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INTERJURISDICTIONAL PRECLUSION, FULL FAITH AND CREDIT AND FEDERAL COMMON LAW: A GENERAL APPROACH

Stephen B. Burbank †

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This Article is dedicated to the memory of Judge Henry Friendly.
INTRODUCTION

Fashioning a law of preclusion that sensitively accommodates individual and institutional interests as well as the policies and structure of the substantive law is a difficult enterprise even in a wholly domestic context. The enterprise is considerably more difficult in an interjurisdictional context. The full faith and credit clause of the Constitution and its implementing statute have simplified the task in interjurisdictional cases involving state judgments, or so it has seemed. Thus, in the state-state configuration, the answers to most questions have, for many years, appeared clear. As a result, recognition of judgments was the least important—and perhaps the most welcome—part of a course in conflict of laws, one that could as well have been entitled workers' compensation.1

The answers have always been considerably less clear in cases involving mixed state and federal configurations, but the questions were neglected. In recent years, however, interest in this branch of interjurisdictional preclusion has led to progress in solving some of its mysteries. Much of the credit belongs to Professor Ronan

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1 See U.S. Const. art. IV, § 1, quoted infra note 8; 28 U.S.C. § 1738 (1982), quoted infra note 6; infra text accompanying notes 21-25.

Degnan. By focusing attention on sources of law and demonstrating how federal law may bear on the issues, his 1976 article\(^3\) dispersed fog that, in this area as in others involving the relationship between federal and state law, rolled in after *Erie Railroad v. Tompkins.*\(^4\) Moreover, there is now available a work that, within a comprehensive treatment of preclusion, elaborates Professor Degnan’s pioneering study with discriminating intelligence.\(^5\)

Professor Degnan’s signal contribution to the study of interjurisdictional preclusion was to remind us that the full faith and credit statute\(^6\) speaks to the recognition of the judicial proceedings of state courts in subsequent proceedings in federal courts as well as in the courts of other states. That perception, coupled with the perception that the “*Erie* problem” is in fact a collection of discrete problems whose solution depends upon the source of putative federal law, enabled Degnan to demonstrate that the jurisprudence associated with *Erie*’s progeny has no place in one area of interjurisdictional preclusion where it had assumed prominence. Thus, the statute and not *Erie*’s progeny directs a federal court sitting in diversity with respect to the preclusive effects of prior state judicial proceedings, whether those of courts of the state where the federal court sits or those of some other state.\(^7\) Of greater import and interest, Degnan’s work made it clear that the full faith and credit statute must be reckoned with whenever an action in federal court is preceded by state judicial proceedings claimed to have preclusive effect. Degnan himself did not pursue these issues, but they have been the center of the Supreme Court’s attention in a series of cases decided during the past few terms.

Interjurisdictional preclusion is a multi-lane highway, and Pro-

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\(^4\) 304 U.S. 64 (1938).


\(^6\) 28 U.S.C. § 1738 (1982). The statute provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings, or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

\(^7\) See Degnan, *supra* note 3, at 750-55.
Professor Degnan travelled it in more than one direction. Neither the full faith and credit clause of the Constitution\textsuperscript{8} nor the implementing statute appears to speak to the preclusive effects of the proceedings of federal courts. Degnan described how the Supreme Court hurdles that barrier to arrive at the obviously sensible conclusion that state courts are not free to disregard the proceedings of a federal court claimed to have preclusive effect.\textsuperscript{9} Moreover, he recognized that, simply because federal law imposes that obligation, it need not also answer the question of the preclusive effects of federal judicial proceedings.\textsuperscript{10} In a section of his article that has proved influential, Degnan argued that, just as uniform federal law governs the scope and effect of federal proceedings adjudicating matters of federal substantive law (a clear, if not clearly reasoned, proposition in Supreme Court opinions), so should it govern the preclusive effects of federal proceedings adjudicating matters of state substantive law.\textsuperscript{11} Thus, in his view, the federal-state configuration is the mirror image of the state-federal, permitting him to propose a general rule applicable to both:

\begin{quote}
A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.\textsuperscript{12}
\end{quote}

“Even the most luminous analytic framework”\textsuperscript{13} can blind us. Once the gains it permits are secure, the framework invites refinement. With respect to interjurisdictional preclusion, it is an appropriate time to survey those gains and to reexamine the areas where there is still room for debate, and hence for progress.

In this Article, I argue that Professor Degnan’s proposed general rule, as applied to both the state-federal and federal-state configurations, “moves too fast and far”\textsuperscript{14} in the directions he charted. Applied to the preclusive effects of state judicial proceedings in federal court, as it has been by the Supreme Court in recent years, the rule risks the sacrifice of policies animating federal substantive law and indeed of federal substantive rights. Perception of the risk to

\begin{footnotes}
\item[8] “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1.
\item[9] See Degnan, supra note 3, at 744-50.
\item[10] See id. at 756.
\item[11] See id. at 755-76.
\item[12] Id. at 773.
\end{footnotes}
federal law posed by application of domestic state preclusion law helps to explain doubts, hesitations, and peculiarities in the Supreme Court’s recent decisions, as it helps to refine the rule. Neither the full faith and credit clause nor the full faith and credit statute directs application of domestic state preclusion law. The former does not apply in the state-federal configuration. The latter does not choose domestic state preclusion law; it refers to the domestic state solution, which is determined exogenously and may be governed by federal law.\footnote{See infra text accompanying notes 318-461.}

Applied to the preclusive effects of federal diversity proceedings adjudicating matters of state law, as it has been by some lower federal courts, Professor Degnan’s rule risks the sacrifice of state substantive policies and rights as well as of the articulated federal policy against different outcomes on the basis of citizenship. Other federal courts, as well as scholars and law reformers, have recognized that the rule is too broad in this context. They have not, however, adequately addressed the issues.\footnote{See infra text accompanying notes 215-317.}

Professor Degnan’s general rule was the product of an insufficiently general approach. I believe that the best hope for further progress lies in that direction. But there are formidable obstacles, both to the development of a more general approach and to its application to the law of preclusion.

Problems of interjurisdictional preclusion are problems in the relationship between federal and state law. Because the putative federal law of preclusion is federal common law—I believe I can demonstrate that, apart from the Constitution and except when a federal statute provides a rule of preclusion, that is all it ever is—we are likely to confront vigorous disagreement concerning the standards of pertinence and validity of judge-made federal rules. But the scholars who have skirmished on the question of a federal common law of “procedure” in federal diversity cases have tended to neglect the battle of which it is but a part.\footnote{See, e.g., Els, The Impossible Myth of Erie, 87 Harv. L. Rev. 693 (1974); Redish & Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma, 91 Harv. L. Rev. 836 (1977); Westen & Lehman, Is There Life for Erie after the Death of Diversity?, 78 Mich. L. Rev. 311 (1980); Redish, Continuing the Erie Debate: A Response to Westen and Lehman, 78 Mich. L. Rev. 959 (1980); Westen, After “Life for Erie”—A Rebuttal, 78 Mich. L. Rev. 971 (1980). But see Bourne, Federal Common Law and the Erie-Byrd Rule, 12 U. Balt. L. Rev. 426 (1983).} The Supreme Court has decided relatively few cases implicating a federal common law of “procedure” in diversity cases. The Court has, however, spoken often on the question of federal common law. It would be surprising if we could learn nothing from those cases in this context. As to
both groups of cases, however, the role played by the Rules of Decision Act must be identified.18

Once one recognizes that the full faith and credit statute states or chooses only a domestic referent and not domestic state preclusion law, it is not apparent why a general approach to federal common law should not also accommodate problems concerning the preclusive effects of state judicial proceedings. The analysis must confront, however, the tendency of courts and commentators to treat problems of federal law in domestic state litigation, or at least those to which a procedural label can be attached, as sui generis.19

If I am right that a traveller on all lanes of the interjurisdictional preclusion highway must consider whether there is pertinent and valid federal common law, and that a general approach to that question is both possible and fruitful whether or not the Rules of Decision Act provides a common vehicle, the remaining roadblocks are specific to the nature of preclusion rules.

As a concession to the shortness of life, we are drawn to characterization, particularly in delimiting the proper spheres of federal and state law. Professor Degnan would have us assimilate preclusion law to procedure.20 But rules of preclusion, like many legal rules, resist confident characterization. Emphasis on the changes in the legal landscape that made possible modern domestic preclusion law or preoccupation with the stimuli for more recent developments in that law may cause us to lose sight of the complex of policies and values that inform the basic rules and to view history in our own image. Moreover, single-minded attention to policy analysis may cause us to forget that legal rules, including preclusion rules, have effects as well as purposes. We may be willing to accept the costs of applying the same preclusion rules to all adjudications of domestic substantive law, against the background of which they were formulated. Reference to a domestic law model, however, may cause us to neglect the additional costs that attend the application of such trans-substantive preclusion rules to adjudications of the laws of other jurisdictions.

In my view, both traditional federal common law analysis and analysis under the Rules of Decision Act support the accepted (but

18 See infra text accompanying notes 81-129, 264-85. The Rules of Decision Act provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
19 See infra text accompanying notes 318-67.
20 See Degnan, infra note 3, post,.
unreasoned) conclusion that uniform federal preclusion law governs the interjurisdictional effects of federal judicial proceedings adjudicating matters of federal substantive law. Neither, however, supports that conclusion to the extent urged by Professor Degnan, or the commentators who have modified his general rule, where a federal court adjudicates matters of state substantive law in the exercise of diversity jurisdiction. As to the interjurisdictional effects of state judicial proceedings, both Professor Degnan’s general rule and the Supreme Court’s recent cases are misdirected. The correct interpretation of the statute focuses attention on the domestic preclusion solution, which may be furnished, pursuant to traditional federal common law analysis or analysis under the Rules of Decision Act, by federal common law. The full faith and credit statute makes the domestic solution the national solution.

Simplicity and predictability are important in the law of interjurisdictional preclusion as in other areas of law. Professor Degnan’s general rule has these great advantages. The benefits may be purchased, however, at a cost too great. We need a law of interjurisdictional preclusion that is sensitive to the complexity of our federal system and to the fact that preclusion rules have effects as well as purposes. Ironically, symmetry of a sort is attainable: in both the federal-state and state-federal configurations, we are left with mixed regimes of federal and state law.

I

Credit to Judicial Proceedings: Sources of Legal Obligation

A. The Constitution

Article IV, section 1 of the Constitution directs that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State” and provides that Congress may prescribe their manner of proof and effect. Congress’s power under article IV is limited to the interjurisdictional effects of state judicial proceedings; it does not extend to the preclusive effects of those proceedings in the same state. The meager historical evidence suggests that, in providing a norm of respect and empowering Congress to flesh it out, the framers sought “not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise ‘independent, sovereign states.’”

Article IV, section 1 provides no guidance on problems of in-

21 See supra note 8 for the text of the full faith and credit clause.
22 Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev.
terjurisdictional preclusion in mixed state and federal configurations. First, it makes no mention of the “public Acts, Records, and Judicial Proceedings” of the federal government. Second, by its terms, the section imposes no obligation upon the federal government to give full faith and credit to the public acts, records and judicial proceedings of the states.

B. Federal Statutes

The first Congress implemented and elaborated the full faith and credit clause, requiring that duly authenticated records and judicial proceedings of the courts of any state have “such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”23 In so providing, a Congress closer than any to the framers’ purposes, and one that had enacted legislation resolving doubts concerning the existence of lower federal courts, remedied the second omission noted above in connection with article IV.24 It did not, however, remedy the first. Nor, it is generally agreed, was the gap regarding federal judicial proceedings wholly filled by a supplementary statute passed in 1804. That legislation made the provisions of both the 1790 and 1804 statutes applicable to, inter alia, the judicial proceedings “of the respective territories of the United States, and countries subject to the jurisdiction of the United States.”25

C. The Special Problem of Federal Courts as the Rendering Forum

After a brief survey of Supreme Court decisions declaring an obligation on the part of the state courts to respect federal judicial proceedings, Professor Degnan concluded that the Supreme Court “was wantonly right” and not “willfully wrong in doing what it did.”26 What the Court appears to have done, in some cases, was to

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23 Act of May 26, 1790, ch. 11, 1 Stat. 122.
24 See McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 326 (1839); Degnan, supra note 3, at 743-44. That is not to say that art. IV, § 1 is the only source of constitutional authority for legislation prescribing the effect of state judgments in federal courts.
26 It would be little more than an act of blind heroism to contend that federal courts are included as the courts of a country “subject to the jurisdiction of the United States.” The rendition of this phrase as referring to a “possession” of the United States in the present codification of the Judicial Code seems to reflect a much more probable interpretation.
18 WRIGHT, MILLER & COOPER, supra note 5, § 1168, at 651 n.10.
26 Degnan, supra note 3, at 749.
attribute an obviously sound result to the full faith and credit statute, a reading it will not bear. A few of the cases are worth another look, particularly because, upon reexamination, a firmer basis for the Court's conclusion need not be left to the imagination. The full faith and credit statute has nothing to do with federal judgments; the obligation to respect them is a derivation of federal common law.

The first case Professor Degnan discussed is Dupasseur v. Rochereau.27 The language he deemed relevant, however, speaks to the question of the preclusive effects to be given the proceedings of a federal court, not to the source of the basic obligation of respect.28 For analysis addressing the latter question, it is necessary to look elsewhere in the Court's opinion. In holding that it had jurisdiction to hear the case, the Court opined:

Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State courts.

The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to wit, the first section of article four: and the right to bring such a case before us by writ of error under the twenty-fifth section of the Judiciary Act, or the act of 1867, is based on the refusal of the State court to give validity and effect to the right claimed under that article and section.

In either case, therefore, whether the validity or due effect of a judgment of the State court, or that of a judgment of a United States court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court.29

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27 88 U.S. (21 Wall.) 130 (1875). The correct date of decision is found in 22 L. Ed. 588.

28 "The only effect that can be justly claimed for the judgment in the Circuit Court of the United States, is such as would belong to judgments of the State courts rendered under similar circumstances." Dupasseur, 88 U.S. at 135, quoted in Degnan, supra note 3, at 745.

29 Dupasseur, 88 U.S. at 134 (emphasis added). The Court's reliance on art. IV in its discussion of state court judgments demonstrates that the entire discussion concerned the basic obligation of respect. See McElmoye v. Cohen, 38 U.S. (13 Pet.) 512, 324-25 (1839) (art. IV, § 1 is self-executing as to basic obligation). A recent student note seri-
In the first paragraph, the Court suggested that the obligation of respect for a federal judgment flows from the federal statutes that created the lower federal court and vested it with jurisdiction. In later referring to “an infringement of a different article of the Constitution” (than article IV, which concerns only state judicial proceedings), the Court may have intended to suggest that article III imposes the obligation (upon the creation by Congress of lower federal courts). The latter is not a necessary interpretation, however. The Court may have had in mind that disregard of an obligation derived from federal statutes, as of one derived from article III, would constitute an infringement of the supremacy clause of article VI.

However imprecise the Dupasseur Court's ascription of an obligation of respect for federal judgments was at the time, the notion that federal jurisdictional statutes may be the source of policies to be given effect by the courts comes as no surprise today. A grant of jurisdiction to the federal courts would be an empty gesture if their determinations of right and duty could be reexamined without restraint by the state courts. In an alienage diversity case like Dupasseur, for example, of what use to the plaintiffs was the promise of an unbiased federal forum if the promise could be broken at will by state courts in subsequent litigation? This mode of analysis is congenial to a modern reader; we should not assume that it was beyond the ken of the Court in the nineteenth century. In any event, the Court in Dupasseur did not mention the full faith and credit statute, either in its discussion of the obligation of respect for federal judgments or in stating the rule that state law governed the preclusive effects of the judgment involved in that case.

The Court did, however, mention the full faith and credit statute in Emory v. Palmer, the case “most often cited for the rule that state courts must give full faith and credit to federal adjudications.” Emory involved the effect of a judgment of the Supreme Court of the District of Columbia in subsequent proceedings in the
courts of Connecticut. Having determined that it had jurisdiction, the Court noted that the full faith and credit statute’s provision for the effect to be given state judicial proceedings was founded on article IV, section 1, “which, however, does not extend to the other cases covered by the statute.” The Court continued:

The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution [than article IV, § 1], such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced.

According to Professor Degnan, “[t]he Court’s reasoning is perplexing: it suggests that because the statute requires states to recognize judgments of territorial courts, and because territorial courts are courts ‘of the United States,’ the statute thereby requires the states to recognize the judgments of all ‘courts of the United States.’” Perhaps so, although the Court’s holding may have been only that the District of Columbia is one of “the respective territories of the United States” or one of the “countries subject to the jurisdiction of the United States” contemplated by the statute. Alternatively, the Court may not have been relying on the full faith and credit statute at all.

How then explain the broad language at the end of the quoted passage? How indeed, given that one of the cases the Embey court cited in support of the broad language was Turnbull v. Payson. In Turnbull the Court, albeit without referring to the supplementary

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34 Embey. 107 U.S. at 9.
35 Id. at 9-10 (emphasis added).
36 Degnan, supra note 3, at 747.
38 95 U.S. 418 (1877), cited in Embey. 107 U.S. at 10.
legislation of 1804, had said that "the act of Congress does not apply to the courts of the United States." Moreover, even in the absence of statutory support, the Court in *Turnbull* had posited an obligation on the part of "all other courts of the country" to respect the proceedings of federal courts. Finally, if the Court in *Embry* was interpreting the full faith and credit statute to cover the judicial proceedings of all federal courts, the rule it announced as to preclusive effects was problematic on its face. The Court went on to hold:

The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts in the courts of other States, in the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, 326, where it was said: "They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered." \(^\text{441}\)

The federal court that rendered the judgment at issue in *Embry* was not situated within the territory of any state. The courts of the District of Columbia could, however, be assimilated without strain to the status of courts of a state and thus provide a referent of the sort contemplated by the statute. \(^\text{442}\) What of other, geographically dispersed, federal courts? Domestication so as to fit the statutory model was and is more difficult. \(^\text{443}\) In sum, *Embry* need not be read

\(^{39}\) *Turnbull*, 95 U.S. at 423.

\(^{40}\) Id.

\(^{41}\) *Embry*, 107 U.S. at 10.

\(^{42}\) The *Embry* Court, having asked "what causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment," *id.*, found that one of its previous decisions stated "the law prevailing in the District of Columbia, not by reason of any local peculiarity, but because it was a general principle of equity jurisprudence." *Id.* at 11 (citing *Marine Ins. Co. v. Hodgson*, 11 U.S. (7 Cranch) 332 (1813)).

\(^{43}\) That is, if the full faith and credit statute is thought to apply to federal judgments, under the statute where is one to look for the governing law: to the law that would be applied in subsequent proceedings in the rendering court or in such proceedings in some other federal court? This problem would disappear if the statute chose the rendering court as the referent, as the Court has occasionally, albeit carelessly, suggested. See, e.g., *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). But the statute did not (and does not) say that, see supra text accompanying note 23; note 6. Although the choice of referents makes no difference as to state court judgments, we cannot assume at the start of the analysis that the same law will be applied to federal judgments in all federal courts. The purposes of the exercise are precisely to determine whether that proposition is true and whether the full faith and credit statute speaks to the problem. *But see* Case Comment, 4 ILL. L. REV. 515, 516-18 (1910) (statute applies to federal judgments and requires application of uniform federal preclusion law in certain circumstances).
as relying on the full faith and credit statute, and there is good reason not to do so.

The point is not that the Supreme Court has never sought refuge in the full faith and credit statute, for it surely has, and not that the “Court has consistently assumed that the implementing statute of 1790 required such recognition,”44 for it surely has not. Rather, the point is that the Court has consistently reached the same result, with or without that refuge.15 In Dupasseur and Turnbull, and perhaps in Embry itself, the Court relied not on what Congress had said in so many words, but on what the “national government” might do within its constitutional prerogatives and what it was necessary to do. Having “supplied” one “ellipsis”46 in the statute explicitly, the Court in Embry recognized that another had already been supplied. Even taking Professor Degnan’s view of Embry, the Court’s exercise in statutory interpretation merely blessed an anterior exercise in federal common law. Moreover, with or without the statute, the Court did not limit itself to declaring an obligation of respect for federal judgments.

Dupasseur, Embry, and the cases following them were not, however, the only instances of “judicial legislation”47 concerning federal judgments during this period. Federal common law, in the sense of judge-made federal law that is binding on both federal and state courts, is not exclusively a post-1938 phenomenon.48 In the area of interjurisdictional preclusion, the Supreme Court went beyond a federal rule of respect for federal judicial proceedings and references to state law for preclusive effects long before 1938. In Deposit Bank v. Frankfort,49 for example, the Court announced a federal common law rule of preclusive effect for proceedings of a federal court determining federal rights. The Court refused to permit the Kentucky state courts to apply state law so as to deny preclusive effect to the judgment of a Kentucky federal court holding that the bank had constitutionally protected contract rights under a state statute. It stated:

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44 Degnan, supra note 3, at 745.
15 See 18 Wright, Miller & Cooper, supra note 5, § 4468, at 651.
46 Embry, 107 U.S. at 9. The Embry Court was referring to the failure of the statutory language consistently to refer to territories and countries subject to the jurisdiction of the United States.
47 Costigan, The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation, 4 Colum. L. Rev. 470, 483-84, 489 (1904).
49 191 U.S. 499 (1903).
In our judgment the adjudication of the Federal court relied upon here, although based upon the judgment of a state court given as a reason therefor, is equally effectual as it would have been had the Federal court reached the conclusion, as upon the original question, that the Hewitt law constituted a binding contract between the parties. Any other conclusion strikes down the very foundation of the doctrine of res judicata, and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution and established by the judgments of the Federal courts.\footnote{\textsuperscript{50}}

The Deposit Bank case, together with Stoll \textit{v. Gottlieb},\footnote{\textsuperscript{51}} in which it was cited, may provide the key to what Professor Degnan regards as “the puzzling suggestion” in \textit{Stoll} that “because there was a federal question involved (bankruptcy) [in the federal judicial proceedings], [t]he problem before the Supreme Court of Illinois was not one of full faith and credit but of \textit{res judicata}.”\footnote{\textsuperscript{52}} For, when juxtaposed with Dupasseur, those cases help to illuminate the various roles of federal common law in connection with federal judgments.

Although suggesting that the federal statutes establishing the lower federal courts and vesting them with jurisdiction require respect for the proceedings of federal courts, the Court held in Dupasseur that state rules govern the preclusive effects of the judgment of a federal court whose jurisdiction is founded on alienage diversity.\footnote{\textsuperscript{53}} In other cases, including Deposit Bank and Stoll, federal interests require federal preclusion rules. Both regimes of preclusion rules, federal and state, subsume, to the extent that they implement, the basic federal obligation of respect for federal judgments. To that extent, both regimes of preclusion law are binding under the supremacy clause. “\textit{Res judicata}”—federalized in one case and federal in the other—seems as good a way to describe them as any. The Court in \textit{Stoll} grasped this point as to federal preclusion rules,\footnote{\textsuperscript{54}} but its reliance on the full faith and credit statute for nonfederal question judgments prevented full understanding.\footnote{\textsuperscript{55}} That reliance, although not “surprising” in light of the history, is indefensible.

\begin{footnotes}
\textsuperscript{50} \textit{Id.} at 320. \textit{See infra} text accompanying notes 72-75.
\textsuperscript{51} 305 U.S. 165 (1938).
\textsuperscript{52} Degnan, \textit{infra} note 3, at 749 (quoting \textit{Stoll}, 305 U.S. at 171).
\textsuperscript{53} 88 U.S. (21 Wall.) 130, 135 (1875). \textit{Quoted infra} text accompanying note 63. The last sentence in the quotation helps to clarify how state law subsumes, by implementing, the basic obligation of respect.
\textsuperscript{54} \textit{See also} Baldwin \textit{v. Iowa State Traveling Men’s Ass’n}, 283 U.S. 522, 524-25 (1931) (suggesting that federal preclusion law governs issue of validity of diversity judgment).
\end{footnotes}
The statute plays no part in an analysis of the obligations imposed by federal judgments.

II

The Preclusive Effects of Federal Judgments

In treating the law governing the preclusive effects of federal judgments, Professor Degnan told a story like this:56

Prior to 1938, when *Erie* was decided and the Federal Rules of Civil Procedure became effective, federal courts were required, in common law actions, to apply the procedural law of the state in which they sat. During that period, and probably for that reason, the Supreme Court decided that the preclusive effects of federal judgments were to be the same as those of state judgments in the state in which they were rendered.57

After *Erie* and the Federal Rules, the federal courts came to realize that, "[a]t least in matters of exclusive federal jurisdiction,"58 federal preclusion law should govern federal judgments. But they were concerned about the implications of *Erie* for the preclusive effects of diversity judgments and slow to realize the implications for preclusion law of the nearly complete rejection of conformity in the Federal Rules.

Starting about 1951, courts have increasingly recognized that preclusion law is largely a reflex of procedural law and that the Federal Rules speak directly to some aspects of preclusion and indirectly to others. Even when the Federal Rules do not speak "authoritatively,"59 *Erie* jurisprudence has no role to play. The full faith and credit statute does not appear to contemplate pick-

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56 See Degnan, supra note 3, at 755-71. See also Restatement (Second) of Judgments § 87 comment d (1982); C. Wright, LAW OF FEDERAL COURTS § 100A, at 695 (4th ed. 1983) (telling largely same story).

57 Professor Degnan glosses over the problem of the decrees of federal courts sitting in equity, which were free to apply their own procedure. See Degnan, supra note 3, at 746 n.20, 756-57. It is true that "[t]he few cases in which the federal adjudication was a decree in equity . . . elicited no special notice of the problem of governing law." Restatement (Second) of Judgments § 87 comment a (1982), but the fact that the Court did not vary its approach in those cases belies the notion that the source of preclusion law followed the source of procedural law. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 129-30 (1912); infra note 65 and accompanying text. Professor Schiedel had criticized the decision affirmed by the Court in *Bigelow* for failure to mark the distinction. See Case Comment, supra note 43 (for authorship, compare id. at 522 with Schiedel, Swilt v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts, 4 Ill. L. Rev. 533 (1910)). But Schiedel took the view that the federal equity decree in question not only resulted from proceedings conducted according to federal equity procedure but applied a discrete federal equity jurisprudence. See Case Comment, supra note 43, at 519. That was not the view of the Court. See *Bigelow*, 225 U.S. at 129-30.

58 Degnan, supra note 3, at 760.

59 Id. at 763.
ing and choosing among federal and state preclusion rules. Moreover, at some point the power of the federal courts finally "to decide the force of federal adjudications" is a federal constitutional question. Rather than engaging in the difficult business of determining what that point is, we should read the Rules of Decision Act not to apply.

The story is artfully told, but it does not persuade. As an historical account, it assigns to the Supreme Court in the years prior to 1938 a view of preclusion law it did not hold, and thus it sees in that year a great divide that did not exist. As a doctrinal account and prescription, the story fails to integrate the approach suggested for preclusion with the approach taken by the Court to other problems involving the relationship between federal and state law, essentially wishing away a statute and a body of doctrine by resort to dubious constitutional premises.

It may be, of course, that Professor Degnan's conclusion—federal preclusion law governs the effects of all federal judgments—is a good one. Informed judgment on that question requires, I believe, engaging broader themes, against an historical background more faithfully rendered.

