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Kentucky Law Journal

Volume 79 | Issue 2 Article 3

1990

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Recommended Citation

Maltz, Earl M. (1990) "Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles," *Kentucky Law Journal*: Vol. 79 : Iss. 2 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol79/iss2/3

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Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of *Erie* Principles

BY EARL M. MALTZ*

INTRODUCTION

The doctrine of *Erie Railroad v Tompkins*[1] is one of the central features of federal jurisprudence. *Erie* established new principles to govern cases in which federal jurisdiction is based on diversity of citizenship. Purporting to interpret both Article III of the Constitution and the Rules of Decision Act,[2] the Supreme Court held in *Erie* that in diversity cases the federal district courts should follow the substantive law of the states in which they sit.[3] Subsequent cases, however, have made it clear that procedural issues in diversity cases remain subject to uniform federal law.

Since *Erie*, the Court and commentators have struggled to define the appropriate standard that distinguishes between substantive and procedural issues. In *Guaranty Trust Co. v York*,[4] the majority stated that the test was whether the rule being applied was "outcome determinative."[5] Later, *Byrd v Blue Ridge Cooperative*[6] indicated that the federal courts should adopt a balancing analysis. Finally, in *Hanna v Plumer*,[7] the Court returned to a modified outcome determinative standard. Commentators on *Erie* issues have been similarly divided.[8]

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[1] 304 U.S. 64 (1938).

[2] 28 U.S.C. § 1652 (1988).

[3] Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938).

[4] 326 U.S. 99 (1945).

[5] Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[6] 356 U.S. 525 (1958).

[7] 380 U.S. 460 (1965).

[8] *See, e.g.*, M. REDISH, FEDERAL JURISDICTION IN THE ALLOCATION OF JUDICIAL POWER

This Article provides a new perspective on the controversy over the *Erie* doctrine. The Article begins by reviewing the various positions taken by both the cases and commentators that have discussed the problem.[9] It argues that each of these positions is flawed, and describes a new approach based on the interaction between the doctrine of enumerated powers and the policies underlying the specific decision to grant Congress the power to vest the federal courts with diversity jurisdiction.[10] The Article then applies the analysis to two controversial issues: the role of the doctrine of *forum non conveniens* in the federal courts, and the problem of choice of law.[11]

I. THE ERIE DOCTRINE—CURRENT APPROACHES

A. *Case Law and Commentary—An Overview*

Analysis of the role of state law in diversity actions must begin with *Erie*. *Erie* was a common law negligence action brought by a Pennsylvania resident against a New York corporation. Under the preexisting rule of *Swift v. Tyson*,[12] the action would have been governed by federal common law. Overruling *Swift*, the *Erie* Court held that state law provided the appropriate standard for decision.[13]

The majority deployed a variety of arguments in support of its conclusion. The opinion first contended that the *Swift* approach created both undesirable forum shopping and unfair discrimination between diverse and nondiverse parties.[14] Next, the Court argued

169-205 (1st ed. 1980) ("refined balancing test"); Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORN. L. REV. 625 (1985) (federal common law should be related to federal statutes); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (fairness based considerations); Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989) (use of stricter Erie doctrine); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964) (formulation of new federal common law); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958) (constitutional basis of *Erie* doctrine); Leathers, *Erie and its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791 (1974) (apply modern choice of law principles); Westen and Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311 (1980) (emphasis on validity of federal rule).

[9] *See infra* notes 12-49 and accompanying text.

[10] *See infra* notes 50-57 and accompanying text.

[11] *See infra* notes 58-115 and accompanying text.

[12] 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

[13] Erie Railroad v. Tompkins, 304 U.S. 64, 71 (1938).

[14] *Id.* at 74-77.

that *Swift* had misinterpreted the Rules of Decision Act, which provides that "[t]he laws of the several states, except where federal laws otherwise require or provide, shall be regarded as rules of decision in the civil actions in the courts of the United States."[15] Finally, the opinion argued that the *Swift* rule was unconstitutional because it "invaded rights which are reserved by the Constitution to the several states."[16]

Erie itself dealt with a clearly substantive rule of law It plainly was not intended to prevent federal courts from adopting uniform procedural rules. The difficulty is that some rules have both substantive and procedural aspects. The Court has vacillated somewhat in its analysis of these rules.

Guaranty Trust Co. v York[17] was the first major effort to describe generally applicable principles for distinguishing between substantive and procedural rules for *Erie* purposes. *York* was a diversity action filed in a district court in New York. The action sought equitable relief for an alleged breach of trust. The state statute of limitations precluded the suit in state court and, under then-uniformly accepted choice-of-law principles, such rules generally were viewed as procedural.[18] The Court held that in such an action, the federal courts were required to apply the statute of limitations that would govern an analogous action in New York state court.[19] In reaching this conclusion, the majority relied on the "outcome determination" test, asserting that

> The intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[20]

Byrd v Blue Ridge Cooperative[21] took a different approach. *Byrd* was a negligence action brought by a South Carolina resident who had been injured while working for an electric power company Under South Carolina law, if the plaintiff had been a stat-

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[15] 28 U.S.C. § 1652 (1988).
[16] *Erie*, 304 U.S. at 80.
[17] 326 U.S. 99 (1945).
[18] RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 603 (1934).
[19] Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).
[20] *Id.* at 109.
[21] 356 U.S. 525 (1958).

utory "employee" of the power company, his sole remedy was an action under the state's workers' compensation scheme. Under state law, the question of the plaintiff's status would have been determined by the judge. Under federal practice, by contrast, the plaintiff's status was to be determined by a jury. The Court conceded that a straightforward application of the outcome determination test would have required the federal courts to follow state practice.[22] Nonetheless, the majority held that the plaintiff was entitled to a jury determination of his status.[23]

In reaching this conclusion, the Court relied on a balancing test. The Court concluded that the state's choice to allow the judge to determine the plaintiff's status was not intimately bound up with the rights and obligations of the parties, but was "merely a form and mode of enforcing the immunity."[24] While conceding that South Carolina had some interest in maintaining its allocation of the decision-making function, the majority argued that the federal rule reflected an essential characteristic of the federal judicial system.[25] Thus, the opinion concluded that federal law rather than state law should govern the issue of who had decision-making power to determine the plaintiff's status.

Neither *York* nor *Byrd* dealt with the impact of the Rules Enabling Act on *Erie* analysis. This statute grants the Supreme Court power "to prescribe general rules of practice and procedure . . . in the United States district courts," but also provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[26] The Federal Rules of Civil Procedure [the Rules] were adopted pursuant to this authority. *Hanna v. Plumer*[27] outlines the current framework for analysis when the Rules conflict with state law.

