To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-935

Marvin Allen et al., Petitioners,
v.
Willie McCurry.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[December —, 1980]

JUSTICE BLACKMUN, dissenting.

The legal principles with which the Court is concerned in this civil case obviously far transcend the ugly facts of respondent's criminal convictions in the courts of Missouri for heroin possession and assault.

The Court today holds that notions of collateral estoppel apply with full force to this suit brought under 42 U. S. C. § 1983. In my view, the Court, in so ruling, ignores the clear import of the legislative history of that statute and disregards the important federal policies that underlie its enforcement. It also shows itself insensitive both to the significant differences between the § 1983 remedy and the exclusionary rule, and to the pressures upon a criminal defendant that make a free choice of forum illusory. I do not doubt that principles of preclusion are to be given such effect as is appropriate in § 1983 action. In many cases, the denial of res judicata or collateral estoppel effect would serve no purpose and would harm relations between federal and state tribunals. Nonetheless, the Court's analysis in this particular case is unacceptable to me. It works injustice on this § 1983 plaintiff, and it makes more difficult the consistent protection of constitutional rights, a consideration that was at the core of the enacters' intent. Accordingly, I dissent.

In deciding whether a common law doctrine is to apply to § 1983 when the statute is silent, prior cases uniformly have

accorded the intent of the legislators great weight.[1] For example, in reference to the judicially-created immunity doctrine, the Court has observed that when the "immunity claimed . . . was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." *Owen* v. *City of Independence*, 445 U. S. 622, 638 (1980).[2] This very proper inquiry must be made in order to ensure that § 1983 will continue to serve the important goals intended for it by the 42d Congress. In the present case, however, the Court minimizes the significance of the legislative history and discounts its own prior explicit interpretations of the statute. Its discussion is limited to articulating what it terms the single fundamental principle of res judicata and collateral estoppel.

Respondent's position merits a quite different analysis. Although the legislators of the 42d Congress did not expressly state whether the then-existing common law doctrine of preclusion would survive enactment of § 1983, they plainly anticipated more than the creation of a federal statutory remedy to be administered indifferently by either a state or a federal court.[3] The legislative intent, as expressed by supporters[4]

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[1] See, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. — (1980); *Monell* v. *Department of Social Services*, 436 U. S. 658 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

[2] See also *Robertson* v. *Wegmann*, 436 U. S. 584 (1978) (survival of action); *Carey* v. *Piphus*, 435 U. S. 247 (1978) (nature of damages award).

[3] Representative Osborn's remarks of April 13, 1871, illustrate the contemporary understanding:

"That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should [enact protective legislation]. . . .

"The question now is, what and where is the remedy? I believe the true

[*Footnote 4 is on p. 3*]

and understood by opponents,[5] was to restructure relations between the state and federal courts.[6] They deliberately opened the federal courts to individual citizens in response to

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remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." Cong. Globe, 42d Cong., 1st Sess., 653.

[4] See, *e. g.*, *id.*, at 460 (remarks of Rep. Coburn, whom the Court by its reference to the Congressman's "spring up and resume" observation, *ante*, at 10, n. 16, would interpret the other way) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so."); *id.*, App., at 79 (comments of Rep. Perry) ("The first section provides redress by civil action *in the Federal courts* for a deprivation of any rights, privileges, and immunities secured by the Constitution. . . .") (emphasis added).

[5] *Id.*, at 396 (comments of Rep. Rice) ("[The bill] is but a bold and dangerous assertion of both the power and the duty of the Federal Government to intervene in the internal affairs and police regulations of the States and to suspend the exercise of their rightful authority. . . . It is at war with the spirit of a republican Government."); *id.*, at 416 (comments of Rep. Biggs) ("[If this bill should pass] we have by law done what has never before been done in our history, whatever the provocation, namely: authorized the punishment of crimes and offenses of a personal character among us under the Federal tribunals, which shall be of equal authority in criminal cases with our own State courts, and in many cases shall be of superior authority, and of an altogether extraordinary character[.] First, for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding."); *id.*, App., at 86 (comments of Rep. Storm) ("Now these questions

[*Footnote 6 is on p. 4*]

the States' failure to provide justice in their own courts. Contrary to the view presently expressed by the Court, the 42d Congress was not concerned solely with procedural regularity. Even where there was procedural regularity, which the Court today so stresses, Congress believed that substantive justice was unobtainable.[7] The availability of the federal

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could all be tried, I take it, in the State courts, and by a writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. . . . But the first section of this bill does not allow that right. It takes the whole question away at once and forever; and I say that on the ground of delay it is objectionable."). See also *id.*, at 686–687 (comments of Sen. Schurz); *id.*, App., at 216 (comments of Sen. Thurman).

