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Richard W. Bourne
University of Baltimore School of Law

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FEDERAL COMMON LAW AND THE *ERIE-BYRD* RULE

Richard W. Bourne†

From their first year in law school through their careers, attorneys have been mystified by the twists and turns of the Erie *doctrine and the seemingly incompatible unfolding of what Judge Friendly labeled the "new federal common law." The author attempts a fresh reconciliation through a review of both bodies of law. He concludes that in areas not directly covered by either the Constitution or federal statutes, federal courts are authorized to resolve conflicts between federal and state rules through application of a federal procedural common law in much the same way that they have worked to resolve conflicts with state policy in areas of federal substantive concern.*

I. INTRODUCTION

In overruling *Swift v. Tyson*[1] in 1938, Justice Brandeis' majority opinion in *Erie Railroad Co. v. Tompkins*[2] proclaimed: "[E]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal *general* common law."[3] The words were scarcely uttered, however, before the same Justice, writing for another majority, was applying federal common law as the rule of decision in a case defining the water rights of various states under an interstate compact.[4] In the years that followed, the Supreme Court spawned an enormous body of case law under the aegis of the *Erie* doctrine, while at the same time giving flower to an extremely variegated body of *specialized* federal common law.[5]

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† B. A., Harvard College, 1964; LL.B., University of Virginia School of Law, 1968; LL.M., Harvard Law School, 1975; Attorney, Department of Justice, 1968-73; Teaching Fellow, Harvard Law School, 1973-75; Assistant Professor of Law, University of Richmond Law School, 1975-79; Associate Professor of Law, University of Baltimore School of Law. The author wishes to thank many colleagues, particularly Professor John C. McCoid of the University of Virginia and Professor Eugene J. Davidson of the University of Baltimore, for their comments and criticisms. These people deserve credit for much of what is good in the article, and bear no responsibility for the rest.

1. 41 U.S. (16 Pet.) 1 (1842).
2. 304 U.S. 64 (1938). The literature of *Erie* is vast. The author believes that the most significant recent contributions to this literature are Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) and Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977). The central theses of these articles are evaluated and criticized, respectively, at *infra* notes 158-85 and 256-76.
3. 304 U.S. at 78 (emphasis added).
4. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
5. A number of writers have discussed the new federal common law at length. *See, e.g.,* Friendly, *In Praise of Erie — And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964) [hereinafter cited as Friendly]; Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption,* 67 COLUM. L. REV. 1024

A number of commentators have sought to reconcile the apparent antagonism of these two trends. Professor Wright, for example, suggests the "two simultaneous developments are probably more than coincidental."[6] Perhaps the most important effort is Judge Friendly's.[7] In his view, the *Erie* jettison of *Swift,* made necessary because of the unconstitutionality of general federal lawmaking under the tenth amendment,[8] created a need for a body of federal judge-made law which could provide uniform rules on issues of national concern and thereby minimize the centrifugal forces of American federalism.[9] By focusing federal judges on the appropriate doctrinal sources of national power, *Erie* opened the door to "a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding on every forum . . . ."[10]

The purpose of this article is to explore the relationship between this kind of federal common law and the *Erie* doctrine.[11] It seeks to reconcile *Erie* and the new federal common law by making the former a specialized branch of the latter. The argument proceeds through three stages. First, there will be a descriptive analysis of federal common law of the non-*Swift* variety before and after *Erie.* The cases suggest judicial willingness to apply federal judge-made law, as opposed to local rules of decision, in areas where the sovereign interests of the federal government are exclusive or at least appear paramount. Increasingly this has occurred in zones of activity heavily influenced by federal regulatory legislation. Under the influence, though not the command,

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(1967) [hereinafter cited as Hill]; Mishkin, *The Variousness of "Federal Law": Competence and Discretion of the Choice of National and State Rules of Decision,* 105 U. PA. L. REV. 797 (1957) [hereinafter cited as Mishkin]; Note, *The Federal Common Law,* 82 HARV. L. REV. 1512 (1969) [hereinafter cited as Note].

6. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 282 (3d ed. 1976) [hereinafter cited as WRIGHT].
7. *See* Friendly, *supra* note 5.
8. *Id.* at 394-98. However, it is this writer's opinion that more than the tenth amendment was involved. *See infra* notes 143-44 and accompanying text.
9. *See* Friendly, *supra* note 5, at 421. Judge Friendly calls the new federal common law "a new centripetal tool incalculably useful to our federal system." *Id.*
10. *Id.* at 405.
11. At the outset, the author would like to note substantial agreement with Judge Friendly's view. His position, briefly, is that:

> [t]he coincidence of the death of the first (*Swift*) doctrine and the growth of the second (new federal common law) would itself suggest that *Swift* . . . had retarded the development of federal decisional law of the latter type. . . . Since most cases relating to federal matters were in the federal courts and involved "general" law, the familiar rule of *Swift* . . . usually gave federal judges all the freedom they required in pre-*Erie* days and made it unnecessary for them to consider a more esoteric source of power . . . . By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding all courts because of its source, to develop within a quarter century into a powerful unifying force.

Id. at 407 (citations omitted). Friendly's argument is at most a limited one, a sort of "necessity-is-the-mother-of-invention" approach.

of federal positive law, the federal courts have fashioned national rules in such a way as to preempt large areas of activity from state regulation. At the same time, due regard for state interests has on occasion led to the incorporation of local law as the federal rule of decision in particular cases.

The second stage of the analysis involves the operation of the *Erie* doctrine as it has unfolded since 1938. As with federal common law generally, in this area the federal courts have tended to apply federal law when it was believed that there was a legitimate federal interest in doing so. This is true not only on questions directly governed by provisions of federal positive law, but also on issues indirectly influenced by federal legislation or otherwise believed to be exclusively beyond the ken of state lawmaking. The seminal case authorizing the latter development is *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[12] decided twenty years after *Erie*. Even after *Byrd*, however, when there appears to be little or no independent federal interest in applying a federal rule of decision, the *Erie-Byrd* cases have demonstrated a willingness to adopt state law and policies as the rule of decision, particularly when failure to do so would undermine a significant state policy.

The message of the new federal common law cases is that in areas of exclusive or predominate federal substantive concern, federal law should provide the controlling rule of decision. It follows that in areas of exclusive or predominant federal procedural concern, federal law may also govern. While it is proper and useful to recognize the applicability of much of the teaching of the new federal common law cases to *Erie-Byrd* problems, one must be mindful that in the latter area the adjective nature of procedural law frequently requires restraint in defining federal policies and the circumstances in which they should be applied. The final stage of the discussion therefore turns to how federal and state interests should be accommodated in those cases where federal judge-made procedural rules conflict with state rules, both procedural and substantive.

II. FEDERAL COMMON LAW

A. *The Pre-*Erie *Lines*

In the era before *Erie* and in addition to the ill-starred cases falling under *Swift v. Tyson*,[13] federal judges fashioned federal rules of decision in a number of contexts. First, they did so by filling in the meaning of vague provisions of federal positive law[14] and by fashioning

12. 356 U.S. 525 (1958).
13. 41 U.S. (16 Pet.) 1 (1842).
14. *See, e.g.*, United States Mortgage Co. v. Matthews, 293 U.S. 232, 236 (1934) (in evaluating emergency mortgage relief statute against mortgagee claims that statute offends impairment clause, Court applied independent federal standards for defining scope of agreement); Douglas v. Kentucky, 168 U.S. 488, 500-02 (1897)

remedies for which federal law provided rights and obligations.[15] In these areas the federal courts were arguably only construing legislative materials produced by other institutions of government; certainly they could look to these materials to anchor and thus legitimate their decisions. While there was no question that in using the methodologies of common law courts to construe legislation the federal judiciary was not utilizing extra-judicial powers, their decisions nevertheless smack of common law in the sense that they were "making" law, albeit in ways clearly within their delegated authority.[16]

Second, there were a number of decisions in which federal courts made law in the absence of specific constitutional or legislative commands.[17] This has been true, for example, in those areas in which federal courts were vested with exclusive jurisdiction to decide certain claims but were afforded little or no legislative guidance as to how to decide them.[18] In each of these areas federal judges have sometimes

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(in applying the Constitution's impairment clause to state contracts authorizing lottery sales federal, not state law, determines whether a contract exists).

15. *See, e.g.,* Weeks v. United States, 232 U.S. 383 (1914) (the foundation of the exclusionary rule cases in which a federal remedy was developed to enforce the fourth amendment).

16. *See* D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942) (Jackson, J., concurring). Justice Jackson explains that:

> The federal courts have no *general* common law as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law. . . .
>
> Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes and is apparent from the terms of the Constitution itself. . . .

Id. at 469-70 (emphasis in original).

17. Consider, for example, the line of cases authorizing the federal government to sue to redress grievances against it without a statutory grant of standing to do so. *E.g.,* Cotton v. United States, 52 U.S. (11 How.) 229 (1850) (federal government may sue to protect its property rights like any other corporation); *In re* Debs, 158 U.S. 564 (1895) (federal government has standing to seek injunction against Pullman railway strike because of pecuniary interests in uninterrupted mail service, the federal interest in eliminating nationwide nuisance, and the governmental need to relieve unreasonable impediment to flow of interstate commerce).

18. For interstate dispute cases which support this proposition see, *e.g.,* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Kansas v. Colorado, 185 U.S. 125 (1902). For admiralty and maritime decisions see, *e.g.,* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). For bankruptcy proceedings which lend support to this theory see, *e.g.,* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); James v. Gray, 131 F. 401 (1st Cir. 1904).

The United States Constitution vests the Supreme Court with original jurisdiction to hear "Controversies between two or more States. . . . between a State and Citizens of another State . . . and between a State . . . and foreign States,

adopted a federal common law rule in such a way as to displace a competing state rule of decision. When a federal rule was applied in this way, it was given the same force as a rule emanating from Congress and was held enforceable in the state as well as federal courts.[19] This did not make state law completely irrelevant to the process; occasionally due regard for an important local policy would lead the federal court to consider or adopt local law as the rule of decision.[20]

Citizens or Subjects." U.S. CONST. art. III, § 2. Under 28 U.S.C. § 1251(a) (1976 & Supp. V 1981), the Supreme Court has exclusive original jurisdiction over suits by one State against another. Congress has provided the district courts with original jurisdiction, exclusive of the state courts, in admiralty and bankruptcy cases. *See* 28 U.S.C. §§ 1333, 1334 (1976 & Supp. V 1981).

One could argue that in cases of exclusive federal jurisdiction, necessity requires the use of federal common law in the absence of other sources of rules for decision. Note, however, that issues in these fields may arise in areas where the jurisdiction is concurrent, rather than exclusive, thus vitiating the necessity rationale. Realizing this, scholars have developed other reasons for the use of federal common law. *See, e.g.,* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 531-32 (1954) (inability of states to fashion comprehensive set of rights and remedies because of quasi-exclusive grant of admiralty jurisdiction to federal court justifies implying congressional grant of power to federal courts to develop national common law under saving to suitors clause); Henkin, *The Foreign Affairs Power of the Federal Courts — Sabbatino,* 64 COLUM. L. REV. 805, 817 (1964) (unfairness of judging acts by interested states' rules justifies neutral federal common law in interstate dispute cases); Hill, *supra* note 5, at 1025, 1031-68 (constitutional preemption authorizes federal common law in interstate and maritime dispute areas as well as in areas where federal proprietary interests or problems of international law are implicated); Note, *supra* note 5, at 1520-21 (concept of national sovereignty requires ability to avoid internal conflicts threatening rupture and to face other nations in a uniform way, thus justifying interstate dispute and foreign affairs cases).

19. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Chelentis v. Lukenbach S.S. Co., 247 U.S. 372 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

20. *See, e.g.,* Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (federal practice of applying a rule of literal compliance with marine insurance policy relaxed in favor of application of differing state practice, in view of paramount state interest in regulating insurance); Sultan R.R. & Timber Co. v. Department of Labor and Indus., 277 U.S. 135 (1928) (state may award workmen's compensation to worker on navigable river, despite inconsistency with general admiralty law, when employment was stationary and issues were essentially "local" in character); Prudence Realization Corp. v. Geist, 316 U.S. 89 (1942) ("The court of bankruptcy is a court of equity . . . and it is for that court — not without appropriate regard for rights acquired under rules of state law — to define and apply federal law in determining the extent to which the inequitable conduct of a claimant . . . in bankruptcy requires . . . subordination to other claims. . . ." *Id.* at 95).

The notion that a federal court should give due regard to rights created under state law in determining the reach of federal law, common or statutory, is of course not novel. *See, e.g.,* De Sylvia v. Ballentine, 351 U.S. 570 (1956) (state interest in regulating domestic relations requires incorporation of state rule of inheritance to illegitimate offspring into federal statute providing for renewal of copyright by "children" of deceased author); Mason v. United States, 260 U.S. 545 (1923) (measure of damages for conversion of oil from government land determined under local law); United States v. Fox, 94 U.S. 315 (1877) (when government takes property from a person who lacks good title under state law, it obtains

The "new" federal common law heralded by Judge Friendly and other commentators has its roots in this pre-*Erie* body of law. Although *Erie* did away with the ability of federal courts to fashion "general common law" in diversity cases, so as to displace state common (and occasionally statutory) law,[21] it did not seriously affect the bankruptcy, admiralty, and interstate dispute lines of cases.

1. Bankruptcy

In bankruptcy, the changes after *Erie* were more formal than real. The post-*Erie* jurisprudence required a reformulation of the doctrinal basis offered in favor of application of federal standards in the face of contrary state created rights. The old tendency to justify reordering of creditor priorities on the basis of "general law" or "equity jurisprudence" was believed no longer appropriate; the same decisions could now only be rationalized under the bankruptcy statutes.[22] The problem remained, however, of what to do when the statutes themselves were silent. As these cases illustrate, federal judges continued to render nugatory state created rights, however this was now done in the name of furthering the "policy of the Bankruptcy Act."[23] The change in formulation should not obscure the similarity of result; the decisions subsequent to *Erie* were consistent with those before it.[24]

2. Admiralty

A somewhat similar but more twisted pattern emerged in the admiralty cases. Here, prior to *Erie,* it was believed that the federal common lawmaking power arose from a need for a nationally uniform body of maritime law.[25] The most interesting early cases involved

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no better title than its grantor, otherwise important vested rights would be destroyed).

21. Professor Horwitz cites Watson v. Tarpley, 59 U.S. (18 How.) 517, 521 (1855), Pease v. Peck, 59 U.S. (18 How.) 595, 598-99 (1855), and Oates v. National Bank, 100 U.S. 239, 246, 249 (1879) for the proposition that prior to *Erie* the Supreme Court sometimes "bluntly declared that state statutes had to yield before the 'general commercial law'; in many other cases the federal courts simply refused to be bound by an anticommercial state court 'interpretation' of its own statute." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 250 (1977).

22. For an extensive treatment of this subject see Hill, *The Erie Doctrine in Bankruptcy,* 66 HARV. L. REV. 1013 (1953).

23. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162 (1946).

24. *Compare* American Surety Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133 (1935) (a pre-*Erie* case where the power to subordinate claims was found in the Court's general equity power) *with* Pepper v. Litton, 308 U.S. 295 (1939) (a post-*Erie* case grounding the Court's authority to subordinate claims in the Bankruptcy Act).

25. Professor Currie expounds the uniformity argument in Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. The views of Justice Story can be found in DeLovio v. Boit, 7 Fed. Cas. 418 (C.C.D. Mass. 1815) (No. 3776). *See* Stevens, *Erie R.R. Co. v. Tompkins and the Uniform General Maritime Law,* 64 HARV. L. REV. 246 (1950). At least one commentator, however, has used an argument based on the twin theories of necessity and constitutional pre-

whether federal common law should supercede state law regarding the navigable waters within the states. In 1917, the Supreme Court held in *Southern Pacific Co. v. Jensen*[26] that the national need for uniform rules of liability in unseaworthiness cases within the maritime jurisdiction (at that time largely undeveloped by Congress or the federal courts) compelled a kind of federal preemption which barred a state court from awarding workmen's compensation damages for wrongful death to a longshoreman who was accidentally killed on the navigable waters of a state.[27] Although statutory changes[28] and Supreme Court decisions[29] suggest that the particular result in *Jensen* might no longer hold today,[30] the uniformity doctrine of federal preemption is still alive and well.[31]

3. Interstate Disputes

The tradition that federal courts may fashion federal common law to determine rights and obligations in cases involving interstate disputes is an old one,[32] and is supported by arguments closely resembling the necessity and functional justifications in admiralty.[33] If anything

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emption to justify action in this area. Hill, *supra* note 5. The Supreme Court has recently said, "We consistently have interpreted the grant of admiralty jurisdiction . . . as a proper basis for the development of judge-made rules of maritime law." Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95-96 (1981) (quoting Fitzgerald v. United States Lines Co., 374 U.S. 16, 20-21 (1963)).

26. 244 U.S. 205 (1917).
27. *Id.* at 216. In dissent, Justice Holmes emphasized the paucity of federal authority in the area and castigated the court majority for imagining that "law is a brooding omnipresence in the sky" to be divined by federal judges. *Id.* at 222. (Holmes, J., dissenting).
28. *See* 33 U.S.C. § 903 (1976) (compensation for injuries occurring on navigable waterways); 33 U.S.C. § 905 (1976) (exclusiveness of liability and remedy); 46 U.S.C. § 761 (1976) (providing a wrongful death action for families of seamen killed at sea); 46 U.S.C. § 688 (1976) (recovering for injury to or death of seamen); *see also* Note, *Fixing the Landward Coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 36 MD. L. REV. 851 (1977).
29. *See* Sea Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Hess v. United States, 361 U.S. 314 (1960); *see also* American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1979) (plurality affirming the judgment of the New York Court of Appeals which allowed plaintiff to amend a tort complaint alleging negligence and unseaworthiness to add his spouse as a plaintiff for loss of society).
30. Almost certainly the Court will not again reach the precise result in *Jensen,* where application of state law would have been more generous to the plaintiff had it been allowed. *Cf.* Sun Ship Inc. v. Pennsylvania, 447 U.S. 715 (1980) (allowing application of a state law which resulted in greater benefits accruing to the plaintiff).
31. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Kossick v. United Fruit Co., 365 U.S. 731, 731-42 (1961); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953); *see also* Sea Land Services, Inc. v. Gaudet, 414 U.S. 573, 577 (1974) (a wrongful death case relying heavily on *Moragne).*
32. *See* Kansas v. Colorado, 185 U.S. 125 (1902); Note, *What Rule of Decision Should Control In Interstate Controversies,* 21 HARV. L. REV. 132 (1907).
33. Professor Wright believes that "the Court, of necessity, has developed its own

new has occurred after *Erie,* it is the marked increase in the willingness of the federal judiciary to fashion federal common law in such a way as to override state created rights.

Two leading cases come to mind. The first is *Banco Nacional de Cuba v. Sabbatino.*[34] The dispute involved the proceeds of the sale of a shipload of sugar which, prior to its delivery to New York, had been expropriated in Cuba by a decree of the then-recognized Castro government.[35] Both parties recognized that the result turned on whether the act of state doctrine, which generally validates acts of recognized foreign governments within their own territories to the extent those acts are legal there,[36] superceded general principles of international law, which would suggest the illegality of the expropriation. If the state courts were free to formulate their own views on this issue, and if the Supreme Court was bound by *Erie* to follow the law of the state where the federal district court sat, then the bank would lose. Conversely, if the question was inherently federal, to be decided independent of *Erie* considerations, the bank would win. The Supreme Court held squarely for the bank.

Writing for the majority, Justice Harlan discussed the scope of the act of state doctrine and the choice of law question at some length. *Erie,* he said, was simply irrelevant to "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community," which he found had to be "treated

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body of law to govern [interstate conflict] questions, because of the obvious unsuitability of looking to the law of a particular state when two states are in dispute." WRIGHT, *supra* note 6, at 279. A significant student note suggests that the manifest unfairness of judging acts of one state by another's law cannot be the sole justification, since the Court has decided such cases on its own law even when the two states' laws were identical. *Note, supra* note 5, at 1520 (citing Connecticut v. Massachusetts, 282 U.S. 660, 669-71 (1931)). The student author instead has opined that the basis for federal common law in this area lies in a fundamental requirement of sovereignty over any federal union, "that it be able to avoid internal rupture by settling disputes among its component parts." Note, *supra* note 5, at 1520. Judge Friendly goes a step further, saying that "the Constitution can well be deemed to require that the federal courts should fashion law when the interstate nature of a controversy makes it inappropriate that the law of either state should govern." *See* Friendly, *supra* note 5, at 408 n.119.

34. 376 U.S. 398 (1964).

35. The two parties were a bank, asserting the legality of the expropriation decree, and claimants who, having purchased whatever title the original private owner had held, argued the expropriation to be illegal. The case was filed in federal district court under diversity jurisdiction.

36. The Court previously defined the doctrine as:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

exclusively as an aspect of federal law."[37] Foreign relations are a matter of exclusive concern to the national government, and a single uniform federal standard for answering questions which impact upon such relations is necessary to avoid "divergent and perhaps parochial state interpretations."[38] If, in dealing with these "uniquely federal" concerns,

> federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.[39]

Justice Harlan did not argue that judicial application of the act of state doctrine itself was constitutionally compelled.[40] Instead he believed that, in the absence of acts by other branches of government, the matter was for federal courts to determine. To buttress his argument that there are "constitutional underpinnings"[41] and indirect statutory support[42] for the position that the question fell within an "enclave of federal judge-made law which binds the States,"[43] Harlan cited a string of constitutional and statutory provisions dividing responsibility for foreign relations among the national legislative, executive and judicial branches and vesting federal courts with jurisdiction to deal with various issues of foreign relations.[44] Under the influence (though certainly

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37. *Sabbatino,* 376 U.S. at 425.
38. *Id.* This was particularly true of questions relating to the scope of the act of state doctrine, the adoption of which Harlan found to be as much a function of separation of powers among the various branches of the national government in dealing with foreign powers as it was of general international law. *Id.* at 423-24. Subsequently, in Zschernig v. Miller, 389 U.S. 429 (1968), the Court held invalid a state law barring a foreign national from inheriting property in that state, if his country would not grant American citizens reciprocal rights, because it felt that the statute might impair the effective exercise of American foreign policy by the President and Congress.
39. *Sabbatino,* 376 U.S. at 424.
40. Apparently Harlan believed that Congress could override a court-fashioned rule, as it did subsequent to the *Sabbatino* decision. Congress immediately responded to the *Sabbatino* decision by passing the Hickenlooper Amendment to the Foreign Assistance Act of 1961. The amendment forbade American courts from invoking the act of state doctrine without executive prodding in any case based upon a post-1958 confiscation in violation of "principles of international law." *See* 22 U.S.C. § 2370(e)(2) (1976). The amendment had the desired effect because on remand the statute was held retroactive and the bank's case dismissed. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967).
41. *Sabbatino,* 376 U.S. at 423.
42. *Id.* at 427 n. 25.
43. *Id.* at 426.
44. *Id.* at 427 n. 25. Harlan stated that "Various constitutional and statutory provisions indirectly support this determination, *see* U.S. CONST., art. I, § 8, cls. 3, 10; art. II, §§ 2, 3; art. III, § 2; 28 U.S.C. § 1251(a)(2), (b)(1), (b)(3) (1976 & Supp. III. 1979); § 1332(a)(2) (1976); § 1333 (1976); §§ 1350-51 (1976 & Supp. III. 1979), by reflecting a concern for uniformity in this country's dealings with foreign nations

not at the command) of these provisions, which at most suggested the federal interest in foreign relations and the delicacy of the separation of powers issues that international questions can sometimes pose, Justice Harlan "concluded that the scope of the act of state doctrine must be determined according to federal law."[45]

Aside from these vague references to federal positive law, the strongest precedential support Justice Harlan could find lay in "the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters."[46] He cited *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,*[47] a suit between private parties in which the Court had settled a water rights dispute by using federal common law principles to construe an interstate compact regulating water apportionment. In Harlan's view, *Hinderlider* implied that apportionment was a matter of federal law which the states may not undermine even when dealing with private parties.[48] Similarly, he reasoned that the issues arising from the act of state doctrine were intrinsically federal in nature.[49] Thus Harlan concluded that federal law alone would determine the scope of the act of state doctrine, holding that the Cuban decree could not be challenged because to do so would offend the Cuban government and could "interfere with negotiations being carried on by the Executive Branch."[50]

The second interstate conflict case is *Illinois v. City of Milwaukee.*[51] Illinois invoked the Supreme Court's original jurisdiction to hear claims against six different Wisconsin municipal agencies to obtain an order abating the latters' pollution of Lake Michigan. An order of dismissal from the original jurisdiction docket was not possible unless the state's claim "arose under" federal law[52] and hence could be initially filed in an appropriate federal district court for consideration. The Supreme Court held that the action did arise under federal law.[53]

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and indicating a desire to give matters of international significance to the jurisdiction of federal institutions. . . ." 376 U.S. at 427 n. 25.