Hanna involved a dispute over the proper mode of service of process in diversity actions. The relevant state rule required in-hand service. The Rules, by contrast, allowed service at the "dwelling house" of the defendant.[28] Applying a *Byrd*-type balancing test, the district court held the state rule applicable. The Supreme Court unanimously reversed.[29]

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[22] Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 537 (1958).
[23] *Id.* at 538.
[24] *Id.* at 536.
[25] *Id.* at 538-39.
[26] 28 U.S.C. § 2072 (1988).
[27] 380 U.S. 460 (1965).
[28] FED. R. CIV. P. 4(d)(1).
[29] Hanna v. Plummer, 380 U.S. 460, 464 (1965).

In its discussion of *Erie* principles, the *Hanna* Court seemed to endorse a version of the outcome determination test, but noted that the test "cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws."[30] If a federal rule adopted pursuant to the Rules Enabling Act was involved, the Court stated that the federal rule should be applied so long as it was "rationally capable of classification as procedural."[31]

The rigors of the *Hanna* approach were softened somewhat by the subsequent decision of *Walker v. Armco Steel Co.*[32] In *Walker*, the issue was the date when an action was "commenced" for purposes of satisfying the statute of limitations. Under state law, an action was not deemed commenced for statute of limitations purposes until service of a summons on the defendant.[33] By contrast, rule 3 of the Federal Rules of Civil Procedure states that a civil action is commenced by the filing of a complaint.[34] A unanimous Court held that state law governed the statute of limitations question, noting that "there is no indication that the Rule was intended to toll a state statute of limitations,"[35] and suggested that a federal rule should not be held to displace a state standard unless the "plain meaning" of the rule makes a clash "unavoidable."[36]

Taken as a whole, the case law on the *Erie* doctrine reflects the two different themes featured prominently in *Erie* itself. Cases such as *York* and *Hanna* emphasized the unfairness of the *Swift v. Tyson* rule to the party who is forced to litigate in federal court. By contrast, *Byrd* focused almost entirely on a perceived conflict between state and federal interests.

Commentators are similarly divided into two camps. One group, led by John Hart Ely, emphasizes fairness-based considerations.[37] The other group, including David Currie and Martin Redish, is primarily concerned with issues of federalism.[38] None of the models that have been suggested provides a full justification for the *Erie* doctrine.

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[30] *Id.* at 468.

[31] *Id.* at 472.

[32] 446 U.S. 740 (1980).

[33] OKLA. STAT. tit. 12, § 95 (1971).

[34] FED. R. CIV. P. 3.

[35] Walker v. Armco Steel Co., 446 U.S. 740, 750 (1980) (footnote omitted).

[36] *Id.* at 749-50 n.9.

[37] *See* Ely, *supra* note 8, at 724-25.

[38] *See* R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 795 (4th ed. 1987); Redish, *supra* note 8, at 169-205.

1. *The Erie Doctrine and Litigant Fairness*

a. Forum Shopping

The crudest form of the litigant fairness argument focuses on the danger of forum shopping. This argument rests on the view that it is unfair to allow a nonresident to "shop" between state and federal courts in order to obtain legal doctrine more favorable to his case. The fear of forum shopping underlay the Supreme Court's endorsement of the modified outcome determination test in *Hanna v. Plumer*.[39]

The difficulty with the forum shopping argument is that it proves too much. By its nature, establishing diversity jurisdiction in the judicial system will give some parties the power to choose between state courts and federal courts. Faced with that choice, a rational person will forum shop—that is, choose the most advantageous forum. Thus, the forum shopping argument is not merely an argument against the rule of *Swift v. Tyson*; it is an attack on the institution of diversity jurisdiction generally.[40] If diversity jurisdiction is to be retained, the forum shopping argument only has force if one can show that choosing a forum to obtain a favorable choice of law is somehow more unfair than choosing a court to obtain some other advantage.

b. The Quasi-Equal Protection Justification

Perhaps cognizant of the weakness of the generalized attack on forum shopping, Ely focuses on the quasi-equal protection strand of the *Erie* opinion. He claims that the doctrine is best understood as being aimed at "the unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen."[41]

Despite its facial appeal, this argument also fails to adequately justify the rejection of *Swift v. Tyson*. The *Erie* rule makes a difference only when the courts of the forum state apply a rule that the federal courts would view as unfair. Otherwise, even under a system that rejected *Erie*, the federal court would independently

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[39] 380 U.S. at 467-68.

[40] Ely, *supra* note 8, at 710.

[41] *Id.* at 712.

adopt the forum state rule. Thus, in essence, the party in litigation with a noncitizen is contending that because he would gain an unfair advantage in a lawsuit with a cocitizen, he should also be allowed to enjoy that same advantage in an analogous lawsuit with a noncitizen. This argument is not terribly appealing. In short, neither of the fairness-based arguments justifies the abandonment of *Swift*.

2. *Federalism-Based Arguments*

a. *The Constitutional Argument*

The *Erie* majority claimed that its conclusion was constitutionally-mandated by the doctrine of enumerated powers.[42] Even in the context of early-twentieth century constitutional jurisprudence, this claim was questionable. Normally a court that has jurisdiction over a cause of action also has the authority to determine the legal rules governing that cause of action. Moreover, nothing in the text of Article III takes that power away from the federal courts in diversity cases. Thus, even if the legislative power of Congress were otherwise limited, the power to enforce Article III would give the federal courts the authority to create common law

As Ely notes, the *Erie* constitutional analysis is outdated.[43] Under current constitutional law, Congress, through its expansive power over commerce, could regulate most matters traditionally left to state control.[44] Given this authority, Congress could also grant the federal courts power to fashion common law to govern these issues.[45] Thus, the doctrine of *Swift v Tyson* clearly would be acceptable under modern constitutional analysis.

b. *The "False Conflict" Argument*

David Currie argues that *Erie* problems create what modern choice of law scholars describe as false conflicts between state and

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[42] 304 U.S. at 79 (quoting Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

[43] Ely, *supra* note 8, at 702-04.

[44] *See, e.g.*, Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (regulation of local utilities); Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264 (1981) (land use planning).

