Federal Judgments Law: Sources of Authority and Sources of Rules

Stephen B. Burbank

University of Pennsylvania

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the Civil Procedure Commons, Conflict of Laws Commons, Constitutional Law Commons, Jurisprudence Commons, Law and Society Commons, Legal History Commons, and the Political Theory Commons

Repository Citation
https://scholarship.law.upenn.edu/faculty_scholarship/755

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
Federal Judgments Law: Sources of Authority and Sources of Rules

Stephen B. Burbank*

I. Introduction ................................................. 1552
II. Federal Judgments Law in Domestic State Litigation ........ 1556
III. Federal Judgments Law in Interjurisdictional Cases ........ 1560
   A. Federal Common-Law Analysis and Repeal Analysis
      Distinguished ........................................ 1560
   B. Untangling Sources of Authority from Sources of
      Rules .................................................. 1565
IV. Federal Judgments Law in International Cases ............... 1571
   A. Sources of Authority in General ..................... 1571
   B. Federal Common Law: Practical Considerations .......... 1574
   C. Federal Common Law: Sources of Authority and
      Sources of Rules ...................................... 1577
   D. Legal Sources: Additional Complexities ................ 1582

* Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania. A.B. 1968, J.D. 1973, Harvard University. Rainer Krause, LL.M. 1991, S.J.D. 1992, provided excellent research assistance. I appreciate the helpful comments and suggestions of Leo Levin, David Shapiro, Stephen Subrin, and Barbara Woodhouse. This Article is dedicated to the memory of Paul Freund.
I. Introduction

Problems in the allocation of lawmaking power between the federal
government and the states do not—and I am inclined to think that they
should not—loom large in the traditional course on conflict of laws. For
federal law has had little impact on the central topic of that course, the
allocation of lawmaking power among the states, leaving the matter largely
to states' discretionary choices. Yet it can be misleading to talk, and
sloppy to think, about federal-state allocations in terms of choice. Where
federal law, whatever its source, is pertinent and valid, the Supremacy
Clause makes the choice for us. To be sure, the question of pertinence
may call for, as interstate choice of law often calls for, what Brainerd
Currie termed "restraint and enlightenment." It is not useful, however,
to equate a court's role and function in answering questions regarding the
pertinence and validity of federal law with the freedom of a state court to
choose the governing law in an interstate case.

   Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92
   (1985) (holding that the application of Kansas law to every claim in a nationwide class action was
   "sufficiently arbitrary and unfair as to exceed constitutional limits"). Elsewhere, I have noted this trend
   against constraints on legislative jurisdiction:

   [T]he uniform tendency of our domestic law has been toward the loosening of
   mandatory controls on the exercise of lawmaking power, federal and (inter-) state,
   with the result that meaningful limitations at both levels are the result of self-
   restraint. In that process, courts have played a prominent role, if only by default.

   B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1989)).

2. But see Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of
   the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie
   choice."); RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 269 (6th
   between federal and state law"); Michael H. Gottesman, Draining the Dismal Swamp: The Case for
   Federal Choice of Law Statutes, 80 GEO. L.J. 1, 1 n.2 (1991) ("Choice between competing legal
   regimes is also necessary . . . when one party to litigation invokes a state law but the other party
   contends that federal law is exclusive and preempts the state law.").

3. See U.S. CONST. art. VI, cl. 2; Peter Westen & Jeffrey S. Lehman, Is There Life for Erie After

4. BRAINERD CURRIE, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED
   ESSAYS ON THE CONFLICT OF LAWS 177, 186 (1963). Currie counsels courts, when determining the
   policies and interests of the forum state, to consider the possibility that a broad formulation may
directly conflict with the interests of another state. It is proper, in this situation, to "adopt a moderate
   definition in order to avoid such a conflict." BRAINERD CURRIE, The Verdict of Quiescent Years, in
   SELECTED ESSAYS ON THE CONFLICT OF LAWS, supra, at 584, 604. The same course may be
   appropriate for a court interpreting the reach of federal law.

5. See Westen & Lehman, supra note 3, at 342-44, 351 n.117, 353-54 n.122 (discussing the
   process of considering the pertinence of federal law and pointing out that, once a court finds validity
   and pertinence, state law is irrelevant).

6. Alfred Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie
   Problem?, 17 OHIO ST. L.J. 384, 387 (1956) ("[O]nce the extent of the federal right is established
The recognition of interstate judgments is also a staple in the traditional course on conflict of laws, and the emphases of that topic may seem to contradict, if not the normative, then the empirical proposition with which I began. For federal law looms very large indeed in the recognition of interstate judgments. In part because the Supreme Court has acknowledged the pertinence of only federal constitutional and statutory law, however, the mischief of federal-state “choice of law” has been avoided. So, alas, have most of the interesting problems. These problems include sources of authority to make law, notably determining the pertinence and validity of federal common law, and sources of rules of law, notably fashioning governing federal law by the incorporation of existing state (or federal) rules. Those are the problems I wish to address in this Article, having first set the contexts in which they arise.

In theory, the reach of federal judgments law is broad, and the extent to which its reach has exceeded the Supreme Court’s grasp goes a long way toward explaining the sorry state of the law of interjurisdictional preclusion today. The Court has recognized that, even though neither the Constitution’s Full Faith and Credit Clause nor its implementing statute speaks to litigation that is wholly domestic to one state’s courts, the Due Process Clause may constrain a state’s domestic law of preclusion. The
Court has not acknowledged, however, other possible federal constraints on domestic state preclusion law in state court, including federal preemption or, as I prefer to think about it, federal common law. Recent developments in cognate areas prompt renewed hope that the Court may see the light.

This failure to see the potential for federal constraints in addition to the Constitution in cases that are confined to the courts of one state has contributed to the Court’s fundamental error in interpreting the Full Faith and Credit Statute in interjurisdictional cases. That error lies in imputing to the statute a choice of the domestic preclusion law of the rendering state, rather than the law that would have been applied in the courts of the rendering state. In theory, the latter could include not only domestic state preclusion law, but also the preclusion law of another state or federal preclusion law. The costs of the Court’s error include not only the theoretical possibility that, in applying the domestic preclusion law of the rendering state, the recognizing court will apply law different from that which would have been applied in the courts of the rendering state, contrary to the core purpose of full faith and credit, but also the harsh reality that federal rights will disappear in the smoke (and mirrors) of a presumption against repeal of the Full Faith and Credit Statute by subsequently enacted federal legislation. Again, recent developments
demonstrate that this question of interpretation is not merely of academic interest. 18

One might have thought that the Court, freed of the perceived constraints of the Full Faith and Credit Statute—as it has been in recent cases involving the preclusive effects of unreviewed state administrative proceedings in subsequent federal-question litigation in federal court19—would pay careful attention to sources of authority to make law and to federal interests. Instead, the Court has virtually ignored questions of power,20 sending decidedly mixed signals, even in the same case, on its willingness to protect federal substantive policies and rights against the potential ravages of federal or state preclusion law.21

In fact, it should not have been a surprise that, without the security blanket of the Full Faith and Credit Statute, the Court would ignore, by assuming the answer to, problems of lawmaking power. After all, the Court once sought to apply the Full Faith and Credit Statute to problems beyond its scope22—to determine the preclusive effects of federal judgments in state courts.23 More recently the Court has either simply asserted the applicability of uniform federal law (federal-question judgments)24 or ducked any inquiry into governing law (diversity judgments).25

Burbank, supra note 9, at 814 n.388 (citations omitted).

18. See infra subpart III(A).


20. See Solimino, 111 S. Ct. at 2169-70; Elliott, 478 U.S. at 794; infra text accompanying notes 90-94.

21. See infra text accompanying notes 63-88.

22. "Neither the full faith and credit clause of the Constitution nor the implementing statute appears to speak to the preclusive effects of the proceedings of federal courts." Burbank, supra note 9, at 736.

23. See Stoll v. Gottlieb, 305 U.S. 165, 170 (1938) ("[T]he 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."); Embry v. Palmer, 107 U.S. 3, 10 (1883) (noting that the judgments of federal courts have been recognized as on the "same footing" with state court decisions). But see Turnbull v. Payson, 95 U.S. 418, 423 (1877) ("[T]he act of Congress [the Full Faith and Credit Statute] does not apply to the courts of the United States . . . ."); Burbank, supra note 9, at 745 (arguing that "the Court's exercise in statutory interpretation [in Embry, 107 U.S. at 9] merely blessed an anterior exercise in federal common law.").

24. See Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 324 n.12 (1971) ("In federal-question cases, the law applied is federal law.").

25. There are, however, numerous pre-1938 decisions requiring the application of state preclusion
Finally in this depressingly long list of interesting problems that the Court has either made uninteresting or wished away, for close to one hundred years the Court has essentially abandoned internationally foreign judgments, leaving *Hilton v. Guyot* a derelict on the waters of the law and one that might be thought to pose greater than normal risks precisely because it lies in international waters. *Hilton*, it turns out however, is not the problem, and the Court cannot solve the real problem, because it lacks both the power and the institutional capacity to do so.

II. Federal Judgments Law in Domestic State Litigation

The Supreme Court has acknowledged that the Due Process Clause constrains a state's freedom in according preclusive effect to the judgments of its own courts. To date, however, it has not acknowledged that federal law may play a larger role in determining the preclusive effects of these judgments in domestic state litigation. I have previously argued that although state preclusion law will usually apply, it must, on occasion, yield to federal common law. I will not repeat that argument in full here, but it may be useful for the benefit of skeptics to explore the relevance of two Supreme Court cases decided since I developed, and applied to domestic state litigation, a general approach to federal common law.

