

## A DOCTRINE OF FAITH AND CREDIT

*Brian M. Vines\**

INTRODUCTION.....	247
I. DOCTRINAL OVERVIEW.....	250
II. THE CURRENT STATE OF THE DOCTRINE .....	252
A. <i>State-State Faith and Credit</i> .....	252
B. <i>State-Federal Faith and Credit</i> .....	256
C. <i>Current Supreme Court Doctrine</i> .....	259
III. POLICY ARGUMENTS FOR A BROAD READING .....	261
A. <i>Interested Parties</i> .....	262
B. <i>Sovereign Interests</i> .....	263
1. <i>Internal Policy Choices Should Be Respected</i> .....	263
2. <i>Possibility of State-Federal Forum Shopping</i> .....	266
IV. ANCHORING “FAITH AND CREDIT” .....	269
A. <i>Theoretical Framework</i> .....	269
B. <i>Ratification of the Implementing Statute</i> .....	270
C. <i>The Implementing Statute’s Substantive Scope</i> .....	272
1. <i>Quality of a Judgment—What Is a “Judicial Proceeding”?</i> .....	272
2. <i>Which Parties Are Bound by a Judgment?</i> .....	274
3. <i>What Claims Does a Judgment Preclude?</i> .....	276
4. <i>What Issues Does a Judgment Decide?</i> .....	277
D. <i>Does “Same” Mean No More as Well as No Less?</i> .....	278
CONCLUSION.....	280

### INTRODUCTION

IMAGINE a judgment from a California state court in which a plaintiff (“P1”) prevails in a civil suit against the defendant (“D”). A second plaintiff (“P2”) brings a related suit in Alabama against D and seeks to estop D from relitigating issues found ad-

---

\* Law Clerk to the Honorable William H. Pryor, Jr., U.S. Court of Appeals for the Eleventh Circuit; J.D. 2007, University of Virginia; B.S. 2002, Auburn University. I would like to thank Professor Caleb Nelson for his insightful comments and consistent encouragement on the writing of this Note. Also, this Note benefited greatly from the hard work of the *Virginia Law Review* staff, especially Victoria Alterman. Finally, neither this Note nor my career in the law would be possible without the love, encouragement, and patience of my wife, Sarah Beth.

verse to D in California. If the first judgment had been decided in Alabama rather than California, P2 would not be able to benefit from the issue-preclusive effect of the judgment. Alabama adheres to the traditional mutuality requirement, which only allows a party to benefit from a judgment's preclusive effect if the party would have been bound by the judgment.<sup>1</sup> California, on the other hand, has abandoned the mutuality requirement.<sup>2</sup> Given the conflict between the preclusion laws of Alabama and California, may the Alabama court choose which state's law it will enforce? Or does federal law require Alabama to give the California judgment the same preclusive effect that the judgment would have in California?

What if the situation was reversed? P1 wins a judgment in Alabama against D. P2 seeks to estop D from litigating issues in California. Alabama, as noted above, would not permit the issue preclusion. Can California allow P2 to estop D, or must it instead follow Alabama law requiring mutuality?

The answers to questions such as these have considerable practical importance. Cost-conscious litigants determine how much they are willing to spend based on the associated risk of loss or probability of gain in any litigation. If a litigant in Alabama knows that the judgment between the two parties will be limited in its effect, she will litigate the issue accordingly. Uncertainty surrounding the judgment's preclusive effect will change that analysis. Unfortunately, there is currently no consistent answer to these questions. To the contrary, under the status quo, litigants can expect uncertainty with respect to the preclusive effects of their judgments in other state jurisdictions. As Part I will explain, the ultimate question concerning the interstate preclusive effect of a judgment is the scope of the implementing statute, 28 U.S.C. § 1738, which is the statutory enactment of the Constitution's Full Faith and Credit Clause.

Wright & Miller's *Federal Practice and Procedure*, unquestionably the most influential treatise on the federal judicial system, offers a flexible approach to interpreting the scope of the implementing statute.<sup>3</sup> It argues that the implementing statute's scope should

---

<sup>1</sup> Redmond v. Bankester, 757 So. 2d 1145, 1151 n.2 (Ala. 1999).

<sup>2</sup> Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942).

<sup>3</sup> 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4467 (2d ed. 2002) [hereinafter Wright & Miller]. Wright &

hinge on the specific doctrine of *res judicata*, or preclusion law, at issue. Wright & Miller concludes that not all aspects of modern preclusion law should fall under the command of the implementing statute.<sup>4</sup> Anchored to the “core values” of reliance, repose, and finality, Wright & Miller conducts individualized policy analyses for separate preclusion law doctrines to determine whether the second forum (“F2”) is obliged to follow the law of the first forum (“F1”) for that doctrine.<sup>5</sup> Doctrines that it concludes are not essential to the “central role of *res judicata*” or that “intrude on substantial interests of later courts” are placed outside the scope of the implementing statute and therefore outside of federal law’s command.<sup>6</sup> F2 is not bound by federal law, and thus it can choose whether to follow F1’s law. According to Wright & Miller, this freedom of choice is of no concern because “the interests to be advanced are sufficiently important to warrant the cost of such uncertainty.”<sup>7</sup> At first blush, this seems like a reasonable principle to define the implementing statute’s scope. Its application, however, is far from certain<sup>8</sup> and surprisingly exclusionary.<sup>9</sup> Ultimately, Wright & Miller has a very narrow understanding of the implementing statute’s scope, in that it does not understand the statute to reach many doctrines of modern preclusion law. Throughout this Note, I will refer to Wright & Miller’s understanding of the implementing statute as the “narrow” or “flexible” approach.

---

Miller is frequently cited by courts as persuasive evidence of federal law in procedural areas. See, e.g., *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007).

<sup>4</sup> Wright & Miller, *supra* note 3, § 4467, at 36.

<sup>5</sup> *Id.* at 37–51.

<sup>6</sup> *Id.* at 36.

<sup>7</sup> *Id.* at 51.

<sup>8</sup> For an example of uncertainty, consider Wright & Miller’s argument that F2 should give claim-preclusive effect to a penalty dismissal by F1 because the “argument is so strong it *probably* deserves entry into the realm of full faith and credit.” *Id.* at 45 (emphasis added).

<sup>9</sup> The Wright & Miller policy analysis removes significant aspects of modern preclusion law from the scope of the implementing statute. Wright & Miller agrees that F2 must enforce many aspects of F1’s judgments, *id.* at 19, but collateral aspects of the judgment are unclear. Claim preclusion is considered close to the “central core” such that *most* aspects should be respected by F2. *Id.* at 19, 41–42. The issue-preclusive effects of F1’s judgment in F2 are more questionable. Under Wright & Miller, full faith and credit does not require F2 to honor F1’s law concerning the parties precluded, the quality of the judgment required, or the requirement of mutuality. *Id.* at 42–44.

Contrary to Wright & Miller's position, this Note will argue for a broad understanding of the implementing statute's scope such that the statute encompasses most doctrines of modern preclusion law. Throughout this Note, I will refer to my suggested approach as the "broad approach." This understanding is a clear rule that courts can easily follow, as opposed to a policy-based standard that is difficult to implement. This Note will present a doctrinal theory that both supports such a reading and provides certainty in the application of the implementing statute.

This Note will proceed in three steps. Part I will briefly explain the relationship between the implementing statute and the constitutional full faith and credit provision. Part II will explore the current case law on these matters and reach two conclusions. First, courts are thoroughly confused as to the command of the implementing statute. Second, a broad rule regarding the implementing statute is preferable because it will create consistency in the application of the statute. Part III will argue that a broad reading of the implementing statute's command is normatively superior to a narrow approach. Finally, Part IV will present a method of interpreting the statute that provides a jurisprudential anchor to the doctrine of "faith and credit." Ultimately, this Note will argue for an interpretation of the implementing statute that will bring certainty to a muddled area of law, clarifying the nebulous phrase "full faith and credit."

### I. DOCTRINAL OVERVIEW

The drafters of the Constitution did not leave the deference owed to state court judgments to the caprice of sister states' legislatures or judiciaries. Instead, the drafters included in the Constitution the Full Faith and Credit Clause, which requires that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other state."<sup>10</sup> This Clause created a constitutional floor for the respect F2 must give F1's judgment. The drafters went further, however, granting Congress the power to "prescribe the Manner in which such . . . Proceedings shall be

---

<sup>10</sup> U.S. Const. art. IV, § 1.

proved, and the Effect thereof.”<sup>11</sup> Congress exercised that power through the implementing statute.<sup>12</sup>

When evaluating federal law’s commands over the preclusive effect of judgments, both the implementing statute and the Constitution must be considered. Unfortunately, commentators have not determined the precise scope of the Full Faith and Credit Clause.<sup>13</sup> Instead, Congress, commentators, and courts have relied on the implementing statute to clarify the rules governing the preclusive effect of judgments.

This Note focuses on the requirements of the implementing statute because its command is at least as great as the command of the Constitution.<sup>14</sup> The implementing statute requires that a state’s judgment should have the “same full faith and credit” as that judgment has in the state in which it was rendered.<sup>15</sup> This Note seeks to understand what Congress meant by “faith and credit.” If a characteristic of a judgment is governed by “faith and credit,” then F2 must give it the “same full faith and credit” as F1.<sup>16</sup> This Note argues that most modern doctrines of preclusion law fall under “faith and credit” and that F2 must treat F1’s judgments exactly the same as F1, including treatment of issues such as nonmutual issue preclusion. If federal law speaks to F2’s treatment of the preclusive effects of a judgment of F1, it must do so through the implementing statute. As Part II shows, however, the current state of the law shows that there is little clarity concerning application of the implementing statute to the preclusive effect of judgments. Part IV provides a doctrinally based interpretation of the implementing statute that can provide certainty to the statute’s meaning and

---

<sup>11</sup> *Id.*

<sup>12</sup> 28 U.S.C. § 1738 (2000).

