* DOCTRINE, AND THE CAPTIVE STATE LITIGANT

I
INTRODUCTION

Principles of res judicata[1] normally bar relitigation of either a cause of action[2] or an issue essential to a prior judgment.[3] By statute, federal courts are compelled to apply state principles of res judicata in determining the preclusive effect of a prior state court judgment.[4] While most federal courts refuse to imply any exceptions to this statute,[5] many cite overriding federal policies and ignore state rules of decision.[6] The Supreme Court has failed to resolve the disagreement.[7]

If general principles of res judicata are rigidly applied, an involuntary state party[8] who unsuccessfully submits claims to a state court may be permanently denied access to a federal hearing for related constitutional claims, even if those claims were never raised in state court. In light of a clear congressional intent to open the federal courts to the civil rights claims of private citizens,[9] this result is unfair and unwarranted.

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1. "Res judicata" is used here to refer to both "claim preclusion" principles, *see* note 2 *infra*, and "issue preclusion" principles, *see* note 3 *infra*.

2. Claim preclusion principles normally make a final, valid judgment on the merits conclusive on the parties as to all matters that were litigated or could have been litigated on the same cause of action. 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 624 (2d ed. 1974) [hereinafter cited as MOORE'S]. "Cause of action" is usually defined to include all claims or defenses surrounding or related to the disputed transaction. *See* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 340-41 (1978); MOORE'S ¶ 410[1] at 1163.

3. Issue preclusion or "collateral estoppel" principles normally bar relitigation of any question essential to a prior judgment in subsequent adjudication of any cause of action. MOORE'S, *supra* note 2, ¶ 0.405[3] at 634.

4. 28 U.S.C. § 1738 (1966). *See* note 31 *infra*.

5. *See* note 40 *infra*.

6. *See* notes 39 & 70 *infra*.

7. "Our Rule 19 provides that one of the principal factors in determining whether certiorari should be granted is whether the decision below conflicts with another decision: Is the federal law, statutory or constitutional, being interpreted and enforced differently in different sections of the country? . . . [New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978) is one of] many cases in which the Court refused to review lower court decisions that conflicted with decisions of other federal or state appellate courts." Brown Transport Corp. v. Atcon, Inc., 439 U.S. 1014, 1017, 1019 (1978) (White, J., dissenting from denial of certiorari). For a sample of the Justices' conflicting statements on the subject matter of this Comment, *see* note 67 *infra*.

8. An involuntary state litigant is one who is compelled by a party plaintiff and by federal abstention doctrines to present his case to a state tribunal. *See* text accompanying notes 59-60 *infra*.

9. For a discussion of the *Younger* doctrine, see text accompanying notes 34-38 *infra*.

In *New Jersey Education Association v. Burke*,[10] the United States Court of Appeals for the Third Circuit adopted a res judicata test that bars from federal court only those claims previously argued before and decided by a state court; plaintiff is permitted to raise before the district court any federal civil rights claims that could have been raised but were not. This test, if applied in a manner designed to provide involuntary state civil litigants with access to a federal forum, suggests a substantial modification of the *Younger v. Harris* abstention doctrine.[11] It would permit parties enmeshed in state civil proceedings who have been barred from federal court by *Younger* to withhold their federal claims or defenses from state adjudication and to raise them at a subsequent federal hearing. This Comment will argue that the *Burke* approach, while inappropriate to the facts of the *Burke* case, is consistent with policies favoring judicial economy, fairness to litigants, and federal primacy in resolving federal issues, and should therefore be adopted by the federal courts.

II
FACTS OF THE CASE

New Jersey's State Board of Education amended its regulations in 1976 to require teachers in bilingual/bicultural educational programs to be fluent in English.[12] The class of roughly 900 teachers affected by the change challenged the regulations in the Superior Court of New Jersey, Appellate Division,[13] alleging violations of state law and federal guarantees of due process and equal protection under the fourteenth amendment.[14]

After the appellate division twice dismissed without prejudice the class's motions for interim relief,[15] the class filed a federal action under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey. The complaint, seeking injunctive relief and a declaratory judgment, alleged unconstitutional impairment of contract, uncompensated taking of property, and *ex post facto* violations[16] in addition to the fourteenth amendment infringements cited in the state action.[17]

Despite an offer by the class to drop its state suit, the district court dismissed the complaint on the basis of two federal abstention doctrines, the *Pullman* and *Younger* doctrines,[18] after the class had submitted its federal claims in state court.[19] The appellate division subsequently sustained the validity of the disputed regulations and denied relief, though it invited a challenge stemming

10. 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).
11. *See* text accompanying notes 45-46 *infra*.
12. 579 F.2d at 765. N.J.A.C. 6:11-8.8 and N.J.A.C. 6:11-8.9 contain the disputed regulations.
13. 579 F.2d at 765. The appeal is authorized by N.J.R. 2:2-3(a)(2), which permits appeal from promulgation of rules by a state administrative agency.
14. 579 F.2d at 766 n.4.
15. Brief on Behalf of Defendants-Appellees at 5.
16. These claims were based on U.S. CONST. art. 1, § 10 and amend. V.
17. 579 F.2d at 766 n.4.
18. *Id.* at 765-66 & n.3. See text accompanying notes 42-46 *infra*.
19. Petitioner's Reply Brief for Certiorari at 3.

from the regulations' effect upon individual class members.[20] The New Jersey Supreme Court denied certification,[21] and the class chose not to seek review by the United States Supreme Court.