45. *Sabbatino,* 376 U.S. at 427.
46. *Id.* at 426.
47. 304 U.S. 92 (1938).
48. *Sabbatino,* 376 U.S. at 427.
49. *Id.*
50. *Id.* at 432.
51. 406 U.S. 91 (1972).
52. *See* 28 U.S.C. § 1311 (1976).
53. Illinois v. City of Milwaukee, 406 U.S. 91 (1972). In order to resolve the case this way, the Court had to overrule dictum in a case decided the previous term, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) (strongly suggesting that actions by states to abate interstate pollution did not arise under federal law. *Id.* at 498 n. 3), and fashion a new federal common law of nuisance. None of the interstate dispute cases it cited was direct precedential authority for the novel proposition it was upholding. Closest in point were cases in which the Court had previously agreed to entertain, under its original jurisdiction, actions by a state to enjoin pollution emanating from outside its borders. *E.g.,* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 280 (1901). The main argument in these cases, however, was not choice of law, but whether the

City of Milwaukee was an appropriate application of the reasoning in the older interstate dispute cases. When a state is injured by another state, or by people operating in it, the injured state needs a neutral forum and a nonparochial body of law to protect it.[54] The Court was correct in opening the federal courts to the injured state and in allowing the judiciary to fashion federal law in the absence of Congressional action. Up to this point, *City of Milwaukee* is merely an instance of the application of the interstate dispute cases.

However, *City of Milwaukee* is potentially much broader than the interstate dispute cases. To the extent that it is founded on the federal interest in preventing water pollution and in developing nationally uniform standards for such prevention, the case might be cited as authority for suits by private as well as public agencies and as protecting plaintiffs from water pollution of not only interstate waterways but also intrastate navigable streams. Indeed, these issues divided the circuit courts after *City of Milwaukee* was decided.[55] It seems clear, however,

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Court should hear the suits. To this the Court had reluctantly acceded, because of the relative defenselessness of the states should this alternative be barred:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court.

City of Milwaukee, 406 U.S. at 104 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)) (citations omitted). The Court did not view the original jurisdiction suits as sufficient authority for what it was doing in *City of Milwaukee,* perhaps because the necessity of applying federal law does not arise so directly in nonoriginal jurisdiction cases. In any event, further support was derived from cases in which the Court implied remedies for the violation of a federal statutory right or had employed federal common law to construe interstate compacts. *See, e.g.,* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957); Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). Perhaps the most interesting support the Court found for its position lay in the existence of federal anti-pollution statutes and regulations. *See City of Milwaukee,* 406 U.S. at 101-03. These statutes did not show legislative preemption of the field; on the contrary, while in time they might be found to fill the legislative void, at that time they were insufficient to define a plaintiff's rights or to provide him a remedy. *See id.* at 107-08. The Court offered the legislative background only to show a federal legislative interest in the area adequate to preempt state lawmaking in the area. *Id.* The idea that the federal positive law might also preclude federal judges from making law in the area seems not to have occurred to the Court; instead, it used this legislation as a springboard for judicial action.

54. *See supra* note 33.

55. *Compare* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980) (private actions authorized in view of broad federal interest in uniform rules to protect national natural resources), *rev'd sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (comprehensive remedial scheme of statute preempts state courts from fashioning judge-made remedies) *with* Committee for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976) (no private actions based on interests of state governments and need to provide federal forum to preserve federalism interests have been authorized since *City of Milwaukee*); *see also* Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980) (state may sue in-state polluter for

that the broad language of the original decision, particularly the repeated reference to the positive law background as evidence of a strong national policy against water pollution, suggest the appropriateness of a more sweeping federal common law of nuisance than can be justified under the interstate dispute cases alone.[56]

On the other hand, *Sabbatino's* relationship to the interstate dispute cases is more attenuated. Justice Harlan's broad reading of *Hinderlider* is by no means required by the decision itself, which proceeds at least as much from a need for a neutral federal forum to construe an interstate document as it does from the broader policies ascribed to it by his opinion. The decision gains justification from other sources, chiefly the need for national uniformity in determining who speaks for our government in foreign relations and the inextricable relationship such questions have to the doctrine of separation of powers. The background of federal constitutional and statutory provisions indicating the federal nature of these concerns, together with the obvious utility of working out international problems according to a single set of standards, warranted a rule ensuring that federal agencies would use their own standards to determine and implement national policy in the international sphere and to maintain the delicate balance among the branches in the exercise of power over foreign relations matters. To say that positive law commanded the final result in *Sabbatino,* however, is to go too far; there was nothing in either the Constitution or the federal statutes remotely suggesting that the act of state doctrine should, on the facts of the case, supercede general principles of international law. Yet the positive law, though lurking in the background, did influence the result by making it clear that virtually all the issues the conflict of these doctrines posed were intrinsically federal in nature.

The bankruptcy, admiralty, and interstate dispute cases were fountainheads of federal substantive common law before *Erie* overruled *Swift.* Pre-*Erie* formulations in these areas, emphasizing background legislative policies, national uniformity, and the need for federal preemption, foreshadowed continued development after the *Erie* decision. In the post-*Erie* era, however, federal courts began expanding federal

polluting navigable but intrastate waters in order to assure application of uniform rules of decision in protecting national natural resources); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc) (federal common law not violated when plaintiffs allege pollution of Lake Superior and air but fail to allege significant injury to persons or property in another state).

56. *See* Comment, *Federal Common Law of Public Nuisance: An Expanding Approach to Water Pollution Control,* 10 U. BALT. L. REV. 134 (1980). The commentator's expansive view of *City of Milwaukee,* has, of course, been undercut by City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that the 1972 Federal Water Pollution Control Act, enacted shortly after the first *City of Milwaukee* case was decided, had preempted the field in the regulation of interstate discharges of untreated sewage) and Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (comprehensive remedial scheme of statute preempts courts from fashioning judge-made remedies).

substantive law into entirely new areas. The discussion now turns to the growth of this "new" federal common law.

B. Post- Erie *Formulations*

1. Clearfield Trust Co. v. United States

Perhaps the best known of the "new federal common law" cases is *Clearfield Trust Co. v. United States.*[57] A stolen and forged government check was cashed at a bank, which guaranteed prior endorsements, and was presented to the government for payment. The government sued the bank on the guarantee, and the bank defended on the basis of government delay in giving notice of the theft. The Supreme Court refused to apply local law, under which the bank's defense was valid, instead looking to the federal law merchant of an earlier era, under which the government's recovery would be barred only if the bank could demonstrate that the delay in notice clearly caused it injury.

This result was achieved through a three-step inquiry.[58] First, the Court had to decide whether the case involved federal interests sufficient to oust the direct application of *Erie.* The Court deemed *Erie* irrelevant because of the manifest federal pecuniary interest involved and because of the background of federal constitutional, statutory, and regulatory rules which permeated the issues at stake. According to Justice Douglas' majority opinion, there was no question that the rights and duties of the federal government flowing from its own commercial paper were to be determined by federal rather than local law.[59] The second and third questions addressed both involved whether to apply local law on the precise issue in question or to select a broad federal rule. This involved determining what federal law should be and whether it should be applied in contravention of local law. The Court indicated that the desirability of a uniform rule governing the negotiability of federal issues made choice of variable local rules inappropriate.[60] The Court then found the federal law merchant developed under the aegis of *Swift* "a convenient source of reference" for fashioning federal common law rules in the area.[61]

The *Clearfield* answer to the choice of law issue has been justly

57. 318 U.S. 363 (1943).

58. In his analysis of the case Judge Friendly incorporated the second and third questions into one. For him, the *second* question was whether, assuming a federal court could formulate a rule of decision, it should do so by adopting a uniform nationwide rule or follow state law. *See* Friendly, *supra* note 5, at 410.

59. *Clearfield Trust Co.,* 318 U.S. at 366-67.

60. Douglas went on to say that:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty.

Id. at 367.

61. *Id.* at 367-68.

criticized.[62] At the time of the decision it was not clear why lack of uniformity would seriously imperil the negotiability of federal paper; private parties seemed able to cope with variable state law within manageable limits. Moreover, the result of the decision could lead to confusion in the marketplace because of differences in the rules applicable to governmental and private negotiable instruments. Subsequent cases limited *Clearfield* to situations where governmental interests were most directly affected,[63] and even then sometimes adopted local law as the appropriate rule of decision when failure to do so might interfere with strongly articulated local policies.[64] When both federal and state interests are operative, the process involves balancing.[65] In the absence of state interests, however, the *Clearfield* uniformity doctrine has been applied to suits involving other kinds of government issued commercial paper, government contracts, and federal liens.[66]

2. Tort Actions Implicating the Government's Interests

A somewhat analogous set of rules have developed regarding the rights of the government in tort actions. The leading case is *United States v. Standard Oil Co.*,[67] where the government sought to sue, for loss of services and the costs of medical and disability payments, a tortfeasor who had injured a government soldier. No federal statute created a right of action on such facts, but local law provided for consequential and derivative claims in analogous situations. Relying upon *Clearfield*-type analysis, the court reasoned that the issues and interests were peculiarly federal in character, justifying the application of federal common law.[68]

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62. *See* Friendly, *supra* note 5, at 410; Trautman, *The Relations Between American Choice of Law and Federal Common Law,* 41 LAW & CONTEMP. PROBS. 105, 112 (1977) [hereinafter cited as Trautman]; Note, *supra* note 5, at 1526-31.
63. *See, e.g.,* Bank of Am. Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956).
64. *See, e.g.,* United States v. Yazell, 382 U.S. 341 (1966).
65. *See* Trautman, *supra* note 62, at 113-14.
66. *See* WRIGHT, *supra* note 6, at 280 nn. 11-13. Professor Wright notes that the universal adoption of the Uniform Commercial Code (UCC) should make it, and not the federal common law, the uniform national rule of commerce, but that the cases have continued to apply the federal common law even when it differs from the nationally uniform UCC rules. *Id.* at 280.
67. 332 U.S. 301 (1947).
68. The reasoning of the Court was as follows:

> [T]he scope, nature, legal incidents and consequences of the relation between persons in [military] service and the Government are fundamentally derived from federal sources and governed by federal authority . . . . So also are interferences with this relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly it has the power in execution of the same functions to protect the relation once formed from harms inflicted by others.
>
> Since also the Government's purse is affected, its fiscal powers . . . add their weight to the military basis for excluding state intrusion.

The *Standard Oil* Court's analysis of the other *Clearfield* questions—what federal law might be and whether it should override local law—differed considerably from that in *Clearfield.* The Court discussed the choice of law issues extensively and concluded that the government's interest indicated the issues should be resolved without resort to local law.[69] As the Court saw it, the questions were "chiefly . . . of federal fiscal policy, not of special or peculiar concern to the states or its citizens."[70] The soldier-government relation, the Court believed, while analogous to certain relationships under local law, was so distinctly and exclusively a concern of federal law as to make state law irrelevant.[71] In addition was the problem of uniformity; the Court could find "no good reason why the Government's right to be indemnified . . . should vary in accordance with the different rulings of the several states, simply because the soldier marches . . . across state lines."[72]

The next part of *Standard Oil* also differs from *Clearfield.* Unlike the *Clearfield* Court, which seemed to be going out of its way to protect federal interests by venturing into a vast field involving the flow of federal paper,[73] the *Standard Oil* majority was much more restrictive. Having loudly heralded the need to protect the putative federal interests of the national treasury and the soldier-government relationship the Court declined to do so, refusing to fashion a common law right of action on behalf of the government.[74]

Id. at 305-06.

69. The Court stated that:

> Whether or not . . . state law is to control in [this case] is not at all a matter to be decided by application of the *Erie* rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicia[ry] . . . but also the Government's legal interests and relations, a factor not controlling in the types of cases . . . governed by the *Erie* ruling. And the answer to be given necessarily is dependant upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences to be properly drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

Id. at 309-10.

70. *Id.* at 311.

71. *Id.*

72. *Id.* at 310.

73. Of course after Bank of Am. Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956) and United States v. Yazell, 382 U.S. 341 (1966), it is perhaps untrue that *Clearfield* in fact heralded a body of federal common law with quite such a wide sweep.

74. This part of the decision drew a sharp if lonely dissent from Justice Jackson. He could not understand why the court had:

> qualms about applying . . . well-known principles of tort law to this . . . state of facts . . . . The law of torts has been developed almost exclu-

Cases like *Standard Oil* can give the impression that the court failed to make common law. But the decision did make law, though of a somewhat negative kind. The uniformity arguments as well as those indicating the lack of state interest are sufficient to preempt the government's claimed right to sue a tortfeasor who injures a soldier in those states where private citizens could obtain damages in analogous circumstances. Given this, one wonders what purpose was served by the court's discussion of protecting federal interests.

3. Federal Preemption with Federal Interests

Closely analogous to the *Clearfield-Standard Oil* line of cases, where direct governmental pecuniary interest and a need for national uniformity combined to justify the ousting of state law in cases involving federal entities, are another group of new federal common law cases, the best known of which is *Textile Workers Union of America v. Lincoln Mills.*[75] In that litigation a union sued the mill management to enforce an arbitration clause in the labor-management contract. Pursuant to a federal jurisdictional statute, suit was filed in federal district court. The question involved was under what law the contractual provision for arbitration was to be construed. Under local law such a provision was deemed unenforcible, an executory "agreement to agree." Federal positive law was silent on the issue. Reversing the Fifth Circuit, a divided[76] Supreme Court upheld the district court's order of enforcement on the basis that federal common law of labor-management contracts was to be used in construing such provisions and that such law mandated enforcement.

Justice Douglas' majority opinion in *Lincoln Mills* found authority to fashion federal common law in the Labor-Management Relations Act of 1947. The Act provides for federal jurisdiction to hear suits for violations of labor contracts, and permits suit by or against a union as an entity.[77] The legislation does not purport either to create the right to contract in labor-management relations or to define the contractual rights of either side once a contract is made. On its face all the statute does is vest the federal courts with jurisdiction to hear contract disputes

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> sively by the judiciary in England and this country by common-law methods. With few exceptions, tort liability does not depend upon legislation. If there is one function which I should think we would feel free to exercise under a Constitution which vests in us judicial power, it would be to apply well-established common law principles to a case whose only novelty is in facts.

Standard Oil, 332 U.S. at 318 (Jackson, J., dissenting) (citation omitted).

75. 353 U.S. 448 (1957).

76. Justice Frankfurter filed a vigorous dissent on statutory and constitutional grounds. *See id.* at 460. Justices Burton and Harlan concurred in the result, but not on the basis of statutory construction. *See id.* at 459. Justice Black did not participate. Thus, only four members of the court supported Justice Douglas' opinion.

77. *See* 29 U.S.C. § 185 (1976).

once they arise and to declare that unions can be treated as juristic persons in such suits. Nevertheless, on the basis of admittedly weak[78] and heavily controverted[79] construction of the legislative history and language of the statute, Justice Douglas concluded that Congress intended to create a broad body of federal labor contract law "which the [federal] courts must fashion from the policy of our national labor laws."[80] Having reached this conclusion, Douglas decided that it would foster the congressional policy of creating industrial peace to place sanctions behind agreements to arbitrate grievances, and thus to ignore the local law in this case.

Lincoln Mills is an ambiguous case. The majority opinion can be interpreted as supporting the proposition that a grant of federal jurisdiction necessarily carries with it the implication that Congress is vesting federal judges with general power to make law, at least in the absence of statutory direction to the contrary.[81] While this view is superficially consistent with the admiralty, interstate dispute, and early bankruptcy cases, it goes beyond anything the Supreme Court has ever said directly, at least since *Erie,*[82] and is entirely unwarranted on the basis of that opinion alone.[83] The opinion may also be read broadly as

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78. Justice Douglas' majority opinion characterized the legislative history of the Act as "somewhat cloudy and confusing," though he argued it contained "a few shafts of light that illuminate our problem." *Lincoln Mills,* 353 U.S. at 452. Later, he conceded that "there is a great medley of ideas reflected in the hearings, reports, and debates on this Act." Yet, he found, "abundantly clear" support from the "entire tenor of the history [of the Act] . . . ." *Id.* at 455.
79. Justice Frankfurter began his attack on the majority's construction this way:

> [T]he Court has a "clear". . . conclusion emerge from the "somewhat," to say the least, "cloudy and confusing legislative history." This is more than can be fairly asked even from the alchemy of construction . . . . [T]he Court relies on a few isolated statements in the legislative history which do not support its conclusion, however favoringly read . . . . [T]he legislative history reinforces the natural meaning of the statute as an exclusively procedural provision, affording . . . an accessible federal forum for suits on agreements between labor organizations and employers, but not enacting federal law for such suits.

Id. at 462 (Frankfurter, J., dissenting); *see* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1, 27-30 (1957).
80. *Lincoln Mills*, 353 U.S. at 456.
81. *See infra* note 92.
82. *See* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 786 (2d ed. 1973). Certain cases decided during the heydey of *Swift's* regime do suggest that the purpose of diversity jurisdiction was to give federal courts general lawmaking power. *See, e.g.,* Burgess v. Seligman, 107 U.S. 20 (1883); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864).
83. Professor Mishkin, in discussing whether the grant of federal jurisdiction to cases in which the United States is a party justifies federal common law noted that:

> *Erie* would tend to cast doubt on implication of lawmaking power simply from the grant of jurisdiction over suits brought by the United States, if only because (1) it establishes that jurisdictional grants do not necessarily entail such a power; and (2) it expresses a strong policy against differences in governing law being based on choice of tribunal (a problem not present in suits between states).

suggesting that whenever Congress has legislated a great deal in a given area, the courts are ipso facto authorized to make law in the area.[84]

Lower court cases like *Kohr v. Allegheny Airlines,*[85] in which the Seventh Circuit upheld a right of contribution by one tortfeasor against another in an air collision case because of the degree to which air transport is federally regulated (despite the generally recognized view that primary liability of air carriers turns on state law) seem to suggest occasional judicial adoption of this view. On the other hand, the mere fact of congressional legislation "around" a subject certainly may not be taken as a broad authorization to fashion new rights and remedies, as recent Supreme Court decisions make clear.[86]

The narrowest reading one could place upon *Lincoln Mills* would be to suggest that it is merely a run-of-the-mill case of statutory construction. Justice Douglas' discussion of the Labor-Management Relations Act and particularly its legislative history hints that the Court had somehow found a legislative decision to vest the courts with general lawmaking power. The problem with this view is that the legislation's language and history are totally inadequate to support the argument.[87]

Douglas' opinion implies that allowing state contract law to render unenforceable an arbitration clause in a labor contract would seriously frustrate the broad purposes of the federal statute, which clearly was drawn on the basis that collective bargaining was a surer way to industrial peace than walk-outs or lock-outs.[88] Without imputing any intent to Congress, which may not have considered the issue, one can conclude the operation of state law in this context would be hostile to the

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Mishkin, *supra* note 5, at 799 n.10.

84. Professor Hill's informative article can be misapplied to justify this view. Professor Hill argues that constitutional preemption often furnishes a sounder basis than does remote statutory policy for the creation of federal common law, particularly with respect to situations involving foreign maritime law, relations, and the proprietary interests of the United States. Certainly his view automatically justifies a broad-based federal common law. Hill, *supra* note 5, at 1080. *But cf.* Hill, *The Erie Doctrine in Bankruptcy,* 66 HARV. L. REV. 1013, 1050 (1953) ("The federal courts may make substantive law *only* to effect a policy derived from the Constitution or from a valid Act of Congress.") (emphasis supplied).

85. 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

86. *See, e.g.,* Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 96-97 (1981) (Court unanimously and explicitly rejected *Kohr*). For a discussion of *Northwest, see infra* notes 97-110 and accompanying text.

87. *See supra* notes 78-79.

88. Much of Justice Douglas' opinion amounted to recitations of statements in the bill's legislative history indicating that its purpose was to provide for industrial peace by providing enforceable contracts with no-strike clauses. *See Lincoln Mills*, 353 U.S. at 453-55. Only after this recitation does the opinion say it:

> seems . . . clear . . . that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common law rule against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

Id. at 456 (citations and footnotes omitted).

purposes of the statute. This, together with the jurisdictional grant, the total legislative preemption of related areas, and perhaps the preferability of a nationally uniform rule to cover a process which inevitably crosses state lines, would justify the decision to make federal law the vessel for construing contract terms on a case-by-case basis.[89] So read, *Lincoln Mills* is quite consistent with the implied remedies cases, in which the Court has fashioned private remedies to correct constitutional[90] or statutory[91] wrongs when state law was viewed as hostile to federal interests or when federal legislative interests would be frustrated in the absence of a federal remedy.[92]

This interpretation of *Lincoln Mills* also permits due regard for appropriate balancing of state and federal interests in and outside of the particular context in which the case was decided. There is nothing in *Lincoln Mills* to suggest that the Court would not adopt, as the appropriate rule for decision, local law whenever statutory policy and national uniformity interests would not be seriously impaired and important local policies and expectations would be vindicated.[93] Quite

89. *See* Note, *supra* note 5, at 1532-35. The writer, after concluding that the result was not fairly inferable from concepts of national sovereignty, congressional intent, or a need to fashion federal remedies for breaches of federal duties, nevertheless approved it as an efficient and effective way of protecting federal concerns, providing creative lawmaking to further such concerns and supporting Congress' policy of encouraging judicial enforcement of collective bargaining agreements. *Id.*

90. *See, e.g.,* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

91. *See, e.g.,* J.I. Case v. Borak, 377 U.S. 426 (1964).

92. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court implied a private right of action for damages stemming from violation of the fourth amendment's prohibition of unreasonable searches and seizures. The court deemed it necessary to note that restricting a person wronged under the amendment to his state created rights under local trespass or invasion of privacy law might subject him to "inconsistent or even hostile" local rules. *Id.* at 394. In T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), Judge Friendly declined to fashion a federal right of action to enforce an assignment of copyright interest, or to construe federal jurisdictional statutes as covering such actions, but said the court should "not be understood . . . as necessarily agreeing . . . that federal jurisdiction would not exist if a complaint alleged that a state declined to enforce assignments of copyright valid under federal law." *Id.* at 827. Moreover, *Lincoln Mills* is consistent with the commerce clause preemption cases which outlaw state regulation which would seriously impair the flow of interstate commerce. *See, e.g.,* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940). It is also consistent with the preemption cases which outlaw state regulation which would interfere with the operation of comprehensive federal legislation in a given area. *See, e.g.,* Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954); Phillips Petroleum Co. v. Wisconsin, 346 U.S. 672, 685 (1954) (Frankfurter, J., concurring); Maurer v. Hamilton, 309 U.S. 598 (1940).

93. Such would be the case when a court was called upon to apply family benefits flowing from a labor contract. *Cf.* United States v. Yazell, 382 U.S. 341 (1966) (governmental interest in uniform rule on federal loan must yield to policy of Texas protecting married women from being bound on own contracts); De Sylvia

to the contrary, the Court in *Lincoln Mills* suggested it would be quite appropriate to adopt by reference state law in such circumstances.[94]

Lincoln Mills was at one time viewed as a possible mandate for creating broad bodies of federal common law in any area heavily regulated by federal legislation when the desired federal common law rules would be consistent with the regulation.[95] This was true whether the case was seen as an implied remedies case, where the court was somehow interpreting a vague phrase, or a federal common law case, where the court was perceived as filling in an interstitial area found in provisions of federal statute law. The scope of the decision, however, has been seriously narrowed in recent years by judicial tightening of statutory construction in cases involving implied remedies and by requiring that a party seeking development of affirmative federal common law show a strong need for a national rule supported by both uniformity considerations and a sense that judicial lawmaking is somehow compelled by peculiar circumstances.[96]

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v. Ballentine, 351 U.S. 570 (1956) (copyright law provision for renewal by "children" of author construed to incorporate illegitimate offspring consonant with state policy of descent and distribution and domestic relations).

94. 353 U.S at 457.

95. Judge Friendly's early comment was that *Lincoln Mills* "is pregnant with possibilities." Friendly, *supra* note 5, at 413. Lower courts, following his lead, have created rights and remedies against interstate telephone companies, Ivy Broadcasting Co. v. American Telephone and Telegraph Co., 391 F.2d 486 (2d Cir. 1968), and airlines, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), because they were in heavily regulated industries and the desired federal common law rules would be consistent with the regulations. WRIGHT, *supra* note 6, at 282, properly calls both decisions "debatable."

96. In a recent dissenting opinion, Justice Stevens outlined the process in the following way:

> During most of our history . . . [we held that] a statute enacted for the benefit of a special class presumptively afforded a remedy for members of that class injured by violations of the statute. Applying that presumption, our truly conservative federal judges . . . readily concluded that it was appropriate to allow private parties who had been injured by a violation of a statute enacted for their special benefit to obtain judicial relief . . . . Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs. In recent years, however, a Court that is properly concerned about the burdens imposed upon the Federal Judiciary, the quality of the work product of Congress, and the sheer bulk of new federal legislation, has been more and more reluctant to open the courthouse door to the injured citizen. In 1975, in Cort v. Ash, 422 U.S. 66 (1975), the Court cut back on the simple common law presumption by fashioning a four factor formula that led to the denial of relief in that case. Although multi-factor balancing tests generally tend to produce negative answers, more recently some Members of the Court have been inclined to deny relief with little more than a perfunctory nod to *Cort* . . . factors. The touchstone now is congressional intent.

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 23-25 (1981) (Stevens, J., dissenting) (citations and footnotes omitted); *see also* Texas Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

4. Federal Preemption Without Federal Interests

A recent example of this trend is the unanimous decision in *Northwest Airlines, Inc. v. Transport Workers Union of America.*[97] The plaintiff, an employer liable to employees for back pay as a result of discrimination in violation of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, was seeking a judicial ruling to obtain contribution from the defendant union as an implied right under the statutes or as a matter of federal common law. The Court treated each argument separately and rejected both. With respect to the question whether the right to contribution could be implied from the statutes, the Court found no support for such implication from the language, legislative history, or purpose of the statutory scheme.[98] Noting the comprehensive nature of the federal legislation, the Court said no positive inference could be drawn from Congress' failure to address the contribution issue.[99] Turning to the issue whether it should fashion federal common law in the area, the Court noted cases in which it had construed broadly-worded constitutional and statutory provisions "in the common law tradition," and recognized its duty to fashion common law, in the absence of legislation, "in cases raising issues of uniquely federal concern . . . ."[100]

But then the majority drew back. First there was an ode to judicial deference to Congress.[101] Second, the Court, after conceding that no inference could be drawn from congressional silence on the issue, went on to conclude that Congress had decided not to create the remedy, on the basis that the comprehensiveness of the legislation suggested that Congress deliberately omitted it.[102]

97. 451 U.S. 77 (1981). Justice Blackmun did not participate in the decision, but all eight remaining justices concurred in the court's opinion, penned by Justice Stevens.

98. *Id.* at 86-91.

99. *Id.* at 94-95.

100. *Id.* at 95. The Court also recognized the admiralty line of cases, including a case in which it had upheld the federal common law rule of contribution against attack on *Erie* grounds because of inconsistency with local law, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974), as creating a zone largely occupied by a specialized body of federal common law. *See* Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95-96 (1981). In discussing the admiralty exception to the new general rule against lawmaking by federal judges, the Court adverted to the jurisdictional necessity argument mentioned above in the discussion of the admiralty cases. *See supra* notes 26-27 and accompanying text. The Court then cited *Lincoln Mills* as justified by "analogous considerations." 451 U.S. at 96.

101. "Federal courts," the Supreme Court said:

> unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. . . . [W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is "subject to the paramount authority of Congress."

Northwest Airlines, 451 U.S. at 95. (citations omitted).

102. The Court stated that:

The weakness of the first part of the majority's opinion is overmatched by that of the second. The question was one of whether to create a common law right of action. Stevens, writing for the majority, adverted to, but did not directly discuss, the view of the district court below that the common law no-contribution rule was archaic and inequitable.[103] Similarly, he noted, but barely discussed, the fact that nearly all the states have abandoned the rule[104] and that the lower federal courts have recently tended to overthrow it with regard to federal causes of action.[105] Stevens then reiterated the desire not to "upset carefully considered legislative programs," stated that congressional inaction regarding the right to contribution suggested deliberate rejection, and concluded that it would be presumptuous for the Court to "fashion a new . . . rule which Congress has declined to adopt."[106] At least with respect to the Title VII contribution claim, reliance upon judicial deference and legislative intent involved entirely fatuous reasoning.[107] Indeed, as Hart and Sacks have demonstrated in other contexts,

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> The authority to construe a statute is fundamentally different from the authority to fashion a new rule . . . which Congress had decided not to adopt. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII . . . are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

Id. at 97. While *Northwest Airlines* might be rationalized as a desire to alleviate docket load, the Court's analysis is suspect. The section dealing with implied remedies on the basis of statutory construction purported to apply the four-factor test of Cort v. Ash, 422 U.S. 66 (1975), which includes not only statutory language, history, and purpose, but also the likelihood that Congress intended to supersede or supplement existing state remedies. However, it applied only the first three factors, avoiding mention of the fourth. Since surely the question of whether there should be a right of contribution among joint violators of a federal statute is not a question which should be relegated to state law and hence answered differently depending upon where the discriminatory events occurred, this last factor would seem to weigh against the decision of the court. It might not be significant enough to outweigh the others but it should have been addressed. In a later case the same term, then in dissent, Justice Stevens criticized "some Members of the Court [for] hav[ing] been inclined to deny relief with little more than a perfunctory nod to the *Cort* . . . factors." *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (Stevens, J., dissenting). Interestingly, Stevens then cites as an example a concurring opinion of Justice Rehnquist in California v. Sierra Club, 451 U.S. 287, 301 (1981) (Rehnquist, J., concurring), rather than the *Northwest Airlines* opinion, which Stevens himself had written.

103. 451 U.S. at 83-84.

104. *Id.* at 87 n.17. The Court notes that 39 states and the District of Columbia have abandoned the rule, ten by judicial decision and the remainder by statute.

105. *Id.* at 91-92 nn. 24-25.

106. *Id.* at 97.

107. The Court did not detail how the Title VII scheme might be "upset" if contribution were allowed. The Court does say that the Equal Employment Opportunities Commission, appearing as amicus, argued for contribution in the court of appeals

legislative inaction is scant proof of anything at all.[108]

This of course does not mean the ultimate result was wrong. One could easily decide to deny discriminators relief because of their presumptively dirty hands. Similarly, one could rationalize a result against discriminators simply on the basis that, absent affirmative congressional direction, the courts should refrain from creating rights of access to already overworked federal courts. The point is, however, that nothing in the Court's opinion even remotely suggests consideration of such concerns. Thus, though the result may have been correct, the mode of analysis was lacking.

It would be a misreading of *Northwest Airlines* to assume it does not make federal common law and is inconsistent with the older cases. The opinion itself breeds such error by failing to discuss the choice of law issue it necessarily had to decide while talking lengthily but pointlessly about deference to congressional primacy in making federal law.[109] *Standard Oil* teaches that, in areas of exclusive federal concern, when one can fathom no legitimate reason for permitting differences depending on where the facts arise, denial of a right of action is every

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and then argued against contribution in the Supreme Court, basing its later argument on the "upset" theory. *Id.* at 88-89. A conclusory footnote reference to a flipflopping agency is not highly persuasive. The reference to a "comprehensive" remedial scheme is little more than a charade; all Title VII assures is equitable relief for victims of discrimination. The remedial provisions of Title VII are general, and only look to protecting victims of "unlawful employment practices." After setting forth administrative preconditions for private actions, the statute speaks to their judicial remedy as follows:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, . . . or labor organization, as the case may be . . . or any other equitable relief as the court deems appropriate).

42 U.S.C. § 2000e-5(g) (1976). The subsection then proceeds to limit recovery of backpay under certain circumstances not here relevant.

For broader "pattern and practice" violations, for which suit is authorized by the Attorney General or the EEOC, the remedial section is much shorter, permitting "such relief, including . . . permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as . . . necessary to insure the full enjoyment of the rights herein described." 42 U.S.C. § 2000e-6(a) (1976). This "comprehensive scheme" certainly "comprehends" relief for victims. Equally as clear it does not "comprehend" the question of relief for one wrongdoer against another. Repeatedly calling it "comprehensive" fails to diminish the truth of the previous sentence.

Indeed, there is no evidence that the inaction was "deliberate," or even conscious. Quite to the contrary, the only evidence offered by the Court is that Congress failed to say, hear, or decide anything at all regarding contribution — quite possibly because its members did not think one collective second about it.

108. HART & SACKS, THE LEGAL PROCESS 1381-1401 (1958).

109. Close reading of the decision brings forth a footnote in which the Court, in a backhanded way, acknowledges that state law would not be the appropriate rule of decision on the facts in *Northwest Airlines*. *See* 451 U.S. at 97 n.38.

bit as much a federal common law decision as would be its grant.[110] *Northwest Airlines* is precisely such a case for one cannot imagine what interest the states would have in applying their own rules of contribution to a problem which exists solely because of the federal statute. Nor can one suggest any reason why a co-discriminator's liability should vary according to where the acts of discrimination occur. To the contrary, whatever interests are involved arise from the federal statute, and whatever rule should prevail ought to be, in view of the multistate nature of many employers, unions, and jobs, nationally uniform.

5. Interest Analysis and Preemption

The *Clearfield-Standard Oil* and the *Lincoln Mills-Northwest Airlines* holdings have much in common with the traditional lines of cases employing federal judge-made law. In all these cases a judge's authority to make law is posited upon a federal interest in the subject matter of the lawsuit.[111] In some cases this interest appears direct, immediate and concrete.[112] In others it appears less immediate, more abstract, emanating from a sense that in the constitutional scheme of things the issues are more appropriately a matter of federal than local concern,[113] or from a belief that the operation of local law could seriously impair some federal regulatory interest.[114] Frequently a background of federal positive law — constitutional, statutory, or regulatory — is conjured up to evidence a federal regulatory interest in the subject matter of the suit. The influence this law has upon the case may be more or less direct.[115] In addition there is the frequent perception of a positive

110. The Court itself appears oblivious to the fact that decisions like *Northwest Airlines* do in fact constitute federal common law, albeit of a somewhat limited kind. Consider the Court's unanimous opinion in Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), where it extended the reasoning of *Northwest Airlines* in such a way as to eliminate contribution among violators of the antitrust statutes. The *Texas Indus.* opinion suggests that *Erie* prohibits federal common law except in two circumstances: when a federal rule is needed to protect uniquely federal interests or when Congress has authorized federal judges to develop substantive law. *Id.* at 640. The opinion then proceeds to demonstrate how the contribution question fails to fit either circumstance. *Id.* at 640-46.

111. Professor Trautman sees federal common law as a vehicle for vindicating "identifiable federal concerns which cannot be accommodated satisfactorily within the body of relevant state law." Trautman, *supra* note 62, at 114. Professor Mishkin believes "effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation' . . . the governing law in an area comprising issues substantially related to an established program of government operation." MISHKIN, *supra* note 5, at 800-01. Federal "concerns" and "functions" involve not only ongoing federal legislative programs, but also interstate peace, international relations, and interstate and international commerce. *Id.* Whether one talks of "concerns," "functions," or "interest," the idea is the same: there must be a means of effectuating national interests in areas of national concern or function.

112. *See, e.g.,* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

113. *See, e.g.,* Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

114. *See, e.g.,* Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964).

115. Cases like Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448

need for a uniform rule on an issue — or at least that there are no significant reasons why uniformity should be sacrificed in the service of some local rule. Finally, on occasion the Court adopts a federal rule simply because the question seems inherently federal, because it arises on account of a federal statute, and its determination implicates no state interests.[116] Thus, the Court justifies, in the absence of provisions of federal positive law directing a different outcome, a federal judge-made rule consistent with the structure and purposes of existing federal positive law.

The arguments summarized above are frequently used to justify the exercise of legislative jurisdiction by federal judges. Similar considerations often come into play when a court, having concluded it can adopt a federal common law rule, makes the decision whether to do so or to adopt by reference local law. That precisely the same considerations might weigh heavily both in the constitutional decision regarding whether judicial power exists and in the prudential judgment as to whether and to what extent it should be exercised should not be surprising to students of federal jurisdiction.[117] This is particularly true of the uniformity policy. In many of the old admiralty cases, and in *Sabbatino, Clearfield,* and *Lincoln Mills,* uniformity was used not only to justify a federal common law decision, but also to justify preempting any deference to local law as well.

When federal interests in a particular result are weakest, however, the policy of uniformity may give way if it would interfere with legitimate state policies or party expectations created in light of them. The process is a weighing one.[118] While one can occasionally disagree with

(1957), Illinois v. City of Milwaukee, 406 U.S. 91 (1972), and Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946), appear to be mere extensions of the comprehensive regulatory schemes enshrouding the questions they presented, while many from the admiralty and interstate dispute lines, *see supra* notes 25-56 and accompanying text, appear to arise almost spontaneously from jurisdictional statutes which provide federal judges an almost intuitive sense that in the absence of Congressional legislation only they can fashion an appropriate rule of decision.

116. *See supra* notes 67-74, 97-110 and accompanying text.

117. For example the Supreme Court has called the justiciability doctrine "a blend of constitutional requirements and policy considerations." Flast v. Cohen, 392 U.S. 83, 97 (1968). Confusion between the two is frequent. In Barrows v. Jackson, 346 U.S. 249, 255 (1953), the Court admitted it had "not always clearly distinguished" case-or-controversy standing limitations and what it referred to as "complementary rule(s) of self-restraint for its own governance." Today the dichotomy is often phrased in terms of article III and "prudential" limitations on federal jurisdiction. *See, e.g.,* Warth v. Seldin, 422 U.S. 490 (1975). What the cases say about standing could easily be said about the other branches of justiciability. For example, in discussing ripeness, scholars have noted that "opinions denying (declaratory) relief often leave it doubtful whether the court thought that a controversy was lacking or simply that declaratory relief was inappropriate." HART & WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 353 (2d ed. 1973).

118. Bankruptcy judges are willing to recognize vested state rights, but are not bound to give all of them the same priority in making equitable distribution of an estate; federal courts are willing to hold that the United States is bound by provisions of

the way the Court has struck the balance of interests in particular cases, one cannot avoid the sense that on occasion it is clearly a necessary concomitant of the power to choose among conflicting rules of decision. Analysis of the federal common law cases is generally conducted entirely apart from discussion of the *Erie* cases, as if these lines had little in common. The thesis of this article is that both bodies of law are cut from common cloth and that understanding one can aid analysis of the other. Before demonstrating these points, the investigation must examine the *Erie* and *Byrd* decisions.

III. THE ERIE-BYRD DOCTRINE

A. The Erie *Holding*

Swift v. Tyson[119] had authorized federal courts to develop their own rules of decision in diversity cases when no state statute dictated the appropriate rule and when the questions were ones of "general" rather than "local" law. *Erie Railroad Co. v. Tompkins,*[120] overruling *Swift,* held, apparently on constitutional, statutory, and policy grounds, that a federal court sitting in diversity may not fashion general federal common law rules of decision but rather has to apply state law. Viewed from the perspective of this writer, it is hard to believe the *Swift* opinion was drafted with the intent to authorize federal judges to independently fashion common law rules in all diversity cases. Justice Story's opinion in *Swift* never suggested that Congress, much less the federal courts, possessed general legislative jurisdiction to determine all rights and obligations arising under state law. Instead, in order to permit the federal judiciary to fashion sound national rules when there was a need for uniformity, as with respect to questions of negotiability of notes which would easily cross state lines, Justice Story adopted what we would now call a fiction: the notion that judge-made law is not law at all, but merely evidence of what the law is. This permitted him to avoid the Rules of Decision Act,[121] which he otherwise conceded required that state "law" be applied as the rule of decision, at least in

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local real estate law in title disputes and yet not willing to find it bound by local rules regarding negotiable paper. The state interest in requiring compliance with the wills statute to pass community property to a surviving spouse is insufficient to outweigh the federal interest in having simple national rules regarding passage of title by co-purchasers of government bonds, because of the presumed tendency of such rules to promote the salability of such bonds and the efficient management of the national debt. The state interest in protecting a surviving spouse's property right under local community property law is, however, sufficient to outweigh the same federal interest. *See* Trautman, *supra* note 62, at 113-14.

119. 41 U.S. (16 Pet.) 1 (1842).

120. 304 U.S. 64 (1938).

121. Currently found at 28 U.S.C. § 1652 (1976), the Rules of Decision Act remains unchanged from the time of the *Swift* decision, except for minor revisions occurring in 1948. The present version of the statute reads as follows: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of deci-

the absence of supervening federal authority.[122] Yet it also led to an anomaly: the judge-made "law" the federal courts adopted under *Swift* was no more controlling over state judges than was the judge-made law of state courts controlling over the federal courts. This anomaly inevitably led to a failure of the national uniformity policy which Justice Story meant *Swift* to encourage.[123]

The *Erie* facts are familiar and can be briefly stated. Tompkins was walking along a railroad's right of way when an object projecting from a passing train struck him. Under state law his status appeared to be that of a trespasser, able to recover only for willful and wanton misconduct. Under federal general law he would be considered a licensee,

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sion in civil actions in the courts of the United States, in cases where they apply." *Id.*

122. Justice Story was trying to avoid the argument that the Rules of Decision Act required application of the New York common law cases holding that an endorsee who had obtained a note in consideration of cancellation of a pre-existing debt could not prevail as a holder in due course in a suit against the maker who was defending on the basis of fraud. "In order to maintain the argument," he said,

> it is essential . . . to hold . . . that the word "laws" . . . includes within the scope of its meaning, the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws . . . . [W]e have not now the slightest difficulty in holding, that this section . . . is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.
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> It becomes necessary for us, therefore, . . . to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule . . . applicable to negotiable instruments . . . . [To] establish the opposite conclusion . . . probably [would undermine] more than one half of all bank transactions in our country, as well as those of other countries . . . . The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-20 (1842). As Professor Hill has remarked, the overruling of *Swift* "reflects essentially a changed jurisprudence rather than a changed view of the Constitution." Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427, 443 (1958).

123. The failure of the policy is well documented. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 n.7 (1938). Of the commentators, only Professor Crosskey has suggested that *Swift*-type federal common law should govern in state as well as federal courts. *See* 2 CROSSKEY, POLITICS AND THE CONSTITUTION chs. 25-26 (1953). Crosskey's views are attacked in Friendly, *supra* note 5, at 394, and Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427, 444-45 (1958).

free to recover upon proof of ordinary negligence. The federal district court applied federal general law and was affirmed by the Second Circuit. The Supreme Court reversed.

Justice Brandeis' majority opinion was a broad based attack on *Swift*. In part the opinion rested on policy considerations and statutory construction conclusions diametrically opposed to Justice Story's in *Swift.* Brandeis argued that *Swift* was bad policy for three reasons. First, the uniformity it had attempted to facilitate had failed to materialize. Second, there was confusion resulting from this as well as from the inherent ambiguity of the national-local distinction developed in *Swift's* progeny.[124] Third, and most important, *Swift* and its progeny engendered a sense of unjust arbitrariness arising from the uneven treatment of similar cases tried in neighboring state and federal courthouses.[125] Justice Brandeis' treatment of the statutory construction issue was terse: recent scholarship proved that the term "laws" within the Rules of Decision Act was meant to refer to judge-made as well as positive law,[126] and hence Justice Story was just plain wrong.