<sup>13</sup> The history of the Full Faith and Credit Clause of the Constitution is generally considered inadequate for determining the rules governing the preclusive effects of judgments. See, e.g., Wright & Miller, *supra* note 3, § 4467, at 36; Ronan E. Degnan, *Federalized Res Judicata*, 85 *Yale L.J.* 741, 743 (1976) (“So the origin of a legal phrase of great importance to our federal system remains obscure.”). But see Larry L. Teply & Ralph U. Whitten, *Civil Procedure* 224 (1994) (summarizing Professor Whitten’s historical argument for a concrete meaning of “full faith and credit”).

<sup>14</sup> *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938) (noting that the implementing statute is broader than the Constitution).

<sup>15</sup> 28 U.S.C. § 1738.

<sup>16</sup> *Id.*

hence to the requirements of federal law concerning the preclusive effect of judgments.

## II. THE CURRENT STATE OF THE DOCTRINE

In this Part, a survey of how courts analyze the preclusive effects of other courts' judgments illustrates the inconsistent manner in which states apply the implementing statute and the confusion among courts as to what is required by federal law. First, in the context of state courts considering the judgments of sister states, the case law demonstrates that courts take a variety of approaches and reach divergent results concerning the requirements of the implementing statute. Another observation is that few states fully comprehend the requirements of federal law, nor do they embrace the policy analysis Wright & Miller suggests. Instead, the state courts create and apply exceptions to full faith and credit inconsistently, creating uncertainty as to the preclusive effects of judgments. Second, this Note examines the federal courts' treatment of state court judgments. In contrast to state courts, federal courts consistently apply the preclusion law of F1, confident that the implementing statute demands this treatment. Finally, a brief review of U.S. Supreme Court jurisprudence shows that it can be read to support a broad reading of the implementing statute.

### *A. State-State Faith and Credit*

States frequently have the opportunity to decide the effect of a sister state's judgments and consistently enforce those judgments.<sup>17</sup> The requirements become more complicated when a judgment's collateral consequences (for example, issue- and claim-preclusive effects) are considered.<sup>18</sup> Wright & Miller asserts that "some flexibility" can be tolerated in the application of the implementing statute, and the following cases illustrate that flexibility is prevalent among states' treatment of each other's judgments. Though Wright & Miller suggests a reasoned policy analysis to determine whether doctrines of preclusion are governed by the implementing statute, it is important to note that states are not engaging in such an analy-

---

<sup>17</sup> Wright & Miller, *supra* note 3, § 4467, at 17–19.

<sup>18</sup> *Id.* at 19 ("Recognition for collateral purposes, however, is different, and may move free from the law of the judgment state.").

sis. Currently, a litigant trying to predict the preclusive effect of her judgment has very little doctrine on which to rely because states treat the judgments of sister states with considerable inconsistency. This Note argues that a simple, strict rule concerning “faith and credit” will lead to a more consistent understanding of the implementing statute’s scope—that is, which preclusive doctrines warrant full faith and credit.

Contrary to Wright & Miller’s preferred approach, some states follow every aspect of F1’s preclusion law, though for various reasons. Some reason that federal law commands them to follow all aspects of F1’s preclusion law.<sup>19</sup> For example, Massachusetts courts understand the implementing statute, the Constitution, and the associated Supreme Court case law to demand F2 to follow many, if not all, aspects of F1’s preclusion law.<sup>20</sup> While analyzing Vermont law for the issue-preclusive effect of a Vermont judgment, Massachusetts’s appeals court declared that “[a]s a matter of full faith and credit, we afford a sister-State judgment the same preclusive effect as would a court of that State.”<sup>21</sup> In *Heron v. Heron*, Massachusetts’s highest court stated that “[d]ifferences between [F1] and Massachusetts policy” do not affect federal law’s command to give full effect to F1’s judgment.<sup>22</sup> Rather than weighing Massachusetts’s substantive policy choices against F1’s preclusive policy, as Wright & Miller suggests, Massachusetts subordinates its policy interests to the command of the implementing statute. If a litigant thinks a judgment will be used for preclusive effect in Massachusetts, she can be confident that the effect will be governed by the preclusion law of F1. As the cases discussed below demonstrate, few states are as consistent as Massachusetts concerning the preclusive effect of another state’s judgment.

---

<sup>19</sup> See, e.g., *Gardner v. Pierce*, 838 N.E.2d 546, 551 (Ind. Ct. App. 2005) (citing *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982)) (looking to Texas law for the preclusive effect of a Texas judgment because of the command of Supreme Court precedent); *Brown v. Brown*, 387 So. 2d 565, 566 (La. 1980) (applying Arkansas preclusion law to an Arkansas judgment based on the command of the Constitution).

<sup>20</sup> *Trifiro v. French*, No. 04-P-226, 2005 WL 840372, at \*4 (Mass. App. Ct. Apr. 12, 2005).

<sup>21</sup> *Id.*

<sup>22</sup> *Heron v. Heron*, 703 N.E.2d 712, 714 (Mass. 1998). In *Heron*, the Massachusetts court looked to F1 law for issues of judgment finality and claim-preclusive effect. *Id.*

Other states enforce aspects of F1's preclusion law outside Wright & Miller's "central core," but because these states use inconsistent reasoning for doing so, litigants remain uncertain as to how their judgments will be treated. For example, in *Rourke v. Amchem Products*,<sup>23</sup> Maryland's highest court provided three alternative reasons for enforcing F1's preclusion law without definitively resting on any one of them. The court addressed the question of whether Virginia law should govern the issue-preclusive effect of a Virginia judgment. Virginia law required mutuality for issue preclusion, whereas Maryland law concerning nonmutual preclusive effect remained unsettled.<sup>24</sup> Ultimately, in reaching its decision to enforce Virginia's preclusion law, the Maryland court considered Supreme Court precedent, policy considerations for applying F1's law, and arguments against applying nonmutual issue preclusion as a matter of Maryland law.<sup>25</sup> Delaware provides another example of uncertainty, in that it regularly enforces the preclusion law of F1 but not pursuant to one clear line of reasoning. In one case, the Delaware Court of Chancery thoroughly analyzed New York's claim-preclusion law because it believed that was the demand of the implementing statute.<sup>26</sup> In another case, comity, not federal law, led the Supreme Court of Delaware to respect Kansas's mutuality requirement in the face of contrary Delaware law.<sup>27</sup> These courts respect the preclusion law of F1 but are not confident in their reasons for doing so.<sup>28</sup> This uncertainty prevents litigants from knowing, *ex ante*, how F2 will treat F1's doctrine of preclusion law.

Another trend among state courts is to enforce doctrines of F1's preclusion law but without conducting a reasoned policy analysis, as Wright & Miller suggests. These courts recite the requirements of the implementing statute but proceed to give preclusive effect to

---

<sup>23</sup> 863 A.2d 926 (Md. 2004).

<sup>24</sup> *Id.* at 934, 938–39.

<sup>25</sup> *Id.* at 935–39.

<sup>26</sup> *In re Nat'l Auto Credit S'holders Litig.*, No. Civ.A. 19028-NC, 2004 WL 1859825, at \*2 (Del. Ch. Aug. 3, 2004).

<sup>27</sup> *Columbia Cas. Co. v. Playtex FP*, 584 A.2d 1214, 1218 (Del. 1991). It should be noted that the judgment in Kansas was that of a federal court, but the Delaware court looked to Tenth Circuit law that declared the preclusive effect of a judgment based on diversity would be that of the state in which the federal court sat. *Id.*

<sup>28</sup> See also *Centre Equities v. Tingley*, 106 S.W.3d 143, 150–55 (Tex. App. 2003) (holding initially that Alabama law governs what parties are bound by an Alabama judgment but then confirming its decision with Texas law).



F1's judgment using their own law. In *Chrison v. H & H Interiors*, a Georgia appellate court looked to Tennessee law to conclude that a penalty dismissal was "on the merits" and, therefore, that giving the judgment claim-preclusive effect was warranted.<sup>29</sup> The court then used Georgia law to determine which parties were bound by the Tennessee judgment.<sup>30</sup> Similarly, a Washington court declared that the implementing statute required it to give an Oregon judgment issue-preclusive effect and yet proceeded to analyze that effect under Washington law.<sup>31</sup> Wright & Miller's policy analysis places doctrines of preclusion law outside the scope of the implementing statute and therefore outside the command of federal law. These courts, contrary to Wright & Miller, fail to explain why federal law's command does not apply to the doctrines of preclusion law they are addressing. Instead, these courts purport to apply the implementing statute, which requires that the "same full faith and credit" be given to a judgment,<sup>32</sup> but then apply their own law to another state's judgment without any explanation.<sup>33</sup> Again, without a reasoned policy analysis, a litigant will have no way to predict how his judgment will be treated in another state.

Finally, several state courts completely ignore the implementing statute—that is, they disregard federal law—when determining the preclusive effect of F1's judgment. The Mississippi Supreme Court failed to mention the Clause or the implementing statute when it applied Mississippi issue-preclusion law to a Louisiana judgment.<sup>34</sup>

---

<sup>29</sup> 500 S.E.2d 41, 45 (Ga. Ct. App. 1998).

<sup>30</sup> *Id.*

<sup>31</sup> *Lee v. Ferryman*, 945 P.2d 1159, 1163–66 (Wash. Ct. App. 1997).

<sup>32</sup> 28 U.S.C. § 1738 (2000).

<sup>33</sup> See also *Carr v. Rose*, 701 A.2d 1065, 1070, 1076–77 (D.C. 1997) (looking to District of Columbia law for issue-preclusive effect of Pennsylvania judgment after looking to Pennsylvania law for claim-preclusive effect); *In re Estate of Wallen*, 663 N.E.2d 1350, 1358 (Ill. App. Ct. 1994); *Breaux v. Avondale Indus.*, 842 So. 2d 1115, 1123 (La. Ct. App. 2003); *Aetna Life Ins. Co. v. McElvain*, 717 P.2d 1081, 1085–86 (Mont. 1986); *Cartesian Broad. Network v. Robeco USA*, No. 602089/04, 2005 WL 3442964, at \*2–3 (N.Y. Sup. Ct. June 6, 2005) (referring to New York law after determining a Massachusetts judgment was due "full faith and credit").

