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ARTICLE

# THE *ERIE* DOCTRINE REVISITED: HOW A CONFLICTS PERSPECTIVE CAN AID THE ANALYSIS

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## INTRODUCTION

I have taught Civil Procedure for the past twenty-five years. Having returned to teaching Conflict of Laws last year, after not having taught that course since the mid-1980s, I was interested in re-examining the *Erie*[1] doctrine from the vantage point of both of these subject areas. My goal was to see whether a combination of learning from these two related disciplines would introduce additional coherence into the analysis of this topic.

In one sense, the *Erie* doctrine and traditional choice of law determinations present analogous questions, since they both involve making a selection between competing legal rules. Choice of law determinations are of course made in a "horizontal" setting, i.e., in determining which state's or country's law to apply to an issue, with respect to a transaction touching on two or more jurisdictions. *Erie*, on the other hand, is implicated in a "vertical" setting, where the action is being heard in a federal court based on a claim arising under state law,[2] and where it is necessary to determine whether the federal court may apply federal law or whether it must apply state law to an issue in the lawsuit.

One alternative would be for the forum always to apply its own law—whether that forum is a state court deciding whether to apply its own rule or that of another jurisdiction, or whether it is a federal court deciding whether to apply state or federal law. That approach would certainly be simpler and more efficient. Instead, both choice of

1 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2 A shorthand way of describing these situations is that *Erie* commands that federal courts usually will apply state law in cases brought in those courts based on diversity jurisdiction. In fact, of course, the action may be in federal court because the plaintiff asserts a federal question, and the state law claim is heard in the exercise of the federal court's supplemental jurisdiction, or alternatively, the state law claim arises out of a cross-claim, counterclaim, or third party claim. This Article will also adhere to the "diversity jurisdiction" convention. *See generally* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

law rules and *Erie* counsel that on some occasions, the forum will, or even must, defer to the law of another sovereign.

To a large extent, similar reasons underlie this deference. Among the frequently stated rationales are the desire for uniformity of outcome; the predictability[3] and certainty that flow from that expected uniformity; the goal of affording fairness to the parties; comity based on respect for the sovereignty of other jurisdictions and their interests in the parties and the dispute, and the resultant enhancing of harmonious relations; facilitation of interstate and international commerce and travel; promoting ease of judicial administration; and the oft-cited aphorism, the wish to prevent "forum shopping."[4]

Yet, there are other motivations. For the most part, the willingness to defer in the horizontal setting to the rules of another jurisdiction is the product of comity.[5] In the vertical setting, that deference is the result of federalism, and it may in fact be required by the Constitution and/or by statute.

State vs. state[6] choice of law and *Erie* also present other striking differences. In the horizontal setting, it would not be inappropriate for the forum, in choosing between the legal rules of more than one jurisdiction, initially to conclude that either choice would be "correct" or acceptable. Indeed, it is not unlikely that different fora, applying different choice of law principles to an identical factual setting, would resolve to apply the laws of different jurisdictions to that same transaction. In contrast, in the *Erie* setting, there can only be one correct

3 This predictability is important both in advance of the dispute, so that the parties can make plans with knowledge of their likely rights and duties, and also after the dispute has arisen, so that the parties can assess their potential liability, in part to weigh the advisability of settlement.

4 *See, e.g.*, Schultz v. Boy Scouts of Am., 480 N.E.2d 679, 687 (N.Y. 1985) (finding that reasons for forum state to apply law of parties' common domicile include significant reduction in "forum shopping opportunities," rebuttal of charge that "forum-locus is biased in favor of its own laws and in favor of rules permitting recovery," advancement of "concepts of mutuality and reciprocity," and production of "rule that is easy to apply and brings a modicum of predictability and certainty"). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) & cmts. c–k (1971) (identifying choice of law principles). *But cf.* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) ("[A]ctions described as 'forum shopping' lie on a continuum of activities, many of which are integral to the legal system and may actually enhance its capacity to provide needed remedies. . . . [F]orum shopping in fact furthers legitimate goals of the legal system.").

5 There are, of course, some constitutional limits on a forum's ability to apply its law to a dispute with which it has few or no contacts. *See infra* note 158.

6 Throughout this Article, in this horizontal choice of law setting, a "state" may also include a foreign country.

answer. Either federal law applies to a particular issue or state law applies to that issue, but never both.[7]

In the horizontal setting, there are a variety of choice of law approaches that have been suggested by courts, by the Restatements, and by academics, and a state is free to choose among these alternatives. Having opted for one of these methodologies, there are only limited constraints, of either a constitutional or statutory nature,[8] on the application of that choice in any concrete situation.[9] In contrast, in the vertical setting, although there is disagreement at the margins as to the appropriate rules—some of these disagreements prompted the writing of this Article—for the most part, the limits on this form of choice of law can be found in the major Supreme Court cases and in some lower court decisions fleshing out the *Erie* doctrine. And, as just noted, *Erie's* mandate—that a federal court sometimes must apply state law to particular questions of law—is the product both of constitutional and statutory (principally the Rules of Decision Act[10]) imperative.

Finally, in the horizontal setting, the basis for choosing between the laws of different states and of foreign countries is that each has some contacts with or interest in the parties and the dispute—whether it be the domicile of the plaintiff or the defendant, the situs of the tort, the place in which the contract was to be performed, or a myriad of other possibilities—that support the application of its rules. In the vertical setting, it is still true that one (or more) state has contacts with the transaction; however, since by definition the claim in dispute does

7 *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) ("It is never the case under *Erie* that either federal *or* state law—if the two differ—can properly be applied to a particular issue . . ., but since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.") (citation omitted).

8 While the federal constitutional constraints are external to the states, the statutory constraints are self-imposed. For example, although a state would be free to apply its own statute of limitations to a dispute with which it has few or even no contacts, *see* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (discussed *infra* notes 132–37 and accompanying text), the majority of states have enacted borrowing statutes, which mandate that the courts occasionally apply the statute of limitations of another jurisdiction. For the most part, however, choice of law rules are judge-made, and as with other common law rules, can be altered or modified.

9 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941) ("Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. . . . This Court's views are not the decisive factor in determining the applicable conflicts rule.").

10 Judiciary Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (1994)) (discussed *infra* notes 16–17 and accompanying text).

not arise under federal law, the federal court's only "contact" is to serve as the forum for the resolution of the dispute.

The question then is whether, despite these differences, the similarities are sufficient to allow principles from the choice of law arena to inform the *Erie* analysis. Although it is probable that many of the determinations that must be made by the federal courts would be unaffected by invocation of learning from horizontal conflict of law determinations, I conclude that some aspects of this methodology—and particularly interest analysis and other modern policy-based choice of law principles—would prove useful in the *Erie* setting. First, the extension to *Erie* cases of one important device employed in many modern conflicts cases—the characterization of certain differences in legal rules as "false conflicts," leading to the use of the law of the only jurisdiction with a real interest in having its legal rule applied to the dispute—would reduce the number of situations in which *Erie* questions must be resolved. In addition, these modern techniques for resolving "true conflicts" between the laws of two or more states would prove instructive for resolving clashes between state law and federal judge-made law.

## I. THE *ERIE* DOCTRINE: A BRIEF SURVEY

### *A.* Swift v. Tyson *and* Erie v. Tompkins

The saga of Harry Tompkins' 1934 encounter with a refrigerator car operated by the Erie Railroad Company, and the ensuing litigation, has been retold countless times.[11] Tompkins was walking parallel to the railroad's tracks in Pennsylvania on a frequently used pathway when he was apparently struck by a door on a refrigerator car that had not been closed properly; his right arm was severed in the accident. Relying on the diversity jurisdiction of the federal courts, Tompkins brought an action in the U.S. District Court for the Southern District of New York. Under Pennsylvania's common law, since Tompkins was a trespasser, the railroad owed him a duty only to avoid "wanton" or "willful" negligence. In contrast, the federal courts, applying their own common law rules, had traditionally imposed a higher duty on landowners in these situations, finding liability for "ordinary" negligence.

11 The interesting facts of the accident and the subsequent litigation are described in Irving Younger, *Observation: What Happened in* Erie, 56 TEX. L. REV. 1011 (1978) and Bob Rizzi, Erie *Memoirs Reveal Drama, Tragedy,* HARV. L. REC., Sept. 24, 1976, at 2.

