

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

5-1999

Comments on Rooker-Feldman or Let State Law Be Our Guide

Jack M. Beermann

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Courts Commons](#), [Judges Commons](#), [Jurisdiction Commons](#), and the [Litigation Commons](#)

Recommended Citation

Jack M. Beermann, *Comments on Rooker-Feldman or Let State Law Be Our Guide*, in 74 Notre Dame Law Review 1209 (1999).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/1994

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



COMMENT

COMMENTS ON *ROOKER-FELDMAN* OR LET STATE LAW BE OUR GUIDE

*Jack M. Beermann**

I feel privileged to have been asked to be a commentator on the three principal papers in this symposium. These are three excellent papers, and although there has been some valuable commentary on the *Rooker-Feldman* doctrine, there will be no need to go beyond these papers to gain a full appreciation of the doctrine, its applications, and its problems, which run as deep as the problems of any doctrine.

The *Rooker-Feldman* doctrine is an oddity in the law. In fact, I have been unable to think of another legal doctrine that lacks both a clear role and a clear justification. The lack of a justification is tied to the lack of a clear role. Because the vast majority of cases that could be barred under *Rooker-Feldman* are already barred by other, more firmly established doctrines, *Rooker-Feldman* appears unnecessary. Further, in the remaining cases which are barred under *Rooker-Feldman* but not by another, related doctrine, the result appears to be undesirable and the cases should actually be allowed to go forward, whether for the reasons underlying the inapplicability of the other, more firmly established doctrines, or more specifically because *Rooker-Feldman* is not based upon a sensible reading of the statutes regulating the jurisdiction of the federal courts.

To illustrate how odd the place occupied by *Rooker-Feldman* is, consider two important articles involving the doctrine, albeit both in its pre-*Feldman* days when it was known simply as *Rooker*. In 1978, David Currie urged a rediscovery of the *res judicata* defense, arguing that the *Rooker* doctrine was not broad enough to cover all the situations in which federal court relitigation of issues decided in state court should

* Professor of Law, Boston University School of Law. Thanks to Ron Cass, Bill Ryckman, and Ward Farnsworth for allowing me to bore them with my harangues on the *Rooker-Feldman* doctrine during the preparation of this Comment.

be barred.¹ Then, just two years later, Williamson Chang argued that *Rooker* should be understood as an aspect of *res judicata*.² Thus in a space of two years, the forgotten defense is remembered and should encompass its previously less-neglected cousin.

Twenty years later, the papers in this symposium find a landscape altered more in form than in substance. The Supreme Court, having applied *Rooker* to prevent Marc Feldman³ from challenging (in federal district court) the District of Columbia Court of Appeals' refusal to waive the requirement that he attend an ABA-accredited law school before being admitted to the D.C. bar, has failed to clarify the contours of the doctrine. While Justice Scalia's concurrence in the *Pennzoil* case indicates that at least some members of the Court continue to believe that *Rooker-Feldman* is jurisdictional,⁴ the Court's most recent reference is to the "*Rooker/Feldman abstention doctrine*,"⁵ in-

1 See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 321-25 (1978).

2 See Williamson B.C. Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337 (1980).

3 Marc Feldman did not attend law school. Rather, he studied law in the office of an attorney in Virginia, audited courses at the University of Virginia School of Law, and served for six months as a law clerk to a United States District Judge. He then passed the Virginia bar examination and was admitted to the Virginia bar. He was also admitted to the Maryland bar after that state waived its requirement that applicants for the bar attend an ABA-accredited law school. In Maryland, he worked as a staff attorney for a legal aid bureau. The District of Columbia Court of Appeals refused to waive its requirement that applicants attend ABA-accredited schools. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 465-68 (1983). Marc Feldman later became a law professor at Rutgers, Camden, where he taught *Con-Torts*, an innovative combination of traditional first year Contracts and Torts courses. From what I understand, this innovation ultimately led or contributed to his departure from the Rutgers faculty, which he left to become director of a legal aid bureau in Fresno, California. After several years there, Feldman returned to academia, becoming a professor at Maryland Law School. While at Maryland, he remained active in legal services matters. Professor Feldman died in 1998. While I did not know Professor Feldman, I know that he is missed by many colleagues and students.

4 See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (Scalia, J., concurring). Justice Scalia concurred only to state that Texaco's claim was not barred by *Rooker-Feldman*. The best explanation for why Justice Scalia bothered to file this opinion is that since, in his view, the *Rooker-Feldman* doctrine is jurisdictional, it had to be reached before the Court could properly decide the abstention question that was the basis for the Court's decision, since abstention presumes jurisdiction.

5 See *Johnson v. DeGrandy*, 512 U.S. 997, 1005 (1994) (Souter, J.) (stating that the State "contends instead that the . . . challenge deserved dismissal under this Court's *Rooker/Feldman* abstention doctrine") (emphasis added). It is unclear whether the abstention reference was considered or inadvertent.

dicating that support for the jurisdictional view of *Rooker-Feldman* may be eroding.

The most striking development in recent years is, as Suzanna Sherry reports, the sheer number of lower court decisions in which *Rooker-Feldman* has been employed to dismiss cases.⁶ This is in marked contrast to the paucity of references to *Rooker-Feldman* in the Supreme Court, which, despite the confusion in the lower courts, has not chosen to review *Rooker-Feldman* cases on certiorari.

In my view, the widespread use of the *Rooker-Feldman* doctrine is linked to the Court's relatively recent fixing of the rules of preclusion under the Full Faith and Credit statute.⁷ Under that statute, federal courts are required to accord state judgments the same preclusive effect as would the courts of the rendering state—no more, no less.⁸ It is the "no more" that creates, in the eyes of some federal courts, the need for *Rooker-Feldman*. Before the Supreme Court prohibited it, there were some federal courts that gave state judgments greater preclusive effect than they would receive in the state courts.⁹ As is

6 See Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1035, 1088 (1999).

7 28 U.S.C. § 1738 (1994).

8 See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 88 (1984) (White J., concurring) (citations omitted).

9 In *Marrese*, the Seventh Circuit, en banc, accorded a judgment of an Illinois court greater preclusive effect than the state courts would have recognized. See *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd*, 470 U.S. 373 (1985). Judge Flaum's concurring opinion was the most interesting because in the course of arguing that federal courts are free to afford greater preclusive effect to state judgments than the state court would allow, he stated in the published slip opinion that "the Supreme Court has never held that a federal court may not give a state court judgment *greater* preclusive effect than the courts of that state would give it." See *Marrese v. American Academy of Orthopaedic Surgeons*, Nos. 81-2671, 83-2683, 26 (7th Cir. 1984) (Flaum, J., concurring) (emphasis in original). Then, less than three weeks later, the Supreme Court decided *Migra*, in which Justice White noted: "In *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 75 (1903), this Court held that a federal court 'can accord [a state judgment] no greater efficacy' than would the judgment-rendering State. That holding has been adhered to on at least three occasions since that time." *Migra*, 465 U.S. at 88 (White, J., concurring) (citing *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 7-8 (1940); *Wright v. Georgia R.R. & Banking Co.*, 216 U.S. 420, 429 (1910); *City of Covington v. First National Bank*, 198 U.S. 100, 107-09 (1905)). Rather than reverse himself, Judge Flaum amended his concurring opinion to state that "the Supreme Court in *Kremer* did not hold that a federal court may not give a state court judgment *greater* preclusive effect than the courts of that state would give it." *Marrese*, 726 F.2d at 1163. That statement was true, because greater preclusive effect was not the issue in *Kremer*, and Judge Flaum apparently purposely ignored direct Supreme Court precedent con-

often the case, after one avenue is closed, good lawyers don't give up, they look for another avenue, and the lower federal courts apparently found in the *Rooker-Feldman* doctrine a route to giving state judgments greater preclusive effect in federal court than they would receive in state court.

