This is an Article about what Justice Jackson would have called lawyers' law. 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. It treats as well of a decision last Term in which the Supreme Court accepted (yet most controversial) of the solutions I proposed.

* David Berger Professor for the Administration of Justice, University of Pennsylvania, A.B. 1968, J.D. 1973, Harvard University. David Shapiro, Catherine Stuve, and Stephen Sablin provided helpful comments on a draft. This Article is a revised version of Rssus, Rigor and Reality: An Essay for Arthur von Mehren, in LAW AND JUSTICE IN A MULTINATIONAL WORLD: A TRIBUTE TO ARTHUR T. VON MEHREN (James A.R. Nafisht & Steven C. Salmond 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 prior the volume of sound more than its quality, Arthur is proud 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-runging, and a tolerance for ambiguity so severe, as to be, depending on the audience, either intimidating, encouraging or imperceptible. 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 another perspective, to be relentless in pursuing the implications of an idea, and, above all, never to accept without verifying the conventional wisdom.

I (internal citation unavailable) (footnotes omitted).


ten years ago. 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 DISMISAL

Fresh, from a reexamination of the Supreme Court’s power under the Rules Enabling Act of 1934, I undertook what I thought would be a small project exploring the relationship between federal and state law on issues in the “wildfire zone” 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 Robert D. Gold’s seminal article, Federalism and Preclusive Jurisdiction, in which he argued that the court system which renders a judgment should provide the rules as to the judgment’s preclusive effects, had made an impression on me. But it seemed to me that both Degeus and those who embraced his proposal, even while modifying it, 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.  


4 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2004)); see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 819 (1982). This work engendered in me the no small amount of dismis- siveness 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 asked why that was so, he replied, “John Ell 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 David S. Mickelth in the Hon George Wharton Pepple (Dec. 15, 1997), quoted in Burbank, supra note 4, at 1184 & n.26.


7 See, e.g., Restatement (Second) of Judgments § 87 cmt. h (1952); Charles A. Wright et al., Federal Practice and Procedure § 4472, at 722 (1981 & Supp. 2001) (hereinafter Wright, Miller & Cooper); Charles A. Wright, Law of Federal Courts § 1004, at 257-58 (9th ed. 1994) (hereinafter Wright, Law of Federal Courts). These works “take the position that federal law governs but that, as to cer- tain questions of preclusive implication state substantive policies, state law should be borrowed in federal law.” Burbank, supra note 2, at 780 (footnote omitted).

Not believing that it was necessary for this project to engage in extensive
historical research, I was prepared to accept Degnan's ac-
count of the doctrinal history. Still, I felt obligated at least to read all
of the early cases on which Degnan's account was based. Unfortu-
nately, as I put his article to the test of its footnotes, I realized that,
although Federalized Rex indicates did make an important contribution,
its capacity to obscure was as great as its capacity to illuminate. Nu-
merous errors in describing cases aside,9 Degnan's history, upon
which some of his followers also relied, was tendentious, if not dis-
torted.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 fed-
eral judgments in the first place11 and to scratch the often-repeated, but
hardly analyzed, notion that federal preclusion law governs the preclusive
effects of the federal question judgments of federal courts.12

9 197-12 (1945). "What is surprising is that those who do not accept Professor
Degnan's compare dispatch of the Rules of Decision Act and who have explored a
modified version of his general rule for diversity judgments proved as if these cases
did not exist." Burhans, supra note 2, at 760 (footnote omitted). For a more recent
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10 See Burhans, supra note 2, at 741, 742 n. 52, 750 n. 87.
11 See id. at 741, 745, 149, 748-49 n. 65. Professor Cooper apparently picked up
the most venus distinction, a selective quotation from Dempsey v. Richmeade, 88 U.S.
(21 Wall.) 190 (1875) (the correct date of the decision is found in 22 L. Ed. 585),
quote by correctly descried the full name given by the Court for its decision in that
case. See 18 Wercott, Miller & Cooper, supra note 7, § 4468, at 650. But he did not
flag the problems in Degnan's work and its role in the story that author told, and the
capacity of this story to withstand continued. See, e.g., Note, Erie and the Preclusive

Thus, within one article I committed the sins of revealing serious flaws in the
work of a senior academic and disregard 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 Burhans, supra note 2, at 791, 796 (criticizing Wercott, Law of Fed-
eral Courts, supra note 7, § 10681; supra note 110.
11 See id. at 741-47. We research revealed that, contrary to the story told by
Degnan, the Supreme Court in the nineteenth and early twentieth centuries ap-

erred to expand the role of preclusion law in preventing rights conferred by the sub-
national law and to derive the source of the governing preclusion law from the source
of the governing substantive law, not preclusion law for diversity judgments, and
federal preclusion law for federal question judgments. See id. at 747-53. For the role
that a distinctly federal law of preclusion for federal question judgment played in
the Supreme Court's strategy of controlling state courts in this period, see Edward A.

due. 97,

Burhans, supra note 1, at 741-47.
Inflected by, but not a captute of, this history, I came to realize that, with respect to federal judgments and under modern concepts, the governing law is almost always federal common law. Yet, I was confirmed in the fact that, since the dual resolution initiated by Erie Railroad Co. v. Tompkins, both the Supreme Court and commentators have failed to assimilate problems of federal common law in state law diversity cases to those in federal law non-diversity cases. Therefore, I 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 Rule of Decision Act, which I regarded (and regard) as the more appropriate unifying vehicle.

