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ROOKER-FELDMAN, FROM THE GROUND UP

Barry Friedman & James E. Gaylord*

I. INTRODUCTION: THE ROOKER-FELDMAN PROBLEM

How can we account for a rule that appears to be at the same time both superfluous and extremely significant? That is the problem presented by the *Rooker-Feldman* doctrine.\(^1\) On the one hand, it is undeniable that courts dismiss many cases for want of jurisdiction on the basis of this doctrine.\(^2\) On the other hand, commentators and courts alike struggle to understand what it is that *Rooker-Feldman* adds to other existing rules.\(^3\)

It is difficult to see what *Rooker-Feldman* contributes. Stated in the most uncontroversial and minimal of ways, the *Rooker-Feldman* doctrine limits the jurisdiction of federal courts to hear certain cases that have their roots in state court litigation.\(^4\) The problem is that other, more well-developed doctrines appear to do the same thing. If a case

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1 So named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).


4 See Edmonds v. Clarkson, 996 F. Supp. 541, 545 (E.D. Va. 1998) ("The Rooker-Feldman doctrine clearly establishes the rule that federal district courts lack jurisdiction to hear constitutional claims that have been adjudicated by state courts or that are 'inextricably intertwined with the merits of a state court judgment.'") (quoting *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 228 (4th Cir. 1997)).
has been litigated to some point of finality in the state system, preclusion rules will bar relitigation of any issue that either was or could have been raised in the state courts.\(^5\) On the other hand, if state litigation is still ongoing, the federal courts will stay their hands on the basis of the Younger doctrine.\(^6\)

It might be that there are gaps in the other doctrines that Rooker-Feldman plugs, but an attempt to explain Rooker-Feldman in this manner encounters some real difficulties. To name just one, exceptions to other existing doctrines tend to be there for a reason. For example, preclusion rules will not bar a party from litigating in federal court if that party did not have a full and fair opportunity to litigate initially in state court.\(^7\) Rooker-Feldman might fill that gap, but the gap exists precisely because the Due Process Clause\(^8\) requires it. Minimal concepts of fair play hold that parties cannot be bound to a judgment when they were unable to participate in the litigation in which it was rendered.\(^9\) It is difficult to see Rooker-Feldman as prohibiting something due process requires.

The ordinary approach to determining the scope of a doctrine like Rooker-Feldman would be to identify its rationale, then apply the doctrine to cases as its rationale would suggest appropriate. However, the Supreme Court has provided no clear understanding of what role the Rooker-Feldman doctrine is designed to play, and there is no consensus regarding the rule's purpose either among scholars or in the lower courts. Thus, scholars struggle to find a role for Rooker-Feldman among other jurisdictional doctrines with which it seems to overlap.\(^10\)


\(^6\) See Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts should abstain from interfering with ongoing state proceedings).


\(^8\) U.S. Const. amend. XIV, § 1, cl. 2.

\(^9\) See Kremer, 456 U.S. at 481 (finding that state proceedings must "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law"). Of course, res judicata can sometimes apply even to nonparties. For example, the effects of claim preclusion and collateral estoppel will extend to those who were not parties to previous litigation but were "virtually represented" by such parties. See, eg., Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84 (5th Cir. 1977). Such exceptions comport with due process. Rooker-Feldman thus does no work in these cases either.

This Article is an attempt at something a little different: construction of the doctrine from the ground up. The idea we explore is whether, beginning only with the most general understanding of the Rooker-Feldman rule, we can identify what work the doctrine possibly could do. If we can find some role for Rooker-Feldman, fine. If not, perhaps it should be sent off to the junkyard of superfluous rules.

The analysis we employ proceeds in three steps, two of which are quite simple. First, we set out a basic definition of when the Rooker-Feldman doctrine conceivably could apply, a definition we derive from an examination of the primary cases. Accepting what is clear and uncontroversial and rejecting the rest, we adopt this overinclusive definition: Rooker-Feldman might apply any time the lower federal courts would hear certain cases that find their roots in prior or ongoing state court litigation. Second, we set out two preconditions for identifying what constitutes “work” sufficient to justify retaining the doctrine. Those preconditions are that application of the Rooker-Feldman doctrine must accomplish a result and further an interest that differs from other doctrines, and that application of Rooker-Feldman in those circumstances serves some purpose appropriate to the law of federal jurisdiction. Part II of this Article addresses these two steps.

Part III of the Article then proceeds systematically to see if there is any case in which Rooker-Feldman actually makes a difference. We employ a methodology similar to that employed by Henry Hart in his famous Dialogue on the power of Congress to control the jurisdiction of the federal courts. Hart moved case-by-case through all the prototypical cases he could imagine, beginning with civil defendants, then criminal defendants, and then proceeding to different types of plaintiffs. In each case he sought to establish that Congress’s power over jurisdiction of the federal courts did not threaten substantive rights. The effect of Rooker-Feldman, in contrast, is to deprive lower federal courts of jurisdiction in cases related in some fashion to prior or ongoing state litigation. We begin with cases in which the federal plaintiff was not a party to the state court proceedings, then we move to cases in which the federal plaintiff either was a party defendant or a party plaintiff in state court, and conclude by looking at cases reviewing ad-

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11 See infra Part II.A.
12 See infra Part II.B.
14 See id.
15 See id.
ministrative decisions. Our central question in each prototypical case is whether any interest is served by applying the *Rooker-Feldman* doctrine to bar the federal action that is not already served by another doctrine.

Our conclusions are two, both quite surprising. First, we find that *Rooker-Feldman* might properly perform a very small amount of work. The *Rooker-Feldman* doctrine might fill a gap in the *Younger* and preclusion doctrines in cases in which a party that initially had a choice to litigate in federal court opts instead for state litigation, and then becomes disenchanted with that decision before the state court reaches a final judgment. In other words, *Rooker-Feldman* might do some work only when a state court plaintiff jumps ship on a lower state court proceeding (or the unfinished proceeding of the state's highest court). What is ironic is that it might do so only in the one place in which the lower courts have deviated from the *Rooker* and *Feldman* decisions themselves. Both the rationale and the facts of *Rooker* and *Feldman* preclude review by the lower federal courts of the final decisions of the states' highest courts, not the lower state courts. Yet it is only in this latter case that *Rooker-Feldman* does any work.

Second, the application of *Rooker-Feldman* in *Feldman* itself, and in any case involving attorney admission or the discipline of a lawyer or judge, is highly problematic. Because these cases typically arise in the states' highest courts, no subsequent judicial review usually is available. *Rooker-Feldman* is used to bar review in some of these cases in the lower federal courts despite the fact that other doctrines might not. Yet, it is precisely because these cases more properly are understood as administrative proceedings (albeit before a judicial tribunal), rather than as true judicial proceedings, that there is a legitimate concern about the ability of the states' highest courts to perform their regulatory function and provide appropriate judicial review. In many cases there are allegations of bias or challenges to the disciplinary and

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16  *See infra* Part III.
17  *See infra* Part III.C.1.
18  We say "might" because, as we explain *infra* notes 144–50 and accompanying text, it is open to question whether such a federal plug is necessary.
19  *See infra* text accompanying notes 49–50.
20  A writ of certiorari from the United States Supreme Court obviously is too rare to be meaningful.
21  *See* e.g., Guarino v. Larsen, 11 F.3d 1151 (3d Cir. 1993); Edmonds v. Clarkson, 996 F. Supp. 541 (E.D. Va. 1998).
22  *See infra* text accompanying notes 200–203, 221.
admission rules.\textsuperscript{23} Although these allegations may prove unfounded, there is a sufficient basis for questioning whether a state's highest court can provide the dispassionate resolution that ought to be required when no other judicial review commonly occurs.\textsuperscript{24} Thus, for the very reason that preclusion rules may not operate here, \textit{Rooker-Feldman} should not either.

Our conclusions may be summarized simply: \textit{Feldman} itself should be overruled. The \textit{Rooker-Feldman} doctrine should be abolished. Doubt should be cast on state supreme court management of the essentially regulatory function of licensing attorneys and disciplining attorneys and judges. Finally, there might be a need for a new doctrine to plug the small hole left by the \textit{Younger} and preclusion doctrines—in other words, to bar state plaintiffs from jumping ship to federal court in midstream if they become dissatisfied with state court proceedings.

\section*{II. Preconditions}

We begin with the \textit{Rooker} and \textit{Feldman} decisions themselves, in order to develop a broad definition of the \textit{Rooker-Feldman} doctrine's potential scope. Then, we sketch out some basic rules to identify situations in which the doctrine might be said to justify itself—in other words, to "do some work."

\subsection*{A. A Basic Definition of Rooker-Feldman}

The decisions in \textit{Rooker} and \textit{Feldman} are maddeningly elusive. Prior to widespread reliance on the doctrines by the lower courts,\textsuperscript{25} they might have been thought to have little germinal force. \textit{Rooker}\textsuperscript{26} was decided in 1923, and for the most part lay dormant for sixty years.\textsuperscript{27} \textit{Feldman}\textsuperscript{28} addressed a quite specialized problem, federal review of state bar admission decisions. Yet, the \textit{Rooker-Feldman} doctrine

\textsuperscript{23} See, e.g., Leaf v. Supreme Court, 979 F.2d 589 (7th Cir. 1992) (concerning an attorney who brought constitutional challenges to disciplinary procedures against him and who claimed bias in prosecution).

\textsuperscript{24} See Guarino, 11 F.3d at 1159 n.4 (noting that "when a court makes a decision concerning the legality of its own actions, it may be too biased to justify abstention by the federal courts even if its actions are considered adjudicative").

\textsuperscript{25} See Sherry, supra note 10, at 1087–88 (noting that the \textit{Rooker-Feldman} doctrine has "experienced explosive growth in the lower courts").

\textsuperscript{26} Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

\textsuperscript{27} See \textit{Fallon et al.}, supra note 10, at 1501 (stating that \textit{Rooker} was largely forgotten until 1980).

\textsuperscript{28} District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).
has grown to be something that sweeps far more broadly than these two decisions.

From all that appears in *Rooker*; the issue was whether a federal plaintiff could bring an action claiming constitutional error in a state proceeding to which he was a party. The relevant part of the Court's conclusion states, in toto:

If the constitutional questions stated in the bill [i.e. federal complaint] actually arose in the cause [i.e. state case], it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding ... Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

*Rooker* tells us some things, and leaves others in question. On the one hand, the underlying principle is straightforward: from *Rooker* it appears that issues that arise in a state case cannot be the subject of subsequent litigation in an original federal action, but only may be heard on direct appeal to the Supreme Court. The principle is grounded in the respective grants of statutory jurisdiction to the Supreme Court and lower federal courts. On the other hand, *Rooker* fails to answer some basic questions such as: (a) whether the issues actually must have been raised or litigated in the state proceeding; (b) what it means precisely for an action in federal court to be one to "reverse or modify the judgment" of the state court; and (c) whether it is only final decisions of the states' highest courts that are implicated by the jurisdictional bar. All these questions have proven problematic.

29 The Court's opinion is brief and tells us little about the facts of the case.
30 *Rooker*, 263 U.S. at 415-16 (citation omitted).
32 This question was subsequently answered by *Feldman*. See infra text accompanying notes 40-41.
33 *See*, e.g., Gresham Park Community Org. v. Howell, 652 F.2d 1227, 1233-36 (5th Cir. 1981) (describing conflicting lines of authority as to whether *Rooker*'s "modify a state court decision" language encompasses an action to enjoin a state court injunction).
34 *Compare In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) (holding that *Rooker-Feldman* applies to decisions
Feldman dealt with the question of whether bar admission decisions by the highest court of the District of Columbia—analogous to a state's highest court—could be challenged on constitutional grounds in federal district court.\(^{35}\) Echoing Rooker, the Feldman Court held that this part of the federal action must be dismissed: "The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court."\(^{36}\) The Court went on to hold, however, that not every aspect of the federal proceeding necessarily was barred by what occurred in state court.\(^{37}\) The federal plaintiffs in Feldman complained not only about the application of the District of Columbia’s bar admission waiver rules to their specific case; they also challenged the general constitutional validity of those rules.\(^{38}\) Adding another layer of analysis to the Rooker decision, the Feldman Court concluded that although the federal plaintiffs could not bring to federal district court any claim "inextricably intertwined" with the state court decision, they could bring their "general attack" on the validity of the bar rules.\(^{39}\)

Feldman did answer one of the questions raised by Rooker, but it confused the second (and left the third alone). Feldman made pretty clear that the federal plaintiff cannot circumvent Rooker's jurisdictional rule simply by omitting or failing to bring the federal part of the claim to state court.\(^{40}\) In other words, Rooker-Feldman will bar not only federal issues actually raised in state courts, but also those inextricably intertwined issues that could have been raised there.\(^{41}\) On the

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\(^{36}\) Id. at 476.

