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INTERJURISDICTIONAL PRECLUSION AND FEDERAL COMMON LAW: TOWARD A GENERAL APPROACH†

Stephen B. Burbank††

In this paper, I will present some tentative conclusions from work-in-progress. My thesis is that problems of interjurisdictional preclusion always, and that even preclusion problems domestic to state courts in one state may, present problems in the relationship between federal and state law. I believe further that progress can be made in solving the mysteries of interjurisdictional preclusion by recognizing that, apart from the Constitution, unless a federal statute provides or chooses preclusion law, the only putative federal preclusion law available is federal common law. Finally, contrary to conventional formulations, I believe that the full faith and credit statute¹ does not provide or choose preclusion law. The perspective of federal common law is therefore appropriate in considering the law that governs the preclusive effects of a state court judgment in the courts of the same state, which, by reason of the statute, is also the law that governs its interjurisdictional effects.

At the start, I acknowledge a substantial intellectual debt to Professor Ronan Degnan, whose 1976 article, *Federalized Res Judicata*,² dispersed fog that, in this area as in others involving the relationship between federal and state law, rolled in after the Supreme Court's decision in *Erie Railroad v. Tompkins*.³ Perhaps his most important contribution was the reminder that the full faith and credit statute speaks to the preclusive effects of state court judgments in

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†† Associate Professor of Law and Associate Dean, University of Pennsylvania. This paper was delivered to the Section on Civil Procedure at the annual meeting of the American Association of Law Schools on January 5, 1985. It summarizes the tentative conclusions of the author on the problems treated. A more comprehensive article is in preparation. Although that will be the occasion to thank the many people who have assisted me in this work, I want to acknowledge my gratitude to Frank Goodman and Linda Silberman, my colleagues and friends, for their especially valuable assistance in this preliminary phase.

¹ The full faith and credit statute provides that "[s]uch Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1982).

² Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

³ 304 U.S. 64 (1938).

federal courts, and the demonstration that, as a result, in a federal diversity suit involving a prior state judgment, *Erie* jurisprudence must yield to the statutory command.⁴ Professor Degnan's reminder also made it clear that the full faith and credit statute must be reckoned with not only in subsequent diversity cases, but *whenever* a state court judgment is claimed to have preclusive effect in federal court. Although he did not pursue those issues, they have been the focal point of recent decisions by the Supreme Court in federal cases involving assertions of federal substantive rights.

Professor Degnan did not neglect the problem of federal judgments, which neither the full faith and credit clause of the Constitution⁵ nor the full faith and credit statute appears to include. He painted two historical pictures. The first depicts the Court deriving the obligation to respect federal judgments from the full faith and credit statute.⁶ In the second, depicting the law that measures the basic obligation, the Conformity Act⁷ dominates the background, leading the Supreme Court to tie the preclusive effects of all federal judgments to those prescribed by the courts of the state in which they sit.⁸ In the foreground, with 1938 a clear divide, stand the Federal Rules of Civil Procedure and *Erie*. Degnan noted the gradual acceptance, after some *Erie*-inspired doubts, of the proposition that uniform federal law governs the preclusive effects of federal judgments adjudicating matters of federal substantive law.⁹ Building on the rejection of conformity in the Federal Rules, the impact of enhanced procedural opportunities on modern preclusion law, and on a few pre-1976 cases holding that federal preclusion law controls the effects of federal judgments adjudicating matters of state substantive law,¹⁰ he proposed the following as a general rule:

*A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.*¹¹

⁴ See Degnan, *supra* note 2, at 750-55. The Rules of Decision Act provides that state law applies "except where . . . Acts of Congress otherwise require or provide." 28 U.S.C. § 1652 (1982). The full faith and credit statute requires federal courts to give the same effect to a state court judgment that courts in the rendering state would give it.

⁵ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

⁶ See Degnan, *supra* note 2, at 744-50.

⁷ Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197.

⁸ See Degnan, *supra* note 2, at 755-57.

⁹ See *id.* at 759-60.

¹⁰ See *id.* at 760-71.

¹¹ *Id.* at 773 (emphasis in original).

Professor Degnan's proposed general rule has the appeal of symmetry, but it also has the substantial advantages of simplicity and predictability, which are important where legal rules shape litigation conduct, as do preclusion rules. In my view, however, those advantages are purchased at a cost too great. Applied to federal judgments adjudicating matters of state substantive law, as it has been by some lower federal courts,¹² the rule risks the sacrifice of state substantive policies and of the federal policy against different outcomes on the basis of citizenship. Applied to state judgments adjudicating matters of federal substantive law, as it has been by the Supreme Court in recent cases,¹³ the rule risks the sacrifice of federal substantive policies.

With respect to federal judgments, my research suggests that we need some new historical pictures. Considering first the obligation to respect federal judgments, it is not just that the words of the full faith and credit statute hardly can bear the interpretation that all federal court judgments are covered.¹⁴ It is also that the statute has always provided the measure of the obligation to respect the judgments it covers: interjurisdictional preclusive effects are measured by domestic preclusive effects.¹⁵ Federal courts in territories, countries subject to the jurisdiction of the United States, and the District

¹² See, e.g., *Silcox v. United Trucking Serv.*, 687 F.2d 848, 852 (6th Cir. 1982); *Miller v. A.H. Robins Co.*, 565 F. Supp. 24, 25 n.2 (S.D. Fla. 1983).