The federal district court, applying federal law, awarded judgment for Tompkins; that judgment was sustained on appeal to the Court of Appeals for the Second Circuit.[12] In the Supreme Court, Justice Brandeis framed the issue, not in terms of the conflicting standards of tort liability, but rather "whether the oft-challenged doctrine of *Swift v. Tyson*[13] shall now be disapproved."[14]

The *Swift* decision, handed down in 1842, was principally an analysis of commercial law issues.[15] However, its subsequent significance was the limiting interpretation it gave to the so-called Rules of Decision Act,[16] which was in fact a section of a federal statute dating to the First Congress in 1789. The Act provides:

> [T]he laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[17]

*Swift* was a dispute about a bill of exchange that was drawn by two men—Norton and Keith—who were involved with Tyson in real estate transactions in the State of Maine. Tyson was the drawee of a bill that was made payable to Norton; that bill was accepted by Tyson in New York and then was endorsed by him to Swift. When Swift brought suit in a federal court in New York to collect on the bill, Tyson attempted to assert several defenses—including fraud and failure of consideration—that would have been available to him in an action between he and Norton.[18]

Although there was decisional law in New York—including cases from the highest court of the state—that supported Tyson's position, Justice Story rejected the contention that the Rules of Decision Act required the application of that law. He stated that the Act required only application of the "laws" of the states, and "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."[19]

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12 *See* Tompkins v. Erie R.R. Co., 90 F.2d 603 (2d Cir. 1937).

13 41 U.S. (16 Pet.) 1 (1842).

14 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

15 Justice Story's discussion of the issue for which the decision has become famous took up less than a paragraph of the Court's opinion, and Justice Catron's concurring decision made no reference to this issue.

16 Judiciary Act, ch. 20, 1 Stat. 73 (1789).

17 *Id.* § 34, 1 Stat. 92 (1789).

18 One element of the failure of consideration defense was that the bill was given in exchange for a preexisting debt, which assertedly did not constitute "valuable consideration." *Swift*, 41 U.S. (16 Pet.) at 4.

19 *Id.* at 18.

Rather, the Act required deference only to positive statutes of the state, judicial interpretations of those statutes, "rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."[20]

In contrast, the interpretation and effect of contracts was not to be done by reference to state decisional law, but rather by considering general principles and doctrines of commercial jurisprudence. While the "decisions of the local tribunals upon such subjects are entitled to . . . the most deliberate attention and respect of this Court . . . they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."[21]

Although the rule in *Swift* may have crept in with a whimper,[22] the determination to address its continuation, as noted above,[23] was done with a bang. Given its longevity and provenance, the Court in *Erie* expressed reluctance to overrule *Swift*.[24] However, Justice Brandeis concluded that this result was mandated by both the Rules of Decision Act and the Constitution. While offering a number of other

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20 *Id.*

In fact, it has been argued that:

> The true dichotomy stressed in the *Swift* opinion, therefore, is not that between decisional and statute law, but rather that between questions of local law, where the federal courts are bound by state statutes, and general law, where they are not; and while "general law" is a vague, undefined term, Story clearly puts commercial law within its boundaries.

Charles A. Heckman, *The Relationship of* Swift v. Tyson *to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246, 248 (1973).

Resolution of this dispute is not essential to the proposals made in this Article.

21 *Swift*, 41 U.S. (16 Pet.) at 19.

22 *See supra* note 15. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 102–03 (1945), Justice Frankfurter indicated that similar attitudes towards treatment of state law in the federal courts had been evinced in cases, including some in the Supreme Court, predating *Swift* by at least three decades.

23 *See supra* note 14 and accompanying text.

24 "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) (footnote omitted).

justifications for the Court's holding,[25] the *Erie* Court ultimately relied on a constitutional imperative for the decision.[26]

Interestingly, however, while providing hints, the opinion did not specifically identify either textual or interstitial sources in the Constitution for the requirement of deference to state law. A variety of possibilities have been suggested and subsequently criticized.[27] Among these are the general federalism fabric of the Constitution; the equal protection component of the Fifth Amendment's Due Process Clause;[28] the Tenth Amendment;[29] and Articles I and III of the Constitution.[30] Without belaboring the point, since resolution of that

25 In the order in which they were listed in Justice Brandeis's opinion, these reasons included recent research by Professor Charles Warren indicating that *Swift* had given erroneous construction to the Rules of Decision Act; *Swift* had been subject to widespread criticism; the benefits hoped for from *Swift* (presumably including increased congruence among legal rules) did not accrue; state courts' persistence in adhering to their own views of common law issues prevented uniformity; the absence of clear distinctions between issues of "general law" and of "local law" created yet another level of uncertainty; the *Swift* rule introduced grave discrimination by noncitizens against citizens; it prevented uniformity in the administration of the state's laws; and the *Swift* doctrine had been urged as a reason to abolish or limit diversity jurisdiction. *See id.* at 71–72.

26 *See supra* note 24. In contrast, Justice Reed, in his concurring opinion in *Erie*, 304 U.S. at 90–92, argued against any view that the *Swift* doctrine was unconstitutional and instead urged that it could be rejected merely as a misinterpretation of the Rules of Decision Act—that the word "laws" in that statute in fact included common law as well as a state's Constitution and statutes.

27 *See, e.g.*, Abram Chayes, *Some Further Last Words on* Erie*: The Bead Game*, 87 HARV. L. REV. 741 (1974); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

28 Although the Court did not use this concept, it did state that "the [*Swift*] doctrine rendered impossible equal protection of the law." *Erie*, 304 U.S. at 75. However, in 1938, the Equal Protection Clause of in the Fourteenth Amendment constituted a limitation only on the conduct of the states. It was not until years later that the benefits of the Clause were extended through the Fifth Amendment's Due Process Clause to cover conduct by the federal government. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

29 *See Erie*, 304 U.S. at 78–80 ("[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States . . . . [I]n applying the [*Swift*] doctrine this Court and the lower courts have invaded rights that in our opinion are reserved by the Constitution to the several States.").

30 *See id.* at 78 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

question is not important to this Article, my own preference is for a combination of these latter two alternatives. The authority given to Congress to create federal courts and to confer subject matter jurisdiction on them does not carry with it the power to create substantive law in areas beyond the ability of Congress to legislate.[31] This conclusion is supported both by Justice Brandeis' famous statement that "[t]here is no federal general common law"[32] and by the coincidental development of "federal common law."[33] While *Erie* prohibits the creation by federal judges of law in areas that fall outside the purview of federal competence—defined in part by the areas in which Congress could create positive law[34]—the federal courts undoubtedly have the power to develop "federal common law" in areas where there is a "federal interest."[35]

### *B. Basic Principles*

#### 1. Is There a Clash Between State and Federal Law?

As a result of several dozen subsequent Supreme Court decisions (as well as literally thousands of lower court opinions) interpreting the command of *Erie*,[36] the rough outline of this "doctrine" can be

31 *See* Boyle v. United Tech. Corp., 487 U.S. 500, 517 (1988) ("*Erie* put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law.") (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973)) (Brennan, J., dissenting).

32 *Erie*, 304 U.S. at 78.

33 The appropriate scope of federal common law is discussed *infra* notes 238–46 and accompanying text.

34 Limitations on the scope of the federal courts' power to declare rules of federal common law, and conversely the requirement that federal courts must defer to state "rules of decision" in areas of general law, are *not* necessarily coextensive with the reach of power granted by Article I to the Congress to legislate. In *Erie*, a major criticism of the *Swift* doctrine was that "[t]he federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision that Congress was confessedly without power to enact as statutes." *Erie*, 304 U.S. at 78.

While there may have been doubt in 1938 about whether Congress could have passed a statute defining the duty of a railroad operating in interstate commerce towards persons walking on its rights-of-way, I assume there would be broad acceptance today of Congressional power under the Commerce Clause to enact such legislation. It does not follow that, in the absence of such a statute, a federal court today could create a federal standard regarding that duty and could disregard a different rule defined by a state court.

35 *See infra* notes 238–46 and accompanying text.