\(^{37}\) See id.

\(^{38}\) See id. at 468, 472.

\(^{39}\) Id. at 486–87.

\(^{40}\) See id. at 484 n.16 ("By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.").

\(^{41}\) Even on this point, however, the decision is not clear whether Rooker-Feldman is doing any independent work. This is because the Court, in its discussion of the doctrine, criticizes the Fifth Circuit’s decision in Dasher v. Supreme Court, 658 F.2d 1045 (5th Cir. 1981), for thinking the bar on bringing appeals to the district courts only applies to claims that were raised. In important language, the Court stated, "if the constitutional claims presented to a United States district court are inextricably intertwined with the state court’s denial in a judicial proceeding of a particular plaintiff’s
other hand, *Feldman* blurred the prohibition against a district court “revers[ing] or modify[ing]” a state court “judgment” by focusing, not on the specific “judgment,” but upon the state court’s decision.

In addition, *Feldman* muddied more waters than it cleared. In holding that the District of Columbia Court of Appeals’ decision on the bar admission question was “judicial” rather than “administrative,” and thus barred by the relevant jurisdictional statute, the Court reduced those terms almost to meaninglessness. After all, as Justice Stevens (referring to the District of Columbia Court of Appeals) pointed out in dissent, “that court performed no more and no less than the administrative function of a licensing board.” The majority conceded that “the proceedings in both Feldman’s case and Hickey’s case did not assume the form commonly associated with judicial proceedings.” Having given away the heart of the case, the Court then provided only the following impenetrable explanation: “[T]he form of the proceeding is not significant. It is the nature and effect which is controlling.”

The distinction between prohibited claims that are “inextricably intertwined” with the state court action and “general attacks” that are permissible has proven impossibly difficult to understand, as is apparent from the widespread confusion in the lower courts.

To make matters worse, the one thing *Rooker* and *Feldman* did not seem to say nonetheless has been adopted by virtually all lower courts as an essential part of the doctrine, managing to destroy the only coherent rationale the doctrine might have had. The lower courts have

application for admission to the state bar, then the district court is in essence being called upon to review the state court decision.” *Feldman*, 460 U.S. at 483 n.16. But then the Court went on to state that simply because it might not have jurisdiction over a claim not raised in state court did not mean the district court would, relying not on the appellate rule it had just set out, but on other grounds, including preclusion doctrines. *See id.*

44 *See id.* at 480, 486.
45 *Id.* at 489 (Stevens, J., dissenting).
46 *Id.* at 482.
47 *Id.* See *infra* text accompanying notes 200–03, 220 for a discussion of this issue.
48 Compare Lowrie v. Goldenhersch, 716 F.2d 401, 406–08 (7th Cir. 1983) (finding no inextricable intertwining in disappointed bar applicant’s complaint despite its “purely personal” thrust), with Czura v. Supreme Court, 813 F.2d 644 (4th Cir. 1987) (holding that challenge to state’s permanent disbarment rule was inextricably intertwined despite its broad framing). *See also* Sherry, *supra* note 10, at 1103–11 (discussing the confusion in the lower courts).
overwhelmingly held that *Rooker-Feldman* applies to bar federal actions following state *lower court* proceedings, in addition to cases filed following the proceedings of the states' highest court.\(^4\) If *Rooker-Feldman* were nothing more than a rule based on the specific jurisdictional statutes of the Supreme Court, it would make sense to prohibit "appeals" from decisions of the states' highest courts to the federal district courts on the ground that only the Supreme Court has jurisdiction over these matters.\(^5\) But extending *Rooker-Feldman* to deprive the federal courts of jurisdiction following activity in the states' lower courts deprives the *Rooker-Feldman* doctrine of its rationale.

We thus are left with a confusing doctrine unsupported by any rationale which nonetheless limits access to the federal courts. Meanwhile, the lower federal courts struggle—without much guidance from the Supreme Court—to understand when a state proceeding is "judicial,"\(^5\) what sort of action in federal court seeks to "revise or modify" a state "judgment,"\(^5\) and to make sense out of the somewhat impenetrable distinction between "general attacks" and claims that are "inextricably intertwined" with the state court decisions.\(^5\)

Fortunately, in order to work from the bottom up, we need very little in the way of a starting point. Stated in the most general terms, as applied by the lower courts, *Rooker-Feldman* prohibits the lower federal courts from hearing certain cases that find their basis in the same set of facts that also provided the basis for prior litigation in the state courts. It obviously is true that *Rooker-Feldman* does not prohibit hearing *all* of those cases, as the "general attack" exception makes clear.\(^5\) But, in order to find where *Rooker-Feldman* does some work, we include more cases than the doctrine may actually govern, in the expectation that these cases will be weeded out as we proceed. What we want is a statement of the *Rooker-Feldman* doctrine that captures in some basic and uncontroversial...

\(^4\) See, e.g., Rolleston v. Eldridge, 848 F.2d 163, 165 (11th Cir. 1988); Phinizy v. Alabama, 847 F.2d 282, 284 (5th Cir. 1988); Worldwide Church of God v. McNair, 805 F.2d 888, 899 n.3 (9th Cir. 1986); Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1142–43 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987).

\(^5\) Of course, federal review of cases decided by a state intermediate or lower court or agency also might be barred under another doctrine. For example, the *Younger* doctrine might do this work.

\(^5\) Compare Ktsanes v. Underwood, 552 F.2d 740 (7th Cir. 1977) (holding that state supreme court's denial of petition for exemption from bar admission rule was an administrative rather than judicial act), with Grossgold v. Supreme Court, 557 F.2d 122 (7th Cir. 1977) (holding that state supreme court's denial of petition for reconsideration of suspension from bar was both administrative and judicial).

\(^5\) See supra note 33.

\(^5\) See supra note 48.

\(^5\) See supra notes 37–39, 48 and accompanying text.
sial way when it could conceivably apply. Overinclusiveness, rather than underinclusiveness, is important at this point.

B. When Can It Be Said that Rooker-Feldman Has Bite?

Having arrived at a basic definition of Rooker-Feldman, we need to find a way to identify those instances in which the doctrine is doing some work. There are two essential preconditions that must be met before Rooker-Feldman might be said to have bite; the first is simple to define, the other more complicated. The first is that application of the Rooker-Feldman doctrine must actually dictate a result different from that mandated by other doctrines and the interests that justify them. The second is that this now-isolated Rooker-Feldman situation must further another interest that is appropriate to the law of federal jurisdiction.

Before turning to the two preconditions, a word is necessary regarding the structure of the law of federal jurisdiction. Very often that law serves to allocate cases between state and federal courts. This allocative function furthers various “interests” that justify exercising state or federal jurisdiction. These interests are the proper motivation for jurisdictional allocation, but courts and commentators often look past them, fail to specify them carefully enough, or specify them at too high a level of generality to be useful in solving the allocational problem. Thus, for example, it does little good to say a case should be in state rather than federal court because of concerns about “federalism” or “comity” because these terms are extremely broad and all-encompassing. On the other hand, it does make sense to discuss specific interests, such as the poor incentives and burdens created by inviting litigants to run to federal court if dissatisfied with the result in a prior litigation.55

The first precondition gets at this problem by avoiding doctrinal redundancy with regard to both outcomes and interests. The precondition is an obvious one, but the following chart emphasizes what it is we are after so as to avoid confusion.

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55 Even here, however, it may be useful to dig more deeply and examine whether the complaining party had any voice in the choice of forum. See infra Part III.C.2.
Does Another Doctrine Bar Federal Jurisdiction?

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<th>No</th>
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<td>No</td>
<td>Rooker-Feldman has no impact.</td>
<td>Rooker-Feldman has no impact.</td>
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<td>Yes</td>
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What the chart shows is that we care about only those cases in which the Rooker-Feldman doctrine would deprive a federal court of jurisdiction, and no other doctrine would.\textsuperscript{56} If another doctrine (such as preclusion or the Younger doctrine) would deprive the federal court of jurisdiction, Rooker-Feldman does no additional work. If another doctrine would not serve to bar the federal court from proceeding, but neither would Rooker-Feldman, Rooker-Feldman does no work. It is only when Rooker-Feldman prohibits federal litigation of a case that otherwise would go forward that we can say the Rooker-Feldman doctrine potentially is doing any work.

As simple as this sounds, it sometimes will be necessary to examine closely the justification given for applying Rooker-Feldman in a case in order to determine whether the Rooker-Feldman doctrine is doing independent work or is simply redundant of an existing doctrine. Sometimes courts apply Rooker-Feldman and justify the result with reference to an interest that plainly is the interest to which another doctrine is directed. For example, if a federal court applies Rooker-Feldman because of the need to avoid duplication of work done in state court, the federal court really is applying a preclusion doctrine. This may or may not be the correct preclusion outcome, but the Rooker-Feldman doctrine is not doing any work.\textsuperscript{57}

The second precondition is slightly more complicated to explain, but its goal is only to assure that when Rooker-Feldman serves to bar a case from federal jurisdiction a legitimate reason exists for throwing the case out of federal court. The first precondition narrows the pool to those cases that are dismissed from federal court under the Rooker-Feldman doctrine, when otherwise they would stay. There are going to

\textsuperscript{56} Rooker-Feldman by its nature never allows a case into federal court that is otherwise barred.

\textsuperscript{57} One might argue that this hypothetical is simply a case in which "federal" preclusion law is broader than state preclusion law. The Supreme Court, however, has ruled out this result, holding that state preclusion rules govern in federal court. See Allen v. McCurry, 449 U.S. 90, 105 (1980); infra notes 92–94 and accompanying text. Rooker-Feldman might be a new name for an outcome prohibited by Supreme Court doctrine, but we foreclose that possibility as illegitimate.
be a fair number of these cases. What we need is some way we can try to agree about right and wrong outcomes in these cases. The second precondition asks whether the additional interest being asserted to justify barring the claim under *Rooker-Feldman* when another doctrine would not do so is one properly used to allocate cases between state and federal court. Something like this precondition is essential to distinguish unacceptable outcomes from acceptable ones.

Once a case is identified in which no other doctrine is barring the exercise of federal jurisdiction, but the *Rooker-Feldman* doctrine might, the question is whether it is possible to identify a legitimate interest that justifies that result. Legitimate interests are those that serve to justify the allocation of cases between federal and state courts. Although often specified poorly, these sorts of interests are familiar to federal jurisdiction scholars and to the judges deciding the cases. For example, federal jurisdiction scholars would agree that excluding federal plaintiffs because they have red hair would not be acceptable. On the other hand, even though scholars may disagree over the wisdom of this policy or its application in individual cases, they likely would agree that doctrines that avoid interference with ongoing state proceedings generally serve legitimate interests. If such an interest can be identified, then perhaps the case is one in which the *Rooker-Feldman* doctrine properly applies and does some work. If no such interest presents itself, then perhaps courts are applying *Rooker-Feldman* to bar cases from federal court when they should not be barred.