[45] *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (by virtue of statute, federal common law governs interpretation of collective bargaining agreement).

federal law He suggests that only the governments of the states whose residents are involved have interests in the substantive outcome of the litigation. He contends that the interest of the federal government is only in creating an impartial forum. Currie concludes that the lack of a federal interest in the underlying substantive law justifies the *Erie* doctrine.[46]

The difficulty with Currie's analysis is that it assumes that the federal government has no interest in the substantive outcome of diversity litigation. In diversity of citizenship litigation, both the plaintiff and the defendant are citizens of the United States, and the federal government has an interest in seeing that justice is given to each party The fact that Congress may not have adopted a specific statute does not vitiate this interest. Thus, diversity cases in general cannot accurately be characterized as creating false conflicts.

c. *The Balancing Test*

Martin Redish urges adoption of a more sophisticated analysis of the relationship between state and federal interests. Taking *Byrd* as a starting point, Redish advocates a "refined balancing test" to resolve *Erie* issues dealing with arguably procedural rules. On the federal side, he would consider only the interest in "avoiding significant cost or inconvenience to the federal courts that would accompany the application of a particular state procedural rule."[47] Redish would balance this federal interest against whatever state policy underlies the rule at issue.[48]

Although more plausible than the Currie analysis, Redish's approach also faces serious theoretical difficulties. One problem, endemic to balancing approaches generally, is that they call on courts to compare values that are essentially incommensurable. For example, one cannot accurately compare the weight of a federal interest in cost avoidance with the interest of a state in doing justice. Even more importantly, the two sovereigns whose interests are involved are not of equal stature. To the extent that their interests truly conflict, the supremacy clause of the Constitution mandates preference for the federal government. Thus, state interests *per se* cannot constrain the federal courts.[49]

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[46] R. CRAMPTON, D. CURRIE & H. KAY, *supra* note 38, at 795.
[47] Redish, *supra* note 8, at 195.
[48] *Id.* at 197-98.
[49] Westen and Lehman, *supra* note 8, at 314.

The latter point is particularly critical to an understanding of the relationship between state and federal law in diversity cases. Since state governments have no constitutional authority to control the functioning of the federal courts, the proper analysis of *Erie* questions must be derived from federal sources alone. The next section of this Article examines the relevant federal policies.

B. *The Erie Doctrine and the Structure of the Constitution*

The proper analysis of *Erie* issues begins with an examination of the nature of the federal government created by the Constitution. As already noted, the Constitution *per se* does not require rejection of the doctrine of *Swift v Tyson*.[50] But in the absence of an expression of contrary congressional intent, it is clearly desirable for the federal courts to adopt an approach that is consistent with the basic structure of the document that created them.

The drafters of the Constitution were faced with two competing considerations. On one hand, the framers sought to establish a government that was strong enough to serve certain important purposes. On the other hand, they were concerned about the potential dangers of centralizing too much power at the national level, fearing that such a concentration would unduly reduce the authority of the state governments and generally threaten the liberty of the citizenry In an effort to accommodate both concerns, the drafters created a federal government of enumerated powers and, in the tenth amendment, reserved all residual authority to the states. Madison emphasized this point in *The Federalist No. 46*, noting that under the Constitution, "all the more domestic and personal interests of the people will be regulated and provided for"[51] by the state governments. In other words, the existence of the federal government was not intended to change the legal incidents and consequences of normal, day-to-day relationships between citizens.

Article III is a typical example of the concept of enumerated powers. Article III does not allow the creation of federal courts with general jurisdiction. Instead, the Constitution grants federal jurisdiction only in specifically-defined cases where state courts are viewed as inadequate. The jurisdictional grant is a classic example of what the author will label the "limited impact theory"—the

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[50] *See supra* notes 42-45 and accompanying text.

[51] THE FEDERALIST No. 46, at 314 (J. Madison) (Van Doren ed. 1945).

principle that federal instrumentalities should have only a limited impact on the overall process of governing the nation.

The diversity clause poses particularly difficult problems for this principle. In diversity cases, the federal courts take cognizance of substantive issues that are not directly related to any subject over which the federal government generally is granted control. *The Federalist No. 80* describes the rationale for this jurisdictional grant by reference to the privileges and immunities clause of Article IV [the comity clause]:

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled [by the comity clause], the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.[52]

The diversity clause was thus seen as a way to guarantee the fair treatment of litigants who are not residents of the state that is the situs of the litigation.

In one sense, the rule of *Swift v Tyson* did serve this purpose. Admittedly, under *Swift* the claims of nonresidents might be judged by a different standard from those applicable to residents of the forum state. But at least the process by which the standard was determined was fair. Thus, neither the resident nor the nonresident could complain because the presumably unbiased federal judge determined that some rule of law was more just than that applied to similar claims by the resident's home state courts.[53]

The difficulty with the *Swift* rule is that it goes beyond the policies that justify diversity jurisdiction. The comity clause generally was understood to require only that states grant the same basic rights to transients as to their own citizens.[54] Thus, the grant of federal jurisdiction is in essence a nondiscrimination clause, designed to guarantee that citizens of state A involved in litigation in state B will be treated no worse than citizens of state B litigating in their home courts.

This policy can be fully effectuated by adopting what might be described as the principle of equality—the theory that a state A citizen should have the same rights in a diversity action in federal

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[52] THE FEDERALIST No. 80, at 353 (A. Hamilton) (Van Doren ed. 1945).

[53] Ely, *supra* note 8, at 713.

[54] Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. OF LEG. HIST. 305, 334-39 (1988).

courts in state B that a citizen of state B would have in the courts of his home state. Obviously, a state A citizen is being treated as well as state B citizens litigating in state B courts if the legal rules applied to the state A citizen are no different than those applied generally by the state B courts. At the same time, this approach—captured in broad outline by the *Erie* doctrine—minimizes the role of the federal government in defining substantive rights of citizens in their day-to-day activities. Thus, this approach also comports with the limited impact principle.

This argument does not imply that federal adoption of the principle of equality is constitutionally mandated. As already noted, the jurisdictional grant in Article III implies a concomitant power to define independently common law rules. The existence of a power to define legal rules, however, does not imply that in each case a court will ignore the law of other jurisdictions; indeed, state courts commonly borrow the substantive rules of other jurisdictions through the application of choice of law doctrines. Given that the principle of equality effectuates both the policy underlying the diversity clause and the more general structure of the Constitution as a whole, it makes sense in common law diversity cases for the federal courts to adopt a choice of law analysis that will effectuate that principle.