The *Erie* majority stated that it would not have overruled *Swift* on policy or statutory grounds alone. Indeed, the Court said it would not have acted but for the "unconstitutionality of the course pursued" under *Swift.*[127] This aspect of *Erie* has been criticized as dictum[128] which was unnecessary,[129] ill-considered[130] and vague.[131] Such criti-

124. *Erie,* 304 U.S. at 74.
125. *Id.* at 74-77.
126. *Id.* at 72-73. This part of Justice Brandeis' opinion has received heavy criticism from several quarters. *See, e.g.,* 1 & 2 CROSSKEY, POLITICS AND THE CONSTITUTION 626-28, 866-71 (1953); Ely, *The Irrepressible Myth of Erie,* 87 HARV. L. REV. 693, 703 n.59 (1974) [hereinafter cited as Ely]; Friendly, *supra* note 5, at 389-91; Shulman, *The Demise of Swift v. Tyson,* 47 YALE L.J. 1336, 1345 (1938); Note, *Swift v. Tyson Exhumed,* 79 YALE L.J. 284, 285 n.8 (1969).
127. *Erie,* 304 U.S. at 77-78.
128. Justice Stone later wrote Justice Roberts that *Erie's* constitutional discussion was "unfortunate dicta." MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 480-81 (1956). Judge Clark agreed. *See* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 55 YALE L.J. 267, 278 (1946).
129. Justice Reed was content to concur on the basis of the majority's nonconstitutional arguments, and commentators picked up on this to argue that there was simply no need to address the constitutional issue in order to overthrow the regime of *Swift. See, e.g.,* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 136-37 (1942); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases,* 67 YALE L.J. 187, 190 (1967); Shulman, *The Demise of Swift v. Tyson,* 47 YALE L.J. 1336, 1342, 1344 (1938).
130. Justice Butler's dissent in *Erie* noted, *inter alia,* that the issue of whether *Swift* should be overruled as unconstitutional had not been briefed. This complaint was once widely heralded. Judge Friendly, a friend of the decision, concedes reargument might have "shown the weakness of the . . . 'discovery' " of evidence regarding the meaning of the Rules of Decision Act, and seems tacitly to accept the methodological criticism, but blunts it with the remark that "the vital thing . . . is whether the opinion is sound, not whether it manifested an 'excathedra approach.' " Friendly, *supra* note 5, at 399 n.71.
131. Professor Wright notes that *Erie* was an "unusual . . . constitutional decision [in

cisms are unjustified. The first three criticisms can be given short shrift. The constitutional basis of the decision will not evaporate because people do not like it.[132] The judges said that it was necessary, that without it they "should not be prepared to abandon" the *Swift* doctrine,[133] and they must be taken at their word. The claim that *Erie* was ill-considered appears a bit lame when one realizes that at least since the *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*[134] case ten years before the *Erie* decision, *Swift* had been raked over the coals by judges and commentators alike.[135]

The claim of vagueness deserves a bit more attention. It must be granted that the Brandeis opinion fails to cite a single provision of the Constitution in support of its constitutional holding. This is justified, or at least explainable, in light of the extremely basic nature of the constitutional rationale of the decision. *Erie* clearly, and correctly, suggests that in our form of government, the federal courts have no general legislative mandate to make law for the states.[136]

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that it] avoids making specific reference to the constitutional provision involved" and criticizes the opinion as "cryptic." WRIGHT, *supra* note 6, at 261.

132. WRIGHT, *supra* note 6, at 262; Ely, *supra* note 126, at 702-03 n.59; Friendly, *supra* note 5, at 385-86; Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427, 439 (1958).

133. *Erie,* 304 U.S. at 77-78.

134. 276 U.S. 518 (1928).

135. The *Taxicab* case, had, of course, involved a considerable extension of the *Swift* principle in a setting pervaded by unconscionable forum shopping. The *Taxicab* majority opinion drew one of Justice Holmes' most biting dissents. *See id.* at 532 (Holmes, J., dissenting). The dissent focused not only on the extension of *Swift,* but on the doctrine itself. Holmes argued that *Swift* rested on "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct," and that this assumption rested on the patent fallacy that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute . . . ." *Id.* at 533. Justice Holmes' position in the *Taxicab* case was repeatedly cited in Justice Brandeis' majority opinion in *Erie. See Erie*, 304 U.S. at 79-80. Brandeis noted the widespread criticism of *Swift* after the *Taxicab* case was decided. *Id.* at 73 n.6. As Judge Friendly wryly remarked years later, "It seems likely that certiorari had been granted in *Erie* . . . with more in mind than whether the particular question decided by the court of appeals was one of 'general' or 'local' law; and it is certain that Brandeis was not alone in thinking from the outset that the continued existence of *Swift* was at stake." Friendly, *supra* note 5, at 399 n.71. Friendly goes on to review the fact that the constitutional issues were addressed on oral argument, and that the parties could have asked for opportunity to rebrief the issues had they so chosen, and hence could claim no "unfairness." *Id.* Finally, Friendly notes the spirited "intramural" debate among the justices regarding the propriety of *Erie's* constitutional holding. *Id.*

136. As the Court later summed up *Erie's* constitutional holding:

> [N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965). The commentators now seem agreed that the constitutional objection was to general federal lawmaking without

Erie's constitutional basis has to do with two notions which pervade constitutional law — federalism and separation of powers.[137] *Erie* suggests a hybrid of tenth amendment, article I and article III analysis. According to the tenth amendment, those legislative powers not vested in the federal government are reserved to the states.[138] One cannot find general legislative jurisdiction for Congress to enact laws for the states in article I because it simply is not directly or indirectly on the checklist found there.[139] Similarly, one cannot conclude that by vesting the federal courts with article III judicial power the framers intended to grant them general legislative jurisdiction,[140] or even legislative jurisdiction coterminous with that of Congress,[141] because unbridled judicial exercise of such jurisdiction would be fundamentally inconsistent with the perceived view of the nature of judicial power itself.[142]

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regard to some specific grant of power in the Constitution. *See, e.g.,* Ely, *supra* note 126, at 702-04; Friendly, *supra* note 5, at 397; Mishkin, *Some Further Last Words on Erie — The Thread,* 87 HARV. L. REV. 1682, 1684 n.10 (1974) [hereinafter cited *Last Words*].

137. Federalism suggests some sort of division of power between the federal and state governments, while the separation of powers doctrine is tied up with the notion that at any level of government there are fundamental divisions of power along functional lines among the executive, legislative and judicial branches.

138. U.S. CONST. amend. X.

139. Judge Friendly advanced this tenth amendment argument in 1964. Friendly, *supra* note 5, at 394. With Hanna v. Plumer, 380 U.S. 460 (1965), as a guide, Professor Ely elucidated the argument more forcefully ten years later. *See* Ely, *supra* note 126, at 700-04. Ely is responsible for the "checklist" language in the text.

140. Friendly, *supra* note 5, at 395-98; Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 439-45 (1958).

141. *Last Words, supra* note 136; Friendly, *supra* note 5; Note, *The Competence of the Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084, 1085-86 (1964). Professor Mishkin's Harvard article, written in response to Ely's *Irrepressible Myth* article treats the subject most extensively. In his view, not only the tenth amendment, but also

> Principles related to the separation of powers impose [a] . . . limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress) . . . . The point may perhaps be made most easily by example. I take it there is little doubt that Congress could validly enact "no fault" liability for all automobile accidents in the country — and no doubt at all about accidents on public thoroughfares carrying interstate traffic. At the same time I take it as equally clear that the federal courts would currently not seriously entertain the contention that they should adopt a federal "no-fault" liability rule even if the . . . accident clearly involved interstate traffic . . . . I submit that this conclusion is of constitutional dimension, and that any other course would be "unconstitutional" in the sense that term was used in the *Erie* opinion.

Last Words, supra note 136, at 1683-85.

142. This exegesis of *Erie's* admittedly oblique constitutional discussion helps explain why the majority may have rejected Justice Reed's concurring opinion. Justice Reed: (1) stated that he had no doubt of Congress' power to enact legislation based on the Article I checklist; (2) indicated uncertainty as to whether Congress might enact substantive as well as procedural rules to govern all actions within the federal courts' jurisdiction; and (3) suggested that in the absence of the Rules of

While the tenth amendment aspect of the *Erie* holding has been fully and adequately stated elsewhere,[143] the separation of powers aspect of *Erie* has not.[144] The gist of the argument may be illuminated with the following problem. Suppose, as doubtless most members of the 1938 Court would have surmised, Congress had power under the article I commerce clause to enact comprehensive legislation which, *inter alia,* governed the issues in *Erie* or *Swift.* Does it follow that, in the total absence of such legislation, the Court would be free to exercise lawmaking power co-extensive with the unexercised power of Congress?

The answer must be no. There is a long, unbroken tradition of

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Decision Act he would have serious doubts as to the Court's constitutional inability to adopt general common law rules coextensive with Congress' arguable power to enact such substantive legislation. Therefore he preferred to rest the holding solely on the statute and to postpone for future decision the constitutional issue. *Erie,* 304 U.S. at 90, 91 (Reed, J., concurring). The majority opinion must be viewed as an implicit rejection of at least part of Justice Reed's approach. It is hard to believe the majority disagreed with his first proposition — the view that Congress could act regarding matters on the federal checklist. Rather they doubtless took issue with his second and third propositions set out above. Indeed, the opinion rejects the second—that Congress might possess general power to enact any substantive rule it wishes simply on the basis of its power to create the lower federal courts. *Id.* at 78. Moreover, the opinion obliquely challenges the third on the related basis that "no clause in the Constitution purports to confer such power on the federal courts." *Id.*

143. *See supra* note 139.

144. *See supra* note 141. The most expansive treatments are in Note, *The Competence of the Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084, 1085-86 (1964) and *Last Words, supra* note 136, at 1683-85. The notewriter argues that the Supreme Court's lawmaking powers are limited in part by the separation of powers doctrine, but then goes on to build upon HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953) to find deeper roots in federalism. Mishkin's piece also mixes separation of powers with federalism arguments. He justifies his decision that the federal courts could not alone fashion a federal common law rule of no-fault, despite his certainty that Congress could do so under the commerce power, as follows:

> In my judgment, the clarity and strength with which the inappropriateness of federal judicial lawmaking . . . is perceived . . . is itself significant evidence of the constitutional nature of the limitation. On a more theoretical level, I base my position in part on a consideration of how differently the allocation of power between the states and the federal government would appear if a contrary conception were adopted, and how remote that allocation and that conception would be from any accepted view from the time of the Framers to the present. Even more importantly, I base it on the structure established by the Constitution whereby the states . . . are represented in Congress but not in the federal courts.

Last Words, supra note 136, at 1685. I share Professor Mishkin's intuitive certainty. I have reservations about the federalism arguments, particularly the "structural" one. Both the notewriter and Mishkin find support for it in Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954). In my judgment, the argument unduly complicates what is in fact a really simple issue of defining the distinction between adjudicative and legislative jurisdiction.

judicial deference to legislative supremacy over the lawmaking function. When lawyers speak of the reasons why judges should not make law they usually refer to tradition and prudential arguments about the relative limitations of judicial method, the dependence of courts upon litigation and inability to control their agendas, and the undemocratic nature of judicial institutions. Nevertheless, such arguments easily shade off into charges of judicial usurpation of legislative prerogative.

While stated largely in terms of prudential concerns, these arguments emanate from the very structure of governmental institutions and fundamental conceptions of the nature of judicial power. The Constitution speaks of three kinds of power — legislative,[145] executive,[146] and judicial,[147] and vests them respectively in the Congress, the Presidency, and the Supreme Court and inferior courts to be established by Congress. Those who debated the Constitution's adoption were vitally concerned that the separation of these powers should regularize restraints on federal power in order to preserve liberty.[148] More-

145. U.S. CONST. art. I.
146. U.S. CONST. art. II.
147. U.S. CONST. art. III.
148. Virtually all of the Framers were influenced by Montesquieu, who was perceived as the fountainhead of the checks and balances theory which underlies the Constitution. For example, both Madison and Hamilton spoke reverently of him as "the celebrated Montesquieu" in their arguments for the Constitution. THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961); THE FEDERALIST No. 78, at 301, 466 (A. Hamilton) (C. Rossiter ed. 1961). Montesquieu's THE SPIRIT OF THE LAWS, was first published in 1748 in Geneva but was widely disseminated in America by the time of the framing of the Constitution. The work, particularly Book XI, was quite influential in America. Most of his discussion relates to separating the legislative from the executive power. His reason was tersely stated: of the three powers, "the judiciary is in some measure next to nothing . . . ." Nevertheless, to protect the judiciary and to prevent tryanny, he wished to separate it from the other two. *See* XI MONTESQUIEU, THE SPIRIT OF THE LAWS (T. Nugent trans. 1952). This view of the relative weakness and unimportance of the judiciary and the judicial power runs through THE FEDERALIST as well. Madison was sure the judicial branch was weak. *See* THE FEDERALIST No. 48, at 210 (J. Madison) (C. Rossiter ed. 1961). In the very paper in which Hamilton heralded the doctrine of judicial review later adopted in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), he displayed the same view, even going so far as to quote Montesquieu's statement about the judiciary being "next to nothing." *See* THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton attributed the sovereign function of will to the legislature, and clearly indicated judicial efforts to assume this function would be viewed as an illegitimate usurpation of power. *Id.* at 468-69.

Conceding that courts might misconstrue or even contravene legislative will occasionally, Hamilton nevertheless felt this would "never . . . in any sensible degree . . . affect the order of the political system." *Id.* No. 81, at 485. Madison believed that legislative power was clearly distinct from judicial power and that judges should not exercise legislative power lest "the subject . . . be exposed to arbitrary control." *Id.* No. 47, at 303. Nothing in Hamilton's article for the power of judicial review of congressional acts impeaches the idea that he shared these views. The premise for judicial review was simply the existence of a higher law — the Constitution — which, in cases of "irreconcilable variance [with Congressional acts] . . . ought, of course, to be preferred . . . . Nor does this conclusion

over, they thought of the legislative power as functionally distinct from judicial power, and as a corollary clearly accepted the inferiority of the judicial branch in the lawmaking sphere.[149]

To say that federal judicial lawmaking power is more limited than that of Congress is not to say it does not exist at all. The case law previously discussed suggests federal common law is appropriate when judges are pursuing some federal interest or purpose at least implicitly evidenced by the Constitution or an act of Congress, or when there is a perceived need for national uniformity on an issue created by federal law and no reason at all for applying state law.[150] But the uniformity interest alone is not a mandate for broad judicial legislating.[151] When state interests are perceived to arise the inclination to adopt a uniform federal rule must be tempered by due regard for state interests. Regarding the precise issue in *Erie*, there simply was no federal interest or purpose emanating from any federal positive law to place on the scales in juxtaposition to the interests which would have been served by following state law.[152]

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by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . . ." *Id.* No. 78, at 467-68.

149. One must concede that the Supreme Court has never squarely held that judicial reticence to make law has constitutional underpinnings resting ultimately on the article III, section 1 "judicial power" language. The Court's only direct references to the article III phrase has arisen in contexts where the judges were using the words interchangeably with "case-or-controversy" limitations of a different but related subsection of the article. *See, e.g.,* Muskrat v. United States, 219 U.S. 346 (1911). The Court's failure to crystalize the "judicial power" concept as an independent limit on judicial lawmaking power, together with the fact that limitations on the propriety of judicial lawmaking are generally stated in terms of tradition and prudential considerations, tends to obscure the idea that the question of judicial power to make law is likely subject to constitutional limitations. Certainly the historical argument suggests that what is or is not within "judicial power" has a constitutional dimension. Constitutional theory is consistent with this view. Frequently, as in the justiciability area itself, the courts make policy judgments with the full awareness that outer limits are imposed on their discretion by background constitutional language and concerns. The cases dealing with judicial power limitations are not in conflict with this position. The fact that they have not defined the Constitution's outer limits on judicial power, and have so far seen fit only to articulate nonconstitutional arguments, is perfectly consistent with the notion that constitutional limitations do lurk in the background. It may be that it has simply been unnecessary to marshall them but that they remain available for those rare instances when they are needed. Since the Court has never defined these limits, it is speculative to attempt here to do so except to venture that, as in the justiciability area, the constitutional arguments would likely have much in common with the prudential ones.

150. For example, *Lincoln Mills* and the bankruptcy cases can be seen as examples of federal common lawmaking to fulfill the purposes of larger statutory schemes, while *Clearfield Trust,* the admiralty cases, and *Sabbatino* can be viewed as protecting federal interests in areas where there is a need for national uniformity.

151. *See, e.g.,* Northwest Airlines, Inc. v. Transportation Workers Union of America, 451 U.S. 77 (1981); United States v. Standard Oil Co., 332 U.S. 301 (1947).

152. What is true in *Erie* is frequently true in run-of-the-mill diversity cases. In such settings substantive federal common law should be unconstitutional. This view is

The constitutional basis of *Erie* is important because it sets the outermost limits of federal lawmaking power in areas where state interests may be implicated. It has been pointed out that most post-*Erie* decisions have not mentioned the constitutional argument, but instead have relied upon nonconstitutional arguments for justification.[153] Recent commentary explains this tendency, not as an implicit rejection of the constitutional basis of *Erie,* but instead as a function of the kind of issues these later cases presented.[154] Virtually without exception, post-*Erie* Supreme Court cases have presented issues where the differing federal and state rules have at least arguably dual aspects involving

entirely consistent with the widely shared notions that the Constitution prohibits a disinterested state from applying its own rule, however superior, under circumstances where to do so would interfere with the interests of other concerned states (thus violating the full faith and credit clause) or the legitimate expectations of the parties (thus infringing on fourteenth amendment due process rights). Cases and commentators differ in defining disinterested fora, with some speaking in terms of a significant contact analysis, others in terms of governmental interests, and still others in terms of both. *See* Allstate Ins. Co. v. Hague, 450 U.S. 971 (1981); Richards v. United States, 369 U.S. 1, 15 (1962) (dictum); John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

The contacts analysis is of little help in discussing vertical conflicts problems such as those raised by federal common law or the *Erie* doctrine. *But see* Lauritzen v. Larsen, 345 U.S. 571, 590-91 (1953) (dictum). The governmental interest approach is more helpful. The commentator most closely associated with interest analysis is the late Brainerd Currie. He was certain that under full faith and credit analysis, if only one state had a legitimate claim to have its law apply, all states would have to defer to that state's law. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 212-13 (1963). Likewise he was certain that due process forbids the operation of the law of a state with no legitimate interest in an issue. *See id.* at 193, 196, 232-33, 271. Professor Leflar is in substantial agreement. *See* LEFLAR, AMERICAN CONFLICTS LAW 122, 125, 127 (1968).

Currie and others have argued that the constitutional aspect of the *Erie* doctrine is but an application of the principle that a disinterested forum cannot frustrate the policies of an interested state. *See* CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 443 (1963); Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427, 440-41 (1958); Weintraub, *The Erie Doctrine and State Conflict of Law Rules*, 39 IND. L.J. 228, 240 (1964). Moreover, devotees of interest analysis rationalize the limited federal common law cases by explaining that they, unlike *Erie,* involve situations where there are federal interests at stake which must either govern or at least be weighed in the balance against whatever state interests are at stake. *See, e.g.,* LEFLAR, AMERICAN CONFLICTS LAW 130-39 (1968).

153. From the time *Erie* was decided in 1938 until 1956, no mention was made of *Erie's* constitutional basis at the Supreme Court level. The first reference came in Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (dictum), suggesting that the issue whether Congress might subject a legal claim to arbitration in the federal courts might raise serious constitutional questions. The only Supreme Court majority which has discussed the constitutional holding of *Erie* directly in reference to its holding was that in Hanna v. Plumer, 380 U.S. 460 (1965).

154. Ely, *supra* note 126; Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma,* 91 HARV. L. REV. 356 (1977) [hereinafter cited as Redish & Phillips]; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine,* 85 YALE L.J. 678 (1976).

both procedural and substantive concerns.[155] In such settings, it is clear that Congress has legislative jurisdiction, arising from its power to organize the federal courts, to make rules for the court's administration[156] and to the extent that these powers are partially but not fully exercised, the federal courts have at least limited responsibility to make procedural decisions consistent with the mandates of federal positive law.[157] The courts can therefore deal with most problems on the basis of statutory construction and policy considerations without reaching the outermost limits of their constitutional power. Indeed, one can argue that they have done so.

B. Professor Ely's Analysis of Erie

Professor Ely suggests that once one accepts *Erie's* holding that diversity jurisdiction does not authorize federal courts to make purely

155. The early cases applying *Erie* suggested that the dual concepts of procedure and substance defined issue zones in which federal and state law would respectively reign supreme. *See, e.g.,* Palmer v. Hoffman, 318 U.S. 109 (1943); Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939). Some commentators are also of the view that the distinction constitutes the touchstone upon which the *Erie* rule operates. *See, e.g.,* Bonner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEX. L. REV. 509 (1962); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031 (1962). From the first, however, the distinction was criticized as unprincipled. *See, e.g.,* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 163-65 (1942); Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939). After cases which decided the issue by judicial fiat, *see* Sibbach v. Wilson, 312 U.S. 1 (1941), or were concluded successfully only by ignoring the rule, *see* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the Supreme Court eventually abandoned the distinction. *See, e.g.,* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes"); Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Neither 'substance' nor 'procedure' represents the same variants. Each implies different variables depending upon the particular problem for which it is used"). A recent article suggests that the impossibility of reconciling these dual concepts finally forced the Supreme Court, in the *Hanna* case, to adopt a third category, the "arguably procedural, therefore federal" test for applying provisions of federal positive law. Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics,* 28 BUFFALO L. REV. 383, 427-35 (1979).

156. Hanna v. Plumer, 380 U.S. 460 (1965), is directly on point. The Court said:

> [T]he constitutional provision for a federal court system (augmented by the necessary and proper clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. at 472.

157. This would seem to follow both from Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525 (1958) and from Professor Mishkin's view that the federal common law cases affirm the necessary "recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision,* 105 U. PA. L. REV. 797, 800 (1957).

substantive decisions involving state-created rights simply because they have a right to decide the cases, virtually all the problems of an *Erie*-type case can be resolved as a matter of statutory construction. Ely relies heavily upon *Hanna v. Plumer*[158] for his analysis. First, Ely points out that there are those cases where a provision of federal positive law is directly on point. Assuming the agency which adopted the provision had authority to do so, the federal rule would govern, despite any state law to the contrary, because of the operation of the supremacy clause.[159] Second, Ely states that there are cases when no provision of federal positive law can be fairly construed as governing the issue. In such a setting, the issues must be determined as a matter of construction of the Rules of Decision Act.[160]

The first part of the Ely analysis gives little cause for concern, until one realizes that tremendous problems of statutory construction accompany the determination of whether the federal rule is on point, and what it means if it is.[161] Even if one gets around the problem of

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158. 380 U.S. 460 (1965). *Hanna* involved a personal injury action against the executor of an estate filed in Massachusetts federal court. Service was effected on the executor's wife in compliance with FED. R. CIV. PRO. 4(d)(1), but the executor challenged its sufficiency in light of a state rule requiring in-hand delivery. The Supreme Court upheld the service under the federal rule. Chief Justice Warren's opinion began with a generalized discussion of the *Erie* doctrine that ended with the suggestion that federal law should be applied unless to do so would undermine "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. The opinion then cut short discussion of *Erie*, noting "the incorrect assumption that the rule of *Erie* . . . constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure." *Id*. at 469-70. Warren went on to hold that the rule was directly on point, that it was a valid exercise of the court's rulemaking authority under the Rules Enabling Act, 28 U.S.C. § 2072 (1976), and that it governed the case. 380 U.S. at 473-74.

159. 380 U.S. at 706-07 n.77. Ely's view is consistent with current notions that constitutional or congressional provisions designed to determine matters of federal judicial procedure are operative no matter what state law is. *See* Simler v. Conner, 372 U.S. 221 (1963) (seventh amendment jury trial right); Parsons v. Chesapeake & Ohio R.R. Co, 375 U.S. 71 (1963) (federal change of venue statute). In instances such as these, Ely has no problem with the operation of federal positive law under the Rules of Decision Act because that statute excepts from its coverage provisions and requirements of the Constitution and acts of Congress.