Summing up: what we are looking for is any instance in which the general understanding of the *Rooker-Feldman* doctrine would close the doors of a federal court under circumstances in which those doors otherwise would be open, but application of the *Rooker-Feldman* jurisdictional bar can be said to further interests generally recognized as appropriate by the law of federal jurisdiction. It is a two-step process. First, look to see if the *Rooker-Feldman* doctrine is reaching a different result—in other words, throwing a case out of federal court that other doctrines and the interests they serve would permit to remain there. If such a case is found, the next step is to see whether any other interest can be identified which justifies allocating the case to state court. If such an interest can be found, *Rooker-Feldman* is accomplishing something that justifies its existence. If not, it’s not.

### III. *Rooker-Feldman*, Systematically

It is the party structure of litigation that provides the most systematic way to analyze potential *Rooker-Feldman* problems. *Rooker-Feldman* is always about barring the door to federal court to a federal plaintiff
who was either a plaintiff, defendant, or nonparty in a prior state proceeding. Here we examine the different consequences for our basic definition of *Rooker-Feldman*, depending on the party against whom *Rooker-Feldman* is asserted in federal court. Some important distinctions receive virtually no attention in the lower court decisions. On the other hand, most problems that appear to be *Rooker-Feldman* problems are not.

### A. Absent Parties

One doctrinal area that appears superficially settled is that of federal plaintiffs who were not parties to the state court proceeding. Most courts appear to have a blanket rule that *Rooker-Feldman* will not bar a federal suit under these circumstances. Yet, despite this superficially clear rule, as Suzanna Sherry has observed, “lower courts have . . . applied *Rooker-Feldman* even where the federal plaintiff was not a party to the state proceedings . . . .” In other words, despite the existence of a blanket rule, some courts have barred seeming nonparties from litigating in federal court.

As a general rule, however, *Rooker-Feldman* generally cannot bar a federal case of a federal plaintiff who was not a party to the state court proceeding. To hold otherwise would run afoul of the minimal requirements of due process. Take the worst case, that of a federal

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58 See, e.g., Bennett v. Yoshina, 140 F.3d 1218, 1224 (9th Cir. 1998) (“[S]ince the new plaintiffs were not parties to the state suit, their suit is not barred by the *Rooker-Feldman* doctrine.”); E.B. v. Verniero, 119 F.3d 1077, 1092 (3d Cir. 1997) (“*Rooker-Feldman* does not bar individual constitutional claims by persons not parties to earlier state court litigation.”) (quoting Valenti v. Mitchell, 962 F.2d 288, 298 (3d Cir. 1992)); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (“The *Rooker-Feldman* doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court.”).

59 Sherry, *supra* note 10, at 1112.

60 See, e.g., T.W. & M.W. v. Brophy, 124 F.3d 893 (7th Cir. 1997); Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969); Maszur v. Woodson, 932 F. Supp. 144 (E.D. Va. 1996). Sherry uses this fact to support her theory that what matters for *Rooker-Feldman* purposes is not the party status of the federal plaintiff, but whether the relief sought would cause the federal court effectively to review a state court judgment.

61 As this Article was going to press, the Supreme Court decided a case which casts this point in high relief. In *South Central Bell Telephone Co. v. Alabama*, No. 97-2045, 1999 WL 152458 (U.S. Mar. 23, 1999), the Court held that due process prevented a state court from binding nonparties to a prior litigation, even though they brought the same claims, were aware of the earlier action, and were represented by the same lawyer. See id. at *3, *6; see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”).
plaintiff who was unable, despite best efforts, to participate in a state court judgment that affected her. Due process would not permit *Rooker-Feldman* to bar this suit.\textsuperscript{62} How then can lower courts be using *Rooker-Feldman* to bar nonparty suits?

There is no need to tarry over this problem, because it turns out on close examination that the *Rooker-Feldman* doctrine is not doing any "work" in these nonparty cases. Any appearance to the contrary is only because in some cases in which the federal courthouse is barred to nonparties, it appears no other doctrine could be doing the work. As Sherry observes, the fact that nonparties are involved would seem to rule out the obvious other doctrinal principle that might apply, that being preclusion. "Res judicata is designed to keep losers from relitigating. As such, it is largely limited to parties and those in privity with them; individuals who have not participated in the original litigation can hardly be described as relitigating."\textsuperscript{63}

In all these apparent *Rooker-Feldman* cases, however, the real work actually is being done by preclusion principles, and any state interest implicated in these cases is precisely the same as that at stake in preclusion cases. In other words, whether the cases purport to be applying res judicata principles or not, that is effectively what is going on. Because the federal plaintiffs appear to be nonparties, the cases are not discussed in preclusion terms. But what each case really is about is how far a state court can go to bar subsequent relitigation by a person or entity who effectively should have been a party to the state proceeding or is an apparent privy of such a party. Stated one final way, all these cases are about the state's interest in defining the party structure of the original dispute in its courts, as well as the subsequent impact that original litigation will have.

Perhaps the easiest case in which to see this is *Hart v. Comerica Bank*.\textsuperscript{64} Basically, *Comerica* involved an attempt to relitigate in federal court issues that were resolved in state court probate proceedings regarding administration of a trust.\textsuperscript{65} Both cases sought removal of trust administrators because of alleged misconduct.\textsuperscript{66} The federal plaintiffs were not parties to the state court proceeding, and indeed some of

\textsuperscript{62} See *Parklane Hosiery*, 439 U.S. at 327 n.7. Sherry does not appear to be arguing otherwise.

\textsuperscript{63} Sherry, *supra* note 10, at 1114. Sherry goes on to say that *Rooker-Feldman* is "designed to keep the lower federal courts from reviewing state court judgments," which she believes is fulfilled whether or not the federal plaintiff was a state court party. *Id.*


\textsuperscript{65} See *id.* at 966–67.

\textsuperscript{66} See *id.* at 967.
the federal defendants were not either.\textsuperscript{67} The \textit{Comerica} court noted this and acknowledged the general rule that \textit{Rooker-Feldman} could not apply to nonparties, but applied \textit{Rooker-Feldman} to bar the federal suit anyway.\textsuperscript{68}

Despite the court's choice of doctrinal analysis, however, \textit{Comerica} was about a preclusion interest: the extent to which the state court could compel participation at the original proceeding. The \textit{Comerica} court stated: "The instant Plaintiffs, as they conceded at the hearing, were parties to the prior Wayne County Probate Court proceedings because they had the opportunity to intervene in those proceedings and doing so was necessary to preserve their rights."\textsuperscript{69} Of course, this statement is a non sequitur. Nonparties cannot be "parties." Moreover, as the Supreme Court aptly has observed, as a general matter, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."\textsuperscript{70}

The heart of \textit{Comerica} was an implicit holding that despite the general requirement of joinder as a party, Ohio \textit{did} have a legitimate interest in demanding that the absent parties participate in the original proceeding,\textsuperscript{71} thus eliminating any due process problem with precluding absent parties. The state court in \textit{Comerica} had provided notice to the parties of what it was doing, and those parties chose not to participate.\textsuperscript{72} Had they done so, preclusion rules would have applied in the subsequent federal action.\textsuperscript{73} The question in \textit{Comerica} effectively was whether a state could apply res judicata to bar a subsequent suit by plaintiffs who were welcome to participate in a probate proceeding and who had adequate notice that their interests were being adjudicated. It also was effectively the question the court decided (in the affirmative), despite the label the court put on the case. Whether the federal plaintiffs had a right to skip the state litigation, and then to litigate in federal court, is essentially a question of preclu-

\begin{itemize}
  \item \textsuperscript{67} See \textit{id.} at 970–71.
  \item \textsuperscript{68} See \textit{id.} at 971–72.
  \item \textsuperscript{69} \textit{id.} at 970–71 (emphasis added).
  \item \textsuperscript{70} Martin v. Wilks, 490 U.S. 755, 765 (1989).
  \item \textsuperscript{71} This is particularly true given that, as a probate action, \textit{Comerica} was essentially a proceeding in rem. \textit{Cf.} \textit{JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 111} (2d ed. 1993) ("Because a court proceeding in rem adjudicates conflicting claims to local property . . . due process does not require the court to summon, or even identify all those whose interests might be affected by the judgment.").
  \item \textsuperscript{72} See \textit{Comerica}, 957 F. Supp. at 966–67.
  \item \textsuperscript{73} \textit{See, e.g.,} Smith, Hinchman & Grills, Assoc's. v. Tassic, 990 F.2d 256 (6th Cir. 1993) (applying Michigan preclusion law to prevent a plaintiff from relitigating an adverse state court decision in federal court).
\end{itemize}
sion law and not one in which the *Rooker-Feldman* doctrine does any independent work. Stated differently, the interests at stake were preclusion interests and nothing more.

Of similar ilk are two other cases that appear at first blush to be *Rooker-Feldman* nonparty cases, *T.W. & M.W. by Enk v. Brophy* and *Allen v. Allen.* Both cases were domestic relations cases of the sort that generally the federal courts are reluctant to hear. *Enk v. Brophy* effectively was an attempt by a self-appointed federal guardian ad litem to challenge a state court custody decision by claiming that the custodian appointed by the state court was sexually abusing the children. The federal complaint accused the several state and private defendants (acting in supposed concert) of violating the childrens' constitutional rights. In an opinion by Chief Judge Posner, the court held that *Rooker-Feldman* barred the action. *Rooker-Feldman* was a secondary ground for decision, however: Judge Posner first concluded that the appropriate course of action in such a case was for the purported federal guardian ad litem to go to state court to be appointed there before filing any federal suit. Again, this case highlights that at bottom what was at stake was the question of who properly was a party to the state court proceeding. Had all the proper parties been present in the state court, preclusion rules would have barred the federal suit and *Rooker-Feldman* would be irrelevant. In fact, the putative plaintiff in federal court was the child, who was a party in state court, so the Seventh Circuit's decision to require anyone else purporting to speak for the child to seek that permission in state court was eminently sensible.

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74 124 F.3d 893 (7th Cir. 1997).
75 48 F.3d 259 (7th Cir. 1995).
76 By way of the domestic relations exception to federal jurisdiction. Although this exception does not apply to tort cases, see Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992), Chief Judge Posner pointed out in a later case that the fact that *T.W. & M.W. by Enk v. Brophy* essentially involved a challenge to a custody decree brought it within the "core" of the domestic relations exception. See Friedlander v. Friedlander, 149 F.3d 739, 740 (1998).
77 See *Enk*, 124 F.3d at 895.
78 See id.
79 See id. at 898.
80 See id. at 897.
81 See id. ("If the state court has the power under state law to appoint a guardian ad litem in a federal suit but decides not to do so because it is satisfied that the children are being adequately represented by their aunt or by the existing guardian ad litem, that judgment would bind the federal district court as a matter of res judicata.").
82 See id. at 895.
To similar effect is *Allen v. Allen*, in which the biological father of a child sued in federal court to challenge a state court decision awarding joint custody to the man who was the mother's husband at the time the child was conceived.\(^83\) The biological father subsequently had married the mother, but at the time of the state custody hearing he had not legitimated the child and could not participate.\(^84\) The federal court held *Rooker-Feldman* applied in an opinion that emphasizes the point being made here:

Had Allen followed prescribed state law procedures in establishing his parentage, of course, he would have been a party in the underlying suit and would have been barred by *Younger* and *Rooker-Feldman* from seeking review here. It would indeed be incongruous if Allen's failure to turn to his state court remedies gave him greater rights than someone who had adhered to these procedures . . . .\(^85\)

In point of fact, had Allen properly been a party to the state court proceeding, *preclusion doctrines* (rather than *Rooker-Feldman*) properly would have barred his subsequent suit, and it is those underlying preclusion interests that were being protected in *Allen v. Allen*. In neither *Enk* nor *Allen* does the *Rooker-Feldman* doctrine really do any additional work.

