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Stephen B. Burbank

*University of Pennsylvania Carey Law School*

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AFTERWORDS: A RESPONSE TO PROFESSOR  
HAZARD  
AND A COMMENT ON *MARRESE* †

*Stephen B. Burbank* ††

Presenting work-in-progress is risky, not to say hazardous, business. Evidently, some of the risks have been realized here, although my distinguished commentator has met me on at least part of my ground. Indeed, he has tried to appropriate a good deal of it as his own.

A major goal of my work, as the title of my paper suggests, is to advance the view that, in most interjurisdictional cases, the only putative federal preclusion rules available are rules of federal common law. Thus, for example, in the federal-state configuration, the Federal Rules of Civil Procedure do not (and cannot validly) provide preclusion rules, and in the state-federal configuration, the full faith and credit statute does not choose state preclusion law. Professor Hazard's comments are confined exclusively to the problem of federal judgments, which includes the first configuration.

In suggesting that my argument proves too much, Professor Hazard makes a strawman out of an important sub-theme in my work, namely that "the Rules of Decision Act speaks directly to the circumstances when it is permissible for federal courts to fashion or apply federal common law."<sup>1</sup> In observing that "there is nothing in the Rules of Decision Act stating or implying any . . . limitation [to cases involving state-law based claims],"<sup>2</sup> Professor Hazard is simply agreeing with me. Perhaps together we can persuade the Supreme Court, whose recent decision confining the Act to diversity cases is part of the "rough treatment" I referred to.<sup>3</sup> I regret that the constraints of a twenty-five minute presentation prevented me from elaborating the reasons why, under the Rules of Decision Act (as well as under traditional federal common law analysis), uniform federal preclusion law governs the preclusive effects of a federal judg-

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†† Associate Professor of Law and Associate Dean, University of Pennsylvania.

<sup>1</sup> Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 632 (1985).

<sup>2</sup> Hazard, *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 643 (1985).

<sup>3</sup> Burbank, *supra* note 1, at 631 & n.30. See *DelCostello v. International Bhd. of Teamsters*, 103 S. Ct. 2281, 2287 n.13 (1983); see also *id.* at 2295 (Stevens, J., dissenting).

ment adjudicating matters of federal substantive law.<sup>4</sup> They will be elaborated in the more comprehensive article, of which my paper forms a tentative summary.

In suggesting that my argument proves too little, Professor Hazard provides what is lacking in the *Restatement (Second) of Judgments* and most other commentary and cases—a reasoned defense of the proposition that, on most matters, uniform federal law should govern the preclusive effects of federal judgments adjudicating matters of state substantive law. In so doing, he expressly rejects a line of Supreme Court cases that has only recently been affirmed<sup>5</sup> and relies on others the vitality of which is in dispute,<sup>6</sup> thus confirming a suggestion made in my paper.<sup>7</sup> I applaud this explicitness; indeed, it is just what my paper calls for.<sup>8</sup> 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. Indeed, even the Court can be slow to change its ways, as we are reminded by something else Holmes said about *Swift v. Tyson* in the case from which Professor Hazard quotes: “I should leave *Swift v. Tyson* undisturbed . . . but I would not allow it to spread the assumed dominion into new fields.”<sup>9</sup>

As to the constructive part of the argument for uniform federal preclusion rules made by Professor Hazard, it is my position that some such rules may plausibly be thought to be required, even for judgments on state law claims, by the federal statutes establishing the federal courts and vesting them with jurisdiction. The analysis is a logical consequence of the theory of respect for federal judgments I advance as an alternative to the full faith and credit statute.<sup>10</sup> We simply disagree as to where fair implication ends and wishful thinking begins.

Professor Hazard asserts that “the question is probably one of

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<sup>4</sup> See Burbank, *supra* note 1, at 631 n.31.

<sup>5</sup> See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); see also *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965) (dictum).

<sup>6</sup> On *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958) as authority for a general approach, compare Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 707-18 (1974), with Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977). In my view, *Herron v. Southern Pac. Co.*, 283 U.S. 91 (1931), adds nothing to *Byrd* in support of Professor Hazard's major premise.

<sup>7</sup> See Burbank, *supra* note 1, at 636.

<sup>8</sup> *Id.* at 636.

<sup>9</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting).