The Third Circuit viewed the district court's dismissal as an unwarranted extension of the *Younger* abstention doctrine[22] into "an area in which both the traditions of our dual court system, and congressional efforts to protect constitutional rights favor the allowance of federal relief."[23] In deciding whether to give res judicata effect to the prior decision of the appellate division, the court recognized the trend exhibited in recent Supreme Court decisions requiring federal courts to give broad preclusive effect to unappealed state court judgments; nevertheless, the court treated *England v. Louisiana State Board of Medical Examiners*[24] as the applicable precedent.[25] The *Burke* court inferred from that decision a broad right to withhold federal constitutional claims from state court adjudication and thus overcome claim preclusion principles.[26] The court reasoned that strict application of res judicata

> would turn the state court into quicksand. It would not only serve as a trap for unwary plaintiffs who desire a federal tribunal, but encourage competently represented litigants to forego any venture into state jurisdiction to exhaust state administrative and judicial procedures on pain of losing their right to a federal hearing. Such results are hardly salutary.[27]

The Third Circuit observed that its limited res judicata rule gives due regard to matters actually decided in state court and guarantees access to a federal hearing for constitutional claims.[28] The court remanded the class's constitutional claims regarding *ex post facto* violations, contract impairment, and property-taking for trial on their merits; it remanded the due process and equal protection claims for the purpose of determining whether they were fully and freely litigated in the state court proceedings.[29]

III
ANALYSIS

The Full Faith and Credit Clause[30] mandates that a final judgment that is res judicata in the state of decision be recognized as conclusive in every other state. The Act of Congress implementing the clause, 28 U.S.C. § 1738,[31] ex-

20. Yi v. Burke, No. A-540-76 (Super. Ct. App. Div. July 12, 1977).
21. Yi v. Burke, No. 13,974 (Sup. Ct. July 20, 1977).
22. For a discussion of the *Younger* doctrine, see text accompanying notes 45-46 *infra*.
23. 579 F.2d at 771.
24. 375 U.S. 411 (1964). See text accompanying notes 47-50 *infra*.
25. 579 F.2d at 772.
26. *Id.* at 773. See note 2 *supra*.
27. *Id.* at 774.
28. *Id.*
29. *Id.* at 776.
30. U.S. CONST. art. IV, § 1.
31. (1966). The statute, with minor changes, dates back to 1790. Torke, *Res Judicata in Federal*

tends this requirement to the federal courts.[32] One clear purpose of a scheme that promotes nationwide full faith and credit is to make a state judicial decision as binding in every state and federal court as it is in the courts of the state of decision, and thereby to help unify the nation.[33] A federal court is thus compelled to behave like a state court for preclusion purposes and accord the same res judicata effect to a state court judgment as would a court in the state of decision. The statute contains no express exceptions.

The Reconstruction Era civil rights statutes[34] sought to unify the nation in a different way. Recognizing that certain state courts might be antipathetic to the vindication of federally created rights, Congress consciously altered the relationship between the states and the nation with respect to protection of those rights.[35] The Civil Rights Acts, by interposing the federal courts between the states and the people, firmly established the federal government's role as guarantor of basic federal rights against state power. Section 1983, in particular, offered a broad federal remedy against incursions under color of state law upon rights protected by the Constitution or federal law.[36]

Congress's provision of a federal remedy in response to the states' failure to enforce laws with an equal hand strongly implied that a federal civil rights plaintiff's ability to obtain a federal hearing should not be conditioned upon utilization of available state remedies. Thus, the Supreme Court in *Monroe v. Pape*[37] held that a section 1983 claimant may bypass the state courts entirely and obtain immediate federal judicial relief.[38]

Despite the holding of *Monroe*, most courts, in the absence of a special statutory scheme,[39] refuse to permit a civil rights claimant to enter federal court if that party already has waived his right to a federal hearing by voluntar-

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Civil Rights Actions Following State Litigation, 9 IND. L. REV. 543, 555 (1976). The provision states, in pertinent part: "[J]udicial proceedings . . . 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."

32. *E.g.*, Davis v. Davis, 305 U.S. 32, 40 (1938) (decided under the prior version of section 1738).

33. The Full Faith and Credit Clause was a nationally unifying force that "altered the status of the several states as independent foreign sovereignties . . . by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application." Magnolia Petrol. Co. v. Hunt, 320 U.S. 430, 439 (1943).

34. 42 U.S.C. §§ 1981-1983, 1985 (1974) are the primary sections giving rise to a federal private cause of action for violations of federal rights by state officials. It is beyond the scope of this Comment to distinguish these sections by their legislative histories and relative importance in the res judicata context.

35. Mitchum v. Foster, 407 U.S. 225, 238-42 (1972).

36. 42 U.S.C. § 1983 (1974) expressly authorizes suits in equity to redress "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States under color of state law.

37. 365 U.S. 167 (1961).

38. *Id.* at 183.

39. *See, e.g.*, Batiste v. Furnco Constr. Corp., 503 F.2d 447, 450-51 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); Kremer v. Chemical Constr. Corp., 464 F. Supp. 468, 471-74 (S.D.N.Y. 1978). In both cases, plaintiffs alleging employment discrimination under Title VII, 42 U.S.C. § 2000e-2000e-17 (1974) were given a *de novo* federal hearing after full and voluntary state litigation.

ily litigating the same cause of action in state court;[40] the policies underlying res judicata, and the unambiguous language and intent of section 1738, do not admit of so broad an exception. Suppose, however, that a party is an involuntary state litigant.[41] If that party proceeds to litigate to an adverse judgment in state court and subsequently seeks a federal hearing on his civil rights claims, then the policies underlying sections 1738 and 1983 collide head-on: the former policies would deny a hearing because the state judgment is res judicata, while the latter favor granting a federal hearing out of distrust of state civil rights adjudication.

A. Abstention

This collision arises in part because federal abstention doctrines may compel an unwilling party to pursue available state remedies. These doctrines are based on concerns of federalism and "comity," which reflect a proper respect for state functions. Abstention permits a district court to decline or to postpone the exercise of its jurisdiction, thereby remitting a federal plaintiff to state court.