¹³ See *infra* text accompanying notes 73-80. The word "adjudicating" in this context includes the preclusion of federal claims and issues not raised as such in the initial action.

¹⁴ As enacted in 1790, the statute provided that the duly authenticated "records and judicial proceedings of the courts of any state . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122. The obligation thus imposed was extended to the records and judicial proceedings of the courts "of the respective territories of the United States, and countries subject to the jurisdiction of the United States" by the Act of Mar. 27, 1804, ch. 55, 2 Stat. 298, 299. "It would be little more than an act of blind heroism to contend that federal courts are included as the courts of a country 'subject to the jurisdiction of the United States.' The rendition of this phrase as referring to a 'possession' of the United States in the present codification of the Judicial Code seems to reflect a much more probable interpretation." 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4468, at 651 n.10 (1981) [hereinafter cited as WRIGHT, MILLER & COOPER].

¹⁵ With respect to the interjurisdictional effects of the proceedings of state courts in other states, the statute implements the full faith and credit clause of the Constitution. See *supra* note 5. The full faith and credit statute's extension of the obligation to federal courts has been thought to represent a "nearly contemporaneous" construction of the constitutional provision by the first Congress. Degnan, *supra* note 2, at 744.

Congress's power to prescribe the effects of federal judicial proceedings does not derive from article IV, § 1. E.g., *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 134 (1875); *Embry v. Palmer*, 107 U.S. 3, 9-10 (1883); see also *infra* text accompanying notes 20-22.

of Columbia¹⁶ can be assimilated to state courts for purposes of the measure of interjurisdictional effects the statute provides. But for other, geographically dispersed, federal courts there is no obvious domestic referent or model. The problem of domesticating federal judgments for purposes of the full faith and credit statute might appear to have inspired the rule stated in early cases that the preclusive effects of a federal court judgment are determined by the preclusion law applied in the courts of the state in which the rendering federal court sits. But the first case to state the rule did not mention the statute,¹⁷ and the first case to suggest the relevance of the statute did not involve a federal court that sat in a state.¹⁸ Moreover, long before 1938 the Supreme Court held that, at least in some cases, federal preclusion law governs the effects of federal judgments adjudicating matters of federal substantive law.¹⁹

In fact, the first decision of the Supreme Court dealing with the problem of respect for federal judgments suggested that the obligation to respect the federal judgment involved in that case derived from the federal statutes that created the court and vested it with

¹⁶ See *Embry*, 107 U.S. at 10 ("The question then arises, what causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment . . ."); *infra* text accompanying note 18. It is not necessary to read *Embry* as interpreting the statute to cover the judicial proceedings of all federal courts. But see Degnan, *supra* note 2, at 746-47. Early commentators suggested that the District of Columbia, whose court's judgment was involved in *Embry*, was a "'country subject to the jurisdiction of the United States.'" Note, *Conclusiveness and Effect of Judgments as between Federal and State Courts*, 21 U.S.C.A. Rep. 478 (1897). See also Note, *Res Judicata as a Federal Question*, 25 HARV. L. REV. 443, 445 (1912). In any event, the Court had already posited an obligation to respect federal judgments and prescribed the effects of a federal judgment without relying on the statute. See *Dupasseur*, 88 U.S. (21 Wall.) at 134-35; *infra* text accompanying note 20. Moreover, in *Embry* itself the Court relied on a prior decision in which it had recognized, albeit without reference to the supplemental act of 1804, that "the act of Congress does not apply to the courts of the United States . . ." *Turnbull v. Payson*, 95 U.S. 418, 423 (1877), cited in *Embry*, 107 U.S. at 10. In some cases, however, the Court did rely on the full faith and credit statute in according preclusive effect to the judgments of federal courts. See, e.g., *Metcalf v. Watertown*, 153 U.S. 671, 675-76 (1894).

¹⁷ See *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875).

¹⁸ *Embry v. Palmer*, 107 U.S. 3 (1883).

¹⁹ See, e.g., *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903), in which the Court noted:

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

Id. at 517. See also *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 290-91 (1906); 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4468, at 656-57. But *Deposit Bank* hardly "made explicit" the rule "that federal rules measure at least most *res judicata* questions" as Wright, Miller, and Cooper argue. *Id.* at 656.

jurisdiction.²⁰ The notion that implicit in, and necessary to fructify, a congressional grant of jurisdiction to a federal court is an obligation on the state courts not by their own lights to disregard a judgment entered by that court should win easy acceptance from those accustomed to federal common lawmaking. Perhaps in the nineteenth century the decision involved a more extreme form of "judicial legislation"²¹ than the wrenching out of shape of the full faith and credit statute, but again, federal common law is not a recent phenomenon. In any event, under the decision that advanced the suggestion, state law was held to furnish the measure of respect due the federal judgment, and like the basic obligation itself, the state preclusion rules were binding throughout the nation under the supremacy clause.²² Here, in other words, is a theory of respect for

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

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

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

Dupasseeur v. Rocherau, 88 U.S. (21 Wall.) 130, 134 (1875) (emphasis added). See 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4468, at 654.