A. The History

We have seen that in Dupasseur,62 the Supreme Court, without referring to the full faith and credit statute, posited an obligation in the state courts not to disregard federal judicial proceedings. Having established the basic obligation, the Court considered the preclusive effects of the federal judgment before it, which was entered by a federal court in Louisiana sitting in alienage diversity jurisdiction. Again without reference to the statute, the Court reasoned:

The only effect that can be justly claimed for the judgment in the Circuit Court of the United States, is such as would belong to judgments of the State courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from

60 See id. at 768. Professor Degnan's argument is surprising, given that he recognizes the dubiety of applying the statute to federal judgments. See id. at 748-49. Moreover, the argument apparently assumes that the statute requires a monolithic regime of state law as to state judgments. One of the major purposes of this Article is to demonstrate that that assumption is erroneous. See infra text accompanying notes 318-461. Other considerations may, of course, suggest the wisdom of a single source of preclusion law. See infra text accompanying notes 202, 248-49.
61 Degnan, supra note 3, at 770 n.138.
62 88 U.S. (21 Wall.) 130 (1875).
the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the State courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment . . . rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a State court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court.\(^\text{53}\)

Professor Degnan quotes parts of this passage as support for his hypothesis that, prior to 1938, the preclusive effects of federal judgments were governed by state law, because federal courts in actions at law were required by the Conformity Act to apply, roughly, state procedural law.\(^\text{64}\) Fairly read, the passage does not support the hypothesis, which in any event is too broadly formulated.

According to the Court in Dupasseur, the preclusive effects of the federal judgment involved in that case had to be the same as those of a state court judgment “rendered under similar circumstances,” because the rendering federal court, “deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the State courts.” Important to the conclusion were the ground of federal jurisdiction (alienage diversity), the substantive law applied (state), and the procedural law applied (state). Moreover, if the order of precedence established in the sentence leaves any doubt as to which federal source of state law was uppermost in the Justices’ minds, the headnote, written by the author of the Court’s opinion, provides additional basis for inferring that it was not the Conformity Act.\(^\text{65}\)

\(^\text{53}\) Id. at 135. See supra note 53.

\(^\text{64}\) See Degnan, supra note 3, at 756; see also id. at 745-46. In both places, the quotations omit the language, “was in the exercise of jurisdiction to administer the laws of the State.” Apparently, the omissions fooled the author of the Note, supra note 29. See id. at 1518.

\(^\text{65}\) The headnotes to Dupasseur were written by Justice Bradley, author of the Court’s opinion. Headnote 3 provides in relevant part: “If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the state law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to the judgment of the State Courts under like circumstances.” Dupasseur v. Rochereau, 22 L. Ed. 588 (1875). See also Deposit Bank v. Frankfort, 191 U.S. 499, 516 (1903) (cases in which “no higher sanctity or effect can be given to a judgment of the Circuit Court . . . than to state judgments . . . [are cases in which] the court derives its jurisdiction
The Court's opinion in *Dupasseur*, carefully crafted to address only the preclusive effects of a judgment of a federal court sitting in alienage diversity, thus supports neither an attempt to assimilate preclusion law to procedure, nor the notion that state law provided the measure of preclusive effects for all federal judgments, prior to 1938. It is true that in the *Crescent City Live Stock* case the Court appeared to extend the rule stated in *Dupasseur* to cover the preclusive effects of a federal judgment on a matter of federal law in the courts of the state in which it sat. The case is, however, ambiguous. Other cases in which the Court invoked the broad formulation involved judgments of federal courts sitting in diversity, albeit not always within the same state.

On at least some occasions when the Court was unambiguously called to decide whether the preclusive effects of a federal judgment adjudicating matters of federal law are delimited by the law applied in the courts of the state where the federal court is held, the Court applied an independent federal rule. Thus, in determining the effect of a sale of property under the order of a district court exercising bankruptcy jurisdiction, the Court held:

> Without examining into the decisions of the State courts on that subject, it is sufficient to say that in construing the effect of

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from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the State where the proceedings are had"; *Bigelow v. Old Dominion Copper Mining & Smelting Co.* 225 U.S. 111, 129-30 (1912) ("The United States court was in the exercise of jurisdiction to administer [*state law], since its jurisdiction depended solely upon diversity of citizenship. Its judgment is . . . entitled in the courts of another State to the same faith and credit which would attach to a judgment of [*the rendering state]."); 18 WRIGHT, MILLER & COOPER, supra note 5, ¶ 4468, at 655 ("[The Supreme Court affirmed the lower court's judgment in *Dupasseur*], ruling that the effect of the federal judgment must be measured by [*state law*], in a statement that looks both to the fact that [*state substantive law*] controlled the action and to the fact that under the [*Conformity Act*] procedure in the federal court had been drawn from [*state practice*]. . . .") (footnote omitted); *Dupasseur*, supra note 35. For language suggesting that the Court associated the concept of "administering" [*state law*] with the [*Rules of Decision Act*], see *Owings v. Huill*, 34 U.S. (9 Pet.) 607, 625 (1835) (Story, J.).

*66* *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141 (1887).

*67* See id. at 146-47; DeGraw, supra note 3, at 747-48 (where, however, there are errors in describing sequence of events and Court's opinion). For the nature of the federal judgment involved, see *Crescent City Live Stock*, 120 U.S. at 157.

*68* Compare *Crescent City Live Stock*, 120 U.S. at 146-47 with id. at 151.

*69* See, e.g., *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912) (different states); *Hanover Nat'l Bank v. Farnum*, 176 U.S. 640 (1900) (different states); *Metcalf v. Watertown*, 158 U.S. 608 (1895) (same state). In *Stoll v. Gottlieb*, the Court observed that "[i]n [*federal law*] the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances." 305 U.S. 165, 170 (1938) (footnote omitted) (dicta). The Court in *Stoll* went on to distinguish federal judgments on federal questions. See id. at 170-71; supra text accompanying notes 31-54.
this sale under the order of the District Court of the United States, it must be decided by those general principles which govern bankruptcy proceedings under that statute, rather than the code of the State in regard to voluntary sales of mortgaged property between individuals.79

In that case, the Court had previously observed that the result of the state court’s decree was “at variance with the policy of a statute whose main purpose was to secure an equal distribution of an insolvent debtor’s property among all his creditors.”71

The question was more starkly put, and received full dress attention, in Deposit Bank v. Frankfort.72 The Court found that the rule stated in Dupassem was intentionally limited to cases “wherein the court derives its jurisdiction from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the State where the proceedings are had.”73 Having distinguished Crescent City Live Stock, albeit unpersuasively,74 the Court articulated a view of federal judgments in federal question cases, and of preclusion law, that simply does not fit in Professor Degnan’s story:

But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the Federal courts, can never be taken away or impaired by state decisions. The same reasoning which permits to the States the right of final adjudication upon purely state questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction.75

The Court’s emphasis on the source of the substantive law applied by the rendering court—state law in Dupassem and federal law in Deposit Bank—is surprising only to those who have been habituated to thinking about preclusion law as procedure and to thinking about procedure disembodied from rights under the substantive law. In the nineteenth century and beyond, procedure was imbued with notions of the importance of securing and protecting substan-

79 Factors’ & Traders’ Ins. Co. v. Murphy, 111 U.S. 738, 743 (1884).
71 Id. at 742.
73 191 U.S. at 519.
74 See id. The language from Crescent City Live Stock quoted there was irrelevant to the problem before the Court in Deposit Bank.
75 Deposit Bank, 191 U.S. at 517. See also Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 290-91 (1906) (federal court decrees are given “the force and effect to which it is entitled under the principles of res judicata as settled by this court, especially in view of the fact that the controversy . . . involved rights protected by the Constitution . . .”). In Wright, Miller & Cooper, supra note 3, § 1408, at 656-57. But Deposit Bank hardly “made explicit” the rule “that federal rules measure at least most res judicata questions” as Wright, Miller, and Cooper argue. Id. at 656.
tive rights.\textsuperscript{76} Moreover, the "very foundation" of preclusion law, "its most important principle," was the protection of the "rights . . . established by . . . judgments."\textsuperscript{77} This idea was so strong that the Supreme Court permitted a successful defendant in a patent infringement suit to enjoin the plaintiff from bringing subsequent suits, based on the same patent, against those who sold the product manufactured by the defendant in the first suit.\textsuperscript{78} As expressed by the Court in a more conventional context:

This doctrine of \textit{res judicata} is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. . . .\textsuperscript{79}

In sum, no monolithic rule regarding the preclusive effects of federal judgments existed prior to 1938, and thus that year marked no great divide. The cases that prescribed a federal obligation of respect for federal judgments and defined whether federal or state law governed their preclusive effects may plausibly be read as applying federal common law, binding throughout the land by virtue of the supremacy clause. Even if the cases are not so viewed, there can be no doubt that, long before \textit{Erie} and the Federal Rules, the Supreme Court had held that federal preclusion law governs at least some questions of the effects to be accorded federal judgments on matters of federal substantive law. During the same period, the Court required that the preclusive effects of federal alienage and diversity judgment on matters of state substantive law follow state law. The Court’s articulated concern in both contexts was to protect rights conferred by the substantive law.

An assertion that a proposed change in the law is evolutionary, not revolutionary, is a standard palliative of the law reformer.\textsuperscript{80} The fact that it is not so is insufficient warrant for the status quo. Whatever the history with respect to the preclusive effects of federal

\textsuperscript{76} See S. Subrin, The Field Code and Federal Rules of Civil Procedure: The Fantasy and Reality of Procedural Continuity 53 (unpublished manuscript) ("The major goal of the Field Code was to facilitate the swift, economical, and predictable enforcement of discrete, carefully articulated rights.").

\textsuperscript{77} Deposit Bank, 191 U.S. at 520.

\textsuperscript{78} See Kessler v. Eldred, 266 U.S. 285 (1924). The \textit{Kessler} Court was not concerned with the preclusive effect of the judgment, but rather with the rights established by it. See \textit{id.} at 288-89.

judgments, the law of the future should fit within the context of which it is inescapably a part. In this case, the context is federal common law.

B. Preclusion Law as Federal Common Law

1. Federal Common Law and the Rules of Decision Act

In espousing a general rule of federal preclusion law for federal judgments, Professor Degnan suggested that the grant of judicial power to decide cases and controversies in article III implies some binding effect and that “it seems inappropriate that some other sovereignty—the states—should have ultimate authority to determine what binding effect the judgment has and on whom.” He argued that “it is in the nature of the judicial power to determine its own boundaries” but conceded that there is a “possible limitation of federal courts’ power to give force to their own adjudications . . . if the Congress ha[s] acted affirmatively and unequivocally to reduce it.” Professor Degnan found no need to face the issue because, in his view, Congress had not made the attempt.

To treat the effect of diversity judgments as a matter amenable to [common law] rulemaking by the federal courts is not inconsistent with the command of the Rules of Decision Act that the “laws of the several states . . . be regarded as rules of decision.” . . . By the terms of the Act, state rules of decision are applicable only where there is no constitutional or statutory requirement to the contrary, and only “in cases where they apply.” That the power to decide the force of federal adjudications is, in extremis, a defining element of article III judicial power gives reason to find that even in less extreme instances the laws of the several states do not “apply” within the terms of the Rules of Decision Act itself.

Professor Degnan’s argument is curious. Article III may be the ultimate source of the obligation to respect federal judgments. If so, article III may be thought to require a limited number of federal preclusion rules to protect the basic norm of respect. But the no-
tion that it is also a grant of power to the federal courts initially and
finally to determine all matters relating to the preclusive effects of
their judgments is wishful thinking. The inherent powers of federal
courts, in the sense of powers that are insulated from congressional
override, are limited to those “necessary to the exercise of all
others.”87 Tested by that demanding standard, an assertion of
inherent power with respect to most preclusion rules simply comes
too late in the day. As to diversity judgments, the federal courts
managed tolerably well under the regime of Dupassee v. Rochereau88
for more than one hundred years. The switch from the Conformity
Act89 to the Federal Rules, whatever its significance for sub-constitu­
tional law, cannot transmogrify a power that was not regarded as
inherent in the sense of being “shielded from direct democratic con­
trols”90 into one that is so regarded. If article III judicial power
does not include the power, as against a contrary legislative direc­
tion, to determine the rules of evidence in federal court,91 it re­
quires more than an “abstract” argument to distinguish rules of
preclusion.92

87 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). See
Michaelson v. United States, 266 U.S. 42, 65-67 (1924); Eash v. Riggins Trucking Inc.,
757 F.2d 557, 560-64 (3d Cir. 1985); Burbank. Sanctions in the Proposed Amendments to the
Federal Rules of Civil Procedure: Some Questions About Power, 11 HOFSTRA L. REV. 947, 1004-
06 (1983) (hereinafter cited as Sanctions); Burbank. The Rules Enabling Act of 1934, 130 U.
88 See supra text accompanying notes 31, 53-54, 62-65.
89 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.
Mining Co., 428 U.S. 1, 31 (1976) (dictum); Burbank, Rules Enabling Act, supra note 87, at
1116 n.455.
92 Degnan, supra note 3, at 768. Observe that Congress’s acknowledged control
over supervisory court rulemaking by the Supreme Court, see, e.g., Sibbach v. Wilson &
Co., 312 U.S. 1, 9-19 (1941), is not dispositive. See Burbank, Rules Enabling Act, supra
note 87, at 1183 n.728. A distinction should also be drawn between the power of a
federal court to fashion rules in the context of a case or controversy and its power to
govern practice and procedure prospectively through local court rules. Congress has
regulated local rulemaking by the federal courts since 1789, and the statutes have always
required consistency with acts of Congress. See 28 U.S.C. § 2071 (1982); Burbank, Supra-
tion, supra note 87, at 1004-05 n.39.

If, as Professor Degnan maintains, preclusion is a species or reflex of procedure, how
does one square with his analysis the Court’s acquiescence, from the beginning of the
Republic, in congressional regulation of the procedure of the federal courts in actions at
law through directions to follow state law? See Burbank, Rules Enabling Act, supra
and efficient use of the supervisory power, however, is invalid if it conflicts with constitu­
tional or statutory provisions.”). Only rarely has the Court balked at those directions.
(1931). Needless to say, commentators sympathetic to Professor Degnan’s conclusion
make the most of those rare occasions, attempting to generalize from holdings that, as in
Deprived of its constitutional prop, Professor Degnan’s argument for ignoring the Rules of Decision Act\textsuperscript{93} also collapses. Yet, he has not been alone among commentators in wishing the Act away in the context of federal common law. Moreover, the Supreme Court itself has been less than clear in articulating the relevance of the Act to inquiries regarding the relationship between federal and state law, no matter what the context.

One answer to Professor Degnan’s treatment of the Rules of Decision Act, at least in diversity cases, is that the Court appears to have had that statute in mind when it tied the preclusive effects of federal alienage and diversity judgments to state law.\textsuperscript{94} Moreover, the language of the Court in Dupasereur v. Rochereau was not that of freedom to choose the governing law.\textsuperscript{95} But that is not a sufficient answer, if only because the Court has recently evinced a willingness to dispense with precedent rooted in the Act, albeit in nondiversity cases.\textsuperscript{96} If, as I contend, the Act is pertinent, it is necessary to reconcile with its requirements cases, both pre- and post-1938, in which the Court has held that federal preclusion law governs the effects of a federal judgment. The task is not, I think, as difficult as has been assumed, although taking the Rules of Decision Act seriously has implications for federal common law. The arguments require a brief survey of well-plowed terrain.

The Court’s decision in Erie Railroad v. Tompkins\textsuperscript{97} involved an interpretation of the Rules of Decision Act, one that it said was con-

\textsuperscript{93} See supra text accompanying note 84.
\textsuperscript{94} See supra note 65 and accompanying text.
\textsuperscript{95} Dupasereur, 88 U.S. at 135, quoted supra text accompanying note 63.
\textsuperscript{96} See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 150 n.13 (1983); supra text accompanying notes 109-10, 113-21.
\textsuperscript{97} 304 U.S. 64 (1938).
stitutionally compelled. So long as federal courts exist and have jurisdiction to adjudicate cases in which the Constitution requires them to apply state law, that law may be said without linguistic strain to govern "of its own force." In such cases the Rules of Decision Act is redundant.

Long after *Erie*, there was widely shared uncertainty as to the reach of its constitutional holding. The Court's persistent failure, in diversity cases, to disaggregate the problems in the relationship between federal and state law that it resolved by reference to that case ensured confusion. Moreover, in addressing those problems, the Court rarely referred to the Rules of Decision Act.

In the same period, the Court was called upon to declare the limits of the holding in *Erie*. That case could be read as speaking to the constitutional power of the federal government. It was thus natural for the Court to neglect other possible constraints on fed-

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99 See id. at 77-80.
100 See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956); *Ely, supra* note 17, at 700-06.
102 But see, e.g., Mishkin, *Some Further Last Words on Erie—The Thread*, 67 HARV. L. REV. 1682 (1974) (hereinafter cited as *Last Words*). Professor Mishkin reads *Erie* as being animated by a perception of constitutional limitations on federal lawmaking by the federal courts in addition to those on federal lawmaking by Congress. See id. at 1684 n.10; see also Mishkin, *supra* note 99, at 800 n.13. I agree with him that there are such limitations, but *Erie* need not be read to speak to the issue, at least for the reason given by Professor Mishkin. It may be true that "even by then contemporary standards, Congress would have been seen as having power to prescribe a substantive rule of liability for the specific accident in *Erie*." Mishkin, *Last Words, supra*, at 1684 n.10. See also, e.g., *Ely, supra* note 17, at 703 n.62. Friendly, *In Praise of Erie—End of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 397 n.66 (1964). But, other explanations for the Court's language aside, it is not clear that the Court thought Congress then had, or that it now has, the power to prescribe such a rule applicable only in federal courts, with the states having concurrent jurisdiction and remaining free to apply their own rules. That, of course, would be the statutory equivalent of the "federal general common law" banished in *Erie*, 334 U.S. at 78, in the sentence immediately preceding that commenting on the powers of Congress. It is unclear whether Professor Merrill shares this view of *Erie*. Compare Merrill, *supra* note 92, at 14 with id. at 15.

I am aware that *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), may be thought to suggest power in Congress to regulate interstate commerce through legislation applicable only in federal court. See id. at 405. But the question was left "up in the air," id. at 424 (Black, J., dissenting); and the Court subsequently and unequivocally held that at least certain provisions of the Federal Arbitration Act are binding in state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984). Moreover, it seems clear that, whatever Congress's actual intent, it could have restricted the Act's applicability to federal courts in the exercise of its power to regulate the procedure.
eral common law, including the Rules of Decision Act. At least it was not surprising when the occasions for declaring Erie’s limits did not involve the exercise of federal diversity jurisdiction, and given that old habits die hard.

In recent years, the Court and most commentators have recognized that the reach of Erie’s constitutional holding is short even in diversity cases. In other words, state law rarely governs “of its own force.” The Court has not made clear, however, whether the nonconstitutional constraints on judicial lawmaking in diversity cases derive from the Rules of Decision Act or from some other source. When called upon to decide whether federal common law governs in nondiversity cases, however, the Court has recognized, albeit begrudgingly, that the Act does have a role to play. The reasons for the Court’s ambivalence become clear when one considers the history of federal common law after Erie.

It is commonplace that the question whether federal common law or state law governs involves a two-step inquiry. The first

of the federal courts. See id. at 25-29 (O’Connor, J., dissenting); Westen & Lehman, supra note 17, at 356.

I also agree with Professor Mishkin that “where Congress has . . . spoken in terms which are not only unambiguously consistent with an underlying constitutional principle but actually affirmatively restate its meaning and implications and thus reinforce it—proper construction of the congressional language should be most hospitable to giving it full range.” Mishkin, Last Words, supra, at 1686. I am, therefore, puzzled why he has given short shrift to the Rules of Decision Act in his other work on federal common law. See Mishkin, supra note 99, at 800-01 n.16, 814 n.64; supra note 108 and accompanying text. A finding of federal lawmaking competence does not exhaust constitutional concerns about the separation of powers. See Merrill, supra note 92, at 20. And taking the Rules of Decision Act seriously will prevent the “gregarious abuses” that, in common ground, would be unconstitutional. See Westen & Lehman, supra note 17, at 340-41.

The Erie Court knew the difference between “federal general common law,” see Erie, 304 U.S. at 78, and “federal common law.” Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). In stating that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State,” Erie, 304 U.S. at 78, the Court may have intended to address the issue that concerned Professor Mishkin. Compare Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1313 (1985) (“Not a word in Erie spoke to the problems to come in cases such as Clearfield Trust . . . .”) with id. at 1319-20 (implicitly recognizing that quoted language does speak to those problems). The Court’s formulation is, in any event, reminiscent of the Rules of Decision Act. In neither case need the language used be interpreted “in a cradled or wooden fashion.” Robertson v. Wegmann, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting). See Friendly, supra, at 408 n.119. But see C. Wright, supra note 56, § 90, at 388.

103 See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). There the Court upheld the application of rules developed by the federal courts prior to Erie. See id. at 367. But see D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 443, 465-75 (1942) (Jackson, J., concurring).

104 See, e.g., Hanna v. Plumer, 380 U.S. 460, 471-72 (1965); Ely, supra note 17, at 700-06; supra text accompanying note 99.

105 See generally Mishkin, supra note 99. See also United States v. Kimbell Foods, Inc., 440 U.S. 713, 726-29 (1979). Other important works on federal common law include:
step looks to whether there is federal competence to provide a rule of decision. At one level, the issue of competence requires an examination of the constitutional prerogatives of the federal government. At another level, the inquiry requires an examination of the prerogatives, both constitutional and statutory, of the federal courts. Particularly in the early years following *Ernst*, the Court tended to conflate the two levels and hence to leap from a conclusion of federal power to one of judicial power.106 Moreover, in its enthusiasm for a legitimate, although hardly new, species of judicial lawmaking, the Court at times treated the second step of the inquiry—whether a uniform federal rule or state law “adopted as federal law” should apply—cavalierly, if it paused at that step at all.107

More recently, the Court has applied the brakes. The Court has paid some attention to the second level of the first step of the inquiry—the relationship between the federal courts and Congress. But it has applied most of the braking force at the second step. Increasingly, the Court, while asserting that a matter is governed by federal law, has determined that there is no need for a uniform federal rule. The result in these cases is that state law governs, as federal law, unless it is found to be hostile to or inconsistent with federal interests.108

And what is the relevance of the Rules of Decision Act? In a 1973 decision, the Court suggested that, where the first step of the inquiry (federal competence) is satisfied, “the Constitution or Acts of Congress ‘require’ otherwise than that state law govern of its

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Professor Mishkin justified lack of specificity as to the boundaries of federal judicial competence on the ground that “in many areas of undoubted federal competence, adoption of state law is indicated, and functionally the areas of competence may well shade off imperceptibly into those where state law governs of its own force.” Mishkin, supra note 99, at 806 n.15.
force.”

Ten years later, the Court observed that, when the second step of the inquiry yields the conclusion that a uniform federal rule applies, “then the Rules of Decision Act is inapplicable by its own terms.”

The first of these decisions may be thought to suggest that the constitutional holding of *Erie* not only limits the interpretation of the Rules of Decision Act but exhausts it. In any event, the Court’s approach deprives the Act of any role in defining the circumstances in which it is appropriate for the federal courts, as opposed to Congress, to make law. But there is no historical warrant for the suggestion that *Erie*’s constitutional holding exhausts the Rules of Decision Act, whatever confusion about the reach of that holding may have followed in its wake. The Act is not confined to cases in which state law governs “of its own force.” Moreover, the language of the Act requires federal judges to justify federal common law by reference to a constitutional or statutory source that either explicitly or implicitly authorizes—“provides” for—or implicitly and plausibly calls for—“requires”—its creation.

The quoted statement from the second decision is correct, and its negative pregnant is that, if a uniform federal rule is not required or provided for by the Constitution or acts of Congress, the Act is not “inapplicable by its own terms.” The Court was unwilling to

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111 See, e.g., McKenney v. Silberman, 28 U.S. (3 Pet.) 270 (1830); McNiel v. Holbrook, 37 U.S. (12 Pet.) 84 (1838); Campbell v. Haverhill, 155 U.S. 610 (1895). See also Hill, State Procedural Law in Federal Non Diversity Litigation, 69 Harv. L. Rev. 66, 78-83 (1955); Note, The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine, 85 Yale L.J. 678, 680-90 (1976). These sources document the application of the Act to matters, such as statutes of limitations and evidence, as to which federal competence is indisputable. They also make clear that an attempt to confine the Rules of Decision Act to questions of substantive law is ahistorical. Compare Hazard, supra note 92, at 645 and Merrill, supra note 92, at 32, with Burbank, supra note 92, at 661.

112 “In a much-admired concurring opinion,” C. Wright, supra note 56, § 60, at 389, but one that, in this aspect, is much ignored, Justice Jackson observed:

> i do not understand Justice Brandeis’s statement . . . (that “There is no federal general common law,”) to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except “where the constitution, treaties, or statutes of the United States [of] require or provide.”


accept that conclusion and, by argumentation reminiscent of the kitchen sink, struggled to avoid it.\(^{113}\) We may quickly dispense with the Court’s suggestion, based on language in *Erie*,\(^{114}\) that the Act is confined to diversity cases.\(^{115}\) That suggestion finds no support in the language of the Act, in history, or in the Court’s own fumblings with the Act in nondiversity cases.\(^{116}\) The fact that considerations requiring application of state law in diversity cases are not relevant to the elaboration of a federal legislative scheme\(^{117}\) tells us nothing about the relevance of the Rules of Decision Act in the latter context. Similarly, the fact that “neither *Erie* nor the Rules of Decision Act can now be taken as establishing a mandatory rule that we apply state law in federal interstices”\(^{118}\) does not answer the question whether the Act speaks to the circumstances when the filling of those interstices with judge-made federal law is permissible. It is true, of course, that where federal lawmaking competence exists, it


\(^{114}\) “[T]he purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 72-75 (1938).

\(^{115}\) See DelCostello, 462 U.S. at 160 n.13.

\(^{116}\) The Court explicitly rejected an attempt to restrict the Act’s applicability in Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895). See also DelCostello, 462 U.S. at 17: n.1 (Stevens, J., dissenting). The DelCostello Court’s attempt to dispatch Campbell and other cases on the ground that they were decided before *Erie*, in which it had recognized the restricted purpose of the Act, is unpersuasive. See id. at 160 n.13. The *Erie* Court relied on the work of Charles Warren. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923), cited in *Erie*, 304 U.S. at 73 n.5. Although the original congressional grants of jurisdiction magnified the importance of diversity cases, Warren’s attribution of a restrictive purpose involved pur speculation, rhetorically useful in aid of the author’s effort to demonstrate that the Court erred in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). See Warren, *supra*, at 83-85. Professor Goebel posits no such restricted purpose. See J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 500-03 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 1. 1971). For other more recent historical work casting doubt on Warren’s conclusion on this matter, as well as on others, see Fletcher, *The General Common Law and Series 34 of the judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 151 (1984). See also *infra* note 121.

