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Federal Jurisdiction and Res Judicata: Litigation in State Courts of Federal Constitutional Questions Closing the Door to the Federal Courts

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this purpose need not be choked by inflexible restrictions implied by the sixth amendment. As long as the jury is large enough to promote group deliberation and to provide a fair possibility for obtaining a representative cross section of the community, it will be able to perform its role; *i.e.*, to interpose between the accused and his accuser. This decision leaves Congress and the states free to objectively evaluate and implement the most advantageous and practical number of jurors necessary to adequately perform the functions of a jury within our present judicial environment.

It is evident to this writer that there are very good arguments in favor of a smaller jury.[27] The advantages are numerous and include the possibilities of reducing delays and the steadily increasing costs of litigation. As long as due consideration is given to preserve the effectiveness of the jury, it is time that all lawmaking bodies untie themselves from the archaic past. Now that the number twelve is no longer sacred, it may be advisable for the various states to examine the structure of their jury systems and adapt the size of the jury to the requirements of each particular type of litigation.[28]

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FEDERAL JURISDICTION AND RES JUDICATA: LITIGATION IN STATE COURTS OF FEDERAL CONSTITUTIONAL QUESTIONS CLOSING THE DOOR TO THE FEDERAL COURTS

The plaintiff, Paul, initially litigated and lost in the Florida state courts an action for a declaratory decree that the erection of a Latin Cross each December on the defendant's courthouse, with the sanction of the defendant's county government, was a violation of the establishment and freedom of religion clauses of the first amendment as applied to the states through the due process clause of the fourteenth amendment and was also a violation of the equal protection clause of the fourteenth amendment to the United States Constitution.[1] Subsequently, Feder

(1968). "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

27. Wiehl, *Six Man Jury*, 4 GONZAGA L. REV. 35 (1968); Tamm, *The Five-Man Civil Jury*, 51 GEO. L.J. 120 (1962). For evaluations of experiments with smaller juries which resulted in prompt trials, lower costs, and verdicts no different than those returned by 12-man juries, the reader should consult the following sources: Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC'Y 136 (1958).

28. Another area of jury reform under current consideration, although outside the scope of this note, is the controversy regarding the merits of majority versus unanimous verdicts.

1. Paul v. Dade County, 202 So.2d 833 (Fla. 3d Dist. 1967), *cert. denied*, 207 So.2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968).

joined Paul in filing a similar suit in the United States District Court for the Southern District of Florida. This complaint was dismissed for failure to allege a specific statutory grant of jurisdiction.[2] On appeal to the United States Court of Appeals for the Fifth Circuit, the court, although finding specific statutory jurisdiction,[3] took judicial notice of the previous state court litigation and *held*, affirmed: A federal district court has no jurisdiction to hear federal constitutional cases already litigated in state courts.[4] *Paul v. Dade County,* 419 F.2d 10 (5th Cir. 1969), *cert. denied*, 379 U.S. 1065 (1970).

This note will not discuss the first amendment establishment and free exercise of religion issues raised in the state and federal court litigation.[5] Instead, attention will be focused on the two issues raised in the Fifth Circuit's opinion: the jurisdiction of the federal courts vis-a-vis the state courts; and the res judicata effect of prior state court decisions on the right to invoke the jurisdiction of the federal courts.

I. JURISDICTION

The jurisdiction of the federal district courts is derived from Acts of Congress, as authorized by the United States Constitution, and is clearly original in nature.[6] That the federal district courts do not have authority to merely review state court decisions, *i.e.*, exercise appellate

2. This court is powerless to act in the absence of a specific statutory grant of jurisdiction. A careful inspection of the complaint in this case failed to disclose that the jurisdiction of this Court has been validly invoked.

Thereupon, it is ORDERED and ADJUDGED that this complaint be and the same is hereby dismissed without prejudice.

Paul v. Dade County, Civ. No. 68-1229 (S.D. Fla. Dec. 9, 1968).