Federal abstention is governed primarily by two doctrines, the *Pullman* doctrine[42] and the *Younger* doctrine.[43] According to the *Pullman* doctrine, controversies involving unsettled questions of state law are to be decided in state tribunals prior to a district court's consideration of the underlying federal constitutional questions. *Pullman*'s rationale is grounded in avoidance of premature constitutional adjudication. Since the federal issue may be mooted or presented in a different posture by the state court determination of state law, the federal court should defer its adjudication until potentially controlling state issues are put to rest.[44]

The *Younger* doctrine forbids federal courts from interfering in pending state proceedings, trial or appellate, absent extraordinary circumstances.[45] This equitable doctrine originated in the traditional reluctance of federal courts to enjoin state prosecutions. In its present form, *Younger* suggests that as long as the federal issues can be raised and timely decided by a competent state tribunal, district courts should not interrupt ongoing state enforcement actions used by a state in its sovereign capacity to vindicate important social policies.[46]

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40. *See, e.g.*, Bennun v. Board of Governors, 413 F. Supp. 1274, 1278 (D.N.J. 1976) (prior state judgment on same cause of action precludes civil rights claims based on new theory); Mitchell v. NBC, 553 F.2d 265, 274 (2d Cir. 1977) (state judicial review of agency determination bars subsequent federal civil rights action). *See generally* Currie, *supra* note 2, at 328-32. *But see* Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) (section 1983 federal plaintiff not claim precluded despite adverse decision in prior, voluntary state proceeding on parallel state claims).

41. *See* text accompanying notes 59-60 *infra*. For a survey of commentators who distinguish voluntary from involuntary state litigants in this context, see note 97 *infra*.

42. The doctrine is derived from Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

43. The doctrine is derived from Younger v. Harris, 401 U.S. 37 (1971).

44. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 n.7 (1964).

45. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01 (1975).

46. Trainor v. Hernandez, 431 U.S. 434, 444 (1977); Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

In the *Pullman* situation, the Supreme Court has resolved the conflict between sections 1738 and 1983 in favor of preserving access to a federal forum. In *England v. Louisiana State Board of Medical Examiners*,[47] plaintiff originally attempted to enter federal court but was remitted to Louisiana state court under *Pullman*. After an adverse decision there on the merits of all state and federal claims, plaintiff tried to return to district court for a federal hearing on the already litigated federal constitutional claims. The Supreme Court held prospectively that a party involuntarily remitted to state court could "reserve" his federal claims during state proceedings for subsequent federal adjudication.

The Court saw "no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court."[48] The Court, nevertheless, had

> fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. . . . "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."[49]

The Court stressed the importance of the initial factual determinations of a trial court, as well as federal primacy in deciding federal issues, in granting remitted *Pullman* plaintiffs access to a federal hearing.[50]

Unlike *Pullman* abstention, however, where a federal court merely postpones a hearing until underlying state issues are resolved, *Younger* "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts."[51] The remitted *Younger* party is expected to return to the state courts for a disposition of his entire case.

State litigants for whom federal habeas corpus ultimately becomes available nevertheless are able to obtain a *de novo* federal hearing despite *Younger* abstention by a federal court. Federal habeas furnishes an avenue of federal relief to state prisoners seeking release from incarceration, and thus applies to many state criminal defendants remitted by *Younger* whose constitutional defenses have failed in state court. While the confined party must have exhausted

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47. 375 U.S. 411 (1964).

48. *Id.* at 419.

49. *Id.* at 415 (citation omitted).

50. *Id.* at 415-16.

51. Gibson v. Berryhill, 411 U.S. 564, 577 (1973). An additional concomitant of *Younger*, is that a party must exhaust state appellate processes before seeking federal relief. Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975). *Younger*'s exhaustion requirement, like that imposed on federal habeas corpus petitioners by 28 U.S.C. § 2254(b)-(c) (1977), is rooted in notions of comity, Preiser v. Rodriguez, 411 U.S. 475, 491 (1973), and requires resort to all available state judicial and administrative remedies, Lerma v. Estelle, 585 F.2d 1297, 1299 (5th Cir. 1978), unless the relief sought is wholly prospective. Wooley v. Maynard, 430 U.S. 705, 710-11 (1977). Exhaustion of state remedies, however, does not by itself imply that a party must submit every claim to every level of a state's appellate court system.

state remedies to qualify for habeas relief, he subsequently is not bound by prior state court determinations on his federal claims.[52] Habeas corpus can thus serve as an effective section 1983 substitute for remitted *Younger* criminal defendants who seek only their freedom.[53]

Certain remitted *Younger* parties, however, are unable to utilize the federal writ of habeas corpus. First, *Younger* in recent years had been extended to state civil litigants, to whom habeas relief is unavailable.[54] Second, many criminal defendants remitted under *Younger* are convicted and yet spend no significant time in jail. Third, state criminal defendants subjected to unconstitutional searches and seizures can no longer obtain their freedom through federal habeas corpus.[55] These remitted *Younger* litigants, of which the class in *Burke* is an example, are compelled by the terms of *Younger* to advance state and federal claims in state court despite the unavailability of subsequent federal habeas corpus review. If Supreme Court review of an adverse state ruling is denied, and the state parties bring a federal civil rights claim in federal court, section 1738 would seem to bar relitigation of essential issues already decided by the state court. Moreover, since claim preclusion rules in a particular state may bar relitigation of claims, counterclaims, or defenses that could have been raised in a prior proceeding,[56] the remitted party may be denied access to a federal forum even on claims that were not addressed in state court proceedings.

If, as the Supreme Court has asserted, section 1983 was "a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century,"[57] those older concepts have resurfaced in the form of the *Younger* doctrine. Both *Younger* and section 1738 are grounded in the belief, renounced by section 1983, that the nation "will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[58]

For the purposes of this Comment, an involuntary state litigant is deemed

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52. Fay v. Noia, 372 U.S. 391, 423 (1963).

53. The Court in Preiser v. Rodriguez, 411 U.S. 475 (1973), held that federal habeas corpus relief, if available for the type of relief sought, is the exclusive remedy open to petitioners in state custody. Damages, however, are only available under section 1983, not under habeas corpus. State prisoners are therefore not barred by *Preiser* from bringing section 1983 claims for damages in federal court. *Id.* at 494.