36 *Erie* is certainly one of the most frequently cited of all Supreme Court decisions. As of March 1999, the Westlaw KeyCite service indicated that it has been cited in 8887 subsequent cases and noted that the average Supreme Court case of that vintage had been cited only 158.7 times.

summarized as follows: first, when presented with state law that provides a rule for determining an issue arising in the litigation and when faced with a different (and therefore conflicting) federal rule, the federal court must determine whether the federal law actually applies to the question in dispute.[37] Sometimes described as whether there truly is a "collision" or "clash" between federal and state law, this initial inquiry indicates that sometimes federal law should be given a more limited or restricted reading, and so state law, which thus turns out to be the only rule on point, obviously becomes dispositive. As the description of the Supreme Court cases on this first step will indicate, conflicting evaluations of the objectives of various federal rules have led to results that cannot easily be reconciled.

The principal discussion of this step in the analysis is found in *Walker v. Armco Steel Corp.*[38] In a tort action that was brought in a federal court in Oklahoma, the plaintiff filed his complaint with the court within the requisite two-year period specified by the state statute of limitations; however, service of process was not made on the defendant until more than two years and three months had elapsed after the cause of action had accrued. The Oklahoma statute of limitations provided that an action is not "commenced" until service of process is accomplished, although it also afforded the plaintiff a sixty-day period to make service for those complaints that had been filed within the limitations period. Since neither of these deadlines had been satisfied and since admittedly the action would not have been timely in state

37 The *real* first step is to determine the content and scope of both the state rules and the potentially conflicting federal rules. The federal court's identification of the content of state law in turn may involve such questions as whether an existing precedent is still good law, whether the state's highest court would follow the decision of a lower court, and how the state courts would resolve matters of first impression. *See* West v. American Tel. & Tel. Co., 311 U.S. 223, 236–38 (1940) (finding that federal court must apply rule announced by intermediate appellate court unless it is convinced by other persuasive data that state supreme court would decide otherwise, and courts cannot simply apply "better" rule that it thinks the state supreme court ought to follow); *cf.* Salve Regina College v. Russell, 499 U.S. 225, 231 (1991) ("[A] court of appeals should review *de novo* a district court's determination of state law.").

Although a discussion of these questions is beyond the scope of this Article, I cannot resist including my favorite *Erie* quotation, which is found in an opinion by Judge Friendly: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), *judgment set aside and remanded*, 365 U.S. 293 (1961). *See also Salve Regina*, 499 U.S. at 238 ("The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge.").

38 446 U.S. 740 (1980).

court, the defendant moved to dismiss the action. The plaintiff, in turn, argued that Rule 3 of the Federal Rules of Civil Procedure (FRCP), which provides that an "action is commenced by filing a complaint with the court,"[39] controlled and that the second step of the analysis, called for by *Hanna v. Plumer*,[40] was required.

Rejecting this contention, the Supreme Court concluded that Rule 3 should be given a more limited reading. It stressed that

> [a]pplication of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. . . . The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.[41]

The Court held that Rule 3 governed only "the date from which various timing requirements of the Federal Rules begin to run"[42] and did not affect or toll state statutes of limitations.[43] Instead of clashing, the Rule and the state statute "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict."[44] And, in the absence of such a conflict, the policies behind *Erie* required application of the state's rule.[45]

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39 FED. R. CIV. P. 3.

40 380 U.S. 460 (1965). *See infra* notes 101–05 and accompanying text.

41 *Walker*, 446 U.S. at 749–50 (citation omitted).

42 *Id.* at 751.

43 The Court stated that it did not intend "to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning." *Id.* at 750 n.9. However, the Court declined to decide whether Rule 3 would even have the sought-for tolling effect for actions filed under federal law. *See id.* at 751 n.11. As a number of commentators have noted, by referring to what may be nonexistent "timing requirements," the more limited scope given to Rule 3 may render it close to meaningless.

*See generally* FLEMING JAMES ET AL., CIVIL PROCEDURE 130 (4th ed. 1992) (stating that *Walker* involved a "questionable interpretation of the purpose of Rule 3"); George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 692 (1993) (asserting that one of "most significant aspects of the *Walker* decision" is "the Court's somewhat strained reading of Rule 3"); Paul Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 316 ("*Walker* is simply an anomaly"); Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 967 (1988) (attempting to reconcile *Walker* with *Hanna* required "strained explanation" of "clear wording" of a Federal Rule).

44 *Walker*, 446 U.S. at 752.

45 *See id.* at 753 ("There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to

In contrast, in two subsequent decisions, the Supreme Court expressly found irreconcilable conflicts between the state rule and the federal law—between a state statute and a Federal Rule of Appellate Procedure (FRAP) in *Burlington Northern R.R. Co. v. Woods*,[46] and between a state common law doctrine and a federal statute in *Stewart Organization, Inc. v. Ricoh Corp.*[47]—and then in both cases decided that federal law would apply.[48]

In *Burlington Northern*, Alabama had provided by statute for the automatic entry of a ten percent penalty against a defendant who unsuccessfully contested on appeal an adverse money judgment entered in the trial court. In contrast, Rule 38 of FRAP gave discretion to the courts of appeals to award "just damages and single or double costs" upon making a determination that either party had prosecuted a frivolous appeal. The Supreme Court concluded that "the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute."[49]

In *Stewart*, the defendant had made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer a breach of contract action from a federal district court in Alabama to a federal court in New York. That request was justified in part by a forum selection clause in the contract, designating Manhattan as the only location in which litigation arising out of the contract could be brought. The plaintiff asserted that transfer should not have been permitted because Alabama treated forum selection clauses as contrary to public policy, and thus an Alabama state court would have retained the action. Again zeroing in on the discretionary and flexible nature of the federal statute, in contrast to Alabama's categorical rule that focused on a single concern or subset of factors, the Supreme Court found that these ap-

judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.").

46 480 U.S. 1 (1987).

47 487 U.S. 22 (1988).

48 *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305 (7th Cir. 1995) (finding no clash between Federal Rule of Civil Procedure 68's provision for settlement offers by defendants and a state law permitting plaintiffs to make such offers).

49 *Burlington Northern*, 480 U.S. at 7. The Court also noted that the Alabama statute, like a similar Mississippi statute, penalized every unsuccessful appeal regardless of merit, while Rule 38 penalized only frivolous appeals or appeals interposed for purposes of delay. The Court therefore concluded that "the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application to federal diversity actions." *Id.*

proaches resulted in "two choices in a single 'field of operation,'"[50] and thus, unlike *Walker*, this was "not a case in which state and federal rules 'can exist side by side.'"[51]

Finally, in its most recent *Erie* decision, *Gasperini v. Center For Humanities, Inc.*,[52] the majority rejected Justice Scalia's assertion that there was a "direct collision" between the standard for the grant of a new trial found in FRCP Rule 59 and a state standard for judicial review of the amount of a jury verdict.[53] Citing *Walker*'s assertion that the Federal Rules should be interpreted "with sensitivity to important state interests and regulatory policies,"[54] the Court concluded that since Rule 59 contained no standard for determining whether damages were excessive, and since the state law that gave rise to the claim was the only candidate for making that determination, there was no "clash" between state law and the Federal Rule.[55]

The apparent inconsistency between these decisions is the product of the use of conflicting canons of construction. On the one hand, the Court has asserted that federal statutes and the Federal Rules should not be given unnecessarily narrow interpretations. How-

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50 *Stewart*, 487 U.S. at 30 (quoting *Burlington Northern*, 480 U.S. at 7). The Court also explained that the reference in earlier cases, such as *Walker* and *Hanna*, to the determination whether a "direct collision" exists between state and federal law

> is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the "direct collision" language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute.

*Id.* at 26 n.4.

51 *Id.* at 31 (quoting *Walker*, 446 U.S. at 752). *See supra* note 44 and accompanying text. As Justice Scalia's dissent and others have argued, it is questionable whether § 1404(a) indeed controlled the issue here or whether it deserved a narrower reading, making the federal statute applicable in diversity cases only after it was determined that state law did not serve as an obstacle to transfer. *See also infra* notes 68–73 and accompanying text.