<sup>10</sup> See Burbank, *supra* note 1, at 633; see also *id.* at 629. Professor Hazard agrees with me that the full faith and credit statute does not apply to federal judgments. Hazard, *supra* note 2, at 642.

major premise.”<sup>11</sup> I doubt it, and I certainly do not accept the major premise he imputes to me. I did not rely on *Guaranty Trust Co. v. York*<sup>12</sup> for a worldview. I did not even rely on it for a reading of the Rules of Decision Act. My precise point in citing the case was that the results Professor Hazard deplores find their inspiration not in that statute but in a “policy of federal jurisdiction” that the Court has read into the diversity statute.<sup>13</sup> Until disavowed, this policy must be confronted when considering federal common law in (but only in) diversity cases.<sup>14</sup> More generally, whatever one thinks of the policy, it is not the only obstacle to uniform federal preclusion rules for judgments on state law claims when one adopts—the closest thing to a major premise in my paper—the view that the federal preclusion rules are rules of federal common law.<sup>15</sup>

Professor Hazard would have us believe that *his* major premise has the support of history. But he attributes to the Rules of Decision Act a dichotomy between procedure and substantive law that other scholars have found lacking.<sup>16</sup> Moreover, he ignores the historical evidence that, if we insist upon retrojecting a procedure/substance dichotomy, the Supreme Court has chosen to assimilate preclusion rules to substantive law.<sup>17</sup> Such may be the wages of writing history in the light of major premises rather than *vice versa*.<sup>18</sup> Professor Hazard is no more successful in enlisting pre-1938 history as the ally of his position, argued at a high level of generality, than was Professor Degnan, who sought support in particulars.<sup>19</sup> That does not mean that they are wrong. There were, after all, some changes made in 1938. But removing history as a prop does tend to isolate the normative choices those scholars would have us make; perhaps it also shifts the burden of persuasion, although precedent may already do that.

There is an apparent paradox in Professor Hazard’s view of preclusion. On the one hand, he admits there is a “good case” for the proposition that preclusion rules are beyond the Supreme

<sup>11</sup> Hazard, *supra* note 2, at 645.

<sup>12</sup> 326 U.S. 99 (1945).

<sup>13</sup> See Burbank, *supra* note 1, at 636.

<sup>14</sup> See *id.* at n.59.

<sup>15</sup> See *id.* at 634.

<sup>16</sup> See Hazard, *supra* note 2, at 645; but see, e.g., Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955).

<sup>17</sup> See Hazard, *supra* note 2, at 645. But see Burbank, *supra* note 1, at 630.

<sup>18</sup> See Hazard, *supra* note 2, at 645 (“Taking as a major premise the proposition that the federal courts are an ‘independent system for administering justice,’ the following line of analysis is invited if not compelled . . . .”); *supra* text accompanying notes 16-17. Elsewhere Professor Hazard asserts: “[Federal] courts have their own judges, their own procedure, their own bar, their own enforcement auxiliaries, their own tradition, their own identity.” Hazard, *supra* note 2, at 647. Procedure? Tradition? Since when?

<sup>19</sup> See Burbank, *supra* note 1, at 626.

Court's rulemaking power under the Enabling Act,<sup>20</sup> presumably because they would "abridge, enlarge or modify . . . substantive right[s]." <sup>21</sup> On the other hand, he describes preclusion rules as a "technical specification,"<sup>22</sup> akin, I suppose, to the "technical conundrums" with which the Court has been "preoccupied."<sup>23</sup> Law reformers have long assured us that procedure is technical, details—in short, adjective law.<sup>24</sup> Whatever the accuracy of those labels as to other matters, only in Wonderland do they describe rules of preclusion. Granting for purposes of argument that the Founders would have rejected the "Frankfurter thesis,"<sup>25</sup> would they have rejected the holding in *Guaranty Trust*?<sup>26</sup> If not, why would they have regarded statutes of limitations, but not rules of preclusion, as properly to be furnished by state law?<sup>27</sup> These questions seem to me more difficult, if we really take the Rules of Decision Act seriously, than Professor Hazard's questions about "constitutive rules"<sup>28</sup> provided by the Constitution. At least, however, we have begun to raise, and suggest answers to, the hard questions.