Possible reasons for skepticism about the role of federal preclusion law in state litigation include the knowledge that (1) only rarely has the Court directed the displacement of state “procedural” law in state court and (2) for a long time it seemed to do so only in FELA cases. Yet, as a general matter, there can be no doubt either about federal lawmaking competence in connection with “[l]egal rules which impact significantly

---

26. Hereafter, I shall refer to internationally foreign judgments as simply “foreign judgments,” distinguishing them from interstate judgments.
27. 159 U.S. 113 (1895).
28. See infra subparts IV(B)-(C).
29. See supra note 11 and accompanying text.
30. See supra text accompanying notes 11-12.
32. See generally Burbank, supra note 9.
35. See Hill, supra note 6, at 387-88 (noting in FELA cases “a judicial tendency . . . to ascribe to Congress an intention that federally-created rights sh[ould] receive uniform enforcement . . . notwithstanding the concurrent responsibility of the state courts in such enforcement’”).
upon the effectuation of federal rights" or about the potential of preclusion rules to have such an impact. And if there had been any doubt about the relevance of the former proposition, announced in federal court litigation, for litigation in state court, *Felder v. Casey* should have dispelled it.

In *Felder*, the Court required the displacement of a Wisconsin notice-of-claim statute that the state courts had applied to terminate an action brought under section 1983. It is true that in doing so, the Court invoked the language of preemption. But there is no harm in the language of preemption, backed up by appeals to the Supremacy Clause,


38. 42 U.S.C. § 1983 (1988); see *Felder*, 487 U.S. at 136-37. The Court described the notice-of-claim statute as follows:

That statute provides that no action may be brought or maintained against any state governmental subdivision, agency, or officer unless the claimant either provides written notice of the claim within 120 days of the alleged injury, or demonstrates that the relevant subdivision, agency, or officer had actual notice of the claim and was not prejudiced by the lack of written notice. Wis. Stat. § 893.80(1)(a) (1983 and Supp. 1987). The statute further provides that the party seeking redress must also submit an itemized statement of the relief sought to the governmental subdivision or agency, which then has 120 days to grant or disallow the requested relief. § 893.80(1)(b). Finally, claimants must bring suit within six months of receiving notice that their claim has been disallowed. *Ibid.*

*Id.* (footnote omitted).

39. See *id.* at 138. As I have noted elsewhere, "[m]y quarrel is not, of course, with the choice of the 'preemption' label instead of 'federal common law.' It is rather with the failure to see the problems whole. Preemptive lawmaking is a subset of federal common law." Burbank, *supra* note 9, at 808 n.360; see also *id.* at 809 n.366 (arguing that "[t]he 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" of the failure of the Court to address the relationship between preemption principles and federal common law); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 32-39 (1985) (noting the Court's failure to realize that preemptive lawmaking can be used to develop a general theory of federal common law).

It is also true that at one point the Court employed a mode of analysis—treating the problem as the converse of that in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)—as mischievous as assimilating federal-state allocation problems to interstate choice of law. See *Felder*, 487 U.S. at 151-53; *supra* text accompanying notes 1-6. By analogy to Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Court equated the federal courts' constitutional obligations under *Erie* with the state courts' "constitutional duty" under the Supremacy Clause. This is unfortunate. See Burbank, *supra* note 9, at 755-57, 808-10. The problem derives in part from the Court's apparent failure to recognize that *Guaranty Trust* cannot plausibly be deemed a constitutional holding. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 700-06 (1974). The converse-*Erie* reasoning was, however, unnecessary to the decision. See *Felder*, 487 U.S. at 151.

40. See *id.* at 138, 150, 151, 153. The Court's invocation of the Supremacy Clause to vindicate the supremacy of a federal statute should be distinguished from Professor Weinberg's attempt to make the Supremacy Clause the source of authority for federal common law. See Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 836-38 (1989); see also *infra* note 51.
so long as the reader observes that in *Felder* state law was made to yield, not to an identifiable statutory policy choice, but to "the remedial objectives of § 1983." It would be more faithful to the respective lawmaker roles of Congress and the federal courts to say that in *Felder* the Supreme Court required that a state statute yield, in state court, to federal common law.

Preclusion law can cut off assertions of legal right made for the first time. In that, it is functionally similar to the notice-of-claim statute in *Felder* for purposes of allocating federal and state lawmaker power. Moreover, it is worth emphasizing that *Felder* was not a FELA case. Indeed, the Court's extensive use of FELA precedent merely confirmed arguments imputing to those cases the general principle that state procedural law must, on occasion, yield to federal common law in state court.

Another of the Supreme Court's recent decisions similarly confirmed those arguments, albeit indirectly. In *University of Tennessee v. Elliott*, the Court held that unreviewed state administrative findings cannot have preclusive effect in a subsequent Title VII action. In the Court's view, for a federal court to accord state administrative factual findings preclusive effect would have been inconsistent with the statutory direction that a federal administrative agency, the EEOC, give such findings only "substantial weight." In addition, a rule of preclusion would have been inconsistent with the previously recognized statutory policy in favor of a trial de novo following administrative proceedings.

*Elliott* was brought in federal court. What if, however, the plaintiff had chosen to sue in state court? Imagining such a case before the Supreme Court's decision in *Elliott* and its recent decision making clear that state courts have concurrent subject matter jurisdiction under Title VII, I observed:

> 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 actions, the question

44. 478 U.S. 788 (1986).
45. *Id.* at 795.
46. *Id.* at 795 (citing 42 U.S.C. § 2000e-5(b) (1988)).
47. *Id.* at 795-96. *See also* Chandler v. Roudebush, 425 U.S. 840, 848 (1976) (observing that Congress intended in the Equal Opportunity Act of 1972 to accord federal employees the same right to a trial de novo as was provided in the amended Civil Rights Act of 1964).
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. 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, 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.49

I hope we can agree, at least after Felder, that the reasons the Court gave
for refusing to apply a rule of preclusion to the Title VII claim in Elliott
would also require displacement of a state-law rule of preclusion if that
case had been filed in state court. Moreover, even though we may not
agree about the role of the Rules of Decision Act50 in bringing about the
results,51 or about the utility of “preemption” analysis,52 we should be

49. Burbank, supra note 9, at 813 (footnotes omitted); see also id. at 821 n.419 (“The Court’s
reasons for refusing preclusive effect to an unappealed arbitration award in a federal § 1983 action are
equally applicable in a state § 1983 action.”).

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.”).

51. For a fully developed statement of my views about the role of the Rules of Decision Act in
authorizing and limiting federal common law, see Burbank, supra note 9, at 753-74, 787-97, 808-10,
816-17. Professor Redish now agrees with me, at least as to the relevance of the Act for federal
common law that is not “procedural.” See MARTIN H. REDISH, THE FEDERAL COURTS IN
THE POLITICAL ORDER 29-46 (1991); Burbank, supra note 1, at 1479 n.126.

Professor Weinberg terms it “curious” that she does “not find scholarly discussion of the
meaning of the words [in the Rules of Decision Act], ‘except where the Constitution . . . otherwise
require[s].’ ” Louise Weinberg, The Curious Notion that the Rules of Decision Act Blocks Supreme
Because I have devoted considerable attention to that language, I agree. See, e.g., Burbank, supra note 9,
at 758-62, 773-74, 787-91. If Professor Weinberg had seriously engaged work other than Professor
Redish’s, she might have found what she was looking for; Professor Redish’s work takes an
impoverished view of the Rules of Decision Act. See REDISH, supra, at 161 n.95; George D. Brown,
curious is the notion that the “supremacy clause requires courts to . . . fashion federal case law.”
Weinberg, Curious Notion, supra, at 865; see also id. at 870 (“[A]s the Constitution requires . . . all
courts must work under federal common law when the supremacy clause so requires.”); Weinberg,
supra note 40, at 816-17, 836-38 (reiterating Weinberg’s view of the Supremacy Clause). The
Supremacy Clause is not a source of lawmaking power; it merely states that valid and pertinent federal
law is supreme. See, e.g., Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107-09
(1989); Henry P. Monaghan, Federal Statutory Review Under Section 1983 and the APA, 91 COLUM.

I also find curious Professor Weinberg’s reliance on the fact that the Rules of Decision Act
speaks directly only to federal courts as proof against the Act’s relevance to federal common-law
able to agree that the results themselves are not easily explained by traditional federal common-law analysis. 53

III. Federal Judgments Law in Interjurisdictional Cases

A. Federal Common-Law Analysis and Repeal Analysis Distinguished

Once it is clear that, in litigation confined to the tribunals of one state, the governing preclusion law need not be domestic state law, but may
rather be the preclusion law of another state or federal law, the house of cards that the Supreme Court has constructed in recent cases involving the Full Faith and Credit Statute collapses.\textsuperscript{54} It would hardly unify the country to require a recognizing court to apply a different preclusion law—namely, the domestic preclusion law of the rendering state—than the rendering state's courts themselves would apply.\textsuperscript{55} The Full Faith and Credit Statute thus means what is says,\textsuperscript{56} and because it makes no choice of law, the search for another statute expressly or impliedly repealing it is usually a wild goose chase.\textsuperscript{57} Such a search makes sense only when it is proposed to depart from the choice that Congress did make in the Full Faith and Credit Statute, namely the choice of the rendering state's courts as the referent for determining the governing preclusion law in the courts of other states and in federal courts.\textsuperscript{58}

What difference does it make whether the Full Faith and Credit Statute is interpreted to choose, as the Supreme Court has required, the domestic preclusion law of the rendering state or, as I advocate, the law that would be applied in the courts of the rendering state? \textit{In theory}, it may make a substantial difference, or so I have argued. The measure of that difference lies in a comparison of the reach or impact of federal common law, on the one hand, and of express or implied repeals by subsequently enacted federal statutes, on the other.\textsuperscript{59} \textit{In practice}, the

\textsuperscript{54} See supra notes 14-18 and accompanying text.
\textsuperscript{55} See supra text accompanying note 16.
\textsuperscript{56} See supra note 15 and accompanying text.
\textsuperscript{57} See supra note 17 and accompanying text. Moreover, even accepting the Court's interpretation of § 1738, "repeal analysis should focus on the question whether [Congress intended] that preclusion questions . . . arising under a subsequently enacted statute] be determined by (uniform) federal rather than state law. After all, state law may not preclude." Burbank, supra note 9, at 817-18.
\textsuperscript{58} Attention to Congress's choice of a state court referent causes problems when another statute evinces special concern for a federal forum:

\begin{quote}
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."
\end{quote}

Burbank, supra note 9, at 818 (footnotes omitted); cf. id. at 825 (arguing that § 1738 does not apply in cases raising claims within the exclusive jurisdiction of the federal courts).