3. *See* note 48 *infra.*

4. A federal district court is without jurisdiction to hear federal constitutional claims already litigated in state courts when, as here, there is already a final, appealable judgment by a state court at the time the federal suit is instituted.

Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969).

On the court's authority to sua sponte question its jurisdiction at any time, *see, e.g.*, Vorachek v. United States, 337 F.2d 797 (8th Cir. 1964); Lowry v. International Bhd. of Boilermakers, 259 F.2d 568 (5th Cir. 1958).

5. In the state court, the plaintiff alleged that the defendant had erected a Latin cross on a public building, with public funds, and that this action constituted the establishment of religion in violation of the first and fourteenth amendments to the United States Constitution as well as parts of the Florida Constitution. From an adverse final decree in the circuit court, the plaintiff appealed to the third district court of appeal which *held*, affirmed:

[W]e hold that under the Schempp test [School Dist. of Abington Tp. v. Schempp, 374 U.S. 203 (1963)], this does not amount to the establishment of a religion in violation of the First Amendment, and that it does not amount to a religious activity, controlled, supported or influenced by the government . . . .

Paul v. Dade County, 202 So.2d 833, 835 (Fla. 3d Dist. 1967). The *ratio decidendi* was that the cross had acquired a secular connotation as a yule season decoration, as have other previously purely religious symbols such as the dove, star, fish, and three intertwined rings.

6. The Constitution does not create any inferior federal courts, but gives Congress the power to do so. Thus these courts must have their genesis in acts of Congress, and the extent of their jurisdiction depends, subject to constitutional limits, upon the Congressional grant.

1 A J. MOORE, FEDERAL PRACTICE ¶ 0.201 (2d ed. 1965) [footnotes omitted.]

jurisdiction over state court decisions, was clearly established by the Supreme Court in *Rooker v. Fidelity Trust Co.*[7] While the Rooker case is still the most definitive statement of the law in this area, there are some interesting qualifications regarding its application in such areas as deprivation of constitutional rights,[8] habeas corpus,[9] public policy,[10] and deprivation of voting rights.[11]

The effect of state court litigation of federal claims upon the right to return to the federal courts was expressly decided by the Supreme Court in *England v. Louisiana State Board of Medical Examiners.*[12]

> We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decisions in this Court—he has elected to forgo his right to return to the District Court.[13]

While the *England* case was basically an application of the abstention doctrine, it involved the concepts of jurisdiction and res judicata. The plaintiffs, chiropractors, brought an action in the federal district court seeking an injunction exempting them from the educational requirements

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7. 263 U.S. 413 (1923). In a much quoted opinion, Mr. Justice Van Devanter said:
> If the constitutional questions stated in the bill actually arose in the cause, 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. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. . . . 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.

Id. at 415-16 (footnotes omitted). This passage was quoted with full approval and was in fact the *ratio decidendi* of Brown v. Chastain, 416 F.2d 1012, 1013 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970), a decision relied upon by the Fifth Circuit in the *Paul* case. *See also* Dade County Classroom Teacher's Ass'n, Inc. v. Nathan, 413 F.2d 1005 (5th Cir. 1969); Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968); Warriner v. Fink, 307 F.2d 933 (5th Cir. 1962).

8. Hanna v. Home Ins. Co., 281 F.2d 298 (5th Cir. 1960), *cert. denied*, 365 U.S. 838 (1961). In this case, the court followed Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) but propounded the following dicta: "*Unless alleged errors constitute a deprivation of constitutional rights*, they may be reviewed only by the United States Supreme Court." Hanna v. Home Ins. Co., 281 F.2d 298, 303 (5th Cir. 1960) (emphasis added). *See also* O'Connor v. O'Connor, 315 F.2d 420 (5th Cir. 1963).

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

10. Kloeb v. Armour & Co., 311 U.S. 199 (1940).

11. When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960); *accord*, South Carolina v. Katzenbach, 383 U.S. 301 (1966).

