

ARTICLES

SEMTEK, FORUM SHOPPING, AND FEDERAL COMMON LAW

*Stephen B. Burbank**

INTRODUCTION

This is an Article about what Justice Jackson would have called lawyers' law.¹ It treats of some difficult problems in a corner of conflict of laws that proceduralists have occupied—where state and federal law vie for space—problems that I set out to solve early in my career.² It treats as well of a decision last Term in which the Supreme Court accepted the most controversial of the solutions I proposed fif-

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* David Berger Professor for the Administration of Justice, University of Pennsylvania. A.B. 1968, J.D. 1973, Harvard University. David Shapiro, Catherine Struve, and Stephen Subrin provided helpful comments on a draft. This Article is a revised version of *Reason, Rigor and Regret: An Essay for Arthur von Mehren*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: A TRIBUTE TO ARTHUR T. VON MEHREN* (James A.R. Nafziger & Simeon C. Symeonides eds., forthcoming 2002) (internal citation unavailable). I owe an enormous intellectual debt to Professor von Mehren. As I said in the original:

In today's academic environment, which may prize the volume of sound more than its quality, Arthur is proof that it need not be thus, that there is a place for scholars who heed Theodore Roosevelt's advice to "walk softly and carry a big stick." In his case the "big stick" is a mind so rigorous, an intellectual appetite so wide-ranging, and a tolerance for ambiguity so serene, as to be, depending on the audience, either intimidating, discouraging or impenetrable. Those qualities can also be, as they have been for me, inspiring, causing one to dig deeper into a problem and to view that problem in broader perspective, to be relentless in pursuing the implications of an idea, and, above all, never to accept without verifying the conventional wisdom.

Id. (internal citation unavailable) (footnotes omitted).

1 See Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945).

2 See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

teen years ago.³ More broadly, my hope is to cast some light both on the question whether forum shopping between state and federal court is a problem worthy of concern today and on the nature, including the politics, of procedural scholarship.

I. DISCOVERY AND DISILLUSIONMENT

Fresh from a reexamination of the Supreme Court's power under the Rules Enabling Act of 1934,⁴ I undertook what I thought would be a small project exploring the relationship between federal and state law on issues in the "twilight zone"⁵ between procedure and substantive law that are not controlled by the Federal Rules of Civil Procedure. The question I initially sought to answer was whether federal or state law governs the preclusive (*res judicata*) effects of the judgments of federal courts sitting in diversity. Professor Ronan Degnan's seminal article, *Federalized Res Judicata*,⁶ in which he argued that the court system which renders a judgment should provide the rules as to the judgment's preclusive effects, had much impressed me. But it seemed to me that both Degnan and those who embraced his proposal, even while modifying it,⁷ had failed fairly to confront the implications for this context of Supreme Court decisions in diversity cases that articulated a federal policy against different outcomes on the basis of citizenship.⁸

3 See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

4 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1994)); see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). This work engendered in me no small amount of disillusionment as to what counts for scholarship in the field of procedure and the relationship between scholarship and law reform. See *id.* at 1186. It did not help that, shortly after the article (my first) was published, a prominent academic commenced our first conversation with the observation, "I did not like your article." When I inquired why that was so, he replied, "John Ely is my friend."

5 "The truth is that the twilight zone around the dividing line between substance and procedure is a very broad one." Letter from William D. Mitchell to the Hon. George Wharton Pepper (Dec. 19, 1937), *quoted in* Burbank, *supra* note 4, at 1134 n.530.

6 Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

7 See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 87 cmt. b (1982); 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4472, at 725 (1981 & Supp. 2001) [hereinafter WRIGHT, MILLER & COOPER]; CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 100A, at 737-38 (5th ed. 1994) [hereinafter WRIGHT, *LAW OF FEDERAL COURTS*]. These works "take the position that federal law governs but that, as to certain questions of preclusion implicating state substantive policies, state law should be borrowed as federal law." Burbank, *supra* note 2, at 780 (footnote omitted).

8 See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744-47 (1980); *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965) (dictum); *Guar. Trust Co. v. York*, 326 U.S. 99,

Not believing that it was necessary for this project to engage in extensive historical research, I was prepared to accept Degnan's account of the doctrinal history. Still, I felt obligated at least to read all of the early cases on which Degnan's account was based. Unfortunately, as I put his article to the test of its footnotes, I realized that, although *Federalized Res Judicata* did make an important contribution, its capacity to obscure was as great as its capacity to illuminate. Numerous errors in describing cases aside,⁹ Degnan's history, upon which some of his followers also relied, was tendentious, if not distorted.¹⁰ And so, although I had intended a short article on the law governing the preclusive effects of federal diversity judgments, I was driven also to investigate the source of the obligation to respect federal judgments in the first place¹¹ and to scratch the oft-repeated, but hardly analyzed, notion that federal preclusion law governs the preclusive effects of the federal question judgments of federal courts.¹²

107-12 (1945). "What is surprising is that those who do not accept Professor Degnan's complete dispatch of the Rules of Decision Act and who have espoused a modified version of his general rule for diversity judgments proceed as if these cases did not exist." Burbank, *supra* note 2, at 785 (footnote omitted). For a more recent example, see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426-31 (1996).

9 See Burbank, *supra* note 2, at 741, 742 n.32, 750 n.67.

10 See *id.* at 741, 745, 749, 749-50 n.65. Professor Cooper apparently picked up the most serious distortion, a selective quotation from *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875) (the correct date of the decision is found in 22 L. Ed. 588), since he correctly described the full basis given by the Court for its decision in that case. See 18 WRIGHT, MILLER & COOPER, *supra* note 7, § 4468, at 655. But he did not flag the problem in Degnan's work and its role in the story that author told, and the capacity of that story to mislead continued. See, e.g., Note, *Erie and the Preclusive Effect of Federal Diversity Judgments*, 85 COLUM. L. REV. 1505, 1518 (1985); *infra* note 41.

Thus, within one article I committed the sins of revealing serious flaws in the work of a senior academic and disparaging the views of the latter's best friend, who happened to be the lead author of the most influential treatise in federal practice and procedure. See Burbank, *supra* note 2, at 791, 796 (criticizing WRIGHT, LAW OF FEDERAL COURTS, *supra* note 7, § 100A); *infra* note 115.

11 See Burbank, *supra* note 2, at 740-47.

12 See *id.* at 747-78. My research revealed that, contrary to the story told by Degnan, the Supreme Court in the nineteenth and early twentieth centuries appeared to regard the role of preclusion law as protecting rights conferred by the substantive law and to derive the source of the governing preclusion law from the source of the governing substantive law, state preclusion law for diversity judgments, and federal preclusion law for federal question judgments. See *id.* at 747-53. For the role that a distinctively federal law of preclusion for federal question judgments played in the Supreme Court's strategy of controlling state courts in this period, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL

Informed by, but not a captive of, this history, I came to realize that, with respect to federal judgments and under modern conceptions, the governing law is almost always federal common law. Yet, I confronted the fact that, since the dual revolution initiated by *Erie Railroad Co. v. Tompkins*,¹³ both the Supreme Court and commentators had failed to assimilate problems of federal common law in state law diversity cases to those in federal law non-diversity cases. I therefore advanced a general approach effecting such assimilation, alternatively grounded in the Supreme Court's approach in (non-diversity) federal common-law cases or in the Rules of Decision Act,¹⁴ which I regarded (and regard) as the more appropriate unifying vehicle.¹⁵

My approach failed to support Professor Degnan's general rule, or the modifications suggested by his followers, in diversity cases.¹⁶

POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 43 (2000).

13 304 U.S. 64 (1938). On the dual revolution, see Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964), and Edward A. Purcell, Jr., *Brandeis, Erie, and the New Deal "Constitutional Revolution"*, 26 J. SUP. CT. HIST. 257, 272–75 (2001).

14 "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 (1994).

15 See Burbank, *supra* note 2, at 753–62, 778–97. Having adopted a federal common-law approach to the preclusive effects of federal judgments, I considered the implications of that approach for state court judgments, with respect to which Professor Degnan made an important contribution by recalling attention to the full faith and credit statute. See 28 U.S.C. § 1738 (1994); Burbank, *supra* note 2, at 735; Degnan, *supra* note 6, at 750–55. Here, too, the general approach seemed to shed light, both by exposing the fallacy of treating problems of federal "procedural" law in state courts as *sui generis*, and, more importantly, by helping to expose a fundamental error in the interpretation of the full faith and credit statute implicit in Degnan's article and subsequently made explicit in decisions of the Supreme Court. See Burbank, *supra* note 2, at 797–829.

Contrary to conventional formulations, the full faith and credit statute does not require application of the domestic preclusion law of the rendering state. Rather, it requires application of the preclusion law that the courts of the rendering state would apply. That domestic state law usually will furnish the rules applied domestically should not blind us to the possibility that, according to principles governing the relationship between federal and state law that have their source elsewhere, federal law may supervene.