\textsuperscript{59} Elsewhere, I have compared the reach of the Supreme Court's repeal analysis with the reach of federal common law:

\begin{quote}
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
Court's failure to see the displacement of state "procedural" law in state court as but another manifestation of federal common law may have narrowed the theoretical gap considerably, and that failure no doubt would support the view that the difference between federal common law and repeal analysis is only of academic interest. Yet, however flawed the Court's reasoning in *Felder v. Casey*, the case stands as contemporary evidence that a general approach to the problem of allocating federal and state lawmaking power is possible. Federal common law is the most appropriate vehicle.

The Supreme Court's recent forays into interjurisdictional preclusion speak with a forked tongue on this question. In *Elliott*, with the Full Faith and Credit Statute rightly or wrongly out of the picture, the Court thought, rightly or wrongly, that it was required to confront the problem of federal common law. The Court's conclusion in *Elliott*, that a rule of preclusion would be inconsistent with Title VII, although supported by specific language in *Kremer v. Chemical Construction Corp.*, is difficult to reconcile with the holding in, or general tenor of, *Kremer*.

---

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.

Burbank, supra note 9, at 819 (footnotes omitted). I also described this difference 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],'... and requiring evidence of specific intent as to preclusion matters." Id. at 819 n.413 (quoting Merrill, supra note 39, at 36); see also Luneburg, supra note 31, at 143-44 (arguing that the Supreme Court's approach adopts an unnecessarily restrictive reading of § 1738 and requires finding an implied repeal of that statute).

60. See supra text accompanying notes 29-33.
61. 487 U.S. 131 (1988); see supra text accompanying notes 38-41.
62. Cf Susan N. Herman, Beyond Parity: Section 1983 and the State Courts, 54 BROOK. L. REV. 1057, 1069-70 (1989) ("The Supreme Court in *Felder* is continuing a trend toward minimizing the role of state law, maximizing the creation of federal common law, and exalting the desirability of uniformity between state and federal courts in adjudication of federal rights.").
63. See University of Tenn. v. Elliott, 478 U.S. 788, 794 (1986). The Court may have surrendered too easily on the question whether 28 U.S.C. § 1738 applies to administrative proceedings. To be sure, the statute refers to the "judicial proceedings of any court." 28 U.S.C. § 1738 (1988). The Full Faith and Credit Clause, however, uses the language "judicial Proceedings," U.S. CONST. art. IV, § 1, and applies to state administrative proceedings as well. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270-72 (1980). The Clause, by its own terms, does not bind federal courts. See *Davis v. Davis*, 305 U.S. 32, 40 (1938). There is no evidence that the First Congress intended a different meaning in the Full Faith and Credit Statute, passed to implement and make applicable to the federal courts the Full Faith and Credit Clause. When the Statute was first passed, administrative proceedings were not even contemplated, and thus perhaps they should not be excluded from the Statute. See *Elliott*, 478 U.S. at 795 (noting that both the Constitution and § 1738 "antedate the development of administrative agencies").
64. See *Elliott*, 478 U.S. at 794.
65. See id. at 795-96; supra text accompanying notes 43-47.
67. In *Kremer*, the Court held that Title VII did not expressly or impliedly repeal the Full Faith and Credit Statute, and it did so without resolving whether claims under Title VII were within the
The key is that Kremer, in which state proceedings did have preclusive effect in subsequent Title VII litigation, involved administrative proceedings reviewed by a state court, thus triggering the Full Faith and Credit Statute and the Court’s repeal analysis. Elliott, in which no preclusion was permitted as to Title VII, seems to confirm my contention that federal common-law analysis is more protective of federal policies and federal substantive rights than is repeal analysis.

But what the Court in Elliott confirmed in one part of the opinion, it confuted in another. The Court held that the unreviewed state administrative proceedings could preclude Elliott’s claim under section 1983. In doing so, the Court relied very heavily on cases finding no express or implied partial repeal of the Full Faith and Credit Statute, concluding that “[t]he Court’s discussion in Allen suggests that it would have reached the same result even in the absence of § 1738.” Perhaps, but only because the Court in Allen was confused about the relationship between judge-made law and statutes. Repeal analysis requires very clear evidence of Congress’s intent as to the specific question of preclusion. As the Court demonstrated in McDonald v. City of West Branch and elsewhere in Elliott itself, federal common-law analysis should consider whether a judge-made rule of preclusion is consistent with the language, structure, and policies of a statute viewed as a whole.
The Court's most recent interjurisdictional preclusion decision, although hardly a model of analytical precision, highlights the difference at issue. In *Astoria Federal Savings and Loan Ass’n v. Solimino,*\(^{74}\) the question was whether the unreviewed findings of a state administrative agency have preclusive effect in a subsequent federal action under the Age Discrimination in Employment Act of 1967 (ADEA).\(^{75}\) In holding that such findings have no preclusive effect, the Court reasoned that there is a presumption of "administrative estoppel,"\(^{76}\) but that it is "properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue."\(^{77}\) More important for present purposes, the Court distinguished this "lenient presumption in favor of administrative estoppel"\(^{78}\) from a rule of clear statement and "the kindred rule that legislative repeals by implication will not be recognized 'absent a clearly expressed congressional intention to the contrary.'"\(^{79}\)

Two factors suggest that the Court tracked the distinction between federal common-law analysis and repeal analysis in *Solimino:* (1) its observation that repeal analysis did "not cast its shadow here"\(^{80}\) because the Full Faith and Credit Statute did not apply, and (2) its actual implementation of the "lenient presumption in favor of administrative estoppel."\(^{81}\) Unlike Title VII, on which it was modeled, the ADEA contains no direction to the EEOC to accord "substantial weight" to state administrative findings.\(^{82}\) The linchpin of the Court's analysis in *Elliott* with respect to Title VII was, thus, not available in *Solimino.*\(^{83}\) Nonetheless, the Court found other evidence of what it chose to call the congressional "decision" not to accord preclusive effect to state administrative findings.\(^{84}\) In

---

Cola Gen. Bottlers, Inc., 820 F.2d 892, 893 (7th Cir. 1987) (stating erroneously that Elliott was "precluded from relitigating his civil rights claim under ... § 1983"); *Id.* at 895-97 (neglecting to note whether the arbitration proceedings would have preclusive effect in the rendering state).

76. *Solimino,* 111 S. Ct. at 2169.
77. *Id.* at 2170.
78. *Id.* at 2172.
79. *Id.* at 2170 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
80. *Id.*
81. *Id.* at 2172.
82. *Id.* at 2171-72.

83. The Court, however, found nothing "talismanic" about Title VII's directive. *Id.* at 2172. This language was "simply the most obvious piece of evidence that administrative res judicata does not operate in a Title VII suit." *Id.* (quoting Duggan v. Board of Educ., 818 F.2d 1291, 1297 (7th Cir. 1987)).

84. *Id.* Particularly because the Court noted the district court's holding in favor of preclusion "by virtue of Congress' failure in either the language or legislative history of the Age Act 'actually [to] address[s] the issue,'" *Id.* at 2169 (quoting the district court), such hyperbole (characterizing congressional inaction as a decision) makes even preemption rhetoric sound good. See supra text.
reality, the evidence supported only the conclusion that a judge-made rule of administrative preclusion would be inconsistent with the structure of, and policies animating, the ADEA. That, of course, is all that is necessary under federal common-law analysis. Unlike its treatment of section 1983 in Elliott, in Solimino the Court made a serious attempt to grapple with the implications of preclusion for the statutory scheme.

B. Untangling Sources of Authority from Sources of Rules

The use of federal common-law analysis rather than repeal analysis under the Full Faith and Credit Statute is thus of both theoretical and practical interest. Yet were the Court aware of the issue, it still might be reluctant to adopt the interpretation I have urged. Under the Court’s approach to section 1738, there usually is no question either about the source of authority (federal) or the source of rules (state). My approach invites questions as to both the source of authority and the source of rules by requiring inquiry as to the law that would have been applied if the subsequent action had been brought in the rendering state’s courts rather than in the courts of another state or in federal court.

Even when section 1738 does not apply in interjurisdictional cases, the Court appears reluctant to be precise about sources of authority or sources of rules. Neither in Elliott nor in Solimino did the Court discuss the authority for the application of federal law. Rather, the Court simply assumed that, although the Full Faith and Credit Statute did not apply, federal law governed and that its only task was to determine the content of that law. For one familiar with cases involving the preclusive effects of the federal-question judgments of federal courts, Elliott’s laconic

85. See Solimino, 111 S. Ct. at 2172 (holding that § 14(b) of the ADEA, which requires complainants under the Act to first pursue their claims with responsible state authorities before filing federal actions, “suffices to outweigh the lenient presumption in favor of administrative estoppel, a holding that also comports with the broader scheme of the Age Act and the provisions for its enforcement”).

86. See supra text accompanying note 73.

87. See supra text accompanying notes 70-72.

88. Solimino, 111 S. Ct. at 2170-71. Although in Solimino the Court quoted a passage from Allen that seemed highly protective of judge-made rules of preclusion, 111 S. Ct. at 2171 (quoting Allen v. McCurry, 449 U.S. 90, 97-98 (1980)), contrasting § 1983 with Title VII, it did not recognize, or at least acknowledge, that in Allen and that part of Elliott treating § 1983, the Court had applied a different analysis. See supra text accompanying note 71.

89. I do not refer to suspicions that the Court’s rediscovery of the Full Faith and Credit Statute in civil rights cases was no coincidence. For an explanation of my views on this subject, see Burbank, supra note 9, at 801.

90. See University of Tenn. v. Elliott, 478 U.S. 788, 794-95, 796-97 (1986); Solimino, 111 S. Ct. at 2169-70.

91. See supra text accompanying note 24.
observation that "we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute"\textsuperscript{92} is not surprising. Indeed, the Court cited some of those cases in support of its observation.\textsuperscript{93} Yet even if (as I believe) uniform federal law governs the preclusive effects of the federal-question judgments of federal courts,\textsuperscript{94} it may not be immediately obvious why uniform federal law should also govern the preclusive effects of state administrative proceedings determining matters of state law.