²¹ Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 COLUM. L. REV. 470, 484 (1904).

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The only effect that can be justly claimed for the judgment in the Circuit Court of the United States, is such as would belong to judgments of the State courts rendered under similar circumstances. *Dupasseeur & Co. were citizens of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the State courts.* It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment . . . rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rocherau, if it had been rendered in a State

federal judgments that has the promise of coherence. The problem in each case is to determine the law that governs the preclusive effects of a federal judgment. Once determined, that law, whether federal or state, is binding under the supremacy clause because, or to the extent that, it defines the measure of the basic obligation to respect the judgment.

A new historical picture is also needed for the law governing the preclusive effects of federal judgments. I have already noted that 1938 marked no great divide with respect to judgments on federal questions,²³ and that there was thus no monolithic rule requiring the use of state law prior to that time. Moreover, the impetus to apply state law to federal diversity judgments lay less in the Conformity Act than in the duty of a federal court exercising diversity jurisdiction to "administer the laws of the State," by which the Court meant state substantive law.²⁴ Thus, whether the Court applied state preclusion law or federal preclusion law to federal judgments, the emphasis was on the source of the substantive law administered by the rendering court. That may come as a surprise to those who have been taught to think of preclusion as procedure and to think of procedure as disembodied from substantive rights. In the nineteenth century and beyond, the central function of preclusion law was thought to be the protection of the substantive rights embodied in a judgment.²⁵

So much for history. I will not belabor my analysis of the law that governs the preclusive effects of the judgments of federal courts

court, then it should have the same effect, being rendered by the Circuit Court. *If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court.*

Dupasseur, 88 U.S. (21 Wall.) at 135 (emphasis added).

²³ See *supra* note 19 and accompanying text.

²⁴ *Dupasseur*, 88 U.S. (21 Wall.) at 135; see also *supra* note 22; 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4468. The headnotes to *Dupasseur* were written by Justice Bradley, author of the Court's opinion. Headnote 3 provides in relevant part: "If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the state law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to the judgment of the State Courts under like circumstances." *Dupasseur v. Rochereau*, 22 L. Ed. 588 (1875). See also *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 129-30 (1912).

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

Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917). See also *Deposit Bank v. Frankfort*, 191 U.S. 499, 520 (1903).

adjudicating matters of federal substantive law. That uniform federal law applies has been generally assumed, and indeed the proposition has been stated, without analysis, by the Supreme Court on a number of occasions.²⁶ The conclusion may seem obvious, and certainly there is federal lawmaking competence. If, however, one analyzes the problem as a problem of federal common law, the conclusion is not self-evident, precisely because it imports uniform federal rules rather than state law borrowed as federal law except where it is hostile to or inconsistent with federal policies.²⁷ For those who are skeptical of any role for state law, even borrowed as federal law, a consideration of limitations periods under federal statutes not containing any may provide food for thought.²⁸ Further, the justifications for uniform federal preclusion rules are harder to come by for one who believes, as I do, that the Rules of Decision Act²⁹ has received rough treatment in the Supreme Court's federal common law decisions.³⁰ I believe that the conclusion is correct, in part because a regime of borrowed state law would present serious problems of administrability for both courts and litigants.³¹

Federal judgments adjudicating matters of state substantive law are, however, another matter. Here, the Rules of Decision Act must be confronted unless one accepts Professor Deguan's argument that, because the power conferred by article III on the federal courts

²⁶ *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938). See also *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946); *supra* note 19 and accompanying text.

²⁷ For a representative example of the Supreme Court's approach to federal common law after *Erie*, see *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). For more recent treatment, see *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). See generally Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Mishkin, *The Varioussness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision*, 105 U. PA. L. REV. 797 (1957); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969). Because they are "[l]egal rules which impact significantly upon the effectuation of federal rights, [preclusion rules] must . . . be treated as raising federal questions" in this context. *Burks v. Lasker*, 441 U.S. 471, 477 (1979).

²⁸ See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Professor Scott noted that limitations periods and preclusion rules have a common purpose of "putting an end to controversies." Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

²⁹ "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1982).

³⁰ See, e.g., *DelCostello v. Intertional Bhd. of Teamsters*, 103 S. Ct. 2281, 2287-88 n.13 (1983); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 590-94 (1973); see also *infra* notes 36 & 59 and accompanying text.

³¹ The problems for the federal courts would include supervising a system of borrowed, trans-substantive state preclusion law to ensure against the application of particular rules that are hostile to or inconsistent with federal policies. The problems for litigants would include ascertaining the state law to be borrowed: a miscalculation could lead to the loss of federal rights.

finally to determine the preclusive effects of their judgments is implicated at some point, it is best to ignore the Act.³² I do not accept that argument,³³ nor the argument that federal common law is one of the sources of federal law that, if it otherwise requires or provides, displaces state law under the Act.³⁴ Finally, I do not accept the argument that the Rules of Decision Act plays a role but the role it plays is up to the reader, who is free to manipulate the language "in the cases where they apply," as he or she chooses.³⁵ In my view, the Rules of Decision Act speaks directly to the circumstances when it is permissible for federal courts to fashion or apply federal common law.³⁶

The two most influential works discussing interjurisdictional preclusion since Professor Degnan's article have been the *Restatement (Second) of Judgments*,³⁷ and volume 18 of Wright, Miller and Cooper's treatise on federal practice and procedure.³⁸ Neither work fully embraces Professor Degnan's general rule as applied to federal judgments adjudicating matters of state substantive law. Both endorse the view that federal law controls but suggest that state preclusion law should be borrowed when it reflects state substantive

³² See Degnan, *supra* note 2, at 768-70.