Ely did have trouble with the assumption that a rule of court adopted under the auspices of the Rules Enabling Act, 28 U.S.C. § 2072 (1976), should be treated like any act of Congress including those adopted under the Rules of Decision Act. *See* Ely, *supra* note 126, at 718-38.

160. Ely, *supra* note 126, at 707-18. *See supra* note 121 for the text of the Rules of Decision Act.

161. The federal rule in Hanna v. Plumer, 380 U.S. 460 (1965), permitting substituted service on an individual defendant under enumerated circumstances, certainly appeared on its face to cover the case then before the Court. But so also did the federal rules in the door closing statute cases. *See* Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949); Woods Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); *see also* Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (en banc); Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); *see also* Walker v. Armco Steel Corp., 446 U.S. 740

whether the federal rule is on point, one still must determine whether to construe its terms according to a nationally uniform standard or incorporate by reference standards of local law applicable to closely related questions. The Supreme Court has provided little guidance on whether, and under what circumstances, lower courts should employ selective incorporation of state law or balance federal and state interests in applying federal rules.[162] The lower federal courts have at least

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(1980). In each of these cases the federal rules were somehow held inapposite because direct application of them would interfere with some perceived significant state interest or encourage forum shopping.

State courts, notably those of California, have sometimes refused to construe what appear to be on-point domestic substantive statutes in such a way as to displace the law of another state where to do so would frustrate the other state's strongly held policies and upset the expectations of people acting on them. *See, e.g.,* Cable v. Sahara Tahoe Corp., 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979); Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961); People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). In addition, a few state courts have refused to apply local rules, despite their "procedural" characterization, where to do so would serve no important domestic interest and would undercut the policies of the only states having substantive interests at stake. *See, e.g.,* Farrier v. May Department Stores Co., 357 F. Supp. 190 (D.D.C. 1973) (refusing to apply longer local statute of limitations when concerned states had shorter ones); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973) (same).

The commentators have generally approved of the balancing approach to cases like these. Some argue for "moderate and restrained interpretation" of local laws as a means of avoiding real conflicts with foreign policies and interests. *E.g.,* Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROBS. 754, 757 (1963). Some have developed a "comparative impairment" conflict principle "subordinat[ing], in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination." Baxter, *Choice of Law in California — a Restatement,* 21 U.C.L.A. L. REV. 719, 753 (1974). However, it is highly doubtful that there is any real difference between the two approaches. *See* Cavers, *The Changing Choice-of-Law Process and the Federal Courts,* 28 LAW & CONTEMP. PROBS. 732, 743 n.9 (1963).

162. *See, e.g.,* De Sylvia v. Ballentine, 351 U.S. 570, 580-82 (1956); United States v. Standard Oil Co., 332 U.S. 301, 308-09 (1947) (dictum). The cases in the *Erie* line can be read as either suggesting selective incorporation where the interests of uniformity are outweighed by local policies, or as simply authorizing a federal court in constructing a federal rule to take into account local interests as they appear in the particular case. Hanna v. Plumer, 380 U.S. 460 (1965), which developed the "federal rule on point" test, *id.* at 471, ended rather obliquely with a note that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the rules make the character and result of the federal litigation stray from the course it would follow in state courts . . . ." *Id.* at 473. Shortly before *Hanna*, a 5-4 majority of the Court hinted how the choice of law problem should be handled in National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). The majority upheld service of process on out-of-state defendants through service on an in-state "agent for service of process" identified as such in the plaintiff-drawn contract but otherwise totally unknown to the defendant and in fact on plaintiff's payroll. The legal question was whether the in-state recipient of service was a duly appointed agent of the defendants. Justice Black, in dissent, believed that under state law she was not and argued that state law should be applied. *Id.* at 320. The majority disagreed with both propositions:

We deal here with a federal Rule, applicable to federal courts in all 50

suggested the appropriateness of weighing federal statutory policies, including whether there is a need for uniform enforcement of them, against the degree to which their enforcement would short-circuit state policies or undermine significant state interests.[163] Professor Ely's "analytic framework"[164] is offered as a solution to confusion he claims was engendered by mixture of "all questions respecting choices between federal and state law . . . under the single rubric of 'the *Erie* doctrine.'" It is this admixture which has served to make "a major mystery out of what are really . . . distinct and rather ordinary problems of

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> states. But even if we were to assume that this uniform federal standard should give way to contrary local policies, there is no relevant concept of state law which would invalidate the agency here at issue.

Id. at 316. After *Hanna,* in deciding how to apply federal rule 19(b)'s "equity and good conscience" test for determining whether to dismiss or proceed without a necessary party, the Court was a bit more helpful. The Court indicated that the joinder question was one of federal law, but that in applying the test, the courts should apply state law to determine what interest an outsider has. Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 n.22 (1968). "The decision whether to dismiss . . . must be based on factors varying with the different cases, some factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id.* at 118-19.

163. In a few areas the lower federal courts incorporate by reference state law to define a term in a federal rule. For example, with regard to the federal rule that "local" actions must be tried in the district which is the locus of the property the weight of authority holds that the state in which the action is brought has substantive reasons for distinguishing "local" from "transitory" actions and that federal courts must employ that state's standard in defining what is a federal "local" action. *See* Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat'l Bank, 416 F.2d 301 (5th Cir. 1969); Still v. Rossville Crushed Stone Co., 370 F.2d 324 (6th Cir. 1966), *cert. denied,* 387 U.S. 918 (1967); Josevig-Kennecott Copper Co. v. James F. Howarth Co., 261 F. 567 (9th Cir. 1919); Minichiello Realty Assoc., Inc. v. Britt, 460 F. Supp. 896 (D.N.J. 1978), *aff'd per curiam,* 605 F.2d 1196 (3d Cir. 1979); Central Transport, Inc. v. Theurer, Inc. 430 F. Supp. 1076 (E.D. Mich. 1977). The majority rule has been heavily criticized as inconsistent with *Hanna* and the notion that federal venue law warrants uniform treatment, *see* 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3822 (1976), but nevertheless seems so well entrenched it is unlikely to disappear. *See* Hasburgh v. Executive Aircraft Co., 35 F.R.D. 354, 355 (D. Mo. 1964).

More generally, without attempting to incorporate by reference state law to construe a word appearing directly in a federal statute or rule, the federal courts have acted consistently with the Court's recommendation in Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), suggesting that the federal rule governs procedural issues without regard to state procedural law, but nevertheless should be applied in individual cases in such a way as to weigh the substantive rights of the parties under state law. For example, in determining whether to permit an action to go forward without a "necessary party" the substantive policies of the state are now considered as "part of a balancing process." 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1603 (1972); *see, e.g.,* Schutten v. Shell Oil Co., 421 F.2d 869, 873 (5th Cir. 1970); Bennie v. Pastor, 393 F.2d 1, 4 (10th Cir. 1968); Stevens v. Loomis, 223 F. Supp. 534, 536 (D. Mass 1963), *aff'd,* 334 F.2d 775 (1st Cir. 1964).

164. *See* Chayes, *The Bead Game,* 87 HARV. L. REV. 741 (1974); Ely, *The Necklace,* 87 HARV. L. REV. 753 (1974). Professor Chayes' article was a comment on Ely's *Irrepressible Myth* piece, and *The Necklace* was Professor Ely's response.

interpretation"[165] involving the tenth amendment, the Enabling Act, and the Rules of Decision Act. Of course, Ely adds, "there will be occasions with respect to all three on which reasonable people will differ . . . ."[166] A problem with this comforting assurance is that it glides over the fact that, in construing clearly valid provisions of federal law, there is legitimate confusion about the manner and extent to which conflicting federal and state policies and interests should be considered.[167]

But let us push aside this omission and consider that part of the Ely framework involving questions not directly governed by federal positive law. Professor Ely believes resolution of such questions inevitably turns on the language and putative policies underlying the Rules

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165. Ely, *supra* note 126, at 698.

166. *Id.*

167. For example, in Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), the Court adopted a balancing test to handle problems influenced, but not directly controlled, by seventh amendment values and the federal interest in respecting state law and avoiding forum shopping. Professor Ely said that the question presented in *Byrd* — "whether to apply federal law, which required that a jury decide the issue in dispute, or state law, which had a judge decide it — could have been decided, at least if the subsequent decision in Simler v. Conner, 372 U.S. 221, 222 (1963) [seventh amendment fully applicable in diversity actions] is to be believed, on seventh amendment grounds pure and simple." Ely, *supra* note 126, at 709. This oversimplifies how *Byrd* might have been decided. *Simler* involved the question whether federal or state law should govern in deciding if a claim was to be deemed equitable or legal so as to know whether the seventh amendment right to jury trial applied. In a brief *per curiam* opinion, the Court held the question was to be determined under federal law, and that uniformity concerns justified application of a single federal standard for distinguishing actions at law from bills in equity. The opinion cited *Byrd* and other cases as indicating the strength and vitality of federal jury trial values. But one can "believe" everything contained in *Simler* without accepting the notion that it makes the *Byrd* decision a constitutional one. Whatever else it did say, *Simler* did not raise to a constitutional level all discourse in the federal courts regarding every single way in which the power to decide cases is divided between judge and jury. In federal question cases, many issues have been decided without the judge's believing their decisions were directly controlled by the seventh amendment. There is no reason one should assume similar questions arising in diversity cases should uniformly be transformed into constitutional issues. Since the Constitution always lurks in the background, of course *Byrd could* have been decided on constitutional grounds. But in light of the fact that the constitution generally does so lurk, the question is whether, given *Simler,* the *Byrd* Court *would* have so decided the case. The *Byrd* court itself dodged the constitutional issue, saying it was acting "under the influence — if not the command" — of the seventh amendment. *Byrd,* 356 U.S. at 537. *Simler* adds nothing to this; nor does it subtract from the possibility of deciding the issue on federal nonconstitutional grounds, which *Byrd* says a court may do.

Ely's failure to discuss the "influence if not the command" language of *Byrd* is consistent with his desire to create an analytic framework where the only problems are ones of simple statutory construction. But, as Professor Ely himself conceded, "[a]nalytic frameworks do not by themselves generate unequivocal answers to hard questions." Ely, *The Necklace,* 87 HARV. L. REV. 753 (1974). More seriously, such frameworks can obfuscate their solution by giving them a surface simplicity they do not warrant.

of Decision Act. This appears to oversimplify a very complex set of issues. Professor Ely simply ignores the last phrase of the statute which makes the entire sentence a meaningless circularity or at the very least renders anything one might say regarding it somewhat problematical.[168] Many of the post-*Erie* cases speak not of the statute, but instead of the "policies of our federalism"[169] in such a way as to homogenize the *Erie* opinion's separate treatment of the statutory and policy reasons for the holding of the case. Moreover, as has been pointed out elsewhere, the *Erie* rule, and for that matter the *Swift* rule before it, has been applied to cases in which the statute clearly did not apply, in the same way it was applied in cases it did purport to govern, leading one to the conclusion that the statute adds nothing and is but a congressional declaration of what the courts would do without it.[170]

But the Ely thesis is flawed in more serious ways as well. Whether the nonconstitutional aspect of the *Erie* doctrine is viewed as a question of statutory construction or policy, the real question is what policies will be deemed relevant. Professor Ely, relying heavily upon "considered dictum"[171] in *Hanna* regarding "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of laws,"[172] suggests that federal courts must apply state rather than federal law whenever application of a differing rule would tend substantially to encourage either of these evils.[173] Aside from difficulties in determining what "substantially" means,[174] this view trivial-

168. Note, *supra* note 5, at 1515 suggests that the statutory command of the Rules of Decision Act, 18 U.S.C. § 1652 (1976), to make "the laws of the several states . . . rules of decisions . . . in cases where they apply," is completely circular because of the last phrase. Perhaps because this would make the statute meaningless, others have read it as permitting a federal decisional rule only "where the Constitution, Treaties, or statutes of the United States . . . require or provide. . . ." *See* Note, *The Competence of the Federal Courts to Formulate Rules of Decision,* 77 HARV. L. REV. 1084, 1089 (1964).

169. For example, the Court in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), spoke glowingly of "the policy of federal jurisdiction which *Erie* . . . embodies . . . ," *id.* at 101, saying that the case "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts," *id.* at 109, and called this "a policy . . . important to our federalism. . . ." *Id.* at 110. Justice Harlan later spoke of *Erie* "as one of the modern cornerstones of our federalism . . . ." Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

170. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945); Mason v. United States, 260 U.S. 545, 558-59 (1923). In both *Guaranty Trust* and *Mason* the Court was dealing with equitable actions, as to which the pre-1948 version of the Rules of Decision Act did not purport to apply. The Court in both cases said the statute was merely "declaratory" of what the Court's approach would be without it.

171. Ely, *supra* note 126, at 710.

172. *See Hanna,* 380 U.S. at 468.

173. Ely, *supra* note 126, at 710-18.

174. The *Hanna* Court used the word "substantial." 380 U.S. at 469. Professor Ely spoke of "materially" different degrees of effort to win lawsuits and "how likely" differing rules would change expectations of outcome, in juxtaposition to "fungible" rules with "trivial" differences. Ely, *supra* note 126, at 713-14. The nub of his idea is clear. But there are still difficulties in deciding when rule differences are

izes what others have perceived to be much more important statutory and policy considerations: the appropriate accommodation of federal and state interests in adjudications of state rights and obligations before a federal court.[175]

The major precedential basis for suggesting that concerns other than forum shopping and perceived inequity should be considered when federal positive law does not dispose of the case comes from the Court's decision in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[176] The case involved a common law action for on the job injuries filed by a contractor's employee against the contractor's client, the power company. The company defended on the basis that the victim was its employee, within the meaning of the state's workmen's compensation statute, and should be limited to his statutory remedy. Under state law, the issue of whether the victim was a statutory employee would be decided by the trial judge. The plaintiff argued that federal practice rules made this issue a question for a federal jury.

The Supreme Court ruled for the plaintiff, holding that state law should be displaced on the basis of balancing state and federal interests in the case.[177] Although the opinion is somewhat confusing, it may be

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really "material" or "trivial," and it is not clear that these difficulties are merely occasional, as Professor Ely suggests. *See id.* at 698. One wonders whether Professor Ely really believes that Ragan v. Merchants Transfer & Warehouse Co, 337 U.S. 530 (1949) is one of those cases involving a problem which in "many cases" would create "substantially more difficult" problems of compliance rather than simply one which "ordinarily [would] affect only a lawyer's ordering of his business." Indeed, he describes this as the test but is silent as to where he comes out on *Ragan*'s facts. *See* Ely, *supra* note 126, at 716 n.126.

175. *See* Redish & Phillips, *supra* note 154, at 359-61. Professor Ely entirely ignores federal procedural interests. For example, when confronted with monetary and uniformity arguments for applying a federal rule in the context of Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) by Professor Chayes in Chayes, *The Bead Game,* 87 HARV. L. REV. 741, 750 (1974), his reply, briefly stated, is that a "federal court is unable to replicate state practice only to the extent it refuses to try . . . ." Ely, *The Necklace,* 87 HARV. L. REV. 753, 757 (1974).

Ely does recognize that a basic purpose of the Rules of Decision Act must have been to assure respect for state substantive policies, but indicates this policy will come into play only on rare occasions and relegates virtually all references to it to footnotes. *See* Ely, *supra* note 126, at 708 n.86, 714 n.124, 716 n.126.

What Professor Ely does take seriously are the "twin aims of the *Erie* rule." Of these, the anti-forum shopping language of *Hanna* is quite important in developing a "handy and useful touchstone" for solving *Erie*-type problems. *Id.* at 710, 717. According to Ely, the more serious of the evils is "simple unfairness . . . 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 co-citizen." *Id.* at 712.

176. 356 U.S. 525 (1958).

177. *Id.* at 537-38. Viewed in historical context, it is hard to believe that the Court in *Byrd* was not developing its balancing test as a means of shoring up faith in federal statutes and rules. WRIGHT, *supra* note 6, at 274-75; Ely, *supra* note 126, at 709. This conclusion is reinforced by recognizing that, since the *Byrd* Court apparently believed the rule differences before it were *not* outcome determinative,

read as requiring a weighing of the extent to which the federal rule would impinge upon state substantive interests and encourage forum shopping against the extent to which applying state law would impinge upon federal interests.[178] The Court noted that the "affirmative countervailing [federal] considerations at work" included the "federal policy favoring jury decisions of disputed fact," developed "under the influence — if not the command — of the Seventh Amendment," as "an essential characteristic" of "the federal system [as] . . . an independent system for administering justice to litigants who properly invoke its jurisdiction."[179] These interests outweighed upholding state substantive policies; indeed, the Court found that none were implicated by the state practice in question.[180] Similarly, the policy of discouraging forum shopping was not involved because the Court found there was no strong possibility the differing rules would affect the results of the litigation.[181]

Professor Ely believes the short shrift given *Byrd* in the dictum of the later *Hanna v. Plumer*[182] opinion suggests *Byrd* was *sub silentio* overruled or at least confined to its facts.[183] Thus Ely has derisively

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356 U.S. at 535, broadening the basis of decision to include balancing of state and federal interests must have been by conscious design. There is no question that the rigid application of the "outcome-determinative" test of Guaranty Trust Co. v. York, 326 U.S. 99 (1945) in the 1949 trilogy of "door closing statute" cases, Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949) (use of state statute of limitations upheld to give defendants same protection in federal court as they would have in state court); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (corporation could not sue in Mississippi federal court without first qualifying to do business under Mississippi law); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) (federal rule did not preempt state rule requiring plaintiff to post bond before bringing shareholder derivative action), caused a lot of commentary regarding whether the federal rules could withstand attack in diversity cases. Gavit, *States' Rights and Federal Procedure,* 25 IND. L. REV. 1, 26 (1949); Merrigan, *Erie to York to Ragan — A Triple Play on the Federal Rules,* 3 VAND. L. REV. 711, 717 (1950); *see* Clark, Book Review, 36 CORNELL L.Q. 181, 183 (1950). Although others were less sanguine about the ability of the federal rules to survive, *see, e.g.,* Symposium, *Federal Trials and the Erie Decision,* 51 NW. U.L. REV. 338 (1956), the fears continued and in fact may have been exacerbated by the unfortunate dictum in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) which suggested that even federal statutes might be subject to attack under the *York* standard. *Id.* at 207-08.

178. *See* WRIGHT, *supra* note 6, at 275; Ely, *supra* note 126, at 709. Professors Redish and Phillips have discussed at greater length the difficulty of understanding what *Byrd* said. *See* Redish & Phillips, *supra* note 154, at 364-66.

179. *Byrd,* 356 U.S. at 537.

180. *Id.* at 536.

181. *Id.* at 540.

182. 380 U.S. 460 (1965).

183. Ely, *supra* note 126, at 717 n.120. *See also* Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine,* 65 MICH. L. REV. 613, 714-17 (1967). The *Hanna* opinion certainly seemed to all but ignore *Byrd,* mentioning it only once in passing and indirectly attacking its approach by debunking the balancing attempt of the lower court.

> The Court of Appeals seemed to frame the inquiry in terms of how "important" [the state statute] is to the State . . . . [I]t is not clear to what

criticized the Fourth Circuit for continuing *Byrd* balancing, saying it "seems not to have gotten the message."[184] Subsequent cases at the Supreme Court level and in virtually all the circuits continue to treat *Byrd* balancing as alive and well,[185] suggesting that perhaps Ely rather than the Fourth Circuit has failed to appreciate fully the issues in question.

C. Byrd's *Contribution to the* Erie *Rule*

To argue that a significant part of *Byrd's* analysis has survived *Hanna* does not solve very much, however, unless one understands *Byrd.* The decision itself is open to several ambiguities. First is the question whether, on the state side, one is to treat the extent to which the federal rule impinges upon state law as a separate step, preliminary to balancing and conclusive if answered in the affirmative, or instead to weigh this factor along with the anti-forum shopping and fairness policies against the federal interests *Byrd* presents. As written and applied by a number of lower courts, the *Byrd* opinion seems open to the first, or two-step, approach.[186]

Despite these rulings, the better view would be to reject the two-step approach and instead factor the substantive weight of the state's policy into the balancing process.[187] Federal case law since the Great Depression is inconsistent with a notion that federal legislative jurisdic-

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> sort of question the Court of Appeals was addressing itself. One cannot meaningfully ask how important something is without first asking "important for what purposes?" *Erie* and its progeny make clear that . . . the importance of a state rule is indeed relevant, but only in the context of . . . whether . . . failure to enforce it would unfairly discriminate . . . or whether . . . failure to enforce it would be likely to cause a plaintiff to choose the federal court.

Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965).

184. Ely, *supra* note 126, at 717 n.130.
185. *See* discussion of Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), *infra* notes 240-55 and accompanying text; *see also* Redish & Phillips, *supra* note 154, at 369 n.74, 369-72. The writers acknowledge not having found a *Byrd* balancing case in the Ninth Circuit.
186. Redish and Phillips correctly point out that a literal reading of *Byrd* requires this approach. *See* Redish & Phillips, *supra* note 154, at 364. *Byrd* characterized the initial issue as whether the state rule "is bound up with [substantive] rights and obligations in such a way that its application in the federal court is required," 356 U.S. at 535, and indicated that balancing is appropriate when "rules . . . of form and mode . . . not bound up with rights and obligations" are at issue. *Id.* at 537-38. Among opinions which appear to adopt this approach are Miller v. Davis, 507 F.2d 308, 314 (6th Cir. 1974); Poitr v. Demarrias, 502 F.2d 23, 26 (8th Cir. 1974), *cert. denied,* 421 U.S. 934 (1975); Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63-64 (4th Cir. 1965); Masino v. Outboard Marine Corp., 88 F.R.D. 251, 256 (E.D. Pa. 1980).
187. *See* Redish & Phillips, *supra* note 154, at 365. Cases weighing all the factors simultaneously include Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759, 765-66 (5th Cir. 1963); Monarch Ins. Co. v. Spach, 281 F.2d 401, 406 (5th Cir. 1960); Seaboard Finance Co. v. Davis, 276 F. Supp. 507, 515 (N.D. Ill. 1967); Wheeler v. Shoemaker, 78 F.R.D. 218, 224-25 (D.R.I. 1978).

tion is precluded by the tenth amendment within discrete zones of state decision-making, but instead suggests that federal legislative jurisdiction extends to any item on the checklist of powers found in article I, § 8 of the Constitution.[188] If *Hanna* decided anything, it decided that the constitutional power of Congress and the judiciary to fashion rules of procedure are on the constitutional checklist, and when this power is exercised the rule prevails, despite any contrary state law. The two-step approach of *Byrd* is inconsistent with this view. For example, if the state rule were found to be bound up with state rights and obligations it would prevail, even if the Court concluded that the seventh amendment or federal legislation enacted pursuant to congressional power to set up the federal courts required that a jury decide the issue. Surely state substantive interests cannot be found to supersede rights validly created by the seventh amendment or the Congress; the supremacy clause just does not cut that way.[189]

A second set of ambiguities in *Byrd* relates to what federal interests are to be put on the scales. One of these is the role federal positive law, or the absence thereof, should play in the case.[190] With regard to this ambiguity, the impact of *Byrd* is clearer. The question whether a judge or jury should decide the issue presented by the *Byrd* facts could be decided under the influence but not the command of federal positive law and, if *Byrd* is to be taken as an honest opinion, it was.[191] To

188. *See, e.g.,* United States v. Oregon, 366 U.S. 643, 649 (1961); United States v. Darby, 312 U.S. 100, 114-24 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31-32 (1937). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976) (apparently resurrecting the pre-Depression "reserved powers of the states" tenth amendment enclave theory, at least for application to very peculiar facts).