*See generally* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1643 (1998) (asserting that *Stewart*'s reading of "vague federal directives broadly to displace state law" constituted "overzealous application of *Hanna*"); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 338 (1988) ("majority opinion in *Ricoh* leaves a number of distressing problems and legal anomalies in its aftermath"); Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1961–64 (1991) (criticizing *Stewart*).

52 518 U.S. 415 (1996) (discussed *infra* notes 62–67 & 114–15 and accompanying text).

53 *See id.* at 468.

54 *Id.* at 427 n.7.

55 *See id.* at 437 n.22.

ever, the Court also seeks to be sensitive to state interests to ensure that unnecessary clashes between state and federal law may be avoided. The next Section of this Article will discuss the extent to which conflicts analysis may help determine the existence of a "collision" in this vertical setting.[56]

2. Dealing with a Clash: What Is the Source of the *Federal* Rule?

As the second step in the analysis, after it is determined that both rules are on point, the federal court should then identify the source of the federal rule.[57] One can then identify a hierarchy—running from the Constitution, to federal statutes, to the several sets of Federal Rules, to federal judge-made law—with regard to the extent to which federal law must yield to the law of the state.

a. Clashes with the U.S. Constitution

At one end of the spectrum, if the federal rule is the product of constitutional command, federal law will always prevail, since the Constitution is the supreme law of the land.[58] Potential clashes between the Constitution and state law have principally arisen with respect to the Seventh Amendment's protection of the right to jury trial and limitations on subsequent judicial review of a jury's findings. However, in both of the Supreme Court cases that raised this possibility, the Court found that the Amendment only "influenced" the result but did not control the issue and, thus, did not command yielding to the constitutional provision.

At issue in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[59] was whether the federal courts had to defer to a state's allocation of decisionmaking responsibility to a judge rather than to a jury with respect to a specific and disputed issue or whether they could follow the federal practice of using the jury as fact-finder. The Court declined to decide whether the Seventh Amendment spoke to this particular ques-

56 *See infra* notes 116–24 and accompanying text.

57 The source of the *state* law is irrelevant. By rejecting the distinction in *Swift v. Tyson* between positive and "general" law, one of the key conclusions of *Erie* was that all state law—whether judge-made or the product of the legislative process—is equally "law" for purposes of the Rules of Decision Act.

58 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, § 2.

59 356 U.S. 525 (1958).

tion[60] and instead decided, as discussed below,[61] to apply the federal approach for other reasons.

*Gasperini v. Center for Humanities, Inc.*,[62] involved application of the second half of the Seventh Amendment—the Re-examination Clause—which forbids a court from re-examining a fact tried by a jury other "than according to the rules of the common law."[63] The New York legislature had enacted a statute requiring the state intermediate appellate courts to determine whether a jury award was excessive or inadequate based on whether it "deviates materially from what would be reasonable compensation."[64] Judicial interpretation had extended this obligation to the state trial courts. At issue was whether federal courts in New York hearing a diversity case were required to follow this standard or whether they should use the more deferential traditional federal standard, under which a verdict is set aside only if it "shocks the conscience" of the court.

Justice Ginsburg's majority opinion and Justice Scalia's dissent gave different readings to the pre-1791 history of judicial review of jury decisions, with the majority concluding that the standard to be applied could not be derived from the commandment of the Seventh Amendment. However, both opinions apparently agreed that had the pre-1791 common law, which was incorporated into the Constitution by the Seventh Amendment, absolutely prohibited such judicial review, the federal courts would have had to follow the constitutional command, irrespective of any *Erie*-type considerations.[65]

Similarly, despite the disagreements in *Gasperini*, there is no question that there would have to be a right to trial by jury in a federal court in a diversity case seeking monetary relief, even if the state court

60 Justice Brennan first stated that the distribution of trial functions between the judge and jury was done "under the influence—if not the command—of the Seventh Amendment." *Id.* at 537 (footnote omitted). The Court then added that "[o]ur conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh amendment embraces the factual issue [involved here]." *Id.* at 537 n.10.

61 *See infra* notes 110–13 and accompanying text.

62 518 U.S. 415 (1996).

63 "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

64 N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

65 For example, had the state abolished jury trials altogether, the parties would still have been entitled to a jury in the federal courts even if it were clear that the only reason that the plaintiff (or the defendant by removal) had opted for federal court was to obtain the benefit of a jury trial.

had expressly abolished that right.[66] Conversely, there need not be a jury trial in a federal court action in which the plaintiff is seeking purely equitable relief, even if the state court would accord that right in the same action.[67]

b. Clashes with Federal Statutes

The obligation to follow federal statutes that conflict with state law is only slightly less strong. As discussed above,[68] in *Stewart* the Supreme Court had to decide whether to apply the flexible standards of 28 U.S.C. § 1404(a) for transfer of an action from one federal district court to another, based in part on a forum selection clause, in the face of state decisional law treating such clauses as unenforceable because they were contrary to the state's public policy. The Court chose to ignore the state rule, holding instead that a federal procedural statute that controls the issue "must be applied *if* it represents a valid exercise of Congress's authority under the Constitution."[69] Although

66 *See* Simler v. Conner, 372 U.S. 221, 222 (1963); Gipson v. KAS Snacktime Co., 83 F.3d 225, 230 (8th Cir. 1996).

67 In *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931), the Court held that a federal judge sitting in a diversity case could take an action away from the jury and direct a verdict, notwithstanding a provision in the Arizona Constitution that the defenses at issue in the case "shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." *Id.* at 92. Rejecting the argument that the Rules of Decision Act compelled deference to the state constitution, the Court held that "state laws cannot alter the essential character or function of a federal court." *Id.* at 94.

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), the Court relied heavily on *Herron*. While conceding that it was decided before 1938, Justice Brennan noted that even pre-*Erie*, federal courts had a duty to defer to the positive law of the states; nonetheless, "the strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," *id.* at 533, compelled use of a federal standard to determine the availability of a right to a jury trial.

*See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 465 (1996) ("[N]o one would argue that *Erie* confers a right to a jury in federal court wherever state courts would provide it; or that, were it not for the Seventh Amendment, *Erie* would require federal courts to dispense with the jury whenever state courts do so.") (Scalia, J., dissenting); Goar v. Compania Peruana de Vapores, 688 F.2d 417, 423–24 (5th Cir. 1982).

Although there is no authority on point, it is arguable that a contrary result should occur if the right to trial by jury is treated by the state as bound up with, and is essential to, the cause of action, so that the use of a jury as the trier of fact is viewed by the state as a "substantive" element of the claim.

68 *See supra* notes 50–51 and accompanying text.

69 Stewart Org. v. Ricoh Corp., 487 U.S. 22, 31–32 (1988). Because of congressional power found in Article III, as augmented by the Necessary and Proper Clause, to prescribe rules governing procedure in the federal courts, a statute that is capable of classification as "procedural" will pass constitutional muster. However, because the

the decision did not mention the Supremacy Clause, the unmistakable conclusion is that subject only to that determination, a federal statute will always prevail over an inconsistent state law.[70]

This result is flawed in two respects. First, it is true that vertical forum shopping to obtain a more favorable rule was not at issue in this case since the plaintiff had opted for federal court. But the Court's holding would apply equally in the future if a plaintiff were to commence an action in state court and then the defendant chose to remove the case in order to get the benefit of the federal transfer alternative, in a situation in which Alabama's rule clearly would have locked the defendant into litigating in that state had the action remained in state court. Furthermore, the transfer alternative became available only because the parties happened to be citizens of different states.[71]

Second, the holding also treated as irrelevant whatever policies—which the Court dismissed as not even worthy of discussion[72]—animated Alabama's antipathy to forum selection clauses. Instead, the Court flatly rejected these concerns: "Because a validly enacted Act of Congress controls the issue in dispute, we have no occasion to evaluate the impact of application of federal judge-made law on the 'twin aims' that animate the *Erie* doctrine."[73]

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forum in which a contract dispute is litigated certainly can affect the resolution of disputed issues, Alabama's decision to keep such litigation in-state may well have been part of the state's "substantive" law, and thus, the application of § 1404(a) here may have failed even the "arguably procedural" test.

70 "If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter . . . ." *Id.* at 27.