Id. at 800 (footnote omitted).

16 Application of my general approach suggested that the Court and commentators were correct in asserting that federal preclusion law, consisting of uniform judge-made rules, governs the effects of the federal question judgments of federal courts, although that conclusion was by no means as simple and straightforward as they apparently assumed. See Burbank, *supra* note 2, at 762–78.

On the contrary, I concluded, with the exception of a few matters as to which uniform federal law may be required either to safeguard the basic federal common-law obligation to respect federal judgments or to vindicate (non-preclusion-related) policies of the federal court *qua* forum, the content of that obligation should be measured by state law.¹⁷ Thus, notwithstanding the major changes in the legal landscape on which Degnan relied, the results I advocated were pretty much the same as those dictated by the Court's 1875 decision in *Dupasseur v. Rochereau*,¹⁸ which he had sought to consign to the fate of the Conformity Act of 1872.¹⁹

Critical to my conclusion about diversity judgments were the dual propositions that the Federal Rules of Civil Procedure do not, by and large, contain preclusion law and that they cannot validly prescribe such law.²⁰ With the Federal Rules of Civil Procedure out of the way

17 See *id.* at 778–97. Under the Supreme Court's approach to federal common law, one would say that federal common law borrows state law on most questions regarding the preclusive effects of diversity judgments. I would say that state law governs as to such matters because Congress has commanded its borrowing in the Rules of Decision Act. The last is a detail (albeit, particularly to a judge concerned about the locus of power, an important detail!), since in either case federal law is the source of authority. The important point is that state law is the source of most of the rules. See *id.* at 753–62, 787–92; Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1556–70 (1992).

18 88 U.S. (21 Wall.) 130 (1875).

19 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197; see Burbank, *supra* note 2, at 749; Degnan, *supra* note 6, at 745–46, 756.

20 See Burbank, *supra* note 2, at 772–76, 782–83; Burbank, *supra* note 4, at 1121–31. Fudging on these questions was useful, if only rhetorically, to Professor Degnan's argument. See Burbank, *supra* note 2, at 747; Degnan, *supra* note 6, at 760–63. Indeed, it appears to be an occupational disease. See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 1006 & n.307 (1998); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 319–21, 321 n.115 (1993). In that, scholars have followed in the path of the rulemakers themselves, whose understandable desire to take advantage of the opportunities that preclusion law presents for achieving efficiency in adjudication has waged a sixty-year struggle with their awareness that the Enabling Act sets limits on that quest. Thus, although the members of the original Advisory Committee "rejected as exceeding its authority the strongly urged suggestion that its class action rule should include a provision as to the preclusive effects of a judgment on persons not parties," Burbank, *supra* note 2, at 772 (footnote omitted), they did include a preclusion provision in Rule 14, only to delete it in 1946 because it "stated a rule of substantive law which is not within the scope of a procedural rule." *Id.* at 772 n.184. The struggle continues. The Advisory Committee is considering proposals to amend Rule 23 so as to include provisions that would give preclusive effect to rulings denying class certification and refusing to approve a proposed class settlement. In my view, however desirable as a matter of policy, those proposals are invalid under the Enabling Act. The same results could be obtained by legislation or, perhaps, by federal common law. See Stephen B. Burbank, Preliminary

as a source of binding federal preclusion rules (although not as a source of non-preclusion-related policy that may inform federal common-law rules of preclusion that are otherwise valid²¹), it seemed to me impossible to justify the displacement of state law on most matters of preclusion. Or, at least so it seemed once one recognized that the substantive law interests directly at stake were state interests and that any federal interest in efficient adjudication was contingent, and so long as one did not dismiss or ignore the articulated federal policy against different outcomes on the basis of citizenship.

It took a dialogue with Geoffrey Hazard while my project was in progress to help me understand some of the larger forces that were operating in favor of that which I found insupportable. I realized that the reason why some eminent scholars had been able to overcome this last barrier to accepting Professor Degnan's general rule in diversity cases, with minor modifications, lay in their unarticulated rejection of the policy of federal jurisdiction pursued by the Court in cases following *Erie Railroad Co. v. Tompkins*.²²

It has taken years of reading history, particularly the work of Professors Edward Purcell²³ and William Ross,²⁴ for me to progress beyond the position of agnosticism I took about that policy in 1986²⁵ and to embrace it. Many of those who taught procedure (and federal courts) when I was in law school at Harvard (1969–1973) were under

Remarks at a Conference on Class Actions Sponsored by the Advisory Committee (Oct. 23, 2001) (on file with author).

21 See Stephen B. Burbank, *Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine*, 28 RUTGERS L.J. 87, 108–10 (1996).

22 See Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 635–37 (1985); Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 645–52 (1985); Stephen B. Burbank, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659, 660 (1985).

[Hazard] rejects a line of Supreme Court cases that has only recently been affirmed and relies on others the vitality of which is in dispute, thus confirming a suggestion made in my paper. I applaud this explicitness; indeed, it is just what my paper calls for. Of course, now that all the cards are on the table, lower federal courts may feel reluctant to apply uniform federal preclusion rules in this context. They lack the freedom of law professors to overrule the Court.

Id. at 660 (footnotes omitted).

23 See, e.g., PURCELL, *supra* note 12; EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992); Purcell, *supra* note 13; EDWARD A. PURCELL, JR., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679 (1999).

24 See, e.g., WILLIAM G. ROSS, *A MUTED FURY* (1994).

25 See Burbank, *supra* note 2, at 831.

the thrall of Henry Hart. As a result, I had no real sense of the serious, practical and social problems of unfairness, unequal access, and manipulation that underlay Justice Brandeis's opinion in *Erie*, and hence, little reason to apprehend that similar problems might recur.²⁶

In the years after World War I, Brandeis had grown increasingly concerned over the proliferation of elaborate, exploitative, and sometimes unethical litigation practices. Since the late nineteenth century, corporations operating in interstate commerce had regularly—and, in Brandeis' mind, quite unfairly—exploited diversity removal jurisdiction to impose heavy legal and extra-legal burdens on individuals who sued them. In response to that practice, an emerging urban personal injury bar had gradually developed a variety of counter-tactics to defeat corporate removal practices. . . .

Disturbed by the mushrooming tactical escalation and the compounding waste of social resources, Brandeis began exploring ways to impose greater order and efficiency on litigation practice. He experimented with the Commerce Clause, the Full Faith and Credit Clause, and even the politically dangerous Due Process Clause as devices to minimize incentives for interstate forum shopping. *Erie* was a part of his overall campaign. Abolishing the general federal common law would eliminate a major incentive for intra-state forum shopping and reduce the utility of a variety of popular manipulative tactics. That achievement, in turn, would mean that courts and litigants could concentrate their efforts on addressing the substantive merits of disputes. The result would be to simplify litigation practice, conserve social resources, and rationally order the overall business of the nation's judicial system.²⁷

II. SEMTEK

A. *The Background*

Life is stranger than art. It would be difficult for even the most adept spinner of law school hypotheticals to devise a case more chal-

26 See PURCELL, *supra* note 12, at 141–46 (“Defects, Social’: The Progressive as Legal Craftsman”); *id.* at 229–57 (“Henry M. Hart, Jr., and the Power of Transforming Vision”).

Perhaps, too, the most general conclusion to be drawn from Hart's vision of *Erie* and the federal judicial system is that legal abstraction, while never socially neutral, always remains socially volatile. Without constant reference to changing social dynamics and consequences, students of procedure can scarcely know what they are talking about.

Id. at 257; see also Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 847–54 (2001); *infra* text accompanying note 110.

27 Purcell, *supra* note 13, at 272–73 (footnotes omitted).

lenging than *Semtek International Inc. v. Lockheed Martin Corp.*²⁸ For the case presents not only the intricacies of interjurisdictional preclusion with which I wrestled in 1986, but also the special conflict of laws problems that attend statutes of limitations.²⁹ *Semtek* also well illustrates the relevance today of the practical and social concerns that undergirded Justice Brandeis's opinion in *Erie* more than sixty years ago.

Semtek involves a dispute concerning contract and related rights in the enticing but hazardous economy of post-Soviet Russia.³⁰ *Semtek* was a fledgling company "formed in 1992 to contract with emerging Russian enterprises, particularly with respect to satellite ventures."³¹ Convinced that it had been muscled unfairly out of its major asset, a potentially lucrative joint venture for the commercial use of Russian satellites, by Martin Marietta Technologies, Inc., *Semtek* sued Lockheed (Martin Marietta's successor in interest) and a representative of Martin Marietta in a California state court, alleging breach of contract and various business torts. Lockheed removed the case to federal court on the basis of diversity of citizenship³² and sought dismissal on the ground that the action was barred by California's two-year statute of limitations. The district court agreed with Lockheed and dismissed the case.³³

28 531 U.S. 497 (2001).