189. The nub of this argument is set forth in Ely, *supra* note 126, at 700-02, where the writer attacks Justice Harlan's dissent in Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring), as erroneously positing the enclave theory of the tenth amendment. The commentary following Ely's article has generally approved of this part of his analysis. *See, e.g., Last Words, supra* note 136, at 1683; Redish & Phillips, *supra* note 154, at 357-58.

190. As has been pointed out elsewhere, the "presence or absence of a specific federal statute or rule was thought decisive by Judge Friendly and a majority of the Second Circuit," but entitled to little weight by Judge Clark of that court as well as the Seventh Circuit. WRIGHT, *supra* note 6, at 275. *Compare* Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963) (en banc) (majority opinion by Judge Friendly finding failure of federal rules to provide for amenability to service of process fatal to claim that federal service standards should supplant state law denying amenability) *with* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 515-16 (2d Cir. 1960) (opinion directly contra to *Arrowsmith) and* Allstate Ins. Co. v. Charneski, 286 F.2d 238, 244 (7th Cir. 1960) (declaratory judgment act's apparent grant of federal remedy not dispositive when grant would initiate state substantive policy).

191. It has been pointed out that most cases applying *Byrd* have involved the relation between judge and jury, such as remittitur, counsel's arguments to the jury, sufficiency of the evidence, unanimity requirements, and jury size, but that a few cases have extended *Byrd* balancing to "quite analytically distinct problems such as collateral estoppel and door closing statutes." Redish & Phillips, *supra* note 154, at 371, nn.90-96. The former cases emphasize the language in *Byrd* discussing the seventh amendment's "influence" and suggest that the policy of uniformity cannot

comprehend how the seventh amendment could not apply and yet have residual influence, one need only look to analogous federal common law in other areas. *Textile Workers Union of America v. Lincoln Mills*[192] decided that the federal common law of contract in labor relations was to be developed under the influence but not the command of the Labor-Management Relations Act. Similarly, *Illinois v. City of Milwaukee*[193] decided that a federal common law of nuisance was to be fashioned in light of the federal interests in resolving interstate disputes. Indeed, virtually every federal common law case the Court has handed down has found justification in part upon a federal constitutional or statutory background which "influenced" but did not "command" the result.[194]

Once one begins to see the relevance of these cases to the issues in *Byrd* one can understand the "influence" language. The seventh amendment obviously has direct relevance to some issues involving judge-jury relations within the federal courts. When it applies, it governs.[195] But there are other areas when the law governing the relationship at issue is determined by Congress, or failing its action, by the federal courts acting in their role as administrators of the federal court system. These include cases when federal practice with respect to jury power is more restrictive than state practice,[196] and when it is

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be allowed to disrupt the federal system for allocating functions between judge and jury, while the latter rely heavily upon the *Byrd* opinion's reference to the federal system as an "independent system for administering justice to litigants who properly invoke its jurisdiction." *Byrd,* 356 U.S. at 537. In addition, the latter cases perceive the federal mode of distributing trial functions between judge and jury as one of many "essential characteristics" of the federal system entitled to consideration. Redish & Phillips, *supra* note 154, at 384-89.

192. 353 U.S. 448 (1957).

193. 406 U.S. 91 (1972).

194. *See, e.g., supra* notes 57-74 and accompanying text.

195. This of course is the particular holding of Simler v. Conner, 372 U.S. 221 (1963). *Conner* may now be viewed as a particular application of the *Hanna* view that when there is federal positive law on point it governs.

196. The seventh amendment does not guarantee the right to a *nonjury* trial. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959). In 1931, the Court was confronted with a diversity case in which a state constitution assured jury consideration of an issue which, if the case were to be tried under federal procedural standards, would be decided by the judge. The Court unanimously held that neither the Conformity Act nor the Rules of Decision Act required application of the state procedure. Herron v. Southern Pacific Co., 283 U.S. 91, 94 (1931). However, in denying the applicability of the state constitution, the Court stated:

> The controlling principle governing the decision on the present question is that state laws cannot alter the essential character or function of a federal court. The function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court. . . .

Id. There is little reason to believe that *Herron* has been undermined by *Erie* and its progeny. WRIGHT, *supra* note 6, at 448-50. In the first place, the pre-*Erie* rule of *Swift* had, on the basis of construction of the word "laws" in the Rules of Decision Act, excluded from statutory coverage state *common* law rules in areas

less.[197] If Congress does not like what the courts are doing, it can overrule their decisions, as it has in the past, both with regard to other jury issues[198] and issues quite remote from them.[199] Absent congressional legislation, however, it is up to the courts to try to fashion modes of proceeding consistent with the Constitution and the congressional mandate that they operate the system.

The federal common law created in *Byrd* is consistent with the values the Court perceived as emanating from the seventh amendment. It is consistent with the way in which federal trial judges have decided, in the absence of congressional legislation to the contrary, to apportion power between judge and jury. And it is consistent with the congressional mandate, implicit in the very creation of diversity jurisdiction, that the courts responsibly exercise the judicial power of the United States.

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of national concern. The *Herron* case, involving as it did construction of different language in the Rules of Decision Act (after all, in *Herron* the state constitution was not judge-made) was in no sense a *Swift*-type decision and should survive *Erie.* Moreover, the *Byrd* opinion itself cited *Herron* with approval and even went so far as to quote the language set forth above in support of the notion that judge-jury power allocation in the federal courts is exclusively a matter of federal concern. *Byrd,* 356 U.S. at 538-39.

197. This, of course, is the *Byrd* case itself.

198. For example, prior to the enactment of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1866 (1976), federal jurors were selected largely on the same basis as their counterparts in the states where the federal courts sat. In 1946, the Supreme Court held illegal a federal trial judge's exclusion of daily wage earners from consideration for jury duty. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). The Court found the exclusion inconsistent with the "American tradition of trial by . . . an impartial jury drawn from a cross-section of the community." *Id.* at 220. The decision was not based on the seventh amendment, however, but rather on the Court's "power of supervision over the administration of justice in the federal courts." *Id.* at 225. Because it was a common law, nonconstitutional decision, it could be refined and modified by a subsequent congressional enactment. That is precisely what happened when Congress passed the Jury Selection Act. While the statute continues the federal policy of assuring that juries be "selected at random from a fair cross section of the community . . . wherein the court convenes," 28 U.S.C. § 1861, and contains, *inter alia,* a general prohibition against exclusion on account of "economic status," *id.* § 1862, it nevertheless contains numerous exemptions and exclusions which assure in many cases an unrepresentative jury pool.

199. Procedural examples are legion. In 1958, Congress enacted a provision creating dual citizenship for corporations having states of charter different from their main places of business. 28 U.S.C. § 1332(c) (1976). The statute was aimed at eliminating cases like Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), where a local business reincorporated in a neighboring state for the sole purpose of creating diversity jurisdiction. In 1964, Congress further revised the statute to eliminate from the diversity jurisdiction direct actions against out-of-state insurers when both the victim and the tortfeasor were citizens of the same state, thus reversing the rule of Lumbermen's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1948). In 1948, taking its cue from Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), but going beyond mere codification of the *Gulf Oil* rule, *see* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955), Congress enacted the federal change-of-venue statute. 28 U.S.C. § 1404(a) (1976).

IV. THE SCOPE OF FEDERAL PROCEDURAL COMMON LAW IN LIGHT OF *BYRD*.

The federal common law of procedure authorized by *Byrd* is supreme when the federal interests it raises outweigh the countervailing policies against forum shopping and undue incursions upon state interests, in much the same way that the specialized federal common law outlined previously is supreme. There are, however, differences. First, of course, is the question of scope. The federal common law of *Byrd* does not operate in state courts, as does the substantive federal common law of *Lincoln Mills* or *Clearfield Trust.* This is true for the same reasons that the seventh amendment, federal jury selection rules, and federal venue statutes do not apply in state courts.

Second, the federal court's power to employ federal procedural common law rules to displace state rules is unlikely to be exercised absent federal substantive interests. Fundamentally, this is true because procedural law is inherently adjective. Since like cases should obtain like treatment, and matters of form are generally given less importance than matters of substance, it is not surprising that federal judges are reticent to uphold the majesty of federal conventions in the face of countervailing considerations of fairness and substantive policy. Nevertheless, *Byrd* forces the choice upon them. The balance of this article will consider how this choice should be exercised, first taking up the question of what to do when state substantive policies are not at stake, and second considering what to do when they are.

A. *Scope of Federal Procedural Common Law In the Absence of State Substantive Interests*

The procedural law created in *Byrd* must be extended beyond the narrow confines of judge-jury relations.[200] This is clearest when no significant state substantive interests are implicated. Absent them, the

200. In seeking to reconcile recent Supreme Court decisions on *Erie* questions, one can note, as have Professors Redish and Phillips, "perhaps the Supreme Court wishes to establish an enclave for judge-jury relations governed by *Byrd* within the broader *Hanna* test. . . ." Redish & Phillips, *supra* note 154, at 372 n.98. The authors cite Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam), where the Court referred to both *Byrd* and *Hanna* as somehow supporting the notion that the allocation of power to both trial and appellate courts in reviewing the size of jury verdicts is, in the federal system, "a matter of federal law. . . ." *Id.* at 649-50. In other recent *Erie*-type cases, the Court has been content to employ *Hanna*-like concern with the policy against unfair judicial administration without any attempt to "balance" federal and state interests. *See, e.g.,* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (reaffirming Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)); Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam) (reaffirming Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). Since both *Walker* and *Day & Zimmermann* are in part justified on *stare decisis,* and since neither explicitly dealt with the inconsistencies between *Hanna* and *Byrd* (indeed, neither even mentioned the latter case) the theory that the Court views judge-jury relations a *Byrd* enclave within a *Hanna*-grounded universe is highly speculative.

only countervailing interests to the dominance of federal procedural law are the policies against forum shopping and inequitable administration of law. These are not in themselves state policies. Instead, they are policies of the federal courts, enunciated in *Erie* and its progeny, relevant primarily to guide federal choice of law decisions in the exercise of diversity jurisdiction.

Forum shopping alone cannot be viewed as an unmitigated evil. If Congress viewed it as such, it could easily eliminate it simply by abolishing diversity jurisdiction. The fact that the jurisdictional statutes[201] permit it suggests that, at least for some purposes, it is believed to be highly desirable.[202] Most of the commentators seem to agree that forum shopping is bad only if it leads to unfairness, the kind of "equal protection problems which [originally] troubled the Court in *Erie.*"[203] There seems to be some agreement that since forum shopping is not itself a *per se* evil, the main reason for using it is that it provides a handier touchstone than "unfair discrimination" for determining in which cases state laws should prevail.[204] But surely congressional retention of diversity jurisdiction, with all its attendant weaknesses and in the face of the myriad problems the *Erie* decisions have uncovered over the years, suggests that forum shopping should at most be a warning signal and not a litmus test.[205]

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201. 28 U.S.C. §§ 1332(a)(1), 1441(a)(b) (1976).

202. For a modern discussion of the virtues and vices of diversity jurisdiction, see Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal,* 91 HARV. L. REV. 317 (1977). Chief Justice Marshall's historic justification for it was that it assured out-of-state litigants a neutral forum and allayed fears of prejudice from their opponents' home state courts. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). While this justification has been directly disputed, *see* Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483, 492-97 (1928), and has its detractors, Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction,* 79 U. PA. L. REV. 869, 976 (1931), it is still the generally accepted argument for diversity jurisdiction. *See, e.g., Erie,* 304 U.S. at 74; *Hanna,* 380 U.S. at 467. However, since both the original jurisdiction statute and the removal statute permit jurisdiction in theoretically neutral venues, and since the former also permits in-state citizens to invoke it and thereby escape their own state courts, one must conclude that either there was careless drafting or that other justifications beyond those of Chief Justice Marshall's carried some weight. One such explanation is a wide-spread belief that federal courts are simply better than their state counterparts and that their operation will provide better justice and also spur state rules reform. *See generally* WRIGHT, *supra* note 6, at 90-91.

203. *Hanna,* 380 U.S. at 468. *See* Ely, *supra* note 126 at 712; McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape,* 51 VA. L. REV. 884, 889 (1965); Redish & Phillips, *supra* note 154, at 373.

204. *See, e.g.,* Ely, *supra* note 126, at 710, 717; Comment, *Hanna v. Plumer: An Expanded Concept of Federal Common Law — A Requiem for Erie?,* 1966 DUKE L.J. 142, 164-65. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Court admitted that no danger of forum shopping existed but said state law should be followed to avoid inequitable administration of the laws. *Id.* at 753.

205. *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965), where the Court stated:

> "Outcome-determination" analysis was never intended to serve as a talisman. Indeed, the message of [*Guaranty Trust*] itself is that choices between state and federal law are to be made not by application of any

Unfair discrimination seems at first glance a more serious evil. It is fundamental that like cases should be treated the same, and that, as the *Hanna* Court put it, "it would be unfair for the character or result of litigation to differ materially because the suit had been brought in a federal court."[206] This argument feeds back into the forum shopping concern. It has been suggested that if one party would lose, or even have to work harder to win, because of rule differences, he would necessarily be disadvantaged *vis-a-vis* others whose situations are similar but for the availability to his opponent of a federal forum. This shift in advantages is the unfairness *Hanna* aimed to eliminate.[207]

But this argument is overdrawn. To say that one party is disadvantaged, and the other advantaged, because of the operation of diversity jurisdiction, is not necessarily to say that there exists an "unfair" or "inequitable" or invidiously "discriminatory" administration of law. All one may really conclude from an advantage/disadvantage analysis is that a competent lawyer would take advantage of it and forum shop. To conclude that an "advantage" caused someone to lose or be burdened "unfairly" requires inquiry as to why he lost or was burdened. If the justification for the burden is great enough, none would call the impact "unfair."[208] Moreover, on the face of it, federal procedural pol-

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> automatic "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.

Id. at 466-67 (citations omitted). Certainly *Hanna* later identified avoidance of forum shopping as one of those underlying policies. *Id.* at 467. But the same Court was rather cavalier about the forum shopping its Rules Enabling Act analysis permitted the Federal Rules of Civil Procedure to encourage, suggesting that the Court attached little moral authority to the policy against forum shopping *per se.* Redish & Phillips, *supra* note 154, at 377 n.121. Even Professor Ely, who heartily approves of the "re-juvenated outcome determination test" he finds in *Hanna,* Ely, *supra* note 126, at 717-18, agrees that the likelihood of forum shopping at most "may turn out to be a handy touchstone for identifying those situations exhibiting the evils against which the [Rule of Decision] Act was directed. . . ," *id.* at 710, evils which he identifies as unfair administration and infringement on state substantive policies. *Id.* at 712, 716 n.126.

206. *Hanna,* 380 U.S. at 467.

207. Professor Ely writes:

> What *Erie* mentioned, and *Hanna* picked up, was simple unfairness. . . . The point of the *Hanna* dictum is that it is difficult to find unfairness. . . whose elimination would justify disrupting a federal court's routine, when the difference between the federal and state rules is trivial, when their requirements are essentially [the same]. . . . The Court therefore suggested by its examples that a federal court may adhere to its own rules in diversity cases insofar, but only insofar, as they are neither materially more or less difficult for the burdened party to comply with than their state counterparts, nor likely to generate an outcome different from that which would result were the case litigated in the state court system and the state rules followed.

Ely, *supra* note 126, at 712-14 (citations omitted).

208. Perhaps Professor Ely is an exception. He says that the Court "suggested by its examples" cases illustrating these types of unfairness, vaguely citing in support of his proposition two pages from the *Hanna* opinion. *See id.* at 714 n.122 (citing Hanna v. Plumer, 380 U.S. 460, 468-69 (1965)). The pages cited do not support

icies seem capable, at least in certain circumstances, of providing such justification.

None of the Supreme Court's *Erie* decisions, except perhaps *Hanna,* suggests that in no instance should federal procedural law control.[209] Even Justice Frankfurter, who suggested that a federal court sitting in diversity was "only another court of the State" and developed the "outcome determinative" test[210] upon which *Hanna* built, was unwilling to issue a blanket refusal ever to apply federal procedural standards in diversity cases. Indeed, in the very case which announced the test, he explicitly refused to sacrifice, to state rules of local practice, the remedial flexibility of a federal judge sitting in equity — finding such flexibility inherent in and essential to federal jurisdiction.[211]

Justice Frankfurter's reference to federal independence in determining the scope of federal equitable remedies is but one example of situations in which state law should not be allowed to interfere with essential federal judicial functions. There are dozens of other contexts in which federal interests might well be deemed paramount. Consider, for example, narrow issues of judicial administration. In one situation, an attorney might find that the United States Marshal Service is more efficient and speedy in making service than the local sheriff, or that the federal district court's jury dockets are noticeably shorter than those of the county courts in the district. Such considerations might lead to forum shopping, but no one would suggest the federal trial judge change the practice of his court to eliminate the possibility. Another example is the operation of federal venue statutes. Both *Livingston v. Jefferson*[212]

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the notion that differential treatment is inherently unfair. The Court was explaining why the outcome determination test, applied literally, was overbroad, and justified a retreat to a "forum shopping-unfair administration" test.

209. *Erie* itself involved substantive state and federal laws, and for a variety of reasons is inapposite to the present debate. First, when state substantive policies are implicated there is heightened reason to fear that the parties will perceive that the case's result turned on which judge heard the case rather than on the merits. Second, in *Erie* itself, there could be no justification for the differential impact, because the federal rule involved, one of general common law, was really beyond the power of the federal courts to create or enforce.

210. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945).

211. *Id.* Nor should *Hanna* itself necessarily be viewed as suggesting there can never be a nonstatutory federal reason adequate to displace application of a differing state rule. The modified outcome determination test which derives from its dictum was developed only as a side effect (and not necessarily a well thought out one) of the Court's effort to cut Justice Frankfurter's outcome analysis down to size. The Court never purported to grapple with the problem which would arise and be dealt with in *Byrd* — but instead went on simply to show why outcome analysis was never meant to govern cases like *Hanna.* Moreover, if the Court had meant to overrule *Byrd,* it could have done so explicitly. Instead, it simply ignored the precedent. But since the Court may not have perceived the immediate question—the manner in which notice is given a defendant—as involving an essential federal judicial function, ignoring *Byrd* should not necessarily be construed as overruling it.

212. 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411). In this case, Chief Justice Marshall, sitting on circuit, imported into federal venue law the English rule that certain

and *Gulf Oil Co. v. Gilbert*[213] were, in their day, federal common law cases. Their holdings have been partially incorporated into federal statutes, but the doctrines retain continuing vitality independent of these statutes.[214] Suppose a plaintiff wanted to sue a diverse defendant on a federally "local" action under circumstances where the property was located in Canada, and by far the more convenient forum was situated there. Should the plaintiff be able to sue the defendant in his home state which does not recognize local actions at all and which has failed to adopt the doctrine of forum non conveniens? The federal "local" action rule might not govern the issue,[215] and certainly the federal change of venue statute would not.[216] But the federal venue statutes

claims theretofore characterized as "local" could only be brought in the place where the property was located. Though Marshall thought it anomalous, he felt bound by the precedents to extend the "local action" characterization beyond strictly *in rem* proceedings to such *in personam* actions as trespass *quare clausum fregit*. *Id.* at 665. The Marshall rule has been adopted as a gloss limiting the application of the general venue statute to transitory or nonlocal actions. Casey v. Adams, 102 U.S. 66, 67 (1880); *see* 28 U.S.C. § 1391 (1976).

213. 330 U.S. 501 (1947). Here the Court approved a discretionary dismissal, on the basis of the forum non conveniens doctrine, of a tort action filed in the Southern District of New York even though all conceded that the filing was proper under the venue statutes. *Id.* at 504.

214. The United States Code now gives implicit recognition to the rule of *Livingston*. *See* 28 U.S.C. § 1392(b) (1976). In 1948, just after *Gulf Oil* was decided, Congress enacted the federal change of venue statute. 28 U.S.C. § 1404(a) (1976). While the statute was drafted in accordance with the doctrine of forum non conveniens, it has been held that the statutory standards for transfer and the common law standards for dismissal differ slightly, though involving consideration of similar criteria. *See, e.g.,* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); Parsons v. Chesapeake & Ohio R.R. Co., 375 U.S. 71, 72 (1963) (per curiam). Since statutory transfer is a less draconian remedy than the common law dismissal, it is generally easier to obtain, and the statute has largely superseded the common law doctrine. Forum non conveniens dismissals remain an option, however, in those rare instances when federal venue is monumentally inconvenient and the only alternative fora are state courts or foreign tribunals. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); *see, e.g.,* Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1960).

215. The weight of authority seems to be in favor of having state law determine whether an action should be classified as local or not. *See, e.g.,* Huntington v. Attrill, 146 U.S. 657, 669-70 (1892) (dictum); Still v. Rossville Crushed Stone Co., 370 F.2d 324, 325 (6th Cir. 1966), *cert. denied,* 387 U.S. 918 (1967); Peyton v. Desmond, 129 F. 1, 4 (8th Cir. 1904). These cases are inconsistent with the view of Chief Justice Marshall, who said in *Livingston* that he was "decidedly of opinion" that the issue was exclusively one for federal courts to decide. *Livingston,* 15 F. Cas. at 665. Moreover, the cases have recently been rejected by a number of courts on the grounds that federal venue presents issues of exclusive federal concern warranting uniform federal standards. *See, e.g.,* Pasos v. Pan American Airways, Inc. 229 F.2d 271 (2d Cir. 1956); Minichiello Realty Assoc., Inc. v. Britt, 460 F. Supp. 896 (D.N.J. 1978), *aff'd per curiam,* 605 F.2d 1196 (3d Cir. 1979); Central Transport, Inc. v. Theurer, Inc., 430 F. Supp. 1076 (E.D. Mich. 1977). The Court in Illinois v. City of Milwaukee, 406 U.S. 91, 108 n.10 (1972), suggested that the nuisance action therein approved might be filed under the general venue statutes, but since the case was not a diversity action its application was questionable. Most recently, in Leroy v. Great Western United Corp., 443 U.S. 173, 183 n.15 (1979), the Supreme Court appeared to leave the issue open.

216. The transfer statute, of course, only permits transfer to another *federal* court. 28

themselves represent an effort, albeit incomplete, to apportion federal litigation among courts in a consistent, economical, convenient, and fair way. A refusal to apply the federal common law of venue to facts such as these, because this in some way would cause forum shopping, would seem an outrageous intrusion of state procedural policies upon an area of independent federal interest. Under the influence, though certainly not the command, of this statutory scheme the federal court would have ample justification to remit the plaintiff to either the local courts or the Canadian forum.[217]

U.S.C. § 1404(a) (1976). Despite claims of Yankee imperialism, there are as yet no American federal courts in Canada.