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


15. See Birnbank, supra note 2, at 753-62, 778-97. Having adopted a federal common-law approach to the precedential effects of federal judgments, I considered the implications of that approach for state court judgments, with respect to which Professor Bogen wrote an important contribution by recalling attention to the full faith and credit statute. See 28 U.S.C. § 1738 (1994); Bogen, supra note 2, at 755

16. Bogen, supra note 6, at 290-55. Here, too, the general approach seemed to shed light, both by exposing the fallacy of treating problems of federal "procedural" law in state court as "outliers" and, more importantly, by helping to expose a fundamental error in the interpretation of the full faith and credit statute implicit in Bogen's article and subsequently made explicit in decisions of the Supreme Court. See Biren

17. Contrary to Bogen's formulation, the full faith and credit statute does not require application of the domestic predomination law of the rendering state. Rather, in requires application of the predomination law that the courts of the rendering state would apply. That domestic state law usually will furnish the rules applied downstream 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.

18. Application of my general approach suggested that the Court and commentators were correct in asserting that federal predomination law, consisting of uniform judge-made rules, governs the effects of the federal supreme judgments of federal courts, although that conclusion was by no means as simple and straightforward as it apparently assumed. See Birnbank, 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.\(^7\) Thus, notwithstanding the major changes in the legal landscape on which Begna\n, relied, the results I advocated were pretty much the same as those dictated by the Court's 1875 decision in Upham v. Regional,\(^8\) which he had sought to conjoin to the site of the Conformity Act of 1872.\(^9\)

Critical to my conclusion about diversity judgments were the dual propositions that the Federal Rules of Civil Procedure do not, by any large, contain preclusion law and that they cannot validly prescribe such law.\(^10\) With the Federal Rules of Civil Procedure out of the way:

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17 See id. at 778-81. 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 so that state law governs as to such matters because Congress has commanded it by making 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 755-56, 787-92; Stephen B. Burbank, Federal Judgments: Law Source of Authority and Sources of Rules, 70 Tex. L. Rev. 1511 (1992).

18 58 U.S. (15 Wall.) 130 (1873).

19 Act of June 1, 1872, ch. 555, § 17, 17 Stat. 190, 197; see Burbank, supra note 2, at 749, Begna\n, supra note 6, at 746-47, 796.

20 See Burbank, supra note 2, at 772-78, 782-83; Burbank, supra note 4, at 121-51. Fudging on these matters was useful if only rhetorically, to Professor Begna\n's argument. See Burbank, supra note 2, at 747; Begna\n, supra note 6, at 796-97. Indeed, it appears to be an occupational disease. See Howard M. Eisenho\n, Interjurisdictional Preclusion, 95 Mich. L. Rev. 945, 1006 & n.307 (1997); Graham C. Lilly, The Symmetry of Preclusion, 54 Ohio St. L.J. 291, 319-21, 321 n.115 (1993). In that, scholars have followed in the path of the theologians (themselves, whose understandings of the meaning of the words they have borrowed suggest that the Enabling Act acts limits on that quest. Thus, although the members of the original Advisory Committee "rejected as exceeding its authority the strong urging suggestions that its class action rule should include a provision as to the preclusive effects of a judgment as to person or party," Burbank, supra note 2, at 772 (footnote omitted), they did include a preclusion provision in Rule 23 only as a declarative rule in 1966 because it "stated a rule of substantive law which is not within the scope of a procedural rule." Id. at 772 n.164. The same concerns. The Advisory Committee is considering proposals to amend Rule 23 to so as to include provisions that would give preclusive effect to rulings denying class certification and refusing to approve a pro\n-posed class settlement. In my view, however deniable as a matter of policy, these 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 valid), it seemed to me impossible to justify the displacement of state law on intermatters 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 unsustainable. I realized that the reason why some eminent scholars had been able to overcome this last barrier to accepting Professor Degan's general rule in diversity cases, with minor modifications, lay in the unarticulated rejection of the policy of federal jurisdiction pursued by the Court in cases following Erie Railroad Co. v. Tompkins.

It has taken years of reading history, particularly the work of Professors Edward Purcell and William Rose for me to progress beyond the position of agnosticism I took about that policy in 1980 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

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Remarks at a Conference on Class Actions Sponsored by the Advisory Committee (Oct. 29, 2001), (on file with author).


[Hazard] regards a line of Supreme Court cases that has only recently been affirmed and relies on others the vitality of which is in question, than confirming a suggestion made in my paper. I applaud this explanation indeed, it is just what our paper calls for. Of course, now that all the cards are on the table, lower federal courts may feel a necessity 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).


24 See, e.g., WILLIAM E. ROSE, A МиKER IN THE SATURDAY EVENING POST (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 Cause of Action, exploitative, and sometimes unethical litigation practices. Since the late nineteenth century, corporations operating in interstate commerce had regularly—and, in Brandeis’s mind, quite unfairly—exploited diversity jurisdiction to impose heavy legal and extralegal 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 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. SEMITEK

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 ("Defeat, Social: The Progressive as Legal Craftsmen"); id. at 229–37 ("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 aberration, 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 277; see also Susan Bandes, Erie and the History of the One True Federalism, 110 Yale L.J. 829, 847–54 (2001); supra text accompanying note 110.