One case of a slightly different nature serves to emphasize the underlying preclusion interests at stake in these seeming *Rooker-Feldman* cases. In *Bates v. Jones*,\(^86\) federal plaintiffs sought to challenge the constitutionality of California's term limits amendment for state legislators. Some, but not all, of the federal plaintiffs were parties to an identical state court proceeding.\(^87\) The Ninth Circuit en banc majority avoided the *Rooker-Feldman* issue because it concluded that California state courts would not apply ordinary preclusion rules, but would hear the case again under the state's "public interest" exception to preclusion.\(^88\) Concurring and dissenting judges confronted the *Rooker-Feldman* issue, and—as one dissenting judge said—a concurring judge apparently would have barred the suit based on *Rooker-Feldman* "regardless of whether the parties before the federal court are different from the parties in the prior state court proceeding."\(^89\)

*Bates* was wrongly decided, but for reasons having nothing to do with *Rooker-Feldman*. Rather, it was wrong because the most controver-

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\(^83\) See *Allen v. Allen*, 48 F.3d 259, 260 (7th Cir. 1995).
\(^84\) See id. at 261.
\(^85\) Id.
\(^86\) 131 F.3d 843 (9th Cir. 1997).
\(^87\) See id. at 845.
\(^88\) See id.
\(^89\) Id. at 861 (Fletcher, J., concurring in part and dissenting in part).
sial question—whether state preclusion law would permit relitigation—itself should have been decided by the state court. As the Bates decisions make clear, this was an open question of state law. There were means for asking the California Supreme Court this question, including Pullman abstention and certification. If that court had held that relitigation was barred, then—yet again—the only question remaining in the case would have been whether the additional plaintiffs in federal court were in privity with those in state court, itself a preclusion question relating to the state's interest in determining the scope of prior litigation. At bottom, Bates was about the state's preclusion interest in the effect of its prior judgments, and application of Rooker-Feldman does no extra work.

This discussion emphasizes the essential correctness of the Supreme Court's conclusion in the important case of Allen v. McCurry that state law should govern the application of preclusion rules in federal court. The Allen v. McCurry majority's decision that state law controlled preclusive effect, even in federal civil rights cases, was not without challenge as undermining a federal interest in relitigation. More than one commentator has questioned why state law should resolve this question, especially with regard to § 1983 cases. But Allen v. McCurry itself can be seen as simply identifying the correct interest in such cases, that being how far state law does extend the

90 Compare id. at 845 (holding that California's public interest exception would permit relitigation), with id. at 860 (Schroeder, J., dissenting in part) (contending that the majority "incorrectly concludes that the California Supreme Court would apply a 'public interest' exception to permit relitigation").

91 See Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997) (endorsing certification for novel, unsettled questions of state law, even if the standards for Pullman abstention were not met); Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (noting that where there is doubt as to local law, resort to state certification procedure saves time, energy, and resources, and helps build a cooperative judicial federalism); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (endorsing federal court abstention on difficult, unsettled questions of state law).

92 449 U.S. 90 (1980).

effect of state court decisions. If the states do not care to attach preclusive effect to certain judgments, why should federal courts? Suzanna Sherry's alternative formulation of the *Rooker-Feldman* doctrine itself actually addresses preclusion interests, but too narrowly. Sherry argues that in cases like *Bates*, *Rooker-Feldman* ought not to apply because the federal parties are not trying to overturn the prior state judgment, strictly speaking. But the question to ask is why would the state court in *Bates* care less about the preclusive effect of the constitutional "decision" it rendered in the prior case than in the "judgment" applying that decision to specific parties? What would matter to the state in cases such as *Bates* is preserving the value of the prior adjudication. Federal interests might justify denying the state its wish—for example, if the federal parties could not participate in state court, in violation of due process. At bottom, however, the relevant state interest is the relitigation interest.

Thus, in these nonparty cases, the *Rooker-Feldman* doctrine does no additional work. If the case can proceed in federal court, that usually is because due process compels it. If the case is barred in federal court despite the apparent nonparty status, that is in effect just a judgment about the permissible preclusive effect of the state court proceeding. At any rate, that is what should be the basis of the decision, and *Rooker-Feldman* does no work in such cases.

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94 Federal courts might have some other reason for not hearing the case, but it cannot be to protect the sanctity of the state judgment. Whatever reason that might be, the federal interest supporting it requires specification.

95 See *Sherry*, *supra* note 10, at 1115–16.

96 See *supra* notes 61–62 and accompanying text.

97 For this reason there is little point in pursuing a discussion of the many cases in which the federal plaintiff sought to intervene in state court and, intervention having been denied, filed suit in federal court. If the federal court hears the case, it usually is because due process requires it. If the federal court finds it cannot hear the case, *Rooker-Feldman* also does no work. Either the federal plaintiff should have been admitted in the state court proceeding, in which case the underlying issue must remain open to relitigation, see *Marriot Int'l, Inc. v. Mitsui Trust & Banking Co.*, 13 F. Supp. 2d 1059, 1063 (D. Haw. 1998) (noting that order barring unsuccessful intervenor from relitigating intervention motion in federal court on *Rooker-Feldman* grounds did not prevent it from bringing an action on the underlying claim in the future), or the federal plaintiff effectively had no interest in the state proceeding, in which case federal standing likely will be lacking. The only interesting question is whether the state court in fact litigated the intervenor interest question, and whether that court's reasoning comports with federal law guarantees. See *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 894 (3d Cir. 1996) (considering whether unsuccessful intervenor at the state court level was barred by *Rooker-Feldman* from making a constitutional challenge to the state court's gag order in federal court).
B. Parties Defendant

Existing doctrines generally bar state defendants from relitigating in federal court. The Younger doctrine will bar most federal litigation by state defendants in ongoing state proceedings. Assuming a full and fair opportunity to litigate in state court, preclusion doctrines then will serve to bar federal litigation following a final state judgment. Thus, we can say as a general rule that state defendants do not get to come to federal court.

In order to understand if there is any role for Rooker-Feldman in defendant cases, it is necessary to consider why these parties defendant are denied access to federal courts. In the next Section, dealing with state parties plaintiff, we will see that the case law accommodates competing interests by permitting "involuntary" state plaintiffs to (re)litigate federal claims in federal court. State parties defendant do not have this opportunity, however. That is because in the case of state parties defendant, the interests change in a significant way. The primary difference is that the would-be federal plaintiff is accused of engaging in conduct that violated state law. As such, the state's interest in pursuing the violator in its own courts tends to trump other interests.98

Of course, the federal bar is not universal and the state's interest is not the same in all cases, providing some structure to our discussion of defendants. First, the state's interest would seem to be highest in its criminal law, somewhat lessened in matters of civil enforcement, and less if not nonexistent in controversies between private parties. Second, at least with regard to criminal matters, there is an opportunity for federal review in habeas corpus proceedings. Thus, it makes sense at least to break out criminal from civil cases. What will be evident in both cases, however, is that the Rooker-Feldman doctrine does no work.

1. Criminal Defendants

It is essential first to consider the treatment of criminal defendants, both because it establishes a baseline for the problem of state defendants generally and because of the puzzle of habeas corpus. On the one hand, a case of criminal violation implicates the state's most

serious interests, which would justify a hands-off approach by federal courts to state litigation. On the other hand, the availability of habeas corpus provides the most significant source of relitigation in our dual court system. Habeas permits former state court defendants to raise in federal court any federal (mostly constitutional) claim they actually litigated in state court, and in rare instances claims that they were barred from litigating. The only requirement is that the claim be exhausted in state court before coming to federal court.

Some courts say that habeas is an "exception" to the Rooker-Feldman doctrine, but this is a peculiar formulation that serves to confuse the correct outcome in actual cases. Rooker and Feldman rest on the notion that relevant jurisdictional statutes implicitly vest jurisdiction over appeals from the state courts solely in the Supreme Court. Because habeas jurisdiction finds its roots in statute, if forced one might say, "Rooker-Feldman is implicitly derived from the jurisdictional statutes, but the habeas statute is an explicit jurisdictional exception to that implicit rule." This statement is pretty awkward, made only more so by the fact that Congress has tended to follow the Supreme Court as to the scope of habeas jurisdiction. In any event, it is unclear why, if habeas is an "exception" to Rooker-Feldman, other statutes

99 See 28 U.S.C. § 2254(a) (1994) (stating that court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

100 See Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (holding that a habeas court can hear a claim that the petitioner is barred from raising in state court because of a failure to comply with a state procedural rule upon a "showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged constitutional violation"); see also Murray v. Carrier, 477 U.S. 478, 496 (1986) (noting that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for procedural default").


102 See, e.g., Garry v. Geils, 82 F.3d 1362, 1365 n.4 (7th Cir. 1996) ("[H]abeas corpus ... is an exception to the general principle of Rooker-Feldman."); Blake v. Papadakos, 953 F.2d 68, 71 n.2 (3d Cir. 1992) ("The habeas corpus jurisdiction of the lower federal courts is a constitutionally authorized exception to the principle of Rooker-Feldman.").

103 See supra text accompanying notes 30–31.

104 See Fallon et al., supra note 10, at 1455 (noting that Congress has not significantly modified the habeas statute, while the Supreme Court has "dramatically reshaped the writ"); Barry Friedman, A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 13 (1990) (explaining how Congress generally follows the Supreme Court's interpretation of the habeas statute).
(§ 1983 cases come to mind, if not those under the general federal question statute) are not. This is the basis for Susan Bandes's argument that there is no sound jurisdictional basis for the Rooker-Feldman doctrine.

The bottom-up approach suggests what the structure of habeas itself confirms: habeas is an exception to preclusion rules and Rooker-Feldman actually plays no role in these cases at all. Habeas doctrine seems designed precisely to address preclusion issues. The structure of habeas law is that federal claims cannot be considered until a final state judgment is rendered. The habeas statute and judicial doctrine then spell out in some specificity what preclusive effect state law determinations and fact findings have in federal court. Contrast habeas to other federal jurisdictional grants: in most other federal cases, there is no exhaustion requirement but preclusion rules apply; habeas is the opposite, requiring exhaustion but then effectively waiving preclusion in specified ways. Thus, habeas is about preclusion, not Rooker-Feldman.

The interests at stake in habeas cases support this preclusion understanding of the doctrine. The state has an interest in pursuing enforcement in its own courts. The federal interest is in federal litigation of important rights. Under the state criminal trial/fed-

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108 See Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 512 (1982) (“The writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims.”).
109 See supra note 99.
110 See, eg., 28 U.S.C.A. §§ 2254(d)–(e) (West Supp. 1998) (stating that state court adjudications are reviewed for unreasonable application of federal law, but that determinations of fact are presumed correct); Miller v. Fenton, 474 U.S. 104, 112 (1985) (holding that mixed questions of fact and law are subject to plenary federal review).
112 See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (noting that the state's interest in its enforcement proceedings “are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government”); Judice v. Vail, 430 U.S. 327, 335 (1977) (holding that state's interest in its contempt process is important enough to warrant abstention).
113 See Larry W. Yackle, Reclaiming the Federal Courts 159–60 (1994) (noting that “citizens subject to criminal prosecutions in state court should have an opportunity to raise any federal claims they may have in federal court,” and the purpose of the
eral habeas model, both sets of interests are accommodated. The state gets first crack at the defendant, fulfilling its enforcement interests, but then federal claims are reserved for litigation in federal court. Moreover, the integrity of state processes is respected (i.e., there is deference on facts and state law questions) so long as those processes comported with constitutional due process.