Understood this way, *Rooker-Feldman* is an (illegitimate) expansion of preclusion rules.¹⁰ *Rooker-Feldman* allows a federal court to give greater preclusive effect to a state court judgment because the characterization of the federal claim as an appeal is a matter of federal, not state, law. But even if this characterization is resisted, and *Rooker-Feldman* is genuinely about preventing disappointed state court litigants from "appealing" their cases into the federal system, the distinction between *Rooker-Feldman* as a preclusion doctrine and *Rooker-Feldman* as a jurisdictional doctrine ultimately collapses.

Consider *Rooker*¹¹ itself. In that case, the federal plaintiff sought to enjoin, on grounds of constitutional violations, enforcement of an Indiana state court judgment in a case in which she was a plaintiff. The plaintiff had appealed to the Supreme Court of Indiana and then tried to start over again in the federal district court, which the Supreme Court of the United States held was an improper attempt to appeal the judgment from the state supreme court to the federal district court.¹² But why isn't it fair to characterize this as an original action in equity? Much of the history of equity involves suits in equity to enjoin enforcement of the judgment of a court of law allegedly rendered in violation of some equitable doctrine.¹³ Thus, rather than dismiss for lack of jurisdiction, perhaps the *Rooker* Court should have held that the complaint stated no basis for equitable relief.¹⁴

trary to his opinion in order to give greater preclusive effect to a state court judgment than would the courts of the state. This type of judicial conduct is almost enough to turn one into a crit.

10 The Fifth Circuit apparently recognizes this and has a rule prohibiting the application of *Rooker-Feldman* unless the state court would bar the second action. See *Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995); *Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987).

11 *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

12 See *id.* at 416.

13 Perhaps, as the Court in *Rooker* hinted, federal equity relief from the judgment would have been available if the court of law had acted without jurisdiction over the subject matter or parties. See *id.* at 416 (denying that the complaint can be fairly characterized as alleging that the state court judgment was void for having been rendered without jurisdiction).

14 The Court might also have relied upon preclusion, since there is no indication that *Rooker*, having sued in state court, did not raise or could not have raised her federal claims in state court.

Consider next the decision of the Supreme Court of Nevada in *Nevada Industrial Development, Inc. v. Benedetti*.¹⁵ In that case, the court held that equitable relief against enforcement of a Nevada court's judgment for damages was available because the judgment was based on a mistake and enforcement would result in unjust enrichment.¹⁶ The court allowed an original equitable action in the Nevada trial court because the time for filing a motion for relief from judgment had expired.¹⁷ This is a surprising reading of the importance of the time limits in the rule on relief from judgments, because it allows the exact same attack in an original action after the time limit expires under the relief from judgment procedure. But the important point for *Rooker-Feldman* purposes is that it allows an original action in equity to attack a prior judgment, which appears consistent with general equity practice.¹⁸

Before turning to the papers before us, I want to sketch a minimalist view of *Rooker-Feldman*, in which the overlap with preclusion may be less than in more expansive understandings of the doctrine. In my view, if there is a place for *Rooker-Feldman*, it is as an abstention doctrine under which disappointed state court litigants may not go to federal district court to complain about harm they suffered at the hands of state courts when the state courts would not entertain the action or where there is substantial doubt over whether the state court would entertain the action. Because I believe that § 1983 should be an exception to *Rooker-Feldman*,¹⁹ my version of *Rooker-Feldman* may apply mainly in diversity cases in which no constitutional claims are raised against the outcome in the state courts.

There are two related normative bases for this narrow abstention doctrine. The first reason is that the choice of a federal forum should not ordinarily significantly affect the outcome of a case in a way that is detectable *ex ante* so that forum shopping would result.²⁰ If a state court would allow an independent action collaterally attacking a judgment, so should a federal court, assuming jurisdictional requirements are met. On the other hand, if state courts would bar the collateral attack, or require any attack to be brought in the rendering court as a motion to reopen the judgment, then the federal court action should

15 741 P.2d 802 (Nev. 1987).

16 See *id.* at 804.

17 See *id.* at 804-05.

18 Whether the substantive bases for equitable relief are met is a matter wholly separate from jurisdiction.

19 See *infra* notes 72-77 and accompanying text.

20 This is obviously consistent with both the *Erie* doctrine and with current rules regarding the preclusive effects of state court judgments in federal court.

not be available because otherwise forum shopping might result. The second reason is that, insofar as the state requires any collateral attack on a judgment to be made as a motion for relief from the judgment in the same forum that issued the judgment, federal courts (and other state courts) ought to respect that requirement as part of the state's rules regarding the sanctity of judgments. More generally, federal courts should treat state judgments the same way that state courts would treat them.

To illustrate this, assume the following case. A sues B (a private employer) in state court for wrongful discharge. A loses. A then sues B on the same claim in federal court. In my view, *Rooker-Feldman* has no relevance because it is simply A trying to get two bites at the apple, suing twice over the same conduct but not trying to attack or appeal the judgment in the earlier case.

Now suppose that after losing in state court A sues B in federal court under diversity jurisdiction on the same claim, and also sues the state judge alleging fraud or conspiracy in the state proceedings, and asks for damages due to those violations. In addition to preclusion of the wrongful termination claim, this is potentially a *Rooker-Feldman* case because the claim against the state judge is directly aimed at the state court proceedings. The federal court might wish to abstain from hearing the claims against the judge, due to potential friction with the state court system and uncertainty over whether the state courts would entertain a similar action or require a motion for relief from judgment or an appeal of the judgment as the only methods for attacking the judge's handling of the case.

The basic idea to me is that the *Rooker-Feldman* doctrine has no application when the complaint in federal court is about conduct outside of the state court, because it is inaccurate to characterize such a claim as an appeal from the state court's judgment. It may be an attempt to relitigate, but it is not an appeal. However, when the federal complaint attacks the state court judgment as based, for example, on erroneous procedural or substantive rulings or wrongful conduct by the judge and opposing parties leading to the judgment, then the question arises whether a federal court should hear such a case. If such a claim would be heard as an equity action in state court, then I do not see any jurisdictional bar to the federal case, but if there was uncertainty over whether a state court would allow the collateral attack on a state judgment, then there may be grounds for abstention since the choice of a federal forum should not ordinarily provide the plaintiff with a method for attacking a judgment not known under state law. *Rooker-Feldman* becomes a very narrow abstention doctrine, especially if it does not apply at all in § 1983 cases.