29 After the Supreme Court granted certiorari, I contacted counsel for *Semtek* and obtained the briefs filed to that point. Finding my work relied on extensively in *Semtek*'s brief on the merits, I provided assistance as a volunteer in fashioning a reply brief and in preparing the case for oral argument.

30 See Scott D. Syfert, *Capitalism or Corruption? Corporate Structure, Western Investment and Commercial Crime in the Russian Federation*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 357 (1999). For an account of the business dealings that produced the litigation in *Semtek*, see *id.* at 400-02.

31 Brief for Petitioner at 2, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551) [hereinafter Brief for Petitioner].

32 *Semtek*'s action included a non-diverse individual defendant, but Lockheed removed before formal service and successfully resisted remand on the basis that, at the time of removal, "none of the parties in interest properly joined and served as defendants [was] a citizen of the state in which [the] action [was] brought." 28 U.S.C. § 1441(b) (1994). I admit to surprise that such a ploy, which is reminiscent of the behavior that concerned Justice Brandeis and led to *Erie*, see *supra* text accompanying note 27, was successful. See *N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883-84 (5th Cir. 1998); 14B WRIGHT, MILLER & COOPER, *supra* note 7, § 3723 (1998 & Supp. 2001).

33 See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, Case No.: CV 97-1580 ABC (RNBx), reprinted in Petition for Certiorari app. D, at 48, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551). The court's order provided that the dismissal was "WITH PREJUDICE because, given the allegations in the Complaint, amendment would be futile (Plaintiff cannot plead around or contradict its

While taking an unsuccessful appeal from the district court's judgment to the United States Court of Appeals for the Ninth Circuit,³⁴ Semtek sought recovery from Lockheed in a Maryland state court, relying on Maryland's three-year statute of limitations, under which the action was timely. Lockheed, which is incorporated in Maryland, unsuccessfully sought to remove that case too,³⁵ and it also failed in an attempt to secure an order from the federal trial court in California enjoining Semtek from continuing the Maryland litigation.³⁶

Although unsuccessful in its attempts to remove or enjoin the Maryland state court action, Lockheed succeeded in having that case dismissed as precluded by the judgment of the federal district court in California. Lockheed argued, and the Maryland trial court agreed, that the preclusive effect of the federal court diversity judgment was governed by federal law and that, under Federal Rule of Civil Procedure 41(b),³⁷ the dismissal precluded an action on the same claim in

current allegations)." *Id.*, reprinted in Petition for Certiorari at 58a, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551). The court's judgment, prepared by Lockheed, provided that "the action be dismissed in its entirety on the merits and with prejudice." *Id.*, reprinted in Petition for Certiorari at 59a, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551).

[I]f the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of res judicata would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of the proposed order drafted by successful counsel.

Goddard v. Sec. Title Ins. & Guar. Co., 92 P.2d 804, 807 (Cal. 1939).

34 *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 168 F.3d 501, 501 (9th Cir. 1999) (table).

35 *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913 (D. Md. 1997).

36 *See* Brief for Petitioner, *supra* note 31, at 7. In dicta, the district court observed that its decision dismissing Semtek's action "did not reach the substantive merits of Plaintiff's tort claims" and that "it is not obvious to this Court that res judicata applies to bar Plaintiff's action in Maryland state court." *Semtek*, 988 F. Supp. at 915 (quoting Brief for Petitioner, *supra* note 31, at app. 71a & n.17). Thereafter, Semtek unsuccessfully sought remand from the Ninth Circuit for the purpose of amending the judgment under Rules 60(a) and 60(b)(6), and the district court declined to hear its Rule 60(b)(6) motion. *See Semtek*, 531 U.S. at 500; Brief for Petitioner, *supra* note 31, at 7 n.4.

37 (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for*

Maryland state court.³⁸ The Maryland Court of Special Appeals affirmed the dismissal,³⁹ and the Maryland Court of Appeals denied review.⁴⁰

B. *The Supreme Court's Decision*

In a short opinion for a unanimous Court, Justice Scalia declined to decide the case on one of the grounds urged by Semtek, namely, the continuing authority of the Court's 1875 decision in *Dupasseur v. Rochereau*,⁴¹ and he rejected Lockheed's argument, which had been

lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FED. R. CIV. P. 41(b) (emphasis added).

38 See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, Case No. 97183023 (Cir. Ct. Balt. City 1998), reprinted in Petition for Certiorari app. C, at 36a, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551).

39 *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 736 A.2d 1104, 1121 (Md. Ct. Spec. App. 1999).

40 That court's unreported order is reprinted in Petition for Certiorari app. B, at 35a, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551) [hereinafter Petition for Certiorari]. The Supreme Court granted Semtek's petition for certiorari. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 736 A.2d 1104, cert. granted, 530 U.S. 1260 (2000) (No. 99-1551). Semtek's petition presented two questions, first, whether the Court's holding in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875), was "still good law," and if not, second, "what should be the res judicata effect of a statute of limitations dismissal in a federal court diversity suit?" Petition for Certiorari, *supra*, Questions Presented.

41 88 U.S. (21 Wall.) 130 (1875); see *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501 (2001).

[T]he case is not dispositive because it was decided under the Conformity Act of 1872 . . . which required federal courts to apply the procedural law of the forum state in nonequity cases. That arguably affected the outcome of the case. See *Dupasseur*, *supra*, at 135. See also Restatement (Second) of Judgments § 87, Comment a, p. 315 (1980) . . . ("Since procedural law largely determines the matters that may be adjudicated in an action, state law had to be considered in ascertaining the effect of a federal judgment.")

Id.

Semtek had alerted the Court to the problem with Professor Degnan's treatment of *Dupasseur* and with the story he told using that case as support. See Reply Brief for the Petitioner at 11 n.8, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551) [hereinafter Reply Brief for Petitioner]; *supra* note 10 and accompanying text; *supra* note 12; *supra* text accompanying notes 18-19. That may explain the Court's failure to cite Degnan on this point and its use of the word "arguably." But the support adduced, the *Restatement (Second) of Judgments*, is for this purpose equally flawed because it accepts Degnan's account. The same is true of WRIGHT, LAW OF FEDERAL COURTS, *supra* note 7, § 100A.

accepted by the Maryland state courts, that Rule 41(b) controlled the outcome of the case.⁴²

Appearing, therefore, to chart a course independent of the parties' arguments,⁴³ Justice Scalia's opinion for the Court reasoned that, the judgment in question being federal, federal law governed its preclusive effects and that it was for the Court to specify the content of that law.⁴⁴ Finding no need for a uniform federal preclusion rule in a case involving state substantive law, Justice Scalia asserted that uniformity would in fact be "better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court."⁴⁵ Thus, he observed, notwithstanding changes in the legal landscape,

[T]he result decreed by *Dupasseur* continues to be correct for diversity cases. . . . As we have alluded to above, any other rule would produce the sort of "forum-shopping . . . and . . . inequitable administration of the laws" that *Erie* seeks to avoid, . . . since filing in, or removing to, federal court would be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal.⁴⁶

Finally, acknowledging that federal incorporation of state law would not obtain "in situations in which state law is incompatible with federal interests,"⁴⁷ Justice Scalia could discern "no conceivable federal interest in giving [California's] time bar more effect in other courts than the California courts themselves would impose."⁴⁸ In reversing the judgment, the Court left for determination on remand the content of California's law of claim preclusion thus incorporated as federal common law.⁴⁹

42 See *Semtek*, 531 U.S. at 500–06.

43 See *id.* at 506 ("Having concluded that the claim-preclusive effect, in Maryland, of this California federal diversity judgment is dictated neither by *Dupasseur v. RocherEAU*, as petitioner contends, nor by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue.").

44 See *id.* at 508 ("In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.").

45 *Id.*

46 *Id.* at 508–09 (citations omitted).

47 *Id.* at 509. "If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule." *Id.*

48 *Id.*

49 See *id.*

C. Assessing the Court's Work

On the whole, the Court should be applauded for the result and the reasoning in *Semtek*.⁵⁰ The case was very difficult, and it might have been thought to present a dangerous challenge both to the Court's own power under the Enabling Act and to the power of the federal courts in general to deal effectively with duplicative litigation. Moreover, the case required the Court to reconcile two lines of cases that could be thought to point in different directions. In finessing the challenge, suppressing the desire to maximize efficiency in adjudication, and achieving a workable accommodation of precedent, the Court accomplished a great deal, unanimously and in short order.⁵¹

The structure of Justice Scalia's opinion for the Court is, however, misleading in suggesting that the Court was "chart[ing] a course independent of the parties' arguments."⁵² In fact, the opinion accepted critically important arguments made by *Semtek*, particularly in its reply brief, and/or in my 1986 article, on which *Semtek* relied: from the nature of the federal obligation to respect federal judgments,⁵³ to the very limited role that the Federal Rules of Civil Procedure can play in shaping federal preclusion law,⁵⁴ to the way in which the Court's *Erie* jurisprudence can be assimilated to its (non-diversity) federal common-law jurisprudence,⁵⁵ and to the type of federal interest that may support uniform judge-made rules of preclusion in diversity cases.⁵⁶

Ironically, one of the few arguments made by *Semtek* that the Court's opinion did not incorporate could have prevented a problem potentially arising from the formulation of its holding. *Semtek* argued that the diversity judgment at issue in the case "should have the same preclusive effect as if it had been rendered by a state court in the first forum," seeking to draw the Court's attention to the fact that the

50 See *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 467 (2001) [hereinafter *Leading Cases*].

51 The case was argued on December 5, 2000 and decided on February 27, 2001. See *Semtek*, 531 U.S. at 497. One can only wonder whether decision with more deliberate speed might have eliminated the problems in Justice Scalia's opinion for the Court that I discuss below.