27 Purcell, supra note 13, at 272–73 (footnotes omitted).
lengthening that Semtek International Inc. v. Lockheed Martin Corp.\textsuperscript{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.\textsuperscript{29} Semtek also well illustrates the relevance today of the practical and social concerns that undergirded Justice Brandeis's opinion in \textit{Emery v. Torrey} more than sixty years ago. Semtek involves a dispute concerning contract and related rights in the ensuing but hazardous economy of post-Soviet Russia.\textsuperscript{30} Semtek was a fledgling company formed in 1992 to contract with emerging Russian enterprises, particularly with respect to satellite ventures.\textsuperscript{31} Convinced that it had been mucked 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 citizenship\textsuperscript{32} 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.\textsuperscript{33}

\textsuperscript{28} 551 U.S. 497 (2000).

\textsuperscript{29} After the Supreme Court granted certiorari, I contacted counsel for Semtek and obtained the brief filed in that point. Finding my work relevant on excessively in Semtek's brief on the merits, I provided assistance to a volunteer in fashioning a reply brief and in preparing the case for oral argument.


\textsuperscript{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 am in a surprise that such a play, which is reminiscent of the behavior that concerned Justice Brandeis and led to \textit{Emery v. Torrey}, supra note accompanying note 27, was successful. See A. Y. Life Ins. Co. v. Desmet, 132 F.3d 872, 885-86 (5th Cir. 1998); 1 B. Weinraub, Marler & Coopers, supra note 1, § 3725 (1998 & Supp. 2001).

\textsuperscript{33} \textit{In re Semtek Int'l Inc. v. Lockheed Martin Corp.}, Case No.: CV 97-1530 ABC (RBLW), opened in Petition for Certiorari app. D, z. 38; Semtek Int'l Inc. v. Lockheed Martin Corp., 551 U.S. 497 (2001) No. 99-1531. The court's order provided that the discretion was "WITH PREJUDICE because, given the allegations in the Complaint, amendments would be futile." (Pamphlet cannot point around or contradict in
While taking an unsuccessful appeal from the district court’s judgment to the United States Court of Appeals for the Ninth Circuit, the petition sought recovery from Lockheed as 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, and it also failed in an attempt to secure an order from the federal district court in California enjoining Seastek from continuing the Maryland litigation.

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), the dismissal precluded an action on the same claim in current allegations. See, e.g., Seastek 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." See, e.g., 3-4 action for Commercial at 570, Seastek Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (No. 99-1551).

[If] the intention of the court, gathered from its order or other sources, 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, in the name of the proposed order drafted by successful counsel.

Goddard v. See, Title Ins. & Guar. Co., 92 F.2d 841, 847 (Cal. 1939).

See Seastek Inc. v. Lockheed Martin Corp., 576 F.3d 591, 591 (9th Cir. 1999) (table).


36. See Brief for Petitioner, supra note 31, at 7. In dicta, the district court observed that its decision dismissing Seastek’s action “did not reach the substantive merits of Plaintiff’s tort claims” and that “it is not obvious to this Court that these judgments apply to Plaintiff’s action in Maryland state court.” See id., 988 F. Supp. at 915 (quoting Brief for Petitioner, supra note 31, at app. 74a & 75a). Therefore, Seastek unsuccessfully sought removal from the North Circuit for the purpose of avoiding the judgment under Rules 60(a) and 60(b)(1), and the district court declined to hear the Rule 60(b)(1) motion. See id., 988 F. Supp. at 916; 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.

Under the court in its order for dismissal otherwise provides, a dismissal under this subdivision and nonproceeding not provided for in this rule should take effect immediately.
Maryland state court. 36 The Maryland Court of Special Appeals affirmed the dismissal, 37 and the Maryland Court of Appeals denied review. 38

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 Dupasquier v. Roderique, 39 and he rejected Lockheed's argument, which had been

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

Top. P. Co. P. 41 (b) (emphasis added).


[The case is not dispositive because it was decided under the Commonlaw Act of 1872, which required federal courts to apply the procedural law of the Nation where the cause of action arose. That arguably affected the outcome of the case. See Dupasquier, supra, at 156. Second Restatement (Second) of Judgments § 87, Comment b, p. 315 (1977). ("Since procedural law varies, a court may have to be appraised to an action, state law had to be considered in determining the effect of a federal judgment.")]