Suzanna Sherry's central point appears to be her acceptance of *Rooker-Feldman*'s jurisdictional status on the ground that *Rooker-Feldman* is about courts in a dual system while other doctrines, like preclusion, are more focused on the interests of the parties than on the interests of the courts involved.²¹ Sherry then makes the very interesting point that *Rooker-Feldman* serves the same purpose when a federal case follows a state case that an injunction against suit serves when a state case follows a federal case.²² Sherry's point is that because state courts may not protect themselves by enjoining federal courts, federal courts apply *Rooker-Feldman* as a doctrine of self-restraint, a sort of injunction against themselves.²³

The virtue of Sherry's analysis here is that it places the stress exactly on the point where it should be, as a doctrine born of federalism, distinguishing *Rooker-Feldman* from preclusion, which would be necessary even if there were only one court system. However, this does not distinguish *Rooker-Feldman* from abstention, which also exists only because of the dual nature of our judicial system.²⁴ Abstention also appears to protect courts rather than parties, and it is not jurisdictional.

Assuming for the moment that *Rooker-Feldman* serves the court-protective role as the sort of self-injunction Sherry describes, why is the characterization of the federal action as appellate in nature a matter of federal, not state, law? If the purpose is to protect the state courts, why not apply state law to determine whether relitigation should be allowed? Presumably, the rules state courts set for relitigation in their own courts are viewed by those courts as sufficient to protect them against the evils of relitigation. For instance, suppose in *Rooker* that Indiana law allowed a disappointed state court plaintiff with a legal claim to seek equitable relief from a final judgment in a trial court.²⁵ Why shouldn't the federal court respect the state court's characterization of the claim as within the jurisdiction of a trial court,

21 See Sherry, *supra* note 6, at 1101.

22 See *id.* at 1105.

23 See *id.*

24 I am focusing mainly on cases in which the litigation in state court has been concluded. Abstention doctrines and federal statutes such as the Anti-Injunction Act seem adequate to take care of cases in which a federal plaintiff asks for an injunction against an ongoing state proceeding.

25 The alternatives to a new action in the trial court include an appeal from the original judgment and a supplemental proceeding under the original case, such as a motion for relief from judgment, neither of which may state a claim as an original action in either state or federal trial courts.

just as the federal court is required to respect the state decision not to bar the subsequent equitable action under preclusion principles?²⁶

The federal characterization could lead to curious results. Imagine the following scenario: in Case 1, A sues B for damages in state court. B loses and is ordered to pay damages to A, and the award is upheld on appeal. In Case 2, B files an injunctive claim in the same state's trial court alleging state and federal grounds for enjoining enforcement of the judgment in Case 1, and Case 2 is clearly within the state court's equity jurisdiction. A then removes Case 2 to federal court on both federal question and, because the parties live in different states and the judgment is for more than \$75,000, diversity grounds. Under *Rooker-Feldman*, the federal court should remand this case to the state court because it would be considered an appeal of the original state court judgment, even though under the hypothetical the state trial court would hear it as a proper original action under state law.

Thus, insofar as *Rooker-Feldman* bars cases that would not be barred under state preclusion law, the question under Sherry's analysis appears to boil down to whether state courts need special protection from federal courts when states would allow the second case to proceed in their own courts. I do not understand why state courts cannot be trusted to make rules adequate to protect themselves. One would expect the opposite tendency, that states would be overprotective, and thus federal courts might be justified in being less protective if necessary to protect federal rights. In fact, while the Supreme Court has not been shy about allowing state judgments to preclude federal claims,²⁷ it has raised the possibility that under extreme circumstances federal courts would be justified in creating or recognizing exceptions to § 1738 and not affording state court judgments as much preclusive effect as would the state courts.²⁸

26 The state court might bar the new claim based on preclusion. The federal court would respect this decision under 28 U.S.C. § 1738, and *Rooker-Feldman* would not be necessary.

27 See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (allowing judgment on state class action settlement to preclude federal securities claims that could not have been raised in the state court).

28 See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386 (1985) (allowing for possibility that federal courts would afford a state court judgment less preclusive effect than the rendering state court would if necessary to protect federal interests); see also *Matsushita*, 516 at 380-86 (raising, but rejecting, possibility that federal jurisdictional statute partially repealed § 1738 so that state court judgment would not be given preclusive effect where federal claim could not have been raised in state court).

Another possible reason for relying on federal law to determine whether an action is original or appellate might be that state law would be too varied or complex, and a simpler federal rule would be easier to apply and would add uniformity. I don't see why these particular state rules would be too difficult for federal courts to apply. Given that federal courts are already required to apply state preclusion rules to determine the preclusive effect of state court judgments, there is no reason to believe that it would be especially difficult for federal courts to apply state requirements regarding whether a new action is appropriate.

As far as I can tell, Sherry does not offer an adequate explanation for the federalization of this aspect of the *Rooker-Feldman* doctrine. She does suggest that preclusion rules are difficult to apply,²⁹ but as the papers in this symposium illustrate, *Rooker-Feldman* is also very difficult to apply, especially when federal courts attempt to discern whether the federal claim is "inextricably intertwined" with claims resolved by a prior state court judgment.³⁰

Thus, while Sherry's paper laudably directs attention to the pure federalism reason for the *Rooker-Feldman* doctrine—that some substitute may be necessary for the injunction against suit that federal courts can issue when state court litigation threatens a federal judgment—she does not explain why state law itself, applied by the federal courts, is not up to the task. Perhaps due to my suspicion that *Rooker-Feldman* is just a way for federal courts to afford state judgments greater preclusive effect than would the rendering states, I am drawn to idea that federal courts, if they insist on maintaining a jurisdictional *Rooker-Feldman* doctrine, should mimic state courts as much as possible, and hold that an action is outside federal jurisdiction only if the state court rendering the judgment would view a subsequent action in state court as an impermissible collateral attack on the judgment. This doctrine might be less about jurisdiction than about whether the plaintiff has stated a claim upon which relief should be granted, but it appears to me that it would be better than *Rooker-Feldman* at vindicating the state courts' interest in protecting their judgments.

I can imagine a couple of additional reasons why it might not be wise to rely upon state law to determine whether an original action that might have the effect of attacking a judgment should be allowed. Perhaps such cases simply do not arise in state court because litigants who are happy to remain in state court, or who have no colorable basis for federal jurisdiction, use state postjudgment procedures be-

29 See Sherry, *supra* note 6, at 1107.

30 *Id.* at 1108–11.

cause they know an original action in state court would be improper. A motion in federal court to reopen a state court judgment would obviously be rejected out of hand, so an original federal district court action is the only plausible avenue into federal court. Sherry points out that preclusion rules are easy to avoid because federal plaintiffs know they can simply add a party to the federal case (for example, the state judge whose action allegedly violated the federal plaintiff's federal rights).³¹ Similarly, federal plaintiffs would find ingenious methods for avoiding state law on attacking judgments. Further, perhaps state judgments are more threatened by federal court review than by review in their own courts where the judges may have greater sympathy for the sanctity of state judgments. While I find some merit in these arguments, I do not find them convincing. On the first argument, if state court litigants know when they may not begin an original action in state court, the federal courts should be able to figure that out as well. On the second point, I don't see why state courts will not be able to plug holes in their doctrines—if they cannot, perhaps there is a reason why they shouldn't. Finally, the reverse parity argument, that federal courts will not be sensitive to state interests, ignores the fact that federal courts are already entrusted with protecting state interests under preclusion rules and that, under the current expansive version of *Roquer-Feldman*, federal courts are expected to protect those interests without guidance from state law. If they can do it on their own, adding state law as a tool should not hinder them.