54. *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 605-07 (1975). The scope of this problem is magnified because the uncertain bounds of *Younger* foster numerous district court abstentions that are later reversed. Before reversal of these erroneous abstentions, however, remitted parties may have exhausted state remedies. *Burke* itself is one example of this.

55. In Stone v. Powell, 428 U.S. 465 (1975), the Court held that, if state courts provide an opportunity for full and fair litigation of fourth amendment defenses, petitioner cannot later invoke federal habeas corpus. This holding, stressing the irrelevance of the exclusionary rule to individual guilt, may be equally applicable to violations of the fifth and sixth amendments. *See* Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring).

56. This is the "could-have-been-litigated" test for claim preclusion. *See* note 2 *supra*. A state criminal defendant, however, is generally not claim precluded from bringing a subsequent civil action. *See* note 92 *infra*.

57. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

58. Younger v. Harris, 401 U.S. 37, 44 (1971).

to be a civil or criminal defendant who has sought and been refused a federal hearing in the course of state trial proceedings.[59] In addition, state parties should be deemed involuntary if they can demonstrate that they anticipated nearly certain federal abstention, since judicial resources should not be wasted by unnecessarily compelling litigants to bounce back and forth between the state and federal courts.[60] The following sections will examine three possible approaches to the reconciliation of the policies underlying abstention, res judicata, and the Civil Rights Acts as applied to involuntary state litigants.

B. The Res Judicata Approach

The Third Circuit could have applied section 1738 literally in *Burke* and disregarded the circumstances under which federal relief was sought. This straightforward approach would have compelled dismissal of the class action if it were found to be part of the same cause of action or dispute as the prior state suit, because New Jersey courts have adopted the "entire controversy" doctrine as their state's governing claim preclusion principle. The "entire controversy" doctrine is a broad principle of claim preclusion which bars all claims revolving around a single dispute or complex of facts.[61] There can be little doubt that the *Burke* class, which attacked a single state regulation under a variety of theories and which could have raised all of its civil rights challenges in its initial state suit, would have suffered the preclusion of its remaining civil rights claims had it attempted to reenter the New Jersey courts.[62]

The policy arguments that favor the res judicata approach are numerous and persuasive. First, application of the approach yields a readily predictable outcome because the parties need only examine state rules of decision to ascer-

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59. On the subject of involuntary state litigants, *see generally* 88 HARV. L. REV. 453, 461-63 (1974). Even where a federal hearing is granted, a party involved in concurrent state and federal proceedings could arguably be treated as involuntary because, if the state court reaches a conclusive result first, the state decision would normally have res judicata effect on the federal action pending appeal. MOORE'S, *supra* note 2, ¶ 0.416[4].

60. A state civil defendant choosing not to remove his case to federal court, however, should not be considered involuntary.

61. *E.g.*, Bennun v. Board of Governors, 413 F. Supp. 1274, 1278 (D.N.J. 1976); Falcone v. Middlesex County Medical Soc'y, 47 N.J. 92, 94, 219 A.2d 505, 506 (1966) (per curiam) (action to compel admission to membership bars later action for damages); Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 292-94, 375 A.2d 675, 683-84 (Super. Ct. App. Div. 1977) (entire controversy doctrine requires all contractual participants in a single construction project to raise all claims in one proceeding).

62. Justice White apparently endorses this view, declaring *Burke*'s holding to be that "litigation of federal constitutional issues in a 42 U.S.C. § 1983 action is not precluded by a prior state adjudication of the *same cause of action* in which the federal issues could have been but were not raised." Brown Transport Corp. v. Atcon, Inc., 439 U.S. 1014, 1019 (1978) (dissenting opinion) (emphasis added). Although the *Burke* court feels there is "considerable doubt" on the issue, 579 F.2d at 774-75 n.53, it cites only Township of Brick v. Vannell, 55 N.J. Super. 583, 151 A.2d 404 (Super. Ct. App. Div. 1959) for support. That case has apparently never previously been cited on this point of law by any court; moreover, it is inapposite since it concerns the non-preclusive effect of a declaratory judgment on a possessory action, whereas the instant case involves two actions seeking injunctive relief.

tain the principles to be applied. Second, the approach furthers the goals underlying res judicata, such as reducing vexatious and burdensome litigation, assuring finality to judgments, using judicial resources economically by trying entire cases at one time, and encouraging reliance on judicial decisions.[63] Third, the approach preserves federal deference to state court judgments as a fundamental element of federalism and comity. Fourth, adoption of a res judicata principle derived from federal law violates the language of section 1738 and hampers the statute's efficacy as a means of unifying the nation. Fifth, in enacting statutes construed to operate under concurrent state and federal jurisdiction, such as the Civil Rights Acts,[64] Congress, consistent with res judicata principles, has provided alternative and not multiple forums for adjudication. Finally, considerable doubt exists whether res judicata, given its strong policy justifications, should be suspended even when jurisdiction over a statutory claim is exclusively federal.[65]

This approach is consistent with the Supreme Court's recent line of cases restricting access to the federal courts and expanding the scope of the abstention doctrines in civil rights cases,[66] and the Court has supported it in dictum.[67] Section 1738 can be seen as reflecting a modern, growing faith, shared by the judiciary, in the ability and willingness of state courts to adjudicate fairly claims involving civil rights and civil liberties.[68]

C. The Federal Primacy Approach

A contrary position would permit the *Burke* class to raise all of its federal claims in federal court. This "federal primacy approach" mitigates the harsh-

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63. *See, e.g.*, Montana v. United States, 440 U.S. 147, 153-54 (1979); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir. 1977).

64. State courts have implied a concurrent state right of action for civil rights claims. *E.g.*, New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974); Williams v. Horvath, 16 Cal. 3d 834, 837, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453, 455 (1976); Rzeznik v. Chief of Police, 78 Mass. Adv. Sh. 461, ___, 373 N.E.2d 1128, 1134 n.8 (1978).

65. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 674-75 (1978) (Brennan, J., dissenting); James v. Gerber Prod. Co., 587 F.2d 324, 327-28 (6th Cir. 1978) (under § 1738, failure to object during probate hearings precludes later federal 10b-5 action); *In re* Transocean Tender Offer Sec. Lit., 455 F. Supp. 999, 1009 (N.D. Ill. 1978). *See generally* Note, *Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978) [hereinafter cited as *Collateral Estoppel*]; Einhorn & Gray, *The Preclusive Effect of State Court Determinations in Federal Actions Under the Securities Exchange Act of 1934*, 3 J. CORP. L. 235 (1978) [hereinafter cited as *Preclusive Effect*].

66. *See* Comment, *Restrictions on Access to the Federal Courts in Civil Rights Actions: The Role of Abstention and Res Judicata*, 6 FORDHAM URB. L.J. 481 (1978) [hereinafter cited as *Restrictions*]; Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545, 563-72 (1977).

67. *See* Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) ("[*R*]*es judicata* has been held to be fully applicable to a civil rights action brought under § 1983"); Wolff v. McDonnell, 418 U.S. 539, 554 n.12 (1974). *But see* 411 U.S. at 509 n.14 (Brennan, J., dissenting) (section 1983 "may well be" an exception to section 1738); Ellis v. Dyson, 421 U.S. 426, 440 & n.6 (1975) (Powell, J., dissenting) ("never expressly decided"). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592, 606 & n.18 (1975).

68. *E.g.*, Stone v. Powell, 428 U.S. 465, 494 n.35 (1976), Sylvander v. New Eng. Home for Little Wanderers, 584 F.2d 1103, 1107-09 (1st Cir. 1978).

ness of section 1738's effect by balancing other well-defined federal policies against the policies underlying section 1738.[69] Several courts[70] and commentators,[71] endorsing this approach, have favored readjudication of issues and claims already heard and decided by the state courts, when important federal rights are asserted.

Congress, under this view, by providing original federal jurisdiction for civil rights claims, displayed a fundamental distrust of state court adjudication that implicitly modified the federalism of section 1738.[72] Mechanical application of section 1738 undermines this congressional policy by forcing state litigants to raise all claims in their state forum and blocking any attempt to gain a federal hearing.

According to proponents of the federal primacy approach, the practical effect of section 1738, in conjunction with the abstention doctrines, is to force many civil litigants to rely exclusively on state remedies despite the Supreme Court's pronouncement in *Monroe v. Pape* that state remedies need not be utilized by a federal civil rights plaintiff.[73] The Supreme Court, furthermore, recognized the unique history of the Civil Rights Acts in *Mitchum v. Foster*,[74] and held that section 1983 expressly authorizes federal courts to enjoin pending state proceedings.[75] *Younger* and section 1738, then, should not be permitted to overrule implicitly *Monroe* and *Mitchum* by barring civil rights litigants from federal court.[76]

It can further be argued that this approach is preferable even where litigation in state court is not involuntary. If section 1738 is strictly applied, wise plaintiffs who have a choice will bypass state courts completely if they antic-

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69. *See* American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir. 1972) ("[W]ell-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.").

70. *E.g.*, Henry v. First Nat'l Bank, 595 F.2d 291, 298 n.1 (5th Cir. 1979) (dictum) ("[W]e have serious doubt that, in an action brought under section 1983, a party who has been involuntarily forced to litigate his federal constitutional issues in a state court would be precluded from raising those issues in a federal court."); Red Fox v. Red Fox, 564 F.2d 361, 365 (9th Cir. 1977) (dictum) ("unique historical relationship between the American Indian and the federal government"); Cullen v. New York State Civil Serv. Comm'n, 435 F. Supp. 546, 555-56 n.5 (E.D.N.Y. 1977) (free speech); Moran v. Mitchell, 354 F. Supp. 86, 88-89 (E.D. Va. 1973) (dictum) (civil rights claim asserted where federal habeas review unavailable).

71. *E.g.*, Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191, 211-16, 218 (1972); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NW. U.L. REV. 859, 872-73 (1976); Torke, *supra* note 31, at 568, 576-77; Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870, 914-17 (1975).

72. *See* text accompanying notes 34-38 *supra*.

73. 365 U.S. 167, 183 (1961). *See Developments in the Law—§ 1983 and Federalism*, 90 HARV. L. REV. 1133, 1267 (1977) [hereinafter cited as *Developments*]; Neuborne, *supra* note 66, at 556-60.

74. 407 U.S. 225 (1972).

75. *Id.* at 242. The federal anti-injunction statute, 28 U.S.C. § 2283 (1976), forbids a federal court from enjoining state litigation "except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

76. *See* Juidice v. Vail, 430 U.S. 327, 343-45 (1977) (Brennan, J., dissenting) (*Younger*'s extension to pending state civil proceedings "cripples the congressional scheme enacted in § 1983").

ipate a more sympathetic hearing on their federal claims in federal court.[77] At worst, they may be remitted to state court for trial on their state claims and can return to federal court later with their federal claims. If plaintiffs choose to enter state court, however, they risk losing any federal hearing. A literal reading of section 1738 thus denies state courts an opportunity to resolve important state legal issues and contravenes Congress's provision of alternative forums.[78]

The Supreme Court itself has condoned the refusal of a state court to grant full faith and credit to the laws of a sister state which are contrary to its own state's public policy.[79] The Court has done so even though state courts and legislatures presumably lack the authority to override federal constitutional requirements in making public policy.[80] Since section 1738 is merely statutory, federal courts should have at least as much freedom to weigh section 1983 against section 1738 as state courts have to weigh state public policy against a federal constitutional requirement.

A final consideration supporting use of the federal primacy approach is that application of section 1738 may be artificial if a federal claim or its state equivalent has been rarely used in state court.[81] In such a case, a federal court trying to determine the preclusive effect of a prior state judgement cannot look to other federal decisions without forfeiting section 1738's objective of according priority to state rules of decision.