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Semtek had invoked the Court's power to provide a decision in Dupasquier and with the story he told using that case as support. See Reply Brief for the Petitioner at 1 n.8, Semtek Int'l Inc. v. Lockheed Martin Corp., 551 U.S. 497 (2006) (No. 05-1551) [Certiorari Reply Brief for Petitioner]; supra note 38 and accompanying text; supra note 39; supra note 40; supra note 41; supra note 42. This may explain the Court's failure to cite Dumasquier on this point and the use of the word "argu-

ably." But the support included, the Restatement (Second) of Judgments, is for this purpose equally inadmissible because it accepts Dumasquier's authority. The same is true of W proposed, Law of Federal Courts, supra note 7, § 1004.
accepted by the Maryland state courts, that Rule 41(b) controlled the outcome of the case.\(^42\)

Appealing, 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,

[The result decreed by Dymaszew 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 Semmes, 501 U.S. at 506-06.
\(^43\) See id. at 506 ("Having concluded that the claim-preclusive effect, in Maryland, of this California federal diversity judgment is dictated neither by Dymaszew, nor by Semmes, nor by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue.").
\(^44\) See id. at 506 ("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 506. "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 partly a contrary federal rule.").
\(^48\) 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 *Seminole*. 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.54

The structure of Justice Scalia’s opinion for the Court is, however, misleading in suggesting that the Court was “chart[ing] a course inde- pendently of the parties’ arguments.”55 In fact, the opinion accepted critically important arguments made by Seminole, particularly in its re- ply brief, and/or in its 1986 article, on which Seminole relied, from the nature of the federal obligation to respect federal judgments,56 to the very limited role that the Federal Rules of Civil Procedure can play in shaping federal preclusion law,57 to the way in which the Court’s Erie jurisprudence can be assimilated to its (non-diversity) federal common-law jurisprudence,58 and to the type of federal interest that may support uniform judge-made rules of preclusion in diversity cases.59

Ironically, one of the few arguments made by Seminole that the Court’s opinion did not incorporate could have prevented a problem potentially arising from the formulation of its holding. Seminole 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

55. The case was argued on December 5, 2000 and decided on February 6, 2001. See Seminole, 531 U.S. at 497. One can only wonder whether attention with more deliberate speed might have eliminated the problem in Justice Scalia’s opinion for the Court that I discuss below.
56. See supra text accompanying note 43.
57. Compare Seminole, 531 U.S. at 507–08, with Brief for Petitioner, supra note 41, at 14, and Burbank, supra note 2, at 790–97. One can only wonder whether attention with more deliberate speed might have eliminated the problem in Justice Scalia’s opinion for the Court that I discuss below.
58. Compare Seminole, 531 U.S. at 507–08, with Brief for Petitioner, supra note 41, at 3; 2–14, and Burbank, supra note 2, at 772–75, 782–85.
59. Compare Seminole, 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 Brief for Petitioner, supra note 41, at 14–17.
60. Compare Seminole, 531 U.S. at 508–09, with Brief for Petitioner, supra note 41, at 13–16 & n. 14, and Burbank, supra note 3, at 794–95, 789–83.
case presented horizontal, and not just vertical, interjurisdictional is-
sates. 57 Had the Court accepted this reasoning, it would not have char-
acterized 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 Sessok, 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 Sessok chose
to avoid definitive resolution of the issue. That its interpretation of
the rule is strained, indeed opaque, bespeaks the difficulty of the en-
treprise. It also may reflect the failure of Sessok (and, hence to part,
my failure) to provide adequate help, although, for the purposes of
this law and legal language can and should constrain in-

57 Instead, the Court should hold that this diversity judgment, involving a
state-law limitations question, should have the same preclusive effect as if it
had been rendered by a state court in the first forum, under Dugan... and Exo...
and Exo... If the matter is treated as one of federal common law, the
pertinent state law is irrelevant; the state court's role should be treated because there is no
federal interest requiring the use of a nationally uniform rule governing the
effect of a limitations judgment. Where the first forum, like California, fol-
low the traditional rule that limitations decisions do not have claim preclusi-
ve effect, the second forum is free to apply its own statute of limitations.

Indeed, under this Court's full faith and credit decision, the second forum
would be free to do so even if the first forum treated the limitations as bar-
ring the claim "from thereafter maintaining an action to enforce the
claim in this State." Restatement of Conflicts § 49, cmt. a (1962).

Reply Brief for Petitioner, supra note 41, at 1-2 (footnote omitted); see id. at 2 ("The
question in Sessok should be answered by reference to the preclusive law of the
forum state in which the diversity courts sit and to the full faith and credit obligations that
would be owed to that forum state court's judgment." (footnote omitted) (emphasis ad-
ded)); 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 jurisdiction is to be given that rule
of preclusion' (emphasis added)); id. at 5 ("The quest to write 'full faith and credit
principles'... therefore favors Sessok's argument, not Lockheeds'; id. at 14 (Proper
analysis "would respect the preemptions of both California and Maryland.").

58 Sessok, 534 U.S. at 309.

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

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

60 As Senieck 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 impeding 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 Petitioners, supra note 41, at 2-4. Yes, by addressing Lockheed's argument the Court observed 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 these specified exceptions) preclude suit elsewhere, unless the court otherwise specifies.'" Senieck, 535 U.S. at 595; see also id. at 505-06, n.21 supra.