Thus, while on Sherry's account *Roquer-Feldman* appears to be based on the purest of federalism concerns, insofar as it rejects state law as its basis it has not been adequately justified. If a state court would allow a new action that might attack or frustrate a state court judgment, then there does not seem to be an adequate reason for not allowing the same action to go forward in federal court, assuming all other prerequisites of federal jurisdiction are met and no other doctrine, such as abstention, bars the action.³² The best argument for a

31 See *id.* at 1093.

32 An analogy that comes to mind here is the expansion of the domestic relations exception to federal jurisdiction to cover cases beyond the granting of divorce, alimony, or child support. In attempting to decide whether a particular action was within that jurisdictional exception, courts have looked to state law and stated that the domestic relations exception applies whenever the state courts would require that the claim be brought in the family court system as part of a domestic relations proceeding. See *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (holding that a claim for wrongful interference with custody is not within domestic relations exception); see also *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998) ("The penumbra of the exception consists of ancillary proceedings, such as a suit for the collection of unpaid alimony, that state law would require be litigated as a tail to the original domestic

purely federal rule is that *Rooker-Feldman* is based upon an interpretation of federal statutes, which of course should be decided under federal law. However, in reality, the *Rooker-Feldman* doctrine has moved far from its statutory moorings and cannot be justified purely as a reading of those statutes.

Sherry raises another very interesting aspect of the *Rooker-Feldman* doctrine—the implications of the fact that while the Supreme Court held that Feldman could not challenge the D.C. court's refusal to waive its bar admission rules, he could challenge the constitutionality of the rule itself in federal court.³³ The Supreme Court held that Feldman was not, in the latter case, challenging judicial action and that the general challenge was not inextricably intertwined with the denial of the waiver request.³⁴ The problem, Sherry points out, is that many litigants will lack standing to challenge a general rule if a final judgment makes them ineligible to gain any benefit from an invalidation of the general rule.³⁵

Ironically, this linkage between *Rooker-Feldman* and standing rules means that in some circumstances *Rooker-Feldman* will not apply when there is a threat to a state judgment, but will apply when there is no threat to the state judgment at all. Take Feldman's case. If his general challenge to the District of Columbia bar admission rule was successful, presumably he would reapply for membership to the bar and the D.C. court would be required to admit him. I am assuming that implicit in the Supreme Court's holding that his general challenge was not barred was a finding that he had standing to bring it, and the only basis for standing would be admission to the bar if the general

relations proceeding.”). The domestic relations exception may also be another example of lower courts excluding more cases from federal jurisdiction than the Supreme Court finds appropriate. As Judge Posner acknowledged in *Friedlander*, “[a] dictum in [*Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992)] might be thought to cast doubt on the existence of the penumbra: ‘the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree.’” *Friedlander*, 149 F.3d at 740 (comparing *Ankenbrandt*, 504 U.S. at 704). The Seventh Circuit dismissed this statement as a dictum because “the issue of the outer bounds of the exception, and hence of what we are calling its penumbra, was not remotely before the Court; for the case, brought by a mother against her divorced husband on behalf of their children for physical and sexual abuse, lay far outside any plausible conception of the penumbra.” *Id.* It is an interesting question, albeit for another day, what respect lower courts should accord Supreme Court dicta characterizing judge-made jurisdictional doctrines.

33 See Sherry, *supra* note 6, at 1108.

34 See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486–88 (1983).

35 See Sherry, *supra* note 6, at 1110.

challenge prevailed. The Supreme Court's ruling rejects the argument that his general challenge is inextricably intertwined with his waiver claim.³⁶ Now take a case in which *Rooker-Feldman* is generally held to apply—a federal claim brought by a disciplined attorney who claims that his particular discipline and the state disciplinary rule or procedure is unconstitutional. The reason that the claims are held to be inextricably intertwined is that the only way the disciplined attorney stands to gain from the invalidation of the rule is if his prior discipline is reversed, but attacking that in the federal court is an impermissible appeal of the state judgment.³⁷ In any case, I do not see what *Rooker-Feldman* adds to standing analysis and preclusion. The challenge to the particular disciplinary decision would be barred under preclusion rules, and the attorney would lack standing to challenge the rule itself unless he could show that he was likely to be subject to further discipline for future violations of the rule.

Finally, in my view the example that Sherry's paper ends with, of a case that she thinks should be barred by the *Rooker-Feldman* doctrine,³⁸ helps illustrate what I find troublesome about the doctrine, especially its purely federal law aspect. Sherry recounts a case in which a state plaintiff sued a defendant for breach of a contract which I would characterize as a license to allow cattle to cross the state defendant's property.³⁹ The defendant argued that the contract was without consideration because the fees were not paid (a bad argument since consideration doctrine requires only a promise, not an actual payment), and the defendant counterclaimed for the fees.⁴⁰ The defendant's problem was that the right to collect the fees had been assigned away, so the state court dismissed the counterclaim. The plaintiff won in state court for both specific performance and damages for the past violations. Then the state defendant was reassigned the right to collect the fees and sued in federal court under diversity jurisdiction for them. The federal court dismissed on both *Rooker-Feldman* and preclusion grounds.

36 He may have had a preclusion problem: the Supreme Court left that issue to the lower court on remand. See *Feldman*, 460 U.S. at 487–88.

37 Some disciplined attorneys may have standing to challenge the rules under which they were disciplined if they would like to continue to disobey the rules. For example, an attorney disciplined for unethical advertising might have standing to challenge future applications of the advertising rule if she intended to run similar advertisements in the future.

38 See Sherry, *supra* note 6, at 1126–28 (discussing *Canal Capital Corp. v. Valley Pride Pack, Inc.*, No. 97-CV-2162 (D.Minn. Feb. 20, 1998), *rev'd*, No. 98-1892, 1999 WL 89007 (8th Cir. Feb. 22, 1999)).

39 See *id.*

40 See *id.*

In support of applying *Rooker-Feldman* to the case, Sherry states that the application of preclusion was uncertain because of the dismissal of the counterclaim for fees.⁴¹ Sherry says that this was a perfect case for *Rooker-Feldman* because a victory for the state defendant on the fees claim would nullify the plaintiff's victory in the underlying suit.⁴² If the damages awarded to the state plaintiff took account of the fact that no fees were paid for some period during which the path was open, then Sherry is correct that a federal judgment for the full amount of the fees would be in conflict with the state court judgment. However, if the state court refused, because of the assignment, to consider whether the fees had been paid, the state defendant may never have had an opportunity to litigate the issue of how much the state plaintiff owed in fees, and a federal court order to pay the fees for the period that the path was open would not nullify the state court judgment.