52 See *supra* text accompanying note 43.

53 Compare *Semtek*, 531 U.S. at 507–08, with Reply Brief for Petitioner, *supra* note 41, at 14, and Burbank, *supra* note 2, at 739–47.

54 Compare *Semtek*, 531 U.S. at 503–08, with Reply Brief for Petitioner, *supra* note 41, at 2–11, and Burbank, *supra* note 2, at 772–75, 782–83.

55 Compare *Semtek*, 531 U.S. at 508–09, with Brief for Petitioner, *supra* note 31, at 28–32, and Burbank, *supra* note 2, at 783–97; see also Reply Brief for Petitioner, *supra* note 41, at 14–17.

56 Compare *Semtek*, 531 U.S. at 508–09, with Reply Brief for Petitioner, *supra* note 41, at 15–16 & n.14, and Burbank, *supra* note 2, at 764–65, 780–83.

case presented horizontal, and not just vertical, interjurisdictional issues.⁵⁷ Had the Court heeded this reasoning, it would not have characterized the litigation as “a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.”⁵⁸ As I shall develop in discussing the limitations aspects of *Semtek*, it is hardly a “classic case,” except perhaps for the Marquis de Sade, and the rule prescribed by the Court is, if not the wrong rule, then not quite the right rule. First, however, I turn to the logically anterior question of Rule 41(b), the Court’s treatment of which is the other troublesome aspect of its opinion.

1. Rule 41(b): Carving Sausage Is No Prettier Than Making It

Faced with a formidable challenge to the validity of Rule 41(b) as interpreted by the Maryland state courts,⁵⁹ the Court in *Semtek* chose to avoid definitive resolution of the issue. That its interpretation of the rule is strained, indeed opaque, bespeaks the difficulty of the enterprise. It also may reflect the failure of *Semtek* (and, hence in part, my failure) to provide adequate help, although, *pace* the postmodernists, law and legal language can and should constrain in-

57 Instead, this Court should hold that this diversity judgment, involving a state-law limitations dismissal, should have the same preclusive effect as if it had been rendered by a state court in the first forum, under *Dupasseur* . . . and *Erie* If the matter is treated as one of federal common law, the pertinent state-law *res judicata* rule should be borrowed because there is no federal interest requiring the use of a nationally uniform rule governing the effect of a limitations dismissal. Where the first forum, like California, follows the traditional rule that limitations dismissals do not have claim preclusive effect, the second forum is free to apply its own statute of limitations. Indeed, under this Court’s full faith and credit decisions, the second forum would be free to do so even if the first forum treated the limitations as barring the plaintiff “from thereafter maintaining an action to enforce the claim in that State.” RESTATEMENT OF JUDGMENTS § 49, cmt. a (1942).

Reply Brief for Petitioner, *supra* note 41, at 1–2 (footnote omitted); *see id.* at 2 (“[The question in *Semtek*] should be answered by reference to the preclusion law of the forum state in which the diversity court sat *and to the full faith and credit obligations that would be owed to that forum state courts’ judgments.*” (footnote omitted) (emphasis added)); *id.* at 3 (Rule 41(b) is silent on the answers to the questions “what law will govern, the scope of that which is precluded, *and the territorial scope to be given that rule of preclusion.*” (emphasis added)); *id.* at 5 (“The quest to serve ‘full faith and credit principles’ . . . therefore favors *Semtek*’s argument, not *Lockheed*’s.”); *id.* at 14 (Proper analysis “would respect the prerogatives of both California and Maryland.”).

58 *Semtek*, 531 U.S. at 508.

59 *See* Reply Brief for Petitioner, *supra* note 41, at 4–10; Burbank, *supra* note 2, at 772–75; Burbank, *supra* note 4, at 1121–31; *supra* note 20.

genuity, and the Court's technique of selectively addressing arguments, rather than grappling with a more difficult reality, did not help matters.⁶⁰

Semtek argued that the Court should interpret Rule 41(b) so as to avoid the Enabling Act question, but its suggested interpretation

60 As Semtek pointed out, Lockheed's argument, based on the plain language of Rule 41(b), overreached, as some lower federal and state courts have overreached, in imputing to that rule anything more than the prescription of one element of preclusion law, to wit, whether a dismissal has the capacity to be claim preclusive as "an adjudication upon the merits." Even read literally, the rule simply does not speak to the question of the law that otherwise governs the effect of a dismissal. See Reply Brief of the Petitioner, *supra* note 41, at 2-4. Yet, by addressing Lockheed's argument the Court obscured that distinction, observing, "This would be a highly peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion, saying in effect, 'All federal dismissals (with three specified exceptions) preclude suit elsewhere, unless the court otherwise specifies.'" *Semtek*, 531 U.S. at 503; see also *id.* at 503-04; *infra* note 83.

Drawing this distinction would not have solved the problem, however. First, the state in which a federal diversity court sits may not regard a particular dismissal as having the capacity to yield claim preclusion; that is, it may not regard such a dismissal as "an adjudication upon the merits." That in fact appears to be true of California law with respect to limitations dismissals, since there are cases suggesting that a limitations dismissal in a suit advancing one theory of recovery does not preclude a subsequent lawsuit involving the same underlying transaction but seeking recovery on another theory (as to which a different limitations period applies). See, e.g., *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438 (Ct. App. 1990) (holding that prior summary judgment which was entered on grounds that action was barred by statute of limitations did not act as *res judicata* to preclude subsequent action for common-law fraud). Second, the problem of invalidity under the Enabling Act does not go away simply because a rule attempts to state law in only part of territory that is forbidden to the enterprise.

This aspect presented a third problem for me, and hence for Semtek to the extent that it relied on my scholarship. In working out the law governing the preclusive effects of federal question judgments, I had started with the proposition that uniform federal rules are necessary to determine the preconditions, such as validity and finality, that determine whether there is a judgment entitled to consideration for preclusive effect, and I had reasoned that within the sphere of claim preclusion, the question whether a judgment is "on the merits," is for that purpose functionally equivalent. See *Burbank*, *supra* note 2, at 764-65. Unfortunately, when I turned to the law governing the preclusive effects of diversity judgments, although I did signal that my "tentative conclusion [that such reasoning was 'as applicable to judgments on state law questions as it is to federal question judgments'] should be tested within the analytical framework" dictated by *Erie* jurisprudence, *id.* at 780-81 n.226, I also asserted that, although Rule 41(b) was formally invalid under the Enabling Act, the error was harmless because the rule stated law that was within the power of federal courts to make as common law. See *id.* at 782-83. As *Semtek* demonstrates, the latter assertion requires the same qualification.

was hardly clear and not clearly coherent.⁶¹ Neither is the Court's. Justice Scalia's opinion indulges in an elaborate play on the words "on the merits," moving from the proposition that, because eligibility for claim preclusive effect in some, but not other, jurisdictions has expanded over time to include adjudications that do not in fact resolve the merits of litigation, "it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect,"⁶² to the proposition that "there are a number of reasons for believing that the phrase 'adjudication upon the merits' does not bear that meaning in Rule 41(b)."⁶³ One of those reasons was that "if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate [the Enabling Act's] limitation."⁶⁴ Another was that, "as so interpreted, the Rule would in many cases violate the federalism principle of [*Erie*] by engendering 'substantial variations [in outcome] between state and federal litigation' which would 'likely . . . influence the choice of a forum.'"⁶⁵

61 See Reply Brief for Petitioner, *supra* note 41, at 3 ("The most that can be said is that Rule 41(b) provides a procedure for identifying a federal judgment with the potential to bar another action as a matter of claim preclusion The 'upon the merits' label is a mere datum, for whatever significance state law chooses to accord it."); *id.* at 9-10 ("Rule 41(b) is better interpreted as a procedural rule affording a datum that the federal court regards its decision as 'on the merits,' for whatever significance that has under the preclusion law of the applicable jurisdiction.").

62 *Semtek*, 531 U.S. at 503.

63 *Id.*

64 *Id.* at 503-04.