Although he noted that “[t]he Court has not extended the doctrine of *Erie R. Co. v. Tompkins* beyond diversity cases,” D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 467 (1942) (concurring opinion), Justice Jackson did not question the broader applicability of the Rules of Decision Act. See id. at 465-66, quoted *supra* note 112. See also Hazard, *supra* note 92, at 643; Burbank, *supra* note 92, at 659; Car.tie & Blazing Trains: Judge Friendly and Federal Jurisdiction, 133 U. PA. L. REV. 5, 8 (1984); Weste & Lehman, *supra* note 17, at 367-68. As to the “oft-encountered heresy” that *Erie* limited to diversity cases, see, e.g., Friendly, *supra* note 102, at 108-09 n.122.

\(^{117}\) See DelCostello, 462 U.S. at 160 n.13 (quoting Holmberg v. Amsheick, 327 U. S. 392, 394 (1946)).

\(^{118}\) Id. at 161 n.13.
is a federal question whether the federal courts may, under the Constitution and acts of Congress, fashion federal rules.119 But one of those acts is the Rules of Decision Act. Federal common law cannot plausibly be deemed one of the "Acts of Congress" referred to there,120 the best hope for those who do not simply wish the statute away or confine it to diversity cases.121

The real problem with taking the Rules of Decision Act seriously, as an original proposition, is that the standards for the creation of federal common law suggested in the Act may be thought inadequate to the needs of the federal government, including those of the federal judiciary. Moreover, in light of what transpired after Erie, the Act is an embarrassment because it is a reproach. But those days are gone, if not wholly forgotten. The Court is now more re-

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119 Cf. Mishkin, supra note 99, at 802 ("federal judicial competence to choose which law shall govern").
120 But see Westen & Lehman, supra note 17, at 369-71; Westen, supra note 17, at 985-88. I agree with Professor Redish's criticisms of Professor Westen's position on this issue. See Redish, supra note 17, at 962-64, 968 n.60. See also C. Wright, supra note 56, § 60, at 388 n.4.

This is not to say that federal common law that is itself valid under the Rules of Decision Act may never serve as a valid source of policy in federal common lawmaking. See Merrill, supra note 92, at 58 n.245, quoted supra note 189.

121 For other techniques to avoid confronting the Rules of Decision Act, see Mishkin, supra note 99, at 800 n.16. Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1515 (1969); supra note 102. Having pointed out the flaws in the argument that federal common law should be read into the exception clause of the Rules of Decision Act, see supra note 120 and accompanying text, Professor Redish achieves the same result by manipulating the language "in the cases where they apply." See Redish, supra note 17, at 968 n.60.

Professor Fletcher argues that the Act was originally viewed as an embodiment of a broader lex loci principle. See Fletcher, supra note 116, passim. So viewed, the Act imported choice among bodies of law not, in modern terms, exclusively federal or exclusively state. See also R. Bridwell & R. Whitten, The Constitution and The Common Law 78-97, 99 (1977). But Professor Fletcher is careful to distinguish between judge-made "general common law," which was not binding on the states, and judge-made federal law, which, to the extent it was thought to exist (a hotly debated point), was supreme. See Fletcher, supra note 116, at 1521-27. See also Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003 (1985); Jay, supra note 102 (both supporting Fletcher's conclusion in this regard). Assuming contemporaneous views of the Act should be imputed to the Congress that passed it, nothing in Professor Fletcher's account detracts from the view, taken here, that the Act speaks directly to the circumstances in which federal courts can fashion or apply judge-made rules of federal law binding on the states. But see Jay, supra note 102, at 1263-67. Moreover, on that assumption, changes in the way in which we think about law mean that the language "in the cases where they apply" no longer "leaves us an out." Redish, supra note 17, at 998 n.60. So do various statements to the effect that the Act is "merely declarative of the rule which would exist in the absence of the statute" leave us an out. Mason v. United States, 200 U.S. 345, 359 (1906). Compare Mishkin, supra note 99, at 801 n.16 (invoking such statements as reason to view Act as only "an expression of an underlying policy") with R. Bridwell & R. Whitten, supra, at 110-11 (explaining such statements in historical context). For another similar use of such statements by Professor Mishkin, see Mishkin, Lost Horses, supra note 102, at 1683 n.9.
spectful of Congress's prerogatives and of state law, albeit usually at the second step of the traditional inquiry. The Court need not apologize for past transgressions, but it should set its house in order.

The traditional two-step inquiry is not necessary to protect federal interests, and it may have led to a misallocation of lawmaking within the federal government. If the Constitution or acts of Congress, fairly read, provide for or require federal common law, state law does not apply. The same is true whether a uniform federal rule is called for or a particular state rule is found to be hostile to or inconsistent with federal interests. In other cases where the Constitution does not so ordain, state law applies, not "of its own force" and not by judicial grace or borrowing, but because Congress has borrowed it. The considerations that have prompted the Court to eschew independent choice of law rules in diversity cases, a result not required by the Constitution, are not pertinent outside that context. The same is true with respect to the freedom of the federal courts to determine the law of a particular state.

The only reason to leave the Rules of Decision Act "a derelict ... on the waters of the law" is to avoid highlighting past mistakes. That seems an insignificant benefit measured against the costs, not just those inevitably incurred when the federal courts fail to take seriously an act of Congress, particularly one that imposes limits "on the courts themselves," but also the costs of continuing doctrinal uncertainty. There is good reason not to interpret the Act "in a crabbed or wooden fashion," but it is time to rescue it from the open seas.

2. Cases in which Federal Law Furnishes the Rules of Decision

As we have seen, even prior to Erie and the dual revolution it initiated, the Supreme Court had applied federal law to determine some questions regarding the preclusive effects of federal judicial proceedings. The proceedings in question involved determinations of federal substantive rights. Since Erie, it has be-

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122 See supra text accompanying note 108.
123 See infra text accompanying notes 173-74.
124 See Westen & Lehman, supra note 17, at 315-16, 356-59.
125 See, e.g., Friendly, supra note 102, at 401-02; Hart, supra note 99, at 515.
126 See Mishkin, supra note 99, at 866-10.
128 Mishkin, Legal Worlds, supra note 102, at 1687. See supra note 102.
130 See generally Friendly, supra note 102.
131 See supra text accompanying notes 76-80.
come widely accepted that federal preclusion law governs all questions in such cases. 132

When considering the law that governs the preclusive effects of federal judgments adjudicating matters of federal substantive law, it would seem necessary to advance an approach that is consistent with the Court’s general approach to federal common law. The view that the Rules of Decision Act applies only in diversity cases or the view that its exception clause is triggered upon finding that there is federal lawmaking competence does not provide an escape. But analysis under the Rules of Decision Act should lead to largely the same results as traditional federal common law analysis if the Act is “used to give expression to important federal interests” 133 plausibly grounded in the Constitution or acts of Congress and if the traditional analysis takes separation of powers seriously.

Article IV, section 1 of the Constitution authorizes Congress to prescribe the effects of state judgments in other jurisdictions; it does not provide any authority with respect to cases domestic to one state. 134 The Court has never maintained that article IV has anything to do with the interjurisdictional effects of federal judgments, 135 and a fortiori, it does not speak to domestic preclusion rules, whatever “domestic” means when federal judgments are concerned. 136 The federal government’s interest that the judgments of its courts be respected is fairly inferable from other provisions of the Constitution or laws of the United States. A federal common law obligation to respect such judgments is binding under the supremacy clause. Moreover, to the extent that they provide the measure of that federal obligation, the rules adopted to govern the preclusive effects of federal judgments, whether furnished by federal or state law are also binding under the supremacy clause. 137 But the source of those rules remains to be determined.

Congress’s constitutional power to create substantive law entails power to define the preclusive effects of federal question judgments. Congress has only rarely exercised that power. 138 In the case of putative federal common law rules of preclusion that are binding in federal and state court alike, state interests are impli-

132 See infra text accompanying notes 205-10.
133 See infra text accompanying notes 92-96.
134 See infra text accompanying notes 21-22.
136 See supra text accompanying notes 41-43.
137 See supra text accompanying notes 47-55.
138 See 18 WRIGHT, MILLER & COOPER, supra note 3, § 4406, at 621; Hazard, supra note 92, at 613. I do not here consider Congress’s power under article III. See infra text accompanying notes 227-31.
cated. Moreover, as demonstrated later in this Article, the Federal Rules of Civil Procedure do not provide federal preclusion law, because the Rules Enabling Act does not authorize Federal Rules of preclusion. 139 It is important, therefore, to analyze, rather than merely to accept, the widely shared view that federal preclusion law determines the effects of federal judgments adjudicating matters of federal substantive law.

a. Preconditions to Preclusion. There is little difficulty in concluding that uniform federal law governs two matters typically regarded as preconditions to the application of preclusion. The validity of a judgment is thought to turn on the existence of subject matter jurisdiction and territorial authority in the rendering court and due notice to the defendant. Finality is a concept that, as it has been developed, has no fixed referent outside of the law of preclusion and, at least in recent years, no fixed meaning within it. 140 Save for any constitutional constraints, neither validity nor finality need play a part in domestic preclusion law. But if, as it appears, there is a federal common law obligation not to disregard federal judgments, it requires as a corollary that the federal courts have the power to define the conditions precedent to status as a "judgment" having the potential for preclusive effect. Moreover, the need here is not simply for federal law-in-reserve, acting only as a check against hostile or inconsistent state law. The nature of the problem demands a uniform, and uniformly federal, solution. 141 Under a traditional federal common law analysis, there is federal competence and a need for uniform federal law. Under the Rules of Decision Act, uniform federal law applies because the Constitution or acts of Congress—whichever is deemed the source of the basic obligation—

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139 See infra text accompanying notes 182-98.
140 For treatments of validity and finality from a domestic perspective, see RESTATEMENT (SECOND) OF JUDGMENTS §§ 1-16 (1982); 18 Wright, Miller & Cooper, supra note 5, §§ 4427-4434.
141 These elements of preclusion law are so closely tied to the basic obligation of respect that a regime of borrowed state law would entail serious risks of evasion of that obligation, as well as administrability problems for the Supreme Court and for litigants. See infra text accompanying notes 144-76. The risk of evasion seems particularly great in connection with the question of validity.

[1] The question of validity often arises in a context in which there is also serious doubt about the quality of the adjudication in other respects. As a result, it can often be said with equal meaning that a judgment ought to be avoided because it is invalid and that it ought to be regarded as invalid because it should be avoided.

RESTATEMENT (SECOND) OF JUDGMENTS ch. 2, introductory note, at 29 (1982).

For a case suggesting that federal preclusion law governs a question of validity of a diversity judgment, see Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).
require otherwise than that state law apply. Under both approaches, the federal solution is one that binds federal and state courts alike.

b. Claim Preclusion. The same reasoning applies to one aspect of claim preclusion. Traditional claim preclusion doctrine required that, in order for a judgment to bar another action by the plaintiff on the same claim, the judgment must have been "on the merits." The Restatement (Second) of Judgments has discarded this label, but it retains the notion that some judgments do not constitute a bar.142

Again, there is nothing in the nature of things that requires exceptions to the doctrine of bar. Except as constrained by the Constitution, jurisdictions are free to define those exceptions under domestic law. The basic obligation to respect federal judgments would be meaningless, however, if courts in subsequent proceedings were free to define those judgments that can preclude. Uniform federal common law rules, binding throughout the country, are necessary.143

The analysis becomes more complex with respect to the rest of claim preclusion. At a time when the concept of a cause of action or claim was narrowly formulated and closely tied to the source of the right under substantive law asserted in the action in the rendering court,144 federal preclusion law could be justified by reference to the underlying federal substantive law. In the event of a federal judgment in such circumstances, it was not for the states to alter the federal rights thereby determined. The mode of analysis, focusing on federal judgments as repositories of federal rights, was that used by the Court in Deposit Bank v. Frankfort.145 Moreover, little would have been gained in distinguishing between federal law on the front lines and federal law held in reserve. There was a high degree of homogeneity in preclusion law throughout the country at that time,146 fostered by the Supreme Court's invocation of or reliance on "general common law."147

The modern tendency in domestic preclusion law, reflecting the enhanced procedural opportunities available to litigants in the rendering court and enshrined in the Restatement (Second) of Judgments, is

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142 See Restatement (Second) of Judgments § 20 (1982); see also 18 Wright, Miller & Cooper, supra note 5, §§ 1435-1447.
143 See supra note 141. The conclusion that uniform federal rules are required does not automatically follow from the perception of a federal interest. See supra note 82.
144 See Restatement (Second) of Judgments § 24 comment a. at 196-97 (1982).
146 See Restatement (Second) of Judgments § 87 comment a. at 315 (1982).
147 See, e.g., Gelson v. Hoyt, 16 U.S. (3 Wheat.) 246, 315, 320-22 (1818) (federal question judgment); Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30 (1924) (diversity judgment); 18 Wright, Miller & Cooper, supra note 5, § 4468, at 652. In the famous case of Cromwell v. County of Sac., 94 U.S. 351 (1877), it is impossible to be sure from the opinions the precise nature of the action claimed to have preclusive effect.
away from a narrow formulation of the concept of "claim" for preclusion purposes. Nonetheless, in this area, as in preclusion law generally, there appears to be less homogeneity among American legal systems than once obtained. In any event, rules of claim preclusion, like all preclusion rules, are "legal rules which impact significantly upon the effectuation of federal rights." Under traditional federal common law analysis, they must therefore "be treated as raising federal questions." The next step under that analysis is to choose between uniform federal rules of claim preclusion or state law adopted as federal law (meaning that there is power in the federal courts to choose the state law and to check any rule of state law found to be hostile to or inconsistent with federal interests). Under the Rules of Decision Act, the two steps merge, and it is here that the approaches appear to diverge.

So long as preclusion law affects substantive rights, there is a federal interest in the definition of the federal rights adjudicated in a federal judgment. It is not clear, however, whether that interest requires uniform federal rules. Even if preclusion law is less homogeneous than it once was, still, it is difficult to justify uniform federal rules on the basis of a priori predictions of adverse effect of state law on federal interests. Moreover, modern claim preclusion law may foreclose unadjudicated assertions of rights over a broad range of legal sources, and, in the present context, those sources need not be federal. Even when all sources are federal, as for instance when the putative federal rule of preclusion would foreclose subsequent assertions of legal rights under a federal statute different from that which was relied upon in the first action, uniform federal rules can rarely be justified by reference to the policies animating the statutes. It is obviously impossible to make that case when the rights foreclosed arise under state substantive law.

Under traditional federal common law analysis, when state law

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148 See Restatement (Second) of Judgments § 24 (1982).
149 See id. § 87 comment a.
151 Id.
153 See Restatement (Second) of Judgments § 25 comment e (1982); Cemer v. Marathon Oil Co., 538 F.2d 830 (6th Cir. 1976) (per curiam); infra note 299.

As to the separate problem of "state questions . . . decided as an incident of federal question litigation," it has been suggested that "the clear right of federal courts to insist on their own preclusion rules as to the federal questions may carry over to include all questions in a uniform body of doctrine." 18 Wright, Miller & Cooper, supra note 2, § 4472, at 783 (footnote omitted).
is borrowed as federal law, displacement occurs only when a particular state rule is found to be hostile to or inconsistent with federal interests. But the anterior inquiry—whether a uniform federal rule is necessary—is not cabined in the same way. A uniform rule of federal common law must be consistent with federal substantive interests, but scope is given for the consideration of the values of uniformity itself. There are, in other words, situations in which "the very application of varying state laws would itself be inconsistent with federal interests."  

Ranged against the considerations favoring borrowed state law are problems of administrability for the federal courts that such a system would entail. Preclusion rules are characteristically trans-substantive. A trans-substantive body of federal preclusion law imperfectly accommodates particular federal substantive schemes; trans-substantive bodies of state preclusion rules are even more worrisome. Although federal and state judges alike are obligated to adjust preclusion rules that are inconsistent with federal substantive policies, federal judges are likely to be more sensitive to dissonance than are their state counterparts, particularly in connection with claims within exclusive federal jurisdiction. The rendering court does not determine the preclusive effects of a federal judgment, and some of the courts that determine them are not federal courts. If a state court decided the preclusion question applying borrowed state law, it is not clear that discretionary review by the Supreme Court would be an "[a]dequate means . . . to insure fair treatment of . . . federal interests."  

Interjurisdictional preclusion rules also implicate problems of administrability for litigants. Preclusion rules affect litigation strategy. It is therefore important that litigants know what the rules are. Before filing a complaint asserting federal rights in a federal court, or in response to the successful removal of such a case to federal court, the plaintiff should be able to predict with considerable assurance the rules of claim preclusion that will govern a judgment. A system that informed a plaintiff to look to state law, unless state law was hostile to or inconsistent with federal substantive interests,

157 "[T]he question of the binding effect of the judgment in the first action is tested only in the later actions." Studill v. Strange & Warehouse Co. v. United States, 162 F.2d 849, 853 (1st Cir. 1947). See also Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965, 2972 (1985); C. Wright, supra note 56, § 72, at 483.
would immediately prompt the questions, what state and what law?\textsuperscript{159} These questions are particularly poignant where federal jurisdiction is exclusive.\textsuperscript{160} The first question may be difficult even when jurisdiction is concurrent, because the constraints on choice of law applicable to the exercise of diversity jurisdiction do not obtain outside of that context.\textsuperscript{161} Uncertainty might lead our hypothetical plaintiff to guess wrong and thereby to lose rights under the substantive law. Even if the answer to the choice of law question were clear,\textsuperscript{162} prediction would depend upon the further steps of ascertaining state preclusion law\textsuperscript{163} and testing it against federal substantive interests. Uncertainty would probably prompt a person in this situation to play it safe by satisfying the broadest rule of claim preclusion potentially applicable.

Difficulties of this order are not, however, restricted to preclusion rules. In filling the interstices of federal statutes with limitations periods, the Court has usually opted for state statutes, unless inconsistent with federal substantive interests.\textsuperscript{164} The problems of uncertainty in these cases are even more vexing. Moreover, the potential impact of uncertainty on rights asserted under the substant-

\textsuperscript{159} The decision to borrow state law "raises two questions: first, to what State do we look, and second, given a particular State, what part of that State's law [governs the matter]." De Sylva v. Ballentine, 351 U.S. 570, 581 (1956).

\textsuperscript{160} Apart from the problem of choice of law, see infra text accompanying note 161, exclusive jurisdiction cases present an additional difficulty: no state cases announcing a rule to deal with the precise problem of claim preclusion before the federal court exist. This difficulty is discussed in detail, with reference to initial adjudication in state court. infra text accompanying notes 428-61.


\textsuperscript{162} The federal courts could solve the problem of lack of predictability by adopting for all cases the preclusion law of the state in which the rendering federal court sits. This was the regime suggested by Crescent City Livestock Co. v. Butchers' Union Slaughter House Co., 120 U.S. 141 (1887). See supra text accompanying notes 66-68. Moreover, applying Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), see supra note 161, would usually lead to the same result. But see infra text accompanying note 327. The only state interests implicating in this situation derive from the possible foreclosure of rights under state substantive law. Thus, either approach would render the protection of those interests wholly fortuitous. The rights in question may not be provided by the substantive law of the state in which the federal court sits.

\textsuperscript{163} See supra note 160.


To belabor the obvious, the problem of the limitations period for a federal claim implicates federal procedural as well as federal substantive interests: state interests are either negligible or nonexistent. Therefore, the problem provides a useful basis for testing the analysis in the text, as well as, one would think, a sobering dose of reality for advocates of a federal common law of procedure.
tive law is even more dramatic, and those rights are unquestionably federal. Here, the risk-averse plaintiff would comply—if he could—with the strictest limitation period potentially applicable.

In both the preclusion and limitations contexts, the lack of strong state interests and concerns about the administrability of a system of borrowed state law support a uniform federal rule. Problems of administrability may themselves lead to the loss of federal rights. In the case of the limitations period for a federal statute, the federal nature of the loss, should it occur, is certain. In the case of the rules of claim preclusion in an action asserting federal rights, the federal nature of the loss is contingent—as is the loss of rights under substantive state law. On the other hand, in the preclusion context federal courts are relatively less fettered by the conventions of common law courts and their implications for the separation of powers. Thus, in most cases involving the limitations period for a federal statute, the federal courts are faced with a choice between state law and the creation of federal law that is inherently arbitrary. In contrast, federal courts have available to them a corpus of preclusion law that was fashioned by federal judges. And in the area of preclusion as to federal question judgments, federal judges are less encumbered by precedent applying state law, particularly precedent under the Rules of Decision Act. The Supreme

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168 See, e.g., Cromwell v. County of Sac., 94 U.S. 351 (1877); supra text accompanying note 147. For the relevance of the existence of a body of law fashioned by federal judges to the choice, under traditional analysis, between uniform federal rules and borrowed state law, see, e.g., California ex rel. State Lands Comm’n v. United States, 457 U.S. 273, 284 (1982); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 84-85 (2d Cir. 1961). The existence of a body of law fashioned by federal judges, although not specifically mentioned, may also have played a part in cases like Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), where the Court found federal common law rules to be the general federal common law fashioned prior to Erie. See supra note 103 and accompanying text.

For purposes of this analysis, it is necessary to ignore decisions that have assumed as conclusion by formulating uniform federal preclusion rules.

Court has recently come to realize the costs of borrowed state limitations law.\textsuperscript{170} There is no good reason to incur such costs in connection with preclusion rules for the federal question judgments of federal courts.

Finally, a regime of borrowed state preclusion law in this context might skew litigants’ choices in the initial action in a manner contrary to federal procedural policy. Whatever the role of such policy, or the sources thereof that are cognizable, in the creation or application of federal common law,\textsuperscript{171} it is appropriate to consider potential procedural costs in determining whether federal preclusion law will be uniform or episodic.\textsuperscript{172}

In sum, under traditional federal common law analysis, the rules of claim preclusion governing a federal court judgment adjudicating matters of federal law are within federal competence. Moreover, the problems of administrability, for courts and litigants, that would attend a regime of borrowed state law—problems that include the possible loss of federal substantive rights—support uniform federal rules. The federal courts need not write on a clean slate. Their rules, if known in advance, should prevent the inadvertent loss of any state substantive rights.

Under a Rules of Decision Act approach, difficulty arises only if the Act is interpreted to require that the precise content, rather than the creation, of uniform federal common law rules be “required” by the Constitution or acts of Congress. Nothing in the language of the Act, however, compels that interpretation, even when state law, normally applicable, is displaced because it is hostile to or inconsistent with federal interests.\textsuperscript{173} When the application of state law threatens federal substantive rights, the sources of those rights require otherwise than that state law apply.\textsuperscript{174}

Uniform federal preclusion rules must be consistent with federal substantive law, but they need not be limited to its protection.


\textsuperscript{171} See infra text accompanying notes 181-95 & 291-301.

\textsuperscript{172} Federal procedural policy with respect to the scope of the initial action is, in this aspect, indeterminate. See 28 U.S.C. § 173b; infra note 175; text accompanying note 197. But it is not clear that the uniformity inquiry need, or that it should, be cabined by existing federal law. Moreover, preclusion law affects litigation strategy and may affect the scope of litigation in a manner contrary to a policy of the rendering court that speaks only to the initial action. See infra notes 195 & 242; see further infra text accompanying note 876.

\textsuperscript{173} The Rules of Decision Act is set forth supra note 18.

\textsuperscript{174} See DelCostello v. International Bhd. of Teamsters, 463 U.S. 151, 159 n. 13 (1983); infra text accompanying note 110.
When required to displace state law, federal judges have the power to fashion a substitute that is fully adequate in light of all of the policies and interests that a common law court would consider in making law to govern the matter. They need not blind themselves to the procedural opportunities afforded by the Federal Rules of Civil Procedure nor to the capacity of preclusion doctrine to lessen the burdens of litigation on courts and parties. But, at the same time, they should not confuse stated opportunities with stated requirements nor in their quest for judicial economy see in the Federal Rules of Civil Procedure support for preclusion rules that is not there.

c. Claim Preclusion: Defenses and Counterclaims. Claim preclusion includes defenses to rights asserted under the substantive law. Where federal rights are asserted in federal court, the federal interest in defining both those defenses and the circumstances in which they are precluded is patent. There is no scope for variation if a federal judgment is regarded as a repository of federal substantive rights. In addition and for the same reason, uniform federal law is required for the definition of the circumstances in which a subsequent suit by the defendant in a federal action adjudicating federal rights should be precluded because such suit, if successful, would nullify the federal judgment or impair rights established by it.

The tendency of modern law is to broaden the scope of required counter-demands. As a result, arguments for uniform federal rules do not rest comfortably on the need to protect the substantive rights embodied in the federal judgment. In this instance, a Federal Rule of Civil Procedure appears to speak directly

175 "Federal common law implements the federal Constitution and federal statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law..." D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (footnote omitted). See id. at 469-70, supra note 112; Redish, supra note 17, at 964.


Fed. R. Civ. P. 18, supra infra note 197, could not provide a valid rule of preclusion. See infra text accompanying notes 181-86. Moreover, far from expressing a policy in favor of broad claim preclusion, the Rule is by its terms indifferent. It may, therefore, prove a trap for the unwary litigant, and its preclusion implications would doubtless have come as a surprise to the Congress that allowed it to go into effect.

177 See generally Restatement (Second) of Judgments § 18 (1982).

178 See supra text accompanying notes 144-47.

179 For the treatment of this problem in domestic law, see Restatement (Second) of Judgments § 22(b) (1982). 18 Wright, Miller & Cooper, supra note 5, § 4414.

180 See R. Millar, Civil Procedure of the Trial Court in Historical Perspective 123-29 (1952).
to the problem. But Rule 13(a) raises more questions than it answers.

d. The Federal Rules of Civil Procedure and Federal Common Law. Those who drafted the original Federal Rules of Civil Procedure were not notably concerned about questions of power. They shared no conception of the limitations imposed on their enterprise by the Rules Enabling Act. In cases that they regarded as close, members of the Advisory Committee tended to rely on the Supreme Court to preserve them from error. It is striking, therefore, that the Committee rejected as exceeding its authority the strongly urged suggestion that its class action rule should include a provision as to the preclusive effects of a judgment on persons not parties. Moreover, although Rule 14 originally included a provision on preclusive effects, the Committee deleted that provision in 1946 as beyond the rulemaking power.

On both occasions, the Committee was correct. Read in the light of its history, the Enabling Act does not authorize Federal Rules that predictably and directly affect rights claimed under the substantive law. Aside from the fact that it governs procedure in the rendering court, which lacks the power finally to determine the preclusive effects of its judgment, Rule 13(a) does not in so many words and could not validly provide a rule of preclusion. Indeed, the apparent inflexibility of the Rule provides a case study for differ-

181 A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

FED. R. CIV. P. 13(a).
182 See Burbank, Rules Enabling Act, supra note 87, at 1131-37.
183 See id. at 1164 n.637.
184 A 1946 amendment to Rule 14 deleted the following sentence: "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff." 3 J. Moore, Moore's Federal Practice ¶ 14.01[1], at 14-7 (2d ed. 1984). According to the Advisory Committee, the sentence was "stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment." Id. ¶ 14.01[3], at 14-11.
185 See Burbank, Rules Enabling Act, supra note 87, at 1121-31. For a remarkable misreading of the implications of my work in this context, see Note, supra note 29, at 1520 n.99.