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After my paper was delivered, the Supreme Court decided *Marrese v. American Academy of Orthopaedic Surgeons*.<sup>29</sup> In *Marrese*, it will be recalled,<sup>30</sup> the Seventh Circuit precluded a federal antitrust claim where the plaintiff had previously failed to assert a functionally similar state antitrust claim in state court litigation.<sup>31</sup> A plurality of the court, through Judge Posner, reasoned that 28 U.S.C. § 1738 did not apply and formulated a federal rule of preclusion.<sup>32</sup> The Court

<sup>20</sup> Hazard, *supra* note 2, at 642.

<sup>21</sup> 28 U.S.C. § 2072 (1982).

<sup>22</sup> Hazard, *supra* note 2, at 647.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1052, 1068 (1982).

<sup>25</sup> Hazard, *supra* note 2, at 644; see also *id.* at 645.

<sup>26</sup> *Guaranty Trust*, 326 U.S. at 110 (in suit in equity founded on diversity, state statute of limitations barring recovery must be followed).

<sup>27</sup> I am assuming that the Founders did not share the limited view of the word "laws" in the Rules of Decision Act that was taken in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) and rejected in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Moreover, for these purposes I need not invoke the Process Acts, as to which see Burbank, *supra* note 24, at 1036-39.

<sup>28</sup> Hazard, *supra* note 2, at 647.

<sup>29</sup> 53 U.S.L.W. 4265 (U.S. Mar. 4, 1985).

<sup>30</sup> See Burbank, *supra* note 1, at 640.

<sup>31</sup> *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd*, 53 U.S.L.W. 4265 (U.S. Mar. 4, 1985).

<sup>32</sup> 726 F.2d at 1154. Judge Posner reasoned that § 1738 could not play a role in the case because there can be no state preclusion law regarding actions that are exclusively within federal jurisdiction. *Id.*

reversed the court of appeals and remanded the case for consideration whether the federal action is precluded under Illinois law and, if so, whether the Sherman Act, which vests exclusive jurisdiction in the federal courts, constitutes an implied partial repeal of section 1738.<sup>33</sup>

In contrast to the approach to section 1738 taken below by Judge Posner,<sup>34</sup> which at least was on the right track, the Court reiterated its erroneous general view that section 1738 “directs a federal court to refer to the preclusion law of the State in which judgment was rendered.”<sup>35</sup> In addition, acknowledging that “a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court,”<sup>36</sup> the Court responded with reasoning that suggests other weaknesses in its approach to section 1738. On the one hand, the Court relied on *Kremer v. Chemical Construction Corp.*<sup>37</sup> for a principle of functional equivalence, “illustrat[ing] that a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding.”<sup>38</sup> On the other hand, the Court blurred any distinction between use of state law, mediated through a principle of functional equivalence, and use of federal law. For, in addressing the Chief Justice’s observation that state law would likely be indeterminate on the question of claim preclusion presented in *Marrese*,<sup>39</sup> the Court relied on provisions of the *Restatement (Second) of Judgments* stating or contemplating an *interjurisdictional* solution that is not, and is not based on, the law of any state.<sup>40</sup>

<sup>33</sup> 53 U.S.L.W. at 4268.

<sup>34</sup> See Burbank, *supra* note 1, at 640-41 n.83; *supra* note 32. Indeed, the Court misrepresented Judge Posner’s opinion for the plurality in the court of appeals. That opinion declined to answer the “unsettled question” of “whether or not section 1738 allows a federal court to give a state court’s judgment a greater preclusive effect than the state courts themselves would give it . . . .” 726 F.2d at 1154. *But see* 53 U.S.L.W. at 4267-68 (“Both the plurality opinion, and the concurring opinion, express the view that § 1738 allows a federal court to give a state court judgment greater preclusive effect than the state courts themselves would give to it.”) (citations omitted).

<sup>35</sup> *Marrese*, 53 U.S.L.W. at 4266. See Burbank, *supra* note 1, at 640.

<sup>36</sup> *Marrese*, 53 U.S.L.W. at 4267.

<sup>37</sup> 456 U.S. 461 (1982).

<sup>38</sup> *Marrese*, 53 U.S.L.W. at 4267.

<sup>39</sup> See *id.* at 4269 (Burger, C.J., concurring in judgment).