65 *Id.* (citations omitted). To those who are distressed by this aspect of *Semtek*, viewing it as reintroducing analytical confusion (as between standards of validity of federal common law and Federal Rules of Civil Procedure) that it was a major purpose of the Court's opinion in *Hanna v. Plumer*, 380 U.S. 460 (1965) to dispel, I offer three consoling thoughts. First, the Court had already all but said that, interpreted as it had been by the Maryland courts, Rule 41(b) would be invalid under the Enabling Act, and the language in question came after, and was analytically distinct from, that conclusion. Second, in *Hanna* itself, the Court observed that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 472; see also Reply Brief for Petitioner, *supra* note 41, at 6. Third, on a number of occasions, the Court has "interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996); see also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); Reply Brief for Petitioner, *supra* note 41, at 9.

For these and other reasons, the Court chose narrowly to interpret a Rule 41(b) dismissal "upon the merits" as barring refiling of the same claim in the same federal court.⁶⁶ Its route to that interpretation involved another elaborate play on words, in this case, the words "dismissal without prejudice" in Rule 41(a),⁶⁷ which the Court deemed the opposite of an "adjudication upon the merits" and the effect of which, with the help of *Black's Law Dictionary*, the Court confined to the same court.⁶⁸

Confronted with such a transparently dubious interpretation, it may be useful, as it might have been useful for the Court, to explore the drafting history of Rule 41(b), to see whether it illuminates the problem presented in *Semtek*. In fact, the drafting history reveals a very unsatisfactory and confused process, major last-minute changes, and not uncharacteristic of the original Advisory Committee, lack of careful attention to the limitations on the enterprise.⁶⁹

The rulemakers' major goals initially were (1) to define for the new procedural system the circumstances in which a plaintiff could take a voluntary nonsuit, that is, dismiss a lawsuit without leave of court, retaining the freedom to refile it, and (2) to ensure that the federal courts would not be saddled with a rule like that of the common law, still (in 1935) obtaining in some states, whereby the plaintiff had an unfettered right to take a nonsuit late in the progress of a case

66 See *Semtek*, 531 U.S. at 504–06. Note that the Court's formulation either assumes that all jurisdictions agree about the scope of the claim that is precluded (not unreasonable, perhaps, on the facts of *Semtek*), or reflects the error in *Lockheed's* argument that *Semtek* had pointed out. See Reply Brief for Petitioner, *supra* note 41, at 2–4. The Court left to another day the answer to the question whether "in a diversity case, a federal court's 'dismissal upon the merits' (in the sense we have described), under circumstances where a state court would decree only a 'dismissal without prejudice,' abridges a 'substantive right' and thus exceeds the authorization of the Rules Enabling Act." *Semtek*, 531 U.S. at 506. "We think the situation will present itself more rarely than would the arguable violation of the Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion; and if it is a violation, can be more easily dealt with on direct appeal." *Id.*

67 See FED. R. CIV. P. 41(a)(1).

68 The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim. That will ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself.

Semtek, 531 U.S. at 505.

69 See Burbank, *supra* note 4, at 1132 ("[T]he Advisory Committee . . . had no coherent or consistent view of the limitations imposed by the Act's procedure/substance dichotomy.").

and refile the same action.⁷⁰ But, in the process of revising a draft based on a Minnesota statute that elaborated all of the circumstances in which a case could be dismissed without prejudice and abolished any other such bases, the Committee included a number of situations where, in the court's discretion, a case might be involuntarily dismissed without prejudice.⁷¹

Between the publication of the May 1936 Preliminary Draft and the April 1937 Proposed Rules, a number of influences prompted the Advisory Committee to deal explicitly with voluntary and involuntary dismissals, and with dismissals without prejudice and with prejudice.⁷² In comments on the Preliminary Draft, a Special Assistant to the Attorney General of the United States, observing that "Rule 4[1] enumerates the circumstances in which an action may be dismissed without prejudice," then raised the question "whether all dismissals should not

70 See PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES (Nov. 14–20, 1935) [hereinafter PROCEEDINGS (Nov. 14–20, 1935)], *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, Nos. CI-117-71 to CI-118-0 (Cong. Info. Serv.). The availability of these papers fulfills the hope that they would "be made generally accessible to scholars and that permission [would] be granted to cite their contents." Burbank, *supra* note 4, at 1132 n.529.

71 See PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES (Feb. 20–25, 1936) [hereinafter PROCEEDINGS (Feb. 20–25, 1936)], *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, Nos. CI-211-28 to CI-211-88 (Cong. Info. Serv.). Both alternatives of Rule 41 (Rule 48 in this version, entitled "Dismissal Without Prejudice") that were published for comment in May 1936 defined the circumstances in which a plaintiff, the parties (by stipulation), or the court could dismiss an action without prejudice. See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia 85–87 (May 1936). The Advisory Committee's note cited a number of state statutes, including "2 Mason's Minn. Stats. (1927), § 9322." *Id.* at 87. As put by a member of the Committee during its February 1936 meetings, "The thing we are doing now is to provide the cases in which the court may dismiss the action. We are providing specific cases, put it that way, in which the court may dismiss the action without the dismissal being a judgment in bar." PROCEEDINGS (Feb. 20–25, 1936), *supra*, *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, No. CI-211-69 (Cong. Info. Serv.).

72 As indicated above and recognized by the Committee, the first alternative version published in 1936 already included some involuntary dismissals; it simply did not purport to specify when such dismissals would be with, as opposed to without, prejudice. Moreover, even before publication of the Preliminary Draft, the reporter was raising the question of the relationship between this rule and the separate rule on directed verdicts. See PROCEEDINGS (Feb. 20–25, 1936), *supra* note 71, *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, No. CI-211-86 (Cong. Info. Serv.) (statement of Mr. Clark).

be deemed to be *with* prejudice except in cases that may be specified, among which ought to be included actions prematurely instituted.”⁷³

Thus encouraged, and reassured that it had the power to do so,⁷⁴ by November of 1936 the Advisory Committee had decided to make an effort “to provide definitely when dismissals shall be made without prejudice and when they shall operate to bar the bringing of a new suit,” but the effort “present[ed] many serious problems.”⁷⁵ Following consideration of drafts that sought to state two separate rules governing dismissals without and with prejudice, and in response to the reporter’s concerns that there was “practically complete overlapping between” them and that “[l]isting is always dangerous because of possible omissions,”⁷⁶ the Committee worked from his redraft of a unitary rule providing presumptively that voluntary dismissals were without

73 Letter from Carlton Fox to Advisory Committee on Rules of Civil Procedure 2 (June 18, 1936), *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, No. CI-5102-15 (Cong. Info. Serv.). He continued, “Furthermore, it would seem that provision might be made to the effect that dismissals should be deemed to be on the merits, except where for good cause shown an order is entered at the time of dismissal specifically stating that the dismissal is without prejudice.” *Id.*

74 A written comment by Edgar Tolman, a member of the Committee and its Secretary, on a pre-May 1936 draft of the rule suggested that two 1936 decisions of the Supreme Court established the Committee’s “right to change the law in regard to the dismissal of cases and the effect thereof.” Suggestions of Mr. Tolman (Tentative Draft III), *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, No. CI-2821-95 (Cong. Info. Serv.). But, the writer invited “suggestion [on] the question whether or not we should go to the lengths to which the present rule goes,” observing that “[t]here may be dynamite in it.” *Id.* At most, the cases relied on established the validity of a court rule altering the absolute right at common law and in equity to withdraw or dismiss the plaintiff’s case/suit in the absence of prejudice to the defendant other than the expense and vexation of additional litigation. See *Jones v. SEC*, 298 U.S. 1, 18–25 (1936); *Bronx Brass Foundry, Inc. v. Irving Trust Co.*, 297 U.S. 230, 232 (1936).

At an institute on the new federal rules sponsored by the American Bar Association in 1938, the same individual observed: “Since this rule attempts to state the effect of a dismissal, the question has been raised whether it is really procedural. I call your attention to the English case . . . [*Poyser v. Minors*, 7 Q.B.D 329 (1881)] which involved that very point.” PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES 310 (1938). I need hardly belabor the quaint, pre-realist assumption that this nineteenth-century English case involved the “very point” as did the question of the Supreme Court’s power under the Rules Enabling Act of 1934. See *id.* at 306 (describing *Poyser*).

75 Edgar B. Tolman, Address Before the Law Club in Chicago, Ill. (Nov. 6, 1936), *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, No. CI-929-76 (Cong. Info. Serv.).