Federal Rules of Civil Procedure are not, however, irrelevant. The Rules Enabling Act authorizes the Supreme Court to promulgate "general"—that is, uniform—Federal Rules of practice and procedure. Such Rules cannot by the express terms of the Act "abridge, enlarge or modify any substantive right."\footnote{28 U.S.C. § 2072 (1982).} Valid Federal Rules displace state law under the Rules of Decision Act not because they are "Acts of Congress" but because they are provided for by an act of Congress and one, moreover, that was enacted after the Rules of Decision Act.\footnote{See, e.g., Ely, supra note 17, at 718 & n.134.} In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules.\footnote{See Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 2801-03 (1984); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551, 553-54, 559 (1974); Tullock v. Malvane, 184 U.S. 497, 512-13 (1902); Kroetz v. AFT-Davidson Co., 102 F.R.D. 934, 936 (E.D.N.Y. 1984). Cf. Chardon v. Fumero Soto, 462 U.S. 650, 651 & n.51 (1983) (in action governed by 42 U.S.C. § 1988 (1982), displacement of state tort law not necessary to protect federal interest expressed in 42 U.S.C. § 1983); P. 23. “But there is no reason why preemptive lawmaking could not also be based on the need to preserve or effectuate policies articulated by federal courts pursuant to delegated lawmaking.” Merrill, supra note 92, at 58 n.247, supra note 120.}

That does not mean that the federal courts are free to create uniform federal decisional law or displace particular state law rules in areas untouched by the Federal Rules.\footnote{For a view of American Pipe as implying greater freedom to fashion federal law than that suggested in the text, see Bourne, supra note 17, at 401-02. But see Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466-67 (1975) (suggesting importance of “relevant body of federal procedural law to guide . . . decision”).} Nor does it mean that the federal courts can create federal common law on the basis of policies not validly the concern of Federal Rules.\footnote{The analysis in the text can be extended to local rules of court promulgated pursuant to 28 U.S.C. § 2071 (1982). See Burbank, supra note 1, at 636 n.53; infra note 282.} It does mean, however, that when the Supreme Court has exercised the power delegated by Congress to prescribe uniform Federal Rules, we should regard those Rules, if valid, as if they were acts of Congress. In effect, they are assimilated to the Enabling Act for purposes of the Rules of Decision Act. Because Federal Rules cannot validly provide for the creation of federal common law—Rule 83 in
that aspect is invalid\textsuperscript{192}—they are sources of power only if, fairly read, they may be said to require it.

Federal Rules of Civil Procedure can thus serve as sources of federal common law, not only by leaving interstices to be filled but also by expressing policies that are pertinent in areas not covered by the Rules. Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid Rules may help to shape valid federal common law.\textsuperscript{193} But, when a Rule speaks to, and only to, a matter with which it has no proper concern, it is a troublesome, if not a bootstrap operation to invoke the Rule as legal justification for a federal common law rule that effects the same purpose. Rule 13 serves as an apt example.

Rule 13 was modelled after Rule 30 of the Supreme Court’s Equity Rules of 1912, which also contained a compulsory counterclaim provision. According to the Court in a case involving Rule 30, “[t]hat which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation.”\textsuperscript{194} Although the Advisory Committee refrained from stating a rule of preclusion in the text of Rule 13(a), it cited that opinion and other authority for the conclusion that “[i]f the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred.”\textsuperscript{195}

It was natural for the Advisory Committee to preserve the mandatory language of the Equity Rule. And, particularly at a time

\textsuperscript{192} The last sentence of Fed. R. Civ. P. 83, as amended in 1985, provides: “In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.” For suggestions that the Rule is invalid, see Burbank, \textit{Rules Enabling Act, supra note 87}, at 1193 n.83; Burbank, \textit{Sanctions, supra note 87, at 998 n.2}. For full discussion of that question, including an analysis of the views and purposes of the original Advisory Committee, see \textit{Rules Enabling Act of 1985: Hearing on H.R. 2633 and S 3550 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess. 24-31 (1985)} (letter from Stephen B. Burbank to Committee on Rules of Practice and Procedure (Feb. 27, 1984)).

\textsuperscript{193} See cases cited supra note 189. See also C. Wright, supra note 56, § 72, at 483 (to permit person opting out of class certified under Fed. R. Civ. P. 23(b) to rely on favorable judgment for preclusion purposes “would make a mockery of the (b)(3) procedure”).


A rule like 13(a) might be animated by procedural purposes within the contemplation of the Rules Enabling Act. For instance, one might conclude that the adjudication of claims having the prescribed relationship could result in more accurate fact finding and a more just resolution of, the initial action. Cf. Brunet, \textit{A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria}, 12 Ga. L. Rev. 701, 714 (1978) (jointer devices “should provide the court with more information about each individual claim, revealing strengths and weaknesses”).
when compulsory counter-demands were not common, it was help-
ful for the Supreme Court to signal in its Equity Rules an intent to
depart from the norm. But none of this renders Rule 13(a) legal
support for a federal common law rule. If that is to be done, it
must be justified on the grounds that the Rule, itself not having the
proscribed effect, is valid and that Congress, alerted to the preclu-
sion implications of the Rule, nevertheless failed to block it. At least
Rule 13(a), unlike Rule 18(a), alerts litigants to the possibility of
losing claims if they do not assert them in the initial federal action.

Unless Rule 13(a) supports creation of a uniform federal com-
mon law rule of compulsory counterclaims in federal actions adjudicat-
ing federal substantive rights, the argument for such a rule must
rest on the difficulty in supervising a system of borrowed state law
and the problems posed for litigants by such a system. If that argu-
ment prevails, the uniform rule may be fashioned with Rule 13(a) in
mind. In either event, any such rule should admit of exceptions in
addition to those required by the substantive law.

196 On the problem of incorporating pre-existing “federal law” beyond the power
of the rulemakers to fashion in the first instance in Federal Rules of Civil Procedure, see
Burbank, Rule Enabling Act, supra note 87, at 1147-57.

197 A party asserting a claim to relief as an original claim, counterclaim, cross-
claim, or third-party claim, may join, either as independent or as alternate claims, as
many claims, legal, equitable, or maritime, as he has against an opposing party.” Fed. R.
n.2 (5th Cir. 1980); Degnan, supra note 3, at 764.

222 (1984), the court rejected plaintiff railroad engineer’s contention that the Federal
Employers’ Liability Act does not permit a defendant railroad to assert a counterclaim
for property damage in the employee’s action for personal injuries under the Act. The
court relied in part on the fact that, if not permitted in the employee’s action, the claim
would be barred by reason of Rule 13(a). See id. at 291. Although the court adverted to
possible constitutional objections to such a result, see id. n.5, it did not consider the
possibility that a federal common law rule of preclusion, waiver, or estoppel would ac-
count for the inability of the railroad, by reason of the interpretation of the FELA, to
assert its claim in the suit by the employee. The court’s argument was, of course, a
bootstrap, but it was a bootstrap encouraged by the general poverty of analysis of Rule
13(a).

On the use of Rule 13(a) to create a waiver or estoppel, see, e.g., Diado v. Whitney,
451 F.2d 1, 3 (1st Cir. 1971); Wright, Estoppel By Rule: The Compulsory Counterclaim Under
Modern Pleading, 38 Minn. L. Rev. 423 (1954). The author of that article observes:

Can a neatier example be imagined of the impossibility of sensible distinc-
tions between “substance” and “procedure”? Compulsory counterclaim
provisions are enacted as a regulation of “procedure,” and indeed it, as
in most jurisdictions, they have been made by rules of court, they are
valid only as regulation of “procedure” which must leave rights of “sub-
stance” unimpaired. Yet their effects are held to be extra-territorial on
the explicit ground that these effects are “substantive.”

Id. at 426. With these views, compare, in addition to the analysis in the text:

In recognizing the interdependence of procedure and substance ..., it is
not necessary, although it may be convenient, to reject the utility of any
try to develop rules or standards of classification for court rulemak-

e. Issue Preclusion. Against this background, we need not pause long over the law governing the issues precluded by a federal court judgment adjudicating matters of federal substantive law. To the extent that redetermination of issues adjudicated in the federal action might alter the substantive rights embodied in the judgment, there is a federal interest in furnishing the rules. In addition, the rights that a litigant may lose through adjudication in the federal there is a federal interest in ensuring that there is a federal interest in ensuring that the rules employed are sensitive to considerations that might make that loss unjust. The difficulties of supervising a system of borrowed state law and the potential costs of such a system are comparable to those discussed in connection with claim preclusion. Moreover, the existence of valid uniform federal rules of claim preclusion furnishes an additional argument for the same regime as to issue preclusion. To the extent possible, litigants and the courts should not have to conform their litigation conduct or their decisions to two separate bodies of preclusion law.

One aspect of issue preclusion, however, deserves closer scrutiny. After a federal court adjudicates matters of federal law, the question may arise whether strangers to that action can use findings in it, defensively or offensively, in subsequent litigation against one

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146 Cf. Kessler v. Eldred, 206 U.S. 205 (1907) (patent infringement suit against customer of victorious defendant in previous such suit violates right established by judgment in latter); supra text accompanying note 78. *Finality, repose and reliance are often centered on a colloquial sense of the 'rights' established by a judgment that can be expressed only through binding determination of issues that cannot be reexamined merely because a new claim. . . . can be identified.* 18 Wright, Miller & Cooper, supra note 5, § 4467, at 632-33.

For a recent case in which the Supreme Court appears to have proceeded on the view that federal preclusion law governs the issue preclusive effects of one of its own decisions, rendered in a case originating in a state court, see Lambach v. Hooven & Allison Co., 466 U.S. 553, 361-62 (1984).

200 For the treatment of such matters in a domestic context, see Restatement (Second) of Judgments § 28 (1982); 18 Wright, Miller & Cooper, supra note 5, §§ 4422-26.

201 See supra text accompanying notes 154-72. As suggestive of the risk to litigants from guessing wrong, consider possible variations in state law on the question whether actual litigation is a requirement of issue preclusion. Compare Vestal, The Restatement Second of Judgments: A Model Dissent, 66 Cornell L. Rev. 464 (1981) with Hazard, supra note 80, at 574-86.

202 See supra note 60.
of the parties. Jurisdictions differ on this question, traditionally treated under the rubric of mutuality of estoppel. Following a vigorous and highly successful attack on mutuality, there now seems to be doubt about the wisdom of the revolution. For our purposes, the question is not the wisdom of this or that rule, but whether federal or state law governs the matter where a federal court determined issues of federal law.

On this question, recent Supreme Court authority suggests, if it does not compel, the answer that uniform federal law governs. The first case in this recent series, *Blonder-Tongue Laboratories, Inc. v. Illinois Foundation*, demonstrated that the choice between mutuality or nonmutuality as to federal issues adjudicated in a federal action may implicate substantive federal policies. In approving defensive nonmutual issue preclusion in patent litigation, the Court relied in part on those policies and in part on considerations of efficiency as regards parties and judicial administration. But the Court had already concluded that federal law governed, not relying on the fact that in both actions involved in *Blonder-Tongue* the federal courts had exclusive jurisdiction or otherwise justifying uniform federal law (as opposed to federal-law-in-reserve). In a footnote, the Court laconically observed that "[i]n federal-question cases, the law applied is federal law," and cited in support an equally laconic remark in one of its own decisions. There the matter has rested. In the interim the Court has decided, as a matter of uniform federal law, that offensive nonmutual issue preclusion is available in a federal action against a company that had lost an action brought in federal court by the SEC and that nonmutual offensive issue preclusion does not apply against the United States

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203 See generally Restatement (Second) of Judgments § 29 (1982); 18 Wright, Miller & Cooper, supra note 5, §§ 4463-65.
206 See id. at 328-50.
207 Id. at 324 n.12.
208 See id. at 328-50.
209 Id. at 324 n.12.
211 See United States v. Mendoza, 484 U.S. 154 (1984). But see id. at 162 (holding limited to "repetition of issues such as those involved in this case"). For other related Supreme Court cases, see Curt, Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel, 27 Val. & Mary L. Rev. 35, 37-50 (1985).
In light of the federal interest in these circumstances and the problems of administrability that would attend a system of borrowed state law, even in cases of concurrent jurisdiction, it is difficult to fault the conclusion that uniform federal law governs, although it is easy to fault the lack of analysis of that question. Moreover, here, as in other aspects of the preclusion law governing federal question judgments, we need not consider whether an asserted federal interest in finality, judicial economy, or the repose of the parties (other than an interest in protecting adjudicated substantive rights) would have justified the wholesale displacement of state law. Once the Court found displacement necessary for other reasons, it properly considered those interests in fashioning uniform federal rules. Whether the Court was wise in appearing to embrace the revolution without regard to the requirements of substantive law, and whether “uniform” rules as fraught with qualifications and exceptions as those the Court adopted are in fact efficient, are inquiries beyond the scope of this Article.

3. Cases in which State Law Furnishes the Rules of Decision

a. The State of the Law. In proposing a general rule that federal preclusion law governs the scope and effect of federal judgments, Professor Degnan was primarily concerned with diversity judgments. The blessing of the Supreme Court, however laconic, seemed to render the analysis of federal question judgments, at least those within exclusive jurisdiction, unnecessary. In any event, the result as to federal question judgments followed *a fortiori* if the day could be won on diversity judgments.

Professor Degnan did not rely solely on abstract arguments and the Federal Rules of Civil Procedure. He had available a smattering of decisions that applied uniform federal law to govern the preclusion.
sive effects of federal diversity judgments in varying circumstances.\footnote{216} By the time he published his article in 1976, the Fifth Circuit was clearly moving toward the rule he espoused.\footnote{217}

Since 1976, at least two other circuits have adopted Professor Degnan's general rule for diversity judgments. The result in one circuit, however, may be attributable to filial piety.\footnote{218} The result in the other is supported by such tenuous authority and analysis that it is ripe for reconsideration.\footnote{219} The courts in three circuits apply federal law to govern the preclusive effects of a federal judgment as to matters addressed in Rule 41(b), but they have not otherwise taken a clear position.\footnote{220} In one circuit the position is clear that the governing preclusion law depends upon the precise legal question.\footnote{221}

\footnote{216} See, e.g., Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962); Glick v. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968); Degnan, supra note 3, at 761-63. As to Glick, see infra note 220.

\footnote{217} See Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), appeal dismissed and cert. denied sub nom. Metropolitan Dade County v. Aerojet-General Corp., 423 United States 908 (1975); Degnan, supra note 3, at 760-61. For subsequent Fifth Circuit cases, see, e.g., Henderson v. United States Fidelity & Guar. Co., 605 F.2d 109 (5th Cir. 1980); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982).

\footnote{218} See Precision Air Parts, Inc. v. Axxo Corp., 756 F.2d 1499, 1503 (11th Cir. 1984) (citing only decisions of its parent, the Fifth Circuit), cert. denied, 105 S. Ct. 966 (1985).

\footnote{219} See Silcox v. United Trucking Serv., Inc., 687 F.2d 848 (8th Cir. 1982). The court in Silcox purported to follow Gomer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) (per curiam). See also Silcox, 687 F.2d at 852. But Gomer involved a federal question judgment; moreover, the court in that case relied on Fed. R. Civ. P. 41(b) as to the effect of a dismissal and did not clearly distinguish the question of the law governing the scope of the claim precluded. See Gomer, 583 F.2d at 852.

\footnote{220} Second Circuit: Compare PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896-97 (2d Cir.) (federal law governs effect of dismissal of diversity action under Fed. R. Civ. P. 41(b)), cert. denied, 464 U.S. 936 (1983) with Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713 n.3 (2d Cir. 1977) (unecessary to "decide whether state or federal law, if they were in conflict, would control the res judicata effect of a dismissal by a federal court in a diversity action when the dismissal is based not on a federal rule ... but on a state door-closing statute"). Third Circuit: Compare Compagnie Des Bauxites De Guinee v. L'Union Atlantique S.A. D'Assurances, 723 F.2d 357, 360 (3d Cir. 1983) (federal law governs effect of dismissal of diversity action under Fed. R. Civ. P. 41(b)) with id. at 361 n.1 (unnecessary to decide whether state or federal law of issue preclusion applies). See also Hunt v. Liberty Lobby, Inc., 707 F.2d 1495, 1497 n.5 (D.C. Cir. 1983) (collecting Third Circuit cases). Eighth Circuit: Compare Glick v. Ballentine Produce, Inc., 397 F.2d 390, 392-93 (8th Cir. 1968) (federal law governs effect of dismissal of diversity action under Fed. R. Civ. P. 41(b)) and Degnan, supra note 3, at 762-64 (Glick implicitly applies federal law of claim preclusion) with Gatzemeyer v. Vogel, 589 F.2d 360, 362 (8th Cir. 1978) (applying state law of claim preclusion and Iowa Elec. Light & Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50, 52 (8th Cir. 1983), applying state law of claim and issue preclusion).

For the text of Rule 41(b), see infra note 228.

\footnote{221} See Answering Servs., Inc. v. Egan, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984). The court in Egan qualified broad language in Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983), which held that federal law governs the finality of a diversity judgment for a student comment on Hunt, see Note, Federal Courts—The Role of the Erie and Full Faith and Credit Doctrines in the Choice Between State and Federal Res Judicata Law in Consen-
and in another, state law seems still to be the rule, although, again, the courts’ reasoning leaves much to be desired.\textsuperscript{222} In the remaining five circuits, the matter is up for grabs.\textsuperscript{223}

Professor Degnan’s arguments have also influenced commentators and law reformers, although not usually to the extent of full embrace. The two most prominent works on the subject in the intervening years, the \textit{Restatement (Second) of Judgments} and the treatise of Professors Wright, Miller and Cooper, take the position that federal law governs but that, as to certain questions of preclusion implicating state substantive policies, state law should be borrowed as federal law.\textsuperscript{224} The \textit{Restatement}’s qualification is, however, expressed in the comment to black letter that states: \textit{Federal law determines the effects under the rules of res judicata of a judgment of a federal court.}\textsuperscript{225} Moreover, neither work takes full account of the implications of post-\textit{ Erie} Supreme Court decisions on the relationship between federal and state law in diversity cases.

\textbf{b. Sources of Federal Competence.} If it is correct that the basic obligation to respect federal judgments requires rules defining a “judgment” to which that obligation attaches, binding in federal and state courts, that conclusion is as applicable to judgments on state law questions as it is to federal question judgments. Moreover, in this context as well, the federal interest in uniform federal rules appears to be sufficiently strong to rule out resort to state law.\textsuperscript{226}


I have not found any pertinent cases in the Federal Circuit.

\textsuperscript{224} \textit{See Restatement (Second) of Judgments} \textsection 87 comment b, at 316-18 (1982); \textsection 18 \textit{Wright, Miller & Cooper, supra} note 5, \textsection 4472, at 732-40. See, to the same effect, \textit{C. Wright, supra} note 56, \textsection 100A, at 695-96.

For recent student work bucking this trend and reaching results more in line with those suggested here, see \textit{Note, supra} note 20; \textit{Note, supra} note 222.

\textsuperscript{225} \textit{Restatement (Second) of Judgments} \textsection 87 (1982).

\textsuperscript{226} \textit{See supra} text accompanying notes 140-43. This tentative conclusion should be
When a federal court judgment involves only state substantive law, federal competence to prescribe other rules of preclusion rests primarily, although perhaps not exclusively, on article III of the Constitution and the necessary and proper clause of article I, section 8. Current conceptions of Congress’s powers under article III and the necessary and proper clause suggest that Congress could, if it chose, enact a complete code of preclusion rules to govern state law actions brought in federal court. Some of the policies that may be considered in fashioning preclusion rules concern the effective and expeditious administration of the business of the courts. Thus, the rules would be “rationally capable of classification” as procedural.

The analysis proceeds smoothly so long as both actions, that potentially preclusive and that to which the preclusive effects may be attached, are brought in federal court. The analysis inspires less confidence with respect to a federal-state configuration. In that context, apparently, the necessary and proper clause must do double duty, or Congress’s power to protect federal substantive interests must be added to the constitutional scales.

Congress has not enacted a code of preclusion rules, and I have argued that the Constitution cannot plausibly be interpreted to give that power, as against a contrary congressional directive, to the federal courts. I have also argued that, in considering the relationship between federal and state law on matters of preclusion, the Rules of

227 See Hanna v. Plumer, 380 U.S. 460, 171-74 (1965); 18 Wright, Miller & Cooper, supra note 5, ¶ 4466, at 621 (“Within the limits imposed by the case or controversy requirements of Article III, Congress probably has power to enact a code of res judicata principles for federal judgments as part of its control over the creation, jurisdiction, and procedure of federal courts.”).

228 Hanna, 380 U.S. at 472.

229 The analysis assumes the basic federal obligation of respect as well as a limited number of federal preclusion rules essential to implement that obligation. See supra text accompanying note 220. It also assumes that these matters exhaust any discrete federal interest in finality. See infra text accompanying notes 294-96. The remaining federal “procedural” interests served by preclusion law are implicated only if subsequent litigation is brought in federal court. See supra text accompanying notes 287 & 298-99. Finding support for federal preclusion law in article III and the necessary and proper clause therefore requires opting for a procedural classification as to a matter “falling within the uncertain area between substance and procedure,” Hanna, 380 U.S. at 472, and positing federal power to protect contingent federal interests.

230 See supra text accompanying note 138. Application of preclusion law to adjudications of state law claims by federal courts may have the effect of precluding federal claims or issues.
Decision Act cannot be ignored. That position is strongest in diversity cases. The Act appears to have been influential in shaping pre-
Erie law that the preclusive effects of federal alienage and diversity judgments are governed by state law. Moreover, not even the Supreme Court in its most desperate moments has suggested that the Act is inapplicable in diversity cases.

The task of justifying uniform federal rules across the whole spectrum of preclusion law would appear easy if the Federal Rules of Civil Procedure embodied such a code. In that event, on any interpretation of the Rules of Decision Act that reflected modern developments, the Act would be "inapplicable by its own terms." But the Rules Enabling Act does not authorize Federal Rules of preclusion, and the rulemakers, with few exceptions, have not sought to state them. The rule bearing most closely on claim preclusion suggests anything but foreclosure of assertions of legal rights. In that respect Rule 18(a) may be thought to convey a promise to be broken. The rule on compulsory counterclaims, Rule 13(a), is a product of history and, at most, a vehicle of legal support for federal common law.

Finally, properly viewed, Rule 41(b) merely states what other sources of federal law, of a nationally binding character, have the power to determine; it thus provides fair notice to litigants. Fed-

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231 See supra text accompanying notes 81-129.
232 See supra note 63 and accompanying text.
233 See supra text accompanying notes 114-16.
236 See supra text accompanying notes 181-86.
237 See supra note 175 and accompanying text. Cf. Answering Serv., Inc. v. Figan, 728 F.2d 1500, 1503 (D.C. Cir. 1984) (cross-claim under Fed. R. Civ. P. 13(g)).
238 See supra text accompanying notes 181-86, 193-98.
239 Failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. Fed. R. Civ. P. 41(b).
240 This may be viewed as an instance of the phenomenon I call incorporation. See supra note 196. In that regard, the 1965 amendments to the Rule responded in part to decisional law. See 5 J. Moore, supra note 184, ¶ 41.01[12], at 41-10 (1965 advisory committee note).

The provision in Rule 18(a) that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim." Fed. R. Civ. P. 18(a)(4), has been described as "unique at the time it was first adopted." 9 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2368, at 187 (1971). If so, the most that can be said for it is that it suggests a rule that could validly be formulated.
eral standards are necessary to determine when a federal judgment can preclude subsequent litigation, whatever law governs the preclusive effects of that judgment. In the case of so-called penalty dismissals under Rule 41(b), that interest is buoyed by the additional consideration that uncertainty as to the binding nature of federal judicial action might lead to disregard of perfectly valid Federal Rules and orders and that the costs of such disregard would fall on the federal courts. Thus, the decision in a case upon which Professor Degnan relied, Kern v. Hettinger, was correct, and the courts that have subsequently reached similar decisions were correct. We may forgive reliance on Rule 41(b) as a direct source of legal power in Kern and elsewhere, but we should be wary of attempts to extrapolate from the decisions a more general rule regarding the relationship between federal and state preclusion law.

c. Federal Common Law: General Considerations. If federal law is to govern all matters of the scope and effect of federal diversity judgments, that law must be federal common law. It is possible to maintain that the Rules of Decision Act's force is exhausted once there is a finding of federal lawmaking competence, and that the federal interest in the nature of a "judgment" entitled to respect, if

as a matter of federal common law as a corollary to the basic federal law obligation to respect federal judgments. See, e.g., Engelhardt v. Bell & Howell Co., 299 F.2d 480, 485 (8th Cir. 1962) (upholding validity of Rule).

See supra text accompanying notes 140-45 & 226; infra note 246 and accompanying text.

See, e.g., Asociacion de Empleados del Instituto de Cultura Puertorriqueña v. Rodriguez-Morales, 529 F.2d 915 (1st Cir. 1976), in WRIGHT, MILLER & COOPER, supra note 5, § 1467, at 1453-44.

That is, there is a federal interest relating solely to the initial litigation that justifies a federal rule. See supra note 195.

333 F.2d 353 (2d Cir. 1962). See Degnan, supra note 3, at 761-63.

See cases cited supra note 220.

See Kern, 303 U.S. at 340; Compagnie Des Bauxites De Guinee v. L'Union Atlantique S.A. D'Assurances, 723 F.2d 357, 360 (3d Cir. 1983); Degnan, supra note 3, at 760-63; Note, infra note 20, at 9419. Cf. Cenner v. Marathon Oil Co., 583 F.2d 830, 832 (6th Cir. 1978) (per curiam) (Rule 41(b) dismissed in federal action asserting federal substantive rights); supra note 219.

That is not to say that such reliance is without costs, in particular the loss of flexibility that characterizes common law adjudication. Cf. supra text accompanying 186; infra text accompanying note 310 (Rule 13(a)). In the case of Rule 41(b), comparable flexibility has been achieved by generous interpretation of the language "lack of jurisdiction." See Costello v. United States, 355 U.S. 265, 286 (1951).

Kern itself demonstrates that the application of federal law to a matter covered by Fed. R. Civ. P. 41(b) does not predetermine the law governing the claims or issues that may be predicated by the judgment or the parties who may benefit from or are bound by the judgment. There, the court assumed that state law would govern the availability of nonmutual issue preclusion but found it unnecessary to choose between New York and California law. See Kern, 303 F.2d at 340-41.

See supra text accompanying notes 109 & 111-12.
not Congress's power under article III to enact a complete code of preclusion rules, satisfies the competence requirement. But that argument does not dispense with the need to justify a complete body of judge-made federal preclusion rules, rather than state law borrowed as federal law. Rather, it remits the search for standards governing the creation of federal common law to sources exclusive of the Rules of Decision Act.

In light of a demonstrable federal interest in some matters of preclusion, and assuming that uniform federal law governs those matters, we should consider the possibility that a complete body of uniform federal rules is necessary as to diversity judgments for the administrability of the system of preclusion rules. To the extent possible, litigants and courts should not be required to pick and choose among preclusion rules. Moreover, in this context too, the use of state preclusion law could skew litigants' behavior in a manner contrary to federal procedural policy.