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 the case 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 meritorious transaction but seeking recovery on another theory (in this situation a different limitations period applies). See, e.g., Koch v. Rodin Kamer, 279 Cal. Rptr. 438 (Cal. 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 on common-law fraud). Second, the problem of invalidity under the Enabling Act does not go away simply because a rule attempting 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 Senieck, the extent that it relied on my scholarship. In working out the law governing the presumptive effects of federal question judgments, I had started with the proposition that uniform federal rules are necessary to determine the preconditions, such as availability and finality, that distinguish 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 Burkhart, supra note 2, at 364-65. Unfortunately, when turned to the bias generating the presumptive effects of diversity judgments, although I did signal that my "inclusive conclusion [that such reasoning was applicable to judgments on state law questions as it is to federal question judgments]" should be restated within the analytical framework" dictated by the Supreme Court, at 784-85 820, I also suggested 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 782-85. As Senieck demonstrates, the latter assertion requires the same qualification.
was hardly clear and not clearly coherent.52 Neither is the Court's Justice Scalia's opinion indites 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 so long time that is includes a judgment on the merits is necessarily a judgment entitled to claim-preclusive effect."53 to the proposition that "there are a number of reasons for believing that the phrase 'judicature upon the merits' does not bear that meaning in Rule 41(b)."54 One of these 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 the right (through Rule 41(b)'s mandated claim preclusive effect of its judgment) would seem to violate the Enabling Act's limitation."55 Another was that, "as so interpreted, the Rule would in many cases violate the federalism principle of [556] by engendering 'substantial variations [in outcomes] between state and federal litigation which would likely . . . influence the choice of a forum.'"56

52 See Reply Brief for Petitioner, supra note 41, at 5 ("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 default that the federal court regards its decision as 'on the merits, for whatever significance that has under the preclusion law of the applicable jurisdiction.'").
53 Id. at 509-10.
54 Id. at 509-10.
55 Id. at 509-10.
56 Id. at 509-10.
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.\textsuperscript{66} Its route to that interpretation involved another elaboration play on words, in this case, the words "dismissal without prejudice" in Rule 41(a),\textsuperscript{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 connected to the same court.

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 problems presented in Seminole. 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.

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 (up 1935) obtaining in some states, whereby the plaintiff had an unfettered right to take a nonsuit late in the progress of a case

\textsuperscript{66} See Seminole, 531 U.S. at 504-06. Note that the Court's formulation elides: assumes that all jurisdiction agree about the scope of the claim that is predicated (not unreasonable, perhaps, on the facts of Seminole, or reflect the error in Lockeed's argument that Seminole had joined one, see Reply Brief for Petitioner, supra note 41, at 2-4. The Court has one 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 certain circumstances, is a state court would decree only a dismissal without prejudice, abridges a "substantive right" and thus exceed the authorization of the Rules Enabling Act. Seminole, 531 U.S. at 506. We think the situation will present itself more rarely than would the arguable solution of the Act that would emerge 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.

\textsuperscript{67} See id. at \P 41(a)(1).

\textsuperscript{68} The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the defendant from refiled 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 state court, but in many setting may relate to the dismissing court itself.

Seminole, 531 U.S. at 505.

\textsuperscript{69} See Burbank, supra note 4, at 1192 ("[T]he Advisory Committee ... had no coherent or consistent view of the limitations imposed by the Act's procedure/substance dictionary.").
and reaffirm the same actions. 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.77

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.78

In comment on the Preliminary Draft, a Special Assistant to the Attorney General of the United States, observing that "Rule 41[1] enumerates the circumstances in which an action may be dismissed without prejudice[,] then raised the question "whether all dismissals should not..."
be deemed to be with prejudice except in cases that may be specified, among which ought to be included actions previously instituted. This encouraged, and assured that it had the power to do so, 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." Following consideration of drafts that sought to state two separate rules governing dismissals without and with prejudice, and in response to the reporter's concern that there was "practically complete overlapping between" them and that "[i]t is often dangerous because of possible omissions," the Committee worked from his redraft of a tertiary rule providing prescriptively that voluntary dismissals were without prejudice.

73 Letter from Carlton Fox to Advisory Committee on Rules of Civil Procedure, May 18, 1936, reprinted in Records of the U.S. Judicial Conference Committee on Rules of Practice and Procedure, 1935-1938, No. C1-2021 (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 no order is entered as the time of dismissal specifically stating that the dismissal is without prejudice." Id.

74 A dissenting comment by Edgar Tolman, a member of the Committee and its Secretary, in the 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 (Revising Draft II), reprinted id. As a result, the final version of the Rule of Civil Procedure, 1935-1938, No. C1-2021 (Cong. Info. Serv.). But, the writer insisted "suggestion [as] the question whether or not we should go to the lengths to which the present rule goes," observing that "there may be a compromise in some cases in which the absence of prejudice to the defendant other than the expense and expense of additional litigation. See Jones v. SEC, 295 U.S. 1, 16-25 (1936); Bromberg v. Proguard, Inc., 297 U.S. 191, 192 (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 . . . (Perrot v. Mayor, 7 Q.B.D. 329 (1881)) which involves that very point." Proceedings of the Cleveland Institute on Federal Rules 110 (1938). Indeed, if reliance on the case, the prevalent 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 346 (describing Perrot).