76 Comments for the Style Committee by Mr. Clark and Mr. Friedman on P.D. [Preliminary Draft] February, 1937, Federal Rules of Civil Procedure (Mar. 3, 1937),

prejudice, 'while involuntary dismissals were with prejudice. Unfortunately, that approach "move[d] too fast and far in the other direction."⁷⁷

The Committee had approved in April 1937, and was about to publish for comment, language in Rule 4[1](b) providing that "[u]nless the court in its order for dismissal shall otherwise specify a dismissal under this subdivision and any dismissal not provided for in this rule shall have the effect of an adjudication upon the merits," when the chairman alerted the reporter "to one mistake we have made in the provision."⁷⁸ Pointing out that dismissals for both lack of jurisdiction and improper venue were not "provided for in the rule" and that they "should not have the effect of an adjudication upon the merits,"⁷⁹ William D. Mitchell urged a change in the rule to accommodate those situations, and such a change was included in the Proposed Rules that were published for comment.⁸⁰ So much for the danger of "listing."⁸¹

The drafting history summarized above makes it clear that the Court in *Semtek* was correct in positing that the rulemakers used the words "operates as an adjudication upon the merits" in Rule 41(b) as the opposite of "without prejudice," and thus as synonymous with the words "with prejudice."⁸² It also reveals, however, that to the extent

microformed on RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, No. CI-501-14 (Cong. Info. Serv.).

77 *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

78 Letter from William D. Mitchell to the Hon. Charles E. Clark (May 5, 1937), *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, No. CI-2817 (Cong. Info. Serv.).

79 *Id.*

80 See REPORT OF THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 101-04 (1937) (Rule 42 in this version).

81 See *supra* text accompanying note 76. Rule 41(b) was amended in 1963 to add dismissals "for lack of an indispensable party" to those excepted from the presumptive rule, and in 1966 to change that language to "for failure to join a party under Rule 19." See *supra* note 37; see also *Costello v. United States*, 365 U.S. 265, 284-88 (1961) (expansively defining "jurisdiction").

82 See, e.g., PROCEEDINGS (Nov. 14-20 1935), *supra* note 70, *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, No. CI-117-35 (Cong. Info. Serv.) (Mr. Mitchell: "May I suggest that the words 'the plaintiff may dismiss' ought to be qualified by 'without prejudice,' or 'without determination of the merits,' because the word 'dismiss' is sometimes used to mean a dismissal on the merits."); *supra* text accompanying notes 73, 75; see also PROCEEDINGS OF THE WASHINGTON, D.C. INSTITUTE ON FEDERAL RULES 190 (1938) [hereinafter WASHINGTON INSTITUTE] (Rule 41(a) "provides that an action dismissed by filing a notice of dismissal, unless otherwise stated in the notice, is without prejudice, and that means it is not an adjudication."); PROCEEDINGS OF THE NEW

they thought about the question, the rulemakers believed that they had authority to define both when a dismissal would not be eligible to bar another action on the same claim and when it would be eligible for such effect, and that they sought to do the latter in Rule 41(b).⁸³ I have found no suggestion in this history that the rulemakers intended to cabin the effects to the rendering court.⁸⁴

For those who are not disposed to consult or consider such materials, the Court's error (as a matter of interpretation) in confining the effects of a Rule 41(b) dismissal to the rendering court seems clear in light of the following consideration: if that had been the intended ambit of the rule, it would not have made sense to except dismissals for lack of jurisdiction and improper venue,⁸⁵ since under the doctrine of direct estoppel (issue preclusion), the plaintiff would have been precluded from refileing the case in the same court in any

YORK SYMPOSIUM ON FEDERAL RULES 277 (1938) (Rule 41(b) "dismissal is with prejudice, and is an adjudication unless the court should specify to the contrary.").

83 They may also have proceeded under the unarticulated assumption that there were no differences in the laws of various jurisdictions as to the scope of claim preclusion. That was a much more reasonable assumption in the 1930s than it is today. See Burbank, *supra* note 2, at 765–66. In that light, their attempt to state a presumptive rule of eligibility for preclusion appears less "peculiar," if only because to them claim preclusion was less "complex." Cf. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–03 (2001); *supra* note 60. Still, it was and is more complex than the Court's response to Lockheed's argument may otherwise suggest. See *supra* notes 60, 66.

84 In discussing the preclusive effects of a dismissal under Rule 41(a)(1), Edgar Tolman observed that "[e]ven if [the] claim is brought in a state court, I should think that the state court as well as a federal court, would refuse to permit recovery on a claim which had been adversely adjudicated by a court of competent jurisdiction." WASHINGTON INSTITUTE, *supra* note 82, at 119; *id.* at 207 ("I think the words 'operates as an adjudication upon the merits' mean that the dismissal has the same effect as if the court, after a hearing, entered a judgment dismissing the action and stating 'this dismissal operates as an adjudication on the merits.'").

The Court's interpretation yields a "highly peculiar" rule of preclusion, not even extending to other courts within the same system. See *Semtek*, 531 U.S. at 503; see also *supra* note 60. It may have taken inspiration from the suggestion, with respect to statute of limitations dismissals, that "[h]ere as elsewhere, Rule 41(b) need mean only that the dismissal precludes relitigation of the same limitations issues in the same court. Any greater effect should depend on independent analysis." 18 WRIGHT, MILLER & COOPER, *supra* note 7, § 4441, at 373. Although that formulation refers to issues rather than claims (and may not have intended "the same court" in the literal sense apparently intended by the Court in *Semtek*), and although the antecedent discussion well reveals the failings of Rule 41(b), see *id.* §§ 4435–4441, the proposal is no more faithful to the text of the rule or its history than the Court's. For problems with such an approach outside of the limitations area, as recommended in, for example, *id.* § 4467, at 648, see Burbank, *supra* note 21, at 102–06, 118–21.

85 See *supra* text accompanying notes 78–81.

event.⁸⁶ It might have been better, after all, to decide the Enabling Act question.

2. Complexity on Stilts

Perhaps the most general point of my 1986 article was that, given the characteristics and needs of our federal system, Professor Degnan's proposed rule for interjurisdictional preclusion, however attractive because of its simplicity and predictability, would come at a cost too great.⁸⁷ In rejecting uniform federal preclusion law in *Semtek*, the Court acknowledged some of those characteristics and needs as previously articulated, particularly in *Erie's* progeny, and confirmed their contemporary relevance.⁸⁸ It failed, however, to consider or adequately to account for other such characteristics and needs arising from the fact that the rule at issue in *Semtek* would operate in horizontal as well as vertical interjurisdictional space. Indeed, and ironically, the Court committed a mistake precisely the opposite of the mistake that it has made in situations involving the interjurisdictional preclusive effects of a state court judgment, but perhaps for the same reasons.

According to the Court in *Semtek*, the task of the state courts on remand is to determine the claim preclusive effect of a statute of limitations dismissal as a matter of California law and to give the federal diversity judgment the same preclusive effect as a matter of federal common law. It appears that California law adheres to the traditional view, whereby a limitations dismissal usually bars the remedy and not the right, is not an adjudication on the merits, and does not have

86 See RESTATEMENT OF JUDGMENTS § 45, cmt. d (1942).

The term "direct estoppel" is used in the Restatement of this Subject to indicate that the binding effect of a judgment as to matters actually litigated and determined in one action applies to a subsequent action between the parties based upon the same cause of action, where the plaintiff is not precluded from maintaining such an action by the extinguishment of his cause of action under the rules as to merger and bar.

Id.

87 See Burbank, *supra* note 2, at 739.

88 See *Leading Cases*, *supra* note 50, at 476-77. But see Erichson, *supra* note 20. Professor Burbank cautioned us not to ignore the inherent complexity: "We need a law of interjurisdictional preclusion that is sensitive to the complexity of our federal system" No court has reliably adopted such a nuanced approach to choice of preclusion law, however, and there is no reasonable prospect that courts will do so in the future.

Id. at 1014 (footnote omitted).

claim preclusive effect within California.⁸⁹ Many states, however, have abandoned the traditional view, barring a subsequent suit within the state on the same claim (defined in the broad, modern transactional sense). That is, such states regard a limitations dismissal as an adjudication on the merits domestically.⁹⁰

It is also the traditional view, however, that full faith and credit does not usually require the second forum's (F2's) courts to bar a suit that is timely under the F2's limitations law but that has been dismissed as untimely by the courts of the first forum (F1).⁹¹ So long as

89 See, e.g., *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438, 441-42 (Ct. App. 1990); *supra* note 60; see also, e.g., *Johnson v. City of Loma Linda*, 5 P.3d 874 (Cal. 2000); *Lackner v. LaCroix*, 602 P.2d 393, 395 (Cal. 1979); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir. 1998). For the traditional view, see RESTATEMENT OF JUDGMENTS § 49 (1942).

Note, however, the following:

A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case the judgment is on the merits to the extent that it will bar the plaintiff from maintaining a further action in that State, but it is not on the merits so far as actions in other States are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.

Id. § 49 cmt. a.

This may reflect a narrow conception of a "cause of action" or "claim," with direct estoppel (issue preclusion) picking up the slack. See *supra* note 86; cf. *Advest, Inc. v. Wachtel*, 668 A.2d 367, 371 (Conn. 1995) (stating both that "the only issue that is precluded from litigation is whether the *Connecticut* statute of limitations has run" and that "the running of Connecticut's statute of limitations precludes the defendants in the present action from bringing the same claim in Connecticut").