71 Justice Scalia noted this incentive for forum shopping:

> With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and non-resident defendants will be encouraged to shop for more favorable law by removing to federal court.

*Id.* at 40 (Scalia, J., dissenting).

72 In fact, although the court of appeals had discussed Alabama's policies for its rule, the Court stated that "[o]ur determination that § 1404(a) governs the parties' dispute notwithstanding any contrary Alabama policy makes it unnecessary to address the contours of state law." *Id.* at 30 n.9.

73 *Id.* at 32 n.11. These "twin aims" are discussed *infra* notes 101–07 and accompanying text.

As discussed *supra* note 69, because of the arguably "substantive" nature of the Alabama rule, it is questionable whether the application of § 1404(a) to this situation passed constitutional muster. A consideration of these state policies would have helped to inform a determination whether Alabama's rule was indeed "substantive."

c. Clashes with Federal Rules

Virtually irrebuttable presumptions also apply in favor of application of a Federal Rule in preference to a conflicting state procedural rule. As illustrated by the *Walker* case discussed above,[74] it is true that on several occasions the Supreme Court has declined to apply a Federal Rule, giving it a more limited reach and therefore finding that it did not extend to the issue in question and leaving only the state law to occupy the area.[75] However, the Court has stated that "if the Rule in point is consonant with the Rules Enabling Act and the Constitution, the Federal Rule applies regardless of contrary state law."[76] In fact, in all of the Supreme Court decisions in which the Rule's coverage was found to be coextensive with the state law, the Federal Rule prevailed.[77] And, given the Court's statement in *Hanna* that:

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74 *See supra* notes 38–45 and accompanying text.

75 *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996); Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949) (giving limited reading to Federal Rule of Civil Procedure 23 to find no conflict with state statute that required plaintiff to post bond as precondition to assertion of shareholder's derivative action against corporation); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (similar facts to *Walker*); Palmer v. Hoffman, 318 U.S. 109, 117 (1943) ("[Federal Rule of Civil Procedure 8(c)] covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply.") (citations omitted).

76 *Gasperini*, 518 U.S. at 427 n.7 (citation omitted).

A Federal Rule will satisfy the constitutional constraints if it is "indisputably procedural." Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)). A Federal Rule will satisfy the standards of the Rules Enabling Act if it is a rule of practice, procedure, or evidence, and if it does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1994). A few of the major cases discussing these requirements under the Act are noted *infra* note 77. An extended discussion of these limits is beyond the scope of this Article. It is very important to note, however, as discussed *infra* notes 129–44 and accompanying text, that the characterization of an issue as "substantive" or "procedural" may be quite different depending on whether the inquiry is made for *Erie* or for horizontal choice of law purposes.

77 *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1 (1987); Hanna v. Plumer, 380 U.S. 460 (1965); Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

In *Sibbach*, the plaintiff had sustained injuries in an accident in Indiana and she brought suit for her damages in federal district court in Illinois. While Indiana courts, like the federal courts, permitted physical examination of parties as a part of pretrial discovery, such compelled examination was not permitted in the state courts in Illinois. Resisting the defendant's motion made under Federal Rule of Civil Procedure 35, the plaintiff argued that the Rule exceeded the authority given to the Court by the Rules Enabling Act.

> [W]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions[,][78]

it seems unlikely that any future challenge to an applicable Federal Rule will prove successful.[79]

In *Burlington Northern*, the most recent Supreme Court decision presenting a direct clash between state law and a Federal Rule, this

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Without any citation of *Erie*, the Court dismissed any suggestion that congruence between the federal and Illinois practices was required. "[I]f [the Rules] are within the authority granted by Congress, . . . the District Court was not bound to follow the Illinois practice respecting an order for physical examination." *Id.* at 10. Instead, the Court's opinion focused on the requirement of the Act that the Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1998).

The plaintiff had urged that even if the Rule was "procedural," the limitation in § 2072(b) reflected congressional intent "that in regulating procedure this court should not deal with important and substantial rights theretofore recognized." *Sibbach*, 312 U.S. at 13. Because of concern that this approach would "invite endless litigation and confusion worse confounded," *id.* at 14, the Court rejected this expansive view of "substantive rights" and instead adopted a narrower test: "The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.*

In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), a defendant doing business solely in the Southern District of Mississippi challenged the authority conferred by Federal Rule of Civil Procedure 4(f), which permitted the plaintiff to serve it with process in the Northern District of the state, apparently in conflict with the state court's venue provisions. Concluding that this modest expansion with respect to service of process was consistent with the Rules Enabling Act, the Court stated: "Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants . . . ." *Id.* at 445.

*See also* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 553 (1991) ("Imposing monetary sanctions on parties that violate the [requirements of] Rule [11] may confer a benefit on other litigants, but the Rules Enabling Act is not violated by such incidental effects on substantive rights."); *Burlington Northern*, 480 U.S. at 5 ("Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.").

78 *Hanna*, 380 U.S. at 471.

79 Justice Harlan, in his concurrence, noted that under this standard a Federal Rule would invariably be found controlling: "Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute." *Id.* at 476 (Harlan, J., concurring).

presumption was invoked in a setting that should have raised substantial *Erie* considerations—but that the Court completely ignored. As noted above,[80] Alabama had provided by statute for the automatic entry of a penalty against a defendant who unsuccessfully contested on appeal an adverse money judgment entered in the trial court, while Rule 38 of FRAP left it to the discretion of the courts of appeals to award damages and costs to either party upon a showing that the appellant had prosecuted a frivolous appeal. Reiterating the *Hanna* approach, the Court held, in a unanimous decision, that if the state law and the Federal Rule were in "direct collision," the latter "*must then be applied* if it represents a valid exercise of Congress' rulemaking authority."[81]

This result suffers from the same defects as were noted regarding *Stewart*. The Court ignored the possibility that the defendant, who in fact did remove the case from the state court, might have opted for the federal forum precisely to get the benefit of the less onerous federal penalty scheme.[82] And, it also accorded no deference to several of Alabama's interests, which the Court specifically identified[83] as the state's reasons for imposing its automatic penalty requirement.[84]

d. Clashes with Federal Judge-Made Law

What, then, is left for *Erie* analysis? As a practical matter, serious inquiry only remains when a state rule clashes with a federal proce-

80 *See supra* note 49 and accompanying text.

81 *Burlington Northern*, 480 U.S. at 5 (emphasis added). Applying the standards summarized *supra* notes 36–49, the Court found that Rule 38 could reasonably be classified as procedural and that it satisfied the standards of the Rules Enabling Act since the "choice . . . in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves." *Id.* at 8.

82 Although there was no evidence of such a motivation here, it is certainly not beyond the realm of possibility that a defendant, calculating the possibility of an initial loss in the trial court and not wanting to bear the risk that an appeal might subject it to an automatic penalty, might then opt to remove the case to avoid this draconian result.

83 *See Burlington Northern*, 480 U.S. at 4 ("The purposes of the mandatory affirmance penalty are to penalize frivolous appeals and appeals interposed for delay . . . and to provide 'additional damages' as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal.") (citation omitted).

84 It is certainly arguable that the first of these purposes is directed at deterring appeals in the state system because of the systemic cost they impose and because Alabama might be indifferent as to similar impositions on the federal system resulting from appeals. The second goal, however, of compensating plaintiffs for the expense, delay, and uncertainty in seeking to preserve their judgment on appeal is implicated regardless of the nature of the forum.

dural rule that is the product of judge-made law.[85] The Supreme Court has provided some guidance on this question. But it is the ambiguities that still remain in resolving those clashes that are the subject of the balance of this Article.

### 3. Approaches for Resolving Clashes

The test for choosing between a state law and conflicting federal common law reflects an amalgam of four sometimes overlapping approaches. These methodologies have been used by the Court at different times in different cases, and they may not all have equal present-day validity.

#### a. Substantive-Procedural

First, *Erie* itself stands for the proposition that when the issues are "substantive," state law controls.[86] In *Byrd*, the Court asserted as a first principle that in diversity cases the federal courts were required to apply "state-created rights and obligations."[87]

More recently, the Supreme Court has asserted the opposite proposition: "Only when there is a conflict between state and federal substantive law are the concerns of *Erie* . . . at issue."[88] In *Gasperini*, the Court reiterated this misleading assertion: "Under the *Erie* doc-

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85 Because of the occupation of much of the procedural landscape by the Federal Rules and the growth in federal statutes, the number of unresolved questions continues to diminish.