To understand the ramifications of Sherry's approach to *Rooker-Feldman*, think about Sherry's response if the federal suit had been brought by the actual holder of the right to collect the fees. Sherry's acceptance of a purely federal and jurisdictional *Rooker-Feldman* doctrine allows her to propose a significant expansion of the *Rooker-Feldman* doctrine, to cases brought by nonparties to the state court litigation.⁴³ Sherry would probably bar the claim of the right holder under *Rooker-Feldman* even though the right holder was not a party to the state court suit. In her view, the party should have intervened in the state court suit⁴⁴ and, having failed to do so, has no complaint if a subsequent federal court suit is not available.

This seems to me to be a radical proposal that potentially would create a complicated set of rules requiring nonparties to intervene in numerous situations to preserve their rights. Normally, if a party wants to be certain that all interested nonparties are bound by a judgment, it is the party's responsibility to bring them into the case. In terms of *Rooker-Feldman*, if the state court would allow the nonparty to bring an action that might undo some of the victor's gains in the first state case, there does not seem to be any special reason for the federal court to require the nonparty to intervene in order to preserve a federal forum that would otherwise be available. Again, Sherry has not

41 See Sherry, *supra* note 6, at 1128.

42 See *id.* at 1127.

43 See *id.* at 1114.

44 Sherry argues that *Rooker-Feldman* should be available to bar nonparties and that nonparties with an interest in a case that may be threatened by a state court judgment should be required to intervene to protect their interest. See *id.* at 1112-23.

offered a sufficient reason for a special rule when the second case is brought in federal, and not state, court.

In more straightforward *Rooker-Feldman* terms, if the state defendant was not the owner of the right to collect the fees and if the state court explicitly refused to decide issues regarding the fees, then the federal claim for the fees would not in any sense be an "appeal" from the state court judgment. Sherry's proposal, viewed from this angle, appears to be an effort for federal courts to supervise the mandatory party practice of the state courts by conditioning federal jurisdiction, in some cases, on a federally approved mandatory intervention rule. Sherry has not articulated a federal interest sufficient to support this substantial change.

In sum, if preclusion under state law would not bar the claim and would allow a subsequent suit for damages (and not require a motion to reopen the original judgment), then I see no reason for a federal court sitting in diversity to refuse to hear a case that would be heard by the state court. It seems to me that the best policy in diversity cases is for federal courts to imitate state courts as much as possible unless there is a strong federal reason not to. Here, since the reason for the *Rooker-Feldman* doctrine is purportedly to protect the state courts, it seems to present the strongest claim that the federal courts should mimic the state courts. I therefore do not find that Sherry has made the case for a robust *Rooker-Feldman* doctrine as a substitute for an injunction against suit issued by a state court against a federal court.

Barry Friedman and Jim Gaylord's paper⁴⁵ starts with a premise similar to Sherry's, that the *Rooker-Feldman* doctrine seems to overlap so greatly with other doctrines, namely preclusion and abstention, that one important question is whether the doctrine is superfluous.⁴⁶ They part company in that Sherry finds a far greater need for *Rooker-Feldman* than Friedman and Gaylord because Sherry is concerned that without *Rooker-Feldman* there will be too much relitigation of claims that were or should have been raised in prior state court proceedings.⁴⁷

This difference between Friedman and Gaylord and Sherry arises from Friedman and Gaylord's search for a normative basis for *Rooker-Feldman*. For Friedman and Gaylord, the question concerning the legitimacy of the *Rooker-Feldman* doctrine boils down to a search for a case that would be barred by *Rooker-Feldman* and no other doctrine,

45 Barry Friedman & James E. Gaylord, *Rooker-Feldman*, *From the Ground Up*, 74 NOTRE DAME L. REV. 1129 (1999).

46 See *id.* at 1129-30.

47 See, e.g., Sherry, *supra* note 6, at 1094.

and where there is a legitimate federal jurisdictional reason for barring the claim.⁴⁸ An easy *Rooker-Feldman* illustration is as follows: one limitation on preclusion doctrine is that a nonparty is almost never bound by a judgment and thus if one plaintiff sues in state court and loses, a second plaintiff is normally free to sue on the same claim in either state or federal court, assuming other jurisdictional prerequisites are met. While Sherry sees a proper place for the *Rooker-Feldman* doctrine to block the second plaintiff from suing in federal court, for Friedman and Gaylord it is illegitimate because there is no legitimate basis in the law of federal jurisdiction for this form of nonparty preclusion.⁴⁹

This insistence on a normative basis for *Rooker-Feldman* in the law of federal jurisdiction presents an intuitively attractive basis for analyzing and ultimately in large part rejecting the *Rooker-Feldman* doctrine. As Friedman and Gaylord explain, it turns out that in the vast majority of *Rooker-Feldman* applications, either *Rooker-Feldman* adds nothing to existing doctrine or it bars cases in situations that have been explicitly rejected for generalizable reasons under another doctrine, either preclusion or jurisdiction.⁵⁰

Sharing Friedman and Gaylord's suspicion of the *Rooker-Feldman* doctrine, I find the approach attractive, but ultimately I am skeptical that their approach adds much to our ability to evaluate *Rooker-Feldman* applications. The problem is how to identify a legitimate federal jurisdictional reason for the doctrine.⁵¹ One tempting idea might be to argue that *Rooker-Feldman* should not ever bar a claim when barring the claim has been explicitly rejected by another doctrine, either of federal jurisdiction or perhaps preclusion. This would be a novel proposal, one not generally accepted in other areas of the law. Consider, for example, the relationship in contract law between consideration and reliance-based recovery. Under Friedman and Gaylord's approach, reliance-based recovery might be improper because the basis of liability, a promise made without consideration, had been rejected as a matter of contract doctrine for reasons arguably central to that doctrine. More generally, legal development often occurs when an innovation is rejected under one legal doctrine for reasons the courts view as necessary to protect important interests and is then accepted under another, either a different preexisting doctrine or a newly created one.

48 See Friedman & Gaylord, *supra* note 45, at 1131-32.

49 See *id.* at 1141.

50 See *id.* at 1140-43.

51 *Id.* at 1140.

Another theoretical problem with this approach is that there is no obvious reason why *Rooker-Feldman* should not be viewed as the core doctrine with abstention and preclusion occupying a peripheral, secondary position. *Rooker-Feldman*, after all, purports to be based upon the best reading of the statutes specifying the jurisdiction of the federal courts. If one takes this basis of *Rooker-Feldman* seriously, then whatever interests *Rooker-Feldman* advances would be, by definition, legitimate federal jurisdiction interests, and the fact that the same argument had been rejected under abstention or preclusion would not be persuasive. To use Friedman and Gaylord's example, just because due process cuts against binding a nonparty to a judgment does not mean that due process requires that Congress open the federal courts to suits by nonparties after the identical issue was litigated in state courts.⁵² Perhaps due process would require that *some* forum be open to the claim, but presumably state courts could provide due process.

In more general terms, I am not aware of criteria for deciding when the limits of one doctrine should be understood to foreclose a contrary decision under another doctrine. For example, should the rejection of a claim under tort law bar a similar claim under contract law, even if recognizing the contract claim would undercut the very interest protected by the rejection of the tort claim? The theoretical question here is why the interest protected by the rejection of the tort claim should be privileged when it comes to the contract claim, where a court might want to protect a different interest and use contract law to do it. The only obvious answer to this difficulty might be that the first interest protected in time should prevail, but I find that possibility unsatisfying given the random timing with which disputes may reach the courts.