This conclusion also draws support from the text of the Rules of Decision Act, which provides that "[t]he laws of the several States . . . shall be regarded as rules of decision in civil actions, in the courts of the United States, in cases where they apply."[55] On its face, the language seems to endorse the limited impact theory by closely circumscribing the lawmaking authority of the federal courts. Of course, the statutory command is not absolute; even those who give the Rules of Decision Act the broadest reading concede that purely procedural matters should be governed by federal law.[56] Moreover, the language of the Act can be interpreted to allow the creation of federal common law in other circumstances.[57] But combined with the other factors discussed above, the existence of the statute adds force to the arguments for the equality principle.

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[55] 28 U.S.C. § 1652 (1988).

[56] Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 Nw. U.L. REV. 761, 787 n.103 (1989).

[57] *E.g.*, Westen and Lehman, *supra* note 8, at 316; Weinberg, *Federal Common Law*, 83 Nw. U.L. REV. 805 (1989).

Similar analysis suggests that the *Walker* Court adopted a proper approach to the interpretation of the Rules. Admittedly, the Court could have legally adopted a uniform federal rule on service of process that would have overridden contrary state law But given the centrality of the limited impact theory to the entire concept of federal jurisdiction, the rules should be interpreted to preserve that principle if at all possible. Thus, the overriding influence of the limited impact theory justifies the *Walker* analysis.

In short, in resolving *Erie* problems, the federal courts should seek to accommodate both the limited impact theory and the principle of equality The remainder of this Article explores that approach in the context of two controversial issues—the doctrine of *forum non conveniens* and the question of choice of law rules.

II. THE *Erie* Doctrine and *Forum Non Conveniens*

A. *Forum Non Conveniens in the Federal Courts—An Overview*

For nearly half a century, federal judges have recognized the concept of *forum non conveniens* as grounds for the dismissal of diversity cases. *Gulf Oil Corp. v Gilbert*[58] firmly established the doctrine in the federal courts.[59] *Gilbert* began as a diversity action filed by a Virginia resident against a Pennsylvania corporation. The complaint was based on a Virginia fire that had allegedly been caused by the defendant's negligence. The plaintiff sued in a New York federal district court.

The Supreme Court upheld a district court judgment dismissing the claim under the *forum non conveniens* doctrine.[60] Justice Jackson conceded that the choice of an otherwise appropriate forum by the plaintiff should rarely be disturbed, but he argued that the doctrine of *forum non conveniens* was necessary to prevent the harassment of defendants by plaintiffs who deliberately choose inconvenient forums.[61] While emphasizing the discretion of the trial court was emphasized, Jackson identified two types of relevant factors. First, he discussed "private" factors:

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[58] 330 U.S. 501 (1947).

[59] For a detailed discussion of the history of the doctrine of *forum non conveniens*, see Stein, *Forum Non Conveniens and the Redundancy of Court Access Doctrine*, 133 U. PA. L. REV 781 (1985).

[60] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 512 (1947).

[61] *Id.* at 508.

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.[62]

The opinion also addressed a number of "public" factors that the Court deemed relevant to the *forum non conveniens* issue:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[63]

Shortly after the *Gilbert* decision, Congress adopted 28 U.S.C. section 1404(a) as part of the Judicial Code governing actions in federal court. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[64] The official comments to the statute make clear that Congress believed that it was simply codifying the *Gilbert* doctrine.[65] It soon became clear, however, that section 1404(a) was something more than *forum non conveniens*—and also something less.

Norwood v. Kirkpatrick[66] began the process of distinguishing between *forum non conveniens* and section 1404(a). In *Norwood*, three railroad workers, a Pennsylvania resident and two residents

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[62] *Id.*
[63] *Id.* at 508-09.
[64] 28 U.S.C. § 1404(a) (1988).
[65] *Id.*
[66] 349 U.S. 29 (1955).

of the District of Columbia, were injured in a derailment accident in South Carolina. The plaintiffs sued the railroad company under the Federal Employers' Liability Act, filing their actions in federal district court in Philadelphia, Pennsylvania. The trial court transferred the suit to South Carolina under section 1404(a). Upholding the transfer, the Supreme Court held that section 1404(a) permitted district courts to transfer actions upon a lesser showing of inconvenience than was needed to justify a dismissal on *forum non conveniens* grounds. The majority reasoned that since section 1404(a) did not require *dismissal* of the action, it was a less harsh remedy than its common law counterpart. The Court concluded a 1404(a) transfer should be available in some circumstances where a *forum non conveniens* dismissal would be inappropriate.[67]

Although *Norwood* clearly held that section 1404(a) transfers might be available in some cases where the doctrine of *forum non conveniens* was unavailable, in other contexts *forum non conveniens* is the *only* remedy available to one who seeks escape from an inconvenient forum. The most obvious example is the situation where the alternative is litigation in a foreign country No federal transferee forum exists outside the borders of the United States. Thus, section 1404(a) cannot be applied in those cases.

Additionally, some potential domestic transfers also fall outside the ambit of section 1404(a). The language of the statute allows transfers of an action only to a district "where it might have been brought."[68] In *Hoffman v Blaski*,[69] the Court held that this provision precluded granting a defendant's motion for transfer to a district that lacked personal jurisdiction over the defendant and where venue would have been improperly laid, notwithstanding the fact that the defendant could have waived both objections. The majority thus limited the applicability of section 1404(a) to those districts where no federally-created barrier inhibited the plaintiff's right to bring the action.[70]

Section 1404(a) is not only geographically more limited than *forum non conveniens*. Transfer under the statute has fewer consequences than its common law analogue. Basically, a change in forum may alter the course of a lawsuit in two different ways. First, it will change the physical location of the courtroom. Second,

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[67] Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).
[68] 28 U.S.C. § 1404(a) (1988).
[69] 363 U.S. 335 (1960).
[70] Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960).

the change in forum may lead to a change in the rules that govern the conduct and outcome of the suit. A *forum non conveniens* dismissal may result in both types of change; by contrast, the Supreme Court has held in *Van Dusen v Barrack*[71] and *Ferens v John Deere Co.*[72] that a section 1404(a) transfer should have no impact on the applicable law

In short, the federal court analysis of *forum non conveniens* issues involves a complicated interaction between statutory and common law doctrines. It is not surprising that the proper application of the *Erie* doctrine to the statutory and common law motions raises difficult issues. The next subsection addresses these issues.