³³ The Court has acknowledged plenary power in Congress to prescribe the practice and procedure of the federal courts, *see, e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 472-74 (1965); *Sibbach v. Wilson*, 312 U.S. 1, 9-10 (1941), as well as the rules of evidence applied therein, *see Vance v. Terrazas*, 444 U.S. 252, 265-66 (1980); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976). Accordingly, the Court is unlikely to hold that the power to formulate rules having greater substantive implications, such as rules of preclusion, is "necessary to the exercise of all others," *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), with the result that in formulating them the courts would be "shielded from direct democratic controls." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). For a discussion of the inherent power of federal courts, *see Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004-06 (1983); *see also Burbank, The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115 n.455 (1982) [hereinafter cited as *Burbank, The Rules Enabling Act*].

³⁴ See Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971, 985-88 (1980); Westen & Lehman, *Is There Life for Erie after the Death of Diversity?*, 78 MICH. L. REV. 311, 369-71 (1980). On this point, I agree with Professor Redish. *See Redish, Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 962-64, 968 n.60 (1980).

³⁵ See Redish, *supra* note 34, at 968-69 n.60.

³⁶ For the text of the act, *see supra* note 29. Under this view, federal common law applies where "the Constitution or treaties of the United States or Acts of Congress" expressly so "provide" or where, fairly read, they implicitly and plausibly call for ("require") it. The act should not, however, be interpreted "in a crabbed or wooden fashion." *Robertson v. Wegmann*, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting). *See also infra* note 59 and accompanying text.

³⁷ RESTATEMENT (SECOND) OF JUDGMENTS (1982).

³⁸ 18 WRIGHT, MILLER & COOPER, *supra* note 14.

policies.³⁹ I believe they both have it backwards.

Uniform federal rules may be required when dealing with some aspects of preclusion law, regardless of the substantive law applied by the rendering federal court or the ground of its jurisdiction. But these matters involve preconditions to status as a judgment entitled to recognition, such as validity and finality, or their functional equivalent, the "on the merits" exception to bar, where federal standards may be necessary to protect the basic obligation of respect.⁴⁰ Indeed, in circuits that have not clearly committed themselves to Professor Degnan's general rule but that have applied federal preclusion law to some matters, the matters have clustered around these problems.⁴¹ We may forgive reliance on rule 41(b)⁴² as the source of the federal preclusion rule,⁴³ but we should not extrapolate from the cases a principle broader than that which was necessary to decide them.

If that were all, neither a traditional federal common law analysis nor a Rules of Decision Act approach would lead one to conclude that uniform federal rules are required for *all* questions of preclu-

³⁹ See RESTATEMENT (SECOND) OF JUDGMENTS § 87 comment b, at 316-18 (1982); 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4472, at 732-40.

⁴⁰ For treatments of validity and finality from a domestic perspective, see RESTATEMENT (SECOND) OF JUDGMENTS § 1-16 (1982). The *Second Restatement* has discarded the "on the merits" label but retains exceptions to bar. *Id.* § 20.

The obligation to respect federal judgments would be meaningless if state courts were free to define for themselves those judgments that would be respected. That premise does not, of course, automatically mean that uniform federal rules apply. But, particularly because such rules govern where the federal judgment adjudicates a federal question, see *supra* text accompanying notes 26-31, and given the undisputed federal interest in protecting the basic obligation of respect, uniform federal rules do seem appropriate and may be thought to be required. For a case suggesting that federal preclusion law governs an issue of validity of a diversity judgment, see *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

In the case of so-called disciplinary dismissals under FED. R. Civ. P. 41(b), the basic federal interest is buoyed by the additional consideration that uncertainty as to the binding nature of federal judicial action might lead to disregard of valid Federal Rules and orders and that the costs of such disregard would fall on the federal courts.

⁴¹ See, e.g., *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir.), *cert. denied*, 104 S. Ct. 344 (1983) (federal law governs effect of dismissal of diversity action under FED. R. Civ. P. 41(b)); *Compagnie Des Bauxites De Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 360 (3d Cir. 1983) (same); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983) (federal law governs finality of diversity judgment). For a subsequent case qualifying broad language in *Hunt*, see *Answering Serv. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984).

⁴² FED. R. Civ. P. 41(b).

⁴³ See *Deguan*, *supra* note 2, at 760-63. *Cf. Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (*per curiam*) (rule 41(b) dismissal in federal action asserting federal substantive rights). For the role that Federal Rules of Civil Procedure can properly play in connection with preclusion law, see *infra* text accompanying notes 45-53.