12. 375 U.S. 411 (1964).

13. *Id.* at 419, *accord*, Rankin v. Florida, 418 F.2d 482 (5th Cir. 1969); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967).

of the Louisiana Medical Practice Act on the ground that it violated the fourteenth amendment. A statutory three-judge court invoked the doctrine of abstention to allow the state courts to act. The plaintiffs submitted all questions including the constitutionality of the Act to the state courts which ruled against them. They returned to the federal district court which dismissed their case holding that they could not relitigate in the lower federal courts issues tried in the state courts (their only proper remedy being in the United States Supreme Court).[14] However, the United States Supreme Court reversed and remanded the case to the district court for a decision on the merits of plaintiff's fourteenth amendment claims. Mr. Justice Brennan raised a fundamental objection to forcing a litigant, who has properly invoked the federal district court's jurisdiction regarding federal constitutional claims, to be compelled to accept instead a state court's determination of those claims.[15]

> [R]eview, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination—often by three judges, 28 U.S.C. § 2281—to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.[16]

The *England* case, which merged the principles of jurisdiction and abstention with that of res judicata, was apparently followed in *Rankin v. Florida*.[17] In this case, a federal class action was brought under the Federal Declaratory Judgment Act challenging the constitutionality of a Florida statute. The action was dismissed in the federal district court and the Fifth Circuit Court of Appeals affirmed, holding that since a similar action had taken place in the state courts and had finally been ruled upon and the parties and issues were identical in substance, if not in form, dismissal was correct under the *England* case and the doctrine of res judicata.[18]

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14. England v. Louisiana State Bd. of Medical Examiners, 194 F. Supp. 521 (E.D. La. 1961). *See* note 7 *supra*.

15. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

16. *Id.* at 416. This is not to say that there will not be times when the public interest can be served without hurting private interests and the usual rule of comity must govern in the exercise of equitable jurisdiction by the federal district court. *Accord*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). *See also* Townsend v. Sain, 372 U.S. 293, 312 (1963); Speiser v. Randall, 357 U.S. 513, 525 (1958).

Furthermore, a party may clearly elect to forego his right to return to the federal district court. NAACP v. Button, 371 U.S. 415 (1963).

17. 418 F.2d 482 (5th Cir. 1969).

18. *Id.* at 486.

II. RES JUDICATA

Thus, we are confronted with the second major issue involved in the *Paul* case—the res judicata effect of state court decisions on the right to utilize the federal courts.[19]

Perhaps, the best capsule statement on the doctrine of res judicata (if one is possible at all) was expressed by Professor Moore:

> Res judicata . . . is a salutary doctrine of repose that gives conclusive finality to a final, valid judgment, and, if the judgment is on the merits, precludes further litigation of the same cause of action between the same parties or those in such legal relationship to them that they are said to be in privity and bound by the judgment.[20]

It is important that the judgment be on the merits, for only then will it merge with the plaintiff's claim.[21] Also, the existence of the same cause of action is paramount;[22] unfortunately, defining the cause of action has proved to be far more difficult.[23] Furthermore, the parties must be

19. In this respect, we will be concerned with only two aspects of the broad concept of res judicata; the privity of parties requirement and the public policy ameliorating the doctrine.

20. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.401 (2d ed. 1965) (footnotes omitted) [hereinafter cited as MOORE]. Professor Moore goes on to emphasize the importance of the same cause of action because, technically, if different causes of action are involved, res judicata does not apply and only collateral estoppel can be used to prevent a subsequent litigation of the same issues of fact. Furthermore, the parties are not bound by matters not previously adjudged *even if they could have been. Id. See also* F. JAMES, CIVIL PROCEDURE § 11.18 (1965) [hereinafter cited as JAMES]; Notes, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L. Q. 724 (1967); Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

This distinction between res judicata and collateral estoppel is important because of the following general rule which applies only to res judicata.