<sup>34</sup> *Ditta v. City of Clinton*, 391 So. 2d 627, 629 (Miss. 1980) (referring to Mississippi law regarding when collateral estoppel applies in determining effect of a Louisiana judgment); see also *Goodson v. McDonough Power Equip.*, 443 N.E.2d 978, 982–88 (Ohio 1983) (determining whether Ohio will recognize nonmutual offensive issue preclusion based on a Florida judgment without mentioning "faith and credit" or Florida law).

Refusing to give a Pennsylvania judgment claim-preclusive effect, a Michigan court argued that the Full Faith and Credit Clause did not apply because the Michigan cause of action could not be heard in Pennsylvania.<sup>35</sup> Similarly, a Virginia court refused to give a Massachusetts judgment preclusive effect because, according to Virginia law, an indispensable party was absent.<sup>36</sup> Of course, if the situation were reversed, it is likely that Massachusetts would respect Virginia's law on the issue.<sup>37</sup> These courts did not complete a policy analysis of the issues involved; instead, they simply decided that F1's judgment was not due any "faith and credit."

Wright & Miller suggests a policy-based alternative to a broad view of the implementing statute's scope. Its view, however, is not applied by the states. Instead, state courts are adrift in a flexible approach with little guidance or consistency as to how to treat a judgment from F1. Some states think federal law demands a strict application of F1's law; others rely on comity in applying F1's law; some apply F1's law for no reason at all; others use F1's law for some preclusive doctrines and F2's law for other doctrines, seemingly at random; and finally, some states completely disregard the preclusion law of F1. The current attempt at flexibility, consistent with the approach Wright & Miller suggests, provides little certainty for litigants concerned with the future preclusive effects of their judgments. As an alternative to this unworkable flexible approach, this Note argues that the scope of the implementing statute is broad enough to cover most, if not all, preclusive doctrines, and its command is simple: F2 must treat the judgment exactly as F1 would.

### *B. State-Federal Faith and Credit*

Federal circuit courts are more confident in their interpretation of the implementing statute than state courts: they generally hold that federal law requires F2 to look to F1's preclusion law for the preclusive effect of F1's judgments. Federal courts do not draw distinctions based on how close the particular preclusion doctrine is to

---

<sup>35</sup> *Martino v. Cottman Transmission Sys.*, 554 N.W.2d 17, 20 (Mich. Ct. App. 1996).

<sup>36</sup> *Venator Group Specialty v. MLK Assoc.*, No. 185003, 2000 WL 33316759, at \*2-3 (Va. Cir. Ct. Aug. 14, 2000).

<sup>37</sup> See *supra* notes 20-22 and accompanying text.

the central role of *res judicata*, as Wright & Miller suggests.<sup>38</sup> The federal courts' consistency suggests that the broad analysis endorsed by this Note, which understands the scope of the implementing statute to encompass most aspects of modern preclusion law, is a plausible way to administer the requirements of the implementing statute.

The following two cases are illustrative of federal courts applying the preclusion law of a state, even to issues that are outside Wright & Miller's "central core" of *res judicata*. First, in *In re Catt*, the U.S. Court of Appeals for the Seventh Circuit applied Indiana's minority rule of giving issue-preclusive effect to the findings of a default proceeding.<sup>39</sup> The creditors sought to have the debt declared nondischargeable by a federal bankruptcy court based on an Indiana state court's conclusion in a default proceeding that the debt was procured by fraud.<sup>40</sup> Judge Posner's analysis was brief.

---

<sup>38</sup> See, e.g., *Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786, 793 (8th Cir. 2005) (holding that § 1738 required an Arkansas federal court to look to Wisconsin law for the issue-preclusive effect of a Wisconsin state judgment); *In re Juck*, 93 F. App'x 291, 292 (2d Cir. 2004) (holding that § 1738 required a Connecticut federal court to look to Texas law for the issue-preclusive effect of a Texas state judgment); *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334 F.3d 444, 452 (5th Cir. 2003) (holding that § 1738 required a Texas federal court to look to New Mexico law for the issue-preclusive effect of a New Mexico state judgment); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 446–47 (2d Cir. 1995) (holding that § 1738 required the federal court in Connecticut to consult the *res judicata* law of several states in determining the preclusive effect of those states' respective judgments); *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992) (looking to Alabama law for the preclusive effect of Alabama judgments). Though not as persuasive as the above cases, which involved federal courts looking to states other than the ones in which they sit, there are also many examples of federal courts looking to the law of the state in which they sit to determine the issue-preclusive effect of a judgment of that state. See, e.g., *United States v. B.H.*, 456 F.3d 813, 817 (8th Cir. 2006); *Burke v. Johnston*, 452 F.3d 665, 669 (7th Cir. 2006); *McCormick v. Braverman*, 451 F.3d 382, 397 (6th Cir. 2006); *Strong v. Laubach*, 153 F. App'x 481, 484 (10th Cir. 2005); *Ballenger v. Mobil Oil Corp.*, 138 F. App'x 615, 622 n.33 (5th Cir. 2005). But see *Global Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 45 n.12 (1st Cir. 2005) (noting in dicta that "[c]ourts should be particularly cautious about enforcing issue preclusion rules across state lines because in contrast to the rules of claim preclusion, '[m]any issue preclusion rules fall far outside the central role of judicial finality'" (quoting Wright & Miller, *supra* note 3, § 4467, at 42)).

<sup>39</sup> 368 F.3d 789, 791 (7th Cir. 2004). Federal law does not allow such preclusion. *Id.* at 792.

<sup>40</sup> *Id.* at 790. Federal law provides that a debt created through false pretenses, including fraud, is not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(2)(A) (2000).

First, he declared that the implementing statute required that “[t]he effect of a judgment in subsequent litigation [be] determined by the law of the jurisdiction that rendered the judgment.”<sup>41</sup> He noted that although it would be reasonable for a finding made in a default proceeding not to be given preclusive effect, “a significant minority of states, Indiana among them, allow findings made in default proceedings to collaterally estop.”<sup>42</sup> Judge Posner held that the creditors “want[ed] to use the judgment for . . . the underlying finding of fraud, and under Indiana law they could have used it for that purpose even if there had been no hearing in the state court at all.”<sup>43</sup> He stated that “the criteria for precluding relitigation of findings or a judgment are established by the jurisdiction that renders the judgment,” and since the Indiana court’s judgment comported with due process, notwithstanding the different federal rule, the Seventh Circuit must give the default proceeding issue-preclusive effect.<sup>44</sup>

*Catt* involved a doctrine of preclusion law that Wright & Miller would surely place outside the bounds of the central core of *res judicata* and therefore outside the scope of the implementing statute. They refer to courts that allow issue preclusion based on default judgments as “misguided” and argue that “[i]t would be outrageous to compel other courts to adhere to this view.”<sup>45</sup> Issue preclusion from a default proceeding would raise similar concerns, and yet the Seventh Circuit not only withheld judgment of Indiana’s policy choice, but enforced Indiana’s preclusion law because of the implementing statute’s command.

In *Far Out Productions v. Oskar, Inc.*, the U.S. Court of Appeals for the Ninth Circuit similarly felt bound by the implementing statute to honor Florida’s requirement of mutuality for issue preclusion.<sup>46</sup> Wright & Miller recognizes that, as a policy matter, it is better to respect a jurisdiction’s requirement of mutuality; contrary to the Ninth Circuit, however, Wright & Miller does not think the implementing statute requires courts to follow F1’s mutuality re-

---

<sup>41</sup> *In re Catt*, 368 F.3d at 790–91 (citing 28 U.S.C. § 1738 (2000)).

<sup>42</sup> *Id.* at 791.

<sup>43</sup> *Id.* at 793.

<sup>44</sup> *Id.* at 792–93.

<sup>45</sup> Wright & Miller, *supra* note 3, § 4467, at 44.

<sup>46</sup> 247 F.3d 986, 993 & n.1 (9th Cir. 2001).

quirement because it is outside the “core” values of repose, reliance, and finality.<sup>47</sup> *Oskar* involved an agreement transferring trademark rights of a band’s name to a production company. In 1984, a Florida trial court determined that the transfer was procured by fraud. In the later litigation, band members argued that the Florida judgment precluded the production company from relitigating the validity of the transfer.<sup>48</sup> The Ninth Circuit said the implementing statute required it to use Florida law to analyze the preclusive effect of the Florida judgment.<sup>49</sup> The court noted that Florida required mutuality, unlike federal courts, and used Florida precedents to conclude that the Florida judgment should not be given issue-preclusive effect.<sup>50</sup> The Ninth Circuit understanding of the implementing statute left it little choice but to use Florida law.

Federal circuit courts, unlike state courts, are consistent in their understanding of the implementing statute. Instead of analyzing each doctrine of preclusion law, they consistently follow the preclusion law of F1 when analyzing the preclusive effect of that forum’s judgment. Modern circuit jurisprudence understands the scope of the implementing statute to be broad—covering many, if not all, doctrines of preclusion law.

### *C. Current Supreme Court Doctrine*

The Supreme Court’s doctrine arguably favors an expansive view of the implementing statute’s requirements. Wright & Miller acknowledges that the Supreme Court’s language in its decisions regarding this issue indicates that full faith and credit includes “the complete details of local preclusion doctrine,” but concludes that the Court’s jurisprudence does not “compel[] the conclusion that full faith and credit incorporates every minute detail of *res judicata* doctrine.”<sup>51</sup> This Section shows that the relevant Supreme Court jurisprudence, though inconclusive, at least calls into question

---

<sup>47</sup> Wright & Miller, *supra* note 3, § 4467, at 50–51.

<sup>48</sup> *Oskar*, 247 F.3d at 993.

<sup>49</sup> *Id.* at 993 (“Under the federal full faith and credit statute, federal courts *must* give state court judgments the preclusive effect that those judgments would enjoy under the law of the state in which the judgment was rendered.” (emphasis added)).

<sup>50</sup> *Id.* at 993 & n.1, 994–95.