Although at least some of the cases relied on in Elliott involved the creation or application of uniform federal judge-made rules of preclusion,\textsuperscript{95} the Court's refusal to resort to such rules for determining whether Elliott's section 1983 claim was precluded is proof enough that its reference to "federal common-law rules of preclusion"\textsuperscript{96} was not intended to, or at least did not, encompass uniform preclusion rules. Put another way, in referring to federal common-law rules of preclusion, the Court was assuming a federal source of authority, not specifying a federal source of rules.

Under traditional federal common-law analysis, the question whether a federal substantive claim is precluded by prior proceedings is a question as to which federal lawmaking competence exists no matter what the rendering forum, federal or state.\textsuperscript{97} Because the Court determined that precluding Elliott's Title VII claim\textsuperscript{98} and Solimino's ADEA claim\textsuperscript{99} would be inconsistent with those statutes, it was not called upon to reach the further question whether, if preclusion were permissible, the rules would be uniform federal judge-made rules or state-law rules borrowed as federal law.\textsuperscript{100}

\textsuperscript{92} Elliott, 478 U.S. at 794.


\textsuperscript{94} See Burbank, supra note 9, at 762-78.

\textsuperscript{95} See supra note 93. A difficulty in classifying pre-1938 decisions arises from the "high degree of homogeneity in preclusion law throughout the country ... fostered by the Supreme Court's invocation of or reliance on 'general common law.'" Burbank, supra note 9, at 765 (footnote omitted).

\textsuperscript{96} Elliott, 478 U.S. at 794.

\textsuperscript{97} See supra text accompanying notes 36-37. The same is true when the rendering forum is in another country. See infra text accompanying notes 193-94.

\textsuperscript{98} See supra text accompanying notes 44-47.

\textsuperscript{99} See supra text accompanying notes 82-88.

\textsuperscript{100} For further discussion regarding this inquiry, see United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (asserting that state law may be adopted as the federal rule of decision, but only after the court accounts for considerations of uniformity and also determines whether the application of state law would frustrate a federal program's objectives); Burbank, supra note 9, at 757-58 (describing the two-step inquiry to determine whether to fashion a uniform federal judge-made rule.
The same results may follow if one takes the Rules of Decision Act seriously and, in particular, regards it as speaking to the circumstances in which it is permissible for a federal court to fashion or apply federal judge-made law. The major difference is that the Act itself is the source of authority to apply federal law. State preclusion law, usually the source of rules by reason of the Act's choice, could not preclude Elliott's Title VII claim or Solimino's ADEA claim because, under the Act's exception clause, those statutes required otherwise. In those circumstances, perhaps life is too short to insist on an inquiry into the precise content of the otherwise applicable state law.

The Court's dubious conclusion—that permitting state administrative proceedings to preclude Elliott's section 1983 claim would not be inconsistent with that statute—required it to proceed to the next step of traditional federal common-law analysis. A paean to the benefits of giving preclusive effect to the adjudicative findings of an administrative agency might have suggested that, where the prerequisites for administrative preclusion under federal law announced in United States v. Utah Construction & Mining Co. were met, preclusion would follow under that law, namely, as a matter of uniform federal common law. But the Court

---

101. I have previously described the weaknesses of traditional common-law analysis in light of the Rules of Decision Act:

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.

Burbank, supra note 9, at 762 (footnotes omitted).

102. Cf. Gjellum v. City of Birmingham, Ala., 829 F.2d 1056, 1064 (11th Cir. 1987) ("At some point, the importance of the federal rights and limited ability of the state forum to function as final adjudicator of those rights would require such substantial supplemental federal preclusion requirements as to make resort to state preclusion rules a mere token gesture achieved at the expense of judicial economy.").

103. See University of Tenn. v. Elliott, 478 U.S. 788, 796-97 (1986); supra text accompanying notes 70-73.

104. 384 U.S. 394 (1966). The Court stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." Id. at 422.

105. See Elliott, 478 U.S. at 797-98.
then invoked federalism values and held that a federal court is to "give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts," subject to the check of the Utah Construction prerequisites. That is, the courts should act as if the Full Faith and Credit Statute did apply. Under this regime, adjudicative findings of a state administrative agency will be preclusive only if state law accords them that effect. The result is a hybrid of federal and state law, the latter specified by a uniform federal choice-of-law rule.

Elliott can thus be seen as a case in which the Court decided that, section 1738 being inapplicable, federal common law governed. But federal common law often borrows state law, displacing it only when hostile to or inconsistent with federal law. In connection with Elliott's section 1983 claim, the Court decided to borrow state law. Not being bound by Klawon Co. v. Stentor Electric Manufacturing Co. to follow state choice-of-law rules, and anxious to replicate the results that would obtain under section 1738 as closely as possible, the Court (uniformly) chose the domestic preclusion law of the rendering state (which may or may not be the state in which the federal court sits). But the Court also established the prerequisites for administrative preclusion under federal law as a uniform check on the application of state law that would preclude. In other words, having (probably erroneously) failed to find a threshold barrier to the application of a (state or federal) rule of preclusion to Elliott's section 1983 claims, the Court turned to trans-substantive federal preclusion law for a check.

106. See id. at 798-99.
107. Id. at 799.
108. Id.
109. 313 U.S. 487, 496 (1941); see Burbank, supra note 9, at 768.
110. See Elliott, 478 U.S. at 799. In fact, the Court's formulation, see supra text accompanying note 107, is linguistically consistent with the interpretation of the Full Faith and Credit Statute that I have advocated. See supra text accompanying notes 15, 55-57. As with similar formulations in cases interpreting § 1738, "[w]e can safely assume that the Court meant . . . that the statute 'directs a federal court to refer to the preclusion law of the State in which the [decision] was rendered.'" Burbank, supra note 9, at 802 (quoting Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).
111. See Elliott, 478 U.S. at 799.
112. See id. at 797-98 (citing United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966)). There is irony in calling the regime established in Utah Construction trans-substantive preclusion law, because the decision was very much influenced by the substantive context in which it was decided. See Utah Construction, 384 U.S. at 418-23 (noting that the language and policies underlying the disputes clause in the contract at issue as well as the policies served by the act governing this relationship necessitate the holding that the Court of Claims' findings are final). "But the pull toward applying the same rule to different substantive contexts has been so strong that substantive concerns originally animating a rule are forgotten, and attempts to carve out an exception in a particular substantive context are vigorously resisted." Burbank, supra note 1, at 1466.
From the point of view of the jurisprudence of federal common law, *Elliott* is a fascinating case. Moreover, apart from the Court’s error in conflating federal common-law and repeal analysis, if one concluded that administrative preclusion is not always inconsistent with section 1983, there would be much to be said for the Court’s result. The Full Faith and Credit Statute enjoins a particular kind of federalism for a particular purpose. In *Elliott*, that statute did not apply, but it does not hold a monopoly on federalism. Both the Rules of Decision Act and section 1988—either might have been thought to apply as the source of authority in *Elliott*—look to state law as the usual source of rules. Neither constrains a federal court’s power to choose which state’s law to apply.

More than symmetry counseled choice of the preclusion law of the state whose administrative tribunal rendered the decision claimed to have preclusive effect. Litigants should be able to know the preclusion law that will govern the results of litigation because they may shape their conduct in light of it. That suggests that when a dispute is about, in the sense that it expressly concerns, matters of state law, and it is adjudicated in a state tribunal, the assumption should be that the preclusion law of that state will apply.

Under the Rules of Decision Act, when state preclusion law is inconsistent with the policies of a federal statute, the federal statute requires that state preclusion law not apply. This may be true not only of inconsistency with discrete and specifically identifiable federal statutory policies, but also of inconsistency with a scheme of federal substantive rights as a whole. It is reason enough for concern that we put a congressionally created scheme of federal substantive rights at the mercy of federal judge-made trans-substantive preclusion rules, the content of which was unknown to, and unknowable by, the members of Congress who passed the statute. It would be intolerable simply to loose on the

113. See supra text accompanying notes 70-73.
114. See Burbank, supra note 9, at 739-40, 797-800.
115. See supra notes 50-51.
117. Cf. Burbank, supra note 9, at 797 (arguing that “a system of preclusion rules for diversity judgments keyed to the locus of subsequent litigation would be hopeless”); id. at 767 (discussing the administrability problems litigants would encounter if state law determined the preclusive effects of federal question judgments).
118. See supra text accompanying note 101.
119. See Burbank, supra note 9, at 816 (arguing that “[w]hen 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” (quoting Davis v. Wechsler, 263 U.S. 22, 25 (1923))
120. Cf. id. at 815 (“The effect of modern preclusion rules is to cut off some substantive rights
federal statutory scheme state preclusion rules, which are no more part of the federal legislative background than are federal statutes part of the background against which the state rules are fashioned. Elliott uses trans-substantive federal preclusion law as a check on state preclusion law. This is a technique similar to what I have recommended elsewhere as a means to protect a scheme of federal rights:

[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.]

Perhaps the most consequential of the uniform federal checks imposed on the application of state “administrative estoppel” in Elliott, and that which is of greatest interest for present purposes, is the requirement that “the parties have had an adequate opportunity to litigate.” In Utah Construction the Court elaborated on that concept as follows:

In the present case the Board was acting in a judicial capacity when it considered the . . . claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.

The importance of this exception to preclusion of federal substantive rights by operation of state preclusion law is suggested by the fact that for a brief time after the Court rediscovered the Full Faith and Credit Statute, it appeared that the exception would operate in cases to which that statute applied. Indeed, some Justices clung to it even after its incoherence (as a judge-made exception to preclusion) under the Court’s basic approach

in circumstances that, had they been thinking of preclusion law, the legislators who created those rights, could not possibly have imagined.”); Felder v. Casey, 487 U.S. 131, 147 n.4 (1988) (“The fact that Congress saw no need to alter these neutral procedural rules in no way suggests that all future state-court procedures . . . would similarly be consistent with the purposes and intent of the federal civil rights laws.” (emphasis in original)).