The conclusion that federal law controls on these matters does not extend to the law governing the claims or issues that may be precluded by the judgment or the parties who may benefit from or are bound by the judgment.

sion. The matters considered thus far are a discrete group recognizable as such by courts and litigants. As to the rest of preclusion law, federal substantive interests are contingent, implicated only if the application of preclusion rules in subsequent litigation would foreclose federal claims or issues not originally asserted, while state substantive interests are directly implicated. Given a clearly articulated choice of law rule for diversity cases, problems of administrability of a system of borrowed state law would not be serious for litigants.⁴⁴ Moreover, federal procedural interests, to the extent they are even cognizable, are not merely contingent. From the point of view of the administrability concerns of the federal courts, they are nonexistent. The costs of subsequent litigation would be incurred by the federal courts only if that litigation were brought or removed there. In such a situation, the federal court would be well positioned to check the application of state law that was hostile to or inconsistent with federal policies. Finally, diversity cases require attention to the independent federal policy against different outcomes on the basis of citizenship.

Courts and commentators have used a variety of techniques to justify a uniform body of federal preclusion law for diversity judgments. Professor Degnan's approach attributed some preclusion rules to the Federal Rules of Civil Procedure, using *Hanna v. Plumer*⁴⁵ as a shield,⁴⁶ and invoked article III for the rest.⁴⁷ This technique will not work. Even the Advisory Committee that drafted the original Federal Rules, a group not overly concerned about the Enabling Act's limitations, realized that preclusion rules were off-limits,⁴⁸ and in 1946 their successor body corrected a departure from that view.⁴⁹ Rule 18(a) on joinder of claims is anything but a statement of preclusion policy.⁵⁰ This is particularly clear when its

⁴⁴ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Compare *supra* note 31 and accompanying text.

⁴⁵ 380 U.S. 460 (1965).

⁴⁶ See Degnan, *supra* note 2, at 763 & n.105.

⁴⁷ See *id.* at 763-71; *supra* text accompanying notes 32-33.

⁴⁸ See Burbank, *The Rules Enabling Act*, *supra* note 33, at 1131-37 (1982). For the Committee's rejection of a proposal that their class action rule specify the effect of judgments on persons not parties, see *id.* at 1164 n.637. See also *infra* note 53.

⁴⁹ A 1946 amendment to rule 14 deleted the following sentence: "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff." 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.01[1], at 14-7 (2d ed. 1984) [hereinafter cited as MOORE]. According to the Advisory Committee, the sentence was "stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment." *Id.* ¶ 14.01[3], at 14-11.

⁵⁰ "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." FED. R.

permissive language is contrasted with rule 13(a)'s mandatory language on compulsory counterclaims.⁵¹ The latter is a product of history, notably Equity Rule 30, which had been interpreted accurately to predict preclusion consequences for failure to comply.⁵² At most, rule 13(a) is a statement of policy suitable as a peg on which to hang a federal common law rule of preclusion, waiver, or estoppel, one hopes a rule more flexible than the terms of rule 13(a) suggest.⁵³

Another technique used to justify a uniform body of federal preclusion law for diversity judgments is to ignore post-*Erie* cases suggesting that, in diversity cases, federal common law cannot displace state law where differences between the two would materially affect the character or result of litigation in federal court, leading to

CIV. P. 18(a). See *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 374 n.2 (5th Cir. 1980); Degnan, *supra* note 2, at 764.

⁵¹ A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

FED. R. CIV. P. 13(a).

⁵² On Equity Rule 30, see *American Mills Co. v. American Sur. Co.*, 260 U.S. 360 (1922). Under rule 30, "[t]hat which grows out of the subject-matter of the bill must be set up in the interest of an end of litigation." *Id.* at 365. Although the original Advisory Committee refrained from stating a rule of preclusion or, more generally, of effects, in the text of rule 13(a), it cited *American Mills* for the conclusion that "[i]f the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred." 3 MOORE, *supra* note 49, ¶ 13.01[2], at 13-8. See also *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974); *Southern Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962) (per curiam).

⁵³ The history of the Rules Enabling Act of 1934 reveals that Congress did not mean to authorize court rules having a predictable and direct effect on rights claimed under the substantive law. See Burbank, *supra* note 33, at 1121-31. Preclusion rules have this proscribed effect. Rule 13(a) is valid because it does not purport to state a rule of preclusive effect. Moreover, even though the rule is animated by a purpose that is dubious under the Enabling Act, its preclusion implications are patent, and it was not blocked by Congress. Therefore, as long as a putative federal common law rule of preclusion, waiver, or estoppel did not mimic the seemingly inflexible command of the rule, thereby accomplishing indirectly what could not be accomplished directly, the rule could serve as a source of policy.

On the use of rule 13(a) to create a waiver or estoppel, see Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423 (1954). The author of that article observes:

Can a neater example be imagined of the impossibility of sensible distinctions between "substance" and "procedure"? Compulsory counterclaim provisions are enacted as a regulation of "procedure," and indeed if, as in most jurisdictions, they have been made by rule of court, they are valid only as a regulation of "procedure" which must leave rights of "substance" unimpaired. Yet their effects are held to be extra-territorial on the explicit ground that these effects are "substantive."