According to the analysis to this point, the matters governed by federal preclusion law all have to do with preconditions to recognition or, in the case of the "on the merits" exception to claim preclusion, something that is functionally identical. They are a discrete group, clearly recognizable as such by courts and litigants. The uncertainty that might confront a litigant in a federal question case as to the state law to be borrowed is reduced, if not eliminated, in the diversity context by the existence of a clearly stated choice of law rule for the federal courts. Further, whereas in federal question cases state substantive interests are usually contingent, in diversity cases, assuming the action involves the adjudication of rights under state substantive law, state interests are directly and inescapably implicated. The existence of uniform federal preclusion rules, developed for federal question judgments, is relevant. But those rules

248 See supra note 60, text accompanying note 292.
249 See supra text accompanying notes 171-72.
250 See supra text accompanying notes 161-62.
251 See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Day & Zimmermann, Inc. v. Challoner, 433 U.S. 570 (1977). Moreover, in an action grounded solely on state substantive law, litigants need be less concerned that, in a subsequent action, state preclusion law will be displaced because hostile to or inconsistent with federal substantive interests. As to the possibility of displacement in aid of federal procedural interests, see infra text accompanying notes 278-85 & 291-301.
252 Cf. Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1337, 1337 n.4 (1985) (Burger, C.J., concurring) ("By contrast, when a federal court construes substantive rights and obligations under state law in the context of a diversity action, the federal interest is insignificant and the state's interest is much more direct than it is in the present situation, even if the relevant state law is ambiguous.").

For a case suggesting that federal issue preclusion law governs the judgment of a federal diversity court adjudicating matters of federal substantive law, see Partman Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 92 (1954).
are trans-substantive and hence poorly suited to protect substantive
rights, particularly those conferred by another legal system.253 Finally, an independent federal policy affects the circumstances in which uniform federal law can be applied in diversity cases. The effect of that policy in other contexts has been to submerge the costs to the federal courts and litigants of a mixed system of federal and state law.

The Supreme Court’s decisions in Hanna v. Plumer254 and Walker v. Armco Steel Co.255 suggest that when the only putatively pertinent federal law is federal common law, the question whether a common law rule applies in diversity cases depends upon two inquiries. First, one asks whether the application of a federal rule, rather than the rule that would be applied by the courts of the state in which the federal court sits, would materially affect the character or result of the litigation—whether, in more familiar terms, the rule in question is outcome determinative. Second, if the answer to that question is affirmative, one asks the further questions whether the difference between the putative federal rule and the state rule would lead a litigant to choose a forum for that reason or whether application of a variant federal rule would lead to inequitable administration of the laws.256 It also appears that, if the rule in question is outcome determinative, it does not matter whether, on the facts of the case, a prompted choice of forum, so long as applying a variant federal common law rule would result in inequitable administration of the laws.257

All of this is, of course, well known to first year law students.

What is surprising is that those who do not accept Professor Degnan’s complete dispatch of the Rules of Decision Act and who have espoused a modified version of his general rule for diversity judgments proceed as if these cases did not exist.258

One possible explanation for the failure to grapple with the Erie line of cases is a conclusion that those cases are irrelevant to questions concerning the preclusion law that governs the effects of a federal diversity judgment. But the conclusion is insupportable. It is

253 For the relevance of existing federal rules, see supra note 168. For purposes of this analysis, the validity of federal preclusion rules for federal question judgments is assumed. On the problem of trans-substantive rules applied trans-systemically, compare supra text accompanying notes 156-58 (similar concern as to use of state preclusion law for federal question judgments).
256 See, e.g., Walker, 446 U.S. at 744-47, 752-53; Hanna, 380 U.S. at 466-69 (dictum).
257 Walker, 446 U.S. at 753. For a suggestion that inquiry into the facts of the case on the issue of forum shopping is inappropriate, see Burbank, Rules Enabling Act, supra note 87, at 1175.
258 See supra notes 224-25 and accompanying text.
true that preclusion rules are not made by, and do not have their ultimate bite in, the rendering court. But in fashioning preclusion rules for federal judgments, federal courts are bound by federal statutes, including the Rules of Decision Act and federal jurisdictional statutes. The purpose of the enterprise is precisely to determine the law that will attend a federal diversity judgment and that will bind all courts, federal or state, in which the judgment is subsequently raised. Once that law is ascertained, it will not only furnish the rules prescribing the ultimate bite, but it may also affect the conduct of litigation in the rendering court. As Professor Degnan recognized, albeit in a different context, "[i]f 'outcome determinative' is the relevant test... hardly anything is more dispositive than the doctrine of res judicata."259

Another possible reason for ignoring Erie's progeny is disagreement with the approach taken in those cases. This apparently played a part in the Restatement's treatment. The comment to section 87 follows Professor Degnan's reasoning, including his historical account, a long way down the path, but draws back at the point of banishing state law entirely. The comment mentions Erie and the Rules of Decision Act, and it suggests that federal law should adopt state preclusion law when the purposes of the latter can be characterized as substantive. The analysis wholly neglects the Supreme Court's decisions that characterize rules as substantive according to their effects on diversity cases.260 We can disagree with the message in Hanna's dictum, which arguably became a command in Walker, but we should not ignore it.261 Indeed, since Dean Ely helped to clarify matters by pointing out that one problem is really three,262 scholars have disputed whether the dilemma identified in Hanna's dictum is the dilemma that should concern federal courts sitting in diversity to administer state law where there is no pertinent constitutional or statutory provision or Federal Rule.263 Without repeating this debate, it may be useful to

259 Degnan, supra note 8, at 754 (footnote omitted). Differences in some aspects of preclusion law, however, may not affect choice of forum. See Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1496 (D.C. Cir. 1983); supra note 296.

260 See Restatement (Second) of Judgments § 87 comment b (1982). For the text of § 87, see supra text accompanying note 225. See also C. Wright, supra note 56, § 100A, at 695-96.

261 Professor Hazard, reporter of the Restatement (Second) of Judgments, has recently expressed his disagreement with the post-Erie cases in this context. See Hazard, supra note 92. For my response, see Burbank, supra note 92. For earlier, general expressions of disagreement, see Redish & Phillips, supra note 17; Redish, supra note 17; Bourne, supra note 17.

262 See Ely, supra note 17.

263 See sources cited supra note 17.
restate the implications of my analysis for some of the major points in dispute before moving to the problem at hand.

d. The Rules of Decision Act. Whatever its role in prescribing the relationship between federal and state law in other contexts, the Rules of Decision Act unquestionably plays a role in diversity cases. Moreover, the Act cannot fairly be read to exempt federal common law from its requirements. Nor is the Act exhausted when there is federal lawmaking competence. Finally, the last resort, selectively reading the Act so that the reader determines “the cases where [the laws of the several states] apply,” turns the Court’s mistake in *Klaxon Co. v. Stentor Electric Manufacturing Co.* into a cop-out.265

The Act does not prohibit federal common law, however. The creation of federal common law must be justified by reference to provisions (or the structure) of the Constitution, federal statutes, or Federal Rules that, fairly read, so provide or so require.266 In some cases, the interpretation of those sources will yield the conclusion that a uniform federal rule governs. In other cases, state law applies, unless hostile to or inconsistent with federal interests, and it does so not because the federal courts have borrowed it but because Congress has borrowed it.

Under this view, federal courts are not automatically remitted to state law by the Rules of Decision Act whenever a matter has escaped specific treatment in the Constitution, an act of Congress, or Federal Rules. It is doubtful, on the other hand, whether they have the freedom suggested by the Court in *Hanna.*267 The analysis confines the federal “procedural” policies that federal courts can consider in creating federal common law to those that find expression

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264 312 U.S. 487 (1941).
265 See supra text accompanying note 125; note 121. Although times have changed, and with them notions about law, language in the Rules of Decision Act that reflected an understanding of the power of federal courts to choose the applicable law (even if designed to ensure a choice of state law as to “local” questions), see Fletcher, supra note 116, need not be deprived of all significance, let alone used to deprive the Act of all significance. Under this view, the Act empowers a federal court to choose which state’s law to apply, even in a diversity case. See *Haw. v. Hanna* note 102, at 1269.
266 See supra text accompanying notes 109-29, 173-76 & 187-92. As to local court rules, see supra note 189; supra note 282. See also supra note 120 (federal common law as source of policy for federal common law).
267 “In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure.” *Hanna*, 380 U.S. at 466 (dictum). The Court did not make clear whether it was assuming not only no pertinent Federal Rule but also no relevant Federal Rules. *Corn Products Refining Co. v. A.F.T. Davidson Co.*, 192 F.R.D. 934, 936-37 (D.D.N.Y. 1984) (existence of relevant Federal Rules requires development of federal case law) (with, at 937 (even if Federal Rules silent, court need not apply state law to do so “would not discourage forum-shopping or avoid the inequitable administration of the laws”). For other criticism of *Hanna’s* dictum, see Burbank, *Rules Enabling Act*, supra note 87, at 1174-75 & n.682.
The policy against different outcomes on the basis of citizenship is wisdom of the course taken in diversity cases after valid Federal Rules. The dichotomy is false. Of Congress conferring diversity jurisdiction on the federal courts. In considering whether the Constitution or acts of Congress (including the Rules Enabling Act) require the application of federal law, the federal courts must consider both policies grounded in those sources pointing towards federal rules. The Supreme Court's decision in Byrd v. Blue Ridge Rural Electric Cooperative, the best refuge for those who assert broad power in the federal courts to apply a federal common law of procedure, is not inconsistent with this analysis. Of course the case was easy if the seventh amendment required submission of the issue to the jury. If the Court believed that, its approach is perhaps best explained as a response to fears for the integrity of the Federal Rules because of its own confused opinions in earlier cases painting with a broad brush is not unknown in this corner of the law. But, if the Court believed that, the suggestion that it might have reached a different result if a "strong possibility" had existed that the difference between the federal and state rules was outcome determinative, an aspect of the opinion too easily ignored, is inexplicable. One need not espouse a theory of

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268 Compare Westen & Lehman, supra note 17, at 365-77 (common law policy with Redish, supra note 17, at 962-65, 966-69 & nn.60 (Rules of Decision Act). See also Westen, supra note 17, at 982-89.


270 If this is "high fiction," Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 17 (1975), quoted in Westen & Lehman, supra note 17, at 375 n.196, so be it. But the Court indulges this fiction, and if therefore should not be ignored, even when inconvenient to one's theory of the relationship between the Rules of Decision Act and federal common law.


272 See, e.g., Friendly, supra note 102, at 463 n.93; Ely, supra note 17, at 709, 717 n.130.

273 See, e.g., Ely, supra note 17, at 709.

274 See Byrd, 356 U.S. at 539.

275 Professor Bourne suggests that this aspect of the opinion, rather than that relating to the seventh amendment, reveals the Court's desire to "shorten up both in federal statutes and rules." Bourne, supra note 17, at 466 n.175. See id. at 464 n.167.
constitutional common law\textsuperscript{276} to accept the notion that, when constitutional policies are implicated and the federal rule applicable in federal question cases is clear,\textsuperscript{277} the sole business of constitutional common law to accept the notion that, when constitutional decision may be deferred until the application of federal or state law would make a difference and the federal policy against different outcomes on the basis of citizenship would thus be implicated.

If one regards Byrd as authority in diversity cases for the consideration of federal policies other than those involving the judge-jury relationship,\textsuperscript{278} and if one reads Hanna and Walker as continuing that authority even in cases implicating the federal policy against different outcomes on the basis of citizenship,\textsuperscript{279} the major obstacle to the development of principled guides to decision is the articulation of processes by which the competing policies are identified and decisional weight attached to them. Even those who reject the significance of the policy identified by the Court in its post-Erie cases recognize that, unless those processes are disciplined, federal courts are essentially free of constraints.\textsuperscript{280}

The approach advocated here regards the Rules of Decision Act as speaking directly to the circumstances in which it is permissible to fashion or apply federal common law. It has the obvious effect of imposing discipline on the first of those processes. Federal courts are not free to conjure up "interests"; rather, they must tie them to

\textsuperscript{276} See Monaghan, supra note 270. For a critique of Professor Monaghan's theory of constitutional common law, see Merritt, supra note 92, at 54-59.

\textsuperscript{277} See Byrd, 356 U.S. at 537.

\textsuperscript{278} See Redish & Phillips, supra note 17, at 371.

\textsuperscript{279} Compare Edy, supra note 17, at 717 n.130 ("[t]here is no place in the analysis for the sort of balancing of federal and state interests contemplated by the Byrd opinion,") with Redish & Phillips, supra note 17, at 367-72, 384 (balancing persisted after Hanna and is necessary in light of costs to federal system exacted by Hanna).

Both of these articles were written before the Walker decision. See Redish, supra note 17, at 369 n.2. On one view, because Walker applied Hanna's dictum, interest balancing by the lower federal courts is difficult to justify until the court "reevaluate[s] the standards set out in Hanna." Id. It is possible, however, to read the Court's opinion in Walker as leaving the door open. The Court concluded: "There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which conceivably would be barred in the state courts by the state statute of limitations should proceed ... in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." Walker, 416 U.S. at 753. The negative pregnant may be that, at least in cases where forum shopping is not a concern, but see supra note 257, a consideration of federal policies may furnish a "reason why" and justify a conclusion that a difference in outcome does not constitute "inequitable administration of the laws.

\textsuperscript{280} See, e.g., Redish & Phillips, supra note 17, at 380. But compare Bourne, supra note 17, at 469-71 ("Influence but not the command of federal positive law"), id. at 478 ("A strong federal policy, a concrete federal pecuniary interest, a justifiable sense of the need of uniform federal standards, or a sense that the problem implicates no state interests."), See also id. at 482-84.
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policies already articulated in, or at least articulable from, valid legal prescriptions.281 The natural tendency of institutions to seize the moment to expand their power is thus bounded by a requirement of resort for authority to policy choices made on other occasions through different, more democratic, processes.282

The approach also has the less obvious effect of disciplining the process by which federal policies finding expression in the permissible legal sources are considered, as against competing policies, in determining whether federal common law applies. If the Rules of Decision Act is taken seriously, it should not be interpreted "in a crabbled or wooden fashion."283 Statutory interpretation and federal common lawmaking are variations on a common theme.284 The stronger the pull of a policy underlying the Constitution, an act of Congress, or a Federal Rule toward implementation through federal decisional law, the easier it is to conclude that the source "requires" otherwise than that state law apply.285 Where the pull is weaker but still fairly discernible, and no conflicting federal policies point toward the application of state law, any linguistic strain involved in a

281 C.f. Arrowsmith v. United Press Int'l, 320 F.2d 219, 227 (2d Cir. 1963) (en banc) (denying in diversity action to apply federal standard of personal jurisdiction "in the absence of an overriding federal interest intimated by Congress or its delegate"); Wabco Corp. v. Burger Chef Systems, Inc., 534 F.2d 1165, 1172 (D.C. Cir. 1977) (Rules of Decision Act "gives federal courts no license to shape the policy for diversity litigation").

282 C.f. Mishkin, Last Words, supra note 102, at 1687 ("Where the limits are being imposed on the courts themselves . . . the judicial constraints to act in accordance with legislatively imposed limits should be even stronger in order to counter the inherent tendency of any institution to extend its own reach and power.").

Recent changes in the process by which local district court rules are promulgated may diminish concern about those rules being considered valid sources of policy for federal common lawmaking. See Fed. R. Civ. P. 83 (as amended Aug. 1, 1985). See also H.R. 3550, 99th Cong., 1st Sess. § 404 (1985) (requiring notice and comment in local court rulemaking). The House of Representatives passed H.R. 3550 on Dec. 9, 1985, 131 Cong. Rec. H11399 (daily ed. Dec. 9, 1985). From this perspective, however, resort to valid federal common law as a source of policy for additional common law rules, see supra notes 120 & 189, is troublesome.


284 See Wester & Lehmans, supra note 17, at 332-36.

285 Provisions or the structure of the Constitution or acts of Congress may also be deemed to "provide" otherwise than that state law apply, not because a federal rule alone will secure the purpose but because the framers or Congress contemplated implementation through indigenous federal law. See supra text accompanying note 188 (Rules Enabling Act); Merrill, supra note 92, at 40-46 ("Delegated Lawmaking"). See also Hill, supra note 165 (discussing constitutional and statutory presumption); Monaghan, supra note 270, at 14 ("Federal common law gleaned by implication from the federal structure of the United States"); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 642 (1981) ("Federal common law also may come into play when Congress has vestee jurisdiction in the federal courts and empowered them to create governing rules of law."). As to Fed. R. Civ. P. 83, however, see supra note 192.
generous reading of the words of the Rules of Decision Act confronts the reality of a documented federal interest in the application of federal law and no recognized policy favoring state law. When, however, a pertinent federal policy favors the application of state law, the strain reaches the breaking point.

e. Applying Federal Common Law Analysis and a Rules of Decision Act Approach. So long as uniform federal law governs only the definition of a "judgment" entitled to respect, problems of administering a system of borrowed state law do not justify, either under traditional federal common law analysis or under a Rules of Decision Act approach, uniform federal rules for all preclusion questions arising from federal diversity judgments. Moreover, to the extent aspects of the preclusion law applicable to federal diversity judgments implicate federal policies cognizable under traditional analysis or a Rules of Decision Act approach, the relative homogeneity of preclusion law throughout the country cautions against a categorical a priori determination that the threat to federal interests requires uniform federal rules. In diversity cases federal substantive interests are usually contingent. If federal procedural interests exist that may be considered, they are not only contingent, but in terms of any concern about federal court supervision, they are nonexistent. Finally, distinguished authority, unwilling to follow the Supreme Court's post-Erie decisions as far as Hanna and Walker may require, acknowledges that state preclusion law should apply to protect state substantive policies, and that complete uniformity is therefore impossible.

Those who would apply federal preclusion rules except when confronted by discrete state rules that are deemed "substantive" seemingly have it backwards. In the absence of a documented

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286 See supra text accompanying notes 247-53.
287 See supra note 229 and accompanying text; infra text accompanying note 298.
288 See supra text accompanying note 224.
289 Professor Wright makes an attempt to reconcile the regime he advocates with the Supreme Court's federal common law cases:

To say that federal law governs the preclusive effect of a federal judgment is not to suggest that federal courts are to ignore important state interests or that the preclusive effect of federal judgments is monolithic. It has become very common in other areas to hold that a particular subject matter is governed by federal law, but that a uniform national rule is not necessary and state law is to be looked to so long as it is not discriminatory or in conflict with federal statutes. Some aspects of preclusion reflect primarily procedural policies and go to the essence of the judicial function. These aspects of preclusion should be governed by a single uniform federal rule. Other aspects of preclusion reflect policies that seem more distinctively substantive.

C. Wright, supra note 50, § 100A, at 696 (footnote omitted). For criticism of this formulation, see infra note 312.
case for uniform federal rules, state law applies unless it is hostile to or inconsistent with federal interests. Perhaps, however, I have not fully grasped that case. The fact that the system of preclusion rules will inevitably be mixed does not mean that we should abandon the goal of predictability or the federal interest in administrability. If in significant aspects of preclusion law (in addition to the definition of a "judgment") federal interests require the displacement of state law, predictability as to the governing preclusion law counsels, and the relative homogeneity of preclusion law supports, departures from a federal norm.

As to claim preclusion, Rule 18(a) certainly provides procedural opportunities that federal courts may consider in fashioning common law rules that are otherwise justified. Whether the rule expresses a policy that calls for federal claim preclusion rules is another question, one that is difficult to answer affirmatively. Certainly it is difficult to answer in the way in which those favoring particular federal preclusion rules would answer it. "May" as used in Rule 18(a) does not mean "shall." "Shall" in this context is beyond the competence of the Federal Rules, and "may" juxtaposed with "shall," even if unauthorized, is a particularly feckless vehicle of policy.290

Many would not accept the notion that the federal "procedural" policies justifying federal common lawmaking are confined to those expressed in the Constitution, federal statutes, or valid Federal Rules.291 In the context of preclusion, if one puts rhetoric concerning judicial power in its proper place,292 the arguments reduce to a federal interest in finality or in efficient judicial administration. Preclusion law is also typically concerned with litigants,293 but the concern is a function of (1) the interest in finality, (2) the protection of substantive rights, which state law defines in this context, or (3) repose simpliciter, as to which it is difficult to justify a federal policy independent of that furnished by the system that governs primary activity.

290 See supra notes 172 & 176 and accompanying text.
291 See, e.g., Bourne, supra note 17, at 472-92; Redish & Phillips, supra note 17, at 384-94.
292 See supra text accompanying notes 81-92.
293 Application of both [claim and issue preclusion] is central to the purpose for which civil courts have been established: the conclusive resolution of disputes within their jurisdictions . . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

It is not clear why the federal interest in finality—the interest that both the federal system and litigants in federal court have in the stability of judgments—should extend, as a justification for uniform federal rules, beyond the basic obligation of respect for federal judgments and the few matters of preclusion law (for example, validity and finality) essential for its protection. It is difficult to discern finality as an animating concern of discrete preclusion rules, as opposed to a concern basic to the preclusion law of all American legal systems. Finality in this context is a mask for judicial power.

Let us turn to efficient judicial administration. Assuming a federal interest in reflecting the procedural opportunities afforded by the Federal Rules in federal rules of claim preclusion, it bears repeating that the interest is contingent or, put another way, defeasible. Thus, the costs of litigation foreclosed by a putative federal rule of claim preclusion, but not by state law, will be incurred by the federal system only if subsequent litigation is brought or removed to federal court. If federal-state relations were ordered identically to state-state relations, that would be sufficient. But they have not been so ordered in other contexts involving the exercise of diversity jurisdiction, and it is a disservice to legal thought to pretend

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294 See supra text accompanying note 226.
295 The central problem in finality of judgments is how far the principle of finality is to be qualified. The law of res judicata grapples with this central problem. Its specifications endeavor to state the conditions under which the possibility of failure of civil justice is so substantial as to justify immediate action in the form of retitigation. A policy of reasonable finality requires rules that take into account the complex substantive and procedural considerations going into a civil judgment.

Restatement (Second) of Judgments ch. 1, Introduction, at 12-13 (1982).

296 The principle of finality is an essential element of a court's authority. The rules of res judicata express the quality of a court's authority, not only in general doctrine but in the technical particulars of the rules. The source of the federal courts' authority is in Articles I and III of the Constitution. It is therefore appropriate to hold that, at least in the absence of some other provision by Congress, the effects of a federal judgment are a legal implication of those provisions.

Restatement (Second) of Judgments § 87 comment a (1982). See id. comment b ("The basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function."). Hazard, supra note 92, at 644, 647; see also Burbank, supra note 92, at 660-62 (criticizing Hazard).

297 See Degnan, supra note 3, at 764.
298 See supra note 229, text accompanying note 287.
299 Professor Degnan grasped the difficulty in connection with pendent but unasserted state law claims, noting that application of a federal rule of bar "cannot be justified by conventional invocations of economy, efficiency, and expediency." Degnan, supra note 3, at 772. Rather, he asserted, "[t]he basic rule of claim preclusion, in effect define finality and hence go to the essence of the judicial function.").
that they have. Indeed, to the extent that state preclusion law is not sensitive to the “substantive” policies of other states, the intermediate position taken by the Restatement (Second) of Judgments and others is revealed not as a concession to post-Erie cases, but part of the attack on those cases, and in particular on Klaxon.

Differences between putative federal and state rules of claim preclusion present a “strong possibility” that both the character and result of litigation will differ depending on the forum. Those differences will likely affect choice of forum. Whether, in addition, such differences can be characterized as “inequitable administration of the laws,” if the words mean anything, may depend upon whether federal interests may be considered, whether the contingent federal interest in efficient judicial administration is cognizable, and whether by some process that interest outweighs the declared federal policy against different outcomes on the basis of citizenship. Byrd, the best hope for interest balancers who do not seek to remove the baby from the bath water, provides precious little support for the conclusion that federal law governs. Unless one can dispense with the Court’s entire post-Erie jurisprudence, both traditional federal common law analysis and a Rules of Decision Act approach point towards the application of state law rules of claim preclusion to diversity judgments, because they must take account of the federal policy against different outcomes on the basis of citizenship, and because any federal interest is contingent. Unexpressed disagreement with that jurisprudence will not do.

If claim preclusion does not yield an analysis supporting the ap-

300 See supra text accompanying note 224.
304 See supra note 279.
305 For attempts to clean up, rather than merely drain, Byrd’s dirty water, see Redish & Phillips, supra note 17, at 362-66; Bourne, supra note 17, at 468-71. See also supra text accompanying notes 274-75.

My editors suggest that I have no hope of my readers’ forgiveness for this image.

But Burbank is not brought to book
For one imperfect calyx,
So we’re prepared to overlook
One metaphor suffices.

Field, Frankfurter, JL. Concurring, 71 Harv. L. Rev. 77, 81 (1957) (footnote omitted).
306 See supra text accompanying note 261. Applauding Professor Hazard’s acceptance of my invitation to be explicit in his disagreement with the post-Erie cases, see Hazard, supra note 92. I observed: “Of course, now that all the cards are on the table, lower federal courts may feel reluctant to apply uniform federal preclusion rules in this context. They lack the freedom of law professors to overrule the Court.” Burbank, supra note 92, at 660.
plication of uniform federal rules, there is no longer any need to consider federal law as the norm. There may be a cognizable federal interest in protecting federal factfinding and, as to such matters, the federal policy against differences in outcome on the basis of citizenship is less clearly implicated. But it is also sufficiently difficult to predict as an a priori matter that state issue preclusion law presents a threat to the federal interest that, even if it is cognizable, uniform federal law does not seem justified under either traditional common law analysis or a Rules of Decision Act approach. In that aspect of issue preclusion law where consequential variation is most likely—the persons who may benefit from findings (herein again of mutuality)—any federal interest favoring uniform federal rules is attenuated, and the federal policy against differences in outcome on the basis of citizenship is likely to be implicated in full force.

It remains to consider compulsory counterclaims. Rule 13(a) is valid because it does not purport to state a rule of preclusion. Moreover, even though it is animated by policies that are not properly the concern of Federal Rules, the Rule's implications for preclusion law are patent, and it was not blocked by Congress. Thus, as long as a putative federal common law rule of preclusion, waiver, or estoppel did not mimic the seemingly inflexible command of the Rule, thereby accomplishing indirectly what could not be accomplished directly and robbing the federal common law process of that which traditionally has distinguished it from court rulemakings and which may justify different standards of validity, the Rule could serve as a source of policy. The problem, again, is the federal policy against differences in outcome on the basis of citizenship, there being no doubt in this context that the policy is implicated. Given the clear expression of policy in Rule 13(a), and the concern for obedience to other less problematic Federal Rules that might be aroused through the failure to enforce the policy, uniform but flexible federal common law may be required.

This analysis undoubtedly suggests another reason to reconsider Erie's progeny. Its burden has been that those cases should not be ignored. The greater need, however, is to integrate the

307 Moreover, because of the potential effect of the choice between mutuality and nonmutuality on liability, see supra note 211, the interests of the states, which furnish the rules governing liability in this context, are intense.

308 That is, the difference between a state rule requiring mutuality and a federal rule not so requiring, see supra text accompanying notes 205-14, would materially affect the character and result of the initial litigation in a predictable class of cases, and it would similarly affect choice of forum.

309 See supra text accompanying notes 181-86, 195-96.

310 See supra text accompanying note 186.

311 It has already had that effect. See Hazard, infra note 92.
Court's approach to problems in the relationship between federal and state law in diversity cases with its approach to those problems in other contexts. The Rules of Decision Act is the common vehicle, and it is time to take the statute seriously.