86 Justice Brandeis' opinion in *Erie* only used the term "substantive" once, and then principally as a limitation on congressional power: "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state . . . . And no clause in the Constitution purports to confer such a power upon the federal courts." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

The inference that *Erie* offered a "substantive-procedural" dichotomy as a test for the situations in which federal courts must defer to state law is supported both by the fact that the issue in question there—the duty of the railroad to a trespasser—was clearly substantive and by the coincidence in 1938 of the *Erie* decision and the effectiveness of the Federal Rules of Civil Procedure, which substituted a uniform set of procedural rules in the federal courts for the former regime under the Conformity Act, whereby each federal court looked to the rules of procedure of the state in which the court sat.

87 Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535 (1958); *see also id.* ("[T]he federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the [state] rule . . . to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.").

88 Chambers v. Nasco, Inc., 501 U.S. 32, 52 (1991) (citation omitted).

trine, federal courts sitting in diversity apply state substantive law and federal procedural law."[89]

In fact, these statements do not reflect the reality of decisions such as *Guaranty Trust v. York*[90] and *Gasperini* itself, in both of which the Court held that the federal courts may have to defer to state laws that have both procedural and substantive qualities. And, quite apart from whether this distinction captures the policy behind the *Erie* doctrine, it also suffers from two additional defects: there is an absence of agreement on what issues are substantive,[91] and this "test" fails to address the proper resolution of hybrid or mixed questions[92] since, depending on the context, the same issue can be either procedural or substantive.[93]

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89 Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996). *See also* Salve Regina College v. Russell, 499 U.S. 225, 226 (1991) ("*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary.").

90 326 U.S. 99 (1945).

91 "Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini*, 518 U.S. at 427. "The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive." *Id.* at 465 (Scalia, J., dissenting). See also *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), and note 77, *supra*, for a discussion of the test for "substantive rights" limitation in the Rules Enabling Act, 28 U.S.C. § 2072(b) (1994).

92 In *Gasperini*, Justice Ginsburg noted that New York's "deviates materially" standard for judicial review of jury awards was both "substantive," in that it controlled how much a plaintiff could be awarded, and "procedural," in that it assigned decisionmaking authority to the state's courts. *See Gasperini*, 518 U.S. at 426. The Court ultimately concluded, however, that the statute was predominantly substantive, noting the parties' agreement that a statutory cap on damages clearly would constitute substantive law for *Erie* purposes. "In sum, § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive." *Id.* at 429 (citation omitted).

93 *See Guaranty Trust*, 326 U.S. at 108–09. As the Court stated:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants.
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> . . . .
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> And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

*Id.*

b. Outcome-Determination

Second, *Guaranty Trust* proposed an "outcome-determination" test. The federal courts were viewed as offering an alternative forum for the parties when they were of diverse citizenship, but not a different body of law.[94] Therefore, even with respect to some issues that might possibly be classified as procedural or a mixture of procedure and substance,[95]

> in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be *substantially the same*, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[96]

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94 *See infra* note 155 and accompanying text.

95 At issue in *Guaranty Trust* was whether, in a diversity action in which the plaintiff sought equitable relief, the federal court must apply the state's statute of limitations. *See infra* notes 130–31 and accompanying text.

96 *Guaranty Trust*, 326 U.S. at 109 (emphasis added). Reiterating this standard, the Court asserted that "the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Id.*

A few years later, the Court applied the rule announced in *Guaranty Trust* in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to a state statute requiring a plaintiff who unsuccessfully prosecuted a shareholders' derivative action to pay for all expenses and attorney's fees incurred by the corporation in defending the action and further requiring the plaintiff to post a bond for those expenses as a precondition to litigating. Justice Jackson concluded that even if the plaintiff's characterization of the statute as procedural were accepted, this was not dispositive of the *Erie* issue since the statute also created a new substantive liability. "We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." *Id.* at 556.

On the same day, the Court held in *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), that Mississippi's "door-closing" statute, which required foreign corporations to file a written power of attorney designating an agent on whom service of process could be made as a precondition of access to "any of the courts of this state," equally barred access to noncomplying corporations to the federal courts in the state:

> The *York* case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court.

*Id.* at 538.

Two years previously, in *Angel v. Bullington*, 330 U.S. 183 (1947), the Supreme Court had also held that the federal courts must follow a state "door-closing" statute. A citizen of Virginia had sold land in Virginia to a North Carolina citizen. After the purchaser defaulted on one of the notes, the seller foreclosed on the land and then brought an action for the deficiency in a North Carolina state court. Relying on a North Carolina statute that precluded recovery of such deficiencies, the North Caro-

This second approach was subsequently modified and qualified in *Hanna*, which is discussed below.[97] "Outcome-determination" suffers from the fact that it does not fully reflect all of the policies underlying *Erie*.[98] Furthermore, it fails to take complete account of the fact that a litigant's choice of federal court rather than state court almost always will reflect the judgment that, for whatever reason, the chances for success are enhanced, at least to some extent, in that forum. Indeed, the possibility of discrimination in the state courts has been suggested as a principal motivation for the provision in Article III for the alternative of a federal forum where the parties are citizens of different states.[99] Thus, a requirement that any difference in rules that causes a nontrivial difference in outcome would require application of state law would cast far too large a net. Finally, this test turns on potentially varying interpretations of what differences in outcome will be viewed as "substantial."[100]

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lina Supreme Court upheld the dismissal of the claim. Although of a different form than the statute in *Woods*, this statute was also a form of "door-closing" since it would appear that had the seller been able to obtain personal jurisdiction over the purchaser in Virginia, the courts of that state would have permitted the action. Instead of appealing to the Supreme Court, the seller next brought a claim for the deficiency in a federal court in North Carolina. Because that action would have been barred under the principle of res judicata in state court, the Supreme Court concluded that it would also have to be barred in federal court:

> The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.

*Id.* at 191–92.

97 While not relying on "outcome determination" as a test, the Court in *Gasperini* felt compelled to "address the question whether New York's 'deviates materially' standard, codified in CPLR § 5501(c), is outcome-affective," *Gasperini*, 518 U.S. 415, 428 (1996) and concluded that it "influences outcomes by tightening the range of tolerable awards," *id.* at 425.

98 *See* Hanna v. Plumer, 380 U.S. 460, 466–67 (1965) ("'Outcome-determination' analysis was never intended to serve as a talisman. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule.").

99 *See* Abolition of Diversity of Citizenship Jurisdiction, H.R. REP. No. 95-893, at 2 (1978).

100 Two cases decided by the Supreme Court between *Guaranty Trust* and *Hanna* illustrate the difficulty of ascertaining which differences in outcome are sufficiently "substantial" to require following the state law.

c. Twin Aims of *Erie*

*Hanna* proposed a third approach, asserting that "[t]he 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of the inequitable administration of the [state's] laws."[101] This modification was necessary because, ex post, any differ-

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In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the parties had entered into an employment contract containing an agreement to arbitrate. After the dispute arose, the plaintiff brought, in a state court in Vermont, an action that the defendant subsequently removed. Vermont state law provided that agreements to arbitrate were revocable. Honoring that policy, the federal district court granted a stay of arbitration. The Second Circuit, treating this as a question of "procedure," reversed and ordered arbitration pursuant to the Federal Arbitration Act. Again reversing, the Supreme Court held that the contract in dispute did not fall within the Act and furthermore that *Guaranty Trust* required deference to state law because the kind of forum—court or arbitrator—was significant to the outcome. The Court explained:

> If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy of arbitration . . . substantially affects the cause of action created by the State. . . . The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

*Id.* at 203.

In contrast, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), discussed *supra* notes 59–61 and accompanying text, while conceding that "the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right," *id.* at 537, the Court, distinguishing *Bernhardt*, stated that there was "not present here . . . even the strong possibility," *id.* at 539, and that the choice between judge and jury as trier of fact would actually affect the outcome.