> [A] judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, *but also as respects any other available matter which might have been presented to that end.*

Grubb v. Public Util. Comm'n of Ohio, 281 U.S. 470, 479 (1930) (emphasis added).

It is also important to note that rulings of law, divorced from specific facts, do not become binding upon the parties under res judicata, but rather become legal precedents under the broader doctrine of stare decisis, which would be the case even if they involved entirely different parties. JAMES at § 11.22; RESTATEMENT OF JUDGMENTS § 70 (1942) [hereinafter cited as JUDGMENTS].

21. JAMES at § 11.17; JUDGMENTS § 48.

22. See note 20 *supra*.

23. Professor James suggests three main patterns for defining "cause of action":

> (1) Those which define it in terms of the remedial right which is being enforced and limit it to a single right. . . .
>
> (2) Those which define "cause of action" in terms of a single delict or breach of a primary duty. . . .
>
> (3) Those which give the term "causes of action" a purely factual content. . . .

JAMES at § 11.10 (footnotes omitted).

It is interesting to note that in view of the above complexity of definitions at least one court has actually held that it will not enforce the well-stated rule against splitting a single cause of action "as the evident justice of the particular case requires." State *ex rel.* White Pine Sash Co. v. Superior Court for Ferry County, 145 Wash. 576, 579, 261 P. 110, 111 (1927).

in privity to be bound by the judgment.[24] Thus, while the general rule is that "persons who were not made parties and brought before the court in the first action are not bound by the judgment in it . . ."[25]; this rule is subject to many exceptions.[26]

Finally, there are the policy considerations of the doctrine. These considerations usually emphasize the importance of stability and certainty in the law so that others can guide their actions accordingly.[27] Sometimes, however, this policy, though rigidly applied by the courts, must give way to another overriding public policy.[28] For example, in situations involving special relationships between the parties or a pervasive interest of the courts in the subject matter, res judicata will not be applied.[29]

> [R]es judicata, as the embodiment of a public policy, must, at times, be weighed against competing interests, and must, on occasion, yield to other policies.[30]

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24. The statement that a person is bound by or has the benefit of a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by and entitled to the benefits of all or some of the rules of res judicata. . . .

JUDGMENTS § 83, comment *a*.

In most situations where privity has been held to exist, one or more of the following three relationships are present: "concurrent relationship to the same right of property; successive relationship to the same right of property; or representation of the interests of the same person." MOORE at ¶ 0.411[1]. *See generally* JAMES at § 11.24; JUDGMENTS § 79.

25. JAMES at § 11.26. *Accord*, Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Commonwealth v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966) (prior action held res judicata to commonwealth, attorney general, and city but not to seven minor negroes denied admission to school for poor white orphans who were not parties to previous action) (vacated on other grounds); JUDGMENTS § 93.

26. JAMES at § 11.27-11.30; *see* note 24 *supra*.

An interesting recent case dealing with privity for res judicata purposes defined a person in privity as follows:

> [A] person so identified in interest with a party to a former litigation that he represents precisely the same legal right in respect to the subject matter involved.

Jefferson School of Social Sciences v. Subversive Activities Control Bd., 331 F.2d 76, 83 (D.C. Cir. 1963) (footnote omitted).

27. It is important that judgments of the court have stability and certainty . . . so that the parties and others may rely on them . . . so that the moral force of court judgments will not be undermined by an appearance of indecision and vacillation . . . the tendency of frequent reversals on appeal to undermine the prestige of and respect for the trial court.

JAMES at § 11.1 (footnotes omitted). *See also* JUDGMENTS § 1.

28. JUDGMENTS § 10 lists five factors to be considered in jurisdictional questions. According to Professor Wright:

> The rule that a finding of jurisdiction is res judicata of the issue is subject to exception when the policy in favor of finality of judgments is outweighed by other factors.