By its very nature, the federal primacy approach not only contradicts major premises of section 1738 and of res judicata, but also runs afoul of the *Younger* doctrine, which contemplates dismissal of plaintiff's federal action and presentation of all state and federal claims to the state court. In allowing a remitted *Younger* party to relitigate in federal court federal issues already decided by a state court this approach causes the kind of federal-state friction that *Younger* was designed to prevent.[82] Despite these difficulties, the Eighth

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77. The advantages of obtaining a federal hearing are enumerated by an experienced constitutional litigator in Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

78. In addition, federal case law may restrict a party's ability to bring an entire case before a federal court. An example is the doctrine of pendent jurisdiction. Although this concept has been liberalized in recent years to permit presentation of a party's entire "case," its application remains discretionary, UMW v. Gibbs, 383 U.S. 715, 726 (1966), and restrictive, *e.g.*, Aldinger v. Howard, 427 U.S. 1, 14-15 (1976) (federal plaintiff cannot join a new "pendent" defendant on the basis of a derivative, pendent state-law claim). Litigants may thus be faced with the Hobson's choice of litigating only part of their case in federal court or losing a federal hearing altogether.

79. *E.g.*, Carroll v. Lanza, 349 U.S. 408, 413 (1955). *Accord*, Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 557-61 (2d Cir. 1962) (en banc), *cert. denied*, 372 U.S. 912 (1963).

80. Supremacy Clause, U.S. CONST. art. VI, cl. 2.

81. State court actions under section 1983, for example, have been rare. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573, at 488 n.19 (1975).

82. It might be argued, however, that *Younger* is properly characterized only as an exhaustion doctrine demanding resort to state remedies before use of the normally available federal habeas remedy. Under this view, the doctrine merely requires deferral of federal factfinding until state remedies are exhausted, and the federal primacy approach, far from hindering *Younger*'s goals, actually furthers them by providing for ultimate federal fact-finding even in civil cases. The majority opinion in Huffman v. Pursue, Ltd., 420 U.S. 592, 606-07 (1975) (emphasis in original), appears to refute this view:

Circuit Court of Appeals recently held that a party already convicted by a state court could reallege an unconstitutional search and seizure as part of a section 1983 federal damages action after state appeals were exhausted; collateral estoppel principles were suspended on the grounds that federal habeas relief was not available.[83] This result is clearly justified under the federal primacy approach regardless of whether federal habeas is available. State criminal defendants are, after all, forced in a trial setting to present their best possible defenses, including constitutional claims, in order to avoid conviction and to leave open the possibility of federal habeas; they should not be penalized by res judicata when they later seek to vindicate their federal rights by means other than federal habeas corpus.

D. The Burke *Compromise*

The *Burke* court implicitly recognized the merit of both of the previously discussed positions by steering a narrow course between them. In its view, a state court judgment forecloses a section 1983 litigant from raising grievances in federal court only if such claims were pressed before, and decided by, a state tribunal, provided that the federal suit was commenced prior to a final decision by the state court.[84] This test replaces state "could-have-been-litigated" claim preclusion rules by allowing unlitigated federal claims to be reserved for later federal adjudication.

The *Burke* approach is the functional equivalent of the Second Circuit position that suspends *claim* preclusion rules but fully applies *issue* preclusion rules to prior state civil rights litigants.[85] Under the Second Circuit approach, a

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> The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state-court dispositions of federal questions. *Younger* . . . did *not* turn on the fact that in any event a criminal defendant could eventually have obtained federal habeas consideration of his federal claims.

The federal primacy view nevertheless derives support elsewhere in the same opinion: "[A]ssuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings." *Id.* at 606 (emphasis in original).

83. McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979) ("[I]f collateral estoppel is to apply in § 1983 actions raising search and seizure claims [for which federal habeas is unavailable], there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution."). The Supreme Court has also permitted federal readjudication of constitutional claims that were rejected in prior state proceedings. Wooley v. Maynard, 430 U.S. 705 (1977).

84. 579 F.2d at 774.

85. *E.g.*, Ornstein v. Regan, 574 F.2d 115, 117 (2d Cir. 1978). *Accord*, Fernandez v. Trias Monge, 586 F.2d 848, 854 (1st Cir. 1978); Reich v. City of Freeport, 527 F.2d 666, 671 (7th Cir. 1975). A converse approach is to apply full claim preclusion rules and suspend collateral estoppel. Torke, *supra* note 31, at 574-75; *Developments*, *supra* note 73, at 1337-39. The right to relitigate issues previously adjudicated is worthless, however, where the party is also prevented from bringing a new claim on the original cause of action.

A third approach would gauge the adequacy of the state judicial hearing, *i.e.* its procedural fairness in a trial on the merits, in deciding whether the state judgment should be accorded preclusive effect. Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L.

losing state party cannot relitigate any question necessary to an unfavorable judgment; thus, the party is precluded from relitigating any claim adversely decided by the state court. This result corresponds to the outcome required by the *Burke* approach.[86]

The position advanced by the *Burke* court successfully integrates policy arguments supporting the res judicata and federal primacy approaches. Federal courts should refuse to hear issues and claims already adjudicated by state courts, in order to give proper respect to state judiciaries and to encourage use of state forums for resolution of state issues. The federal judiciary must allow involuntary state litigants to split their causes of action, however, so that access to a federal forum for constitutional claims can be preserved. The preclusion of federal claims that might have been raised in state court is the harshest aspect of section 1738's rigid application, and it is the least defensible in light of the recognized importance of a federal forum to the litigation of civil rights questions.

Although *Burke*'s rule may discourage use of constitutional defenses in state proceedings,[87] litigants should neither be locked into their state forums nor be given the opportunity to raise identical issues in multiple forums.[88] The policies underlying section 1738 are adequately met by respecting the outcome of claims actually considered in the state courts.