<sup>51</sup> Wright & Miller, *supra* note 3, § 4467, at 20, 36.

Wright & Miller's conclusion as to the limited scope of the implementing statute.

In "The Symmetry of Preclusion," Professor Graham C. Lilly reviews several modern decisions and concludes, contrary to Wright & Miller, that the jurisprudence is moving toward requiring F2's complete adherence to the preclusion law of F1.<sup>52</sup> Lilly notes that, in one opinion, the Supreme Court stated that claim preclusion would follow from a state court decision to the federal courts, even if the quality of the judgment would not receive claim-preclusive effect in the federal system.<sup>53</sup> Similarly, in *Migra v. Warren City School District Board of Education*, the Supreme Court "took as 'settled' the proposition 'that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'"<sup>54</sup> Finally, the Supreme Court declared that a federal court should first look to state law when determining the claim-preclusive effect of a judgment, even if the matter is one in which federal courts have exclusive jurisdiction.<sup>55</sup>

More recently, in 2005, the Supreme Court again suggested that the implementing statute requires F2 to follow all of F1's preclusion law.<sup>56</sup> The Court upheld a district court's decision to give preclusive effect to a California judgment because the judgment "would have preclusive effect under the laws of the State in which the judgment was rendered."<sup>57</sup> The Supreme Court did not mention any policy constraints concerning the implementing statute, but

---

<sup>52</sup> Graham C. Lilly, *The Symmetry of Preclusion*, 54 *Ohio St. L.J.* 289, 293-300 (1993). Professor Lilly refers to the states honoring other states' "law of judgments." *Id.* at 292. It is not exactly clear what aspects of F1's *res judicata* law this encompasses, but what is important is that the Supreme Court seems to accept the idea that F2 should respect F1's law concerning the judgment. Part IV will provide a theory for what questions are covered by the command of the implementing statute.

<sup>53</sup> *Id.* at 295-96 (discussing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)).

<sup>54</sup> Lilly, *supra* note 52, at 297 (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)).

<sup>55</sup> Lilly, *supra* note 52, at 298 (discussing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985)).

<sup>56</sup> *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 336 (2005).

<sup>57</sup> *Id.* at 335. The Court, in approving the Ninth Circuit's judgment, assumed that the Ninth Circuit would look to California law to determine the preclusive effect of the California judgment. *Id.* at 335 n.14.

said that the implementing statute “has long been understood to encompass the doctrines of” claim and issue preclusion.<sup>58</sup> The Supreme Court decisions are not conclusive, but they draw into question Wright & Miller’s conclusion that Supreme Court precedents support limiting the scope of the implementing statute. Instead, the Supreme Court precedents suggest that the implementing statute encompasses many, if not all, modern preclusion doctrines.

Wright & Miller suggests that it is “not desirable” that full faith and credit demands obedience to “every last variation of preclusion policy.”<sup>59</sup> Instead, Wright & Miller argues that a “careful appraisal of the purposes that underlie [the] different rules” can inform the scope of the implementing statute.<sup>60</sup> This Part has shown that states are not completing such “careful appraisals,” and many federal courts understand the scope of the implementing statute to govern more questions of preclusion policy than Wright & Miller consider desirable. From this, we can conclude that (1) Wright & Miller’s policy analysis is not being applied in the states, and (2) federal court precedent, both in the circuit courts and the Supreme Court, leans toward a broad interpretation of the implementing statute. Wright & Miller’s theory—the dominant theory regarding the scope of the implementing statute—is unworkable: the states do not and cannot consistently determine what aspects of preclusion law to respect based on “reliance, repose, and finality,” and federal courts do not need a policy analysis to understand the scope of the implementing statute. In the next Part, we see that Wright & Miller’s narrow approach to the implementing statute’s scope is not only pragmatically inferior but also normatively inferior to a broad approach.

### III. POLICY ARGUMENTS FOR A BROAD READING

Up to this point, the normative desirability of a narrow reading for the implementing statute has not been challenged. This Part argues that a broad reading of the implementing statute is normatively preferable to the analysis Wright & Miller suggests. When evaluating policy arguments for the contours of the doctrine of

---

<sup>58</sup> Id. at 336.

<sup>59</sup> Wright & Miller, *supra* note 3, § 4467, at 14.

<sup>60</sup> Id.

faith and credit, two relevant constituencies must be considered: parties interested in litigation and judicial systems. It seems clear that most parties interested in litigation would prefer ex ante certainty concerning the preclusive effect of litigation. Judicial systems, on the other hand, require a more careful analysis to recognize that certainty in preclusive effect is preferable. After weighing policy interests, such as the prevention of forum shopping, it is clear that a broad and strict interpretation of the implementing statute is preferable to one that is narrow and flexible.

### *A. Interested Parties*

Certainty regarding the preclusive effect of a judgment will lead to efficient litigation by parties. Lawsuits today are managed like any efficient business: the probable gains or losses are assessed to determine the appropriate amount of investment. If a defendant predicts that litigation will end in insolvency, it will spare no expense in the defense of the suit. If the exposure of a suit is limited by the facts of the case, a litigant will consider the costs and benefits of the litigation and defend accordingly. Possible gain and associated costs will also affect the strategy of plaintiffs. If, for example, a state allows nonmutual defensive issue preclusion, a prodefendant determination by a trial court on an issue would have broad implications for the plaintiffs' future litigation as compared to a jurisdiction that does not allow such preclusion.

Uncertainty in the application of the implementing statute results in inefficient behavior by litigants. Litigants cannot predict where the judgment that is issued today will be enforced or used for collateral effects in the future. The combination of expansive personal jurisdiction doctrines and national markets makes it possible, even likely, that subsequent, related litigation will arise in any state. As discussed in Section II.A, states vary greatly in their application of the implementing statute. If the preclusive effect of F1's judgment is governed in some respects by F2's law, litigants in F1 will not know what is at stake in their litigation. For example, a judgment in Alabama, where mutuality is required, could be limited to the parties and those in privity with them if a second suit was brought in Massachusetts, where F1's law is completely fol-



lowed.<sup>61</sup> If a second suit were brought in Illinois, where the courts freely expand the preclusive effect of judgments, a whole new class of plaintiffs could estop the defendant on an important issue.<sup>62</sup> Given the high stakes of modern litigation, a litigant would need to litigate the case based on enforcement in Illinois, not based on the law of Alabama. Certainty with respect to preclusive effects will result in litigation based on the law of the jurisdiction in which the parties are currently litigating, not the law of a possible subsequent forum.

### *B. Sovereign Interests*

Wright & Miller focuses on the policy concerns facing courts rather than the implications for individual litigants.<sup>63</sup> A review of the benefits and costs associated with these choices shows that it is in courts' interests to follow F1's law concerning the preclusive effect of F1's judgment.

#### *1. Internal Policy Choices Should Be Respected*

The scope of a jurisdiction's preclusion law is the result of policy choices made within that jurisdiction. When states' preclusive rules differ, the scope of the implementing statute will determine which state's policy choice will prevail in subsequent litigation. If a doctrine is not governed by the implementing statute, then F2 will be free to follow its preclusion policy over F1's policy. Wright & Miller suggests that allowing F2 to expand the preclusive effect of F1's judgment is a win-win situation, in which neither jurisdiction's policy decisions are harmed, because F1 is not the court giving greater preclusive effect and F2 is not forced to litigate an issue when it would normally preclude relitigation.<sup>64</sup>

---

<sup>61</sup> See supra notes 20–22 and accompanying text.

<sup>62</sup> *Finley v. Kesling*, 433 N.E.2d 1112, 1116–17 (Ill. App. Ct. 1982) (holding that Illinois courts can expand the preclusive effect of other states' judgments because the alternative rule would require “courts of one state to subordinate the local policies of that state to the policies and laws of another state”).

<sup>63</sup> See, e.g., Wright & Miller, supra note 3, § 4467, at 47–49.

<sup>64</sup> *Id.* at 47–48.

Upon closer examination, it is clear that changing the preclusive effect of F1's judgment will infringe upon F1's interests.<sup>65</sup> The balancing of two policy considerations influences the preclusion law of a jurisdiction: judicial costs and substantive policy. By limiting the preclusive effect of a judgment, a jurisdiction limits what is at stake in the litigation and, therefore, the judicial system's associated costs.<sup>66</sup> Furthermore, preclusion rules could be the result of a balance between procedural and substantive law. As elaborated in the analysis below, it is important to recognize that if F2 expands the preclusive effect of F1's judgment, litigants will be forced to litigate according to the potential preclusive effect in F2, not according to the preclusive effect dictated by the policy choices of F1.

First, it is necessary to evaluate which jurisdiction's policy choice concerning costs deserves more weight: the policy of F1, whose judgment's effects are expanded, or the policy of F2, who is forced to relitigate issues it otherwise would not. If the costs of litigation are considered in a vacuum, it is not clear which theory of the implementing statute is preferable. If a broad reading of the implementation statute is used, such that F2 must follow F1's preclusion law, the cost to F2 is the relitigation of an issue that F1 has already decided, even though F2 would normally preclude the issue. If the parties could bring a second action in F2, then they could likely have brought the original action in F2. The "relitigation" in F2 of an issued decided by F1 does not increase the burden on F2's judicial system because the litigation is one to which F2 opened its courts as an original matter. If F2 expands the preclusive effect of F1's judgment, F1 will bear the cost of more extensive litigation even though its preclusion law was meant to minimize these costs. A broad approach, therefore, will prevent F2 from exporting litigation costs to F1 without adding any costs to F2. A flexible approach, on the other hand, will force F1 to bear the costs of more extensive litigation—a burden it chose not to accept. Of course,

---

<sup>65</sup> The groundwork for many of the ideas expressed in this Section came from Professor Graham C. Lilly, both through his Conflict of Laws class and his article. Lilly, *supra* note 52, at 309–15.