B. The Application of the Erie Doctrine

1. *Section 1404(a) Transfers*

By their very nature, section 1404(a) transfer motions potentially create tensions with the theory of limited impact. These tensions could be dissolved by simply interpreting the statute to direct federal courts to apply the *forum non conveniens* rules of the states in which they sit. Unfortunately, such an interpretation would be at odds with the structure of the statute itself. Admittedly, the Reviser's Notes do indicate that section 1404(a) was intended to codify the *forum non conveniens* doctrine. However, other factors clearly indicate that state law was not to be the guide for resolving motions under the statute. First, the language of the statute itself does not refer to state law; instead, it seems to evince a set of *federal* concerns regarding the proper allocation of suits within the federal system. Moreover, at the time section 1404(a) was adopted, many states did not recognize the doctrine of *forum non conveniens*. Thus, unless the statute was intended to be a nullity in many parts of the federal court system, Congress must have envisioned the application of a federal standard to section 1404(a) motions.

The foregoing analysis turns on the fact that section 1404(a) transfers are entirely the creature of a federal statute. As the next

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[71] 376 U.S. 612 (1964).

[72] U.S. , 110 S. Ct. 1274 (1990).

For a detailed discussion of *Van Dusen* and *Ferens*, see *infra* notes 103-12 and accompanying text.

subsection demonstrates, quite different considerations govern the relationship between the *Erie* doctrine and common law *forum non conveniens* motions.

2. *Common Law Forum Non Conveniens Motions*

a. *The Position of the Case Law*

The Supreme Court has never explicitly answered the question of whether federal or state law governs common law *forum non conveniens* motions in the federal courts. *Piper Aircraft Co. v Reyno*[73] is suggestive, however. *Piper* arose out of the crash of a British-owned aircraft operated by a Scottish air taxi service. The crash occurred in Scotland and killed passengers who were Scottish citizens. A California attorney persuaded a state probate court to name his secretary administratrix of the decedents' estates. The attorney then filed wrongful death actions in California state court against Piper Aircraft Co., which had manufactured the airplane in Pennsylvania, and Hartzell Propeller, Inc., whose Ohio factory had manufactured the airplane's propellers. On the defendants' motion, the action was removed to federal court and transferred to Pennsylvania pursuant to section 1404(a). Defendants moved to dismiss the action under the *forum non conveniens* doctrine, contending that the case should be tried in Scotland. Plaintiff argued that a dismissal would be unfair because Scottish law was less favorable to them on the issues of liability, damages, and capacity to sue. The District Court granted the motion to dismiss, but the Court of Appeals reversed.

In reviewing the judgment of the Court of Appeals, the Supreme Court could have directly confronted the *Erie* problems raised by *forum non conveniens* dismissals. Instead, in reinstating the trial court judgment, the Court purported not to resolve the issue. Justice Marshall argued that, with respect to the standards for *forum non conveniens* dismissals, federal law and the state laws of Pennsylvania and California were "virtually identical."[74] Thus, in his view there was no need to decide whether federal law or state law governed. However, at the same time the Court did not cite or discuss any state law precedents that might have been

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[73] 454 U.S. 235 (1981).

[74] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

relevant to the specific application of the general test. Thus, implicitly at least, the *Piper* Court seemed to follow a federal standard on the *forum non conveniens* issue.

Numerous lower federal courts have been faced with cases in which they were unable to conclude that state and federal law were the same on the issue of *forum non conveniens*.[75] A majority of the lower federal courts faced with this problem have taken the position that federal law should control. For example, in the leading case of *Sibaja v. Dow Chemical Co.*,[76] the Eleventh Circuit cited two factors in resolving the *Erie* issue. First, the opinion noted that "[t]he doctrine [of *forum non conveniens*] derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression."[77] Additionally, the court cited its interest in controlling its crowded docket as one basis for a *forum non conveniens* dismissal.[78]

The decision to apply federal law has its most dramatic impact in cases where a section 1404(a) transfer might be available to a defendant. In those cases, the federal courts have held that the common law doctrine of *forum non conveniens* was superseded by section 1404(a), at least where it is possible to transfer to another federal district court.[79] Thus, in federal courts, the *forum non conveniens* doctrine generally has been significant only when the alternative forum is one to which the case could not have been transferred—most often the courts of a foreign country

The *Sibaja* analysis rests largely on a perception that decisions regarding *forum non conveniens* motions are basically matters of

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[75] *See* Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV 937 (1990) (describing situations in which federal law differs from state law on *forum non conveniens* issue).

[76] 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985).

[77] Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1218 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *see also* 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3828 at 293-294 (1986).

[78] *Sibaja*, 757 F.2d at 1218; *see also In re* Air Crash Disaster, 821 F.2d 1147, 1156-59 (5th Cir. 1987) (en banc) (management of crowded docket noted as a basis for the inherent power of a court to dismiss on *forum non conveniens* grounds), *vacated sub. nom.*, Pan Am. World Airways, Inc. v. Lopez, 109 S. Ct. 1928, *aff'd in part and vacated in part*, 883 F.2d 17 (5th Cir. 1989); *cf.* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 195-96 and n.90 (1987) (discussing cases reaching dissimilar conclusions through application of various reasoning).

[79] *See, e.g.*, Cowan v. Ford Motor Co., 713 F.2d 100 (1983).

judicial housekeeping. To understand the flaw in this approach, a more detailed explanation of the role of *forum non conveniens* is necessary

3. *The Role of Forum Non Conveniens*

In recent years, the existing structure of *forum non conveniens* analysis has come under heavy criticism from the academic community Commentators contend that the doctrine should be abolished[80] or, at the very least, incorporated into more structured "formal jurisdictional doctrine."[81] In fact, the existing flexible doctrine of *forum non conveniens* performs an important function in the American judicial system.

Understanding the role of *forum non conveniens* requires an examination of the structure of jurisdictional doctrine generally. One might want to restrict the court's jurisdiction for two different types of reasons—nonparty-specific and party-specific. Nonparty-specific concerns—generally grouped under the label "subject matter jurisdiction"—are independent of the interests of the parties before the court. Party-specific concerns, which are usually incorporated into the doctrine of personal jurisdiction, relate to the parties before the court.

Limiting the amount of damages that may be claimed before a small claims court and requiring diversity jurisdiction in federal courts reflect typical nonparty-specific concerns. The small claims restriction is intended to preserve the court's resources for other parties whose claims are within the limits set for the court. The diversity limitation relates to the desire to limit the scope of federal power in order to preserve the quasi-sovereign status of the states. In neither situation are the parties' interests critical to the decision.

The situation is entirely different in the party-specific personal jurisdiction analysis, where the focus of the analysis is fairness to the parties. Although concerns about the proper reach of sovereign authority may influence one's conception of fairness, allocation of sovereign authority *per se* is not the focus of this analysis. Thus, if the parties agree on a forum, party-specific factors will not bar that forum from hearing the case. Problems arise only if the parties disagree on the forum. The question then becomes which party's

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[80] Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV 1259, 1324 (1986).