REV. 610, 617 n.39 (1978) [hereinafter cited as COLUMBIA]; Comment, *State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866*, 62 MINN. L. REV. 987, 1004-05 (1978). To the extent that the issue of procedural fairness is incorporated into state principles of res judicata, it should be respected by federal courts under section 1738. If state hearings are procedurally unfair, they or the state rule giving them preclusive effect can be subjected to a fourteenth amendment attack in federal court under the *Burke* approach, as long as the state litigant foregoes litigating these issues in state court. *See Fernandez*, 586 F.2d 848. In addition, *Younger* may be inapplicable where state procedures are inadequate; a state party would then have ready access to a federal court. *See* Moore v. Sims, 99 S. Ct. 2371 2387-88 (1979) (Stevens, J., dissenting).

86. Although the Third Circuit failed to address the issue, the *Burke* parties presumably will not be collaterally estopped from relitigating factual and legal issues that bear on their reserved claims. A contrary rule would tend to undermine an important policy favoring the *Burke* approach, that of encouraging federal fact-finding on residual federal issues. This policy was a vital aspect of the procedure constructed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). *See* text accompanying notes 47-50 *supra*. This limited suspension of collateral estoppel is an element of the *Burke* approach that differs from the Second Circuit position.

87. *Developments*, *supra* note 73, at 1340. *See* Moran v. Mitchell, 354 F. Supp. 86, 88-89 (E.D. Va. 1973).

88. The Supreme Court has reaffirmed its fidelity to collateral estoppel principles in both civil and criminal cases in recent terms. In its 8-1 decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the Court permitted offensive use of collateral estoppel to effectively deny defendant a seventh amendment right to a jury trial, on the grounds that defendant had previously had a full and fair opportunity and strong incentive to litigate identical issues. *See also* Montana v. United States, 440 U.S. 147, 153 (1979) (doctrine of collateral estoppel broadly applied because "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions."); *In re* Transocean Tender Offer Sec. Lit., 455 F. Supp. 999, 1005-06 (N.D. Ill. 1978) (state judgment given greater collateral estoppel effect by federal court than state courts would give it). The *Montana* Court noted, however, that collateral estoppel would not apply to a claim properly reserved under England v. Louisiana State Board of Medical Examiners, 440 U.S. at 164 n.10.

Younger's aim of having all claims resolved in state court admittedly clashes with the central objective of the rule stated in *England v. Louisiana State Board of Medical Examiners*:[89] by allowing a state party to split his cause of action, *England* sought to preserve a federal hearing for the party's federal claims. *Burke*'s adoption of an *England* procedure in the context of the *Younger* doctrine would, therefore, inevitably reduce the vitality of that doctrine. State defendants who have been denied a federal hearing or who anticipate nearly certain federal abstention would be permitted to make a "*Burke* reserve" of their federal claims and thereby escape conclusive state adjudication of these claims. State courts would be deprived of an opportunity to hear the entire case of involuntary litigants, including important federal issues intrinsic to the litigation before them. Nevertheless, in a choice between the statutory doctrine of federal primacy enacted in section 1983 and the judicial doctrine of comity embodied in *Younger*, the latter must yield. Section 1983 guarantees to every citizen the right to have justiciable constitutional claims heard in federal court, and this right should not be abridged by the judicial doctrines of abstention however strong their policy justifications.[90]

Younger would retain much of its force despite adoption of the *Burke* approach. First, the doctrine would continue to prevent federal courts from interfering in or ignoring state judicial proceedings; federal courts could hear withheld federal claims only after state judicial remedies were exhausted.[91] Second, the *Burke* approach probably would not be utilized in *Younger* abstention cases involving state criminal defendants. Principles of res judicata treat a criminal defense and a civil claim as different causes of action; there is therefore little need for criminal defendants to escape the effects of claim preclusion.[92] In addition, use of the *Burke* reserve by criminal defendants would preclude their invocation of federal habeas corpus on the reserved claim since state prisoners are required to exhaust state remedies on the federal claim presented in a federal habeas petition.[93] Third, state civil defendants who make a *Burke* reserve greatly increase the likelihood of an adverse state decision, and this result will discourage use of the reserve.

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89. 375 U.S. 411 (1964).

90. As Justice Brennan commented in his dissent in Juidice v. Vail, 430 U.S. 327, 343-44 (1977) (emphasis in original):

> It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum *because* of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit *without regard* to the pendency of the state suit. Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress . . . ordained should be a primary responsibility of the federal courts.

91. *See* Hjelle v. Brooks, 424 F. Supp. 595, 599-601 (D. Alas. 1976).

92. *See* Fernandez v. Trias Monge, 586 F.2d 848, 856 n.11 (1st Cir. 1978); Neaderland v. Commissioner, 424 F.2d 639, 641 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970); MOORE'S, *supra* note 2, ¶ 0.418[1], at 2701. A criminal defendant might use a *Burke* reserve, however, to lessen the adverse impact of collateral estoppel: the reserve enables him to withhold from the state court factual or legal issues that are critical to his constitutional claims. A defendant using this strategy obviously faces a greater risk of conviction.

93. Picard v. Connor, 404 U.S. 270, 275-76 (1971).

The solution provided by *Burke* succeeds in reconciling to the extent possible the conflicting policies of section 1983, section 1738, and the *Younger* doctrine.[94] It is therefore preferable to the existing procedure which denies any federal hearing to involuntary state civil litigants.

Although the Third Circuit, in *Burke*, relies on *England* for its governing precedent, the facts upon which *England* created an implicit, narrow exception to section 1738 are distinguishable from the peculiar facts in *Burke*. First, *England* sought to preserve plaintiff's original forum choice,[95] and one precondition to an *England* reserve[96] is, therefore, the plaintiff's involuntary presence in state court. In *England* terms, return to plaintiff's original forum choice is not at issue if a state litigant voluntarily submitted federal claims to the state tribunal for adjudication.[97] The *Burke* class, by freely submitting its constitutional claims to the New Jersey court before the district court abstained,[98] was clearly not an involuntary party in state court and therefore cannot claim the benefit of *England*.[99]

Second, the *Burke* class made no attempt to make an *England* reserve despite the district court's partial reliance on *Pullman* in remitting the class to state court. The class did allege additional constitutional violations in its federal complaint, but it also fully litigated some of its federal claims in state court. If

94. The *Burke* approach arguably inflicts less damage to the *Younger* doctrine than does the federal primacy approach. Rather than permitting federal courts to ignore state decisions and readjudicate matters already decided by the state courts, *Burke* merely permits the withholding of certain federal claims from state adjudication until the state courts have resolved remaining state or federal issues; it abides by specific resolutions of claims submitted to the state courts. In addition, the *Burke* approach properly applies only to state civil litigants, and Justice Stewart has observed that the policies underlying the comity doctrine are less applicable to civil cases than to criminal prosecutions. Younger v. Harris, 401 U.S. 37, 55 n.2 (1971) (concurring opinion).