217. In cases in which a section 1404(a) transfer is unavailable, the Supreme Court has four times found it unnecessary to decide whether federal courts must follow local law or apply for themselves their own law on the issue of whether to dismiss for reason of forum non conveniens. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 248 n.13 (1981); Koster v. American Lumbermens Mutual Cas. Co., 330 U.S. 518, 529-30 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947); Williams v. Green Bay & W.R.R. Co., 326 U.S. 549, 558-59 (1946). *Koster* suggests its probable answer, however, in describing the problem as involving the "autonomous administration of the federal courts in the discharge of their own judicial duties . . . ." 330 U.S. at 520 n.1.

Most of the lower courts which have had to deal with the question have concluded that a federal court should employ its own standard for determining whether to dismiss, independent of what the state courts would do. *See, e.g.,* Miller v. Davis, 507 F.2d 308, 313 (6th Cir. 1974); Thomson v. Palmieri, 355 F.2d 64, 66 (2d Cir. 1966) (dictum); Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 835 (S.D.N.Y. 1957). Both *Miller* and *Szantay,* the latter of which involved a state door-closing statute, employed *Byrd* balancing in deciding to hear cases the state courts would have rejected. In each case the court found that nationally uniform application of the federal venue statutes and other federal policies outweighed whatever federal interest there was in avoiding forum shopping and inequitable administration of the laws. In addition, the courts in *Szantay* and *Shulman* argued that refusal to accept the cases because of the parties' citizenship would be inconsistent with the purpose of diversity jurisdiction — to avoid discriminations against nonresidents. The *Thomson* court's analysis was less developed, but led the court to believe that forum non conveniens issues are "procedural" and hence fall outside the *Erie* rule.

The law is even clearer that in cases where the alternative forum is a federal one to which a section 1404(a) transfer is available, the federal court may freely ignore local rules of forum non conveniens. In Parsons v. Chesapeake & Ohio R.R. Co., 375 U.S. 71 (1963) (per curiam), the Supreme Court said that a prior state dismissal of a claim on the basis of forum non conveniens could "*never* serve to divest a district judge of the discretionary power vested in him" by the transfer statute. *Id.* at 73-74 (emphasis added). While *Parsons* involved an FELA action, rather than diversity jurisdiction, and technically ruled only on the *res judicata* impact of the state dismissal, its conclusion that section 1404(a) transfer was not governed by state law because the two are governed by different considerations, together with its emphatic "never," has led diversity courts to ignore state forum non conveniens rules in considering whether to retain jurisdiction or transfer under section 1404(a). *See, e.g.,* Lapides v. Donner, 248 F. Supp. 883, 893 (E.D. Mich. 1965); *see also* Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955) (state refusal to take suit for forum non conveniens reasons "does not control a federal court, since Congress has explicitly legislated in that field . . .").

The section 1404(a) cases might now be viewed as consistent with the holding

To say that there are cases in which federal procedural interests should be paramount is, of course, not always to make them so. In the case hypothecated, as in the federal common law cases generally, there is either a strong federal policy, a concrete federal pecuniary interest, a justifiable sense of the need of uniform federal standards, or a sense that the problem implicates no state interests—thus suggesting the propriety of applying federal and not local standards. Such factors are not always present. When they are not, deference should be paid to local law. Even when federal interests are present, the interest in upholding the independent operation of the federal rule may be vindicated without unduly encouraging forum shopping or a sense of invidious discrimination by the adoption of alternative mechanisms within federal judicial control. For example, in *Byrd* itself, the Court suggested federal jury control devices might mitigate whatever tendency the decision to allow the jury to address the "statutory employee" issue might have toward encouraging forum shopping.[218]

Recognition that the choice of law issue is a federal one does not in itself necessitate adoption of the federal rule. Recall that in *Clearfield Trust Co. v. United States,*[219] *United States v. Standard Oil Co.,*[220] and *Textile Workers of America v. Lincoln Mills,*[221] the Supreme Court indicated there was a two step process: to decide first whether there was federal judicial power to adopt a federal rule, and second whether this rule should be a nationally uniform one or incorporate by reference local rules. The decisions in the door-closing cases[222] suggest that in the absence of any federal procedural interest, federal rules of positive law will be construed narrowly to permit the operation of state rules in such a way as to eliminate the incentive to forum shop in the federal courts.

Interest analysis of this type might indicate similar results when the federal rule is not founded in positive law but is judge-made. Take, for example, the opposite of the example set out above regarding federal venue rules. If the state rules for local actions and forum non con-

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of Hanna v. Plumer, 380 U.S. 460 (1965) that when federal positive law is on point, it governs, despite any state law to the contrary. *Id.* at 471. The decisions, however, should not be so limited. The transfer statute codified and revised existing law to permit federal judges more discretion to limit plaintiff's initial venue choices than they had enjoyed under the federal forum non conveniens doctrine. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). If state law were the governing principle, the federal court would have to transfer or dismiss whenever the state courts would dismiss. But that is not what cases like *Willis* and *Lapides* mandate. In those cases, the courts retained jurisdiction and refused to transfer the cases. In both holding and rationale, these cases are consistent with the notion that the federal forum non conveniens doctrine may be applied independently of what the state courts might do.

218. *Byrd,* 356 U.S. at 540.
219. 318 U.S. 363 (1943).
220. 332 U.S. 301 (1947).
221. 353 U.S. 448 (1957).
222. *See supra* note 177.

veniens were more inclusive than the federal ones, then unlike the example above federal enforcement of the narrower federal rules would tend to *encourage* federal forum shopping.

Close examination of the interests involved lead to the conclusion that the state rules should be applied. Federal pocketbook interests certainly are not well served by allowing federal courts to become clogged with state cases when the state courts would be closed. The policy against entertaining litigation in monumentally inconvenient fora, which underlies both the local action rule and the forum non conveniens doctrine, is not impaired by utilizing local rules designed to enforce similar policies even more stringently. While one can argue that federal venue certainly presents a federal question and that generally such questions should receive uniform application, the value of uniformity is outweighed by the fact that it would be obtained at substantial cost to federal policies against forum shopping. Since there is nothing else to be put on the "federal" side of the scales — no vindication of an important federal policy — and there is something more to be added to the "state" side — the wasteful use of federal jurisdiction — the answer seems to lie in favor of applying local law.[223]

It must be conceded that the foregoing arguments are fairly debatable. It may be hard to conclude that there is no impairment of an "important" federal policy, or that the use of federal jurisdiction would be "wasteful." One may argue that Congress, by creating federal diversity jurisdiction and venue rules, impliedly indicated to the courts a federal policy interest in allowing plaintiffs, whose cases qualify, to invoke that jurisdiction and choose their venues under uniform federal standards. It also is hard to distinguish the above example, where there is no "important" federal policy, from *Byrd* where the Court obviously did find one.

This argument suggests the slippery nature of any *Erie* analysis.[224]

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223. Read superficially, most of the federal forum non conveniens caselaw seems inconsistent with the text. In Thomson v. Palmieri, 355 F.2d 64 (2d Cir. 1966) and Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833 (S.D.N.Y. 1957), for instance, the federal court assumed jurisdiction, despite local door-closing rules, in order to help nonresident American plaintiffs find an American forum in which to sue foreign defendants. Moreover, other courts refused to transfer or dismiss when the impact of such action would have been to bifurcate the plaintiffs' cases because of service of process problems in various alternative fora. Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Lapides v. Donner, 248 F. Supp. 883 (E.D. Mich. 1965). However, the judges in these cases found independent federal policies favoring assumption of jurisdiction. In the foreign defendant cases, they were concerned with upholding the policy of diversity jurisdiction against discrimination of nonresidents, while in the transfer cases they were concerned with federal policies favoring liberal joinder and opposing piece-meal litigation. Absent such special concerns, the Fourth Circuit at least would abide by the door-closing rules of the state where the federal court sits. *See* Proctor & Schwartz, Inc. v. Rollins, 634 F.2d 738, 748 (4th Cir. 1980); Bumgarder v. Keene Corp., 593 F.2d 572, 573 (4th Cir. 1979).

224. As Professor Wright has indicated, *Byrd* balancing is difficult because the case

It is patent that federal common law cases require this sort of close judgment, and that reasonable people have quibbled about particular judgments for a long time[225] and likely will do so in the future. It is so with all line drawing. The admission that it is difficult to render consistent judgments,[226] however, does not eliminate the necessity for doing it.[227]

B. *Scope of Federal Procedural Common Law When State Substantive Interests Exist*

Part of the wisdom of the retreat of *Erie* from *Swift* lies in its recognition that federal procedure, like all procedure, is primarily adjective law, and that its purposes do not include initiating rules of substantive rights and obligations. The assumption has been that the state rule in question lacks substantive content. This assumption is not always viable. A rule may be characterized as substantive in at least three ways. First, there are those rules which are designed to have direct impact on the way people function and organize their lives outside the litigation setting.[228] A second category of substantive rules, only a

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fails to tell us what is to be put on the scales, much less how much each element weighs. WRIGHT, *supra* note 6, at 275. The caselaw defining the pre-*Guaranty* "substance-procedure" dichotomy was similarly frustrating. *See supra* note 155. For an interesting debate among eminent scholars regarding this same dichotomy in the context of defining the application of rules promulgated under the Rules Enabling Act see Chayes, *The Bead Game,* 87 HARV. L. REV. 741 (1974) and Ely, *The Necklace,* 87 HARV. L. REV. 753 (1974). Professor Ely believes that the modified outcome test of *Hanna's* dictum helps resolve the difficulties of *Byrd* balancing, but has to admit that there are cases in which it does not work. Ely, *supra* note 126, at 716 n.126, 717.

225. For example both Friendly, *supra* note 5, at 410, and Note, *supra* note 5, at 1526-31, criticize the holding in Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

226. Frustration with the Ely analysis has led to two different kinds of responses. On the one hand, some, like myself, believe that the modified outcome analysis fails to properly account for legitimate federal procedural interests and substantive state concerns. *See* Redish & Phillips, *supra* note 154, at 360, 372, 377, 380. Others, frustrated by the uncertainty of even the modified outcome analysis of Professor Ely, would harken back to the old substance-procedure dichotomy, but avoid its pitfalls by concluding that in cases not covered by a federal rule, the federal courts should always apply any state law which is "arguably substantive." *See, e.g.,* Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics,* 28 BUFFALO L. REV. 383 (1979). Such talismanic solutions have failed in the past, and they likely will fail in the future.

227. Professor Trautman concedes the difficulty of balancing in all choice of law contexts but nevertheless recommends it in the federal common law context. *See* Trautman, *supra* note 62, at 107-08, 113-14.

228. Obvious examples of such rules are those banning common law marriage which have among their functions the requirement of a certain amount of ceremony in order to assure considered decision-making in matters the State may deem highly significant for the individuals involved. Less obviously, rules like the statute of limitations, to the extent they give putative wrongdoers a sense of repose, may be considered substantive because they encourage the wrongdoers to be able to plan their lives prospectively without fear of being haunted by their pasts and discour-

shade different from the first, are designed to discourage wrongful use of the litigation process.[229] Finally, there are various rules, such as those defining the elements of causes of action or the classification of particular types of litigants, which may indicate a state decision to favor one class of litigants over another simply because the state believes substantive justice requires the rule.[230] The precise issues in *Erie*[231] and *Palmer v. Hoffman*[232] were substantive in this sense.

Determining whether, and to what extent, a particular state rule implicates such substantive state interests is in itself a difficult matter. Part of the reason is that the state organs which make the rules often fail to articulate their reasons for doing so. This should not be surprising, however, in view of the fact that, for state purposes, there may be little reason for them to do so.

Once a federal court has honestly and sensitively assessed a state law's purposes and found them substantive, it still must evaluate what weight to accord them and the extent to which enforcement of the competing federal rule will undermine these purposes. Such judgments are inherently problematical. The absence of state evidence on these issues should not be all that significant, since in an *Erie*-type case the ultimate import of the nature and significance of the state law's purposes and the

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age their victims from harping on ancient wrongs. Other examples would be rules defining claims like defamation or various defenses like privilege, which may be seen as encouraging free speech or certain types of relationships. These are all classic examples of what Justice Harlan referred to as rules which "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); *see* Ely, *supra* note 126, at 725-26.

229. Examples are the procedural limitations on shareholder derivative actions or actions for fraud, which have as their purpose the elimination of strike suits, or the "domestication" rules for foreign corporations, which have as their function the prevention of evasion of service of process by foreign corporations doing business in the state. Justice Harlan himself felt that Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), which required the plaintiff in a shareholder derivative action to follow the state rule of filing a security bond before he proceeded in federal court, could best be rationalized on the basis that the state statute was substantive. The state statute, he said, "was meant to inhibit small stockholders from instituting 'strike suits,' and thus it was designed and could be expected to have a substantial impact on private primary activity." Hanna v. Plumer, 380 U.S. 460, 477 (1965) (Harlan, J., concurring). It is interesting to note that Justice Harlan was the attorney for the respondent in *Cohen*.

230. In this class of cases one would add state rules which, for instance, allocate burdens of pleading, production, or persuasion in a certain way for particular classes of litigants. The majority in *Byrd* spoke of rules which "tend to benefit one party more than the other." *Byrd,* 356 U.S. at 536.

231. The railroad claimed that under state law plaintiff should be classed as a mere trespasser, and hence entitled to relief only if the railroad's conduct was proven to be wanton or wilful. Plaintiff sought application of federal common law because under it he would be classified as a licensee and needed only to prove simple negligence. *Erie,* 304 U.S. at 69-70.

232. 318 U.S. 109 (1943). There, under state law, plaintiff bore the burdens of production and persuasion on the issue of contributory negligence, while under the "general" law of tort these burdens fell upon the defendants. *See id.* at 117-19.

extent to which they might be frustrated by operation of federal law is relevant only to federalism issues peculiar to the federal court. More disturbing is the unprincipled and seemingly inconsistent way in which the federal courts seem to characterize some state rules as substantive or not, and weighty or insignificant without any apparent attempt to seriously divine the type of impact the rule might have.[233]

There are two fundamental challenges to the process of *Byrd* balancing when attempting to determine if state substantive law should control. The first is that once federal judges are invited to balance federal interests in applying their own rules with the policies against forum shopping and undermining state interests, they will quickly begin to "find" federal interests and balance away forum shopping and state policy concerns. The tendency of judges in choice of law situations to follow the "better law,"[234] often meaning their own domestic

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233. In *Byrd* the Court decided that the state's use of a judge rather than a jury served no significant state policy because it was unable to find any statement to that effect from any relevant state sources. *Byrd,* 356 U.S. at 536. Whicher's wry comment followed:

> The Court thus deduce[s] the South Carolina law, which it purportedly applies as the basis of its opinion, from the *silence* of the South Carolina courts on a point they were never called upon to decide. In other words, the Court avoids application of the rule of the [state] case simply by creating a new and convenient principle of South Carolina law for the purpose.

Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict,* 37 TEX. L. REV. 549, 556 n.39 (1959) (emphasis in original). The same problem has come up in other contexts. The Fourth Circuit could not divine from any state sources the purposes of the South Carolina door-closing statute in Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64-65 (4th Cir. 1965), and Judge Clark could find none from state sources in Arrowsmith v. United Press Int'l, 320 F.2d 219, 235 (2d Cir. 1963) (Clark, J., dissenting), leading each to conclude the state goals were not substantive.

Some manipulation is inevitable, with federal as well as state rules. For instance, the *Arrowsmith* majority limited the application of FED. R. CIV. P. 4(d)(3) to the manner of service because it could find no affirmative evidence the rule was meant to govern amenability, 320 F.2d at 225-27, ignoring the possibility that the question of where a suit might be brought in the federal system could implicate federal interests and thus justify application of an independent body of federal law. *Cf.* 28 U.S.C. § 1404(a) (1976) (The federal change of venue statute).

234. Professor Leflar is the most outspoken commentator among those writing on horizontal conflict of laws issues in favor of allowing judges to consider, among other things, which law is preferable.

> If choice of law were purely a jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterward to see what that state's law was, this consideration would not be present. Everyone knows that this is not what courts do, nor what they should do. Judges know from the beginning between which rules of law, and not just which states, they are choosing. A state's "interest" in a set of facts can be analyzed only by reference to the content of the competing rules of law. Choice of law is not wholly a choice between laws as distinguished from a choice between jurisdictions, but partly it is.

Leflar, *Conflicts Law: More on Choice-Influencing Considerations,* 54 CAL. L. REV. 1584, 1587 (1966). Other writers, while eschewing Leflar's better law approach, come very close to adopting it by suggesting that courts should feel free to aban-

rules,[235] is suggested as putative evidence of what judges will do if one allows them the freedom to decide what goes on the scales and how much the items weigh.

A few lower court decisions which quite debatably apply *Byrd,* provide some evidence of the validity of these arguments.[236] But the list of lower court cases applying *Byrd* provides scant support for the view that there has been wholesale manufacture of bogus federal interests or a return to wanton forum shopping or reckless overriding of state interests. Given the current retreat from judicial activism by the Supreme Court and the natural inclination of federal judges to abhor forum shopping which will clog their dockets, it would be remarkable indeed to see these fears realized.

The second objection to *Byrd* balancing is that it makes the results of *Erie*-type cases less predictable and certain than would be true if one were simply to apply the test of *Hanna v. Plumer.*[237] Indeed, there is no

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don "anachronistic" rules in favor of those which clearly reflect objectively verifiable trends in the law. *See, e.g.,* WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 270-71, 273-75, 373-76 (2d ed. 1980) (suggesting that courts should generally apply rules favoring plaintiffs in tort because of the desirability of spreading loss through insurance, abandon rules such as those preventing survivorship of tort claims, and presume the validity of contracts if any contact state would validate it and refuse to enforce invalidating rules such as spendthrift statutes); *see also* EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 352-54 (1962). Leflar's open espousal of a better law approach to conflicts problems has been adopted in a number of states. *See, e.g.,* Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

235. In Tower v. Schwabe, 284 Or. 105, 585 P.2d 662 (1978), the court rejected the better law approach because it "would result in the application of the law of the forum in each case because every forum thinks it has created the best rule of law . . . ." *Id.* at 110, 585 P.2d at 664. Professor Leflar conceded that "a search for the better rule of law may lead a court almost automatically to its own lawbooks." LEFLAR, AMERICAN CONFLICTS LAW 219 (1968). Indeed, he felt constrained to note that both Ehrenzweig and Brainerd Currie had "suggested that this is the dominant theme in the entire choice-of-law process, the basic rule." *Id.* at 218. In Leflar's view, the desire to apply the better rule was only one of five enumerated factors he felt should guide judges, *id.* at 245, and he made it clear that he was not recommending slavish adherence to forum law. *Id.* at 218-19, 254-59.

236. *See, e.g.,* Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979) (enforcing state rule making participation in state malpractice arbitration procedures condition precedent to right of action, despite the fact that this substantially precluded plaintiff's access to a federal forum and interfered with his right to jury trial under independent federal standards); Allstate Ins. Co. v. Charneski, 280 F.2d 238 (7th Cir. 1960) (dismissing insurer's declaratory judgment suit for nonliability because to do otherwise would undercut state's "substantive" policy of encouraging joinder of all parties in direct action suit); *cf.* Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), *cert. denied,* 402 U.S. 932 (1971) (filing of action in one federal district tolls state statute of limitations in another, because federal system is a unitary one, despite fact that courts of latter state would close their doors to plaintiff).

237. 380 U.S. 460 (1965); *see* WRIGHT, *supra* note 6, at 275-76; Ely, *supra* note 126, at 709-18; Redish & Phillips, *supra* note 154, at 381-83.

question that one of the comparative virtues of the *Hanna* test is that it tends to provide bright lines. Whatever loss will obtain because of the use of *Byrd* balancing, however, can be mitigated by judicial conservatism in finding cognizable federal interests and by giving due regard to state policies and the policy against forum shopping and unfair judicial administration.[238]

Moreover the *Hanna* test should be rejected because it is wrong. The test is incomplete because it excludes the possibility of recognizing interests fundamental to our federalism.[239] In the context of an *Erie* case, these interests can include important federal governmental procedural concerns as well as state substantive rights. One who ignores such interests and the possibility of their reconciliation, in the interest of clarity or simplicity, does so at the peril of the proper accommodation of such interests in narrow groups of cases in which they may be of significance.

A recent Supreme Court case, *Piper Aircraft Co. v. Reyno,*[240] illustrates the difficulties applying *Byrd* can raise as well as the necessity for using it. In *Piper* a California plaintiff, sueing on behalf of Scottish victims of an air crash in Scotland, filed wrongful death claims in a California state court against American manufacturers on negligence and strict liability theories. The case was removed to federal court and transferred to a federal forum in Pennsylvania. The defendants then moved for dismissal for forum non conveniens, asking that the victims be remitted to Scottish courts which would provide relief against de-

238. In dealing with a closely related problem, that of applying federal statutes or rules which might override important state policies, the federal courts have followed the lead of Provident Tradesman's Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 (1968), and have attempted to give appropriate play to significant state policies. Sometimes this is done by incorporating state law into the definition of the federal rule. *See, e.g.,* Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat'l Bank, 416 F.2d 301 (5th Cir. 1969) (state/local transitory action rule imbued with state substantive policy and hence federal court must apply state standard in determining what actions are local under federal venue law); Minichiello Realty Assoc., Inc. v. Britt, 460 F. Supp. 896 (D.N.J. 1978) (same), *aff'd per curiam,* 605 F.2d 1196 (3d Cir. 1979); American Fidelity Fire Ins. Co. v. Hood, 37 F.R.D. 17 (E.D.S.C. 1965) (plaintiff has no right to relief, within meaning of FED. R. CIV. P. 20(a), against liability insurer when state does not permit joinder under direct action statute). More often it is accomplished by balancing federal procedural interests against state substantive concerns. *See, e.g.,* Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974) (while FED. R. CIV. P. 15(c) generally governs relation back issues, it cannot shut off action when state doctrine is more liberal); Harris v. General Coach Works, 37 F.R.D. 343 (E.D. Mich. 1964) (compensation insurer may intervene to protect self against fraudulent claim, but in primary liability phase of litigation no reference to its name to be permitted, out of deference to state policy against undue jury prejudice); *see also* 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1403, 1449, 1460 (1971) (to avoid substantive prejudice to insurers who decline to defend but fear being identified to jury during liability phase, some courts decline to permit impleader despite FED. R. CIV. P. 14, while the better view is simply to order severance or separate trial).

239. *See* Redish & Phillips, *supra* note 154, at 372, 384.