Continuing to believe that Rooker-Feldman plays any role in state criminal defendant cases serves only to confuse courts and distract them from the right issues. Thus, in Dubinka v. Judges of Superior Court, the federal court was faced with an action by three criminal defendants who (while their cases were pending in state court) filed a federal action challenging the California ballot initiative that altered criminal discovery rules. The federal court held that Rooker-Feldman did not apply because the claims were “general” claims under Feldman, but nonetheless went on to dismiss the action based on the Younger doctrine. No harm was done in Dubinka, because Younger in fact governed the case: the Rooker-Feldman doctrine simply did no work. In the face of ongoing state criminal proceedings, Younger bars the exercise of federal jurisdiction. But the Dubinka court’s analysis on Rooker-Feldman grounds creates the misleading impression that the defendants could possibly have obtained federal jurisdiction simply by not raising their claims in state court (because they were separate from the state court judgment and thus a “general” challenge). Yet, just the opposite is correct: habeas would waive ordinary preclusion rules only so long as the defendants did raise their claims as part of the state proceeding. Under the governing structure of the law, the claims about the California referendum properly were part of the state criminal case, subject to subsequent habeas litigation. Thus preclusion and


114 See supra notes 99–101 and accompanying text.
115 See Larry W. Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 1040 (1985) (remarking that habeas “places the construction and implementation of criminal law policy with state authorities but assigns the enforcement of federal procedural safeguards owed to the accused to the federal courts”); cf. Townsend v. Sain, 372 U.S. 293, 312 (1963) (holding that a habeas court will hold an evidentiary hearing where the applicant did not receive a full and fair hearing in state court).
116 23 F.3d 218 (9th Cir. 1994).
117 See id. at 222.
118 See supra notes 99–111 and accompanying text.
habeas corpus rules (not discussed by the Dubinka court), and not Rooker-Feldman, were the key to resolving the case.

Similarly, Plyler v. Moore is a case in which Rooker-Feldman played a starring role but should have played no role. In Plyler, state prisoners filed a class action in federal court claiming that the South Carolina legislature’s amendment of a mandatory furlough program was an unconstitutional ex post facto law. The federal court reached the merits and ruled—arguably correctly—that the South Carolina statute was unconstitutional. The difficult question in the case was whether the federal court should have reached the merits at all. The inmates had filed a prior suit in South Carolina state court to obtain a clarification of the meaning of the amending statute. In the course of that case the ex post facto issue arguably was litigated. Nevertheless, the Fourth Circuit held that it could hear the case because of the so-called habeas exception to Rooker-Feldman.

Rooker-Feldman did no work at all in Plyler and could have served as a basis for confusing the issues. The only real issue in Plyler was whether the inmates’ federal suit properly was brought under habeas jurisdiction or § 1983. If the former, the exhaustion/no-preclusion model would permit relitigation. If the latter, litigation in state court would have barred the action under Allen v. McCurry and preclusion law. Plyler presented only preclusion and habeas corpus questions. Once Rooker-Feldman is taken out of the picture, it is apparent the Plyler plaintiffs would have been much safer had they gone to federal court first, in order to avoid guessing incorrectly which model applied.

In sum, Rooker-Feldman does no work in criminal defense cases. While those cases are ongoing, the Younger doctrine supports state interests in noninterference with state proceedings. After they are complete, preclusion would apply, but habeas corpus protects federal interests by waiving preclusion in order to protect substantive and procedural claims. Habeas—a waiver of preclusion—defines the waterfront, eliminating any role for Rooker-Feldman. Habeas protects state interests by not waiving preclusion for unexhausted claims, defaulted claims, and the ultimate question of whether state law was violated;

119 129 F.3d 728 (4th Cir. 1997).
120 See id. at 730.
121 See id. at 736.
122 See id. at 729–30.
123 See id. at 731.
124 See id. at 733.
125 449 U.S. 90 (1980).
federal interests are served by permitting the relitigation of other federal claims.

2. Civil Defendants, Both Enforcement and Private

Because there is no habeas available following civil cases, the analysis is even simpler, although it does highlight some incongruity in the doctrine. *Rooker-Feldman* does no work in those cases. *Younger* bars federal claims during ongoing state proceedings; preclusion doctrines deal with final state judgments. The only interesting problems involve figuring out why the lower courts get confused, and why civil defendants do not get the same treatment as criminal defendants.

That *Rooker-Feldman* does no work is evident in a case in which the Tenth Circuit thought it might. In *Kiowa Indian Tribe v. Hoover*, the Tribe had been sued in state court in two cases and had judgment entered against it, after which followed a number of enforcement actions to obtain payment of the judgment. The Kiowa Tribe came to federal court seeking a declaration that under federal law it was immune from suit in state court and an injunction against further litigation of state law contract claims or enforcement of the state judgments. The problem was that the Tribe had raised the immunity defense in state court and litigated it at least twice to final decision in the state supreme court; one enforcement proceeding was ongoing in the intermediate state courts, and the defense had been asserted there as well.

Although it is easy to see why the *Kiowa* court wanted to reach the merits, its decision that *Rooker-Feldman* did not bar the federal action was somewhat implausible. On the merits, it was apparent by the time the case reached the Court of Appeals that the Kiowa Tribe should prevail, because the Supreme Court of the United States had held as much in another case involving the same tribe. Thus, it looked like the state courts were playing fast and loose with tribal immunity, and the federal court understandably was anxious to right an evident wrong. In order to do that, however, the Tenth Circuit somehow concluded that the claims the Kiowa Tribe brought to federal court, which had been litigated three times in state court, were not "inextricably intertwined" with the state court decisions. It is tough to

126 150 F.3d 1163 (10th Cir. 1998).
127 See id. at 1165.
128 See id. at 1165–69.
130 See *Kiowa Indian Tribe*, 150 F.3d at 1171.
know what to say about the *Rooker-Feldman* part of that court’s decision except that, again, it was understandable why the Court of Appeals wanted to reach the merits.

The problem is that, *Rooker-Feldman* or no *Rooker-Feldman*, the *Kiowa* court should not have reached the merits; the *Rooker-Feldman* doctrine just does not add much here. It is difficult to see why preclusion doctrines would not bar relitigating immunity issues litigated to final decision in a state supreme court. And *Younger* would bar litigating an immunity defense currently being addressed by the state intermediate courts in an enforcement proceeding. The state might default in raising the preclusion claims, but short of that, the case ought not to go forward.

The same was true in *Facio v. Jones*. In *Facio*, the state defendant was sued over a debt arising from a bounced check. The defendant defaulted, thinking the controversy had been settled with a money order. When the default judgment was entered in state court, the defendant sought to reopen the judgment, which the state court refused to do, holding that state law first required presentation of a meritorious defense. The state defendant then filed suit in federal court arguing that the state rule was unconstitutional. The *Facio* court decided the case on *Rooker-Feldman* grounds, when in reality the case was one of preclusion. If *Facio* thought the state court rule was unconstitutional, he should have appealed the dismissal of his suit in the state courts. Upon failing to appeal, and the time to do so having run, preclusion law surely barred *Facio*’s claim.

There is the nontrivial problem looming of how to distinguish criminal from civil defendants. *Kiowa Tribe* essentially was a substantive defense to the state action, arguing that liability was not permissible under federal law. *Facio* raised a procedural challenge, arguing that the adjudicatory mechanism in state court violated the Constitution. If the defendants in *Kiowa Tribe* or *Facio* had been criminal defendants, they would have been able to litigate both these types of claims in federal court under habeas.

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131 929 F.2d 541 (10th Cir. 1991).
132 See id. at 542.
133 See id.
134 See id.
135 See id. at 542–43.
136 See id. at 545.
137 The state interest argument for prior litigation in state court assumes the defendant violated state law. This interest suggests distinguishing between substantive and procedural challenges to the state court proceeding. As to the former, if the defendant refrains from violating the state law, he could bring an “anticipatory ac-
As difficult as the problem is, however, the question is not one likely to be resolved by the *Rooker-Feldman* doctrine. The difference in treatment may be inappropriate; on the other hand, it could rest on some understanding of the special status of habeas. But *Rooker-Feldman* serves only to force cases out of federal court, it does not serve to open the federal court doors. Thus, *Rooker-Feldman* cannot do any work with regard to civil defendants that is not already done by the *Younger* and preclusion doctrines.

C. Parties Plaintiff

It would seem at first blush that the easiest of the *Rooker-Feldman* cases are those involving state court plaintiffs. After all, the state plaintiff chose the initial forum. Subsequent dissatisfaction with that choice is unlikely to impress anyone as a good reason for permitting a federal court suit. More important, so long as the plaintiff in state court was permitted a full and fair opportunity to litigate her case, there is no apparent federal interest that justifies another suit in federal court. On the other hand, the state plainly has an interest in not having judicial proceedings interrupted or taken for naught once they have begun.

1. Voluntary Plaintiffs

As it turns out, the state's interest is such that the *Rooker-Feldman* doctrine might actually do some work in federal suits brought by state plaintiffs. This is because existing doctrines do not necessarily bar all federal suits in situations where the state interest suggests there should not be federal litigation. Unlike a state defendant, an unhappy state plaintiff could abandon the state suit, so that there would be no ongoing action to which the federal court would defer under the *Younger* doctrine. Preclusion doctrines might not bar a federal action if the state action itself is not final. Yet, there is a state inter-


139 That, incidentally, is a question of state law, and under state law preclusion might well serve to bar a federal action even before the state case goes to the highest
est in protecting the value of work done by its courts, as well as an interest in stopping parties from toying with state courts by filing suits then dismissing them if things do not go as they wish. Thus, *Rooker-Feldman* might do some work if the state plaintiff had engaged in substantial litigation in the lower state court and then grew dissatisfied before any judgment was reached.140

The central point of the state plaintiff story is that parties with a choice of forum ordinarily should be bound by that choice. Ironically, an excellent demonstration of the principle at stake here comes in a case involving not a state plaintiff, but a state defendant who could have removed the case to federal court and chose not to do so. In *South Boston Allied War Veterans Council v. Zobel*,141 the state plaintiff, the Irish-American Gay, Lesbian, and Bisexual Group, sought and obtained an order permitting it to march in a parade. The defendants became dissatisfied with the progress of the state court action and filed their own action in federal court arguing that to permit the march would violate their constitutional rights.142 The parties defendant in state court could have removed the case to federal court initially but did not do so, and the time to remove had run out.143 The federal district court held that *Rooker-Feldman* barred the federal action, stating that it was irrelevant that the state decision from which the federal plaintiffs sought relief was "preliminary in nature."144 This is precisely the point applicable in most plaintiff cases: having had an opportunity to come to federal court and chosen to proceed in state court, a plaintiff cannot bring a subsequent federal action based on dissatisfaction with the state proceeding. If no other doctrine would serve to bar such proceeding—and that may well be the case when state proceedings are "preliminary"—then *Rooker-Feldman* serves a purpose.

The difficult question is whether the *Rooker-Feldman* doctrine should work to deprive these voluntary plaintiffs of access to federal court if state preclusion law would not do so. Some federal jurisdic-

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140 Note that the state's interest in these latter situations is not precisely the same as that furthered by preclusion doctrines: those doctrines protect the state's interest in the sanctity of judgments, while the *Rooker-Feldman* doctrine serves a state's interest in not wasting its judicial resources even if there is no final judgment at stake.


142 See id. at 644.

143 See id. at 644–45.

144 The district court also held that *Younger* abstention applied, which may be correct. See id. at 651. If so, *Rooker-Feldman* is not doing any independent work in this case.
tional doctrines exist precisely to address situations in which state law may not take into account the peculiarities of parallel federal and state judicial systems. State law deals with *intra*-jurisdictional problems, but may not account for *inter*-jurisdictional problems. Thus, we can rely on state law to solve preclusion problems: these problems are present *within* the state court system and the same interest-balancing that determines the outcome in state court ought also to apply if the problems arise in a new court system. But doctrines like *Younger* developed precisely because state law typically has no analog that could be used to determine whether federal proceedings can and should disrupt those ongoing in sister state courts.

The precise issue with regard to applying *Rooker-Feldman* to state plaintiffs is whether state *intra*-jurisdictional preclusion law is sufficient to address the relative state and federal interests, or whether a separate federal doctrine is necessary. An argument can be made that if state jurisdictional law does not bar the voluntary plaintiff from proceeding anew in state court, federal law should not be any different. If so, *Rooker-Feldman* again does no work.

 Nonetheless, as *Chan Tse Ming v. Cordis Corp.* demonstrates, there may well be room for a federal doctrine that addresses the special *inter*-jurisdictional problem of the voluntary state plaintiff who dismisses the state suit and jumps ship to federal court. In *Chan Tse Ming*, a Hong Kong plaintiff sued a Florida pacemaker manufacturer for products liability in Florida state court. The state court ruled that the law of Hong Kong would apply to the action. Perhaps because Hong Kong has less liberal products liability law than the United States, the plaintiff voluntarily dismissed the action and hustled off to federal court. There the court held that “collateral estoppel” did not require it to respect the state court’s choice of law determination.