[6] See *id.*, App., at 149 (comments of Rep. Garfield) (stating that Congress, in considering this legislation, must seek equipoise between opposing poles of government, on one hand, "that despotism which swallows and absorbs all power in a single-central, government," and, on the other, the "extreme doctrine of local sovereignty which makes nationality impossible").

[7] See *id.*, App., at 78 (comments of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished."); *id.*, at 653 (comments of Sen. Osborn) ("The State courts, mainly under the influence of this [Klan] oath, are utterly powerless"); *id.*, at 394 (remarks of Rep. Rainey) ("The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"); *id.*, App., at 153 (comments of Rep. Garfield) ("But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a

forum was not meant to turn on whether, in an individual case, the state procedures were adequate. Assessing the state of affairs as a whole, Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights.

That the new federal jurisdiction was conceived of as concurrent with state jurisdiction does not alter the significance of Congress' opening the federal courts to these claims. Congress consciously acted in the broadest possible manner.[8] The legislators perceived that justice was not being done in the States then dominated by the Klan, and it seems senseless to suppose that they would have intended the federal courts to give full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in those same courts.

I appreciate that the legislative history is capable of alternative interpretations. See the Court's opinion, *ante*, at 8–11. I would have thought, however, that our prior decisions made very clear which reading is required. The Court repeatedly has recognized that § 1983 embodies a strong congressional policy in favor of federal courts' acting as the primary and

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neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."); *id.*, App., at 166–167 (comments of Rep. Williams regarding Klan methods of securing perjured testimony).

[8] Representative Shellabarger, the bill's sponsor, stated:

"This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Id.*, App., at 68.

final arbiters of constitutional rights.[9] In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that Congress passed the legislation in order to substitute a federal forum for the ineffective, although plainly available, state remedies:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.*, at 180.[10]

The Court appears to me to misconstrue the plain meaning of *Monroe*. It states that in that case "the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice." *Ante*, at 10. It is true that the Court in *Monroe* described those three circumstances as the "three main aims" of the legislation. 365 U. S., at 173. Yet in that case, the Court's recounting of the legislative history and its articulation of these three purposes were intended only as illustrative of *why* the 42d Congress chose to establish a federal remedy in federal court, not as a delineation of *when* the remedy would be available. The Court's conclusion was that this

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[9] *E. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

[10] To the extent that *Monroe* v. *Pape*, held that a municipality was not a "person" within the meaning of § 1983, it was overruled by the Court in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 664–689 (1978). That ruling, of course, does not affect *Monroe*'s authoritative pronouncement of the legislative purposes of § 1983.

remedy was to be available no matter what the circumstances of state law:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.*, at 183.

In *Mitchum* v. *Foster*, 407 U. S. 225 (1972), the Court reiterated its understanding of the effect of § 1983 upon state and federal relations:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U. S., at 346." 407 U. S., at 242.[11]

At the very least, it is inconsistent now to narrow, if not repudiate, the meaning of *Monroe* and *Mitchum* and to alter our prior understanding of the distribution of power between the state and federal courts.

One should note also that in *England* v. *Medical Examiners*,

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[11] The Court also stated:

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 407 U. S., at 242.

375 U. S. 411 (1964), the Court had affirmed the federal courts' special role in protecting constitutional rights under § 1983. In that case it held that a plaintiff required by the abstention doctrine to submit his constitutional claim first to a state court could not be precluded entirely from having the federal court, in which he initially had sought relief, pass on his constitutional claim. The Court relied on "the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts," and on its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a federal district court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.*, at 415. The Court set out its understanding as to when a litigant in a § 1983 case might be precluded by prior litigation, holding 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 decision in this Court—he has elected to forgo his right to return to the District Court." *Id.*, at 419. I do not understand why the Court today should abandon this approach.

The Court now fashions a new doctrine of preclusion, applicable only to actions brought under § 1983, that is more strict and more confining than the federal rules of preclusion applied in other cases. In *Montana* v. *United States*, 440 U. S. 147 (1979), the Court pronounced three major factors to be considered in determining whether collateral estoppel serves as a barrier in the federal court:

> "[W]hether the issues presented . . . are in substance the same . . . ; whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circum-

stances warrant an exception to the normal rules of preclusion." *Id.*, at 155.