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 41(1)(b) providing that "[i]n the event of a motion 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 provisions." 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. Mitchel 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 Spriak 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

77 Harris v. Plumer, 380 U.S. 466, 476 (1965) (Harlan, J., concurring).
79 Id.
81 See supra text accompanying note 76. Rule 41(b) was amended in 1963 to add dismissals for "for lack of an indispensable party" to those excepted from the permanence rule, and in 1966 to change that language to "for failure to join a party under Rule 15." See supra note 57; see also Estelle v. United States, 365 U.S. 205, 284-88 (1961) (explicitly defining "judgment").
82 See, e.g., Proceedings (Nov. 14-20 1935), supra note 70, reproduced in Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1938, No. C115817 (GPO, Info. Serv.) (Mitchell, "May I suggest that the words, 'he plaintiff may dismiss ought to be qualified by 'without prejudice,' or 'without determination of the merits,' became 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 it is not an adjudication."); Proceedings of the New
the thought about the question, the rule makers believed that they had authority to define it 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). 85 I
have found no suggestion in this history that the rule makers intended to
cabin the effects to the pondering court. 86

For those who are not disposed to consult, or consider such
materials, the Court's error (as a matter of interpretation) in contin-
ing the effect of a Rule 41(b) dismissal to the pondering court seems
clear in light of the following consideration: if that had been the in-
herited arbit of the rule, it would not have made sense to except dis-
missals for lack of jurisdiction and improper venue, 87 since under the
discipline of direct estoppel (issue preclusion), the plaintiff would have
been precluded from refiled the case in the same court in any

85. They may also have proceeded under the uncontested assumption that there
were no differences in the law of retention jurisdiction in the scope of claim preclu-
sion. That was a much more reasonable assumption in the 1930s than it is today. See
Borah, supra note 2, at 765-66. In that light, their attempt to state a persuasive
rule of eligibility for preclusion appears less "peculiar." If only because to them claim
preclusion was less "complex." Cf. Semet v. Luckhardt Marine Corp., 351
U.S. 897, 561-65 (2001); supra note 66. Still, it was and is more complex than the
Court's response to Luckhardt's argument any otherwise suggeted. See supra notes 66,
68.

86. In discussing the preclusive effect of a dismissal under Rule 41(c), 51 Edgar
Tobin observed that "[i]f even if the claim is brought in a state court, I doubted to
that the same 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." 51
Washington Institute, supra note 82, at 115. Id. at 297 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 operated as an adjudication on the merits.

The Court's interpretation yields a "rigidly peculiar" rule of preclusion, not even
extending to other courts within the same system. See Semet, supra at 563, 565; see also
supra note 68. It may have taken inspiration from the suggestion, with respect to
statute of limitations barred trials, that "[w]here as elsewhere, Rule 41(b) need mean only
that the dismissed precludes relitigation of the same limitations issues in the same
court. Any greater effect should depend on independent accident." 51 Winch, Miller & Cooper,
supra note 7, § 441, at 375. Although that formulation refers to issues rather than claims (and may not have intended the "same court" in the broad sense apparenty intended by the Court in Note 2), and although the antecedent dis-
cretion will recall the rulings of Rule 41(b), 87 see supra § 435-4441, the proposal is no
more faithful to the role of the bar than the Court's. For problems with such an approach outside of the limitations areas, as recommended in, for example,
Id. § 4 477. at 664, see Borah, supra note 21, at 102-06, 118-21.

87. See supra text accompanying notes 79-81.
ever. It might have been better, after all, to decide the Enabling Act question.

2. Complexity on Suits

Perhaps the most general point of my 1986 article was that, given the characteristics and needs of our federal system, Professor Dregnat’s proposed rule for interjurisdictional preclusion, however attractive because of its simplicity and predictability, would come at a cost too great. In rejecting utilitarian federal preclusion law in *Santeh*, the Court acknowledged some of those characteristics and needs as previously articulated, particularly in *Elieir’s* progeny, and confirmed their contemporary relevance. If it failed, however, to consider or adequately to account for other such characteristics and needs arising from the facts that the rule at issue in *Santeh* 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 *Santeh*, 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 comity 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. e (1941).

The term “direct stopgap” is used in the RESTATEMENT of this Subject to indicate that the leading 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.

87 See *Burbank*, supra note 2, at 179.

88 See *Posing Cops*, supra note 30 at 476-77. But see *Eisenberg*, supra note 30.

Professor Burbank cautioned 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.

ld at 1014 (footnote omitted).
claim preclusive effect within California. 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 dominionally.

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 forum's limitations law but that has been dismissed as untimely by the courts of the first forum (F1). So long as

89 See, e.g., Koch v. Roden Enter., 273 Cal. App. 2d 811-41 (Cal. App. 1969); supra note 68, see also e.g., Johnson v. City of Lomita Linda, 5 S.W.2d 374 (Cal. 2009); Lackner v. LaCorte, 600 F.3d 394, 396 (5th Cir. 1999); Richley v. Upjohn Co., 139 F.3d 123, 1319 (9th Cir. 1998). For the traditional view, see RESTATEMENT OF JURISDICTION § 20 (1942).

Note, however, the following: A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to recover 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 of the case that he will bar the plaintiff from pursuing another action in that State, but it is not on the merits of his 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 another 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 the State.

90 See § 48, comment a.

This may reflect a narrow conception of a "cause of action" or "claim" with dire consequences (most precisely) pitching tip the scale. See supra note 68, e.g., Adone v. Noland, 668 A.2d 367, 371 (Conn. 1996) (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.")