The interest of the federal judiciary in efficiency is unquestionable, and unquestionably powerful. Particularly when state substantive rights are involved, however, it is important that federal judges not have free rein to define and pursue that interest. Preclusion rules may implicate substantive policies; they have dramatic effects on substantive rights. When state substantive rights have been in question, from the perspective of purposes or effects, federal judges have not in the past been permitted to act with the autonomy of state judges. Rather, they have been required to do what judges of a particular state would do. The question is whether, in fashioning preclusion rules for diversity judgments, federal judges should have greater freedom to act as if the federal courts were a domestic system.

It would be analytically tidier if there could be one set of preclusion rules applied to successive actions in federal court and another in the federal (diversity)—state configuration. The full faith and credit principle, applicable to federal judgments through sources other than the full faith and credit clause, requires only a very limited set of uniform federal rules. The full faith and credit statute, fairly read, does not designate the source of the law that governs the preclusive effects of the judicial proceedings it covers, although it unquestionably

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312 The attempt made by Professor Wright to reconcile the preclusion regime he favors, which is reflected in the Restatement (Second) of Judgments, with the Court's federal common law cases, see supra note 289, fails on two counts. First, it substitutes an amorphous procedure/substance dichotomy and rhetoric about the "judicial function" for the discriminating analysis that has recently characterized the Court's response to calls for uniform federal law. See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). See also supra text accompanying note 108. Second, the procedure/substance dichotomy suggested ignores "the policy of federal jurisdiction" that has led the Court to allocate federal and state lawmaking authority in diversity cases. See supra text accompanying notes 269-70. Even if the Court accepted the latter reformulation, it is unclear whether it would accept the former.

313 Usually, the federal courts have been provided jurisdiction for a purpose, and any reduction in either their jurisdiction or in litigant access to the courts will itself impose a cost. Moreover, if one myopically focuses upon the administrative dangers caused by docket size, one is likely to accept most judicial attempts to curb those dockets, for the very reason that they have that effect.


315 See supra note 299 and accompanying text.
bly contemplates a domestic model or referent. From the perspective of litigants, however, a system of preclusion rules for diversity judgments keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham. The choice, then, is between imperfect solutions. Until such time as federal policy relevant to preclusion law is more clearly articulated, through processes providing safeguards against judicial parochialism, state law should provide the norm on most questions.

III

The Preclusive Effects of State Judgments

A. The Full Faith and Credit Statute

Professor Degnan evidently believes that the full faith and credit statute directs courts in interjurisdictional cases to apply the preclusion law of the state whose judgment is claimed to have preclusive effect. Certainly, he favors that regime as a normative proposition. In any event, although Professor Degnan devoted little attention to state judgments outside the diversity context, the Supreme Court has recently paid them great attention and blessed Professor Degnan's general rule in the state-federal configuration. The result of the Court's efforts has been that, in order to avoid the application of state preclusion law, a federal court must find a violation of the due process clause or clear evidence of an intent by Congress expressly or impliedly to repeal the full faith and credit

316 See infra note 60; see also infra text accompanying notes 318-52.
317 Such a system might cause litigants to guess whether foreseeable subsequent litigation could or would be brought in, or removed to, federal court and to conduct the initial litigation accordingly. More likely, because of the potential consequences of error, such a system would cause them to conform their conduct in the initial litigation to the most broadly preclusive rules potentially applicable.

One might seek support for such a system in the rule that a dismissal on statute of limitations grounds by the courts of one state is ineffective as a bar in another state. See Restatement (Second) of Conflict of Laws § 110 comment b (1971). That rule, however, represents but a reflex of the traditional, monolithic approach to statutes of limitations for choice of law purposes and is hardly good authority. Moreover, it does not subject litigants to the dilemma that the suggested preclusion regime would impose. Finally, a proponent of a system keyed to the locus of subsequent litigation must be willing to tolerate, or be prepared to eliminate opportunities for, forum-shopping as between state and federal court in order to gain the benefit of a favorable rule of law that the Court has thus far been unwilling to assimilate to interstate forum-shopping for the same purpose. But see 18 Wright, Miller & Cooper, supra note 5, § 4472, at 738 ("[T]here may be settings in which preclusion rules are so closely tied to procedural intercess of the second forum that federal rules are appropriate in a federal court and state rules in a state court.").

318 See Degnan, supra note 3, at 750-53. But see id. at 755 n.60.
319 See id. at 733 (quoted supra text accompanying note 12).
I believe that the Court's approach is demonstrably wrong and that, in this configuration as well, one must consider the role of federal common law.

Consider first the language of the full faith and credit statute as enacted by Congress in 1790:

[The duly authenticated] records and judicial proceedings of the courts of any state . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the states from whence the said records are or shall be taken.

As a linguistic matter, it is difficult to read the statute as choosing the rendering state's domestic preclusion law rather than the law that the courts of the rendering state would apply. The task is no easier today.

Apart from the language of the statute, and in the absence of pertinent legislative materials to aid in interpretation, attention should be paid to the constitutional basis of the statute and Congress's purpose in enacting it. Article IV, section 1 of the Constitution gives Congress the power to prescribe federal preclusion rules governing the effects of state judgments in other jurisdictions. It does not give Congress the power to prescribe such rules with respect to the effects of state judgments domestically, that is, in the states where they are rendered. Congress has not prescribed federal preclusion rules for state judgments in the large. But we are asked to believe that it has chosen domestic state preclusion law to

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321 Act of May 24, 1790, ch. 11, 1 Stat. 122.


My own research has not unearthed any "pertinent legislative materials to aid in interpretation."

324 See supra text accompanying notes 21-22 & 134.

325 Congress has, however, provided specific interstate enforcement rules for child custody determinations. See 28 U.S.C. § 1738A (1982).
govern in interjurisdictional cases.\textsuperscript{326}

There may be cases in which the courts of the rendering state
would choose to apply the preclusion law of another state, as where
the latter's law furnished the rules of substantive law in the initial
action and the question is who is bound by the judgment in that
action.\textsuperscript{327} Let us assume that there may also be cases wholly
domestic to the courts of a state in which federal preclusion law is applicable.\textsuperscript{328} Are we to imagine that, notwithstanding the law applied
domestically in such cases, Congress intended a different law to ap-
ply in cases identical to them in all respects save that they are in-
terjurisdictional? To what end? Such a regime would not serve the
purposes of the full faith and credit clause of the Constitution. On
the contrary, it would be fundamentally at odds with the goal of pro-
viding “the benefits of a unified nation.”\textsuperscript{329}

Admittedly, Congress probably did not consider the role of
either another state’s preclusion law or of federal preclusion law
when it passed the full faith and credit statute.\textsuperscript{330} But in a changed
legal climate, that is hardly a good reason to prefer a reading of a

\textsuperscript{326} “It is now settled that a federal court must give to a state-court judgment the
same preclusive effect as would be given that judgment under the law of the State in
which the judgment was rendered.” Migra v. Warren City School Dist. Bd. of Educ., 165
U.S. 75, 81 (1984). See also at 85-87 (discussing Ohio preclusion law); Parsons Steel Inc.
v. First Ala. Bank, 106 S. Ct. 768, 772 (1986) (“Once the state court has finally rejected a
claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal
courts must turn to state law to determine the preclusive effect of the state court’s decision.”); Marrese v. American Academy of Orthopedic Surgeons, 105 S. Ct. 1327, 1332
(1985) (“This statute directs a federal court to refer to the preclusion law of the State in
which judgment was rendered.”). See also infra text accompanying note 339.

\textsuperscript{327} This is not an assertion that any state court has so acted, but rather that the
choice of another state’s preclusion law would in some cases be rational and constitutional—all that is necessary for the purposes of this discussion. The example is sug-
gested by Restatement (Second) of Judgments § 87 comment b (1982).

\textsuperscript{328} I pursue this assumption infra text accompanying notes 378-427.

\textsuperscript{329} See infra text accompanying note 22. Cheesebrough, Res Judicata and the Full Faith and
see Dutton, Characterization, Res Judicata and the Lawyers’ Clause, 22 Ind. L.J. 201, 207-12
(1917) (statute requires reference to domestic law); cf. Restatement (Second) of Con-

For those driven to interpret the full faith and credit statute as choosing domestic
preclusion law out of fear and loathing of the problem of revet, see Dutton, supra.
note that federal common law is domestic law for these purposes. See infra note 332. See
also Restatement (Second) of Conflicts of Laws § 5 comment b (1971) (“local law” of a
state is not always the law of the same state).\textsuperscript{330}

\textsuperscript{330} Cf. Smith, Full Faith and Credit and Section 1883: A Reappraisal, 63 N.C.L. Rev. 59,
82 (1984) (“In the early nineteenth century there was no sense that the common-law preclusion
doclines might develop independently in state and federal courts.”). Professor Whitten has
made an interesting argument, based on a review of the history, that neither article IV, § 1, nor the
1790 implementing statute, requires that preclusive effect be given in state judgments. See
Whitten, supra note 323, at 542-70. As to the latter, however, and in light of the Supreme Court’s consistent contrary interpr-


statute that can lead to results inconsistent with its purpose when a reading that is more plausible linguistically entails no such results. Under the latter interpretation, Congress has tied the measure of the constitutional (interjurisdictional) obligation of respect to the measure of respect required by law (or usage) in the courts of the rendering state. Contrary to conventional formulations, the full faith and credit statute does not require application of the domestic preclusion law of the rendering state. Rather, it requires application of the preclusion law that the courts of the rendering state would apply. That domestic state law usually will furnish the rules applied domestically should not blind us to the possibility that, according to principles governing the relationship between federal and state law that have their source elsewhere, federal law may supereven. Any such supervening federal law will, by reason of the full faith and credit statute, be binding throughout the land because, by reason of the supremacy clause, it is binding in subsequent proceedings in the courts of the same state, a configuration untouched by article IV, section 1 of the Constitution and by the full faith and credit statute. I refer again, of course, to federal common law.

Given an interpretation that seems obviously correct, linguistically and in light of constitutional and statutory purpose, the temp-

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See, e.g. Restatement (Second) of Judgments § 86 comment c (1978); Wood, State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit, 58 Ind. L.J. 59, 08 (1982); Curtic, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 325-26 (1978); Degan, supra note 3, at 752-53; Smith, supra note 330, at 60-61.

As to the words "law or usage" in the phrase "law or usage in the courts ..., from which they are taken," as applied to state judgments and decrees, the "law or usage" means is the law or usage of the state wherein the judgment or decree in question was rendered. The "law or usage" of a state means (1) the local law or usage peculiar to that state, and (2) the national law or usage, common to all the states, made up of the constitution of the United States, acts of Congress, and treaties, as expounded by the Supreme Court of the United States, constituting "a common law, resting on national authority"—the paramount law or usage in every state, any local law or usage peculiar to any state to the contrary notwithstanding...

Case Comment, supra note 43, at 518.

Since the publication of my tentative conclusions about the full faith and credit statute, see Burbank, supra note 8; Burbank, supra note 92, Professor Laneburg has independently reached the same basic position. See Laneburg, The Opportunity to be Hand and the Doctrine of Preclusion: Federal Limits on State Law, 31 U. Cinn. L. Rev. 81 (1966) (forthcoming). See also The Supreme Court, 1986 Term, 95 Harv. L. Rev. 286, 289 (1981) (suggesting that domestic litigation may lead to federal checks on state law).
tation is to proceed immediately to the more interesting and challenging business of working out its implications. But there is precedent to contend with.

For those either emboldened or disheartened by the Supreme Court's recent series of decisions concerning the full faith and credit statute, it is worthwhile to recall that, as late as 1979, the Court decided two cases involving problems of state-federal interjurisdictional preclusion without reference to the statute. In both cases the Court applied federal preclusion law. A cynic might speculate about the reasons for the Court's rediscovery of the full faith and credit statute and of the role of state preclusion law when federal substantive rights are at issue. Such a person should be aware, however, that this phenomenon is not unique to the present Court.

Over time, the Court's invocation of the full faith and credit statute has been sporadic, as if the statute were periodically lost—whether in the fog following Swift or in that following Erie. Moreover, the opinions that have invoked the statute are of little help on the question of interpretation that concerns us. Consider the following from the Court's 1982 decision in Kremer v. Chemical Construction Corp.:

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed

333 See supra note 320 and cases cited therein; see also McDonald v. City of West Branch, 466 U.S. 294 (1984) (full faith and credit statute does not apply to arbitration award).
334 See Brown v. Felsen, 442 U.S. 127 (1979); Montana v. United States, 410 U.S. 147 (1977); Smith, supra note 330, at 64. It may be more precise to say that in neither case did the Court refer to state preclusion law.

As suggested in the text, I am inclined to believe that the fate of § 1738 at the hands of the Supreme Court has been determined in part by the prevailing jurisprudence of federalism, with inadvertence and confusion also playing a role. That remains true today. In today's jurisprudence of federalism, however, and now that the Court's attention is firmly focused on § 1738, I cannot believe that it will deem cases decided without reference to the statute as having equal claim to attention with those in which the supposed implications of the statute have been worked out. But see, e.g., Smith, supra note 330, at 84-85, 96-101.
by federal law. It has long been established that Section 1738
does not allow federal courts to employ their own rules of res
judicata in determining the effect of state judgments. Rather it
goes beyond the common law and commands a federal court to
accept the rules chosen by the state from which the judgment is
taken. McElmoyle v. Cohen, 13 Pet. 312, 326 (1839); Mills v. Durfee,
7 Cranch. 481, 485 (1813).336

Even this interpretation of the full faith and credit statute can be
read as consistent with what, I have argued, is the correct interpreta-
tion of that statute. Thus, if the Court’s notion of a state’s choice
includes a “choice” of federal common law required by the
supremacy clause, there is no problem. But the Court’s discussion
of New York law suggests no such role for federal law in a domestic
context.337 Moreover, could any court agreeing with the interpreta-
tion of the full faith and credit statute advanced here at the same
time embrace the repeal analysis that has dominated the Court’s re-
cent opinions, including that in Kremer?338 We can safely assume
that the Court meant what it subsequently stated, namely that the
statute “directs a federal court to refer to the preclusion law of the
State in which the judgment was rendered.”339

Whatever the Court intended to say in Kremer, the cases it cited
do not support the interpretation of the statute it has now clearly
embraced as against the interpretation urged here. On the contrary,
in both Mills v. Durfee340 and McElmoyle v. Cohen341 the Court was, in

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337 See id. at 466-67. Note, on the other hand, that the Court’s banishment of the
federal courts’ “own rules of res judicata in determining the effect of state judgments,”
id. at 481-82, is not dispositive of the question because the Court probably was referring
to routine application of a comprehensive body of federal preclusion law, whether pre-
1938 general federal common law or post-1938 federal common law. See id. at 482
338 “Allen v. McCurry . . . made clear that an exception to § 1738 will not be recog-
nized unless a later statute contains an express or implied partial repeal.” 456 U.S. at
468. “Congress must ‘clearly manifest’ its intent to depart from § 1738 . . . .” Id. at
177.

The source of the Court’s repeal analysis appears to have been Carrie, infra note
331, at 326-33. See Allen v. McCurry, 449 U.S. 90, 98 n.11 (1980) (citing Carrie, infra
note 331, at 328). Professor Carrie’s article exposes the conventional but erroneous
view of the full faith and credit statute. See id. at 326 (“[Section 1738] does require that a
claim or issue be precluded in federal court if the res judicata law of the state in
which the judgment was rendered so indicates . . . .”)

There may still be room for repeal analysis under the reinterpreted full faith and
credit statute, but that analysis differs from the Court’s. See infra text accompanying
notes 490-99.

(1985); See Parsons Steel, Inc. v. First Ala. Bank, 54 U.S.L.W. 4144, 4145 (U.S. Jan
340 449 U.S. (7 Cranch) 481 (1813).
341 38 U.S. (13 Pet.) 312 (1839).
this aspect, faithful to the statutory language.\textsuperscript{342} In 
\cite{Mills}, the Court held that the full faith and credit statute bound federal courts and rejected an attempt to limit its reach to the admission of judgments as evidence. As to the latter aspect, the Court could “perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision.”\textsuperscript{343} In \cite{McElmoyle}, the Court observed that the judgments of state courts “are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the Courts of the state in which it was rendered.”\textsuperscript{344}

Apart from \cite{Mills} and \cite{McElmoyle}, a group of cases that might be thought to shed light, but in fact casts shadows, has involved the issue of greater preclusive effect. In a 1903 decision the Court held that a federal court could not preclude litigation with respect to state taxes on the basis of a judgment that would not be preclusive in the rendering state’s courts.\textsuperscript{345} Subsequent decisions reaffirmed the general principle, albeit occasionally in language difficult to decipher.\textsuperscript{346} The main problem with these cases, or at least with one of them, is that the attempt to get behind the language will not be made. In \cite{OklahomaPackingCo.} the Court applied the general principle and held that an Oklahoma state court judgment without preclusive effect in Oklahoma courts could not be preclusive in federal court. The Court concluded: “Hence, the plea of res judicata in this case must fail, for on that issue state law is determinative here.”\textsuperscript{347}

Language like this can take on a life of its own, and the Court’s recent decisions suggest that it has done so. We need not pause over the question whether the full faith and credit statute should be read to forbid greater preclusive effect in interjurisdictional

\textsuperscript{342} For a departure from the literal language of the statute in \cite{Mills}, see \textit{supra} note 43.

\textsuperscript{343} \cite{Mills}. 11 U.S. (7 Cranch) at 485; \textit{see also id. at} 484. For additional discussion of \cite{Mills}, \textit{see Smith, supra} note 336, at 82-85; \textit{Whitten, supra} note 323, at 564-67.

\textsuperscript{344} \cite{McElmoyle}. 38 U.S. (13 Pet.) at 326.

\textsuperscript{345} \cite{Union}. 189 U.S. 71, 75 (1903).


\textit{In Covington}, the Court said that the holding in \cite{Union} was that “the Federal courts were not required to give to [state] judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered.” \textit{Covington}, 198 U.S. at 109 (emphasis added). This formulation appears to have been taken from \textit{Depository Bank v. Franklinville}, 191 U.S. 400, 517 (1909); \textit{See Covington}, 198 U.S. at 109. A separate opinion in \textit{Oklahoma Packing}, issued before the opinion on rehearing, is to the same effect. \textit{See Oklahoma Packing}, 309 U.S. at 11.

\textsuperscript{347} 309 U.S. 4 (1940) (opinion on rehearing).

\textsuperscript{348} \textit{Id. at} 8.
cases. Assuming that it should, *Oklahoma Packing* and its forbears stand only for the proposition that federal courts cannot ignore the statute, routinely applying "federal" preclusion law, whether of pre- or post-1938 vintage. These cases do not speak to the question whether, in subsequent litigation domestic to the courts of the rendering state, federal preclusion law responsive to a particular scheme of federal substantive rights displaces state preclusion law and hence does so interjurisdictionally by reason of the full faith and credit statute.

All of this is not to say, of course, that state law is an inappropriate place to begin analysis. Indeed, in two cases decided in the period between *Swift* and *Erie*, when the Court was emerging from one set of analytical shackles and before it succumbed to another, it suggested that approach. In the first, the Court observed, without reference to the full faith and credit statute:

But if the determination of the state court was *res adjudicata* according to its laws and procedure, no reason is suggested, nor are we able to perceive any, why it is not to be deemed *res adjudicata* here, if the proceeding in the state court was a "case" or "controversy" within the appellate jurisdiction of this Court . . . so that constitutional rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed here.

In the second, the Court, relying on the full faith and credit statute, stated:

Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata*, and precludes a suit to enjoin enforcement of the judgment. . . . Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the State Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it

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350 *See supra* note 337 and accompanying text.

351 Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 130-31 (1927). The Court determined that the state proceeding claimed to have preclusive effect "was judicial rather than legislative or administrative in character." *Id.* at 130, therefore satisfying the case or controversy requirement. *See id.* at 131-34. Moreover, as to the state preclusion law, the Court deemed itself bound by a state court decision interpreting the state statute involved. *See id.* at 134-35. But the Court also relied on cases applying a federal or general federal common law of preclusion. *See id.*
seeks to enjoin the enforcement of the judgment for want of jurisdiction.352

The first case leaves open the possibility that there are "reasons" why domestic state preclusion law should not apply. Both require additional inquiry before applying state law. It is time to address the appropriate scope of that inquiry.

B. Federal Common Law in State Cases

1. Obstacles to Clear Vision

In choosing an interpretation of the full faith and credit statute, it should suffice to consider that (1) a state court could rationally and constitutionally determine the preclusive effects of its judgments according to the law of another state and (2) reading the statute to require a different result in interjurisdictional cases would stand it on its head.353 That has not been, however, what all the fighting has been about. Rather, attention has focused on the role of federal law in the state-federal configuration. The Court has held that domestic state law governs the interjurisdictional effects of a state court judgment, subject only to the requirements of the due process clause and to a finding, on clear evidence, that Congress intended in a subsequent statute expressly or impliedly to repeal the full faith and credit statute.354 In so holding, the Court has failed to consider the role of federal law in domestic state cases, the model or referent used by the full faith and credit statute.

The Court's failure is puzzling in light of its recognition that the due process constraints on the interjurisdictional application of state preclusion law are identical to the constraints applicable domestically.355 Such recognition should have prompted the question whether other valid and pertinent federal law controls in the domestic context and hence, by operation of the statute, in interjurisdictional contexts. There were, I think, three obstacles to clear vision:

First, the Court's erroneous interpretation of the full faith and credit statute foreclosed an inquiry into the relationship between

353 See supra text accompanying notes 321-29.
354 See cases cited supra note 320 and accompanying text.
355 A State may not grant preclusive effect in its own courts to a constitutionally invalid judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise: other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

state and federal law in the domestic context. If the statute represents a choice by Congress of domestic state preclusion law, the choice can be defeated only if it would lead to a deprivation of constitutional rights or if Congress subsequently made another choice.

Second, the Court has approached the relationship of federal and state preclusion law without close attention to the meaning of "federal law." It is no surprise that, having failed to analyze what it means to say that federal preclusion law governs the effects of federal judgments, members of the Court, when freed of the supposed mandate of the full faith and credit statute, take a disembodied federal rule approach to state judgments. What is

356 See supra text accompanying notes 132 & 205-14.
357 See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 71, 88 (White, J., concurring) ("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."). Justice White concluded that this view, which he favored, was foreclosed by the "long standing" "contrary construction of § 1738." Id. But see supra notes 346 & 349. For other criticism of Justice White's opinion, see Smith, supra note 330, at 112 n.300.

It is unclear whether the imputation of a disembodied federal rule approach applies with equal force to Chief Justice Burger's concurrence in Marrese. See Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1335-37 (1985). That depends on the extent to which the inquiry whether "a state statute is identical in all material respects with a federal statute within exclusive jurisdiction," id. at 1337, contemplates analysis of federal statutory policies, including in particular the reasons for the grant of exclusive jurisdiction, and of the implications of those policies for preclusion rules.

Unfortunately, the attempt to mitigate the damage caused by the Court's interpretation of § 1738 involved a reply in kind—unreasoned qualification of state preclusion law with trans-substantive federal rules that have their origin in cases decided in disregard of the full faith and credit statute. See, e.g., Haring v. Proctor, 462 U.S. 306, 313-14 & n.7, 318 (1983) (dictum). In footnote 7, Justice Marshall, writing for a unanimous Court, relied on Montana v. United States, 440 U.S. 147 (1979), for the proposition that "various other conditions . . . must also be satisfied before giving preclusive effect to a state-court judgment." In that way, Justice Marshall (who also wrote the Court's opinion in Montana) sought to avoid the restrictive gloss that had been placed on "full and fair opportunity to litigate" in Kramer v. Chemical Constr. Corp., 456 U.S. 411 (1982). See supra text accompanying note 336. Avoidance was a logical impossibility. Montana did not refer to the full faith and credit statute. See supra text accompanying note 334. The conditions and qualifications the Court announced in connection with the application of preclusion under federal law cannot survive under the Court's current approach to state judgments unless they are required by the due process clause or unless, in a particular case, the Court determines that a subsequently enacted statute represents an express or implied partial repeal of § 1738. See supra note 338. Of course, under the reinterpreted full faith and credit statute, uniform federal preclusion rules may govern in a case like Montana, because such rules would govern when the second action was brought in state court. But, if that were true, it would probably result from the peculiar status of the United States as a litigant. Cf. United States v. Mendoza, 464 U.S. 154 (1984) (offensive nonmutual state preclusion does not apply against the United States).

Justice Marshall also attempted in Haring to preserve possible "additional exceptions to collateral estoppel." Haring, 462 U.S. at 313. from the policies underlying § 1983. But Allen v. McCurry, 449 U.S. 90, 101 (1980), from which those possible exceptions were derived, had assimilated them to "a full and fair opportunity to litigate,"
surprising, and equally untenable, is the Court’s suggestion that federal common law rules of preclusion, otherwise applicable, are insulated from congressional will to the same extent as the full faith and credit statute—to be displaced only upon demonstration of an express or implied repeal.\footnote{358}

Third, cases emanating from state courts were the least likely candidates for the development of a general approach to the relationship between federal and state preclusion law. For, passing the failure to develop such an approach in the context of federal judgments, both the Court and commentators have tended generally to treat federal law in state courts, at least if the issue can be labeled procedural, as a discrete problem presenting unique considerations, if not requiring its own doctrinal apparatus.\footnote{359} I refer to cases in

\textit{id.}, and \textit{Kremer} then shut that door. \textit{But see Smith, supra note 330. at 73-76. 78-79. 108-10. Taken together, Allen and Kremer prevented the Court in \textit{Haring} from realizing the full potential of cases such as \textit{Board of Regents v. Tomiano}. 446 U.S. 478 (1980) (cited in \textit{Haring}, 462 U.S. at 313, for proposition that “12 U.S.C. § 1988 authorizes federal courts, in action under § 1983, to disregard otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying 1983.”). See \textit{infra} text accompanying notes 414-27.

\footnote{358} See \textit{Allen v. McCurry}, 449 U.S. 90, 96, 97-98, 99 (1980), “Since repeals by implication are disfavored, \textit{Radzanower v. Touche Ross & Co.}, 426 U.S. 148, 154, much clearer support than that would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.” \textit{id.} at 99 (emphasis added). It is possible that the Court intended only to signal its assumption that § 1738 itself makes applicable “traditional rules of preclusion.” See \textit{id.} at 95 n.7; \textit{Kremer v. Chemical Constr. Corp.}, 456 U.S. 461, 485 (1982). But the Court had earlier established a dichotomy between the freedom of the federal courts to “look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts.” \textit{Allen}, 449 U.S. at 96, and their obligation under § 1738 “to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.” \textit{id.} Moreover, the Court had already stated the conclusion that “nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of § 1738.” \textit{id.} at 97-98.

The case cited by the Court, \textit{Radzanower v. Touche Ross & Co.}, 426 U.S. 148 (1976), deals only with repeals of statutes. The doctrine suggested as to common law is, for the federal courts, a battle lost long ago. \textit{See, e.g., Jay, supra note 102; see also City of Milwaukee v. Illinois}, 151 U.S. 302, 316-17 & n.9 (1911) (distinguishing standards for finding preemption of state law from those governing displacement of federal common law).

For a case in which the Court paid attention to the implications of the substantive law scheme where § 1738 was found not to apply, see \textit{McDonald v. City of West Branch}, 466 U.S. 284 (1984). See also Smith, supra note 330, at 76 n.103, 117 n.316 (discussing \textit{McDonald}).

