To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JAN 13 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-738

ETHEL D. MIGRA, PETITIONER *v.* WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1984]

with whom JUSTICE POWELL joins,

JUSTICE WHITE, concurring.

In *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 75 (1903), this Court held that a federal court "can accord [a state judgment] no greater efficacy" than would the judgment-rendering state. That holding has been adhered to on at least three occasions since that time. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 7–8 (1940); *Wright* v. *Georgia R. & Banking Co.*, 216 U. S. 420, 427 (1910); *City of Covington* v. *First National Bank*, 198 U. S. 100, 107–109 (1905). The Court has also indicated that the states are bound by a similar rule under the full faith and credit clause. *Public Works* v. *Columbia College*, 17 Wall. 521, 529 (1873). The Court is thus justified in this case to rule that preclusion in this case must be determined under state law, even if there would be preclusion under federal standards.

This construction of § 1738 and its predecessors is unfortunate. In terms of the purpose of that section, which is to require federal courts to give effect to state-court judgments, there is no reason to hold that a federal court may not give preclusive effect to a state judgment simply because the judgment would not bar relitigation in the state courts. If the federal courts have developed rules of res judicata and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal

courts should be free to apply them, the parties then being free to relitigate in the state courts. The contrary construction of § 1738 is nevertheless one of long standing, and Congress has not seen fit to disturb it, however justified such an action might have been.

Accordingly, I join the opinion of the Court.