<sup>40</sup> See *id.* at 4267 n.3 (discussing RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment g and § 26 comment c(1), illustration 2 (1982)). The assumption of an available court in the same system, made in the former, is a reflex of the interjurisdictional rule stated in the latter. See also RESTATEMENT (SECOND) OF JUDGMENTS § 26 comment c(1) reporter’s note. The reporter states:

When the plaintiff, after having lost a state action, seeks relief with respect to the same transaction under a federal statute enforceable only in

The Chief Justice did not go far enough in his concurring opinion in *Marrese*. He argued that "a fair reading of § 1738 requires federal courts to look first to general principles of state preclusion law,"<sup>41</sup> but that "[i]f state law is simply indeterminate, the concerns of comity and federalism underlying § 1738 do not come into play."<sup>42</sup> In a case like *Marrese*, state law is always indeterminate, and in any event the statute is simply inapplicable.<sup>43</sup> Moreover, these may be cases in which state laws do not "apply" within the meaning of the Rules of Decision Act.<sup>44</sup> Finally, whether under the Act or under traditional federal common law analysis,<sup>45</sup> in cases of exclusive federal jurisdiction federal courts should be free to fashion uniform federal rules of preclusion, adjusting trans-substantive federal rules to the extent required by the policies of a particular federal statute.<sup>46</sup>

In the Supreme Court's recent cases, the choice seemed to be a choice between greater (state law) and lesser (federal law) preclusive effects. The concurrences in *Migra v. Warren City School District Board of Education*,<sup>47</sup> and now in *Marrese*,<sup>48</sup> point in quite the opposite direction. Those who would thank the Court for small favors should remember that state preclusion law respects federal substantive policies only fortuitously,<sup>49</sup> and that when it does not, the Court's repeal analysis, requiring too much of unsuspecting Congresses, is

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federal court, it may be argued that he should be held barred especially if he could have instituted his original suit in federal court . . . . It appears sounder, however, not to preclude the federal action by the doctrine of bar, but rather to allow a carry-over decided issue from the state to the federal action by way of issue preclusion . . . .

*Id.* Elsewhere in *Marrese*, the Court observed:

Even in the event that a party asserting the affirmative defense of claim preclusion can show that state preclusion rules in some circumstances bar a claim outside the jurisdiction of the court that rendered the initial judgment, the federal court should first consider whether application of the state rules would bar the particular federal claim.

53 U.S.L.W. at 4267 (footnote omitted).

<sup>41</sup> 53 U.S.L.W. at 4269 (Burger, C.J., concurring in judgment).

<sup>42</sup> *Id.*

<sup>43</sup> Section 1738 is inapplicable because there can be no subsequent state proceeding in which the same problem of preclusion arises. Burbank, *supra* note 1, at 639.

<sup>44</sup> On this view, the Rules of Decision Act would be inapplicable because there is no state law on the question. *Compare id.* at 632.

<sup>45</sup> *See id.* at 631; *supra* text accompanying notes 2-3.

<sup>46</sup> Even if uniform federal rules were not thought required by traditional analysis or "require[d]" under the Rules of Decision Act, the most nearly analogous state preclusion rules would be altered to the extent that they were hostile to or inconsistent with federal substantive policies. *Cf.* Burbank, *supra* note 1, at 638 (federal common law analysis where § 1738 does apply).

<sup>47</sup> 104 S. Ct. 892, 899 (1984) (White, J., concurring); *see infra* note 51 and accompanying text.

<sup>48</sup> *Marrese*, 53 U.S.L.W. at 4268 (Burger, C.J., concurring in judgment).

<sup>49</sup> *See* Burbank, *supra* note 1, at 640 n.80.

unlikely to save the day, perhaps even in exclusive jurisdiction cases.<sup>50</sup> I think that there is a better way, one that need not lead to federal preclusion rules that are disembodied from the substantive law.<sup>51</sup> It lies in the analysis of these problems as problems of federal common law.

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<sup>50</sup> See *id.* at notes 75-76 and accompanying text. See also *Marrese*, 53 U.S.L.W. at 4267 (noting that *Kremer* Court declined to decide exclusive jurisdiction question but found no exception to § 1738).

<sup>51</sup> For an opinion suggestive of a disembodied federal rule approach, were § 1738 not thought to prevent it, see *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892, 899-900 (1984) (White, J., concurring). It is not clear that the criticism applies with equal force to the federal rule suggested by the Chief Justice in *Marrese*, at least to the extent that the inquiry whether "a state statute is identical in all material respects with a federal statute within exclusive federal jurisdiction," 53 U.S.L.W. at 4269, contemplates a careful analysis of federal statutory policies, including in particular the reasons for the grant of exclusive jurisdiction, and of the implications of those policies for preclusion rules.