101 *Hanna*, 380 U.S. at 468. This discussion was, in any event, extended dictum since the holding in *Hanna*, as discussed *supra* notes 77–79 and accompanying text, was that Rule 4(d)(1) prevailed because it satisfied the standards of the Rules Enabling Act—irrespective of any *Erie*-type concerns.

*See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996) (explaining in *Hanna* "that the 'outcome-determination' test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by 'the twin aims of the *Erie* rule'"); *see also* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988) ("If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called 'twin aims' of the *Erie* rule . . . . If application of federal judge-made law would disserve these two policies, the district court should apply state law.").

The Court in *Gasperini* properly declined to view the case as one involving problems of forum shopping. It is unlikely that a plaintiff would opt for federal rather than state court because of the different standard of appellate review in those two courts, especially since under the New York standard, the trial judge had greater freedom to revise a verdict both upward and downward.

ence in rules might affect the outcome of the litigation. Thus, as in *Hanna*, if one were to insist that even in the federal courts service of process could only be made consistent with state practice, the plaintiff's compliance with a mode of service only approved by the Federal Rules of Civil Procedure would necessitate dismissal of the action rather than proceeding with the merits. But this difference, the Court noted, "would be of scant, if any, relevance to the choice of a forum."[102] *Erie* does not command adherence to state law with respect to such trivial differences that are unrelated to the adjudication of the merits of the claim.[103]

The second of these "twin aims" has a dual component. Yielding to state law is intended to accord respect to the state's interests in the regulation of conduct within its borders and in the enforcement of rights and obligations by persons subject to its control.[104] The scope

102 *Hanna*, 380 U.S. at 469.

103 *See id.* at 468 ("Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*, they are also unlikely to influence the choice of a forum.").

104 An excellent example of improper federal interference with a state's determinations with regard to the ordering of conduct within its boundaries or of persons subject to its control was *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)—a decision cited in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 73–74 (1938), as emblematic of the criticism of the *Swift* doctrine.

Brown & Yellow, which was a Kentucky corporation, had signed a contract with the Louisville & Nashville Railroad, also a Kentucky corporation, allowing it exclusive rights to operate a taxicab service at the Railroad's Bowling Green, Kentucky, train station. The Kentucky courts had held similar contracts to be invalid under that state's common law as detrimental to competition and harmful to the public.

After Black & White, also a Kentucky corporation, began taxicab operations at the train station without objection by the Railroad, Brown & Yellow reincorporated in Tennessee, with all of the assets and rights of the Kentucky corporation then transferring to the new corporation. Brown & Yellow then brought an action against Black & White and the Railroad in a federal court in Kentucky, seeking injunctive relief to require enforcement of its contract rights.

Relying on a line of cases dating back to *Swift v. Tyson*, the Supreme Court held that the federal courts were free to disregard Kentucky's common law rules and instead apply their own distinct common law doctrine: "The applicable rule sustained by many decisions of this court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment." *Black & White Taxicab*, 276 U.S. at 530.

It needs no emphasis to note that the consequence of this approach—combined with the acceptance of the easy availability of a federal forum subsequent to the reincorporation in another state—was to leave Kentucky powerless to implement the public policy declared by its highest courts. By differentiating between common law and statutory law, this jurisprudential approach meant that Kentucky could forbid

of this second "aim" is limited, however, by the recognition that these interests do not necessarily extend to the mode of enforcing those rights.

This concern for deference to state-created law is also described as an attempt to guard against "discrimination." However, here this term is not intended to protect a particular class of parties (for example, defendants or out-of-state litigants), but instead to avoid affording to one party to the litigation an expanded set of legal rules that would be unavailable when the parties were citizens of the same state.[105]

The Supreme Court looked to these "twin aims" in *Chambers v. Nasco, Inc.*[106] to support its conclusion that *Erie* did not prohibit a federal court's use of its inherent powers to sanction a litigant for bad faith conduct in the course of litigating a state law claim, although the state court's adherence to the American rule might have prevented the imposition there of any such type of fee-shifting. Since the imposition of sanctions did not depend on which party prevailed in the litigation, but rather on how the parties conducted themselves, there was no risk that they would opt for the forum based on the federal rule. Thus, it was not inequitable to apply the rule only to cases in federal court since "the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed."[107]

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such contracts only by legislative, rather than judicial, action, and that a state's decision of how primary conduct should be regulated under common law rules could be disregarded or circumvented.

105 This concern about disparate treatment often contains references to federal law that favors the noncitizen or the plaintiff. Thus, in *Erie*, Justice Brandeis asserted that "*Swift v. Tyson* introduced grave discrimination by non-citizens against citizens." *Erie*, 304 U.S. at 74. However, assuming no problems with personal jurisdiction, a citizen of the state may also opt to sue the noncitizen in a federal court located in the plaintiff's home state to get the benefit of federal law. In addition, if no defendant is a citizen of the state in which the action is brought, he or she may remove to federal court to obtain those benefits. Therefore, the key objection is to the possibility of having two different rules in two different courts, applicable to an identical dispute arising under state law, depending on the diversity or nondiversity of the parties.

This sounder understanding of "discrimination" is reflected in the Court's statement in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 (1956), discussed *supra* note 100: "There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court [in Vermont] were remitted to arbitration, while those suing in the Vermont [state] court could not be."

106 501 U.S. 32 (1991).

107 *Id.* at 53.

d. Balancing Federal and State Interests

A fourth approach may be discerned in *Byrd* and *Gasperini*: identifying the interests both of the federal courts and of the state that is the source of the substantive rule, and attempting to weigh and balance those interests.[108] While some commentators believed that this approach was merely a "throw-away" in *Byrd*, which therefore could be ignored in light of its disuse by the Supreme Court for more than three decades,[109] the *Gasperini* Court's renewed attention to consideration of federal and state interests supports reliance on this methodology for resolving *Erie* conflicts.

In *Byrd*,[110] by effectively minimizing the state's interest in the use of its chosen mode of allocating decisionmaking responsibilities,[111] while stressing the strong federal interest in maintaining the federal courts as an independent system for administering justice with its own

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108 In *Hanna*, the Court also recognized the relevance of determining the importance to the state of implementing its rule, but it then limited the weight to be given to that interest.

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.

*Hanna*, 380 U.S. at 468 n.9.

*See also* John R. Leathers, Erie *and Its Progeny as Choice of Law Cases*, 11 HOUSTON L. REV. 791, 802 (1974) (arguing that "*Guaranty* was in fact an interest analysis, well in advance of its time").

109 *See, e.g.*, Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 86 (1995) ("My view would be that *Byrd* is no longer useful law."); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 986 (1998) ("Whatever the lower federal courts were doing, the Supreme Court never returned to *Byrd*-style balancing . . . . This treatment left *Byrd* in a puzzling limbo as a case never overruled but studiously avoided . . . .") (footnote omitted).

110 *See supra* notes 59–61 and accompanying text.

111 Justice Brennan's opinion stated that the South Carolina decisions "furnish no reason for selecting the judge rather than the jury to decide this single affirmative defense," Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536, (1958), instead attributing this choice to practical considerations and custom.

set of uniform rules,[112] the Court easily justified the use of the federal practice of having the issue in question decided by a jury.[113]

In contrast, *Gasperini* concluded that a federal district court sitting in New York should apply the state's more restrictive standard for *trial court review* of a jury's verdict, rather than the more deferential federal standard. The Supreme Court found that the "state and federal interests can be accommodated" by adjusting the federal practice to yield to "New York's dominant interest."[114] However, the Court then determined that, with respect to the standard for *appellate review* of the trial court's decision, the federal practice of reviewing only for "abuse of discretion," rather than the more demanding state standard, would control. Failure to follow the federal rule not only might raise Seventh Amendment issues, but also might interfere unduly with federal interests.[115]

As described more fully below, these two cases suffer from inconsistency both in identifying the relevant state and federal interests and in providing a mechanism for determining which should predominate. However, I believe that an informed weighing of these potentially competing interests, drawing in part on experience in the horizontal choice of law setting in the use of this approach, can produce sounder and more consistent resolutions of conflicts in the vertical setting.