90 See *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) ("[O]ur survey of recent cases suggests a clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations."); see also RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. f, reporter's notes (1982).

91 See *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839) (dictum); *Brent v. Bank of Wash.*, 35 U.S. (10 Pet.) 596, 617 (1836) (dictum); *Bank of U.S. v. Donnelly*, 33 U.S. (8 Pet.) 361, 373 (1834) (dictum); *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541-43 (2d Cir. 1933); *Lee v. Swain Bldg. Materials Co.*, 529 So. 2d 188, 190-91 (Miss. 1988); RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. f, reporter's notes; RESTATEMENT OF JUDGMENTS § 49 cmt. a. There are numerous lower court cases to the contrary, although it seems that in most of them the court was acting to preclude from a view of wise policy as a matter of (F2) state law, even when it attributed the result to the requirements of full faith and credit. See, e.g., *Sautter v. Interstate Power Co.*, 567 N.W.2d 755, 757-61 (Minn. Ct. App. 1997). Thus, the current state of the

that remains the law of full faith and credit, *Semtek* itself should be decided on remand so as to accord the federal diversity judgment the same preclusive effect to which a California state court judgment would be entitled (no bar to suit in Maryland under a different statute of limitations). Where, however, a federal diversity court sits in a state that treats limitations dismissals as adjudications on the merits with full claim preclusive effect within the state,⁹² the result of *Semtek* would appear to be that a federal diversity judgment bars suit interjurisdictionally, even though the identical judgment of a state court a block away does not (as a matter of full faith and credit).

Awareness of this problem prompted *Semtek* to flag the question of the territorial scope of the rule to be fashioned as federal common law and to frame the solution it urged in terms of the preclusive effects to which the identical judgment of a California state court would be entitled as a matter of full faith and credit.⁹³ This proposed solution has the additional benefit of implementing the rule in *Dupasseur v. Rochereau*.⁹⁴ In answering the preclusion question using a full faith

federal obligation is unclear, and many of the authorities are hopelessly confused, in part because of lack of precision in the use of legal terminology. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmts. a–b (rev. 1988).

92 See *supra* note 90 and accompanying text.

93 See *supra* note 57 and accompanying text. *Semtek* also suggested the relevance of the Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), where, deeming itself free of the obligations of both the Full Faith and Credit Clause and the full faith and credit statute, the Court nonetheless fashioned a federal common-law rule that mimicked the full faith and credit solution. See Reply Brief for Petitioner, *supra* note 41, at 15; Burbank, *supra* note 17, at 1552, 1560–71.

94 88 U.S. (21 Wall.) 130 (1875).

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 It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States 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 court then, it should have the same effect, being rendered by the Circuit Court.

Id. at 135. The reference to state law in the last sentence of this quotation should not be allowed to obscure the general rule, the dominance of which may be suggested by the immediately preceding discussion of appellate jurisdiction, where the Court assimilated what it was doing as a matter of federal common law to what, in the case of state court judgments, is required by the Full Faith and Credit Clause of the Constitution. See *id.* at 134; Burbank, *supra* note 2, at 741–42. It is confirmed by the Court's occasional and confusing ascription of the obligation to respect federal judgments to the full faith and credit statute. See *id.* at 740–47.

and credit model, there was no need in *Dupasseur* to consider any law other than that of Louisiana, the state in which the federal diversity court sat to administer state contract and property law and in whose courts the question of preclusion arose. But the model does require consideration of other law in some cases, just as, when the interjurisdictional preclusion question involves a state court judgment, the full faith and credit statute requires such consideration.

In situations where a state court is F1, which triggers the application of the full faith and credit statute, the Court has neglected the vertical relationship between federal and state law in the hypothetical domestic state court setting that is the statutory referent determining horizontal (interjurisdictional) preclusive effect.⁹⁵ In *Semtek*, on the other hand, the Court neglected the horizontal work required of the rule it fashioned with a vertical accommodation in mind.

Although opposites in one sense, these mistakes may spring from the same sources. First, in both contexts, the refinement I have insisted on will not make a practical difference in most cases.⁹⁶ But, with respect to the measure of the credit due to a state court judgment, as the Court's decisions in cases not governed by the statute and in cases involving claims within exclusive federal subject matter jurisdiction seem to confirm, the different interpretations will yield different results in some cases, namely cases involving robust federal substantive policies.⁹⁷

Similarly, in tying (most of) the preclusive effects of a federal diversity judgment to the law that would be applied in the state in which

95 See *supra* note 15.

96 Thus, where a state court has rendered a judgment, the preclusive effects of which are in question in subsequent proceedings in another state's courts or in federal court, under either the Court's interpretation of the full faith and credit statute or my own, the domestic preclusion law of the rendering state will usually govern. See Burbank, *supra* note 2, at 800.

97 See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (holding that a state court judgment approving settlement of shareholders' state and federal claims was eligible for preclusive effect in federal court under the full faith and credit statute, even though the federal claims could not have been brought in state court); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (holding that unreviewed findings of state administrative agency have no preclusive effect on federal age discrimination claim); *Elliott*, 478 U.S. 788 (holding that unreviewed findings of state administrative agency could preclude an employee's discrimination claims under Reconstruction era civil rights statutes, but not Title VII claims); *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373 (1985) (holding that the full faith and credit statute requires a federal court to consider state claim preclusion law when determining whether a state court judgment bars a subsequent federal antitrust claim that could not have been brought in state court); Burbank, *supra* note 17, at 1560-71; Burbank, *supra* note 2, at 822-29; *supra* note 93.

the federal court sat, the Court in *Semtek* successfully accommodated both the vertical and horizontal characteristics and needs of the federal system in most cases, since in most cases that law will be the same as the law that would govern the interjurisdictional preclusive effects of the identical judgment of a state court a block away. Whenever, however, F2 remains free to depart from F1's domestic preclusion law as a matter of full faith and credit—to give F1's judicial proceedings either less or greater preclusive effect than they would be given in F1—the *Semtek* formulation could lead to different results as between the judgments of state and federal courts in the same state, and thus lead to problems of forum shopping and other strategic litigation behavior that it was the Court's purpose to prevent.⁹⁸

Second, it may be that the distinctions I have drawn simply escaped the Court's attention. The practical results of my reinterpretation of the full faith and credit statute as applied to state court judgments might well be unattractive to the current Court, since my approach would lead to less preclusion of federal claims—reason enough not to change course.⁹⁹ But it is difficult to believe, with respect to federal diversity judgments, that the Court consciously opted for a formulation that in a predictable class of cases would result in the very practical and social problems that influenced its rejection of uniform federal preclusion law in the case before it. It is also difficult to believe that the Court, particularly Justice Scalia, sought in *Semtek* indirectly to undermine the traditional full faith and credit treatment of limitations dismissals.¹⁰⁰

Third, it is possible that the Court in *Semtek* thought that its formulation did in fact accommodate full faith and credit law and, thus, that it was laboring under the same mistake that has infected its efforts to work out the preclusive effects of state awards in workers' compen-

98 See *supra* text accompanying notes 45–46. Although the Court seems to interpret the full faith and credit statute literally, so as to require F2 to give the same effect as would be given in F1—neither less nor greater—this is not the only possible interpretation. Compare 18 WRIGHT, MILLER & COOPER, *supra* note 7, §§ 4403, 4465, 4467 (advocating greater freedom in F2 to depart from F1 law), with Burbank, *supra* note 21, at 95–102 (discussing problems with that approach).

99 See Burbank, *supra* note 17, at 1560–71 (discussing federal judgments law in interjurisdictional cases).

A cynic might speculate about the reasons for the Court's rediscovery of the full faith and credit statute and of the role of state preclusion law when federal substantive rights are at issue. Such a person should be aware, however, that this phenomenon is not unique to the present Court.

Burbank, *supra* note 2, at 801

100 See generally *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

sation cases¹⁰¹ and state court judgments in litigation involving claims within exclusive federal subject matter jurisdiction.¹⁰² Perhaps, that is, the Court believes that whether a state court judgment dismissing a case on limitations grounds is preclusive in subsequent litigation in another state depends upon the rendering court's views on a question it is without power to decide.¹⁰³

Professor von Mehren has taught me a great deal about these latter questions, requiring me to consider the proper role of a principle of functional equivalence in full faith and credit jurisprudence,¹⁰⁴ as well as the role, if any, that F1's views on interjurisdictional effects should have as a matter of federal law.¹⁰⁵ Perhaps most important, he has caused me to understand the relationship between choice of law and recognition of judgments.¹⁰⁶ From that perspective, as Semtek argued, the traditional full faith and credit treatment of limitations dismissals is a reflex of the traditional choice of law treatment of limitations as a matter of procedure, governed by the law of the forum.¹⁰⁷ There has been progress on the latter front, advanced by revisions in the *Restatement (Second) of Conflict of Laws*,¹⁰⁸ and one can hope that the Supreme Court will adjust full faith and credit jurisprudence ac-

101 See, e.g., *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261 (1980); *Indus. Comm'n v. McCartin*, 330 U.S. 622 (1947); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

102 See *Matsushita*, 516 U.S. 367; *Marrese*, 470 U.S. 373.

103 See Burbank, *supra* note 2, at 822-29; Burbank, *supra* note 21, at 104-06, 118-21; *supra* note 33; cf. *Sun Oil Co.*, 486 U.S. at 729 n.3 ("[I]t cannot possibly be a violation of the Full Faith and Credit Clause for a State to decline to apply another State's law in a case where that other State *itself* does not consider it applicable." (involving choice of law, not judgments)).