91 See Roe, Inc. v. Town of Harwich, 179 F.3d 77, 80 (1st Cir. 1993) ("[O]ther courts of recent dates suggest a clear trend toward giving claim preclusive effect to dismissals based on statutes of limitations."); see also RESTATEMENT (SECOND) OF JURISDICTION § 19 (1985), reporter's notes (1982).

92 See MElmore v. Cohen, 36 U.S. 15 (Pet.) 312, 327 (1839) (dictum); Eron v. Van Horn, 35 U.S. (12 Pet.) 596, 617 (1836) (dictum); Bank v. U.S. 8 U.S. (4 Pac.) 378, 386 (1837) (dictum); Wagener v. Butterfield & Driskell Co., 57 Fed. 549, 56-43 (5th Cir. 1993); Lee v. Swayi 819, M. 305 So. 2d 198, 190-91 (Mich. 1988); RESTATEMENT (SECOND) OF JURISDICTION § 19 cmt. F, reporter's notes; RESTATEMENT OF JURISDICTION § 48, comment a. These are notorious cases that cases to the contrary, although it seems that in most of them the court was acting to preserve from a view of wide policy a matter of (F2) state law, even when it is attributed the result to the requirements of full faith and credit. See, e.g., Satter v. Interstate Power Co., 507 A.2d 750, 751-71 (Conn. 1982). Thus, the current state of the
that remains the law of full faith and credit, Saidit itself should be decided on demand so as to accord the federal diversity judgment the same preclusive effect to which a California state court judgment would be entitled. (See also Smith v. 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, the result of Saidit would appear to be that a federal diversity judgment law suit in California is preclusive. 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 Semtex 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 federal judgment of a California state court would be entitled as a matter of full faith and credit. This proposed solution has the additional benefit of implementing the rule in Dussauge v. Richenda. In answering the question of the full faith of a federal obligation it 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., Restatements (Second) of Conflict of Laws § 110 (1971).}

92 See supra note 90 and accompanying text.

93 See supra note 57 and accompanying text. Semtex also suggested the relevance of the Court's decision in Dussauge v. Richenda, 478 F.2d 798 (4th Cir. 1973), 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, e.g., Brandeis v. Peterson, supra note 41, at 19; Bushman, supra note 17, at 1532, 1560-71.

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

The only effect that can be jointly 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 mischief or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such cases under similar circumstances than is due to the judgments of the State courts in a like case and under similar circumstances. If by the law of the State a judgment like that rendered by the Circuit Court would have had a binding effect at such a state, if it had been rendered in a State court then, it should have the same effect being rendered by the Circuit Court.

See id. at 130. 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 135; Bushman, supra note 2, at 741-42. It is confined to the Court's occasional and confusing acceptance of the obligations to respect federal judgments to the full faith and credit statute. See id. at 740-47.
and credit model, there was no need in Daspert 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 Fl, 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.68 In Semtek, on the other hand, the Court neglected the horizontal work required of the rule in fashioned with a vertical accommodation in mind.

Although opposers in one sense, these mistakes may spring from the same sources. First, in both contexts, the refinement I have insisted an will not make a practical difference in most cases.69 But, with respect to the question 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.70

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

68 See supra note 15.
69 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, in federal court, under either the Court's interpretation of the full faith and credit statute or no one, the domestic preclusion law of the rendering state will usually govern. See Barbash, supra note 2, at 800.
70 See, e.g., Matthews v. Employers Ins. Co. v. Epic's, 532 U.S. 567 (1998) (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); Auton v. Fed. Sav. & Loan Ins. Bd. v. Robinson, 501 U.S. 104 (1991) (holding that unreviewed findings of state administrative agency have no preclusive effect on federal age discrimination claim); Ill. Educ. v. S. U.S. 784 (holding that unreviewed findings of state administrative agency could preclude an employer's discrimination claim under Reconstruction-era civil rights statute, 42 U.S.C. Title VII claims); Marrese v. Am. Acad. of Ortho. Surg. 576 U.S. 573 (1995) (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); Barbash, supra note 17, at 1590–71; Burbank, supra note 2, at 852–99; 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 metajurisdictional precise effect of the identical judgment of a state court a block away. Nevertheless, 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 F2—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 result 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 to workers' competi-

98 See infra text accompanying notes 45-66. Although the Court seems to interpret the full faith and credit statute facially, so as to require F2 to give the same effect as would be given in F1—neither less nor more—this is not the only possible interpretation. Compare 18 WIGGINTON, MILLER & COOGHLAN, supra note 9, §§ 4460, 4465, 4467 (advocating greater freedom to 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 1860-71 (discussing federal preclusion law in metajurisdictional cases).

A critic might speculate about the reasons for the Court's reevaluation 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 would be aware, however, that this phenomenon is not unique to the present Court.

sion cases and state court judgments in litigation involving claims within exclusive federal subject matter jurisdiction. Perhaps, that is, the Court believes that whether a state court judgment dismissing a case on limitation grounds is preclusive in subsequent litigation in another state depends upon the rendering court's view on a question it has no power to decide.

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, as well as the role, if any, that PI's views on interjurisdictional effects should have as a matter of federal law. Perhaps more important, he has caused me to understand the relationship between choice of law and recognition of judgments.