Id. at 436.

forum shopping and inequitable administration of the laws.⁵⁴ One could argue that this "policy of federal jurisdiction"⁵⁵ is not implicated in the preclusion context because preclusion law does not have its ultimate bite in the rendering court, but the argument is purely formal.⁵⁶ One is led to believe that the commentators who have modified Professor Deguan's general rule to the extent of borrowing state preclusion law only when it implicates state substantive policies must simply disagree with the *Erie* line of cases and their emphasis on the effects, rather than the purposes, of legal rules.⁵⁷

In my view, unexpressed disagreement with those cases will not do.⁵⁸ I also believe that, if the cases are taken seriously, it is extremely difficult, under a traditional federal common law analysis or a Rules of Decision Act approach, to justify either across-the-board uniform federal preclusion rules for diversity judgments adjudicating matters of state substantive law, or the borrowing of state preclusion rules only when they implicate substantive state policies.⁵⁹

⁵⁴ See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744-46, 752-53 (1980); *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965) (dictum).

⁵⁵ *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945). See *infra* note 59.

⁵⁶ Under the theory of respect for federal judgments suggested above, see *supra* text accompanying notes 20-22, the purpose of the exercise is precisely to determine what law will furnish the rules of preclusion for a federal judgment. Once those rules are ascertained, not only will they be binding under the supremacy clause in subsequent federal or state actions, but they will affect the strategy and conduct of litigation in the rendering court. As Professor Degnan acknowledged, albeit in a different context, "[i]f 'outcome determinative' is the relevant test . . . , hardly anything is more dispositive than the doctrine of *res judicata*." Degnan, *supra* note 2, at 754 (footnote omitted).

⁵⁷ See *supra* note 39.

⁵⁸ For expressed disagreement, see, e.g., Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Redish, *supra* note 34.

⁵⁹ The Rules of Decision Act need not be interpreted to remit federal courts to state law whenever a matter has escaped treatment in federal statutes, in Federal Rules authorized by 28 U.S.C. § 2072 (1982), or in local court rules authorized by 28 U.S.C. § 2071 (1982). When it authorized the Court to promulgate Federal Rules, Congress must have contemplated that it would be necessary for the federal courts to interpret them and to fill in the interstices of the rules themselves. That does not mean that the federal courts are free to create common law in areas untouched by the Federal Rules, or that they may, through federal common law, attribute to the Federal Rules policies not validly the concern of such rules. It does mean, however, that when the Supreme Court has exercised the power delegated by Congress to prescribe uniform Federal Rules, these rules, if valid, should be treated as if they were acts of Congress for purposes of the Rules of Decision Act. A similar analysis may apply to local court rules, at least if current proposals to discipline the process of their consideration and promulgation are adopted. See H.R. 6344, 98th Cong., 2d Sess. § 4 (1984); Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 337, 370-73 (1983); 39 Fed. R. Serv. 2d (Callaghan), Release 4, at 1-2 (Oct. 1984).

In determining, however, whether federal sources "require" otherwise than that state law be applied, the federal courts must consider not only policies grounded in them that point towards a federal decisional rule, but also those federal policies that point to the application of state law. The "policy of federal jurisdiction," *supra* text ac-

The best hope is to treat the federal courts as a domestic system, in which case a federal interest in efficient judicial administration, if it is cognizable after *Hanna* and *Walker*,⁶⁰ is at least not contingent and might be thought by some process to outweigh the policy against different outcomes on the basis of citizenship. But the full faith and credit statute does not apply to federal judgments;⁶¹ the domestic model it enshrines does not necessarily entail domestic law,⁶² and the federal courts have not been permitted to act as if they were, that is, with the autonomy of, state courts in other contexts involving the exercise of diversity jurisdiction. Rather, they have been required to do what the courts of a particular state would do.⁶³ Until such time as the Court repudiates or redirects the post-*Erie* cases⁶⁴ or Congress clearly expresses procedural policies that resonate for preclusion law in the way rule 13(a) now does, state law should provide the norm on most questions.

Some of the appeal of Professor Degnan's proposed general rule and, one suspects, part of the stimulus to propose it, lies in the conviction that state law always governs the interjurisdictional preclusive effects of a state court judgment.⁶⁵ To one reading the statute for the first time, this conclusion is by no means obvious:

Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.⁶⁶

In enacting the statute Congress exercised the power expressly conferred on it by article IV, section 1 of the Constitution to prescribe the interjurisdictional effects of state judgments.⁶⁷ This constitutional grant of power does not extend to the preclusive effects of state judgments in the courts of the same state. Rather, Congress referred to those effects as the measure of the constitutional (that is, interjurisdictional) obligation under the statute. The statute simply does not speak to the source of the law that furnishes the rules in

companying note 55, identified with the exercise of diversity jurisdiction, is one of the latter.

⁶⁰ *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Hanna v. Plumer*, 380 U.S. 460 (1965).

⁶¹ See *supra* text accompanying notes 14-19.

⁶² See *infra* text accompanying notes 65-72.

⁶³ See, e.g., *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁶⁴ See *Redish & Phillips, supra* note 58.