Another difficulty with applying a presumption that a second doctrine should not be used to undercut interests protected under a prior doctrine is that courts (or commentators such as myself) might find it very difficult to distinguish between rejections based on interests that should be protected generally and rejections that are internal to the particulars of the doctrine. To go back to the contract doctrine example, what are the criteria for determining whether the consideration requirement protects an interest of the promisor that should not be undercut by some other doctrine, or whether traditional contract doctrine rejected reliance liability simply because such liability did not fit analytically into the doctrine?

To use an example closer to the issues surrounding *Rooker-Feldman*, think about how difficult it may be to determine whether *Rooker-*

52 See *id.* at 1141-42.

Feldman should apply in a case where abstention would not. A court may decline to abstain from exercising its jurisdiction for many reasons, a common pair of which are: (1) because it believes it should exercise the jurisdiction granted by Congress unless absolutely necessary; or (2) because in the particular case the court finds that the plaintiff has a substantial interest in pursuing her claim in federal court. If the refusal to abstain was based on the former reason, there would be no problem with applying *Rooker-Feldman* to bar the case, since the case would by definition not be within congressionally granted jurisdiction. However, if the reason for not abstaining was the latter, then an application of *Rooker-Feldman* would undercut the plaintiff's strong interest in choosing the federal forum. Given the way opinions are written in the federal courts, both types of justifications may appear in an opinion rejecting an abstention defense. Thus, it may often be very difficult to know whether *Rooker-Feldman* should be available.

Thus, while I am largely in agreement with Friedman and Gaylord that *Rooker-Feldman* is redundant and may undercut values that support other doctrines of federal jurisdiction, we need clearer normative criteria to support our suspicions of the *Rooker-Feldman* doctrine. For example, suppose a state's preclusion rules reject applying claim preclusion against nonparties for reasons sounding in due process. Does that mean that the *Rooker-Feldman* doctrine should never close the federal courts to a claim by a nonparty? More broadly, would repealing the general federal question jurisdiction statute, or imposing a high jurisdictional amount, violate due process? I think not, and the problem is that the values underlying any particular doctrine may look quite different when viewed through a slightly different doctrinal lens.

Friedman and Gaylord find a sufficient normative basis to apply *Rooker-Feldman* to one class of cases, those in which a plaintiff files in state court and then abandons the state forum after getting the sense that the state court would rule against her claim.⁵³ They argue that there is a state interest in preventing plaintiffs from "toying with state courts by filing suits then dismissing if things do not go as they wish."⁵⁴ Friedman and Gaylord discuss *Chan Tse Ming v. Cordis Corp.*,⁵⁵ in which a state plaintiff abandoned the state courts after an unfavorable choice of law ruling and refiled in federal court.⁵⁶ They point out

53 See *id.* at 1155-56.

54 *Id.* at 1155.

55 704 F. Supp. 217 (S.D. Fla. 1989).

56 See *id.* at 218.

that the local rules of the state trial court for the county in which the case had been filed allowed the presiding judge to reassign the case to the original judge had the plaintiff refiled in the same court, and that this structural protection is not available when the plaintiff refiles in federal court.⁵⁷

Although Friedman and Gaylord do not argue it this way, the strongest argument against allowing the federal claim to go forward seems to be that allowing refiling in the federal forum appears to undercut the state court's interest in not allowing voluntary dismissal to be used as a device for changing venue when no grounds for an ordinary change of venue exist. Add to that the special circumstance that there is always a federal court alternative to a state court in which venue and personal jurisdiction are proper, while it is somewhat less likely that there will be a second state court system in which both jurisdiction and venue would be proper, and they may have identified a unique federal threat to state courts. Further, Friedman and Gaylord may be correct that we should not expect states to have developed bodies of law on the circumstances under which a voluntarily dismissed case may be refiled and litigated in another forum, because the existence of a parallel state court in which both jurisdiction and venue are proper is much less likely than with a federal court.⁵⁸

Even in light of this possibility, I am still unconvinced, for several reasons, that *Rooker-Feldman* should bar the federal filing after voluntary dismissal in the state court. I do not see any reason for federal courts to be more restrictive than state courts over litigation following uncompleted state proceedings. In my view, the federal forum should be presumptively available as long as state law would not prevent the case from being brought in another state or if there are devices available to the plaintiff to bring the case in a different court in the original state. Here, it is important to me that the presiding judge in the county in which *Chan Tse Ming* was litigated is not required to reassign the case to the original judge if the plaintiff happens to refile in state court. Further, some state courts may not have the rule in *Chan Tse Ming*, and in those states there is no good argument for applying *Rooker-Feldman* when state law would allow refiling in any court assuming jurisdiction and venue were proper. Often, venue lies in more than one court within a state, and jurisdiction and venue may lie in the courts of more than one state. If litigation in federal courts following state court voluntary dismissal became a serious problem, the state courts could react perhaps by structuring a doctrine of interjuris-

57 See Friedman & Gaylord, *supra* note 45, at 1157-58.

58 See *id.*

dictional comity under which sister states would not hear such cases under circumstances in which the courts agree that the plaintiff should have to live with the initial choice of forum. If a case is otherwise within federal jurisdiction, then as long as state law would not preclude a second action following abandonment of the first state forum, Friedman and Gaylord need to offer a better argument in support of a special rule when the second forum happens to be federal.

A final thought on Friedman and Gaylord's argument in favor of *Rooker-Feldman* for voluntary state plaintiffs is that I don't see what such cases have to do with *Rooker-Feldman* at all. A federal action following the voluntary dismissal of a state action would not be an "appeal" from the state action in any sense of the word, but would rather be an original action cognizable in a trial, not appellate, court. Even if it were desirable to create a federal doctrine to prevent state plaintiffs from taking advantage of the dual court system in the way Friedman and Gaylord identify, it does not appear to me to be a matter within the purview of *Rooker-Feldman*.

Susan Bandes' paper⁵⁹ focuses directly on the jurisdictional nature of the *Rooker-Feldman* doctrine and she concludes that *Rooker-Feldman* should have jurisdictional status only when "litigants ask the federal courts to rehear issues identical to those on which they have already obtained state court decisions or, in other words, those situations in which an appeal would lie."⁶⁰ Insofar as this would amount to a rather narrow *Rooker-Feldman* doctrine, it sounds attractive, but my initial reaction is to wonder why preclusion rules won't take care of this situation and, if so, why advocate maintaining *Rooker-Feldman*?

Bandes' normative distaste for *Rooker-Feldman* is built around a familiar liberal preference for federal jurisdiction over federal claims. She notes that "section 1331 . . . reflect[s] a congressional judgment that state court vehicles for the vindication of federal rights and interests are inadequate."⁶¹ It is tempting to jump on this bandwagon, but I don't think that what's particularly wrong with the *Rooker-Feldman* doctrine is that it fails to pay sufficient heed to congressional judgments underlying § 1331. After all, the Supreme Court relies upon § 1331 as a basis for *Rooker-Feldman*, so it must be that in the Court's view the congressional policies underlying § 1331 do not, all things considered, favor federal jurisdiction over those cases covered by

59 Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175 (1999).