\footnote{359} \textit{Compare}, e.g., 19 C. Wright, A. Miller, E. Cooper & E. Geissman, \textit{Federal Practice & Procedure} §§ 4019-27 (1977) (reviews of state courts with 19 Wright, \textit{Miller & Cooper, supra note 3, §§ 4514-15 (federal common law)}.

The Court has made progress in collapsing analytical barriers by citing a case displacing state law in state court as sufficiently analogous to lend support to a discussion of the borrowing of state law in federal court. \textit{Burks v. Lasker}, 441 U.S. 471, 479 (1979) (citing \textit{Brown v. Western Ry.}, 338 U.S. 294, 298 (1949)). Moreover, some commenta-
which state “procedural” law has been “preempted” because it was inconsistent with a federal substantive objective. The best known cases arose under the Federal Employers’ Liability Act, and some would treat the phenomenon as essentially confined to litigation involving that statute.


I hope that I have removed the first of the three obstacles. It remains to confront the other two. The problem of federal law in state courts, even if that law is dubbed “procedural” for some purposes, is neither discrete nor aberrational. The problem is one of federal common law—nothing more, nothing less—and we should seek to determine the circumstances appropriate for the development or application of federal common law in the context of state court proceedings. If, as is the case, a general approach is accepted when the question is whether substantive federal common law governs in state cases, no a priori reason exists why the same approach is inappropriate for matters less confidently characterized. Indeed, looking at the problem this way highlights deficiencies in traditional federal common law analysis, even with respect to the problems for which that analysis was specifically adopted.

There is a federal interest in ensuring that legal rules used in the process by which rights under federal substantive law are recognized and enforced are not inimical to a particular scheme of federal substantive rights. This interest exists whether federal or state law provides the process and however the rules are characterized. In the case of litigation in the federal courts, the existence of the inter-


361 Professor Wright observes that “even if the FELA cases are unique, they stand for the proposition that Congress has constitutional power to control the incidents of a state trial of a federal claim.” C. Wright, supra note 56, § 45, at 272-73. See also J. Friedman, M. Kane & A. Miller, Civil Procedure § 4.8, at 234 (1985).

ests suffices, under traditional federal common law analysis, to trigger the conclusion that federal law governs. According to the dominant (but not invariant) approach taken by the Supreme Court, a federal court in such circumstances may choose between a uniform federal rule and state law borrowed as federal law. To the extent that the Rules of Decision Act is deemed relevant, the perception of a federal interest in the first step analysis is thought to dispense with the Act's direction to apply state law.

Why hasn't the same approach been taken in cases litigated in state courts? Surely we must admit the power of the Supreme Court to displace state law employed by state courts in the adjudication of federal rights when the Court finds state law hostile to or inconsistent with those rights. Could it be that those who treat the problem discretely do so because the notion that "federal law governs" the incidents of state litigation involving federal substantive rights seems too broad, nay unconstitutional?

When federal courts adjudicate federal substantive rights, there is unquestioned federal power to make all of the legal rules, including rules of procedure. The only question is whether the federal courts can exercise that power. Congress has no power to make rules of procedure for state courts except as they are necessary and proper to implement federal substantive law, and nothing in article III confers greater power on the federal courts. In these circumstances, the existence of an inchoate federal interest hardly seems sufficient to warrant speaking of state law functioning as federal law. And in this context, it would seem, the Rules of Decision Act functions solely as a restatement of constitutional requirements.

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363 See supra text accompanying notes 105-08.
364 See supra text accompanying notes 109-21.
365 See, e.g., sources cited supra notes 359-60.
366 The Supreme Court, which formulates federal common law for cases in state courts, is bound by the Rules of Decision Act.


The tendency of commentators to speak the language of preemption rather than federal common law in the context of state court litigation is suggestive of the larger issue, put well by Professor Monaghan:

The close relationship between preemption principles and federal common law ... has not been adequately discussed by the Court. Arguably, ambiguous federal statutes should have a displacing impact only when state law is seen to be in material conflict with the policies of federal law. This would establish state law as a norm operative until clearly in-
This analysis should cause us to question whether, even in cases initially brought in federal court, traditional two-step federal common law analysis is useful. The mere existence of federal power does not justify federal common law.\textsuperscript{367} When a federal court concludes that a uniform federal rule is not necessary to protect federal interests, what does it mean to say that state law operates as federal law? One step will do nicely in both contexts, and the Rules of Decision Act provides the common vehicle.

It is not necessary, however, to accept my view of the role of the Rules of Decision Act in connection with state court litigation any more than it is necessary to accept it in connection with federal court litigation. The key is to recognize that, when federal preclusion law applies to either federal or state judgments, it will almost always be federal common law, and that the same principles or standards determine the pertinence and validity of federal common law in both contexts.

3. Applying the General Approach

We are left with the question when federal common law validly applies to determine the preclusive effects of state judgments in state court. Whatever the role of federal "procedural" policies in the development or application of federal preclusion law for federal judgments, they can have no role in this context. But, because my analysis of the law governing the federal question judgments of federal courts considered only the requirements of federal substantive law,\textsuperscript{368} that mode of analysis is equally relevant here.

Under traditional federal common law analysis, preclusion rules are "[l]egal rules which impact significantly upon the effectuation of federal rights."\textsuperscript{369} The existence of that potential for impact in state litigation involving federal substantive rights supports federal lawmaking competence just as it does in federal litigation. In the case


\textsuperscript{368} See supra text accompanying notes 130-214.

of state litigation, however, the case for uniform federal rules is far weaker. The same holds true under a Rules of Decision Act approach.

To be sure, the application of trans-substantive state preclusion law to state judgments adjudicating federal rights\(^{370}\) presents a problem of administrability for the federal courts. The possibility of Supreme Court review may not adequately safeguard federal substantive law against state preclusion rules that are hostile to or inconsistent with its requirements.\(^{371}\) State courts do not always determine the domestic solution, however.\(^{372}\) Given the relative homogeneity of American preclusion law, dissonance is difficult to predict \textit{a priori}. Further, a body of federal preclusion law formulated for similar cases by federal judges, who are likely to be more sensitive to dissonance, provides a convenient initial check for state judges who share the obligation to honor the requirements of federal substantive law.\(^{373}\)

In contrast with the use of state law to determine the preclusive effects of the federal question judgments of federal courts, the use of state preclusion law for domestic state court judgments presents no serious problems of administrability for litigants. In planning litigation strategy, they can be confident that, in most cases, they need only consult the domestic preclusion law of the state where the initial action has been commenced.\(^{374}\)

Indeed, in the context of state court judgments, it is the use of uniform federal preclusion law that would create administrability problems. Local litigants would be required to know, and courts to apply, two entire bodies of preclusion law, perhaps in the same case.\(^{375}\) Although alike in most respects, those bodies of law would

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\(^{370}\) The word "adjudicating" in this context includes the preclusion of federal claims and issues not raised as such in the initial action.

\(^{371}\) \textit{Cf. supra} text accompanying note 158 (federal judgment).

\(^{372}\) Many cases in which a state judgment is claimed to have preclusive effect will be brought in federal courts. Although the reinterpreted full faith and credit statute requires such courts to use the domestic solution of the rendering state, they are free, in the absence of an authoritative ruling by the Supreme Court, to determine the extent to which federal law controls that solution.

\(^{373}\) This safeguard should be distinguished from that discussed \textit{supra} note 372, although federal judges required to apply a domestic state solution under the reinterpreted full faith and credit statute would surely advert to the federal preclusion rule applicable to a comparable federal judgment. The discussion assumes concurrent jurisdiction, and the point made requires an initial adjudication of federal rights. Compare \textit{supra} note 370 and accompanying text. For an analysis of preclusion as to matters within exclusive federal jurisdiction, see \textit{infra} text accompanying notes 428-61.

\(^{374}\) \textit{Cf. supra} text accompanying notes 159-63 (federal judgment).

\(^{375}\) I am assuming that, when federal and state claims are litigated in state court, an argument for uniform federal rules of preclusion as to the former could not plausibly be extended to the latter. Compare \textit{infra} note 153 (federal judgment adjudicating federal and state questions).
not be alike in all. Further, advertence to federal preclusion law could skew litigants' choices in the initial state court action in a manner contrary to that state's procedural policy. 376

There is, then, no strong argument for applying uniform federal preclusion rules to state judgments adjudicating federal rights, particularly when, departing the normative realm, one considers the paradox that a regime of "borrowed" state law, displaced whenever hostile to or inconsistent with federal substantive policies, may prove more protective of those policies than a regime of uniform federal rules. 377 In any event, one need not either embrace a label or invoke the rhetoric of federalism to rebel at the routine application of federal preclusion law to state court judgments in subsequent state proceedings.

Having determined that uniform federal preclusion law is not required, under traditional federal common law analysis a court must still be alert to the possibility that application of state law, borrowed as federal law, will thwart the purposes of, or otherwise interfere with, federal substantive law. In that event, the offending state law rule is displaced, because federal sources require otherwise than that it apply. The same result obtains in connection with litigation in state courts, but there has been a failure to see the problems whole.

In some cases, policies animating federal substantive law may require a rule more preclusive than that provided by domestic state law. Perceptive commentators have suggested as an example successive state contract actions on patent license agreements wherein the validity of the patent is in issue, drawing an analogy to "preemption" cases. 378 If, in the first action, the state court finds the patent invalid, the question may thereafter arise whether one not a party to that action may use the finding to preclude the patentee in state court. The Court's decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation 379 was based in part on the conclusion

376 Cf. supra text accompanying notes 171-72 (use of borrowed state preclusion law may skew federal litigant's choices in initial action in manner contrary to federal procedural policy).

377 See infra text accompanying notes 450-51.

378 See 18 Wright, Miller & Cooper, supra note 5, § 4467, at 625 ("principles akin to federal preemption may occasionally require state courts to follow federal rules of preclusion"); see also supra text accompanying notes 350-61. For the propriety of state courts determining "questions arising under the patent laws," see Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 259 (1897).

that the federal rule of mutuality of estoppel was inconsistent with policies animating federal patent law.\(^{380}\) Presumably a state mutuality rule is equally inconsistent. In such a case, it must yield to federal common law.\(^{381}\)

In other cases, policies animating federal substantive law may require a rule less preclusive than that provided by domestic state law. If, for example, we assume that state courts have concurrent jurisdiction of title VII\(^{382}\) actions, the question may arise whether in such an action brought in state court, that court can apply domestic law according preclusive effect to the adjudicatory proceedings of a state administrative agency that is a deferral agency under title VII.\(^{383}\) A strong argument can be made that application of the state rule would be inconsistent with policies animating title VII. Because the EEOC is required to give only "substantial weight" to administrative findings of deferral agencies,\(^{384}\) and assuming Congress did not intend in that regard to distinguish between investigative and adjudicatory administrative action, it makes no sense to permit a court, federal or state, to give those findings preclusive effect. Doing so would seriously undermine the federal administrative process.\(^{385}\)

Thus far, we have considered cases in which state preclusion law yields to federal common law in domestic litigation because a

\(^{380}\) See id. at 328-50; see also supra text accompanying note 206.

\(^{381}\) Note that, under the reinterpreted full faith and credit statute, such a case does not present a problem of greater preclusive effect. Compare supra text accompanying notes 346-50. The purpose of the inquiry is to determine what the domestic solution would be, recognizing that domestic state preclusion law will usually but not always furnish that solution. The statute makes the domestic solution thus discovered the national solution.

\(^{382}\) 42 U.S.C. §§ 2000e to 2000e-17 (1982). The Supreme Court has not resolved this question. See Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1332 (1985); Kremer, 456 U.S. at 179 n.20. For criticism of the Court's failure to resolve the question in Kremer, see infra note 455 and accompanying text.

\(^{383}\) On the assumption of concurrent jurisdiction, the hypothetical case in the text might arise in New York. Cf. Kremer, 456 U.S. at 99-94 & n.9 (Blackmun, J., dissenting) (suggesting that Court was granting preclusive effect to state agency's decision, as required by state law). It would be the domestic analog of interjurisdictional cases brought in federal court. See, e.g., Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985); Note, Res Judicata Effects of State Agency Decisions in Title VII Actions, 70 Cornell L. Rev. 695 (1985). In Elliott v. University of Tenn., 766 F.2d 982 (6th Cir.), cert. granted, 47 U.S.L.W. 3368 (U.S. Dec. 3, 1985), the court held that an unreviewed state administrative proceeding was not entitled to preclusive effect in a federal action under title VII and the civil rights acts. But the administrative proceeding did not arise within the title VII enforcement scheme and thus did not involve a state deferral agency.


\(^{385}\) See Kremer, 456 U.S. at 470 n.7 ("Since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts."). Cf. Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976) (title VII confers right to trial de novo).
particular state rule is found hostile to or inconsistent with a particular federal substantive policy. The question remains whether there are occasions when state law is at odds, not with specifically identifiable federal substantive policies, but with the sum of such policies, that is, a scheme of federal substantive rights as a whole. This problem, I believe, concerned Justice Marshall in *Haring v. Prosise*, and some of the peculiarities in his opinion for the Court may be attributable to an attempt to address it. Ultimately, the effort to preserve the federal checks that such an analysis affords fell before the logic of the basic interpretive position into which the Court backed. Once one recognizes that the Court’s interpretation of

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387 See supra note 357.
388 See id. The all-or-nothing posture of the first case in the recent series, Allen v. McCurry, 449 U.S. 90 (1980), misdirected attention from the relationship between federal and state law to the question of preclusion or no preclusion. The Court purported to decide only that 42 U.S.C. § 1983 did not prevent the application of the “conventional doctrine of collateral estoppel,” id. at 95 n.7, in a case where federal habeas corpus was unavailable. Incredibly, the Court announced its repeal analysis, see id. at 98-99, without, or so it said, first having determined what the full faith and credit statute requires. See id. at 95 n.2, 95 n.7, 105 n.25; Smith, supra note 330, at 68. The Court’s repeal analysis can be made to appear sensible if § 1738 embodies a choice of domestic state preclusion law. It cannot be made even to appear sensible if, as I maintain, the full faith and credit statute chooses not the preclusion law of the rendering state, but the preclusion law that the courts of the rendering state would apply. In fact, the Court’s repeal analysis makes no sense on its own terms, and a repeal analysis based on a correct interpretation of § 1738 might in some cases yield the conclusion that § 1738 does not apply. See infra text accompanying notes 400-09. Perhaps recognition of the first proposition contributed to the Court’s subsequent erroneous interpretation of the full faith and credit statute. See *Kremen*, 456 U.S. at 481-82 (quoted supra text accompanying note 336). At least Professor Carrico, the probable source of the Court’s repeal analysis, reasoned from erroneous premise to erroneous conclusion and not vice versa. See supra note 338.

In this light, *Haring* may represent an attempt by members of the Court who had lost the major battle to regain some ground in a skirmish that, because everyone agreed on the winner, might find the other generals sleeping, at least at the end of the campaign. See 18 WRIGHT, MILLER & COOPER, supra note 5, 1985 Pocket Part. at 161. Thus, even after it was clear that federal courts could no longer routinely apply uniform federal preclusion rules to state judgments, and when it should have been clear, given *Kremen*, that the Court’s repeal analysis erected high barriers to the use of any federal preclusion law, *Haring* observes that state preclusion rules may be displaced by particular rules drawn from trans-substantive federal preclusion law. See *Haring*, 462 U.S. at 313-14 n.7; see also supra note 357. After *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), this instance of the losers putting one over on the winners must be regarded as a sport. But see Smith, supra note 330, passim. But it does suggest additional scope for federal preclusion law when the rules of battle have changed.

In this series of cases, the Court has, lamentably, confirmed Justice Jackson’s view that “the federalism of the faith and credit clause depends generally on private advocates, not always supported by the best research and understanding, and often finds the perception of the Justices sharpened and their perspective unimpaired by any extensive experience or investigation of this subject.” Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 33-34 (1945).
the full faith and credit statute is wrong, it is appropriate to address the question anew.

Modern domestic preclusion law tends to be not only trans-substantive but also aggressive in its pursuit of the goals of finality and economy. Major changes in preclusion doctrine have occurred in a relatively short time, and the pace of change will continue with the recent publication of the Restatement (Second) of Judgments.\(^{390}\) It seems unlikely that legislatures often think about preclusion law when they are enacting schemes of substantive rights. But they do legislate against a background of judge-made preclusion law.\(^{390}\) It seems equally unlikely that judges often think about particular schemes of substantive rights when they formulate preclusion law. But the totality of such schemes conditions their work. It is probable that neither qualification obtains in an interjurisdictional setting. That is, the federal legislative background probably does not include state preclusion law, and state judges probably do not think about federal substantive law when they formulate state preclusion rules.

Reminders of their duty may suffice to make judges, both federal and state, alert to the possibility that a particular trans-substantive preclusion rule is inconsistent with particular substantive policies. Unfortunately, there is another problem. Preclusion rules not only are animated by and interact with legal policies; they have legal effects. The effect of modern preclusion rules is to cut off some substantive rights in circumstances that, had they been thinking of preclusion law, the legislators who created those rights, could not possibly have imagined.\(^{391}\) Preclusion rules may, in other words, be inconsistent with the sum of policies that inform a scheme of substantive rights.

From this perspective, broadly preclusive trans-substantive rules are tolerable only to the extent that they are sufficiently nonformal, or contain sufficient qualifications or exceptions, to permit the avoidance of preclusion in circumstances where it would be unjust.\(^{392}\) But the characteristics that may make modern preclusion
law tolerable in the administration of substantive law are the very characteristics that bedevil litigants, who desire clear and certain rules in planning litigation strategy.\textsuperscript{393}

These considerations suggest that a court administering a modern domestic body of preclusion law must be alert to the loss of substantive rights caused by the failure of that body of law to provide fair notice of its implications for a particular context or by the failure of the jurisdiction’s law as a whole to afford a fair opportunity to pursue claims of substantive right. Moreover, both concerns are more pressing when the preclusion law is not only trans-substantive, but trans-systemic.

The perception of such problems may or may not have prompted the Court to suggest federal checks against state preclusion law additional to the due process clause and express or implied repeal of the full faith and credit statute.\textsuperscript{394} In any event, the protection of federal substantive rights against “springs”\textsuperscript{395} set by the states is a duty long acknowledged by the Supreme Court.

The principle is general and necessary. . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even on local grounds. . . . This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.\textsuperscript{396}

When the Court determines that state law, in a domestic case, puts “unreasonable obstacles in the way” of a federal scheme of substantive rights, it applies federal common law, and it can do so in accordance with the requirements of the Rules of Decision Act. In the case of preclusion, the domestic solution thereby determined is applicable interjurisdictionally by reason of the full faith and credit

\textit{footnote} is also an example of the influence of procedural policy reflected in a Federal Rule of Civil Procedure on federal common law. See \textit{id.} at 198; \textit{supra} text accompanying note 189.

“One implication of \textit{Kramer} is that preclusion in an intersystem context, where the full faith and credit statute applies, is a less flexible doctrine than preclusion in an intrasystem context.” Atwood. \textit{supra} note 331, at 86-87 n.196.


\textsuperscript{394} See \textit{supra} text accompanying notes 386-88.


\textsuperscript{396} \textit{Davis}, 263 U.S. at 24-25.
C. Special Problems Under the Reinterpreted Full Faith and Credit Statute


It is a pity that the occasion for the Court's recent rediscovery of the full faith and credit statute was a case involving 42 U.S.C. section 1983. For, even if the Court had considered the interpretive approach advanced here, the choice of interpretive approaches might not have appeared to make a difference.

Section 1983 actions present an anomaly. The anomaly results from the existence of a plausible argument that the statute is animated by a policy in favor of a federal forum on the one hand, and concurrent jurisdiction in state courts on the other. When a federal action involving section 1983 follows state proceedings claimed to have preclusive effect, the reinterpreted full faith and credit statute requires a federal court to look to the law that the state courts would apply in a section 1983 action. And in such a state court action, a putative policy favoring a federal forum would not be pertinent.

One answer to this line of reasoning is that the anomaly is apparent rather than real. Once one adopts the correct interpretation of the full faith and credit statute, even a repeal analysis suggests the conclusion that federal preclusion law governs in a subsequent section 1983 action brought in federal court.

Recall that the Court's repeal analysis initially focused on the question of preclusion as against no preclusion. Even though repeal analysis may ultimately have influenced the Court's interpretation of the full faith and credit statute, the fact that the Court regards the repeal question as relevant only if domestic state law would preclude is a signal that it continues to focus on results to the exclusion of the source of law that should determine them.

Under the Court's interpretation of the full faith and credit statute, repeal analysis should focus on the question whether a subse-

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397 For an application of this analysis, see infra text accompanying notes 410-27.
399 For representative arguments concerning the policy in favor of a federal forum, see Allen, 449 U.S. at 110 (Blackmun, J., dissenting). For the concurrent jurisdiction of the state courts, see Martinez v. California, 444 U.S. 277, 283 n.7 (1980).
400 See Allen, 449 U.S. at 99-99; supra notes 358 & 388. In this the Court followed Professor Currie. See Currie, supra note 331, at 328-29; supra notes 338 & 388.
401 See supra note 388.
quently enacted statute or its legislative history provides "clear and manifest" evidence of Congress's intent that preclusion questions in litigation arising thereunder be determined by (uniform) federal rather than state law. After all, state law may not preclude. Thus, the question the Court should ask in a case like *Allen v. McCurry* is whether the language and legislative history of the 1871 act clearly warrant the conclusion that Congress intended preclusion questions arising in litigation under that statute to be determined by (uniform) federal rather than state law.

Of course, that too would be the wrong question, because Congress did not choose state preclusion law in 1790, and there was no reason for Congress to believe that it had in 1871, when the predecessor of section 1983 was enacted. As to the choice Congress did make in 1790, reexamination of the 1871 legislation and its history may yield a different answer to the question of implied repeal.

The solicitude of the 1871 Congress for the availability of a federal forum has led to holdings that section 1983 expressly authorizes an injunction within the meaning of the Anti-Injunction Act and that the normal rule regarding exhaustion of administrative remedies does not apply in section 1983 actions. In light of that solicitude, when a plaintiff has exercised a preference for a federal forum to pursue a claim under section 1983, is there not something odd in pretending that he did not exercise that preference? Yet that is exactly what the reinterpreted full faith and credit statute requires. From this perspective—when the right question is asked—the two statutes reasonably may be deemed "in irreconcilable conflict."

To find that section 1983 partially repeals the full faith and credit statute should not lead automatically to the conclusion that uniform federal law governs, let alone that federal section 1983 actions are immune to preclusion. But the reasons for finding a repeal strongly suggest that uniform federal law governs. In any event, when freed of the supposed mandate of the full faith and credit stat-

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ute, the Court has demonstrated its willingness and ability to apply federal preclusion law that is sensitive to the peculiar substantive context of section 1983.

There are other routes to the conclusion that, even in section 1983 actions, a court's interpretive approach to the full faith and credit statute may make a difference. The Supreme Court's repeal analysis requires clear evidence of congressional intent on a specific issue that Congress rarely addresses. Apart from the fact that the basic premise of the Court's repeal analysis is wrong, the analysis imposes entirely too much on unsuspecting Congresses, that is, on all Congresses legislating before 1980. This is hardly the heyday of federal common law, even in its traditional manifestations. But, on the assumption that the reinterpreted full faith and credit statute applies, federal common law analysis, whether of the traditional type or under the Rules of Decision Act, holds greater potential to protect federal substantive rights than does the Court's repeal analysis.

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409 See McDonald v. City of West Branch, 466 U.S. 284 (1984); supra note 358. The Court did not consider the possibility that state preclusion law might apply except when hostile to or inconsistent with federal interests.

410 If this analysis were accepted, it might lead to different preclusion rules being applied in § 1983 actions brought in federal and state courts. For, the preclusion law applied in federal actions would be uniformly federal law, while that applied in state actions would be state law, except as displaced by federal law in response to the requirements of § 1983. See infra text accompanying notes 410-27. Such a result, whatever "embarrassments" it might entail, see 18 Wright, MILLER & COOPER, supra note 5, 1985 Pocket Part, at 163, would be a function of the basic embarrassment of a statute animated by a strong preference for a federal forum but one not so strong as to have prompted a grant of exclusive federal jurisdiction.

411 See 18 Wright, MILLER & COOPER, supra note 5, 1985 Pocket Part, at 164. It has already been observed that the Congress that passed the predecessor of § 1983 would have found radically different preclusion rules, had it addressed the issue, than are applied today. See supra text accompanying note 391. In addition, a certain irony results in holding any Congress to an awareness of the full faith and credit statute. See Atwood, supra note 331, at 83 n.119. But see Curtic, supra note 331, at 329. At various times in its history, the Court would itself have flunked that test. See supra text accompanying notes 333-35.

412 See supra text accompanying note 108.

413 The difference can be seen as between "normal principles of statutory interpretation" and "the more difficult test of demonstrating an implied repeal." Kremen, 456 U.S. at 471 n.8. Perhaps more usefully, it can be seen as the difference between "asking what collateral or subsidiary rules [of preclusion] are necessary to effectuate or to avoid frustrating the specific intentions of [Congress]." Merrill, supra note 92, at 56; and requiring evidence of specific intent as to preclusion matters.

For another example of the difference that federal common law analysis can make.
In section 1983 actions filed in state courts, the Supreme Court has the power and duty to ensure that the application of domestic state law does not nullify federal substantive rights. The domestic solution thereby determined is binding interjurisdictionally. The concern, again, is to prevent the loss of federal rights through application of state preclusion law that does not give fair notice of its implications for the particular context or through application of state law that, viewed as a whole, fails to afford a fair opportunity to pursue federal substantive claims. For these purposes, the notion of fairness should not be confined to "the least possible good" one can say about state law. The due process clause is not the only pertinent repository of federal rights. And just as federal preclusion law can serve as an initial check for state judges alert to their duty to safeguard particular federal substantive policies, so may it serve as a reference when the concern is the effect of state law, including state preclusion law, on federal substantive rights. Although typically trans-substantive, federal preclusion law is at least fashioned by judges against the background of the substantive law with which it interacts. When the application of state law, which is not so fashioned, would preclude federal substantive rights not precluded under federal law, further inquiry is warranted.

In a case like Allen v. McCurry, it is not enough that the proceeding claimed to have preclusive effect met the requirements of due process. One should also ask whether, if state law would accord the proceeding preclusive effect, that result would be consistent

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See Elliott v. University of Tenn., 766 F.2d 982, 989-94 (6th Cir.), cert. granted, 54 U.S.L.W. 3368 (U.S. Dec. 3, 1985). Although Elliott is an interjurisdictional case, the court held the full faith and credit statute inapplicable because the case involved the unreviewed proceedings of a state administrative body. See id. at 990. The court therefore felt free to fashion federal common law and did so under the influence of the policies found to inform § 1983. Compare supra text accompanying note 409.

For other criticism of the Court's repeal analysis, recognizing the correct interpretation of the full faith and credit statute, see Luneburg, supra note 332, at —.

114 "To say that a law does not violate the due process clause, is to say the least possible good about it." Cheatham, Conflict of Laws: Some Developments and Some Questions, 15 Am. L. Rev. 9, 25 (1971). See Burbank, Sanctions, supra note 87, at 1100.