Although one might argue that if state collateral estoppel law would not have barred relitigation federal law also should not have, a closer examination of the facts shows why a special *inter*-jurisdictional preclusion doctrine might be necessary. The plaintiff, it is true, could have refiled his action in state court after dismissal, just as the case was refiled in federal court. But states that are relatively tolerant of voluntary dismissal frequently provide structural protections that prevent

146 See id. at 218.
147 See id.
148 See id.
149 See id.
dismissing from impairing the uniformity of their adjudicatory processes. Such was the case here. The local rules of Dade County, where Chan Tse Ming was filed, provided that the Presiding Judge could reassign a previously nonsuited case to the judge before whom the case was first filed.\textsuperscript{150} Thus, if the plaintiff had refilled his case in state court, he would probably have gotten the same judge, making it quite likely that the choice of law ruling from the earlier proceeding would have held good.

Such structural protections are not reflected on the federal side of the dual court system, however. If the plaintiff in Chan Tse Ming was allowed to refil in federal court, he would be guaranteed to get a different judge—and one who was not bound by (and perhaps would have no concern for) the preliminary rulings of the state court. The case could not be precluded under federal law, because there had been no final judgment; and the court could not abstain, because there was no ongoing state proceeding. Only through the use of Rooker-Feldman can federal law honor the state's avowed interest in preserving the integrity of its judicial pronouncements.

Thus, there appears to be a place in which Rooker-Feldman might do some work. That place is in cases in which a state plaintiff voluntarily dismisses a case in midstream and comes to federal court. If state preclusion law would not bar the relitigation in state court, perhaps it should not be barred in federal court either. But the further question is whether the existence of a parallel federal court system creates an interjurisdictional problem not resolved adequately by state law.

2. Involuntary Plaintiffs

The easy mistake, however, is to assume that all plaintiff cases should be barred: that conclusion is incorrect because not all state plaintiffs are voluntary plaintiffs. Essential to the basis for excluding state court plaintiffs is that they chose to litigate in state court instead of federal court and then grew dissatisfied. Not all plaintiffs in state court actually made that choice; some of them were forced for one reason or another to litigate their case in the state courts, even though they may in fact have preferred a federal forum.

The concept of the involuntary plaintiff is demonstrated by the Third Circuit’s decision in E.B. v. Verniero,\textsuperscript{151} a case challenging Megan’s Law. Megan’s Law requires prosecutors to inform certain


\textsuperscript{151} 119 F.3d 1077 (3d Cir. 1997).
residents when a sex offender moves into their vicinity.\textsuperscript{152} Under rules established by the New Jersey courts, before a prosecutor does so he must provide notice of his intent to the convicted sex offender, who then has a chance to challenge the prosecutorial action in state court.\textsuperscript{153} E.B. went to state court, and then after the state court proceedings were complete, E.B. challenged the constitutionality of Megan's Law in federal court.\textsuperscript{154}

The Third Circuit incorrectly deemed E.B.'s federal action a "paradigm situation in which \textit{Rooker-Feldman} precludes a federal district court from proceeding."\textsuperscript{155} If anything, E.B. was a paradigm \textit{preclusion} case in which the \textit{Rooker-Feldman} doctrine did no extra work. In order to find that \textit{Rooker-Feldman} was applicable, the Third Circuit ascertained that the New Jersey courts in fact were open to constitutional challenges.\textsuperscript{156} Thus, E.B.'s constitutional claims either were or should have been brought in the state courts as part of the challenge to the prosecutorial action. The state's finality interest, represented by preclusion doctrine, adequately resolves the case.

The problem of the involuntary plaintiff emerges from considering what options E.B. might have had in order to obtain federal review and why federal review might have been justified. First, E.B. could have filed a constitutional challenge to Megan's Law initially in federal court, and had he done so the suit unquestionably would have proceeded. Adjudicating the constitutionality of this state statute surely was within the federal interests in resolving federal law questions in federal courts and protecting federal rights.\textsuperscript{157} The problem is that it is unclear whether E.B. could also have gotten an adjudication of his state law claims in federal court. As a matter of law, the \textit{Pennhurst} doctrine might have barred such adjudication,\textsuperscript{158} and as a matter of state interest, obviously the state would have wished to litigate in state court the questions of which residents should have been notified of E.B.'s status, and what form that notification should have taken. Second, in order to obtain full adjudication, E.B. could have split his claims between state and federal court, but then there would

\begin{itemize}
\item \textsuperscript{152} See \textit{id.} at 1081.
\item \textsuperscript{153} See \textit{id.} at 1086.
\item \textsuperscript{154} See \textit{id.} at 1087–88.
\item \textsuperscript{155} \textit{Id.} at 1090–91.
\item \textsuperscript{156} See \textit{id.} at 1091.
\item \textsuperscript{157} See \textit{supra} note 113.
\item \textsuperscript{158} See \textit{Pennhurst State Sch. & Hosp. v. Halderman}, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars a suit against state officials when the state is the real party in interest). 
\end{itemize}
have been the possibility of a rush to judgment by the state court in order for that proceeding to have had preclusive effect.\(^{159}\)

In order to see why *Rooker-Feldman* should not have barred E.B.'s action, it is instructive to understand that if E.B. had pursued one of his other options (instead of filing only in state court), jurisdictional doctrines relied upon by the lower courts would have permitted him to obtain review of his federal claims. Although the decisions of the courts of appeals are not unanimous,\(^{160}\) for the most part they permit federal plaintiffs in either of the two other circumstances to reserve litigation of federal claims for federal court using the procedure adopted in *England v. Louisiana State Board of Medical Examiners*. Had E.B. come to federal court with all his claims, the federal court may well have sent him first to state court to adjudicate the state claims.\(^{161}\) If this had happened, however, E.B. likely could have used some variant of the *England* procedure to reserve his right to return to federal court with his federal questions (should they not be mooted by the state court judgment).\(^{162}\) Similarly, if E.B. had split his claims, there are some cases that suggest he still could have used the *England* procedure to reserve his right to litigate his federal claims in federal court.\(^{163}\)

The importance of this use of the *England* procedure cannot be overstated. There are many cases in which plaintiffs have state claims that cannot be litigated in federal court and federal claims that would

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159 See, e.g., Beaver v. Bridwell, 598 F. Supp. 90 (D. Md. 1984) (holding that a state disposition was res judicata to a federal suit even though plaintiff had bifurcated his claims in accordance with *Pennhurst*).

160 Compare sources cited infra note 163, with Tarpley v. Salerno, 803 F.2d 57 (2d Cir. 1986) (holding that *England* reservation applies only when there has been an abstention by the federal court).

161 This could have been a result of either *Pullman* abstention, or a stay of the federal action while the state claims were certified in the state's highest court. See Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) (endorsing certification of novel, unsettled questions of state law); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (endorsing federal court abstention on difficult questions of state law).

162 See England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411 (1964) (holding that a federal court litigant forced into state court because of *Pullman* abstention may reserve the right to return to federal court).

163 See United Parcel Serv., Inc. v. California Pub. Utils. Comm’n, 77 F.3d 1178 (9th Cir. 1996) (holding that a litigant may employ the *England* reservation procedure when forced to litigate in state court); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) (allowing reservation when the would-be federal court litigant is precluded from filing in federal court in the first instance, and is in state court “involuntarily”); Delaware Valley Transplant Program v. Coye, 722 F. Supp. 1188 (D.N.J. 1989) (allowing reservation where *Pennhurst* would not allow plaintiff to bring entire suit in federal court).
like to litigate in federal court. *England* solves this problem by permitting litigation of state claims in state court and federal claims in federal court.

If under any other scenario courts could reconcile competing state and federal interests by dividing litigation between state and federal courts, why should matters be different for the truly involuntary plaintiff? If E.B. was a voluntary state plaintiff, then that is precisely when *preclusion* law should have applied to bar the federal suit. But if E.B. was an involuntary plaintiff in state court, then it is unclear why *Rooker-Feldman* should have mandated dismissal of his action; although state interests justify litigation of state claims in state court, there are strong federal interests that support litigating federal questions in federal court. These interests can be reconciled by using the *England* procedure, and no court has specified any additional interest that would justify applying *Rooker-Feldman* to bar federal litigation.

Of course, once the federal plaintiff opts voluntarily to submit all claims to the state courts, that ought to bar a subsequent federal suit on *Rooker-Feldman* grounds even if preclusion does not apply. Thus the federal court of appeals may have erred in *Charchenko v. City of Stillwater* in permitting federal review. In *Charchenko*, a former police officer brought a wrongful termination claim to state court, raising claims under state law and the federal Constitution. The state trial court dismissed the action, holding that it had no jurisdiction either over the state law or federal law claims. The federal appel-

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164 E.B.’s lawyers may have erred by choosing to go to state court without reserving E.B.’s intention to litigate federal claims in federal court, in which case E.B. might have been a voluntary plaintiff. For example, E.B.’s attorneys may have believed that New Jersey’s entire controversy doctrine compelled them to bring all of their claims in state court. The doctrine “prevents a litigant from asserting claims or suing parties if those claims or parties could have been joined in a prior action involving that litigant and based on the same controversy.” Rochelle Cooper Dreyfuss & Linda J. Silberman, *Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 123, 123–24 (1996). At least one federal court has indicated that England reservation applies even in view of the entire controversy doctrine. See *Peduto v. City of N. Wildwood*, 696 F. Supp. 1004, 1012 (D.N.J. 1988). If, however, in order to obtain full adjudication, E.B. effectively were forced into state court with his federal claims, it is not at all clear that *Rooker-Feldman* should have barred federal relitigation.

165 *See Delaware Valley*, 732 F. Supp. at 1199 (noting that “the interests of the states in deciding issues of state law in the first instance, as well as the interests of the federal government in allowing the federal courts to decide issues of federal constitutional law, outweigh the inefficiencies of requiring the parties to litigate in each forum”).

166 47 F.3d 981 (8th Cir. 1995).

167 *See id.* at 982.

168 *See id.*
late court held that *Rooker-Feldman* did not bar the *federal* claim.\(^{169}\) For some reason difficult to fathom, the court of appeals then held that *Rooker-Feldman* did bar the *state law* claims.\(^{170}\)

The relevant issue in *Charchenko* should have been whether there was a state interest that would be served by the federal court respecting the work that had already been done by the state court in the case. If so, that would seem equally true for the state and federal claims posed by *Charchenko*. The district court noted correctly that the state court's jurisdictional ruling as to the § 1983 claim may have been a violation of federal law.\(^{171}\) But, the state plaintiff simply could have appealed the denial of state court jurisdiction over both claims through the state system, and ultimately to the Supreme Court of the United States. On the other hand, if the plaintiff were in state court precisely because his state claims could not have been brought in federal court, the resolution should have been the same as in other cases that have used the *England* procedure to permit split claims.\(^ {172}\)

In the case of the involuntary plaintiff, therefore, *Rooker-Feldman* should do no work. If a plaintiff is voluntarily in state court, federal relitigation is inappropriate. But when a plaintiff is involuntarily in state court because some other doctrine of federal jurisdiction forces

\(^{169}\) See *id.* at 984.

\(^{170}\) See *id.*

\(^{171}\) See *id.* at 983 n.2.

\(^{172}\) Another case like this is *Kirby v. City of Philadelphia*, 905 F. Supp. 222 (E.D. Pa. 1995). In *Kirby*, police officers who were retired because of disabilities sued in federal court claiming a violation of their constitutional rights when they were denied certain benefits. See *id.* at 224. The problem in *Kirby* was that pursuant to a collective bargaining agreement, the police claims had been arbitrated, and then the officers had challenged the arbitration result in state court. See *id.* The district court held that it had no jurisdiction under *Rooker-Feldman*. The key paragraph essentially is a non sequitur. The district court stated:

Had plaintiffs come initially to federal court [i.e., rather than challenging the arbitration result in state court], they would have been able to proceed with their case. However, under Pennsylvania state law the F[raternal] O[rd]er of P[olice] is required to enter arbitration with limited review in state court, in the event of an employment dispute with the City. Plaintiffs therefore have no right to bring this grievance to federal court.