121. Burbank, supra note 9, at 820 (final emphasis added) (footnote omitted).
123. Id.
to the statute (positing a congressional choice of state preclusion law) should have been clear.\footnote{125}

No “further inquiry”\footnote{126} should be necessary to prevent the application of state preclusion law that would foreclose the assertion of federal substantive rights as a result of state administrative proceedings in which the party asserting those rights lacked, according to federal standards, a full and fair opportunity to litigate. The Rules of Decision Act should not be interpreted “in a crabbed or wooden fashion.”\footnote{127} And if we do not so interpret it, the federal statute under which the rights are asserted requires otherwise than that the state preclusion rule apply.

In cases following \textit{Elliott} the hardest task may be to persuade the court that “an adequate opportunity to litigate” or a “full and fair opportunity” to litigate includes more than is minimally required by due process.\footnote{128} The Court in \textit{Kremer v. Chemical Construction Corp.} equated the two, but it did so in response to the (erroneous) view that section 1738 chooses domestic state preclusion law, a congressional choice that would be binding unless unconstitutional or superseded by another legislative choice (\textit{i.e.}, repeal).\footnote{129} In cases like \textit{Elliott}, section 1738 does not apply, and the plaintiff should seek all of the protections of trans-substantive federal preclusion law, which draws heavily on the \textit{Restatement (Second) of Judgments}.\footnote{130} Of course, defendants will urge the court to follow \textit{Kremer} in this aspect.\footnote{131}

\section*{IV. Federal Judgments Law in International Cases}

\subsection*{A. Sources of Authority in General}

Although neither the Full Faith and Credit Clause of the Constitution nor its implementing statute applies to the judgments of foreign tribunals,\footnote{132} there can be no doubt about the existence of federal lawmaker competence to define the circumstances in which, and the criteria by which, foreign judgments will be recognized and enforced in this country. Legislative competence may be found in Congress’s power

\begin{footnotes}
\footnote{125}{See \textit{Haring v. Prosise}, 462 U.S. 306, 313 (1983); \textit{Burbank}, \textit{supra} note 9, at 814.}
\footnote{126}{See \textit{supra} text accompanying note 121.}
\footnote{127}{\textit{Robertson v. Wegmann}, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting).}
\footnote{128}{See \textit{Kirkland v. City of Peekskill}, 651 F. Supp. 1225, 1230 (S.D.N.Y.), \textit{affd}, 828 F.2d 104 (2d Cir. 1987); \textit{infra} note 131.}
\footnote{129}{See \textit{Kremer v. Chemical Constr. Corp.}, 456 U.S. 461, 480-82 (1982).}
\footnote{131}{Plaintiffs are not immune to confusion on this score, with predictably bad effects. See \textit{Layne v. Campbell County Dep’t of Social Servs.}, 939 F.2d 217, 219-20 (4th Cir. 1991) (upholding dismissal of the claims of a plaintiff who mistakenly equated adequate opportunity to litigate with due process).}
\footnote{132}{The Full Faith and Credit Clause is restricted to “the Judicial Proceedings of every other State.” \textit{U.S. Const. art. IV, § 1}. The statute is restricted to “judicial proceedings of any court of any such State.” \textit{28 U.S.C. § 1738} (1988).}
\end{footnotes}
to "regulate Commerce with foreign Nations"\textsuperscript{133} or to "make all Laws which shall be necessary and proper for carrying into Execution"\textsuperscript{134} the Executive's powers in the conduct of foreign affairs.\textsuperscript{135} Congress has rarely exercised its power in this domain, however. Indeed, perhaps the most prominent example of legislation in the area is the amendments to the Federal Arbitration Act\textsuperscript{136} enacted in aid of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly referred to as the New York Convention.\textsuperscript{137}

In default of federal legislation, much of the energy to create uniform federal law on the recognition and enforcement of foreign-court judgments has centered on treaties. The United States, however, is not now a party to any unilateral or bilateral conventions dealing expressly with that subject.\textsuperscript{138} At least for a time, this was not for lack of effort. Particularly when it became clear how badly U.S. nationals might fare as a result of discriminatory recognition provisions agreed to in the Brussels Convention\textsuperscript{139} by the members of the European Economic Community, we sought to take advantage of the opportunity to escape those provisions by negotiating bilateral conventions.\textsuperscript{140} The effort started and ended with the United Kingdom\textsuperscript{141}—from a comparative-law perspective our most likely treaty partner. The enterprise seems to have foundered largely on disagreements about both legislative jurisdiction (particularly the extraterri-
torial reach of United States antitrust law), and adjudicatory jurisdiction (particularly in product liability cases).142

Although obviously an occasion for discouragement, the failure to conclude a treaty with the United Kingdom143 is not grounds for despair. The incentives for a renewed effort have increased with the extension of the Brussels Convention to the member states of the European Free Trade Association.144 A recent paper by Professor von Mehren suggests that revisiting the subject may lead to fruitful avenues of compromise.145 The main question may, therefore, be one of political will.

In the absence of federal legislation and treaties, the only possible foundation for a federal solution to the problems of recognition and enforcement of foreign judgments is federal common law.146 And, indeed, some commentators have suggested that the political will needed might be furnished by the federal judiciary.147 In arguing for uniform judge-made rules, these commentators have, I believe, both misapprehended the nature of the problem and miscalculated the power of the federal courts to solve it.

143. See von Mehren, supra note 140, at 413 (noting that, although initialed, the U.S.–U.K. Convention had not been submitted to the Senate for ratification).
144. See BYRNE, supra note 140, at 8; Michael J. Bonell, Harmonization of Law Between Civil and Common Law Jurisdictions: The 1968 Brussels Jurisdiction and Judgments Convention—An Example to Follow, in ITALIAN NATIONAL REPORTS TO THE XIIIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 70, 85-86 (1990).
145. See von Mehren, supra note 138, at 14-19; see also Ronald A. Brand, Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance, 67 NOTRE DAME L. REV. 253, 327-28 (1991). Professor Brand makes the interesting point that changes in the nature of international arbitration, procedural and substantive, coupled with experience under the New York Convention, see supra text accompanying note 137, may have improved the climate for a multilateral treaty. See Brand, supra, at 292-95. He also notes changes in attitudes towards the extraterritorial application of U.S. laws. See id. at 295-96.
146. Professor Brand’s recent suggestion that the Federal Rules of Civil Procedure could provide uniform federal law on this subject for the federal courts, see Brand, supra note 145, at 319-22, is a non-starter. The Rules Enabling Act, 28 U.S.C. § 2072 (1988), does not authorize rules of this type. See Burbank, supra note 9, at 772-73.
B. Federal Common Law: Practical Considerations

Hilton v. Guyot\textsuperscript{148} represents the best of federal general common law, if not of opinion-writing. Here, after all, was the Supreme Court, in an exhaustive (and exhausting)\textsuperscript{149} opinion that collected authority wherever it might be found, settling a question that had vexed our courts for decades—indeed, since we became a country: what, if any, respect is due the judicial proceedings of the courts of another country?

And, length and prolixity aside, what a grand statement the Court’s opinion in Hilton was. The modern reader may remember only the requirement of reciprocity—do unto others as they would do unto you. Yet even as to that, the Court was less grudging than is sometimes recognized.\textsuperscript{150} Putting reciprocity to the side, the Court in Hilton—in 1895 be it recalled—essentially said that foreign judgments should be treated as if they issued from courts of neighboring states—as if they were entitled to full faith and credit.\textsuperscript{151}

Did I say that Hilton v. Guyot settled the question of the respect due to foreign judgments? That is notoriously not true as to sources of authority.\textsuperscript{152} But the case has been a fertile source of rules, leading to the substantial measure of uniformity\textsuperscript{153} that was the great hope, oft defeated, of the author of Swift v. Tyson.\textsuperscript{154} For Hilton was decided in what Paul Freund called “that spacious era before the Erie case, when federal judges in diversity cases were more than echoes of half-heard whispers of the state tribunals.”\textsuperscript{155} Since Erie ushered in dual revolu-

\textsuperscript{148} 159 U.S. 113 (1895).
\textsuperscript{149} The statement of the case occupies more than nine pages, id. at 114-23, the arguments of counsel some forty pages, id. at 123-62, the Court's opinion sixty-seven pages, id. at 162-229, and the dissent a mere six pages, id. at 229-34.
\textsuperscript{150} See id. at 210-29; Reese, supra note 147, at 790-92.
\textsuperscript{151} See Kurt H. Nadelmann, Non-Recognition of American Money Judgments Abroad and What to Do About It, 42 IOWA L. REV. 236, 240-41 (1957).
\textsuperscript{152} See Reese, supra note 147, at 786-88.
\textsuperscript{153} See BORN & WESTIN, supra note 1, at 565 (noting that “[m]ost state courts have adopted the basic approach to foreign judgments taken almost a century ago in Hilton v. Guyot”); R. Doak Bishop & Susan Burnette, United States Practice Concerning the Recognition of Foreign Judgments, 16 INT'L LAW. 425, 430 (1982) (noting that “the Hilton language still remains the predominant statement of the elements which must exist before a foreign-country judgment will be recognized in the United States”); Brand, supra note 145, at 261-62, 265-66 (noting extensive reliance on Hilton in decisions, statutes, and Restatements). Compare von Mehren, supra note 138, at 11 (observing the “substantial unity that, despite its federal character, United States recognition practice today exhibits”) with id. at 9 (stating that “the law of recognition and enforcement varies in significant details from state to state” (footnote omitted)).
\textsuperscript{154} 41 U.S. (16 Pet.) 1 (1842) (Story, J.); see also Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) (“Experience in applying the doctrine of Swift v. Tyson had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue.”).
there has been near unanimity among courts that, in the absence of a treaty or federal statute, the states are free to define for themselves the standards to use in recognizing foreign judgments, and that federal courts sitting to administer state law in diversity are bound to follow those standards. In doing so, however, whether in cases or statutes, the states have largely adopted the basic rules announced in Hilton, except that most of them have refused to follow the requirement of reciprocity. I believe that the resulting relatively high degree of homogeneity in fundamental domestic rules helps explain why arguments by commentators favoring uniform and uniformly applicable federal rules have fared so poorly. Thus, as a relic of general federal common law Hilton may also be a derelict, but it is a relatively harmless one. The main problem posed by our law of recognition in international cases may not be content but form, and the main problem of national interest in such cases may not in any event be our law of recognition.