But now the Court states that the collateral estoppel effect of prior state adjudication should turn on only one factor, namely, what it considers the "one general limitation" inherent in the doctrine of preclusion: "that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Ante*, at 5, 10–11. If that one factor is present, the Court asserts, the litigant properly should be barred from relitigating the issue in federal court.[12] One cannot deny that this factor is an important one. I do not believe, however, that the doctrine of preclusion requires the inquiry to be so narrow,[13] and my understanding of the policies underlying § 1983 would lead me to consider all relevant factors in each case before concluding that preclusion was warranted.

In this case, the police officers seek to prevent a criminal defendant from relitigating the constitutionality of their conduct in searching his house, after the state trial court had found that conduct in part violative of the defendant's Fourth Amendment rights and in part justified by the circumstances. I doubt that the police officers, now defendants in this § 1983 action, can be considered to have been in privity with the State in its role as prosecutor. Therefore, only "issue preclusion" [14] is at stake.

The following factors persuade me to conclude that this respondent should not be precluded from asserting his claim

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[12] This articulation of the preclusion doctrine of course would bar a § 1983 litigant from relitigating any issue he *might* have raised, as well as any issue he actually litigated in his criminal trial.

[13] See Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 4, April 15, 1977; F. James & G. Hazard, Civil Procedure §§ 11.16–11.22 (2d ed., 1977).

[14] See *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); F. James & G. Hazard, Civil Procedure §§ 11.3, 11.16 (2d ed., 1977).

in federal court. First, at the time § 1983 was passed, a nonparty's ability, as a practical matter, to invoke collateral estoppel was nonexistent. One could not preclude an opponent from relitigating an issue in a new cause of action, though that issue had been determined conclusively in a prior proceeding, unless there was "mutuality." [15] Additionally, the definitions of "cause of action" and "issue" were narrow.[16] As a result, and obviously, no preclusive effect could arise out of a criminal proceeding that would affect subsequent *civil* litigation. Thus, the 42d Congress could not have anticipated or approved that a criminal defendant, tried and convicted in state court, would be precluded from raising against police officers a constitutional claim arising out of his arrest.

Also, the process of deciding in a state criminal trial whether to exclude or admit evidence is not at all the equivalent of a § 1983 proceeding. The remedy sought in the latter is utterly different. In bringing the civil suit the criminal defendant does not seek to challenge his conviction collaterally. At most, he wins damages. In contrast, the exclusion of evidence may prevent a criminal conviction. A trial court, faced with the decision whether to exclude relevant evidence,

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[15] *Triplett* v. *Lowell*, 297 U. S. 638 (1936), overruled by the Court in *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U. S. 313 (1971); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111 (1912); F. James & G. Hazard, Civil Procedure § 11.2 (2d ed., 1977); Restatement of Judgments § 93 (1942); 1B J. Moore's Federal Practice ¶¶ 0.412 [1], 0.441 [3] (2d ed., 1974).

[16] Compare McCaskill, Actions and Causes of Action, 34 Yale L. J. 614, 638 (1925) (defining "cause of action" as "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded"), with C. Clark, Handbook on the Law of Code Pleading 84 (1928) (adopting "modern" rule expanding "cause of action" to include more than one "right"). See also 1 H. Herman, Law of Estoppel and Res Judicata §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 826, 841–843 (1952).

confronts institutional pressures that may cause it to give a different shape to the Fourth Amendment right from what would result in civil litigation of a damages claim. Also, the issue whether to exclude evidence is subsidary to the purpose of a criminal trial, which is to determine the guilt or innocence of the defendant, and a trial court, at least subconsciously, must weigh the potential damage to the truth-seeking process caused by excluding relevant evidence. See *Stone* v. *Powell*, 428 U. S. 465, 489–495 (1976). Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 411–424 (dissenting opinion).

A state criminal defendant cannot be held to have chosen "voluntarily" to litigate his Fourth Amendment claim in the state court. The risk of conviction puts pressure upon him to raise all possible defenses.[1] He also faces uncertainty about the wisdom of forgoing litigation on *any* issue, for there is the possibility that he will be held to have waived his right to appeal on that issue. The "deliberate by-pass" of state procedures, which the imposition of collateral estoppel under these circumstances encourages, surely is not a preferred goal. To hold that a criminal defendant who raises a Fourth Amendment claim at his criminal trial "freely and without reservation submits his federal claims for decision by the state courts," see *England* v. *Medical Examiners*, 375 U. S., at 419, is to deny reality. The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between forgoing either a potential defense or a federal forum for hearing his constitutional civil claim is fundamentally unfair.

I would affirm the judgment of the Court of Appeals.

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[1] See *Moran* v. *Mitchell*, 354 F. Supp. 86, 88–89 (ED Va. 1973) (noting the defendant's dilemma).