<sup>66</sup> See *id.* at 313 (“[I]f f-1 permits a sweeping preclusive effect, it has acquiesced in more extensive trial proceedings that reflect the added risk of broad preclusion in future litigation. In essence, it is willing to absorb the costs associated with more protracted litigation because its final resolution will not only settle the present contest, but will foreclose or restrict future controversies.”).

this analysis is from the perspective of F1. F2 could argue that forcing it to follow F1's broad preclusive rules allows F1 to export the cost of follow-up litigation to F2.<sup>67</sup> A purely economic analysis shows that the harm to F1's and F2's policy choices could be equivalent.

As mentioned above, issues besides costs can lead to narrow preclusive effects for judgments. Alabama courts have relied on the "frailties of the jury system"<sup>68</sup> and the state's liberal rules of civil procedure<sup>69</sup> to explain the jurisdiction's preclusive rules, which are narrow and provide for limited preclusive effect. When substantive concerns are considered, we can see that if F2 ignores F1's preclusion policy, it can increase the volume, not just the intensity, of litigation in F1. Expanding F1's preclusive effects causes more litigants to seek out F1's favorable litigation environment, multiplying the state's litigation costs. For example, a state could have reached a political balance between plaintiff-friendly substantive law and business-friendly preclusion law, seeking to protect liberally its consumers but without exporting its findings to other jurisdictions. F2's substantive policy choice will not be affected if it must follow F1's preclusion law. Unlike the purely economic analysis, F1's decision to limit the effects of its substantive policy was not based purely on an internal cost-benefit analysis but also included decisions concerning the substantive law within its territory. If the implementing statute has a broad scope, states will be able to prevent the expansion of liberal substantive law through narrow preclusion law.

In summary, states that provide limited preclusive effects to their judgments have made policy decisions, both fiscally and substantively, that can be undercut when subsequent states expand the

---

<sup>67</sup> I want to thank Professor Caleb Nelson for pointing out this rebuttal. This rebuttal assumes that if F1 knew it would hear all subsequent litigation, it would choose broad preclusive effects for its judgments. Because it knows it will not bear the full burden of relitigation, however, it can pass some of the costs on to F2 through narrow preclusion rules. That is, because of narrow preclusion rules in F1, parties will not invest as much in a suit in F1 and instead complete the bulk of the litigation in F2.

<sup>68</sup> *Suggs v. Ala. Power Co.*, 123 So. 2d 4, 8 (Ala. 1960).

<sup>69</sup> *Sosebee v. Ala. Farm Bureau Mut. Cas. Ins. Co.*, 321 So. 2d 676, 678 (Ala. Civ. App. 1975) ("Although judicial economy is favored here as elsewhere, our jurisdiction has chosen to liberalize the rules of civil procedure . . . rather than abrogating the mutuality doctrine.").

scope of F1's judgments. This scenario contrasts sharply to the win-win situation envisioned by Wright & Miller.<sup>70</sup> Additionally, more violence is done to F1's policy choices when its judgment is expanded than when F2 is forced to follow F1's narrow preclusion rules.

## 2. Possibility of State-Federal Forum Shopping

In addition to the policy concerns discussed above, F2's freedom to accept or reject the preclusion law of F1 has the effect of creating incentives for a new breed of forum shopping between state and federal courts. The issue is not the final resolution of the implementing statute's scope, but rather federal and state courts' arrival at different answers to that question.<sup>71</sup> First, the federal common law of *Semtek International v. Lockheed Martin Corp.*<sup>72</sup> potentially influences litigants to seek a federal forum in their initial suit to solidify the preclusive effects of that judgment. Second, litigants will disproportionately favor federal over state forums for subsequent trials if they desire the original judgment to have the same preclusive effect as it would have in F1.

In *Semtek*, the Supreme Court held that courts should look to the preclusion law of the state in which the federal court sits to determine the preclusive effect of a diversity judgment in federal district court.<sup>73</sup> This practice has been adopted by federal and state

---

<sup>70</sup> Wright & Miller, *supra* note 3, § 4467, at 48.

<sup>71</sup> See *supra* Sections II.A–B and accompanying text. State and federal courts often reach different conclusions concerning the scope of the implementing statute.

<sup>72</sup> 531 U.S. 497 (2001).

<sup>73</sup> *Id.* at 508–09. *Semtek* involved claim preclusion, and it is not clear whether its logic will prevail when questions of issue preclusion arise. Several cases, however, have hinted that the logic of *Semtek* may apply to issue preclusion as well as claim preclusion. See *Extra Equipamentos e Exportação Ltda. v. Case Corp.*, 361 F.3d 359, 363 (7th Cir. 2004) (noting that Illinois substantive law of collateral estoppel would control the issue-preclusive effect of a federal judgment rendered in a diversity case); *Matosantos Commercial Corp. v. Applebee's Int'l*, 245 F.3d 1203, 1208 (10th Cir. 2001) (noting that an argument can be made to apply *Semtek* to issue preclusion). Other courts have read *Semtek* as a constitutional command based on federalism that applies generally to the preclusive effect of federal diversity judgments in state courts. See, e.g., *Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 120–21 (Minn. Ct. App. 2001) (“Because the *Semtek* holding rests on the constitutional obligation of state courts to respect federal judgments . . . [t]he federalism principles apply equally to claim preclusion and issue preclusion.”). For purposes of this Note, it is only important that these lower courts read *Semtek* to solidify the preclusive effect of federal

courts when determining the preclusive consequences of a district court decision. The following cases demonstrate that a litigant who brings a suit in federal district court is likely to know what preclusion law will govern that judgment's effect in other jurisdictions. In *Gulf Machinery Sales and Engineering Corp. v. Heublein, Inc.*, a federal court sitting in Florida allowed a case to proceed even though it had been dismissed in a Mississippi federal court as barred under the statute of limitations.<sup>74</sup> The federal court in Florida looked exclusively to Mississippi's *state* preclusion law to determine whether claims dismissed under statutes of limitation were precluded.<sup>75</sup> In *Chase Manhattan Bank v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, a New York state trial court followed Texas preclusion law concerning the earlier judgment of a federal district court sitting in Texas.<sup>76</sup> The plaintiff was not barred from pursuing his contribution claim in New York because under Texas law those claims are deemed permissive, not compulsory.<sup>77</sup> Finally, a Minnesota state court relied on *Semtek* to enforce aspects of Wisconsin claim- and issue-preclusion law when the initial judgment was rendered in a Wisconsin federal district court.<sup>78</sup>

In these cases, the supremacy of federal law rendered policy considerations of F2 nugatory in determining the preclusive effect of F1's judgment. Even if the state of Florida, as a policy matter, abhorred being a destination for second attempts to evade statute of limitation bars, the court understood federal law to prevent it from using its own law to dismiss the claim. New York did not expand the preclusive effect of the Texas federal court judgment,

---

court diversity judgments. Because the Supreme Court has not limited *Semtek* to claim preclusion, the fact that lower courts read it as applying to issue preclusion is sufficient to create a distinction that will promote forum shopping.

<sup>74</sup> 211 F. Supp. 2d 1357, 1359, 1362 (M.D. Fla. 2002).

<sup>75</sup> *Id.* at 1361.

<sup>76</sup> 748 N.Y.S.2d 360, 361 (App. Div. 2002).

<sup>77</sup> *Id.*

<sup>78</sup> *Marshall*, 631 N.W.2d at 119, 120–21. There was no claim preclusion because the parties were not “formally adverse” in the Wisconsin proceeding. *Id.* at 119–20. Moreover, there was no issue preclusion because the issue was not “necessary and essential” to the judgment. *Id.* at 121. The issue-preclusion rule is one that falls outside of Wright & Miller’s “central core” of *res judicata*. Wright & Miller, *supra* note 3, § 4467, at 43 (noting that the “arguments are closely balanced” and “it is difficult to suppose that a second court should always be required to honor the choice” of the first court).

even though Wright & Miller sanctions such expansions.<sup>79</sup> Finally, the Minnesota court recognized that “retrial does not advance litigational efficiency or consistency,”<sup>80</sup> but nonetheless followed the preclusion law of Wisconsin because of the “constitutional obligation” of *Semtek*.<sup>81</sup> Under Wright & Miller’s approach, these courts could avoid the preclusive effects of the earlier decisions; federal common law, however, trumps its analysis. Instead, these courts have recognized that if F1 is a federal district court, then F2 is bound to give F1’s judgment the same preclusive effect as the state in which F1 sits.<sup>82</sup>

For similar reasons, a litigant should prefer a federal forum for subsequent suits if he desires the preclusion law of F1 to govern the effect of the judgment. As discussed in Section II.B, federal courts are more likely to follow the preclusion law of F1. For example, compare Illinois state courts’ treatment of other jurisdictions’ preclusion rules with the treatment the Seventh Circuit provides. In *Finley v. Kesling*, an Illinois state court freely changed the preclusive effect of Indiana’s judgment,<sup>83</sup> whereas the Seventh Circuit, in *In re Catt*, considered itself bound by the implementing statute and followed even Indiana’s highly idiosyncratic preclusion law.<sup>84</sup> Such discrepancies could influence a litigant’s decision of where to bring a subsequent action. If *In re Catt* had been brought in Illinois state court, as opposed to a federal court within the Seventh Circuit, it is possible that the Illinois court would have required the plaintiffs to relitigate the issue of fraud, contrary to the Seventh Circuit’s holding.

Wright & Miller’s reading of the implementing statute does not result in a “win-win” situation. Instead, by giving states the freedom to ignore F1’s preclusion law, F1’s policy choices will be disre-

---

<sup>79</sup> Wright & Miller, *supra* note 3, § 4467, at 47–48.

<sup>80</sup> *Marshall*, 631 N.W.2d at 121.

<sup>81</sup> *Id.* at 120.

<sup>82</sup> If the Supreme Court adopted Wright & Miller’s view wholesale, aspects that fall outside the scope of the implementing statute would likely fall outside the scope of *Semtek*, thus removing the incentive to forum shop. Though the Supreme Court could hypothetically resolve this issue, it has not and the current doctrine creates forum shopping incentives.

<sup>83</sup> 433 N.E.2d 1112, 1116–17 (Ill. App. Ct. 1982) (disregarding the mutuality requirement of Indiana).