⁶⁵ See Degnan, *supra* note 2, at 750-53. But see *id.* at 755 n.60. In any event, as a normative matter, Professor Degnan favored the application of state law. See *id.* at 773 (quoted *supra* text accompanying note 11).

⁶⁶ 28 U.S.C. § 1738 (1982).

⁶⁷ See *supra* note 5.

the domestic configuration it uses as the referent. Although state law will usually furnish such rules, federal law may supervene in some cases as a result of principles governing the relationship between federal and state law having their source elsewhere. Any such supervening federal law will, by reason of the statute, be binding nationally, because it is, by reason of the supremacy clause,⁶⁸ binding domestically.

We have, then, another problem of federal common law. Where "[l]egal rules . . . [have a significant] impact . . . upon the effectuation of federal rights,"⁶⁹ as do preclusion rules on federal substantive rights, there is, under traditional analysis, federal power to choose the governing law.⁷⁰ In most situations, however, uniform federal preclusion rules are not required because the state law to be borrowed is clear and because uniform rules might prove disruptive to state courts and to litigants.⁷¹ Federal law-in-reserve, available to check particular state preclusion rules that are hostile to or inconsistent with federal substantive interests, is sufficient. The same result obtains under a Rules of Decision Act approach, and in this context, the advantages of that approach are striking.⁷²

⁶⁸ U.S. CONST. art. VI, cl. 2.

⁶⁹ *Burks v. Lasker*, 441 U.S. 471, 477 (1979); see *supra* note 27.

⁷⁰ Typically, however, the analysis of the problem of federal law in state courts, at least if the law can be labelled "procedural," has been discrete. Compare, e.g., 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE & PROCEDURE §§ 4019-27 (1977) with 19 WRIGHT, MILLER & COOPER, *supra* note 14, §§ 4514-15. See also *infra* note 71.

The Court has made progress in collapsing analytical barriers by citing a case displacing state law in state court as sufficiently analogous to lend support to a discussion of the borrowing of state law in federal court. *Burks v. Lasker*, 441 U.S. at 479 (citing *Brown v. Western Ry.*, 338 U.S. 294, 298 (1949)). For a recent case displacing state law as to the admission of evidence and jury instructions with uniform federal law, see *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980).

⁷¹ Commentators have recognized the possibility that "principles akin to federal preemption may occasionally require state courts to follow federal rules of preclusion." 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4467, at 625. Apart from a reorientation in thinking about the full faith and credit statute, the approach taken in this Article suggests that the problem is amenable to federal common law analysis and that displacement may be appropriate more often than previously recognized.

Even before the demise of the tenth amendment as an independent check on federal lawmaking competence, see *Garcia v. San Antonio Met. Transit Auth.*, 105 S. Ct. 1005 (1985), *rev'g* 557 F. Supp. 445 (W.D. Tex. 1983), preclusion law, because of its substantive impact, was an unlikely candidate for solicitude under that rubric. Cf. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (holding that provisions of Public Utility Regulatory Policies Act of 1978 requiring states to consider standards and to follow certain procedures in doing so are not unconstitutional invasions of state sovereignty). *But cf. id.* at 771-75 (Powell, J., concurring and dissenting) (stating that procedural provisions of the Act violate the tenth amendment).

⁷² Where state court adjudication may preclude federal substantive rights, and where there is, accordingly, federal lawmaking power as to preclusion rules, would we say that, when state preclusion rules are employed, they are really federal common law

If the full faith and credit statute does not choose state law as the measure of the interjurisdictional effects of state judgments—it certainly does not speak to the law that governs their effects domestically—the approach taken in recent decisions of the Supreme Court from *Allen v. McCurry*⁷³ to *Migra v. Warren City School District Board of Education*,⁷⁴ if not their results, is almost surely wrong. The Court's approach, requiring that "Congress must 'clearly manifest' its intent to depart from [section] 1738,"⁷⁵ would make sense if Congress had made a choice of state preclusion law in the full faith and credit statute.⁷⁶ It makes no sense if, as I maintain, Congress made no such choice.⁷⁷ Again, state preclusion law rather than uniform federal law will govern in most cases, but the safety net that Justice Marshall was looking for in *Haring v. Prosis*,⁷⁸ in the process complicating the law of interjurisdictional preclusion (if that is possible),⁷⁹ is at hand. State preclusion rules that are hostile to or in-

or state law borrowed as federal law? I doubt it, but that is the parlance of traditional federal common law analysis.

We should, however, be quite comfortable with the notion that, under the Rules of Decision Act, which is binding on the Supreme Court, state preclusion law must yield when federal substantive policies so *require*. Perhaps this difficulty, psychological if nothing else, has contributed to the failure to see the problems in their entirety. See *supra* note 70. Of course, once one starts down that road, one may begin to question the traditional two-step federal common law analysis even in its conventional applications. See *supra* text accompanying notes 29-30 & 36.

⁷³ 449 U.S. 90 (1980).

⁷⁴ 104 S. Ct. 892 (1984). "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Id.* at 896.

⁷⁵ *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982).

It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken. *McElmoyle v. Cohen*, 13 Pet. 312, 326 (1839); *Mills v. Duryee*, 7 Cranch 481, 485 (1813).