240. 454 U.S. 235 (1981).

fendants only on negligence theories.[241]

The district court ordered dismissal.[242] After discounting the plaintiff's interest in an American forum because she represented foreign interests, the judge weighed "private interest factors," suggesting that federal trial would create unreasonable access-to-proof and joinder difficulties for the American defendants, and "public interest factors" indicating that the plaintiff's choice would impose unduly expensive and lengthy litigation, difficult choice of law problems, and other burdens on the federal forum.[243]

The Third Circuit reversed but the Supreme Court reinstated the district court's order of dismissal. The Court's opinion, delivered by Justice Marshall, unanimously disagreed with statements in the court of appeals' opinion that dismissal would be inappropriate because it would result in application of law unfavorable to the plaintiff's case.[244] In addition, Marshall felt that the Third Circuit's view would render forum non conveniens useless, straight-jacket the trial judge's discretion, promote forum shopping and, at least when a foreign plaintiff wishes to sue an American manufacturer, flood already congested American courts.[245] Despite a brief but pointed dissent,[246] the Court also disapproved of the court of appeals' review of the district court's balancing analysis.[247] The Court approved the trial judge's determination to accord a foreign plaintiff's forum choice less weight than that due American plaintiffs, because of fear that foreigners might unjustifiably seek to avail themselves of American fora and law in cases lacking little or no American contacts.[248] While admitting that the trial judge might have overstated the case,[249] the Court found he had not acted

241. *Id.* at 239-41.

242. *Reyno,* 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd,* 630 F.2d 149 (3d Cir. 1980), *rev'd,* 454 U.S. 235 (1981).

243. 479 F. Supp. at 731-38. The judge relied on Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) to delineate the private and public interest factors.

244. 454 U.S. at 244.

245. *Id.* at 249-52.

246. Justice Stevens, joined by Justice Brennan, wrote a one paragraph dissent. *Id.* at 261-62 (Stevens & Brennan, JJ., dissenting). After noting the limited scope of the writ of certiorari and concurring in the Court's disposition of that question, he recommended remand "for further consideration of the question whether the district court correctly decided that *Pennsylvania* was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania." *Id.* at 262 (emphasis added). Justice White also dissented from dealing with any issues beyond those presented by the grant of certiorari. *Id.* at 261 (White, J., dissenting). Since Justices Powell and O'Connor did not participate in the decision, the majority's views on how to balance the private and public interest factors represented only the position of a minority of the full court.

247. *Id.* at 255.

248. *Id.* at 252, 256-57 n. 21. The Court also indicated that deference was due a plaintiff's choice to sue at home because one can reasonably assume such a decision was based on convenience factors. *Id.* at 255-56.

249. The Court said the district court's statement that Scotland's connections with the case were "overwhelming" was "somewhat exaggerated." *Id.* at 257.

unreasonably in weighing private interest factors in favor of dismissal.[250] Conceding that the Third Circuit's choice of law analysis might be correct, the Court nevertheless found that public interest factors also favored dismissal.[251]

The *Piper* opinion is unsatisfying in many ways,[252] not least in the way it deals with issues posed by *Erie* and its progeny. The Court tried to avoid these issues by asserting that the states involved had forum non conveniens standards identical to those of the federal courts.[253] But, as the Court noted, part of the Third Circuit's argument had been that the case should not be dismissed because to do so would undermine the deterrence policies of the states.[254] Justice Marshall's opinion does not even discuss how much weight the state courts would have accorded a foreign plaintiff's choice of forum, how heavily they would have counted their own deterrence policies in balancing public interest factors, or whether, if there was any evidence on the issue, the state would have dismissed under these circumstances. If one is to balance away substantive state policies and the policy against state-to-federal court forum shopping, one at least ought to make such inquiries.[255]

Despite these shortcomings, *Piper* is an excellent example of the necessity for utilizing federal common law to weigh conflicting federal and state policies and interests. Federal judicial administration presents uniquely federal issues and the Court's decision clearly affirms federal competence to decide such issues, even when this implicates matters of state concern. The opinion, by setting off against federal administrative burdens the state deterrence policy, was engaging in a balancing process similar to that authorized by *Byrd.* Because of its unsupported conclusion that the state courts would have come out the same way, the opinion does not tell us how the Court would have re-

250. *Id.* at 257-59.
251. *Id.* at 260.
252. Although the decision has been praised for discouraging the manipulation of American courts by foreign forum shoppers and for providing much needed protection for American industry, *see* Leigh, *Judicial Decisions,* 76 AM. J. INT'L L. 385, 396 (1982) and Note, *Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals,* 5 FORDHAM INT'L L.J. 533, 563-64 (1982), it has drawn critical comment as well. *See Recent Decisions, Jurisdiction and Procedure — Forum Non Conveniens,* 15 VAND. J. TRANSNAT'L L. 583 (1982). The comment is critical of the Court's reliance on cases where none of the parties was American to support its conclusion that foreign plaintiffs' choice of American fora should be given little deference, *id.* at 594, and argues against protectionist policies which might undermine the value of goods and services offered for export and ultimately invite protectionist reactions. *Id.* at 594-95 n.68.
253. 454 U.S. at 248 n.13.
254. The Third Circuit cited no state authority for the view that dismissal should be refused if it compelled sacrifice of the state's own choice of law rule.
255. Reading the Court's language quoted at 454 U.S. at 260-61, one almost gets the impression from the repeated references to *American* interests that the Court was not mindful that, at least since *Erie,* there is no federal general common law, and hence what was at stake were not *American* but *state* interests.

solved the case had forum shopping concerns been thrown into the balance. It is hard to believe, however, that how the states would have handled the case would be conclusive. Balancing the factors at hand, the Court would likely have decided that federal administrative concerns still warranted dismissal. This would then force those state courts who do not follow *Piper* to shoulder the administrative burdens of enforcing their own deterrence policies.

C. *Refined Balancing Test and the Significance of Doing Justice*

Several years ago Redish and Phillips set out to develop a "refined balancing test" which would adequately protect federal and state interests in *Erie* contexts.[256] Under their scheme, federal procedural concerns in an *Erie* context could be limited to "cost avoidance" interests and "doing justice" interests.[257] State rules might be fairly viewed as affecting primary activity or skewing the results of lawsuits,[258] referred to herein as substantive rules, or be characterized as having "doing justice" or "housekeeping" functions,[259] referred to herein as procedural rules. Federal interests in avoiding costs and in doing justice should clearly prevail, Redish and Phillips argued, only when they were set against state procedural rules.[260] Under their scheme, when the federal interest was merely one of "doing justice," it should never prevail over a state rule implicating substantive concerns.[261] Only when the federal interests were strong cost avoidance ones would they countenance outweighing state substantive interests, and even then they indicated "reliance on the refined balancing test alone may be an inadequate method for resolving the conflict."[262]

The refined balancing test offered by Redish and Phillips provides a useful framework in which to consider *Byrd*-balancing issues. It is, however, seriously flawed. By their own admission, it fails in cases like *Piper Aircraft Co. v. Reyno*[263] when federal cost avoidance and state substantive interests are both operative. Moreover, there is serious reason to question its efficacy in other settings. The problem lies in their denigration of the federal "doing justice" interest — what they rightly concede is the "independent system for administering justice' enunciated in *Byrd.*"[264] They relegate this to a position behind federal "cost avoidance" concerns because the latter, being more concrete, are more easily identifiable and predictable, and because interference with the

256. Redish & Phillips, *supra* note 154, at 384-400.
257. *Id.* at 384-94.
258. *Id.* at 394.
259. *Id.* at 394-95.
260. *Id.* at 390-92, 394-95, 397-99.
261. *Id.* at 392-94, 397-99.
262. *Id.* at 399-400.
263. 454 U.S. 235 (1981).
264. Redish & Phillips, *supra* note 154, at 388.

latter could be viewed as fatal to an essential federal function.[265] In their view, the federal "doing justice" interest is insignificant because, under *Erie,* "a federal diversity court has no more authority to reject state procedure it deems unjust than it has to reject state substantive law for the same reason; its function is not to sit in judgment of the wisdom of state rules and reject those it believes unjust."[266]

I disagree with part of Redish and Phillip's analysis. A federal diversity court has no authority to reject state substantive rules because they are deemed wrong. That was the holding of *Erie.* But on issues of federal concern, including, of course, how the federal courts should operate, they do have authority to decide. That was precisely the point in *Byrd.* The point is perhaps best made by reference to the spate of medical malpractice screening panel cases which have recently come before the federal courts. With one notable exception,[267] the federal courts

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265. *Id.* at 393. The authors state that the "theoretical justification for permitting a federal court to consider the costs created by applying certain procedures is derived from the basic notion underlying federalism that one sovereign in enforcing rights created by another need not follow rules that would unduly burden the performance of its essential functions." *Id.* The word "unduly" is vaguely discordant. And, one wonders, why is cost avoidance "essential" but "doing justice" not?

266. *Id.* at 390 (footnote omitted).

267. Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978). There Chief Judge Pettine declined to enforce the Rhode Island Medical Malpractice Reform Act in a federal diversity action. The state statute required, at the onset of each action in state court, that the judge appoint a mediation panel made up of a "special master," attorney, and doctor selected from lists compiled respectively by the court, bar association and medical society. The panel had the power to subpoena witnesses, employ its own expert, and render findings on the issues of liability and damages. Absent timely objection, the findings were conclusive. If there was objection, the civil action continued, and there would be a full dress trial *de novo* of all issues in the court. The statute provided for the admissibility of the panel's conclusions on the issue of liability. *Id.* at 219. Though recognizing the state statute was substantive and that failure to enforce it would encourage forum shopping and inequitable administration of the laws, *id.* at 227-28, Chief Judge Pettine nevertheless declined to enforce it for several reasons. First, he distinguished other statutes which made referral to a panel a condition precedent to beginning an action by noting that here the panel was appointed *after* the filing of an action and hence was really nothing more than an adjunct of the state court. *Id.* at 221. He balked at making a federal diversity court go on bended knee to a state panel before it could proceed with its own docket, saying that the statute:

> denies the federal court initial jurisdiction. The first trial of the action for all practical purposes occurs before a state tribunal according to state rules of evidence and procedure. With respect to both settlement and the subsequent jury verdict, the hearing before the panel is likely to be the decisive battle between the litigants . . . . The danger of local bias is particularly real when the reviewing panel is not composed of judges who are selected for, sworn to and practiced in impartiality.

Id. at 222-23. Chief Judge Pettine declined to create a federal panel because to do so would "strongly influence the [subsequent] jury verdict or circumvent jury trial altogether" in ways inconsistent with federal jury values, *id.* at 225-26, and would permit "the state . . . unilaterally [to] thrust . . . substantial, added inconvenience and cost onto the federal system" in ways inconsistent with the federal judi-

have upheld the operation of these statutes.[268] As the judges themselves recognized, the purposes of these statutes were plain: not simply to relieve state courts of the burdens of more litigation and help their juries reach "juster" verdicts, but more particularly to do this to the benefit of health care providers and their insurers by promoting prompt settlement of all but the more egregious claims and cutting down the size of presumptively overgenerous jury verdicts.[269] The goals of these state statutes are inherently "substantive."[270] Unfortunately, but pre-

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ciary's interest in avoiding cost, delay, and unnecessary lack of uniformity in federal procedure. *Id.* at 228-29.

268. *See, e.g.,* Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1st Cir. 1981); Davison v. Sinai Hosp. of Baltimore, Inc., 617 F.2d 361 (4th Cir. 1980); Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979); Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind.), *aff'd,* 603 F.2d 646 (7th Cir. 1979); Wells v. McCarthy, 432 F. Supp. 688 (E.D. Mo. 1977); Flotemersch v. Bedford County Gen. Hosp., 69 F.R.D. 556 (E.D. Tenn. 1975). Judge Pettine in Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978), distinguished his case from those where filing with a malpractice panel is a condition precedent to the right of action, citing the *Flotemersch* case. *Id.* at 221. The Fifth Circuit accepted this distinction in *Holy Cross* and decided to follow *Flotemersch,* since the statute it was dealing with (Florida's) was more similar to the Tennessee statute than the Rhode Island one. *See* 591 F.2d at 1169 n.7. The *Edelson* panel rejected the distinction and went on to reject *Wheeler.* 610 F.2d at 137 n.8. *Wheeler's* continuing vitality, even on its own facts, is further questionable in light of the First Circuit's implicit rejection of it in *Feinstein.* 643 F.2d at 887-89.

269. *See* Redish & Phillips, *supra* note 154, at 399. Professor Redish himself has written on the malpractice panel legislation. *See* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 TEX. L. REV. 759 (1977) [hereinafter cited as *Legislative Response*].

270. *See, e.g.,* Wheeler v. Shoemaker, 78 F.R.D. 218, 227 (D.R.I. 1978); *Legislative Response, supra* note 269, at 766-67; Redish & Phillips, *supra* note 154, at 400 n.231; Symposium, *The 1975 Indiana Act in Context,* 51 IND. L.J. 91, 93 (1975). As these authorities suggest, the explosion of claims and high verdicts which emanated from our courts in the early 1970's is what led lobbyists for the doctors, hospitals, and insurance companies to urge these statutes upon the legislatures. They argued that the statutes would relieve court congestion by promoting settlement of sham claims as well as those which were egregious, and would assist juries in reaching more "accurate" decisions, by giving them the benefit of the conclusion of a "neutral" arbitration panel on the "difficult" issues presented by the cases. But the goals were not simply procedural. The air was full of stories of sham claims and runaway verdicts, and the desire was to cut the risks to the doctors, hospitals, and insurers and thereby cut overall health care costs. As a gesture to needy plaintiffs, the statutes also frequently provided that the experts who were called before the panels be made available to the winning party.

Some of the statutes facially suggest a narrower procedural basis, masking the enforced arbitration panel's function in language that going to the panel is a mere "condition precedent" or "precondition" to a full dress trial *de novo.* This may be good public relations, and certainly has frequently succeeded in insulating the statutes from attacks under state and federal jury trial guarantees. *See, e.g.,* Feinstein v. Massachusetts Gen. Hosp., 634 F.2d 880 (1st Cir. 1981); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977); Prendergast v. Nelson, 199 Nev. 97, 256 N.W.2d 657 (1977). *But see* Wright v. General DuPage Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). But, as the *Wheeler* court noted, it is hard to believe most juries will resist the conclusions of "a court-appointed panel of esteemed professionals who have reviewed all the evidence,"

dictably,[271] the procedural barriers they erected resulted in gross overkill of the plaintiffs' legitimate interests; in one instance delays so frustrated the ultimate access to court that a state supreme court was forced to strike down the statute.[272] A year earlier, the Third Circuit had ignored the same situation and enforced the state rule in federal court.[273] While there are numerous objections to the Third Circuit's decision,[274] the most fundamental one cannot be that it did not result in "cost avoidance"; after all, however one works it out, the costs of no litigation are considerably less than the costs of some.[275] The real ob-

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78 F.R.D. at 226, especially when one remembers that their conclusions will be allowed into court without oath or cross-examination.

271. *Cf.* Comment, *Recent Medical Malpractice Legislation — A First Checkup,* 50 TUL. L. REV. 655 (1976) indicating surprise that "[i]n fact, the review panel proceedings actually delay suits and add to the expense of any case that goes to trial." *Id.* at 681. Why this came as a surprise, in view of the interests of the progenitors of the malpractice legislation, is the only thing which surprises this writer.

272. *See* Mattos v. Thompson, 491 Pa. 106, 421 A.2d 190 (1980). The *Mattos* court said the act placed such onerous and impossible conditions on the right to jury trial and access to courts as to offend two provisions of the state constitution. The court found that from its inauguration in April 1976 until May 31, 1980, only 27 % of the claims filed with the Pennsylvania Arbitration Panel for Health Care had been processed in any way. The court concluded that: "Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system. Most importantly, these statistics amply demonstrate that 'the legislative scheme is incapable of achieving its stated purpose.' " *Id.* at 109, 421 A.2d at 195 (quoting Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 121, 394 A.2d 932, 940 (1978)).

273. *See* Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979). The majority conceded that it confronted "an ambitious state program in which the deed has fallen woefully short of the promise," *id.* at 136, and later labeled the arbitration system "a resounding flop." *Id.* But, it said, the state interests "expounded by its legislature" in cutting insurance premiums and promptly resolving malpractice claims outweighed *Byrd*-like countervailing federal considerations involving reasonably speedy and inexpensive access to trial and fair jury consideration of the claim, because "federal plaintiffs are entitled to no better treatment than state plaintiffs . . . ." In addition, the admission of the panel's findings would not "predispose the jury and thus usurp its fact finding power. . ." any more than normal expert testimony would and because, in any event, the court believed *Byrd* should not be applied in light of the the continued vitality of the outcome determination analysis of *Guaranty Trust. Id.* at 139-40.

These arguments are patently specious. As Judge Rosenn in dissent pointed out, the plaintiffs were noncitizens of Pennsylvania, so that relegating them to the state legislature with complaints about access to court is the last thing the court majority should have mandated. *Id.* at 142 (Rosenn, J., dissenting). The analogy of the panel's findings to the testimony of an expert who is subject to cross examination is fatally flawed, and the resurrection of outcome analysis after *Byrd* and *Hanna* seems a bit out of date.

274. For example, unless one is willing to render the federal hearsay rule completely ineffectual, one could easily recognize that the panel's findings would be wholly inadmissible under the Federal Rules of Evidence. *See* FED. R. EVID. 801, 802. If this is true, then the defanged panel would be, even for state purposes, a waste of time.

275. One could argue that Pennsylvania did not want plaintiffs to have a judicial forum. There is no question that the effect of the short-lived Pennsylvania procedure was virtually to abolish the cause of action of medical malpractice in that

jection to the state rule has to do with "doing justice," and a federal court should have held the state rules incompatible with the federal court's interest in doing justice in a reasonable way.[276]

In many contexts cost avoidance and doing justice concerns are mixed. Consider federal cases suggesting that the filing of a class action in federal court tolls the running of the statute of limitations against putative class members and permits them to sue after the court has declined to certify the action as a class action.[277] *American Pipe & Construction Co. v. Utah*[278] rejected the contrary rule as both unfair to those who might have relied on their representation by the class action plaintiff and as inhibiting judicial economy by encouraging putative class members to file intervention motions.[279] While *American Pipe* grounded its holding on policies implicit in Federal Rule of Civil Procedure 23, the Court acknowledged that nothing on the face of rule 23 specifically required its holding and indeed referred to its holding as "judicial tolling" of the statute through choice of "the rule most consistent with federal class action procedure."[280]

None of the cases following *American Pipe* specifically presented an *Erie-Byrd* issue because they involved federal causes of action.[281] There is reason to believe, however, that the nature of the causes are "accidental features" of the cases[282] and that "the rule of tolling adopted . . . was an equitable incident of federal procedure."[283] If so, federal courts considering the impact of rejected class certifications brought under diversity jurisdiction would have power to choose to disregard state cases declining to toll their statutes of limitations in com-

state, and doubtless at least the insurance companies and doctors were happy with the result. If the state really set out to abolish the cause of action, whether or not at the behest of the insurance and medical lobbies, *Erie* would command the federal courts to respect that decision. But none of the opinions in Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979), even remotely suggest that abolition was the goal, and if there is any doubt on the issue it is now laid to rest by Mattos v. Thompson, 491 Pa. 106, 421 A.2d 190 (1980).

276. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

277. Chardon v. Soto, 103 S. Ct. 2611 (1983); Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983); American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

278. 414 U.S. 538 (1974).

279. *Id.* at 553.

280. *Id.* at 554.

281. *American Pipe* involved federal antitrust claims and statutes of limitations and Chardon v. Soto, 103 S. Ct. 2611 (1983), involved the civil rights statute which, via 42 U.S.C. § 1988 (1976), mandates borrowing state statutes of limitations and tolling rules unless they are "inconsistent with the constitution and laws of the United States."

282. Pavlak v. Church, 681 F.2d 617, 621 (9th Cir. 1982), *vacated and remanded,* 103 S. Ct. 3529 (1983).

283. *Id.* Pavlak limited these statements to federal question cases generally, but in support of its view that statutes of limitations might be suspended in favor of federal policy cited *Hanna* and *Byrd*. *American Pipe,* the leading case today, relied in part on earlier court of appeals cases including, interestingly, York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds,* 326 U.S. 99 (1945). *See American Pipe,* 414 U.S. at 549 n.18, 551 n.21.

parable circumstances.[284]

Chardon v. Soto[285] suggests an added dimension to the *American Pipe* problem. In *Chardon*, the issue was whether the statute of limitations should merely be suspended during the pendency of the class action, as suggested by *American Pipe*, or begin to run anew as local law would require.[286] Since applying the local rule would not conflict with any of the procedural policies of *American Pipe*, the court decided to apply it.[287] In dissent, Justice Rehnquist found the *Chardon* holding anomolous in view of his certainty that, had the state rule totally prohibited tolling, the *American Pipe* rule would still have been applied.[288] The anomaly is only superficial, however, if one accepts the notion that in certain areas there is only limited need for federal uniformity and that once the need has been satisfied it is perfectly appropriate to consider the content of various rules of law before exercising choice.[289]

V. CONCLUSION

Proper understanding of the relationship between the new federal common law and the *Erie* doctrine provides indirect but compelling support for the view that it is appropriate to take seriously the doing justice function of the federal courts and to, on occasion, override state rules which interfere with the function. More generally, it justifies greater federal willingness to employ federal procedures in those contexts when the primary opposing concern is avoidance of forum shopping. *Erie* did not abolish all federal common law, but only that which was "general." Pre-*Erie* cases involving admiralty, bankruptcy, and interstate disputes, and post-*Erie* cases like *Clearfield Trust Co. v. United States*[290] and *Textile Workers Union of America v. Lincoln Mills,*[291] warrant the conclusion that in certain cases there is both federal judicial power to adopt federal substantive rules and, in a proper case, to have these rules preempt the operation of conflicting local law. The factors used by federal courts in answering such questions include the extent to which there is a body of federal positive law in the background which warrants but does not compel the adoption of a federal rule, the nature and significance of the federal interests involved, and the nature and significance of countervailing state interests that adoption of a uniform federal rule would impinge upon.

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284. *Cf.* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (state statutes of limitations do not apply to EEOC actions enforcing Title VII claims because inconsistent with Title VII's substantive policies); *see also Lincoln Mills,* discussed *supra* at notes 75-96.
285. 103 S. Ct. 2611 (1983).
286. *Id.* at 2614.
287. *Id.* 2619.
288. *Id.* at 2621-22 (Rehnquist, Powell, & White, J.J., dissenting).
289. *See supra* note 234.
290. 318 U.S. 363 (1943).
291. 353 U.S. 448 (1957).

Use of federal common law as a basis for preempting the operation of state law in the service of federal procedural interests is not inconsistent with the new federal common law, but merely a predictable, entirely congruent, extension of its principles. The *Erie-Byrd* doctrine thus becomes but a branch of the larger corpus of federal common law aimed at resolving conflicts between federal and state policies. In *Byrd,* of course, the positive law background which influenced but did not command the operation of federal common law was procedural — the seventh amendment and the body of legislation establishing the federal courts. The federal interest was not substantive but procedural — the carrying out of constitutional and congressional mandates to have the federal courts operate as independent agencies for administering justice. But here, as there, sound constitutionalism must imply

> recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to . . . effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law . . . apposite to any issue bearing a substantial relation to an established national government function . . . .[292]

Byrd's federal common law is not some illegitimate "ghost of *Swift* . . . still walking abroad . . . ."[293] Instead, it is an entirely legitimate correlative of the doctrine of *Clearfield Trust* and *Lincoln Mills,* their antecedents and progeny.

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292. Mishkin, *supra* note 5, at 800-01.

293. Sampson v. Channell, 110 F.2d 754, 761 (1st Cir.), *cert. denied,* 310 U.S. 650 (1940).