C. WRIGHT, FEDERAL COURTS § 16 (1963) [hereinafter cited as WRIGHT] (footnote omitted). *See generally* JAMES at § 11.35; MOORE at ¶ 0.405 [11]; Comment, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360 (1967) (suggesting the importance of unfettered access to the federal courts as outweighing the need for finality of judgments in certain cases).

29. Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951).

30. *Id.* at 38-39.

The courts have produced similar holdings where the underlying policies of res judicata would be inapplicable to the facts,[31] would produce an inequitable result,[32] would be contrary to the intent of Congress,[33] or would involve habeas corpus.[34]

The difficulty in applying these principles to cases involving state court litigation preceding federal court litigation of the same subject matter is best illustrated in the case of *Angel v. Bullington*,[35] a much criticized decision. This was a diversity case in which Bullington (plaintiff), a citizen of Virginia, sued the defendant, a citizen of North Carolina, for a deficiency judgment and lost in the North Carolina state courts on the basis of a North Carolina statute precluding recovery. Bullington did not seek review to the United States Supreme Court. Instead, he brought the same action in a federal district court in North Carolina, and on appeal, the United States Supreme Court held that the North Carolina state judgment operated as res judicata and precluded recovery in the federal court.[36] Mr. Justice Frankfurter, writing for the majority, did qualify his opinion by recognizing that if a federal right had been claimed, the limitations upon the courts of a state would "not control a federal court sitting in the state."[37] The basis of the criticism of the *Angel* case is centered on the fact that there was never any final judgment on the merits and Bullington never really had his day in court.[38]

The most recent case embodying the jurisdiction and res judicata concepts of the *Paul* case is *Olson v. Board of Education*.[39] The New York state courts had upheld the State Commissioner of Education's ruling on school attendance involving racial imbalance. The Supreme Court denied certiorari and the plaintiff, a parent of another school child, sought to enjoin enforcement of the Commissioner's ruling in the federal district court under the fourteenth amendment and the Civil Rights Act of 1964.[40] While the federal court dismissed the complaint, it did rule on the merits

31. Adams v. Pearson, 411 Ill. 431, 104 N.E.2d 267 (1952).

32. State *ex rel.* White Pine Sash Co. v. Superior Court for Ferry County, 145 Wash. 576, 261 P. 110 (1927).

33. Kalb v. Feuerstein, 308 U.S. 433 (1940).

34. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

35. 330 U.S. 183 (1947).

36. *Id. But see England v. Louisiana State Bd. of Medical Examiners*, notes 12-15 *supra* and note 38 *infra*.

37. Angel v. Bullington, 330 U.S. 183, 192 (1947). *See also* WRIGHT at § 46.

38. MOORE at ¶ 0.409[2]. Professor Moore argues, in addition, that the claimant should not have been foreclosed in the federal court for failure to take what seemed to be an unnecessary appeal from the North Carolina Supreme Court. *Id.*

The dissent of Mr. Justice Rutledge concerning strong overriding policy decisions and the uselessness of barring Bullington for not taking an almost hopeless appeal is well worth reading. Angel v. Bullington, 330 U.S. 183, 201-11 (1947).

See also note 21 *supra*; notes 28 through 34 *supra*; MOORE at ¶ 0.405 [12] (preferring the *England* approach to res judicata over that of the *Angel* case).

39. 250 F. Supp. 1000 (E.D.N.Y. 1966), *appeal dismissed*, 367 F.2d 565 (2d Cir. 1966) (dismissed on other grounds).

40. The plaintiff claimed jurisdiction under 28 U.S.C. § 1343(3) (1964) and 42 U.S.C. §§ 1981, 1983 (1964).

of the case and the approach used is significant. First, under the Congressional statutes invoked by the plaintiff, the court immediately took its expressed jurisdiction, stating that any failure to state a cause of action must be decided after the court assumes jurisdiction.[41] Additionally, the court then went on to hold that the case did not fall within the principles of res judicata or the constitutional requirement of full faith and credit with respect to extensive previous state litigation[42] because the prior state litigation was not a class action and there was no privity between the parties of the state and federal action.[43] The lack of privity is highly significant for the purpose of this note because the plaintiff in *Olson* was the parent of another child who attended the same school as the child of the plaintiff in the state court action. This is an exceedingly close relationship, yet the court refused to find privity for res judicata purposes.