95. 375 U.S. 411, 421-22 (1964); Hamar Theatres, Inc. v. Cryan, 393 F. Supp. 34, 42-43 (D.N.J. 1975); COLUMBIA, *supra* note 85, at 630-32. Thus, *England* has been held not to apply to a remitted *Pullman* party if the party voluntarily entered state court initially, even if only to receive review of an adverse administrative result. Cornwell v. Ferguson, 545 F.2d 1022, 1025-26 (5th Cir. 1977). *See* Roy v. Jones, 484 F.2d 96, 100-01 (3d Cir. 1973). *See also* Montana v. United States, 440 U.S. 147, 163 (1979).

96. A state party's reservation of federal claims for later federal adjudication is called an "*England* reserve."

97. Commentators have been nearly unanimous in their view that only involuntary state litigants can rightfully ask suspension of res judicata in civil rights cases. Averitt, *supra* note 71, at 195-96; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims*, Part II, 60 VA. L. REV. 250, 276-77 (1974); Theis, *supra* note 71, at 868; Torke, *supra* note 31, at 569-70; *Developments*, *supra* note 73, at 1342. *See Collateral Estoppel*, *supra* note 65, at 1290-91. *But see* COLUMBIA, *supra* note 85, at 617 & n.36.

98. Petitioner's Reply Brief for Certiorari at 3.

99. The Third Circuit states that the federal action must be filed before a final state judgment is rendered for its modified preclusion rules to apply. 579 F.2d at 774. This requirement is inexplicable. It cannot be designed to determine whether the party has voluntarily submitted its federal claims to the state court, for on that issue the appropriate question is whether those claims were submitted prior to district court abstention. Although courts have long recognized a party's right to litigate simultaneously in state and federal court, *e.g.*, Colorado River Water Conser. Dist. v. United States, 424 U.S. 800, 817-18 (1976), the pendency of a federal suit normally has no effect on the operation of res judicata, *e.g.*, Briggs v. Arcadia, No. 77 Civ. 1713 (WCC) (S.D.N.Y. Sept. 19, 1978), and only tends to disrupt state judicial proceedings by introducing the possibility of parallel federal proceedings. Averitt, *supra* note 71, at 196.

any federal claims are to be allowed into federal court at all, the logic of *England* requires at least an express reserve in state court of federal claims that the class wishes to withhold, in order to demonstrate the class's intent to return to federal court with them.[100] The Third Circuit apparently assumes that any federal claim not fully litigated in state court is automatically reserved under *England*, even if it is part of a cause of action that a state tribunal already has adjudicated. Unless an express reserve is required, however, the *England* reserve concept would be a fiction requiring no clear, affirmative acts by remitted state litigants, and would permit defeated state parties always to enter district court with a new set of claims. Where some federal claims are submitted to state court and others are reserved for federal court, an express reserve should be required to satisfy the rationale of *England*.

The procedure established in *England*, upon which the Third Circuit relied in creating the *Burke* reserve, provides guidance as to the proper formulation of the *Burke* rule: A party with civil rights claims who is compelled to litigate in state civil proceedings should be entitled to reserve those claims for subsequent federal adjudication. If the Third Circuit had applied this model to the facts in *Burke*, dismissal would have resulted because the *Burke* class submitted its federal claims to the state court voluntarily and because it failed to clearly reserve its withheld federal claims.

IV
CONCLUSION

The willingness of many courts to ignore the congressional mandate of section 1738 and adopt a federal res judicata principle is testimony to the perceived importance of a federal hearing for civil rights claims. As the scope of the *Younger* doctrine expands and the availability of federal habeas corpus relief narrows under the Burger Court, the need for clearer definition of the proper scope of section 1738 becomes critical. The res judicata test ultimately adopted will strongly influence the degree to which federal forums are used for the vindication of important constitutional rights.

Federal policies promoted by the Civil Rights Acts must inevitably be weighed against a respect for state court adjudication and the desirability of judicial finality and repose. The Third Circuit, eschewing both rigid adherence to the language of section 1738 and sweeping disregard for federalism or res judicata, constructed in *Burke* a rational compromise that lends respect to claims adjudicated in state courts but permits subsequent litigation of reserved, unlitigated federal civil rights claims.[101] The *Burke* approach, coupled with the

100. 375 U.S. at 421. Since offering to dismiss the state suit after filing the federal action does not constitute an *England* reserve, New Jersey Education Ass'n v. Burke, 579 F.2d at 775 n.57, mere filing cannot. *See* Lovely v. Laliberte, 498 F.2d 1261, 1263-64 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974); Fisher v. Civil Service Comm'n, 484 F.2d 1099, 1100-01 (10th Cir. 1973).

101. Adoption of the *Burke* approach would lessen the unfruitful uncertainty that currently surrounds the *Younger* doctrine by guaranteeing a federal hearing to parties against whom state en-

abstention doctrines, allocates state and federal claims to their appropriate forums and thus broadens the *England* exception to section 1738 into a generalized and equitable principle.

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forcement actions are instituted. As Justice Stevens has warned, the "increasingly Daedalian doctrine of abstention" is becoming a procedural labyrinth made up entirely of blind alleys. Trainor v. Hernandez, 431 U.S. 434, 470 (1977) (dissenting opinion).