<sup>84</sup> 368 F.3d 789, 792–93 (7th Cir. 2004) (following Indiana’s preclusive rule concerning default proceedings).

garded to the detriment of the state fisc as well as political compromise. Furthermore, the federal courts could become a haven for litigants seeking certainty in a judgment's future preclusive effect.

#### IV. ANCHORING "FAITH AND CREDIT"

This Note has argued that a flexible approach to the scope of the implementing statute is neither properly implemented by courts nor normatively preferable to a broad approach. This Part presents a doctrinal theory to anchor the scope of the implementing statute in case law by answering two questions concerning the implementing statute. First, what is the substantive scope of the implementing statute—that is, what doctrines of preclusion law are considered "faith and credit" and to which judicial proceedings do the implementing statute's commands reach? Second, what is the qualitative command of the implementing statute—that is, how must F2 apply the law of F1 once it is determined that the implementing statute governs the preclusive effect of a judgment?

The argument proceeds in three steps. First, a new theoretical framework for analyzing the implementing statute is presented. Next, judicial precedent prior to 1948, the year Congress reenacted the implementing statute, is used to apply this framework. Finally, this Note applies this theory to reveal a doctrine that defines both the substantive scope and qualitative requirements of the implementing statute.

##### *A. Theoretical Framework*

This Note suggests that the best way to define the scope of the implementing statute is to ask what characteristics of a judgment the implementing statute governs. The main advantage of this Note's theory over Wright & Miller's is its independence from developments in preclusion law. Certain doctrines of common law preclusion law comprise the central component of Wright & Miller's theory. As these doctrines expand and contract, Wright & Miller's theory requires an amorphous and unworkable policy analysis to determine if the "new doctrine" is governed by the implementing statute. Alternatively, if the implementing statute's scope is defined by the characteristics of a judgment with which the statute is concerned, the liberalization of common law *res judicata*

is of no concern to the implementing statute's scope. For example, Wright & Miller argues that the modern doctrine of nonmutual issue preclusion is not governed by the implementing statute.<sup>85</sup> The doctrine of nonmutual issue preclusion, however, can be described as merely defining one characteristic of a judgment, namely, what parties are bound by the judgment's determinations. Under this Note's theory, if it can be shown that the implementing statute governs the characteristic of who is bound by a judgment, the advent of nonmutual issue preclusion would not remove that characteristic from the ambit of "faith and credit." The implementing statute, therefore, would require that all parties bound under F1's preclusion law also be bound in F2.

### *B. Ratification of the Implementing Statute*

Having defined what to look for, the next question is where to find the characteristics governed by the implementing statute. Fortunately, the doctrine of the implementing statute was robust leading up to its codification in Title 28.<sup>86</sup> In 1948, Congress reenacted the implementing statute without any substantive change.<sup>87</sup> Using the doctrine of ratification, this Section argues that Congress adopted prior judicial interpretations when it codified the implementing statute in 1948.<sup>88</sup>

---

<sup>85</sup> Id. at 44 ("Nonmutual preclusion is not so central a component of res judicata as to be swept into full faith and credit.").

<sup>86</sup> See, e.g., Paul D. Carrington, *Collateral Estoppel and Foreign Judgments*, 24 Ohio St. L.J. 381, 381 (1963) (noting that there are "abundant" judicial decisions supporting the idea that preclusive effect is determined by the law of the state where the judgment was rendered); Willis L. M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153, 156 (1949) ("Even more significantly, the [Supreme] Court has made plain that the second state must generally give a judgment the same res judicata effect as it enjoys in the state of rendition.").

<sup>87</sup> The 1948 codification of § 1738 did change the language of the statute from "such faith and credit" to the "same full faith and credit." See Act of May 26, 1790, ch. 11, 1 Stat. 122. The Court, however, does not presume a substantive change in a revision unless an intent to make a change is "clearly expressed." *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (citations omitted). The notes accompanying § 1738 do not mention any changes associated with "the same full faith and credit." 28 U.S.C. § 1738 (2000).

<sup>88</sup> See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").



In fact, the Supreme Court has consistently held that Congress ratified interpretations of sections of Title 28, the implementing statute's title, based on judicial interpretations preceding the 1948 codification. In *Keene Corp. v. United States*, the Court addressed the meaning of 28 U.S.C. § 1500, and, finding the language of the statute to be indeterminate, it turned to "earlier readings" of the statute to determine its meaning.<sup>89</sup> The Court concluded that the precedent leading up to the codification in 1948 was "settled" and accordingly applied "the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them."<sup>90</sup> In *Ankenbrandt v. Richards* the "settled precedent" came from earlier dicta.<sup>91</sup> The issue in *Ankenbrandt* was whether 28 U.S.C. § 1332 has an exception for domestic relationships. Bypassing a historical debate concerning the language of the statute, the Court rested its opinion "on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948."<sup>92</sup> The Court's construction was based on dictum from a case in 1859 and subsequent affirmations by lower courts.<sup>93</sup> Noting that Congress did not intend to make any substantive changes in the 1948 codification, the Court concluded by saying, "[W]e presume . . . that Congress 'adopt[ed] that interpretation' when it re-enacted" the statute.<sup>94</sup>

Accordingly, the Supreme Court apparently is willing to rely on the ratification of judicial interpretations to determine the meaning of Title 28. The historical debate concerning the meaning of the implementing statute has not, and likely will not, clearly resolve the Full Faith and Credit Clause's or the implementing statute's meaning. A solid doctrinal foundation can be constructed, however, by focusing on implied legislative intent in the 1948 codification. As the cases below show, leading up to the 1948 codification,

---

<sup>89</sup> 508 U.S. 200, 210 (1993).

<sup>90</sup> *Id.* at 212 (citing *Lorillard*, 434 U.S. at 580).

<sup>91</sup> 504 U.S. at 700 ("More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. . . . [W]e thus accept the *Barber* dictum as a correct interpretation of the Congressional grant." (referring to *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859))).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (referring to the dictum in *Barber*, 62 U.S. (21 How.) at 584).

<sup>94</sup> *Id.* at 701 (quoting *Lorillard*, 434 U.S. at 580).

courts understood the implementing statute to require F2 to look to F1 for certain characteristics of F1's judgment.

### *C. The Implementing Statute's Substantive Scope*

This Section surveys cases prior to the 1948 codification in order to understand what characteristics of a judgment were governed by the implementing statute. Because Supreme Court precedent implies that pre-1948 interpretations were ratified by Congress in 1948, if precodification courts understood a characteristic to be governed by the implementing statute, courts today should treat that characteristic the same—even if the doctrines defining a particular characteristic have changed.

This Section argues that there are four specific characteristics of judgments that are within the scope of the implementing statute.<sup>95</sup> The first characteristic concerns the definition of “judicial proceeding”: what the quality of a judgment must be in order to fall within the scope of the implementing statute. The next three characteristics concern the definition of “faith and credit”: the issues resolved by a judgment, the parties bound by a judgment, and the legal claims precluded by a judgment. Because these characteristics were governed by the implementing statute prior to 1948, they are still governed by it today.

#### *1. Quality of a Judgment—What Is a “Judicial Proceeding”?*

The implementing statute only applies to “judicial proceedings.” The quality of a judgment is used as a proxy to determine whether the judgment is from a “judicial proceeding.”<sup>96</sup> Prior to 1948, the Supreme Court consistently asked whether the quality of a judgment was sufficient to be binding in F1 in order to determine whether it was due “faith and credit” under the implementing stat-

---

<sup>95</sup> It could be argued that “faith and credit” adopts the general doctrine of *res judicata*. Arguably, Supreme Court cases prior to 1948 affirm this assertion. See, e.g., *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942) (declaring that the Clause and implementing statute compel “the local doctrines of *res judicata*, speaking generally, [to] become a part of national jurisprudence”). Such a theory, however, would create difficulties in defining what the general doctrine of *res judicata* encompasses.

<sup>96</sup> 28 U.S.C. § 1738 (2000).

ute in F2.<sup>97</sup> For example, the Supreme Court relied on F1's law in determining that a jurisdictional finding on a motion had sufficient quality to be binding in F2 because of the implementing statute's command.<sup>98</sup> In *Williams v. North Carolina*, the Supreme Court relied on Nevada law to conclude that a Nevada judgment was of sufficient quality to force North Carolina to give the judgment preclusive effect.<sup>99</sup> The Court explained that simply because a final judgment is easier to obtain in one state is not sufficient to trump the requirements of "faith and credit" because "[s]uch is part of the price of our federal system."<sup>100</sup> Finally, when determining what "faith and credit" a Texas workers' compensation award was due in Louisiana, the Supreme Court cited Texas law for the proposition that the award was entitled to the same finality as that of a Texas state court decision.<sup>101</sup> In all of these cases, the Court looked to F1's law to define the quality of a judgment because it understood that characteristic to be governed by the implementing statute.

Prior to 1948 lower courts also considered the quality of a judgment to be governed by F1's law because of the implementing statute's command. A South Dakota court enforced an interlocutory divorce decree because the decree had preclusive effect under the laws of California.<sup>102</sup> In *Contra Costa Water Co. v. City of Oakland*, a federal court considered what issue-preclusive effect to give a California state court judgment pending on appeal.<sup>103</sup> The court noted that California did not give a judgment pending on appeal preclusive effect and concluded that "[i]t becomes the duty of this

---

<sup>97</sup> See, e.g., *Barber v. Barber*, 323 U.S. 77, 79, 81 (1944) (holding North Carolina law governs the finality of North Carolina judgments in Tennessee); *Riley*, 315 U.S. at 352-53 (looking to Georgia law to determine when probate judgments are final).

<sup>98</sup> *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932).

<sup>99</sup> 317 U.S. 287, 303 (1942).

<sup>100</sup> *Id.* at 302.

<sup>101</sup> *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 435 (1943), overruled by *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 286 (1980).