Accordingly, the state court decision might have great weight under stare decisis regarding the same issues, but it would have no res judicata effect in either the state or federal courts.[44] The court reasoned that while the state court litigation had mentioned the constitutional issues,[45] it had never reached them,[46] but simply established the powers of the Commissioner. In conclusion, the court stated that its resolution of the foregoing issues was not altered by the Supreme Court's denial of certiorari in the earlier state action inasmuch as the high court had repeatedly expressed the view that such action is in no way an expression of opinion upon the merits of any issues involved.[47]

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41. Olson v. Bd. of Educ., 250 F. Supp. 1000, 1004 (E.D.N.Y. 1966).

42. *Id.*

43. *Id.* This is extremely important in view of the commonality of interest test suggested in *Jefferson School of Social Sciences v. Subversive Activities Control Bd.*, *supra* note 26.

44. Olson v. Bd. of Educ., 250 F. Supp. 1000, 1004-005 (E.D.N.Y. 1966). *See also* note 20 *supra*.

45. Olson v. Bd. of Educ., 250 F. Supp. 1000, 1005 (E.D.N.Y. 1966). The court cited with approval the *England* case (see notes 12-15 *supra*) and Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958).

The *Tribune* case involved a proceeding to enjoin enforcement of a state court order banning photographs at a trial and allowed the litigant to return to the federal court after unsuccessfully litigating the question in the state courts and having certiorari denied by the Supreme Court. District Judge Hunter stated:

> I conclude, therefore, that refusal of the United States Supreme Court to grant certiorari to the plaintiffs from the judgment of the Supreme Court of Pennsylvania upholding the validity of said County Court Rule in this action, in no way constitutes an adjudication upon the merits and is not res judicata to the issues raised.

Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486, 492 (W.D. Pa. 1957).

46. *See* note 21 *supra*.

47. In Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950), Mr. Justice Frankfurter deliberately took the opportunity to explain denial of a petition for writ of certiorari saying,

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Id. at 919.

III. Analysis and Conclusion

The instant case was dismissed by the Fifth Circuit on the grounds of lack of jurisdiction while using the concept of res judicata to allow the previous state action to bar federal court litigation. Dealing with the concept of jurisdiction, the court took judicial notice of the prior state action and concluded that the plaintiffs were requesting appellate review of the action[48] which the federal district courts clearly could not do according to both the *Rooker* and *Brown* cases.[49] Since one of the plaintiffs, Paul, was making the same argument in the instant case as he did in the prior state action, the constitutional issues were considered litigated previously.[50] Although Feder was an additional plaintiff, this would not confer jurisdiction *if* it would otherwise be lacking.[51] In relying on the *Brown* case, the court dismissed the fact that certiorari had been denied in the instant case as immaterial. Thus, the court was able to affirm the dismissal as an attempt by the plaintiffs to have a federal district court exercise appellate review, which it cannot do, to hear a federal constitutional question already finally litigated in the state courts.[52]

Paul v. Dade County appears to hold that one generally cannot ask a federal district court to review a final state court decision on a federal constitutional question because it lacks the jurisdiction to do so except in special circumstances[53]—this is unquestionably the law today. However, when the fact is taken into account that the court could have dropped the party creating the res judicata situation, it appears that what the court is really saying is that one who is a genuine nonparty and not bound by any concepts of res judicata to a previous final state court decision on a federal constitutional question cannot enter a federal

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48. Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969).