It is one thing to conclude from an analysis of the relevant legal materials that United States law is substantially uniform in fundamental rules and quite another to persuade a foreign court seeking to apply a reciprocity requirement of the truth of that proposition, or for that matter of any other proposition about law found in cases. We should not be so far removed from our own debates about codification of the law that we cannot understand the skepticism of courts accustomed to codified law when confronted with arguments based on case law from one of fifty-one lawmaking jurisdictions. Indeed, we are not so far removed, for percep-

156. See Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 422 (1964) ("The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where congress has so directed—seems so beautifully simple, and so simply beautiful, that we must wonder why a century and a half were needed to discover them . . . ").

157. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (1987) ("Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.").

158. See id. § 481 cmt. d (observing that the reciprocity requirement "is no longer followed in the great majority of state and federal courts in the United States"); Frederick K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 AM. J. COMP. L. 1, 33 (1988) (noting that the rule of reciprocity announced in Hilton v. Guyot "is becoming obsolete"). The rejection of reciprocity, however, has not been universal. See Brand, supra note 145, at 263-65.

159. See supra note 147 and accompanying text.


tion of the problem was an important influence in the movement for uniform state recognition and enforcement legislation.\textsuperscript{163}

The inadequacy of uniform federal judge-made rules in this area would not be limited to matters of form.\textsuperscript{164} As this country's experience in attempting to work out an acceptable treaty with the United Kingdom demonstrates, even countries sharing a legal tradition can be deeply divided on matters of legislative jurisdiction and substantive policy, and these divisions, as well as differences concerning standards of adjudicatory jurisdiction, can prevent accord on standards for recognition and enforcement.\textsuperscript{165} Uniform domestic law could not bridge those divides unless it waved a white flag of surrender\textsuperscript{166} or were the product of an international lawmaking effort capable of forging compromises in a way that unilateral lawmaking is not.\textsuperscript{167}

The widespread rejection of reciprocity in this country since \textit{Hilton v. Guyot} may reflect the perceived institutional incapacity of courts to engage in the sort of give and take that will be necessary to solve the problems of judgment recognition and enforcement in international cases.\textsuperscript{168} And from that perspective, there is irony in reliance on the decision in \textit{Banco Nacional de Cuba v. Sabbatino}\textsuperscript{169} by those who


\textsuperscript{164} To be sure, uniform case law would be better than nonuniform case law. See von Mehren, \textit{supra} note 140, at 408.

\textsuperscript{165} See Nadelmann, \textit{supra} note 151, at 260-62; \textit{supra} text accompanying notes 141-42; cf. Burbank, \textit{supra} note 1, at 1465-66 ("In many cases, the real problems are not those of legislative jurisdiction; they are problems involving disagreement on matters of substantive law and state policy.").

\textsuperscript{166} Complete surrender would be impossible if, for instance, recognition and enforcement of a foreign judgment would violate due process. See Reese, \textit{supra} note 147, at 796; von Mehren, \textit{supra} note 138, at 15. Moreover, surrender on standards of recognition and enforcement would likely result in a lowest common denominator, the uniformity of which being the best thing one could say about it.

\textsuperscript{167} See Burbank, \textit{supra} note 1, at 1496.

\textsuperscript{168} See Hilton v. Guyot, 159 U.S. 113, 234 (1895) (Fuller, C.J., dissenting) ("[I]t is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary."); cf. Patrick J. Borchers, \textit{Professor Brilmayer and the Holy Grail}, 1991 \textit{WIS. L. REV.} 465, 480 (reviewing \textit{LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS} (1991)) ("Tit for Tat! may be an acceptable game strategy, but it hardly seems like a way to decide real lawsuits involving real parties. Certainly it is not likely to inspire public confidence in the courts."); Burbank, \textit{supra} note 1, at 1480 (noting the danger that a court interpreting a treaty will "compromise the ability of those primarily charged with the conduct of foreign relations effectively to implement our national interests through dialogue with other nations"); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-52 (D.C. Cir. 1984) (rejecting interest balancing in determining prescriptive jurisdiction). \textit{But see Moore, \textit{supra} note 147, at 255-56 (arguing that state rejections of reciprocity lead to the result that "judgments of other nations are largely enforced in this country, while our judgments are not enforced in foreign courts").}

\textsuperscript{169} 376 U.S. 398 (1964).
advocate uniform federal judge-made rules. For *Sabbatino* is best regarded not as authority for an expansive federal common law of foreign affairs but rather for the power of the federal judiciary to make uniformly applicable rules (the act-of-state doctrine) designed to protect courts from entanglements in, and interbranch conflicts about, matters for which they are not institutionally suited. Indeed, the Court in *Sabbatino* also refused to extend the reciprocity of *Hilton v. Guyot* “to the question of standing of sovereign states to sue,” observing that courts’ “powers to further the national interest in foreign affairs are necessarily circumscribed as compared with those of the political branches.”

C. Federal Common Law: Sources of Authority and Sources of Rules

How far, then, could federal common law extend in governing the recognition and enforcement of foreign judgments? The broadest sweep for federal judge-made law would involve uniform rules binding in all cases in federal and state court alike. The narrowest would find state law governing in all cases, no matter what the court, except where a particular state rule was recognized to be hostile to or inconsistent with federal interests. The former is too broad and the latter too narrow. The truth lies somewhere in the middle, very close to what I take to be the law today.

I have already suggested a difficulty in regarding *Sabbatino* as authority for an expansive federal common law of foreign affairs. It is not that the Court eschewed the most obvious peg upon which to hang federal judicial authority when it denied that the act-of-state doctrine was required by the “text of the Constitution.” The Court seems there to have been denying that the Constitution was the source of a particular rule (“irrevocably remov[ing] from the judiciary the capacity to review the

170. See Moore, supra note 147, at 269-70, 273-75.
173. *Id.*
174. See supra text accompanying note 171.
175. *Sabbatino*, 376 U.S. at 423. Specifically, the Court held that “the text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.” *Id.*
validity of foreign acts of state"176), not that it was a source of authority for judge-made law.177 Even if, however, the Constitution plausibly requires uniformity as to acts of state, a doctrine described by the Court in Sabbatino as “concern[ing] the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations,”178 the requirement of uniformity does not automatically extend to other areas in which “international relations” may be implicated.179 Other Supreme Court decisions that tend to be cited in support of broad common-law powers are even less helpful, either because they involved past federal executive action with which state law could be deemed inconsistent180 or because state law, on its face or as applied, was so intrusive as to threaten the future ability of the federal executive to perform its constitutional functions properly.181

Because the fundamental rules in most states, judge-made or statutory, derive from Hilton v. Guyot,182 if there are serious risks of

176. Id.
177. See id. ("The act of state doctrine does, however, have 'constitutional' underpinnings."); id. at 427 & n.25 (noting that various provisions of the Constitution support determining the scope of the act-of-state doctrine according to federal law by "reflecting a concern for uniformity" in foreign relations and "indicating a desire to give matters of international significance to the jurisdiction of federal institutions").
178. Id. at 423. In fact, the Court left open "whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court." Id. at 425 n.23.
179. In asserting, as well as denying, federal authority, we should not address "a valid concern" with "an overcompensating blanket rule." Koh, supra note 171, at 2382.
180. See United States v. Pink, 315 U.S. 203, 223 (1942); United States v. Belmont, 301 U.S. 324, 327 (1937) (both holding that an agreement between the Soviet Union and the United States, in which all claims held by the Soviet Union against American nationals were assigned to the United States, could not be infringed upon by any policy of the State of New York because “no state policy can prevail against the international compact here involved”).
181. See Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding an Oregon probate law that provided for "escheat where a nonresident alien claims personality unless . . . there is a reciprocal right of a United States citizen to take property on the same terms as the citizen in a foreign nation" unconstitutional as applied because "it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with . . . them"). As Justice Harlan, author of the Court's opinion in Sabbatino, observed in his concurring opinion in Zschernig:

If the flaw in the statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that that characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate. For example, the Uniform Foreign Money-Judgments Recognition Act provides that a foreign-country money judgment shall not be recognized if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

Id. at 461 (Harlan, J., concurring). For an argument that "Zschernig's incompleteness is no reason for converting its curb on state law into a presumption in favor of federal law," see James A.R. Nafziger, State Law in International Cases, in 1990 AM. SOC'Y INT'L. L. PROC. 332, 335. For a penetrating analysis of Zschernig, see Harold G. Maier, The Bases and Range of Federal Common Law in Private International Matters, 5 VAND. J. TRANSNAT'L L. 133 (1971).
182. 159 U.S. 113 (1895). See supra text accompanying notes 153, 158.
disruption, they likely have a federal (judicial) source. Moreover, as others have observed, the lead candidate for federal displacement would be the requirement of reciprocity that most states have already rejected. Other inquiries under state recognition law that could prove embarrassing in the conduct of the nation’s foreign relations seem rarely, if ever, of consequence.

Thus, assuming that the Constitution’s foreign relations or foreign trade powers, without more, could ground uniform judge-made rules of recognition and enforcement, a showing could not be made, at least under most of the Court’s recent federal common-law decisions, to support uniform rules as opposed to state law borrowed as federal law except where hostile to or inconsistent with federal interests.

The power to displace state law rules exists in cases brought in both federal and state court, although, as we have seen, it is hard to speak of the state law rules of recognition and enforcement that are normally applicable in state court as “really federal law.” Under an approach to federal common law that takes the Rules of Decision Act seriously, the difficulty with the notion of judicial borrowing is no less in cases brought in federal court, where that statute cannot simply be wished away.