<sup>102</sup> *Nelson v. Nelson*, 24 N.W.2d 327, 331 (S.D. 1946); see also *Isserman v. Isserman*, 42 A.2d 642, 647 (N.J. Ch. 1945) (holding a Nevada divorce decree final because it was final under Nevada law). *Wright & Miller* argues that interlocutory determinations should not be given preclusive effect. *Wright & Miller*, *supra* note 3, § 4467, at 44.

<sup>103</sup> 165 F. 518, 529 (C.C.N.D. Cal. 1904).

court to follow the rule thus established in California.”<sup>104</sup> Instead of resorting to policy concerns to determine if F1’s law governed, this court expressed a belief that the implementing statute clearly required California law to govern what quality of a judgment was required for preclusive effect.

Wright & Miller suggests that not all judgments are entitled to preclusive effect.<sup>105</sup> Before 1948, however, the Supreme Court was not concerned with what judgments were worthy of preclusive effect. Instead, the Court’s understanding of the implementing statute required it to ask whether F1’s law considered the quality of the judgment sufficient for preclusive effect. Because Congress ratified this understanding in 1948, the analysis of whether the judgment would warrant preclusive effect in F1 should still be within the scope of the implementing statute.

## 2. Which Parties Are Bound by a Judgment?

Another characteristic of a judgment is the parties who are bound by it. Prior to 1948, the Supreme Court held that the implementing statute governed this characteristic.<sup>106</sup> Though the Supreme Court was not dealing with the modern doctrine of nonmutual preclusion, its understanding of the implementing statute’s control of this characteristic is manifested through its use of F1’s privity law when determining which parties are bound by a judgment.<sup>107</sup>

In *Riley v. New York Trust Co.*, the Supreme Court used F1’s privity law to determine which parties were bound by that state’s judgment.<sup>108</sup> *Riley* was an interpleader action brought by Coca-Cola

---

<sup>104</sup> *Id.*

<sup>105</sup> Wright & Miller, *supra* note 3, § 4467, at 44–45 (discussing several situations in which it argues F2 should be free to disregard a determination that would have preclusive effect in F1).

<sup>106</sup> See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) (confirming that New York law required a party to be bound by an adverse judgment to claim benefits of issue preclusion).

<sup>107</sup> See *Marin v. Augedahl*, 247 U.S. 142, 150 (1918) (finding a Minnesota judgment binding against a party in North Dakota because Minnesota privity laws reached the individual). Lower courts also looked to privity law under the implementing statute. See *Botz v. Helvering*, 134 F.2d 538, 544–45 (8th Cir. 1943) (looking to the judgment state’s privity law to determine which parties were bound by the judgment).

<sup>108</sup> 315 U.S. 343 (1942).

2008]

*A Doctrine of Faith and Credit*

275

in Delaware to determine which administrator had control over distribution of the decedent's stock. A Georgia court had determined that the decedent was domiciled in Georgia and had ordered Coca-Cola to distribute the stock to a Georgia administrator. A New York administrator disputed the finding of domicile and petitioned Coca-Cola for the stock.<sup>109</sup> The issue before the Supreme Court was the command of the implementing statute concerning Delaware's treatment of Georgia's judgment.<sup>110</sup> Specifically, the question was whether the New York administrator was bound in the Delaware court by the findings of the Georgia court. The Supreme Court stated that the Delaware court could determine the issue of domicile for "any interested party [who] is not bound by the Georgia proceedings."<sup>111</sup> If a party was bound by the Georgia judgment, however, Delaware must give the Georgia proceedings "such faith and credit" as the judgment would have in Georgia.<sup>112</sup> To determine who was bound by the Georgia judgment, the Court analyzed Georgia privity law.<sup>113</sup> The Supreme Court looked to Georgia law to determine which parties were bound because it understood that the implementing statute governed that characteristic.

State and lower federal courts also understood the implementing statute's scope to govern which parties were bound by F1's judgment. There are not as many lower court cases looking at the question of which parties are bound by a judgment, but the cases that were reported clearly considered this a question of "faith and credit" governed by the implementing statute. The Supreme Judicial Court of Maine considered it a settled question that "if a judgment is conclusive between the parties in the state in which it is rendered, it is equally conclusive in every other state of the Union."<sup>114</sup> The U.S. Court of Appeals for the Fifth Circuit quoted Louisiana law declaring which parties are bound by a judgment

---

<sup>109</sup> Id. at 345–46.

<sup>110</sup> Id. at 348.

<sup>111</sup> Id. at 350.

<sup>112</sup> Id.

<sup>113</sup> Id. at 351–52.

<sup>114</sup> *Damon v. Webber*, 89 A. 734, 736 (Me. 1914).

when analyzing what “faith and credit” a Louisiana judgment was due.<sup>115</sup>

Whether a party is bound is a characteristic of a judgment that is governed by the implementing statute. Even though the characteristic’s status is determined by new doctrines, such as nonmutual issue preclusion, it remains within the implementing statute’s scope today.

### 3. What Claims Does a Judgment Preclude?

The Supreme Court also considered the claim-preclusive effect of a judgment as a characteristic within the scope of the implementing statute. In *Magnolia Petroleum Co. v. Hunt*, after determining that the Texas workers’ compensation judgment was sufficient for “faith and credit,” the Court concluded that the award was “res judicata, not only as to all matters litigated, but as to all matters which could have been litigated” because such claims were precluded under Texas law.<sup>116</sup> In *Industrial Commission of Wisconsin v. McCartin*, the Court concluded that an Illinois workers’ compensation award did not preclude the same claim in Wisconsin.<sup>117</sup> The Court explained further that if Illinois law had been as clear concerning the preclusive effect of its judgment as Texas law, the Wisconsin proceedings would have been barred.<sup>118</sup>

When trying to comply with the federal requirements of “faith and credit,” lower courts prior to 1948 consistently looked to the judgment state’s law to define this characteristic. For example, in 1948, the Tennessee Supreme Court carefully analyzed New York procedural law to determine whether a claim would be barred by a

---

<sup>115</sup> Bd. of Comm’rs for Buras Levee Dist. v. Cockrell, 91 F.2d 412, 416 (5th Cir. 1937).

<sup>116</sup> 320 U.S. 430, 435 (1943). Even though *Magnolia* was overruled by *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 286 (1980), it still supports the point of this Section—that prior to 1948 the Supreme Court understood the implementing statute to govern what claims were precluded by a judgment. Furthermore, *Thomas* does not have a majority opinion and is limited to the area of workers’ compensation. 448 U.S. at 286.

<sup>117</sup> 330 U.S. 622, 630 (1947). This opinion can be viewed as creating a “clear statement” rule concerning the preclusive effect of workers’ compensation awards.

<sup>118</sup> *Id.* at 626 (“If it were apparent that the Illinois award was intended to be final and conclusive of all the employee’s rights . . . the decision in the *Magnolia Petroleum Co.* case would be controlling here.”). Furthermore, the Illinois judgment said on its face that it did not bar further proceedings by the employee in Wisconsin. *Id.* at 629.

2008]

*A Doctrine of Faith and Credit*

277

New York judgment.<sup>119</sup> After the New York judgment was rendered and while the Tennessee suit was pending, the New York court had added the terms “on the merits” to the judgment. The prevailing party in New York then pleaded the New York judgment in Tennessee, arguing that the implementing statute required Tennessee to give the New York judgment claim-preclusive effect.<sup>120</sup> The Tennessee court understood the implementing statute to require it to give “such effect to the New York judgment as would be given it in the Courts of New York.”<sup>121</sup> It reviewed New York law and concluded that “the New York judgment would bar the present suit in the Courts of New York” and dismissed the case.<sup>122</sup> Similarly, the U.S. Court of Appeals for the Sixth Circuit in *Potts v. Potts* analyzed Kentucky procedural law to determine the claim-preclusive effect of a Kentucky judgment.<sup>123</sup> Accordingly, prior to 1948, both the Supreme Court and lower federal courts considered the characteristics of a judgment to include the judgment’s claim-preclusive effect within the state that rendered it.

#### *4. What Issues Does a Judgment Decide?*

The fourth characteristic governed by the implementing statute considers the issues that were decided by F1’s judgment. This is another characteristic that Wright & Miller places outside the scope of the implementing statute.<sup>124</sup> Courts prior to 1948, however, clearly saw this as a question of “faith and credit” governed by the implementing statute, and thus this understanding was arguably ratified in 1948. For example, in *Board of Commissioners for Buras Levee District v. Cockrell*, the Fifth Circuit referred to Louisiana law when determining which issues would be precluded by the Louisiana judgment.<sup>125</sup> As to issues on which F1 was silent, the Fifth

---

<sup>119</sup> Graybar Elec. Co. v. New Amsterdam Casualty Co., 211 S.W.2d 903, 906 (Tenn. 1948).

<sup>120</sup> Id. at 904.

<sup>121</sup> Id.

<sup>122</sup> Id. at 906.

<sup>123</sup> 142 F.2d 883, 889–90 (6th Cir. 1944); see also Bd. of Comm’rs for Buras Levee Dist. v. Cockrell, 91 F.2d 412, 417 (5th Cir. 1937) (discussing whether Louisiana claim-splitting rules would preclude the claim).

<sup>124</sup> Wright & Miller, supra note 3, § 4467, at 42–43.

<sup>125</sup> 91 F.2d at 416 (declaring that Louisiana law allows the issues determined in the judgment to lead to estoppel, not the reasons for those determinations).

Circuit concluded, based on Louisiana law, that “[t]he silence of the judgment on any demand which was an issue in the case under the pleadings must be considered as an absolute rejection of the demand.”<sup>126</sup> Instead of referring to federal preclusion law or evaluating the policy choices behind Louisiana’s decision, the court noted that “[t]he effect as res judicata of the Louisiana decree is of course that which Louisiana law gives it.”<sup>127</sup> Similarly, in *Potts*, the Sixth Circuit gave full faith and credit to a Kentucky judgment by determining all issues of res judicata according to the laws of Kentucky.<sup>128</sup> The court cited a Kentucky case for the proposition that an issue would have preclusive effect if “the judgment could not have been rendered without deciding that matter.”<sup>129</sup> These courts consistently held that “faith and credit” included the characteristic of the issues decided by F1’s judgment and, therefore, referred to the law of F1 to determine the content of that characteristic.