60 *Id.* at 1179.

61 *Id.* at 1187 (discussing 28 U.S.C. § 1331 (1994)).

Rooker-Feldman.⁶² Further, so many doctrines—from preclusion to abstention to the well-pleaded complaint rule to the ban on habeas corpus for Fourth Amendment claims—keep cases out of federal court that it is too simplistic to rely upon a general preference for federal jurisdiction over violations of federal rights.

Bandes rightly directs our attention back to the statutory bases for the *Rooker-Feldman* doctrine and explains that we need to accept two negative inferences if we are to accept the statutory bases for the doctrine.⁶³ The two inferences are, first, that because the Supreme Court is granted, in 28 U.S.C. § 1257, appellate jurisdiction over the decisions of the highest state courts, appellate jurisdiction over such cases is denied to any other federal tribunal. Second, it is inferred from § 1331's grant to the district courts of "original jurisdiction" over claims arising under federal law that the district courts lack appellate jurisdiction.⁶⁴

Bandes attacks these bases for *Rooker-Feldman* on the ground that many claims barred by the *Rooker-Feldman* doctrine, at least in the lower federal courts, are not "appeals" within the ordinary sense of the word since the federal litigant is not attempting to relitigate the exact same claim litigated in the state court.⁶⁵ Of course, no federal litigant is foolish enough to file papers in federal district court titled "appeal from the decision of the state court." Bandes proposes that the only claim that is truly an appeal disguised as an original action is a complaint asking a federal court to adjudicate the exact issues adjudicated in state court.⁶⁶ She points out that extensions of *Rooker-Feldman* to claims not actually litigated, and against parties not part of the state proceedings, are not proper because these are not appeals but rather are the kinds of cases that might be affected by another doctrine such as preclusion.⁶⁷ In this way, Bandes attacks *Rooker-Feldman* on its own turf and argues that if *Rooker-Feldman* is truly based upon § 1257 and § 1331, then many of the lower court extensions of *Rooker-Feldman* are

62 This argument does not apply to those applications of *Rooker-Feldman* in the lower courts that depart substantially from any plausible set of inferences from the federal jurisdiction statutes. In such cases, a preference for following Congress's grant of federal jurisdiction would point against applying *Rooker-Feldman*.

63 See Bandes, *supra* note 59, at 1189–90.

64 To this should be added § 1332's grant of original jurisdiction to the district courts of diversity jurisdiction.

65 See *id.* at 1192.

66 See *id.*

67 See *id.*

illegitimate because the cases barred under *Rooker-Feldman* are not truly appeals of a state court judgment.⁶⁸

The statutory bases of *Rooker-Feldman* may actually give rise to an even greater narrowing, or perhaps virtual elimination, of the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine appears to rest upon the use of the word "original" in § 1331 and the grant of jurisdiction to the Supreme Court to review the decisions of the highest state courts in § 1257. But in my view, these provisions have much less meaning than the *Rooker-Feldman* doctrine ascribes to them. They are permissive, not restrictive. Section 1257 grants an appeal that would not otherwise lie, since it is novel to allow an appeal of a final judgment of the highest court of a jurisdiction to any other court. Section 1331's use of the word "original" should be understood merely to direct plaintiffs to the proper court to file their cases. No longer is there "original" jurisdiction over civil cases in a higher court over larger diversity actions as there was in earlier times, such as the circuit court's jurisdiction under § 10 of the Judiciary Act of 1789. The language in § 1331 that should be understood as establishing the limits on federal jurisdiction is the limitation of the original jurisdiction to "all civil actions arising under the Constitution, laws, or treaties of the United States."⁶⁹ If, for example, a claim that a state judgment violates a federal right, brought against a party to that action in state court and perhaps also against the state judge or other court official, is a civil action arising under federal law, then it is within the district court's jurisdiction even if ultimately some preclusion or abstention doctrine means that the claim will not succeed.⁷⁰

This argument is related to but does not depend upon my previous argument that a suit in equity to enjoin the enforcement of a judgment is a proper original action and not an appeal from that judgment. It would be important in this context in response to an argument that the problem is not with the word "original," but rather that an attack on a state judgment is not a "civil action" within the meaning of the district court jurisdictional statutes. In my view, a suit in equity to enjoin the operation of a state court judgment is a civil action because that is precisely the sort of case traditionally brought to a court of equity.⁷¹

68 See *id.*

69 28 U.S.C. §1331 (1994) (emphasis added).

70 A similar analysis applies to the diversity statute and to the application of *Rooker-Feldman* to diversity cases.

71 One complication here is that, especially with the merger of law and equity, and in light of preclusion principles, it may be that the attack on the judgment might be confined, as a matter of state procedure, to a motion for relief from the judgment

This understanding of the statutory bases helps explain why the *Rooker-Feldman* doctrine should not bar § 1983 cases. Section 1983 cases are within federal district court jurisdiction under 28 U.S.C. § 1343(a)(3), which grants jurisdiction over cases “[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.”⁷² This language is similar to the language of § 1983 itself.⁷³ Recall that in *Mitchum v. Foster*,⁷⁴ in deciding that § 1983 was an exception to the Anti-Injunction Act, the Court stated that the purpose of § 1983 was “to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative or judicial.’”⁷⁵ The *Rooker-Feldman* doctrine would virtually prevent § 1983 from protecting people from judicial action because a large proportion of cases against judicial action would be barred by the *Rooker-Feldman* doctrine.⁷⁶ However, because § 1983 has its own jurisdictional provision—28 U.S.C. § 1343—the Court’s reading of the general federal question statute in *Rooker* does not necessarily govern. Even though § 1343, like § 1331, grants to the district courts “original” jurisdiction, if “original” is merely permissive, directing litigants that they should file their cases in federal district court, then as long as a claim otherwise met the requirements for federal jurisdiction the fact that it followed state court litigation, and per-

or some other collateral proceeding in the court in which the judgment was rendered, or that equitable defenses must be raised in the same case rather than in a new proceeding. In such a case, given my preference for following state law, there may not be a separate civil action unless a separate action were allowed in state court. One way to resolve this difficulty may be to examine the practice when two states are involved and require the federal court to follow the practice of the second state.

72 28 U.S.C. § 1343(a)(3) (1994).

73 Here is where I believe that Williamson Chang errs when he states, as Bandes reports, that § 1983 is not an exception to the *Rooker-Feldman* doctrine because it is not jurisdictional. See Chang, *supra* note 2, at 1367, cited in Bandes, *supra* note 59 at n. 13. This ignores the fact that § 1343’s language mirrors the language of § 1983, and § 1343 is jurisdictional.

74 407 U.S. 225 (1972).

75 *Id.* at 242 (quoting *ex Parte Virginia*, 100 U.S. 339, 346 (1879)) (emphasis added).