If that were all, we would be left with the federal common-law regime of narrowest scope described above. But that is not all, or so

---


184. See supra text accompanying note 158. For expressed doubt that Zschemig even requires states to abandon reciprocity, let alone to apply federal law, see SCOELES & HAY, supra note 138, § 24.35, at 964-65 n.5.

185. See Brand, supra note 145, at 275 (noting that considerations of public policy may, but rarely do, result in denial of recognition or enforcement of foreign judgments); Juenger, supra note 158, at 22-23 (discussing the difficulty of determining when a state may legitimately refuse to recognize a foreign judgment because it conflicts with important forum policies); id. at 36-37 (discussing judgments from biased tribunals and procedures incompatible with due process).

186. See generally Maier, supra note 181; Hill, supra note 171.


188. This is essentially the conclusion reached by Professor Peterson in a thoughtful article. See Courtland H. Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Laws, 72 COLUM. L. REV. 220, 234-38 (1972); see also Homer D. Schaaf, The Recognition of Judgments from Foreign Countries: A Federal-State Clause for an International Convention, 3 HARV. J. ON LEGIS. 379, 395-98 (1965-66) (discussing the reluctance of federal courts to develop federal common law in the absence of a statutory or constitutional basis for doing so).

189. See supra text accompanying note 53.

190. See supra text accompanying notes 51-53.

191. See supra paragraph preceding note 174.
courts and commentators seem to think, without bothering to explain why. In cases involving the recognition of foreign judgments that are both brought in federal court and brought under federal substantive law, the tendency has been to look directly to federal law, or at least not to mention state law.\footnote{192. See 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4473 (1981) ("In deciding federal question cases, there is no apparent reason to consult state law and federal courts routinely determine the res judicata effects of foreign judgments without any reference to state law."); see also von Mehren & Patterson, supra note 183, at 39 ("If the issue to which a foreign judgment relates is a federal question . . . the court . . . would apply federal law . . . ."); Eric D. Ram, Note, Reciprocal Recognition of Foreign Country Money Judgments: The Canada-United States Example, 45 FORDHAM L. REV. 1456, 1481 (1977) ("If the recognition [of a foreign judgment] claim is ancillary to one involving a federal question . . . the suit upon the judgment will be decided according to federal common law.").}

As we have seen, under traditional federal common-law analysis, the question whether a federal substantive claim is precluded by prior proceedings is a question as to which federal lawmaking competence exists no matter what the rendering forum.\footnote{193. See supra text accompanying note 97.} This includes a foreign forum. It would be ironic to invoke the homogeneity of domestic law in this area as an argument against the use of uniform federal judge-made rules in federal question cases. For it was, I have argued, the existence of such uniform judge-made rules, albeit in different garb, that largely explains the current state of recognition law.\footnote{194. See Burbank, supra note 9, at 765 & n.168; supra text accompanying notes 152-55, 158-60.} Indeed, the substantial similarity of federal and state rules to determine the preclusive effects of foreign judgments seems instead an argument for permitting the federal courts, in federal question cases, to protect federal interests directly. State interests are negligible, and the administrability costs inherent in references to state law, including those associated with the selection of the state whose law was to be borrowed, would be difficult to justify.\footnote{195. Cf. Burbank, supra note 9, at 765-70 (describing costs that would be incurred if uniform federal preclusion rules for federal question judgments of federal courts were not adopted). I reach a different conclusion as to the governing law in a state-court action on a federal claim. See supra text accompanying note 31.}

Moreover, it may not be inappropriate to consider that, in addition to protecting federal interests that underlie the particular substantive scheme in suit, uniform federal rules of recognition and enforcement could safeguard the general federal interests in foreign affairs and foreign trade. Particularly because "it is not clear that the uniformity inquiry need, or that it should, be cabined by existing . . . law,"\footnote{196. Burbank, supra note 9, at 770 n.172.} we are perhaps entitled to rely on the general proposition that federal law is better calculated than state law to protect federal interests,\footnote{197. Cf. supra text accompanying notes 119-21.} or at least to do so when multiple federal, and few discernible state, interests are implicated.
Such reliance is, of course, more problematic under an approach to federal common law that takes the Rules of Decision Act seriously. Yet, to recur to the distinction suggested by Sabbatino, that statute need not, and should not, be “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.” On the assumption of continuing substantial homogeneity as between federal and state recognition law, the administrability costs of reference to state law might be thought too high to justify “distinguishing between federal law on the front lines and federal law held in reserve.” If, on the contrary, the analysis contemplates either existing differences or possible changes in the law of recognition and enforcement, federal or state, the costs of applying state law would more often include the possible loss of federal substantive rights and thus justify a conclusion that the federal substantive statute requires the application of uniform federal recognition law.

The case for the application of federal judge-made rules of recognition and enforcement to foreign judgments is hardly watertight even when the issue arises in a federal question case in federal court. It crumbles to dust when the case is instead a state-law diversity action. State interests are directly implicated, as is the articulated federal interest against different outcomes on the basis of citizenship in diversity cases. Differences between state and federal law on the recognition and enforcement of foreign judgments could easily and materially affect “the character or result of the litigation.” Moreover, such differences would be likely to affect choice of forum, whether or not they could be characterized as “inequitable administration of the laws.” It appears that, according to the Hanna test, state law should be applied to foreign judgments in diversity cases. Even if the Supreme Court’s approach to these problems still permits the consideration of other federal interests, it is not clear how they could tip the balance in favor of federal law. For as we have

198. 376 U.S. 398 (1964); see supra text accompanying notes 175-78.
199. Burbank, supra note 9, at 770.
200. Id. at 765. I use the term “federal law-in-reserve” to describe federal law that “acts only as a check against hostile or inconsistent state law.” Id. at 764.
201. Obviously, I do not share the view, which the Rules of Decision Act renders incoherent, that in federal question cases “there is no apparent reason to consult state law.” See 18 WRIGHT ET AL., supra note 192, § 4473.
202. See Burbank, supra note 9, at 784 (“[W]hereas 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.”).
204. Hanna, 380 U.S. at 468 n.9.
205. Id. at 468; see Burbank, supra note 9, at 785.
206. See Burbank, supra note 9, at 788-91.
seen, the general federal interest in foreign affairs or foreign trade is not sufficient to require uniform federal rules. In sum, Hilton v. Guyot might be decided the same way in 1995 as it was in 1895—although that seems unlikely with respect to the question of reciprocity—but not because it reflects an enduring source of authority.

D. Legal Sources: Additional Complexities

Whatever the governing recognition law in our courts, federal or state, and whatever the source of the rules provided by that law, the rules themselves may, at key points, require reference to foreign law. The extent to which such references are appropriate is a difficult issue, but one that has occupied scholars more than courts. The same is true regarding the issue of exactly what law or standards should be consulted when a reference to “domestic law” is required or appropriate. Treaties could answer these questions, but we should not hold our breath. I conclude by offering a few preliminary thoughts about this last interesting but relatively neglected set of questions.

Much ink has been spilled on the reasons for recognizing and enforcing foreign judgments. At various times in our history, lacking direction from positive law, courts have sought to justify their positions in the felt necessities of conflicts theory or in the mists of comity. More recently, commentators have focused attention on the relevance to foreign judgment recognition practice of the policies underlying domestic law.

---

207. See supra text accompanying notes 174-90.
208. See supra text accompanying note 168.
209. Reciprocity aside, Hilton might be decided the same way in 1995 because the 1895 decision has proved such a “fertile source of rules” for the states. See supra text accompanying note 153. State law would now be applicable under the Rules of Decision Act.
211. See Juenger, supra note 158, at 15 (describing the “mirror-image principle,” under which “countries measure[] the foreign court’s jurisdiction by reference to the bases found in their own laws”).
212. See supra text accompanying notes 138-45.
214. See Reese, supra note 147, at 784 (noting that the doctrine of “comity” is often used by American courts to justify recognition of foreign judgments while English courts prefer the doctrine of “legal obligations of foreign judgments”); Smit, supra note 213, at 52-55 (observing that comity has been invoked frequently because of its convenient vagueness).
215. See Smit, supra note 213, at 56; Reese, supra note 147, at 784.
Major differences of opinion have emerged depending upon whether those policies are not only weighed, but also defined, from an interjurisdictional perspective, or in other words, whether the relevant “domestic law” is that governing intrastate cases or that governing interstate cases.  

Granting the inadequate explanatory power of comity, it does suggest a policy of accommodation. We may be required to re-rationalize Hilton v. Guyot, but we are probably not free to ignore it. The advancement of intramural preclusion policies did not exhaust the Supreme Court’s agenda in that case, and, reciprocity aside, it is difficult to believe that the Court would stop there today. More generally, it hardly seems a plausible normative posture today that “the principles underlying the doctrine of res judicata provide the only logical and satisfactory explanation for recognition of foreign judgments.”

216. Compare Smit, supra note 213, at 56 (rejecting interstate perspective) with Peterson, supra note 213, at 302-08 (embracing interstate perspective). See Casad, supra note 210, at 59-60. Elaborating his views on the appropriate policy analysis, Professor Peterson writes:

Several conclusions may be drawn at this point. First, it is apparent that new policy factors appear when the res judicata doctrine is lifted from its domestic context and applied to nondomestic judgments. If we truly wish to account for these factors in a policy-oriented approach to the problem of foreign-country judgments, however, we must be prepared to account for those policies which strengthen the res judicata rationale as well as for those which weaken it. Two such strengthening factors have been described as the ordering principle and the policy of finality for American judgments raised abroad. These policies complement the policy of ending litigation, which may still be regarded as the basic ingredient of the res judicata rationale.

Peterson, supra note 213, at 307; see also Peterson, supra note 188, at 240 (defending the interstate perspective).

Professor Peterson’s approach has won the day, at least in the literature. See Casad, supra note 210, at 58-61; von Mehren & Trautman, supra note 210, at 1603-06; Arthur T. von Mehren, Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements, 167 RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL 9, 20-54 (1980).

217. See von Mehren & Trautman, supra note 210, at 1603 (describing “comity” as a “general mode of expression that at most expresses an attitude or disposition”).