Id. at 481-82. The cases cited by the Court neither require the interpretation given them by the Court nor foreclose the interpretation suggested here.

⁷⁶ If Congress had made a choice of state preclusion law in the full faith and credit statute, federal preclusion law might properly be regarded as an exception to the statutory direction, applicable only as a consequence of a subsequent statute containing an express or implied partial repeal of § 1738.

⁷⁷ The only relevant choice made by Congress in the full faith and credit statute is the choice of subsequent proceedings in the courts of the state from which the judgment issued as a model or referent. In most cases, state preclusion law will furnish the rules in this context. In some cases, however, federal law will supervene according to the normal principles governing the relationship between federal and state law. When that occurs, there has been no exception to the full faith and credit statute, and thus there is no need to meet the demanding standards of an express or implied partial repeal.

⁷⁸ 103 S. Ct. 2368 (1983).

⁷⁹ See *id.* at 2373 & n.7. The Court's reliance on *Montana v. United States*, 440 U.S. 147 (1979), is curious. In that case, uniform federal preclusion rules were applied to determine the effects of a state court adjudication of federal constitutional claims on the

consistent with federal substantive policies must yield to federal common law domestically, and the statute makes the domestic solution binding nationally.⁸⁰

This approach is not a panacea. It does not provide an obvious answer to a case where a federal statute may be thought to express a policy in favor of a federal forum, but one not strong enough to result in a grant of exclusive jurisdiction. In that situation, one must confront the choice that section 1738 unquestionably makes, namely, reference to the law that would be applied in a subsequent action in state court, where a policy in favor of a federal forum is not pertinent.⁸¹ Nor does it provide such an answer for the exclusive jurisdiction cases themselves. Whatever one thinks of Judge Posner's opinion in *Marrese v. American Academy of Orthopaedic Surgeons*,⁸² which precluded a federal antitrust claim functionally similar to a state antitrust claim that could have been joined with other claims in antecedent state litigation, perhaps he was correct in concluding that the full faith and credit statute does not play a role.⁸³ The

United States. The *Montana* Court made no mention of 28 U.S.C. § 1738 (1982), the full faith and credit statute. Justice Marshall, who wrote the *Haring* opinion, was also the author of the Court's opinion in *Montana*.

According to the approach suggested here, it may be that uniform federal preclusion rules should govern in a case similar to *Montana* but where the second action is brought in state court, the model provided by § 1738, and thus in a subsequent action in federal court. Cf. *United States v. Mendoza*, 104 S. Ct. 568 (1984) (nonmutual issue preclusion does not apply as against the United States). But, if that were true, it would result from the peculiar status of the United States as a litigant.

⁸⁰ Apart from situations where federal substantive policy requires, but state law does not call for, preclusion, see 18 WRIGHT, MILLER & COOPER, *supra* note 14, § 4467, at 625-26; *supra* note 71, concern is most likely to arise in connection with state rules that are broadly preclusive but relatively inflexible. Indeed, this may have been the Court's concern in *Haring*. See *Haring*, 103 S. Ct. at 2373 n.7. Trans-substantive preclusion rules can only imperfectly accommodate the array of substantive policies with which they interact, and preclusion rules have a dramatic effect on assertions of substantive right. In such circumstances, broad judge-made rules of preclusion are tolerable only if they are sufficiently flexible to adjust to particular circumstances that would make preclusion inappropriate. Trans-systemic, trans-substantive preclusion rules are even more worrisome.

⁸¹ The Court was presented with this problem in *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892 (1984) and *Allen v. McCurry*, 449 U.S. 90 (1980). The all-or-nothing posture in which the question of preclusion was framed doubtless contributed to the Court's approach to § 1738.

⁸² 726 F.2d 1150 (7th Cir.) (en banc 1984), *rev'd*, 53 U.S.L.W. 4265 (U.S. Mar. 4, 1985). But see *Car Carriers, Inc. v. Ford Motor Co.*, 583 F. Supp. 221, 226 n.5 (N.D. Ill. 1984) (questioning *Marrese*).

⁸³ But whether or not section 1738 allows a federal court to give a state court's judgment a greater preclusive effect than the state courts themselves would give it . . . the statute cannot be used to decide this case. The Illinois courts, although hospitable to claims of *res judicata* . . . have not spoken to the . . . issue and will never have occasion to do so, since no federal antitrust suit can be brought in a state court. The issue whether such a suit would be barred by *res judicata* therefore cannot arise. Section 1738 cannot be used to decide this case.

problem is not, however, that there can be no state law on the question. Rather, it is that, because of the exclusive jurisdiction of the federal courts, there can be no subsequent state proceeding in which the same issue of preclusive effects could arise.⁸⁴

Simplicity and predictability are important goals in the law of interjurisdictional preclusion. In seeking them, however, we should not ignore either the complexity of our federal system or the reality that preclusion rules have effects as well as purposes. Ironically, symmetry of a sort is attainable, insofar as in both the state-federal and federal-state configurations, we are left with mixed regimes of federal and state law.

Marrese, 726 F.2d at 1154.

⁸⁴ On this view, the *Kremer* Court should have decided whether title VII vests exclusive jurisdiction in the federal courts before addressing the preclusion problem. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479 n.20 (1982).