This is particularly interesting in view of the fact that the appellants had argued that the jurisdiction invoked was the first and fourteenth amendments to the United States Constitution as well as 28 U.S.C. §§ 1331, 1343 (1964) and 42 U.S.C. § 1983 (1964). Supplemental Brief for Appellant at 5, Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969). As pointed out in the *Olson* case and the *Tribune* case, these statutes alone are sufficient to invoke the original jurisdiction of the federal district courts whether or not there has been prior state litigation, *see* notes 40 and 45 *supra*.

49. *See* note 7 *supra*. *But see* notes 8-11 *supra*.

50. *See* note 5 *supra* for an examination of the *Paul* case. As pointed out in that note, Paul was suing individually. The case was decided partly by determining whether the Latin cross was a secular symbol and one wonders if the constitutional issue of establishment of religion was really reached; *i.e.*, was there even a state court decision on the constitutional merits? *Cf.* note 21 *supra*.

51. But note the appellant's argument that Feder was a Jew and a practising attorney who found the cross offensive as she had to use the courthouse daily, thus raising the free exercise of religion question. This is clearly a different identifiable interest than that of Paul (*see* note 5 *supra*) and thus raises all the issues of res judicata relating to a nonparty as discussed previously in notes 24-26 *supra*, as well as the policy considerations discussed in notes 27-34 *supra* when the argument is viewed in the light of the first and fourteenth amendment questions raised.

52. Paul v. Dade County, 419 F.2d 10, 13 (5th Cir. 1969).

53. This is the substance of the *Rooker* doctrine and the cases which have applied it. *See generally* notes 7-11 *supra*.

district court to litigate the same legal issue;[54] all this is the result of some fusion of the concepts of jurisdiction and res judicata.

When talking about foreclosing the federal courts to first and fourteenth amendment issues, or to federal constitutional questions in general, one must be very careful indeed. The law is probably best expressed in the *England* and *Olson* cases, tempered with strong policy considerations as opposed to the instant case. Since the instant case has few facts and very little rationale, and therefore subject to a broad interpretation, it may be applied so as to preclude litigants from using a federal forum, which for several reasons,[55] is better suited than state courts for the purpose of deciding constitutional questions.

> If, as has been suggested above, the justification for original federal question jurisdiction is to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy, then that jurisdiction should extend to all cases in which the meaning or application of the Constitution, laws, or treaties of the United States, is a principal element in the position of either party. *This is not now the law. It is the rationale on which the present proposals are based.*[56]

JOEL N. MINSKER

54. This is not the law at present, as a careful examination of this case note will reveal. However, the instant case seems to suggest this when one considers the reason behind the court's failure to invoke FED. R. CIV. P. 21 which states:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The authority for invoking this rule when jurisdictional questions arise is legion. Paul could have been dropped to preserve federal jurisdiction *unless the court is saying it had no jurisdiction with respect to Feder alone—query*:

> Jurisdictional requirements are of the utmost importance in considering whether to add or drop parties who are not indispensible . . . . On the other hand, parties who are not indispensible, may be dropped if necessary in order to preserve federal jurisdiction.

2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 543 (Wright ed. 1961) (footnotes omitted). *See, e.g.*, Cox v. Hutcheson, 204 F. Supp. 442 (S.D. Ind. 1962) (class action dismissed but individual plaintiff's action continued); Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941).

55. To begin, the way in which facts are found often dictates the decision of federal claims. *See* notes 15 and 16 *supra*. Also, federal judges appointed for life are more likely than elected state judges to enforce the constitutional rights of minorities. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 427 (1964). Mr. Justice Douglas went on to say:

> The value of the independence of federal judges, and the value of an escape from local prejudices when fact findings are made are considerable ones. Yet under the rule we announce today, those values promise to be lost in important areas of civil rights.

Id. at 436. Furthermore, federal judges apply a national system of law to protect the national interest. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964). Finally, federal judges are considered to have an expertise in dealing with federal questions which exceeds that of state court judges. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Tentative Draft No. 6, 72 (1968).

56. *Id.* at 74.