[81] Stein, *supra* note 59, at 843.

preference will prevail. Therefore, the issue is best viewed as one of the allocation of decision making authority between the parties.

The American system creates a fairly complex hierarchy of principles to govern this allocation. First, it envisions a set of fora in which it would be fair for the defendant to be forced to litigate. The plaintiff has the power to choose any forum within that set as the venue for the lawsuit. If the plaintiff chooses a court that is not within the set of fair fora, the defendant has the right to veto the plaintiff's choice, but the defendant generally does not have the right to designate the specific court that will hear the lawsuit.[82] The key question is not whether the plaintiff has chosen the forum that would be most appropriate to hear the lawsuit; instead, the only issue is whether the court selected by the plaintiff is included in the set of fair fora.

In devising an approach to this problem, courts and legislatures have two basic options. One option is to adopt firm, easily administrable rules. The other option is to rely on flexible standards that take into account a variety of relevant factors. A rules-based approach has particular appeal in the jurisdictional context. Where both the parties and the court system have limited resources, expending those resources in jurisdictional disputes, rather than in resolving the merits, makes little sense. At the same time, even the best jurisdictional rules are likely to be imperfect; occasionally, the interaction among a variety of different factors may render the assertion of jurisdiction over the defendant unfair Such interactions are difficult to capture in rules without losing the ease of administration that is the major attraction of a rule-based system.

The doctrine of *forum non conveniens* provides the basis for a workable compromise. Initially, the jurisdictional inquiry can be focused on rules; the burden is on the plaintiff to demonstrate that the case falls within those rules. Such a demonstration would create a strong presumption that the court should hear the case. The burden then shifts to the defendant to prove that special circumstances justify dismissal for *forum non conveniens*. If the presumption in favor of the plaintiff's choice is strong, the *forum non conveniens* inquiry will consume relatively few resources; most motions by the defendant can be dismissed easily The federal practice of limited appellate review further conserves resources. At the same time, the availability of *forum non conveniens* gives the

[82] The exception is a situation in which only one forum falls into the set of those that are "fair" to the defendant.

courts a safety valve to dismiss particularly strong cases that are outside the standard jurisdictional rules.

Of course, other approaches to the overall personal jurisdiction problems are also plausible. Some of these approaches would change or eliminate the role of *forum non conveniens*. The key point is that the doctrine of *forum non conveniens* is an important element in some jurisdictional schemes and serves a useful role in state court allocations of decision making authority between plaintiffs and defendants. Thus, the *Erie* problems presented in *forum non conveniens* cases should be analyzed much the same way as those presented by other jurisdictional rules.

The federal courts have generally held that such issues are governed by state law[83] This conclusion makes sense in terms of the general principles that should govern *Erie* analysis. If a diverse party was granted access to a federal court when he would be denied access to a state court, then the existence of diversity jurisdiction would alter the balance of power between the parties in a manner unnecessary to effectuate the principle of equality Such a result would violate the limited impact theory. Absent statutory considerations, it should be avoided if possible.

The same considerations indicate that the federal courts should follow state law in evaluating *forum non conveniens* motions. Admittedly, in the context of *forum non conveniens* analysis, such an approach does create some tension with the principle of equality State courts generally are much more likely to invoke *forum non conveniens* in situations where neither party is a resident of the forum state.[84] Thus, a resident of a state may have the option to invoke the power of a state court where a similarly situated nonresident would have no such option. Such disparities in outcome might be viewed as presenting the type of problem that diversity jurisdiction is intended to correct.

This apparent difficulty derives from an overly expansive view of the principle of equality itself. The comity clause requires states to allow nonresidents access to their courts in a wide variety of circumstances. This point should not obscure the fact that the central mission of the state courts is to provide a forum for adjudicating claims that involve either their own citizens or activities taking place within state boundaries. The state courts should be allowed to adopt rules that preserve their resources for this

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[83] *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

[84] Stein, *supra* note 59, at 835 n.236.

general mission. Once a state has chosen that course, federal courts in diversity cases should follow the same approach in order to avoid undermining the theory of limited impact.

In short, federal courts should adopt state law in dealing with *forum non conveniens* motions. This approach should be followed even if a section 1404(a) transfer motion would be granted. As previously noted, section 1404(a) transfers have a far more limited impact than *forum non conveniens* dismissals—particularly on critical choice of law determinations. Thus, barring a *forum non conveniens* dismissal simply because of the existence of the alternative statutory remedy would seriously damage the theory of limited impact.

Similar considerations suggest the appropriate limitations of the Supreme Court's recent decision in *Stewart Org. Inc. v Ricoh Corp.*[85] *Ricoh* was a diversity action brought in Alabama federal court by an Alabama copy machine dealer against a New York manufacturer. The basis of the action was a contract clause that provided that actions on the contract could be brought only in New York's Borough of Manhattan court. Relying on this forum selection clause, the defendant moved for a section 1404(a) transfer to New York. With only one dissent, the Court held that federal law governed the question of whether or not to effectuate the forum selection clause through transfer motions.[86]

On the specific facts of the case, the Court's holding in *Ricoh* was completely unobjectionable. State courts in Alabama apparently refused to honor forum selection clauses. But given the premise that federal law is generally applicable to section 1404(a) motions, this should not be dispositive. Federal transfer motions are often granted in cases where state courts would refuse to dismiss, and there is no reason that state treatments of forum selection clauses should be treated any differently than other state jurisdictional rules in this context.

The situation becomes more complex in a state where forum selection clauses are honored. The state's approach to the forum selection issue should not govern the treatment of a section 1404(a) motion *per se*. However, that is only the beginning of the jurisdictional inquiry If the federal courts were to retain jurisdiction of a case that the courts of the forum state would dismiss, it would enable a diverse plaintiff to obtain a location for the lawsuit, and

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[85] 487 U.S. 22 (1988).

[86] This conclusion is criticized in Freer, *supra* note 8, at 1090.

a governing law, that would be unavailable to him in the absence of a federal forum. Such a result would clearly be inconsistent with the theory of limited impact. Thus, where the forum state would honor a contractual forum selection clause and dismiss a lawsuit on jurisdictional grounds, the federal courts also should honor the clause—not because section 1404(a) should be interpreted to mandate a transfer, but because more general *Erie* principles require that conclusion.