*D. Does “Same” Mean No More as Well as No Less?*

Having outlined the characteristics of a judgment within the implementing statute—the quality of a judgment required for preclusive effect in F1, the parties who are bound by a judgment, the claim-preclusive effects of a judgment, and which issues the judgment decided—the next question is the degree of respect F2 is required to show for the characteristics of F1’s judgment. The most recent implementing statute requires a court to give the “same full faith and credit” to another court’s judgment as it has “in the courts of such State . . . from which [it is] taken.”<sup>130</sup> The previous implementing statute used the language “such” faith and credit. Assuming these two statutes require the same action by courts,<sup>131</sup> we must determine what “same” or “such” means with respect to the “faith and credit” of a judgment. There are three possible ways

---

<sup>126</sup> *Id.* (quoting *Villars v. Faivre*, 36 La. Ann. 398, 400 (1884)).

<sup>127</sup> *Cockrell*, 91 F.2d at 416.

<sup>128</sup> 142 F.2d at 888–89.

<sup>129</sup> *Id.* at 889; see also *Roller v. Murray*, 76 S.E. 172, 176 (W. Va. 1912) (holding that because an issue was determined in Virginia and “[b]eing res adjudicata in Virginia, it must be so in West Virginia, because the Virginia decision must have the same faith and credit in all other states that it is entitled to in that state”).

<sup>130</sup> 28 U.S.C. § 1738 (2000).

<sup>131</sup> We can assume Congress did not intend any substantive change when it changed the language from “such” to “same.” See *supra* note 87.



F2 could treat the preclusive effect of F1's judgment: give it less effect, give it the exact same effect, or give it more effect. Assuming the "exact same" effect would be permissible under the implementing statute, we will evaluate whether giving F1's judgment either less or more preclusive effect is also permissible under the implementing statute.

First, it is easy to label "less effect" as unacceptable. It is hard to argue that giving the "same" of anything is satisfied if less is given. Wright & Miller supports giving less effect in some instances, but their view is based on the issue falling outside the scope of the implementing statute.<sup>132</sup> That is, Wright & Miller only suggests that a court can give less effect when the command to give the "same full faith and credit" does not apply. It does not argue that giving less effect comports with giving the "same" effect. If a judgment's characteristic falls within the implementing statute's scope, it is clear that giving *less* effect does not comport with a statute that requires the "same" effect.

"More effect" involves a slightly more complicated analysis. It could be argued that giving more effect to F1's judgment is permissible because the implementing statute merely requires that F2 give the judgment the "same" preclusive effect and that exceeding this floor does not run afoul of the statute. Under this reasoning, F2 could give *greater* preclusive effect to a judgment from F1 than F1 itself would give. Before rebutting this argument, it is necessary to understand the reasoning required for a court to conclude that "more effect" is permissible under the implementing statute. Recall that the scope of the implementing statute governs many preclusive effects of a state's judgment. If a court purports to apply a judgment's characteristic covered by the implementing statute, it must do so according to the requirements of the implementing statute. For example, if F2 is seeking to determine what parties are bound by a judgment, this Note argues that that characteristic is within the scope of the implementing statute and therefore governed by F1's law. If a court seeks to bind parties that would not be bound in F1, it must argue that binding additional parties is per-

---

<sup>132</sup> See, e.g., Wright & Miller, *supra* note 3, § 4467, at 42 (noting that courts can give less preclusive effect to issue-preclusive rules because "[m]any issue preclusion rules fall far outside the central role of judicial finality").

missible under the implementing statute's command of the "same full faith and credit." As argued below, this reasoning is untenable based on judicial precedent and textual analysis.

Prior to 1948 courts consistently understood "such" to mean same, that is, no more and no less. For example, the Southern District of New York understood the implementing statute to prevent it from giving greater effect to a New Jersey judgment than New Jersey would give.<sup>133</sup> The court in *Cockrell* similarly understood the implementing statute to make the preclusive effect of a Louisiana judgment "that which Louisiana law gives it."<sup>134</sup> A Pennsylvania court reached the same conclusion, noting that the implementing statute required that another state's judgment "is entitled to no greater effect or finality than would be accorded to it in the state where rendered."<sup>135</sup> These courts come to what a layman might consider an obvious conclusion: "same" means same. Furthermore, the plain meaning of the word "same" does not leave much room for "more effect." "Same" is defined as "identical; not different; unchanged."<sup>136</sup> The original statute used the term "such," the definition of which does not clearly mean "the exact effect as F1." But the precedent discussed above shows that "same" is a good word to describe what courts were actually doing.<sup>137</sup> In conclusion, greater preclusive effect is not the same effect. For a court to follow the quantitative demand of the implementing statute, it must give F1's judgment the *exact* same effect as the judgment would have in F1.

#### CONCLUSION

The purpose of this Note is to anchor full faith and credit in something more than Wright & Miller's formulation of "reliance, repose, and finality."<sup>138</sup> These policy concerns are valid, but the stakes of modern litigation require a solid foundation for the preclusive effects of judgments rather than the uncertainty of policy

---

<sup>133</sup> *United States v. Hoffman*, 69 F. Supp. 578, 580 (S.D.N.Y. 1946).

<sup>134</sup> 91 F.2d at 416.

<sup>135</sup> *Dunn v. Hild*, 189 A. 746, 748 (Pa. Super. Ct. 1937).

<sup>136</sup> *The New Oxford American Dictionary* 1498 (2d ed. 2005).

<sup>137</sup> "Such" is defined as "of the type about to be mentioned." *Id.* at 1698.

<sup>138</sup> *Wright & Miller*, *supra* note 3, § 4467, at 51 (concluding that these policies are the "central values" of preclusion doctrines).

concerns.<sup>139</sup> This Note suggests that jurisprudence prior to 1948 can anchor the doctrine through an objective analysis of which characteristics fall within the scope of the implementing statute. Once F2 determines that a characteristic is governed by the implementing statute, F2 must define the characteristic *exactly* as F1 would.

Some might balk at this reading of the implementing statute, fearful that states will promulgate radical preclusion rules to expand the power of their judgments.<sup>140</sup> Fortunately, however, states do not have unlimited power as to the preclusive effects of their judgments—procedural due process and Congress’s constitutional power over this area of law are checks on the temptation to abuse preclusion policy.

The Supreme Court has stated that the implementing statute must be read “in the light of well-established principles of justice protected by other constitutional provisions which [full faith and credit] was never intended to modify or override.”<sup>141</sup> In *Riley*, the Court noted that if Georgia purported to preclude a party that had never been part of the litigation “in personam,” it would “deny procedural due process.”<sup>142</sup> In *Kremer v. Chemical Construction Corp.*, the Court recognized that the implementing statute would apply unless the quality of the judgment was such that procedural due process was violated.<sup>143</sup> These cases demonstrate that the Supreme Court is fully cognizant that the Clause and implementing statute do not overrule the commands of the Due Process Clauses of the Fifth and Fourteenth Amendments. There is no need to complicate the doctrine of full faith and credit in an attempt to police preclusive effect because the Constitution already has adequate built-in protections.

Additionally, the Court has said that states may have to deal with sub-par preclusion rules because it is a “price of our federal

---

<sup>139</sup> See supra Part II (demonstrating that there is little consistency in the implementing statute’s application between states).

<sup>140</sup> See, e.g., Wright & Miller, supra note 3, § 4467, at 44 (noting that it would be “outrageous to compel other courts to adhere” to a doctrine of preclusion law requiring issue preclusion for default judgments).

<sup>141</sup> *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 134 (1912).

<sup>142</sup> 315 U.S. at 353–54.

<sup>143</sup> 456 U.S. 461, 481 (1982); see also *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (noting that a judgment can be challenged under procedural due process).

system.”<sup>144</sup> If, however, modern doctrines of *res judicata* are too liberal for our federal system to function, Congress has the ability to adjust them.<sup>145</sup> Congress not only has the power to determine the interstate respect due state judgments but also has shown itself capable of balancing policy interests with those of full faith and credit.<sup>146</sup> Wright & Miller suggests that the Clause and implementing statute should be informed by an amorphous policy analysis that is neither uniformly applied by state courts nor normatively superior to the strict enforcement of all of F1’s preclusion law.<sup>147</sup> If the Supreme Court adopts Wright & Miller’s policy analysis, it could remove doctrines of preclusion law from the scope of the Constitution’s Full Faith and Credit Clause and the implementing statute, limiting Congress’s ability to legislate under the Clause. A broad reading of the implementing statute will leave the question of what the “effect” of a judgment should be in the hands of Congress—precisely where the Constitution places it.

This Note argues for a rule, rather than the standard that Wright & Miller suggests, for applying the implementing statute. Furthermore, it seeks to supply a doctrinal basis for that rule, clarifying when F2’s actions are controlled by the implementing statute. Simply stated, F2 must apply exactly the same preclusive effect that F1 would have given to each of a judgment’s four characteristics—the quality of a judgment required for preclusive effect in F1, the parties who are bound by a judgment, the claim-preclusive effects of a judgment, and which issues the judgment decided. If consistently applied, this theory respects F1’s policy determinations concerning the preclusive effect of its judgments, while allowing litigants to know in advance the preclusive effect of F1’s judgment in any subsequent forum. Finally, this theory would leave the difficult question—what doctrines of modern preclusion law should be followed in subsequent forums—in the hands of Congress, the political branch the Constitution charged with making that determination.

---

<sup>144</sup> *Williams*, 317 U.S. at 302.

<sup>145</sup> U.S. Const. art. IV, § 1 (“And the Congress may by general Laws prescribe . . . the Effect thereof.”).

<sup>146</sup> See, e.g., 18 U.S.C. § 2265 (2000) (defining what types of domestic violence protective orders must be given full faith and credit); 28 U.S.C. § 1738A (2000) (defining what effect child custody determinations must be given in sister states); § 1738C (removing same-sex marriages from the command of full faith and credit).

<sup>147</sup> See *supra* Sections II.A–B.