218. See supra text accompanying notes 152-60, 201-09.


220. See Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 115 (1987) (holding that a court, in determining whether it has personal jurisdiction over an alien defendant, must “consider the procedures and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by [an American] court” (emphasis in original)); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (noting that courts should consider “concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes”); Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974) (stating that the refusal to enforce an international arbitration agreement “would invite unseemly and mutually destructive jockeying by the parties” that would “damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements”); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”).

221. Smit, supra note 213, at 56.
Just as the Full Faith and Credit Clause and its implementing statute do not hold a monopoly on federalism values in this country,\textsuperscript{222} even less do they hold a worldwide monopoly on law as an instrument of cooperation and unification. \textit{Hilton v. Guyot} was distinctive in part because, apart from the requirement of reciprocity, it cut against the deep grain of American isolationism.\textsuperscript{223} Those who would ignore foreign law and policy in the recognition area are in reality calling for a return to isolationism.\textsuperscript{224}

To be sure, shaping our law of recognition of foreign judgments so as, among other things, to enhance \textit{international} cooperation does not require, were it possible, replicating the particular method of achieving \textit{national} unity that Congress selected in the Full Faith and Credit Statute.\textsuperscript{225} It is, however, difficult to imagine a system that is concerned about international accommodation but makes no references to foreign law.

There are, in any event, good reasons not to replicate interstate recognition practice in the international arena. Whether or not the substantial theoretical attraction of requiring strict compliance with the rendering court’s jurisdictional standards\textsuperscript{226} is thought to justify the costs of policing compliance with foreign law,\textsuperscript{227} it would be very difficult to defend a regime of preclusion for jurisdictional findings in foreign judgment cases identical to the regime that has evolved in interstate cases.\textsuperscript{228} Even if we are willing to abide by the foreign tribunal’s factual findings,\textsuperscript{229} there should be some opportunity to test whether that tri-

\textsuperscript{222}. \textit{See supra} text accompanying notes 114-16.


\textsuperscript{224}. \textit{See Smit, supra} note 213, at 75; Hans Smit, \textit{International Res Judicata in the Netherlands: A Comparative Analysis}, 16 \textit{Buff. L. Rev.} 165, 176 n.63 (1966). This is not Professor Smit’s only such call. \textit{See Burbank, supra} note 1, at 1482 & n.151, 1483 n.153, 1486 n.177, 1491 n.208.

\textsuperscript{225}. \textit{See supra} text accompanying note 9; \textit{supra} note 15.

\textsuperscript{226}. \textit{See} Juenger, \textit{supra} note 158, at 17 n.65 ("[T]here is Supreme Court authority which suggests that the recognition state may refuse to honor the judgment of a sister-state court that lacked 'jurisdiction,' not under constitutional standards but solely pursuant to its own law." (citing Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939))); von Mehren & Trautman, \textit{supra} note 210, at 1610, 1623, 1627-28 (discussing the "hallmark" function of the jurisdictional test for determining whether to recognize a foreign judgment).


\textsuperscript{228}. \textit{See} Sherrer v. Sherrer, 334 U.S. 343, 356 (1948) (barring a collateral attack on a divorce decree where the defendant had an opportunity to contest the jurisdictional issues); American Sur. Co. v. Baldwin, 287 U.S. 156, 166-67 (1932) (holding that a prior action in state court barred a subsequent suit in federal court seeking to enjoin the enforcement of the prior judgment for want of jurisdiction); Baldwin v. Iowa State Traveling Men’s Ass’n, 283 U.S. 522, 525-27 (1931) (ruling that a defendant’s special appearance in federal court barred the defense of want of jurisdiction in a subsequent federal suit upon the judgment).

\textsuperscript{229}. \textit{But see} von Mehren & Trautman, \textit{supra} note 210, at 1627 ("[T]he rendering court can assume jurisdiction on the basis of lax or dishonest fact finding in a contested proceeding as well as
bunal’s assertion of authority to adjudicate was fundamentally fair by domestic standards. 230

If the question is not jurisdiction but rather the scope of preclusive effects, there is better reason to adhere to the law of the rendering court. In international cases as in interstate cases, the answer to the question whether a recognizing court can or should give the rendering court’s judgments greater preclusive effects than they would have at home depends upon policy focus. Those who see in full faith and credit or foreign judgment recognition practice only the policies of intrastate preclusion law are not likely to balk at giving either interstate or foreign judgments greater preclusive effect than they have at home. 231 After all, if the recognizing jurisdiction’s law calls for preclusion, the shared goal of putting an end to litigation will be served, and the rendering jurisdiction will have no complaint. 232

The argument is short-sighted. A rule of greater preclusive effects, once known, could have a consequential impact on the conduct of the initial litigation, as risk-averse parties treat what should have been a local skirmish as if it were a world war. 233 This escalation would impose unwanted costs on the foreign court system. Finality is not the only goal of full faith and credit, 234 and it should not be the only goal of foreign judgment recognition practice. 235

Another reason not to accord greater preclusive effects to foreign judgments than they would have at home relates to the costs of the contrary rule for litigants. 236 Further, in the context of a federal system, “domes-

in one by default.”); id. at 1626-27 (stating that the absence of review in the original litigation by an impartial tribunal, as well as the absence of “political, economic, and legal ties,” justifies different treatment).

230. See BORN & WESTIN, supra note 1, at 585; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. c (1987) (discussing the refusal to recognize a foreign judgment for lack of jurisdiction over the defendant in the rendering court). This formulation masks an additional inquiry into the appropriateness of the rendering court’s exercise of jurisdiction according to a standard not employed, and perhaps not employable, by the rendering court but supported by the facts. See Juenger, supra note 158, at 17.


232. See Casad, supra note 210, at 75.


235. See Peterson, supra note 188, at 239-48; supra text accompanying notes 219-24.

236. See supra text accompanying note 117. Professor Peterson has described these costs in terms of uniformity in the following manner:
tic law" can be an ambiguous referent. For one litigating abroad under a regime of greater preclusive effects and concerned about subsequent litigation in this country, the rule could require research in the preclusion law of fifty-one jurisdictions.237

Finally, where it is deemed appropriate to resort to "domestic law" or "domestic standards"238 as a check on foreign judgment recognition and enforcement practice, these and other concerns counsel against insistence, where possible, on detailed compliance with local law and in favor of checks provided by uniform federal law.239 Usually, as in the

---

A second conception of the ordering principle turns the emphasis away from the relations of nations and back to the relations of the litigant parties. This can best be seen in its negative aspect. A flat refusal to recognize the effect of foreign adjudication does not order the legal relationships of the litigants, but on the contrary tends to confuse these by producing conflicting duties or contradictory relations as between the two or more legal systems with which each of these individuals has contact. The promotion of uniformity, whether in terms of status or rights or duties, is the policy taproot of most choice of law rules in the conflict of laws scheme. That policy would seem to be intensified in its application to the foreign judgments problem, because in the latter area the legal relations of the individual have become in some degree fixed by the foreign adjudication. Adherence to the standard set by the foreign judgment will promote this uniformity just as ignoring the foreign judgment will tend to destroy it. Enforcement and recognition can therefore serve an ordering principle with respect to individuals, by providing a rational process for sorting out their private legal relations when they are caught in a snarl of litigation in two different legal systems.

Peterson, supra note 213, at 306 (footnote omitted); cf. Casad, supra note 210, at 75 ("[G]iving the judgment more extensive issue preclusion effect than it would have in the rendering country could often mean unanticipated prejudice to the losing party and unexpected benefit to the winner.").

237. See Peterson, supra note 213, at 307 n.85; supra text accompanying notes 161-63. Of course, uniform federal law could obviate this problem. See Juenger, supra note 158, at 3 n.6 (discussing a draft of Swiss legislation that would federalize the "entire body of law dealing with foreign country judgments").

238. See supra text accompanying note 230.

239. Professor Juenger provides an acute analysis with respect to jurisdictional standards:

The largest single group of reporting countries measures the foreign court's jurisdiction by reference to the bases found in their own laws. At first blush, the "mirror-image principle" appears eminently fair. What could be more reasonable than to concede as much jurisdiction to the rendition state as the recognition state claims for itself? In reality, however, this version of the Golden Rule is at once too narrow and too broad. It is too narrow because the forum's rules may be unduly restrictive, which jeopardizes the recognition of judgments that rest on an otherwise unobjectionable basis. Conversely, the mirror-image principle projects into the foreign legal system all of the recognition state's jurisdictional assertions, however extravagant they may be. In effect, it endorses foreign exorbitance by honoring judgments of courts that lack a reasonably close relationship to the dispute.

No doubt, the objective of the mirror-image principle, i.e., the congruence of "indirect" and "direct" jurisdiction, has a certain visceral appeal. But the adoption of a single standard for adjudication and recognition makes sense only if that standard is finely tuned. To work well, the jurisdictional bases used must be, on the one hand, sufficiently broad and, on the other, subject to constraints that
case of federal limitations on assertions of adjudicatory jurisdiction\textsuperscript{240} or on provisions for notice and an opportunity to be heard,\textsuperscript{241} the rules will have their source in the Constitution. Occasionally, there may be a pertinent treaty that, although not dealing directly with recognition and enforcement, indirectly constrains the operation of otherwise applicable law. For instance, it would subvert the Hague Service Convention\textsuperscript{242} to deny recognition to a foreign judgment in an action in which service complied with the Convention but did not satisfy the detailed requirements of local law.\textsuperscript{243}

My hope, of course, is that before too long, the applicable uniform federal law will be provided by a treaty or series of treaties directly regulating the recognition and enforcement of foreign judgments.

effectively curtail excessive assertions. \textit{Mechanisms to achieve fine-tuning exist only in federal nations such as the United States, whose Supreme Court exercises constitutional control over state court jurisdiction,} and in quasi-federal systems such as the European Communities, where the Brussels Convention establishes jurisdictional rules that are binding on the member states and whose interpretation is supervised by the Communities' Court of Justice.

Juenger, supra note 158, at 15 (emphasis added) (footnotes omitted).

\textsuperscript{240} See Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).


\textsuperscript{243} See Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986).