104 See ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1460-63 (1965); Burbank, *supra* note 2, at 825.

105 See VON MEHREN & TRAUTMAN, *supra* note 104, at 1458-66; Burbank, *supra* note 2, at 823-25; Burbank, *supra* note 21, at 104-06; see also Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 161-62 (1949) (arguing that it is federal law rather than state law that determines the credit which one state shall give to another's judgments).

106 See VON MEHREN & TRAUTMAN, *supra* note 104, at 87-89, 1460, 1466.

107 The traditional [full faith and credit] rule finds justification in the limits of the choice-of-law process: from the perspective of claim preclusion, a party like Semtek did not have the opportunity to rely on Maryland limitations law in the California action; from the perspective of issue preclusion, the timeliness of Semtek's action under Maryland law was neither litigated nor decided in the California action.

Reply Brief for Petitioner, *supra* note 41, at 5; see Burbank, *supra* note 2, at 797 n. 317; Burbank, *supra* note 21, at 118-19.

108 See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 142 (rev. 1988); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 3.2C2 (4th ed. 2001).

cordingly. But *Semtek* was not a proper vehicle to do that, both because, where F1 (California) has dismissed under its shorter statute of limitations, even the Restatement's approach would not usually lead to preclusion in F2 (Maryland),¹⁰⁹ and because federal common law designed to avoid forum shopping and other strategic manipulation of federal jurisdiction cannot lead by example.

CONCLUSION

The solution to the problem of governing law for federal diversity judgments that I proposed in 1986 was against the grain, if not of conventional wisdom, then of the prevailing wisdom of the academic establishment. As Professor Purcell has demonstrated, Henry Hart forgot what he knew about the manipulation of federal jurisdiction by corporate defendants and thus reinvented *Erie* and dismissed its progeny, disparaging doctrine founded in a concern about forum shopping for a different law.¹¹⁰ How much easier for those who never knew, or never cared, to do the same, particularly in an age when the

109 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. f. Note, however, that Professor Weintraub regards California as a jurisdiction that has adopted a functional approach to limitations questions. See WEINTRAUB, *supra* note 108, § 3.2C2, at 66–67 n.57.

110 See PURCELL, *supra* note 12, at 229–57; *supra* note 26.

Given his intense commitment to the ideal of a “juster justice,” Hart’s response to *Erie*’s social purposes was striking and disappointing. He essentially dismissed Brandeis’ concern with the “practical discrimination” that had occurred under *Swift*. Forum shopping, Hart commented, was merely “a minor consideration which Brandeis mentioned in passing.” Insofar as jurisdictional statutes created an inequality between in-state and out-of-state parties, his proposed solution was simply—and not surprisingly—to expand federal jurisdiction. “[T]he federal government, confident of the justice of its own procedures” should make the “federal forum equally accessible to both litigants.” Beyond that, the policy of eliminating forum shopping was an unworthy “triviality.” Passing over the specific social problem that *Erie* had addressed, he failed to see in it any broader concern with the impact of social and economic inequality on the legal system’s ability to deliver practical justice. His crabbed and sterile view of *Erie*’s social purposes contrasted with his richly imaginative and transforming portrayal of its political purposes.

PURCELL, *supra* note 12, at 251 (footnotes omitted); see *id.* at 253 (“Hart’s concept of ‘primary activity’ shifted the analysis of the *Swift-Erie* problem from a social to a psychological level that emphasized the intellectual uncertainty of rational actors trying to discern which forum, and hence which rule, would judge their behavior.”); *supra* note 26.

federal courts had come to be regarded as bastions for the less fortunate?¹¹¹

Semtek demonstrates that Brandeis' concerns have relevance today. Whatever the formal doctrinal relevance of forum shopping, the oral argument left no doubt that the Justices were aware of, and that some of them were troubled by, the lengths to which Lockheed had gone in manipulating federal jurisdiction in an attempt to secure different and more favorable preclusion law.¹¹²

My proposed solution was also in tension with the utility function¹¹³ of federal judges as opposed to academics—although they may be related—and in particular their perfectly natural desires to maximize their own power and to serve their own institutional interests.

The interest of the federal judiciary in efficiency is unquestionable and unquestionably powerful. Particularly when state substantive rights are involved, however, it is important that federal judges not be given free rein to define and pursue that interest. Preclusion rules may implicate substantive policies; they have dramatic effects on substantive rights. When state substantive rights have been in question, from the perspective of purposes or effects, federal judges have not in the past been permitted to act with the autonomy of state judges. Rather, they have been required to do what judges of a particular state would do. The question is whether, in fashioning preclusion rules for diversity judgments, federal judges should have greater freedom to act as if the federal courts were a domestic system.¹¹⁴

111 Cf. Stephen B. Burbank, *Introduction: "Plus Ça Change . . . ?,"* 21 U. MICH. J.L. REFORM 509, 513 (1988) (discussing *Yale Law Journal's* rejection of an article by Marc Galanter in letter asserting that "[s]ince the demise of the Hughes, and Vinson courts, the legal system has proven itself more sensitive to the demands for legal change from minority interests than any other branch of our government").

112 See Transcript of Oral Argument at 31–32, 41, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (No. 99-1551); *supra* text accompanying notes 30–40. There was no similar concern expressed about *Semtek's* forum shopping for a longer statute of limitations, probably because the Justices regard that as "attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); see also *Leading Cases*, *supra* note 50, at 475–76. For the possibility that, at least when statutes of limitations are no longer insulated from the choice of law process, the Constitution (and its implementing full faith and credit statute) should no longer be interpreted to permit this in the case of judgments, see *supra* text accompanying notes 104–09.

113 See RICHARD A. POSNER, *OVERCOMING LAW* 117–26 (1995).

114 Burbank, *supra* note 2, at 796 (footnotes omitted). In this light, it is an interesting question whether *Semtek*, which denied to federal courts sitting in diversity "free rein" in pursuing efficient administration, should be seen as part of the current Court's reinvigoration of federalism. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62

Of course, this story has what should count as a happy ending, at least for me, since, the exquisite complications of the limitations problem aside, in *Semtek* the Supreme Court adopted the solution I recommended as to the preclusive effects of federal diversity judgments and, in the process, signaled acceptance of my views as to the limitations the Enabling Act places on the Court's power to promulgate Federal Rules of Civil Procedure stating preclusion law. That the author of the Court's opinion, well aware of the origins of that solution, chose not to acknowledge its provenance, may indicate nothing more than that the conventions of scholars do not accompany them to the bench.¹¹⁵

(2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995). Cutting against that view of the case is the fact that the Court's federal common-law jurisprudence over the last thirty years has pretty consistently favored borrowing state law, together with the dominant thrust of its *Erie* jurisprudence. See Burbank, *supra* note 2, at 758, 785–87. Yet, the Court, including Justice Scalia, has not been wholly consistent in borrowing state law to fill the interstices of federal substantive law, see, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), and as we have seen, most of *Erie*'s progeny have not found favor with the academic establishment; those cases do not all point in the same direction, see, e.g., *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), and the weight of lower court opinions on the precise question presented in *Semtek* favored federal judge-made law. Perhaps, then, this was a case where the existence of precedent was helpful to the implementation of a broader agenda favoring respect for state law. See Jenna Bednar, *Federalism, Judicial Independence, and the Power of Precedent* (unpublished paper) (on file with author). It is certainly not inconsistent with this view of the case that the Court insisted on its power over the choice to borrow state law, whereas I had argued that Congress made that choice for the federal courts in the Rules of Decision Act. See Burbank, *supra* note 2, at 753–62, 783–91, 808–10; *supra* note 17.

115 Incredibly, the Court cited Professor Degnan's article for the proposition that federal common law governs, see *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), even though it thoroughly repudiated his argument as to the content of that law. In the case of my article, the convention of some scholars had also been to ignore it. See, e.g., 18 WRIGHT, MILLER & COOPER, *supra* note 7; WRIGHT, *LAW OF FEDERAL COURTS*, *supra* note 7, § 100A. The reason, I expect, is revealed in a letter Professor Wright sent me about another article: "Perhaps I have been overly influenced by the fact that Ron Degnan was as close a friend as I have ever had. Therefore I have tended to accept as gospel everything he said in his Yale article. . . ." Letter from Charles Alan Wright to Stephen B. Burbank (Apr. 17, 1997) (on file with author).