115 Even when the inquiry is purely constitutional, Professor Luneburg makes a persuasive argument that the adequacy of the procedures afforded in the first proceeding should be assessed with reference to what is at stake in the subsequent proceedings (in which the question of preclusion arises). See Luneburg, supra note 332, at —. He also recognizes a role for federal common law checks on state preclusion law in domestic-state litigation. See id. at —.

116 But see, e.g., McDonald v. City of West Branch, 466 U.S. 284 (1984); supra note 155. See also Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238, 1244 (1985) ("[i]n framing preclusion rules in this context, courts shall take into account the federal interests warranting protection.")

117 449 U.S. 90 (1980). Again, the analysis assumes that the full faith and credit statute applies (and that it is being correctly interpreted)
with the scheme of substantive rights established by section 1983. More specifically, under the reinterpreted full faith and credit statute, it is not enough to conclude that a state court’s proceeding on a motion to suppress evidence met constitutional minima given what was involved in that proceeding. Rather, when state law would require preclusion in a subsequent section 1983 action in state court, one should determine whether, viewed as a whole, state law is adequate to the recognition and enforcement of the substantive rights conferred by the federal statute.

Under federal preclusion law, “[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.” In determining the preclusive effect of findings made after a pretrial suppression hearing in state court, the use of this rule should prompt a number of inquiries: to what extent is discovery available to the defendant? to what extent do the rules of evidence apply? who has the burden of persuasion and what is the standard? and who presides at the proceeding, and if that person is not a judge, what is the nature of review by a judicial officer?

Can it be that such inquiries are irrelevant in state court litigation concerning federal substantive rights, and hence (if the full faith and credit statute applies) in federal litigation? Granted that the Congress that passed the predecessor of section 1983 could not have contemplated the procedural opportunities available today in

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418 Professor Laneburg would have the constitutional inquiry consider the stakes in the subsequent proceeding. See supra note 415.

419 See Allen, 449 U.S. at 115-16 (Blackmun, J., dissenting).

As another example, consider McDonald v. City of West Branch, 466 U.S. 284 (1984). The Court’s reasons for refusing preclusive effect to an unappealed arbitration award in a federal § 1983 action are equally applicable in a state § 1083 action. See id. at 288-92. Accordingly, a state rule giving preclusive effect to such an award should yield to federal common law in state court.

420 Montana v. United States, 440 U.S. 147, 161 n.11 (1979). See RESTATEMENT (SECOND) OF JUDGMENTS § 283 (1982). In a case like Allen, which appears to involve nonmutual issue preclusion, see 449 U.S. at 114 (Blackmun, J., dissenting), other exceptions in federal preclusion law are relevant. Cf Parklane Hosiery Co. v. Shore, 439 U.S. 322, 334 (1979) (emphasis nonmutual estoppel may be unfair where second action affords “procedural opportunities unavailble in the first action that could readily cause a different result”). The Court in Parklane embraced the Restatement (Second) of Judgments, see id. at 330-31 & n.16, which provides an exception to issue preclusion in subsequent litigation with others when “[t]he forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined.” RESTATEMENT (SECOND) OF JUDGMENTS § 292 (1982).

421 See 2 W. LAFAVÉ & J. ISRAEL, CRIMINAL PROCEDURE § 19.3 (1984) (hereinafter cited as LAFAVÉ & ISRAEL); 1 id. § 10.5(c).


civil actions in federal or state court, it also did not contemplate modern preclusion law. Assuming answers to some of the inquiries suggested above, what sort of a federal substantive right is it that can be lost as a result of a state court proceeding in which (1) the person subsequently claiming the right is an unwilling participant, (2) discovery is not available to that person, (3) the rules of evidence do not apply, and (4) someone who is not a judge, and perhaps not even a lawyer, hears the testimony? It may be that when the question is the admissibility of evidence in a state criminal trial, such a regime passes constitutional muster. But there is no reason to accept that regime, implemented by state preclusion law, as providing even a lawyer, hears the testimony? The full faith and credit statute does not speak to the problem. If it applies, it merely makes the domestic solution the national solution.

2. Claims Within Exclusive Federal Jurisdiction

Those who hoped that claims within exclusive federal jurisdiction would be insulated from the rediscovered full faith and credit statute received a dire warning in Kremer v. Chemical Construction Corp. In that case, the Court found that title VII does not ex-

\[\text{\textsuperscript{425}} \text{ See supra text accompanying notes 391 & 411.} \]
\[\text{\textsuperscript{427}} \text{ See Luneburg, supra note 332, at —. Cf. McDonald v. City of West Branch, 466 U.S. 284, 292 n.12 (1984) (accord preclusive effect to arbitration award would "gravely undermine the effectiveness of § 1983"); Merrill, supra note 92, at 53 ("By ignoring the possibility of preemptive lawmaker­ ing altogether in the statutory area, the Court has overlooked the fact that relegating a plaintiff to existing state and federal remedies could in some cases render federal rights a mere form of words."). Compare the Court's analysis, under 42 U.S.C. § 1988 (1982), in rejecting a short statute of limitations for a claim brought under 42 U.S.C. § 1981.} \]
\[\text{Similarly, the state petitioners argue that the short limitations period . . . should be applied here because it affords public officers "some reason­ able protection from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them." . . . The statement suggests that the legislative choice of a restrictive six-month limitations period reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-era civil rights statutes, which is to ensure that individuals whose federal Constitutional or statutory rights are abridged may recover damages or secure injunctive relief.} \]
\[\text{Burnett v. Grattan, 101 S. Ct. 2924, 2932 (1981) (quoting petitioner's brief).} \]
\[\text{For the possibility that § 1988 is more than analogically pertinent in this context, see supra note 409.} \]
\[\text{\textsuperscript{428}} \text{ 456 U.S. 161 (1982). See 18 Wright, MILLER & COOPER, supra note 5. 1985} \]
pressly or impliedly repeal the full faith and credit statute without
determining whether title VII confers exclusive jurisdiction on the
federal courts. Moreover, the Court held that antecedent New
York proceedings precluded Mr. Kremer's title VII action without
determining whether the preclusion was of a claim or an issue.

The other shoe dropped last term in *Marrese v. American Academy of Orthopaedic Surgeons*. At issue was the freedom of plaintiffs in
federal court to litigate federal antitrust claims when those same liti-
gants had been unsuccessful in state court litigation, involving state
law claims, against the same defendants. In *Marrese*, there was no
question as to the exclusivity of federal jurisdiction over the claims
sought to be raised in federal court. Nor was there any question
that, if preclusion applied, it would be claim preclusion.

If the full faith and credit statute requires a federal court to apply
the law of the rendering state in determining the preclusive ef-
fact of a state court judgment on a claim within exclusive federal
jurisdiction, that court confronts a conundrum: where will it find
state law? Perception of this difficulty led Judge Posner, speaking
for a plurality of the court of appeals in *Marrese*, to conclude that the
full faith and credit statute did not apply. In his opinion concur-
ring in reversal, the Chief Justice recognized the problem, but he
dispensed with the statute only after satisfying himself that state law
was indeterminate.

The Court, however, was undeterred. Never mind that there
could be no state law on the precise question. That possibility had
not given the court pause in *Kremer*. On remand, the federal court
could probably figure out what Illinois law would be on the question
by looking at cases resolving analogous problems. Only if the lower
court determined that the law thus discovered would preclude the
federal antitrust claim would it need to inquire whether the federal
statute contains an express or implied partial repeal of the full faith

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Pocket Part, at 151-52. It is important to note again that the analysis in the text
concerns the source of preclusion law, federal or state, and not the content of the law
that may be applicable. The distinction is often overlooked. *But see, e.g.*, Atwood, *infra* note 331, at 194-95; *Note, The Claim Preclusive Effect of State Court Judgments on Federal Antitrust Claims: Marrese v. American Academy of Orthopaedic Surgeons, 71 Iowa L. Rev. 609, 615 (1986).

429 456 U.S. at 479 n.20; *see also infra* note 455.
430 *See* 456 U.S. at 481 n.22.
432 *See id.* at 1331.
433 *See id.* at 1333.
134 *Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1154
(7th Cir. 1984) (en banc); *rev'd*, 105 S. Ct. 1327 (1985). For the Court's misrepresentation
of Judge Posner's opinion, see Burbank, *infra* note 92, at 663 n.34.
435 *See Marrese*, 105 S. Ct. at 1333-37 (Burger, C.J., concurring).
and credit statute.\textsuperscript{436}

In circumstances like those presented in \textit{Marrese}, calling the rules discovered “law,” let alone “state law,” is nothing more than a play on words. In this aspect, the Court was most obliging in demonstrating the folly of the course on which it embarked. For, responding to the Chief Justice’s conclusion that Illinois law was likely to be indeterminate on the question of claim preclusion, the Court relied on provisions of the \textit{Restatement (Second) of Judgments} stating or contemplating an \textit{interjurisdictional} solution that is not, and is not based on, the law of any state.\textsuperscript{437} The Court also stated that, having discovered the most closely analogous state law rules, a federal court should consider “whether application of the state rules would bar the particular federal claim.”\textsuperscript{438} The latter passage evokes memories of federal common law and also, perhaps, of the \textit{Rules of Decision Act}. There are critical differences, however. Federal common law, even when incorporating state law rules, is avowedly federal law.\textsuperscript{439} Further, not even a strict reading of the \textit{Rules of Decision Act} suggests that state laws “apply” in situations where it is impossible for them to do so.\textsuperscript{440} In a case like \textit{Marrese}, state law is

\textsuperscript{436} See \textit{id.} at 1332-35. \textit{Kremer} aside, the Court’s only support for its conclusion that § 1738 applies in this context was \textit{Becher v. Contoure Laboratories, Inc.}, 279 U.S. 388 (1929). \textit{Marrese}, 105 S. Ct. at 1332. \textit{Becher} provides no such support. As noted in \textit{Marrese}, “[w]ithout discussing § 1738, this Court. . . held [in \textit{Becher}] that the issue preclusive effect of a state court judgment barred a subsequent patent suit that could not have been brought in state court.” \textit{id.} To be sure, \textit{Becher} does “indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts.” \textit{id.}, but it tells us nothing about what law determines such preclusive effect, except as the failure to discuss § 1738 suggests a federal source. See supra note 428.

For problems with the Court’s repeal analysis, see supra text accompanying notes 100-09.

\textsuperscript{437} See \textit{Marrese}, 105 S. Ct. at 1333 n.3 (discussing \textit{Restatement (Second) of Judgments} § 24 comment g, § 26 comment c(1), illustration 2 (1982)). The assumption of an available court in the same system, made in the former, is a reflex of the interjurisdictional rule stated in the latter. See also \textit{Restatement (Second) of Judgments} § 26 comment c(1) reporter’s note. The reporter states:

\begin{quote}
When the plaintiff, after having lost a state action, seeks relief with respect to the same transaction under a federal statute enforceable only in federal court, it may be argued that he should be held barred especially if he could have instituted his original suit in federal court. . . . It appears sounder, however, not to preclude the federal action by the doctrine of bar, but rather to allow a carry-over decided issue from the state to the federal action by way of issue preclusion . . . .
\end{quote}

\textsuperscript{438} \textit{Marrese}, 105 S. Ct. at 1333 (footnote omitted).

\textsuperscript{439} See supra text accompanying notes 105-08 & 151.

\textsuperscript{440} But see, e.g., \textit{Campbell v. Haverhill}, 155 U.S. 610 (1895) (state statute of limitations applied under \textit{Rules of Decision Act} in federal patent action). The Court’s decision in \textit{Campbell} was driven by its concern that, if a state statute did not “apply,” there would be no limitations period. See \textit{id.} at 613-14. Moreover, the Court suggested that the language in question might confer “a certain discretion with respect to the enforcement of state statutes.” \textit{id.} at 615. See further Merrill, supra note 92, at 34 n 149.
always indeterminate.

The basic problem with *Marrese*, however, is the Court’s adherence to its erroneous interpretation of the full faith and credit statute. One might have hoped that the influences prompting the Court to insinuate federal law into its discussion of “state law” would lead it to reconsider.\(^{441}\) Moreover, Judge Posner’s opinion, even though accepting the Court’s basic premise about the statute, offered food for thought. In any event, under the reinterpreted full faith and credit statute, his conclusion was correct: the statute “cannot be used to decide” a case like *Marrese*.\(^{442}\) The reason, however, is not that there can be no state law on the question. It is, rather, that as a result of the exclusive jurisdiction of the federal courts, the same problem of preclusion cannot arise “in the courts” of the state whose courts rendered the judgment, with the result that there can be no “law or usage,” whether state or federal. Some may reject this interpretation of section 1738 in cases of exclusive jurisdiction as too literal.\(^{443}\) Accepting my basic interpretive position, however, they must admit that if the reinterpreted full faith and credit statute imports a principle of functional equivalence, the mediation of state law through that principle must include consideration of federal policies and interests. In other words, whether or not the full faith and credit statute plays a role, there is a role for federal common law.

Under traditional federal common law analysis, the argument for uniform federal preclusion rules, rather than state law borrowed as federal law except where it is hostile to or inconsistent with federal interests, is likely to be strongest in exclusive jurisdiction cases. Although a regime of borrowed “state law” would not present the federal courts with problems of administrability as serious as those attending preclusion of federal claims in cases within the concurrent jurisdiction of the state courts,\(^{444}\) finding state “law” would impose

\(^{441}\) See *supra* text accompanying notes 437-38.


\(^{444}\) In a case like *Marrese*, the preclusion question will arise only in a federal proceeding. Compare *supra* text accompanying notes 157-58 (federal question judgment of federal court), 371-72 (federal question judgment of state court).
its own costs. Moreover, the administrability problems for litigants would be extreme. At least in cases of concurrent jurisdiction, it is possible that, assuming the choice of law problems can be resolved with confidence, courts of the relevant state will have selected or fashioned the rule of preclusion applicable to the federal claim. Where the federal courts have exclusive jurisdiction, however, there is no possibility of finding a solution in state jurisprudence. Speculation about "state law" mediated through a principle of functional equivalence may be great mental exercise for the Supreme Court. It is not, however, a task to impose on litigants, for whom the stakes include the loss of federal substantive rights.

More fundamentally, a congressional grant of exclusive jurisdiction typically bespeaks concern for the elaboration of a scheme of substantive rights by federal judges. Even if the administrability of a system of borrowed state law were the only relevant consideration, one might well conclude that federal judges should not be distracted by the judicial equivalent of a wild goose chase. Just as Congress usually has better things to worry about than the arcana of preclusion law, federal judges have better things to worry about than what a state court would think about a problem it has never considered and never will. In both cases, one of those better things is paying attention to federal substantive rights.

If one believes, as I do, that the Rules of Decision Act speaks directly to the creation or application of federal common law, the result is no different. Indeed, in exclusive jurisdiction cases one can say, without linguistic strain or academic sleight of hand, that state laws do not "apply" within the meaning of the Act. It matters not, however, because, for the reasons given above, uniform federal preclusion law is likely to be deemed "required" by the statute conferring exclusive jurisdiction on the federal courts.

To say that uniform federal preclusion law governs in exclusive jurisdiction cases is not to say that trans-substantive federal preclusion law governs in such cases or that federal law should not preclude. In connection with cases of concurrent jurisdiction under the

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445 Compare supra text accompanying notes 150-62 (federal question judgment of federal court) with supra text accompanying note 374 (federal question judgment of state court).
446 See, e.g., Brown v. Felsen, 442 U.S. 127, 134 (1979); 16 Wright, Miller & Cooper, supra note 5, § 4470; Atwood, supra note 331, at 101-08.
447 Cf. Wilson v. Garcia, 105 S. Ct. 1938, 1947 (1985) ("Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.") (footnote omitted).
448 See supra note 121; see also text accompanying note 265 (manipulation of language "in the cases where they apply" to avoid requirement to apply state laws).
449 But see supra note 410.
reinterpreted full faith and credit statute, I have noted the paradox that a regime of borrowed state preclusion law may prove more protective of federal substantive policies than federal preclusion law if state and federal judges take their policing function seriously.450

The paradox results from a tendency among federal judges, freed to apply federal preclusion law, to turn, without thought, to preclusion rules announced in a different substantive context or those fashioned in no substantive context. The Supreme Court has encouraged this phenomenon in its cases on mutuality451 and, more generally, in its wholesale borrowings from the Restatement (Second) of Judgments.452

Apart from the problem of unthinking application of preclusion law that is disembodied because it is trans-substantive, we have recently seen evidence of preclusion law that is just plain disembodied.453 The paradox under the Court’s interpretation of the full faith and credit statute is that state law may protect both federal substantive policies and federal substantive rights more effectively than the rules that at least some Justices would apply if they were free to apply “federal law.”454 A court’s power to fashion or apply uniform federal common law imports power to consider policies in addition to those animating federal substantive law. This power is not, however, a license to proceed in disregard of those policies or of the effect of putative federal common law rules on substantive rights.

Finally, the discussion of the exclusive jurisdiction cases has, to this point, focused on cases like Marrese, involving the problem of claim preclusion. When the problem is issue preclusion, a somewhat different analysis may be appropriate.

First, in some cases the question is whether an issue under state law litigated and decided in state court should be given preclusive effect so as to foreclose litigation of a federal claim within exclusive federal jurisdiction. Here too, I believe, the full faith and credit statute plays no role, because the same problem of preclusion cannot arise in subsequent proceedings in the courts of the state.455

450 See supra text accompanying note 377.

451 See supra text accompanying notes 205-11.

452 See, e.g., Montana v. United States, 440 U.S. 147, 154, 162, 164 n.11 (1979). See also supra text accompanying note 358; note 420.

453 See supra text accompanying note 357.

454 See Burbank, supra note 92, at 604-65.

455 On this view, the Kremer Court should have decided whether Title VII vests exclusive jurisdiction in the federal courts before addressing the preclusion problem. See Kremer, 456 U.S. at 479 n.20; see also supra text accompanying note 429.

There are distinctions among cases involving the general problem treated in the text that may bear on the preclusion question. See 18 Wright, Miller & Cooper, supra note 3, § 4470, at 681-85. They do not, however, affect the analysis concerning the
Whether or not that is the case, in the choice, under traditional federal common law analysis, between uniform federal preclusion rules and federal law-in-reserve, I believe that the balance lies again with the former. Thus, for example, there not only is, but there can be, no state law on the question whether the issue is the same, and the answer to that question will inevitably involve interpretation of federal law. The game is not worth the candle, particularly for litigants. Those prematurely mourning the death of federalism may find consolation in the homogeneity of modern preclusion law. And, again, uniform federal preclusion law should not be equated with trans-substantive federal preclusion law or with a rule of no preclusion.

Second, as we have seen, in some cases an issue under federal law integral to a claim within exclusive federal jurisdiction, is incidentally and permissibly adjudicated in state court. In this context, the full faith and credit statute may apply. But under the reinterpreted full faith and credit statute, one must still consider whether state law is displaced, in whole or part, by federal law. Here, it is more difficult to predict problems as a result of a regime of borrowed state law than it is when state courts cannot speak to the question. It is also more difficult to suggest in advance what the congressional grant of exclusive jurisdiction implies for the source of preclusion law. Decision should thus await a particularistic

source of preclusion law under the reinterpreted full faith and credit statute. The same is true with respect to issues of historical fact as opposed to findings applying law to fact. See id. at 680-81.

456 Cf. supra text accompanying notes 434-40 (claim preclusion). I am, of course, assuming—I hope not unreasonably—that this would be a requirement of any jurisdiction's law of issue preclusion.

As Professor Cooper has pointed out, in an analysis directed to the context rather than the source of preclusion rules in this context: "Independent redetermination of issues of law application . . . may be the only sure guarantee that the standards of federal and state law are in fact identical." 18 WRIGHT, MILLER & COOPER, supra note 5, § 4470, at 683.

457 More to the point, they should heed Justice Blackmun's caution: "We must avoid the temptation to let 'federalism' become the Natural Law of the 1980's, a brooding omnipresence to which duly enacted statutes are made to pay homage." Blackmun, Section 1983 and Federal Protection of Individuals' Rights—Will the Statute Remain Alive or Fade Away?, 60 Y.U. L. REV. 1, 23 (1985).

458 See supra text accompanying notes 378-80.

459 The statute would apply where the preclusion problem is presented in a case filed in federal court that could have been filed in state court. It would not apply in an action that could be filed only in federal court.

There remains the possibility that the statute conferring exclusive jurisdiction on the federal courts may be found expressly or impliedly to repeal the full faith and credit statute. See supra text accompanying notes 400-09; note 442.

460 "The basic inconsistency is between the statute making jurisdiction over antitrust claims exclusively federal and the decision that state courts may decide antitrust defenses." Currie, supra note 331, at 347. Professor Currie was, however, concerned with
analysis of the federal statute. The inquiry, however, should not be confined to evidence of Congress's specific intention with respect to preclusion. One should also ask whether the statute implicitly and plausibly calls for uniform federal preclusion rules. If not, state preclusion law applies except when it is hostile to or inconsistent with particular federal substantive policies or where state law would have the effect of nullifying federal substantive rights.461

Conclusion

This is a long article about an exquisitely difficult subject. In part, its length has been determined by a felt need, in suggesting a general approach to problems of interjurisdictional preclusion, to confront the analysis of component parts by courts and commentators who have not seen the problems whole. I also thought it important to support my interpretation of the full faith and credit statute rather fully as a prelude to the application of federal common law analysis in the state-federal configuration.

I expect that every reader of this Article will find something, perhaps many things, with which to disagree. I hope, however, that most readers will agree with the following propositions about federal judgments: (1) The full faith and credit statute does not apply to federal judgments, and even if it did, that statute would not direct the application of the law of the rendering system, i.e., federal law. (2) Whatever the federal source of the obligation to respect a federal judgment, it neither inexorably nor obviously requires that federal preclusion law govern all questions concerning the scope and effects of that judgment. (3) The Federal Rules of Civil Procedure cannot validly provide preclusion rules for federal judgments. (4) Absent federal preclusion law provided by the Constitution, federal statutes, or Federal Rules, the only putative federal rules are rules of federal common law. (5) A substantial body of Supreme Court precedent addresses the circumstances in which federal common law can be validly created or applied, and there is no obvious reason why the mode of analysis emerging from that body of precedent is

461 This is another situation in which the preclusion rules applied in state and federal courts may differ. In that event, the result would be attributable to an anomaly similar to that presented by 42 U.S.C. § 1983. See supra text accompanying notes 398-99; notes 408 & 469. Thus, in a subsequent contract action brought in state court, policies animating the patent laws might require a rule of nonmutuality. See supra text accompanying notes 378-80. In such an action brought in federal court, those policies might have to yield to policies informing the grant of exclusive federal jurisdiction. See 18 Wright, Miller & Cooper, supra note 5, § 4470, at 684-85. In both cases, however, the preclusion law applied would have a federal source.
unsuited to the preclusion context where federal judgments are involved, whether the judgments concern federal or state law questions. (6) When a federal court sitting in diversity adjudicates rights under state law, there is another body of Supreme Court precedent that cannot fairly be ignored in the preclusion context. (7) Unless one explicitly repudiates either or both of the bodies of precedent referred to in (5) and (6) above, it is worth the effort to try to integrate them.

I also hope that most readers will agree with the following propositions about state judgments: (8) The full faith and credit statute does not choose the domestic preclusion law of the rendering state; rather, it requires the application in interjurisdictional cases of the law that the courts of the rendering state would apply. (9) The law thus applied may be domestic state law, the law of another state, or federal law. (10) Unless provided directly by the Constitution or a federal statute, the federal law displacing state law in state courts is federal common law. (11) State court judgments in cases of concurrent federal and state jurisdiction are, according to federal common law analysis, usually governed by (borrowed) state preclusion law. (12) In such cases, however, state preclusion law must yield to federal preclusion law domestically when its application would be hostile to or inconsistent with particular federal policies, and the full faith and credit statute makes the domestic solution the national solution. (13) State preclusion law must also yield to federal preclusion law when the application of state law, viewed as a whole, would be hostile to or inconsistent with a scheme of federal substantive rights. (14) The full faith and credit statute usually plays no role in determining the preclusive effects of state court judgments on claims within exclusive federal jurisdiction. (15) In most cases within exclusive federal jurisdiction, the preclusion law applied will be uniform federal law. (16) “Uniform federal law” does not necessarily mean trans-substantive federal law, and a court must test trans-substantive federal preclusion rules for consistency with federal statutory policies and with the scheme of rights provided by federal substantive law.

In stating these propositions, I have omitted some others for which I have argued but which are probably more controversial. Thus, I believe that the Rules of Decision Act speaks directly to the circumstances in which federal courts can fashion or apply federal common law. I also believe that consideration of the role of federal law in state court cases both helps to explain why that phenomenon has been treated as discrete and suggests problems with traditional federal common law analysis even in its conventional applications. Problems that a Rules of Decision Act approach obviates. But this is
not primarily an article about the Rules of Decision Act, and I am concerned lest readers who disagree with me on that proposition fail to address my basic propositions concerning federal preclusion law.

I also believe that, in section 1983 actions brought in federal court, there should be no need to resort to state preclusion law. In my view, the strong preference for a federal forum evinced by the Congress that passed the predecessor of section 1983 is irreconcilably in conflict with the reinterpreted full faith and credit statute, which assumes and uses as a referent subsequent litigation in state court. In such cases the federal courts should look directly to federal preclusion law, shaped in response to the requirements of the substantive scheme. I recognize, however, that the legislative history of section 1983 is variously interpreted. In any event, correct interpretation of the full faith and credit statute suggests other means to achieve more effective protection of substantive rights under section 1983 than that provided by the Court's essentially incoherent decisions treating the issues.

Apart from propositions that I do not regard as basic to this Article, I acknowledge that I have been relatively and uncharacteristically agnostic on a subject that has sharply divided scholars, to wit, the dilemma that should properly be thought to confront federal courts adjudicating questions of state law in diversity actions. Given my readiness to criticize the Court on other matters, my failure to criticize its post-Erie cases and insistence that lower federal courts and commentators take those cases seriously in the preclusion context, may be thought to signal agreement with them. In my defense, I can only reiterate that, from the perspective of federal common law, the Court's post-Erie cases are not the only barrier to the across-the-board application of uniform federal preclusion rules to federal diversity judgments adjudicating state law questions.

Finally, I hope that my analysis of problems created by the application of trans-substantive preclusion rules will contribute to the reconsideration of some of the basic assumptions of modern procedural systems. Elsewhere, for instance, I have suggested "that Congress too rarely advert to the possible need for specialized procedure—as opposed to the trans-substantive procedure of Federal Rules—when it enacts legislation."102 I have also suggested that "in considering proposed legislation, Congress should require a Procedural Impact Statement, the purpose of which would be to ensure that existing federal procedure adequately will serve a bill's

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Those responsible for federal procedure now recognize a problem in the use of trans-substantive rules of procedure, although their perspective on that problem differs from that of a legislator. Moreover, they have yet to do more than tinker with the existing system in this aspect. One need not believe that the label "procedure" is usefully applied to preclusion law to believe that it is time to stop tinkering with federal procedure and to rethink it.

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463 Id. at 21 n. 12.
465 I have no thought of discussing with you this morning any particular rules, practices, procedures or rules of evidence. On the contrary, what I submit to you is whether it is enough to confine our studies and inquiries into refinement of our processes, when perhaps what we really need to do is take a fresh look at the entire structure we have created to resolve disputes.