In short, the federal courts' treatment of the *forum non conveniens* issue has shown insufficient sensitivity to the theory of limited impact. When the courts have dealt with the related issue of choice of law, other problems have arisen. The next section examines those problems.

III. THE ERIE DOCTRINE AND CHOICE OF LAW RULES

Choice of law problems create unique difficulties for *Erie* analysis. Choice of law questions arise after the federal courts have determined that state law should govern a particular substantive issue. Like their state court counterparts, the federal courts then must decide which state's law to apply

A. *The Regime of Klaxon*

Klaxon Co. v Stentor Electric Mfg. Co.[87] is the much-discussed seminal case. *Klaxon* was a suit on a New York contract that was adjudicated in a Delaware federal court. The jury found for the plaintiff, and awarded him money damages. The question was whether New York or Delaware law governed the availability of prejudgment interest. Reversing a lower court judgment that had made an independent choice of law determination, the Court held that in diversity cases the decision should be made by reference to the conflicts rules of the state in which the federal district court sits.[88]

In *Day & Zimmerman, Inc. v Challoner*,[89] the Court was asked to modify the *Klaxon* rule. *Challoner* was a Texas diversity action

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[87] 313 U.S. 487 (1941).

[88] For examples of the voluminous commentary on *Klaxon*, see Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963-64); Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP PROBS. 732 (1963); Hill, *supra* note 8, at 557-58, 566-68; Weintraub, *The Erie Doctrine and State Conflict of Law Rules*, 39 IND. L.J. 228 (1964).

[89] 512 F.2d 77 (5th Cir. 1975), *vacated*, 423 U.S. 3 (1975) (per curiam).

arising from the premature explosion of an artillery round in Cambodia. The artillery round had been manufactured in Texas by a Maryland corporation, whose principal place of business was in Pennsylvania. The explosion injured a Wisconsin resident and killed a Tennessee resident. Pennsylvania, Tennessee, Texas, and Wisconsin all followed the rule that the manufacturer would be strictly liable in tort. Under Cambodian law, by contrast, the manufacturer could be held liable only if it had been negligent.[90]

In modern conflicts parlance, *Challoner* presented a "false conflict." Since none of the parties had any permanent connection with Cambodia, Cambodia would be said to have no interest in the case, and all interested states had the same substantive law Nonetheless, under Texas conflicts law, Cambodian law would apply on this point. In such a case, the District Court and the Court of Appeals both held that the federal courts were entitled to ignore the Texas choice of law rule and apply the substantive law of Texas. The Supreme Court reversed, reiterating the principle that "[a] federal court in a diversity case is not free to engraft onto . . state [choice of law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."[91] Thus, *Klaxon* was reaffirmed in the strongest possible terms.

At the time the *Klaxon* rule was established, it fit both the limited impact theory and the principle of equality well. American courts uniformly followed the approach of the *Restatement (First) of Conflict of Laws* in deciding choice of law questions. The First Restatement rules are based uniformly on a territorial mode of analysis, and a sharp division exists between substantive and procedural issues. For example, substantive matters of contract validity are governed by the internal law of the place where the contract was formed,[92] and substantive issues in tort cases are decided by reference to the internal law of the place of the injury[93] By contrast, under the First Restatement, the forum follows its own rules in deciding procedural points.[94] At the margins, the dividing

[90] Day & Zimmerman, Inc. v. Challoner, 512 F.2d 77, 80 (5th Cir. 1975), *vacated*, 423 U.S. 3 (1975) (per curiam).

[91] Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam).

[92] RESTATEMENT (FIRST) OF CONFLICT OF LAW § 332 (1934).

[93] *Id.* at §§ 377-379.

[94] *Id.* at § 585.

line between contract and tort on one hand, and substance and procedure on the other hand, are sometimes not entirely clear. But in any event, the citizenship of the parties is generally not crucial to the Restatement analysis. Thus, by adopting state choice of law rules and by reference, the First Restatement, the federal courts could be certain that the rights of a nonresident in a diversity action would be governed by the same legal rules that controlled the lawsuit of a resident in the courts of the forum state.

The situation has changed dramatically in recent years. Although the First Restatement has been criticized by many academic commentators,[95] it remains popular with many state courts.[96] However, spurred by scholarly criticism, other state courts have begun experimenting with different approaches to choice of law analysis. Some states have adopted the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws*;[97] others follow various forms of interest analysis;[98] still others have focused on the "better law" approach;[99] and the approach of some states simply defies easy characterization.[100] Unlike the First Restatement, some of the more modern systems focus explicitly on the residence of the parties as a determining factor in choice of law analysis, giving more favorable treatment to resident parties than nonresident parties.[101]

Ely suggests that conflicts systems that favor residents over nonresidents violate the comity clause.[102] Although this conclusion is somewhat extreme, it was clearly the possibility of such discrimination that prompted the Constitutional Convention to provide

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[95] *E.g.*, W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

[96] The approaches of various states to choice of law issues are surveyed in Smith, *Choice of Law in the United States*, 38 HAST. L.J. 1041 (1987).

[97] *E.g.*, Griggs v. Riley, 489 S.W.2d 469 (Mo. Ct. App. 1972).

[98] *E.g.*, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719 (1976) (comparative impairment analysis), *cert. denied*, 429 U.S. 859 (1976); Lilienthal v. Kaufman, 395 P.2d 543 (Ore. 1964) (pure interest analysis).

[99] *E.g.*, Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973); Hunker v. Royal Indemnity Co., 204 N.W.2d 897 (Wisc. 1973).

[100] *E.g.*, Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972) (rules embodying elements of territorialism, interest analysis; and RESTATEMENT (SECOND) OF CONFLICT OF LAWS); Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970) (combination of territorialism and interest analysis).

[101] *See, e.g.*, Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969) (guest statute); Hart v. American Airlines, Inc., 304 N.Y.S.2d 810 (N.Y. Sup. Ct. 1969) (collateral estoppel rules).

[102] Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

for diversity jurisdiction in the federal courts. Thus, in order to fulfill their constitutional function, the federal courts should modify their approach to problems of choice of law in diversity cases. Rather than simply applying the choice of law analysis of the forum state on issues that are governed by state law, on non-jurisdictional issues the federal courts should apply the law that would have been adopted by the forum state if the party choosing the federal forum had been a resident of that state.