*Id.* at 225–26 (footnote omitted) (citation omitted). The *Kirby* court failed to see that the federal plaintiffs might have had a choice of whether to file in federal court, in which case preclusion rules might have governed a subsequent federal action. Alternatively, if they did not, then *Rooker-Feldman* should not have applied. The state may have an interest in having such arbitration decisions reviewed in some way in its courts, but there is also a federal interest in having the federal challenges brought in federal court. If the *England* procedure can be used to solve this problem in the preclusion context, why not in the *Rooker-Feldman* context?
her there to obtain full adjudication, federal courts properly use the
England procedure to avoid the preclusive effect of prior state litiga-
tion and thus preserve the federal forum for the adjudication of fed-
eral claims. Rooker-Feldman sometimes is used to bar federal litigation
in these cases, but it is unclear why. Given the absence of a clear inter-
est advanced by Rooker-Feldman in these cases, the doctrine should not
be used to bar federal jurisdiction.

D. Administrative Parties

We treat administrative cases separately here not because they are
different than other cases, but because they are not. What we mean
by administrative cases are those cases that begin in a state administra-
tive agency and then find their way into federal court. The problem
of administrative review has caused some difficulty for courts in apply-
ing doctrines such as preclusion and Younger. What we hope to show
is that the same rules developed in the cases of state plaintiffs and
defendants ought to apply in administrative proceedings as well.

We separate out administrative cases because the distinction em-
phasizes that the decision in the Feldman case itself is deeply problem-
atic. As will be evident momentarily, Feldman was a garden-variety
administrative case, one in which the federal plaintiff was an involun-
tary state administrative plaintiff. Other doctrines of federal jurisdic-
tion suggest that there should be federal review available in such
cases. Working from the bottom up, Rooker-Feldman does some work
under the first precondition—it serves to bar federal review where
other doctrines would not—but it perhaps should not under the sec-
ond precondition. The ironic result of Feldman is that lawyers and
judges in licensing and disciplinary cases receive less process due
to them than any other individuals or entities in similar circumstances
receive.

1. Administrative Defendants

Most administrative defendant cases are easy. Rooker-Feldman
does no work in these cases. Just like civil or criminal defendants,
these administrative defendants arguably have violated state law.
Thus, the state interest justifies deference to state litigation. If state
administrative defendants lose before the administrative tribunal,
then they usually can, and therefore likely must, seek review through
the state system. In Ohio Civil Rights Commission v. Dayton Christian
Schools, Inc., the Supreme Court held that Younger would bar federal court suits in the face of ongoing administrative proceedings and suggested that review of such decisions in the state system was appropriate. In University of Tennessee v. Elliott, the Supreme Court held that so long as they comport with due process, administrative proceedings obtain the preclusive effect in federal court that state law would grant them. More important, an administrative judgment pursued through the state court system is just like any other, and preclusive effect will attach to it. Again, in these cases, just as in the other defendant cases, Rooker-Feldman will not do any work.

2. Administrative Plaintiffs

Administrative plaintiff cases tend to confuse courts. These administrative cases have proven difficult for federal courts grappling with other doctrines like Younger and preclusion. But there need not be any confusion insofar as Rooker-Feldman is concerned. If the plaintiff is not voluntarily in state court, then a way should be found to permit litigation of federal claims in federal court. As will be evident, administrative plaintiffs are by nature involuntary plaintiffs.

The Rooker-Feldman problem following administrative proceedings is evident in the Seventh Circuit’s decision in Centres v. Town of Brookfield. In Centres, the federal plaintiffs sought a building permit before the appropriate state bodies. When the permit was denied, they next sought review in state court. However, when the plaintiffs lost their option to build on the property, the state litigation was abandoned and the plaintiffs came to federal court with state and federal

173 477 U.S. 619 (1986). In the Dayton Christian Schools Case, a parochial school terminated the employment of a teacher who had become pregnant. The teacher filed a complaint with the Ohio Civil Rights Commission, alleging sex discrimination in violation of state law. While the administrative proceeding was pending, the school responded with a § 1983 action requesting an injunction on First Amendment grounds. The Supreme Court ordered Younger abstention, saying “it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding.” Id. at 629.


176 148 F.3d 699 (7th Cir. 1998).

177 See id. at 700.

178 See id. at 701.
The Seventh Circuit reversed the district court decision that Rooker-Feldman barred the action. The court applied that circuit's quite peculiar guideline that "if the federal plaintiff was the plaintiff in state court, he must contend with res judicata; if the federal plaintiff was the defendant in state court, he must contend with the Rooker-Feldman doctrine." Applying its rule, the Seventh Circuit held that res judicata, not Rooker-Feldman, was at issue; it then failed to do any res judicata analysis and dismissed the claim for failure to state a claim on which relief could be granted.

The Centres court actually might have stumbled onto the right result in that case, given that no state interest would justify applying Rooker-Feldman where the federal proceeding concerns a question that was not at issue before the state court. The Centres plaintiffs dropped the state court suit because they had lost their option to build. The federal suit was for damages from that loss and it is arguable that the state's interest in litigating the case in state court had evaporated and the federal court could have reached the merits.

Even if Centres had still been pursuing the building permit in state court, federal review nonetheless should have remained available. At bottom, the permissibility of federal review hinges on whether Centres was voluntarily in state court. It probably was not.

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179 See id. at 700, 701.
180 Id. at 702.
181 See id. at 703-05.
182 It is of course correct that the state has no valid interest in litigating claims that were not properly part of the initial state administrative proceeding. In Dale v. Moore, 121 F.3d 624 (11th Cir. 1997) (per curiam), the plaintiff brought a federal suit under the Americans with Disabilities Act, complaining of a position the state bar of Florida took toward his fitness for the bar during proceedings in the state court. The plaintiff was admitted to the bar, but still sought damages in the federal action. See id. at 625. The Eleventh Circuit held the ADA claim barred on Rooker-Feldman grounds, finding that the federal action would require it to examine the propriety of the same Florida bar rules and facts at issue in the state proceeding. See id. at 627. Moreover, the Eleventh Circuit held that the plaintiff could have brought his claim in state court. See id. It is highly implausible, however, that Florida would have litigated a damages claim in the course of the bar proceeding, the Eleventh Circuit's odd perspective on the case notwithstanding. Given that plaintiff's ADA damage claim likely would not have been entertained in the course of the Florida disciplinary proceeding, Florida had no interest that would justify applying the Rooker-Feldman doctrine to bar federal litigation. (It would have been a preclusion question anyway. Another way to think about the Eleventh Circuit's decision is to ask this question. Suppose that Florida declined to adjudicate the ADA damages claim as part of the bar proceeding. Would that have violated Testa v. Katt, 330 U.S. 386 (1947), or would the limited jurisdiction in bar proceedings cases have adequately justified refusing to hear the federal claim? Again, the answer seems apparent: there would have been no Testa problem.)
Given the pervasive regulation of many areas by the state—such as land use, at issue in Centres—parties have no choice but to come to the state agency for what they seek. The hard question is what ought to happen next.

Federal courts are split as to whether abstention rules will bar administrative plaintiffs from coming to federal court following a loss before the state agency, but the better-reasoned view seems to be that immediate federal review is appropriate.\(^{183}\) After all, these plaintiffs have not violated state law, so it is difficult to see what state interest justifies denying them federal review.\(^{184}\) Moreover, barring federal review here creates troubling incentives. In administrative cases where the claim is that the state rule itself is unconstitutional, the lack of an exhaustion requirement in § 1983 cases means the administrative plaintiff simply will skip the state agency altogether if filing there and losing means being forever barred from federal court. It is unclear why the result should differ simply because the agency decision itself allegedly violates the federal Constitution, or confirms that the state rule is in fact unconstitutional. Finally, there is no reason, to the extent there are state interests, that the federal court could not take jurisdiction, send the plaintiff to state court to fulfill the state interests, and use the England procedure to permit the plaintiff to reserve litigation of the federal claims in federal court should that prove necessary.

To the extent that state administrative plaintiffs are treated like involuntary plaintiffs, Rooker-Feldman will not do any additional work in these cases, a point made clear by Narey v. Dean.\(^{185}\) In Narey, a state employee was demoted and filed a challenge in the appropriate administrative body.\(^{186}\) He then lost in that body and filed an action in state court, which he subsequently dismissed voluntarily, without prejudice.\(^{187}\) After the plaintiff filed a § 1983 action, the state argued

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\(^{184}\) The cases cited above deal primarily with Younger abstention in this context. There still may be a preclusion problem under University of Tennessee v. Elliott, 478 U.S. 788 (1986), although states often will not afford preclusive effect to agency determinations of constitutional questions that were or could have been raised before the agency. See, e.g., Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446, 456 (Tenn. 1995) (holding that failure to raise a constitutional challenge during an agency proceeding does not preclude consideration of the challenge by the courts).

\(^{185}\) 32 F.3d 1521 (11th Cir. 1994).

\(^{186}\) See id. at 1522–23.

\(^{187}\) See id. at 1523.
Rooker-Feldman. The Eleventh Circuit in this case held quite properly that Rooker-Feldman, "unlike ... res judicata, applies only to state court decisions, not to state administrative decisions." That makes sense because, unless the state either (1) advances an interest in the finality of that decision, which preclusion rules govern; or (2) advances an interest in uniformity of review of those decisions, which the Burford abstention doctrine would cover, there is no additional interest justifying application of Rooker-Feldman. In short, Rooker-Feldman does no work.

3. Feldman, Attorneys, and Judges

The problem is that the result in Narey appears to be inconsistent with the outcome of Feldman itself. If the state's administrative decision can be challenged in federal court in Narey, why can't the administrative decision at issue in Feldman be challenged similarly? The answer must be that (1) Feldman is wrong; or (2) the "inextricably intertwined"/"general challenge" rule must be interpreted to follow the contours of what the England procedure would preserve; or (3) Feldman is distinguishable.

An optimistic reading of the Feldman decision might suggest that it comports with the analysis thus far. Recall that in Feldman, the Supreme Court held that plaintiffs could pursue “general challenges” but not claims inextricably intertwined with the state proceedings. In its own awkward way this distinction does try to mimic the result of using the England procedure following administrative proceedings to preserve judicial review. Application of England would send to state court any state claims, but it would preserve for federal review any federal claims. Feldman goes a bit further in limiting federal review, but perhaps not much further. It denies the federal court jurisdiction over the state claim (bar admission; decision not to waive the bar

188 See id.
189 Id. at 1525.
190 See University of Tennessee v. Elliott, 478 U.S. 788, 798 (1986) (holding that the traditional purposes of preclusion are "equally implicated whether factfinding is done by a federal or state agency").
191 See Burford v. Sun Oil Co., 319 U.S. 315, 326 (1943) (abstaining to "prevent the confusion of multiple review of the same general issues").
rule), as well as any specific challenge on constitutional grounds to
the applicant's own result.\textsuperscript{194} On the other hand, all other federal
claims are permissible.

It takes some real optimism to reach this conclusion, however. A
far more likely conclusion is that, odd as it sounds, \textit{Feldman} itself
flunks the bottom-up test by allowing the \textit{Rooker-Feldman} doctrine to
do some work when it should not. \textit{Feldman} was an involuntary admin-
istrative plaintiff. As we have seen, preclusion doctrine and \textit{Younger}
would not forbid federal review, nor should they.\textsuperscript{195} \textit{Rooker-Feldman}
errs to the extent it mandates otherwise.