From that perspective, as Semmek 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. There has been progress on the latter front, advanced by revisions in the Restatement (Second) of Conflict of Laws, and one can hope that the Supreme Court will adjust full faith and credit jurisprudence ac-


102 See Motzvich, 506 U.S. 367; Mares, 470 U.S. 373.

103 See Bartho, supra note 2, at 822-89; Bartho, supra note 21, at 104-06, 108-21; supra note 35, at 1406-46; see also Von Mehren & Trautman, supra note 104, at 1408-46; Bartho, supra note 2, at 822-25; Bartho, supra note 21, at 104-06; see also Wilke L.M. Reese & Vincent A. Johnson, The Scope of Full Faith and Credit in Judgments, 41 GA. L. REV. 159, 161-62 (1967) (arguing that it is federal law rather than state law that determines the credit which one state shall give to another's judgment).

104 See Von Mehren & Trautman, supra note 104, at 87-89, 1406, 1466.

105 The traditional full faith and credit view finds justification in the limits of the choice-of-law process from the perspective of claim preclusion, a point Semmek did not have the opportunity to rely on Maryland limitations law in the California action, nor the perspective of issue preclusion, the timeliness of Semmek's action under Maryland law was never litigated nor decided in the California action.

106 See Bartho, supra note 104, at 1406, 1430, 1466.

107 The traditional full faith and credit view finds justification in the limits of the choice-of-law process from the perspective of claim preclusion, a point Semmek did not have the opportunity to rely on Maryland limitations law in the California action, nor the perspective of issue preclusion, the timeliness of Semmek's action under Maryland law was never litigated nor decided in the California action.
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.199 How much easier for those who never knew, or never cared, to do the same, particularly in an age when the

199 See Restatement (Second) of Conflict of Laws § 142 com. I. Note, however, that Professor Weir-Cranch regards California as a jurisdiction that has adopted a functional approach to limitations questions. See Weir-Cranch, supra note 108, § 5.6C2, at 66-67 n.57.

100 See Purcell, supra note 12, at 225-27; supra note 26.

Given his intense commitment to the ideal of a "justiciable" forum, 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 Singh Forum shopping. Hart commented, was merely "a minor consideration" which Brandeis misconstrued in passing. Insofar as "jurisdictional statutes created an inequality between in-state and out-state parties, the 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 a far broader concern with the impact of social and economic inequality on the legal system's ability to deliver justiciable justice. His craggy and ascetic 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 Singh Forum problem from a social to a psychological level that emphasized the psychological uncertainty of rational actors trying to discern which forum, and hence which rule, would judge their behavior.")
federal courts had come to be regarded as bastions for the less fortunate.

Semtek demonstrates that Bandele’s concerns have relevance today. Whatever the formal doctrinal relevance of forum shopping, the oral argument left no doubt that the Jussies 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.

My proposed solution was also in tension with the utility function 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 incent 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 rei 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.

115 J. Stephen B. Burbank, Introduction: "Now Co-Chance...", 21 U. MICH. J.L. REASON 595, 513 (1988) (discussing Ted Grossman’s rejection of an article by Marc Galanter in letter asserting that “[m]ost of the demise of the Hughes and Vannow cases, 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 31-42, 41, Semtek Int’l Inc. v. Lockheed Martin Corp., 518 U.S. 99 (2001) (No. 99-1539); supra text accompanying notes 30-40. There was no similar concern expressed about Semtek’s forum shopping for a longer quart of limitations, probably because the Jussies regard that as “attributable to our federal system, which be a stale within the limits permitted by the Constitution, the right to pursue local policies differing from those of its neighbor.” Kalam Co. v. Seagate Elec. Mfg. Co., 713 U.S. 482, 486 (1941). See also Franchise Tax Bk. v. Washington, supra note 50, at 475-76. For the possibility that, at least when statutes of limitations are no longer insulter from the choice of law process, the Constitution (and in implementing bill faith and credit statutes) would no longer be interpreted to permit this in the case of judgments, see supra text accompanying notes (50-69).


114 Burbank, supra note 2, at 796 (footnotes omitted). In this light, it is an interesting question whether Semtek, which denies to federal courts using in diversity “free rein” in pursuing efficient administration, should be seen as part of the current Court’s reinvigoration of federalism. See, e.g., Knebel v. Hu. Bd. of Regents, 526 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 view as to the limitations the Enabling Act places on the Court's power to promulgate Federal Rules of Civil Procedure stating preclusion law. That 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.  

(2005): City of Boise v. Flores, 521 U.S. 507 (1997); United States v. Loper, 514 U.S. 549 (1995). Citing 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, 785-86. 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., Beals 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., Boyd v. Blue Ridge Rural Elec. Corp., 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 exercise of deference 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 255-62, 283-91, 898-10; supra note 17.  

115. Incredibly, the Court cited Professor Dugan's article for the proposition that federal common law governs, see Dugan v. Lockheed Martin Corp., 551 U.S. 407, 408 (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 scholarly had also been to ignore it. See, e.g., B. Wright, MILLER & COOPER, supra note 1; VINGO, LAW OF FEDERAL COURTS, supra note 7, § 1003. 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 Dugan was once a close friend as I have ever had. Therefore I have a personal interest in accepting everything he said as his Yale article..." Letter from Charles Alan Wright to Stephen B. Burbank (Apr. 17, 1997) (on file with author).