This change in approach would have no impact on results where the forum had adopted an approach to choice of law analysis that does not base results on the residence of the parties. The new rule would make a difference, however, in the federal courts' role in states applying interest analysis or related methodologies. In those states, the federal courts would gain the ability to effectuate the policies underlying the diversity clause by guaranteeing that nonresidents would have the opportunity to avoid discrimination against them by the state courts. Admittedly, the suggested modification would increase the likelihood of forum shopping by nonresident parties. But it is precisely the type of forum shopping envisioned by those who drafted the diversity clause.

B. Choice of Law and Section 1404(a) Transfers

The availability of section 1404(a) transfer motions increases the potential complexity of the choice of law problems faced by the federal courts in diversity actions. The Supreme Court first dealt with the issue in *Van Dusen v. Barrack.*[103] *Van Dusen* arose from the crash of a commercial aircraft en route from Boston, Massachusetts to Philadelphia, Pennsylvania. In the wake of the crash, more than 100 negligence actions were filed in the United States District Court for the District of Massachusetts, and more than 45 were filed in the United States District Court for the Eastern District of Pennsylvania. On motion by the defendant, the Pennsylvania court applied section 1404(a) and transferred the actions begun in Pennsylvania to the Massachusetts court. The question in *Van Dusen* was what effect the transfer would have on the choice of law governing the actions originally instituted in Pennsylvania.

The *Van Dusen* Court held unanimously that Pennsylvania law governed those actions. The opinion first focused on the equality

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[103] 376 U.S. 612 (1964).

justification for the *Erie* doctrine, noting that the basic purpose of the doctrine was to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."[104] The Court further noted that if the law of the transferee forum was applied in cases such as *Van Dusen*, a party subject to suit in the transferor forum could invoke section 1404(a) to gain the benefits of the law of the transferee state.[105] Thus, the Court concluded that the law of the transferor state provided the appropriate rules to govern transferred actions.[106]

The holding in *Van Dusen* was explicitly limited to situations in which the transfer was initiated on motion of the defendant.[107] In *Ferens v John Deere Co.*,[108] the Court extended the rule to cover cases in which the plaintiff initiated the transfer. In *Ferens*, the plaintiff lost a hand after allegedly catching it in a harvester manufactured by the defendant Delaware corporation. The accident occurred in Pennsylvania. More than two years after the accident, the plaintiff raised contract and warranty claims in a diversity action in a Pennsylvania federal court. The plaintiff also filed a tort action in a Mississippi federal court. The actions were split because Pennsylvania had a two year statute of limitations for tort actions, while Mississippi had a six year statute of limitations. On plaintiff's section 1404(a) motion, the Mississippi action was transferred to Pennsylvania district court.

A closely-divided Supreme Court held that the Mississippi statute of limitations would continue to govern the transferred tort action. Speaking for the majority, Justice Kennedy rejected the argument that the Court's interpretation of section 1404(a) would unduly encourage forum shopping, noting that the plaintiff already had the option of proceeding in either Mississippi or Pennsylvania court.[109] Kennedy also argued that a contrary view "would undermine the *Erie* rule in a serious way"[110] by allowing a transfer under

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[104] Van Dusen v. Barrack, 376 U.S. 612, 638 (1964).

[105] *Id.*

[106] For differing perspectives on *Van Dusen*, see Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV 341 (1960); Note, *Choice of Law After Transfer of Venue*, 75 YALE L.J. 90 (1965).

[107] *Van Dusen*, 376 U.S. at 640.

[108] ___ U.S. ___, 110 S. Ct. 1274 (1990).

[109] Ferens v. John Deere Co., ___ U.S. ___, 110 S. Ct. 1274, 1282 (1990).

[110] *Id.* at 1281.

section 1404(a) to change the state law applicable in a diversity case. He further contended that requiring the plaintiff to pursue his suit in an inconvenient forum in order to obtain favorable law would impose unnecessary costs on the federal court system.[111] Thus, the majority concluded that applying the law of the transferor forum "effects the appropriate balance between fairness and simplicity."[112]

Proper analysis of the relationship between section 1404(a), choice of law, and the *Erie* doctrine is relatively straightforward. Section 1404(a) motions are not available to state court litigants; thus, their existence threatens to substantially reallocate authority between plaintiffs and defendants on the matters normally related to choice of forum. As already noted, a federal standard properly governs the decision of a court on the question of whether to grant a section 1404(a) motion. For *Erie* purposes, the question is how best to limit the tension between the existence of transfers and the theory of limited impact.

Given the need for a federal standard, the Court's approach to the effect of section 1404(a) transfers initiated by defendants is entirely consistent with the limited impact theory. Allowing a defendant to force transfer reallocates the decision making power between the parties by giving the defendant a new veto power over the plaintiff's choice of forum, but by holding that a transfer of defendant's motion will not change the applicable law, *Van Dusen* ensures that such a transfer will have no other effects.

The extension of *Van Dusen* to plaintiff-initiated transfers cannot be defended in similar terms. As the *Ferens* majority noted, allowing the plaintiff to move the courtroom from the transferor forum to the transferee forum by its terms has no impact on the allocation of authority between the parties because, by definition, the transferee forum was one in which the plaintiff could have filed the action as an initial matter.[113] Application of the *Ferens* rule, by contrast, gives the plaintiff an option that he would not have had in the absence of federal diversity jurisdiction—the right to litigate in the transferee state under the legal regime of the transferor state. The *Ferens* majority argued that this advantage

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[111] *Id.*

[112] *Id.* at 1284.

Justices Scalia, Brennan, Marshall, and Blackmun dissented. *Id.* at 1284-88 (Scalia, J., dissenting).

[113] *Id.* at 1282.

was not "legal," but rather territorial.[114] Such distinctions, however, are not relevant to the theory of limited impact that should guide *Erie* analysis. Moreover, application of the law of the transferee forum in *Ferens*-type cases would not threaten any federal policy embodied in the transfer statute. Therefore, unlike *Van Dusen*, *Ferens* should be viewed as incorrectly decided.

CONCLUSION

The analysis of the choice of forum and choice of law issues illustrates the benefits of an approach to *Erie* problems that focuses on the conflicting demands of the limited impact theory and the principle of equality The suggested approach would greatly improve judicial performance in this area. Rather than directing the attention of the federal judiciary to talismanic phrases or illusory comparisons of the relative importance of state and federal interests, such an approach would focus the courts' attention directly on the policies underlying both the grant of diversity jurisdiction and the Constitution as a whole. Admittedly, no easily described system will yield simple answers to all *Erie*-related issues. Consistent application of the suggested analysis, however, would generate a more coherent, easily-understood body of precedent determining the boundaries between state and federal law

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[114] *Id.* at 1280.