In order to get a clear understanding of why \textit{Feldman} is wrong, it
is useful to turn for a moment to \textit{Feldman}'s partner cases, those involv-
ing the disciplining of judges and attorneys. These are administrative
defendant cases, of course. The judges and lawyers are accused of
violating state regulatory or even criminal rules. As we have seen, \textit{Rooker-Feldman}
does no work in these cases;\textsuperscript{196} they are adequately handled by the \textit{Younger} and preclusion doctrines.

All too often when \textit{Rooker-Feldman} is employed in administrative
defendant cases, it serves to deny defendants a forum when the other
doctrines arguably would permit federal review. In \textit{Guarino v. Larsen},\textsuperscript{197} for example, the Pennsylvania Supreme Court removed a trial
judge from hearing cases because of alleged misconduct dealing with
jurors. Rather than use its procedure for removing judges from of-


194 See \textit{Feldman}, 460 U.S. at 482–83.
195 See supra Part III.D.2.
196 See supra Part III.D.1.
197 11 F.3d 1151 (3d Cir. 1993).
198 See id. at 1152.
199 See id. at 1155.
200 See id. at 1160.
If Rooker-Feldman would bar a federal action that would survive other doctrines, we need to identify a state or federal interest being served. Surely there is a state interest in conducting attorney and judicial discipline autonomously, but it is difficult to conclude such an interest would trump the federal interest in having constitutional claims regarding such cases resolved in federal court, or at least in some judicial proceeding. The problem in Guarino is that the judicial nature of the proceeding was dubious at best, as was any conclusion that the “show cause” process as to the use of discretionary power would have met due process concerns. Due process requires some adequate hearing, and it is questionable whether that occurred in Guarino.

The Third Circuit realized a possible difficulty with its decision, a difficulty that actually pervades these cases of attorney and judge discipline. In a footnote, the Third Circuit stated that “when a court makes a decision concerning the legality of its own actions, it may be too biased to justify abstention by the federal courts even if its acts are considered adjudicative.” The court further stated that application of this principle to Rooker-Feldman was an open question, and a troubling one as it appeared to be in tension with Feldman itself. Nonetheless, the court determined that it could duck the question because the federal plaintiff had not raised the issue.

The concern about bias identified by the Third Circuit in Guarino, however, is inherent in any administrative scheme in which the administering body also is part of the state judicial system, and particularly so when the administrative body is the state supreme court.

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202 See Feldman, 460 U.S. at 484 n.16 (noting the strength of state interest in regulating state bar); Fieger v. Thomas, 74 F.3d 740, 745 (6th Cir. 1996) (stating that regulating lawyer conduct is a fundamentally important state interest); see also Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1166 (1999) (rooting the federal courts’ “hands-off” attitude toward such inherently local issues in a theory of dual sovereignty that assumes that states and localities are normatively superior to the national government in dealing with the “everyday stuff of life”).

203 Cf. In re Oliver, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”).

204 Guarino, 11 F.3d at 1159 n.4.

205 See id.

206 See id. at 1160.
The possibility of a due process problem is rampant in these disciplinary cases.207 For example, in *Leaf v. Supreme Court*,208 an attorney was subjected to a disciplinary proceeding. The plaintiff raised both constitutional challenges to the procedures being used to discipline her and challenges claiming bias and conspiracy in prosecuting her.209 It may well be, as the Seventh Circuit stated, that Leaf's constitutional claims "push the bounds of reason and credibility."210 Even so, there is reason to wonder how a court so accused can adjudicate such claims in a neutral fashion. This is not to say every accusation of bias by a defendant should result in recusal of the judging court. Based on the description of the case, the proceeding and its outcome against the attorney may have been justified. But in attorney and judge discipline cases, the quarters are a bit too close for comfort.

These cases are basically administrative review cases without *any* judicial review. It is common to have the state's highest court serve as the licensing authority for lawyers and the disciplinary body for attorneys and judges.211 Yet, it is difficult to be a regulator and still adjudicate the same cases in a way that comports with due process. In these cases, no judicial review occurs in a body separate from the state's highest court's exercise of its regulatory function (except the remote possibility of obtaining a writ of certiorari from the United States Supreme Court).

The problem is exacerbated by an apparent zeal on the part of federal judges to defer to the decisions of their state colleagues, leading to application of *Rooker-Feldman* in situations in which it cannot possibly be justified. Such was the case in *Edmonds v. Clarkson*,212 another judicial discipline case. In *Edmonds*, the state trial judge had launched an investigation into possible misconduct of colleagues toward bail bonding agents.213 The case is not clear precisely on the underlying issues, but it appears that the trial judge was African-American, and that there might have been (among other things) a claim of some discrimination in treatment of bonding agents.214 Subsequently

208  979 F.2d 589 (7th Cir. 1992).
209  *See id.* at 594.
210  *Id.* at 602.
211  *See Peery v. Brakke*, 826 F.2d 740, 745 (8th Cir. 1987) (stating that supervision of bar and particularly attorney discipline is traditionally the sole responsibility of the state supreme court).
213  *See id.* at 543.
214  *See id.*
the judge was charged in a disciplinary proceeding. Further complicating matters, one basis for the disciplinary proceeding was an accusation that the judge was having an affair with one of the bonding agents who appeared before him in a forfeiture proceeding.

It is difficult to justify the application of Rooker-Feldman in Edmonds because he resigned (rather than go through the disciplinary hearing) and then filed suit in federal court. Since the judge removed himself from the purview of the state regulatory authority, the state's interest in having the federal proceeding stopped seemed entirely nonexistent. The Edmonds court held the case barred by Rooker-Feldman based on the "strong state interest in regulating the conduct of the state judiciary," but if Edmonds was not a judge anymore, the basis for a regulatory proceeding is unclear. It is true that one type of relief requested in the federal action was reinstatement as a judge; perhaps the federal court should not mandate that relief, instead reaching judgment on the claims for money damages alone. But the facts of the case raise troubling questions about the ability of the state judiciary to resolve the case fairly.

The solution to all this is to remove the attorney disciplinary process from the state supreme courts. It may well be that lawyers and judges should play a role in self-regulation. But the problem with applying Rooker-Feldman in these cases is that inevitably the procedures of the regulatory forum are going to be called into question. At least if there was review of these claims through a court system not involved with the disciplinary proceedings themselves, the state interest in respecting those proceedings would be clearer. When the state's highest court is the regulatory body, however, application of Rooker-Feldman usually means there will be no independent judicial review.

Although Feldman is a bar admission case, and not a disciplinary case, this reasoning does call Feldman into question as well. It should. Feldman was an involuntary state plaintiff denied access to federal court on the basis of the state proceeding. Both doctrinal distinctions made by the Supreme Court in Feldman are in fact problematic. First, Feldman might have seemed a judicial proceeding to the court, but it actually was administrative. Justice Stevens made this point in dis-

215 See id. at 544.
216 See id.
217 See id.
218 Id. at 551.
219 See id. at 544.
220 Cf. Gregory v. Ashcroft, 501 U.S. 452, 468 (1991) (noting that "the states' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment").
sent, and it is obvious he was correct. Although Feldman's complaint followed action by the District of Columbia's highest "court," in a sense that was but a coincidence. If he was a doctor or a dentist with the same complaint, the structure of the case would have been precisely like that in **Centers**: party asks state agency for administrative ruling; agency denies party's request; party comes to (state or federal) court to complain. It is just happenstance that when the applicant is a lawyer, the administrative agency in many states is also the highest court. It is for this reason that the Supreme Court's holding that the District of Columbia Court of Appeals' ruling was "judicial" in nature is so very awkward.

Even more problematic is that the "inextricably intertwined"/ "general challenge" distinction is impossible to understand as employed in **Feldman**. Recall that in **Feldman** the Supreme Court held that Feldman's "general" constitutional claim could be raised in federal court. But this makes no sense. In order to see this, compare **Feldman** to **Facio**. **Facio** was the case in which a defendant who had a default judgment entered against him tried to challenge the state court rule governing defaults. The federal plaintiff in **Facio** argued that his challenge to the constitutionality of the state law was a general challenge; the court, with one judge dissenting, held that the claim was inextricably intertwined with the state court judgment. The majority seems correct. But how could it be that Facio's constitutional claims were inextricably intertwined, when Feldman's (and the Kiowa Tribe's, for that matter) were not? After all, Feldman and the Kiowa Tribe raised in state court the very claims they sought to litigate in federal court. **Facio** did not. No sensible meaning of the words "inextricably intertwined" justifies these results.

The difficulty with interpreting "inextricably intertwined" has led some courts and commentators to conclude that sense can be made of the "inextricably intertwined" standard by applying a standing test. This is a good attempt, but the argument does not work. The **Facio** court stated:

> [T]he two forms of relief [the general challenge to the state law and the pendent claim to have the default overturned] are so intertwined, in fact, that if Mr. Facio is not able to set aside the default judgment against him, he would lack standing to assert his second

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221 See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 489 (1983) (Stevens, J., dissenting) (saying that the court "performed no more and no less than the administrative function of a licensing board").

222 See generally **Facio** v. Jones, 929 F.2d 541 (10th Cir. 1991).

223 See id. at 545.
claim, which is the request that the federal court declare Utah’s default judgment procedures unconstitutional.\footnote{Id.}

But the very same thing was true in \textit{Feldman}.\footnote{Suzanna Sherry distinguishes bar admission from bar discipline cases in terms of standing. See Sherry, \textit{supra} note 10, at 1108–11. She argues bar discipline defendants lack standing to challenge bar rules because they cannot show they would be disciplined again. See \textit{id.} at 1110. But admission candidates, she asserts, can apply again and do have standing. See \textit{id}. As we see with \textit{Feldman}, however, this may be a distinction without a difference relevant to the state interests. Feldman may reapply, but he will not get in unless the rule he challenged in the state proceeding is struck down. How can that not be “inextricably intertwined”?}

The argument in \textit{Feldman} would be that the federal plaintiff had standing and thus his challenge was “general” and not “inextricably intertwined” because he could reapply for admission. However, it is nothing but unhelpful formal reasoning to say Feldman could reapply. Feldman was not getting into the District of Columbia bar until the rule he claimed was unconstitutional was struck down. This is perfectly analogous to Facio’s case. In both cases, the parties would prevail on the claim that really mattered if they won their federal action.

The only administrative cases in which \textit{Rooker-Feldman} seems to do any work are licensing and disciplinary proceedings involving judges and lawyers. Involuntary administrative plaintiffs either have, or should have, their choice of a federal or state judicial forum. Even in case involving administrative defendants, there is at least full review of those proceedings in an independent state judicial system. But \textit{Feldman} condemned lawyers and judges to less federal review than any other state administrative party, including other state professional licensees. This result is difficult to justify.

\textbf{IV. Conclusion}

The analysis that led us here was complex, but the conclusion is rather stunning. The one place that the \textit{Rooker-Feldman} doctrine might appropriately do some work is the very instance in which lower courts have stretched the doctrine beyond the \textit{Rooker} and \textit{Feldman} cases themselves, depriving the doctrine of its rationale. \textit{Rooker-Feldman}...
man sensibly operates to plug any gap in the Younger and preclusion doctrines when a party who could have chosen to litigate in federal court instead chooses state court and then in the course of litigation becomes unhappy with that decision. For the most part this applies to state plaintiffs, but as the Zobel case makes clear, it also might apply to a state defendant who could have removed the action but did not.

On the other hand, the one clear place in which Rooker-Feldman seems troubling is in the very circumstances in which the doctrine developed—lawyer and judge licensing and regulatory proceedings. This would not necessarily be the case if those licensing and disciplinary boards were structured like the administrative boards that regulate other professions. But regulation by the state's highest court asks that body to serve as both regulator and judge. Due process suggests the problem with this approach.

Thus, our conclusion is simple. Feldman should be overruled, and the Rooker-Feldman doctrine is going to have to be renamed or abandoned. It might serve an important gap-filling role with regard to voluntary state plaintiffs, at least so long as state preclusion law does not. Federal courts ought to be reluctant to provide a forum for shipjumping by state plaintiffs; state law may not accommodate this interest because it results from the interjurisdictional problem arising from the existence of federal courts.