76 Suits against state judges for actions taken in nonjudicial capacities, such as hiring and firing of clerical help, would not be understood as claims against state judicial action. See *Forrester v. White*, 484 U.S. 219 (1988). The only § 1983 claims that would be understood as challenges to judicial action would be claims directed at judicial decisionmaking, most of which would be barred by expansive understandings of *Rooker-Feldman*.

haps even attacked the results of that litigation, would not affect federal jurisdiction.⁷⁷

Bandes also appears to endorse *Rooker-Feldman*'s federalization of the characterization of claims for the purpose of determining whether a claim is subject to *Rooker-Feldman*.⁷⁸ Her focus is on whether the state's decision is judicial in nature and she says that "because *Rooker-Feldman* is styled as jurisdictional, the federal courts cannot inquire whether the state proceedings were judicial under state laws, but must use a uniform federal standard."⁷⁹ But why? For example, if a state would not characterize its proceedings as judicial and thus would not apply preclusion doctrines to the proceedings, then why should a federal court, allegedly motivated by the desire to protect the judgments of state courts from federal oversight, characterize them as judicial? I can think of no sound federalism-based reason for a federal court to give *Rooker-Feldman* protection to the decisions of a tribunal that the state itself does not consider judicial.

Bandes points out an important continuing aspect of our federal system, that concurrent jurisdiction over claims is normal, not abnormal as *Rooker-Feldman* might make it out to be.⁸⁰ In fact, there are some claims over which many different state and federal courts might have subject matter and personal jurisdiction. Some states have rules permitting the dismissal of an action on the ground that another action on the identical occurrence is pending in another court.⁸¹ No such rule exists in the Federal Rules of Civil Procedure, perhaps recognizing that it is a fact of life in our system that two cases on the same occurrence may race to judgment, with preclusion rules barring the slower claim but only after the faster claim came to judgment.

According to Bandes, "the *Rooker-Feldman* doctrine can claim jurisdictional status only in the very narrow situations in which litigants ask the federal courts to rehear issues identical to those on which they have already obtained state court decision, or in other words, those situations in which an appeal would lie."⁸² I do not understand why this is a jurisdictional matter. Between two states, the second state would rule against the plaintiff (assuming all usual prerequisites are met) on claim preclusion grounds, not for lack of jurisdiction. In my view, it is not an *appeal* when a person sues in federal court over a

77 Issue and claim preclusion might apply, and judicial immunity might bar damages claims against state judges, but *Rooker-Feldman* would not affect jurisdiction.

78 See Bandes, *supra* note 59, at 1196.

79 *Id.*

80 See *id.* at 1203-04.

81 See, e.g., ILL. COMP. STAT. ANN. 5/2-619(3) (West 1993).

82 Bandes, *supra* note 59, at 1179.

transaction or occurrence that was already the subject of a state court suit, it is simply a civil action that is barred by the merits defense of claim preclusion. An appeal, by contrast, would allege an error in a lower court, not a claim for liability based upon a nonjudicial transaction or occurrence. It is never an appeal when the federal plaintiff alleges facts that occurred outside of the state court and asks for relief directed, not at the state judgment, but rather at the state defendant.

In this regard, I cannot resist mentioning the *Kamilewicz* case,⁸³ which has become a cause célèbre among law professors. The Seventh Circuit's decision that *Rooker-Feldman* bars a malpractice claim against class counsel by members of a class deserves condemnation, as do, in my view, class action rules that allow a plaintiff with no contacts to the forum state to be bound by a judgment entered in that state after notice by mail that the class member may have neither read nor understood.⁸⁴ But the real evil of the *Kamilewicz* decision may be that it characterizes as "judicial" the decisions of a tribunal that would approve a settlement in which the lawyers for the plaintiffs insisted that they receive their fees from their own clients rather than from the defendants and in which some plaintiffs were worse off for having been members of the class. It impugns the reputation of judicial bod-

83 *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996).

84 Perhaps the implicit acknowledgment in *Rooker* that the Indiana court's judgment would not bar the federal claim if the Indiana court had been without jurisdiction should have led the Seventh Circuit to allow the *Kamilewicz* case to go forward on the theory that insofar as counsel were attempting to collect fees from the class in the Alabama courts, they needed a better basis for personal jurisdiction over their clients than the letter sent to class members informing them of the settlement and their rights under it, at least for clients lacking minimum contacts with Alabama. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is one of the roots of this evil, for in that case the Supreme Court held that parties without minimum contacts with a jurisdiction can nonetheless be bound by judgments in certain class actions as long as they received sufficient notice of their rights as class members, including the right to opt out of the class. The Seventh Circuit acknowledged that the class members in *Kamilewicz* were in the position of defendants with regard to the attorneys' fees issue, but still held them bound by the Alabama judgment, or at least required them to seek relief from that judgment in an Alabama court, not a federal court. See *Kamilewicz*, 92 F.3d at 511. Interestingly, the Alabama courts, according to the Seventh Circuit, would allow an independent action to set aside a judgment for fraud. See *id.* ("Alabama has a procedure by which a litigant can assert an independent action for fraud upon the court within three years of the entry of the fraudulently induced judgment."). In my view, the existence of this independent state court action counsels strongly against applying *Rooker-Feldman* to bar the claim in federal court.

ies everywhere to characterize a tribunal that would approve that settlement as judicial.⁸⁵

Bandes' ultimate conclusion, with which I agree, is that the federal jurisdictional statutes do not provide adequate support for the *Rooker-Feldman* doctrine as built out by the lower federal courts.⁸⁶ It may be that the doctrine should be abandoned altogether. The argument for *Rooker-Feldman* depends too greatly on negative inferences from permissive language. However, that said, it seems to me that it is very unlikely that either Congress or the Court will overrule the *Rooker-Feldman* doctrine. What would a statute overruling *Rooker-Feldman* say? Is the Supreme Court likely to admit that "we erred when we held that lower federal courts lack jurisdiction to hear appeals from state court judgments"? What appears more likely is that the Supreme Court will someday take a case in which the *Rooker-Feldman* doctrine was applied broadly, perhaps to bar a nonparty from raising issues that were previously litigated in state court, and the Court will adhere to the relatively narrow limits that it has set forth for the *Rooker-Feldman* doctrine. Then, after a few years of further developments, we can all get together again to debate the merits of the lower federal courts' latest excuse for giving state judgments greater preclusive effect than would be given by the courts of the rendering state.

85 Because the plaintiffs in the federal *Kamilewicz* case were attacking the effects of the state court judgment, the case is a candidate for abstention under the minimalist *Rooker-Feldman* abstention doctrine I outlined at the outset of this Comment. Nonetheless, I do not think that the federal court should have abstained in the particular case for several reasons. First, a federal court should not abstain when the party bringing the federal claim was not subject to the jurisdiction of the state court, and once the federal court decided that the class members were defendants regarding the fees, the class notice should not have been sufficient to give the Alabama courts jurisdiction over class members with no other contacts with Alabama. Second, since Alabama would entertain an independent action to attack the judgment for fraud, the federal court should not abstain from hearing the same claim as long as a sufficient basis for federal jurisdiction exists. Judge Easterbrook, dissenting in *Kamilewicz* from the denial of rehearing en banc, relied mainly on the lack of jurisdiction over the plaintiffs and on an exception to *Rooker-Feldman* he would recognize for malpractice actions against the attorneys in the state case. See *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

86 See Bandes, *supra* note 59, at 1207.