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112 Among the reasons for maintaining the federal courts' independence are achieving uniformity in the rules and standards applied throughout the system and the consequent increased ease in administering those rules. Although it is true that the attempt to obtain uniformity among the states with respect to substantive law may have been a motivation for Justice Story in *Swift*, *Erie* nonetheless rejected this goal as inadequate justification for failing to follow state law, since the federal courts did not have the power to create a federal rule. By contrast, this desire to achieve uniformity in the setting of procedural rules should properly be treated as within the powers of the federal courts.

113 *See Byrd*, 356 U.S. at 537–38 ("The federal system is an independent system for administering justice to litigants . . . . An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury . . . . It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."); Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996) (describing *Byrd* as involving "countervailing federal interests").

114 *Gasperini*, 518 U.S. at 437. ("New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i.e.*, that court can apply the State's 'deviates materially' standard in line with New York case law . . . .").

115 *See infra* note 214.

## II. INSIGHTS FROM CONFLICTS ANALYSIS

There are elements from the conflicts field that touch on all of the steps used to decide whether to apply federal or state law in a diversity case. This Article will next consider the extent to which this learning may be helpful in illuminating the inquiries that courts must make in applying the *Erie* doctrine.

### *A. Is There a Clash?*

As discussed above,[116] there must be a "clash" between federal and state law to raise *Erie* issues. If the federal law does not "occupy" the area that is covered by state law, then by default, only the latter can apply and further analysis would be unnecessary. Similarly, by definition, choice of law problems will not arise unless there is a conflict between the laws of two or more states or countries. However, in contrast to the extensive, but inconsistent, consideration of this question from the *Erie* perspective, there is far less discussion of this question in the horizontal setting.

With respect to potential differences in the substantive laws of two different states, there of course may be situations in which one state will not have decided a particular question or where the law is unclear or potentially outmoded. But for the most part, the laws of each of the states regarding questions of contracts, torts, property ownership, family law, and so forth are relatively formed and comprehensive. And, these rules are then intended to be plenary, in the sense of covering conduct that falls within the particular subject area and that comes within the regulatory power of the state. Therefore, although a state may ultimately decline to apply its law out of deference to another jurisdiction, the situation typically is not one in which the forum state does not have a body of potentially applicable legal rules.

Nonetheless, a different aspect of conflicts analysis—the weighing of the interests of different jurisdictions—may play a helpful role in the preliminary determination of whether there is a collision between state and federal law. As discussed more extensively below,[117] one important methodology used in modern conflicts analysis is the identification of situations in which only one of two jurisdictions genuinely has an interest in the application of its legal rule to a dispute—the so-called "false conflict." In those cases, it follows that the forum should apply the law of the only interested state. Furthermore, the forum

116 *See supra* notes 36–55 and accompanying text.

117 *See infra* notes 193–97 and accompanying text.

state is encouraged to evince a willingness to downplay its own interests or to give greater respect to the interest of the other jurisdiction, to increase the likelihood that a conflict will in fact turn out to be "false." A similar approach can be used in the *Erie* setting to reduce the frequency of federal vs. state law clashes.

As noted, the Supreme Court has employed conflicting rules of construction in its determination of whether there is a clash: that federal statutes and the Federal Rules should not be given unnecessarily narrow interpretations, but also that unnecessary conflicts between state and federal law should be avoided. One way of attempting to reconcile *Walker*,[118] *Burlington Northern*,[119] and *Stewart*[120] would be to look at the comparative strengths of the federal and state interests in those cases. In *Walker*, Oklahoma had a strong interest in applying its statute of limitations to determine which claims were "stale," while there was little or no federal interest in extending such claims. By contrast, in *Burlington Northern*, there was a comparatively strong federal interest in deciding whether to permit or deter appeals, while Alabama had little interest in rules that would reduce the docket of the federal appellate courts. In *Stewart*, there also were strong federal interests in locating an action in one district court rather than another;[121] however, this decision is subject to criticism because, as noted above,[122] the Court paid no attention to the reasons that Alabama might have had for the adoption of its no-forum non conveniens dismissal rule.[123] It is true that *Stewart* and *Hanna* indicate that the existence of a valid federal statute or Rule will always displace a conflicting state procedural rule. However, more frequent resort to the approach used in *Walker*—of finding a "false conflict"—indicates that such a preliminary step may serve as a means of introducing additional respect for state interests and policies.[124]

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118 *See supra* notes 38–45 and accompanying text.

119 *See supra* note 49 and accompanying text.

120 *See supra* notes 50–51 and accompanying text.

121 *See infra* notes 219 & 223–28 and accompanying text.

122 *See supra* notes 71–73 and accompanying text.

123 In the taxonomy used in the next portion of this Article, *Stewart* reduced what was in fact a "true conflict" into a "false conflict."

124 *See* Freer, *supra* note 51, at 1642–44 (arguing that *Gasperini* may have replaced the search for "plain meaning" of a federal rule, with the "heightened sensitivity to potential impact on state policy," to determine existence of "clash").

### B. *Applying Conflicts Methodologies to Four Approaches Used Under* Erie *to Resolve Clashes*

The discussion in the previous Section of this Article[125] indicates that after *Stewart* and *Hanna*, federal statutory law of a procedural nature or one of the Federal Rules almost certainly will control in the face of inconsistent and conflicting state law. Instead, today it is fairly clear that thorny vertical choice of law issues will arise only if the federal rule is the product of judge-made law. I now turn to the benefit that conflicts analysis might give to resolving these questions.

#### 1. Substantive-Procedural

*Erie's* distinction between substantive and procedural rules finds analogies in traditional choice of law doctrine. The normal practice is that even when a state decides to apply the substantive law of another state to a dispute, it will use its own rules of procedure and evidence.[126] Indeed, the decision by a forum state to characterize an issue as "procedural"[127] may occasionally be used as an "escape device" to avoid having to apply the disfavored legal rule of another state.[128]

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125 *See supra* notes 68–73 and accompanying text.

126 In a leading conflicts case, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), which held that the Due Process Clause prevents a state from applying its substantive law to a dispute with which it has limited or no contacts, the Court also stated: "[A] state is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies." *Id.* at 409.

*See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."); RESTATEMENT OF CONFLICT OF LAWS § 585 (1934) ("All matters of procedure are governed by the law of the forum."); *id.* § 597 ("The law of the forum determines the admissibility of a particular piece of evidence.").

127 The forum makes the determination, according to its own choice of law rules, whether a given issue is one of substance or procedure. *See* RESTATEMENT OF CONFLICT OF LAWS § 584 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (2) (1971).

128 *See* Olmstead v. Anderson, 400 N.W.2d 292, 296–97 (Mich. 1987) ("[Under the earlier territorial approach,] courts employed escape devices to avoid potentially harsh results. The two main manipulative techniques were 'procedural characterization' and the 'public policy' exception . . . . Procedural characterization involves characterization of an issue as procedural rather than substantive, and then applying forum law to the procedural issues. Courts, thus, were able to evade applying the law of the state in which the wrong occurred.").

*See, e.g.*, Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961) (stating that the measure of damages in a tort action is a procedural or remedial question,

Nonetheless, it is not clear that this distinction in the horizontal setting will be particularly illuminating in making *Erie* determinations. Certainly some of the motivations for either a federal or a state court's use of its own rules of practice and evidence are the same, including ease of application, uniformity, and the like. However, there is considerable difficulty in defining "substantive" law. This is compounded by the fact that the lines between substance and procedure are often drawn in different places in different situations.[129] More importantly, there are also significantly different reasons for drawing these lines.

A leading illustration of the difference in labeling that may occur is the disparate treatment of statutes of limitations. In *Guaranty Trust*, while declining to characterize a statute of limitations as either procedural or substantive,[130] the Supreme Court nonetheless held that, in a diversity action, federal courts must apply the state's statute of limitations, since a failure to follow it would afford the plaintiff an opportunity to continue litigating a claim that would be pronounced "dead on arrival" in state court.[131] By contrast, in the choice of law field, in *Sun Oil Co. v. Wortman*[132] the Supreme Court held that a state may apply its own longer statute of limitations to a claim even if that state has so few contacts with the dispute that it is forbidden, as a constitutional matter, from applying its own substantive law to the claim, and even if the

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controlled by the law of forum); Grant v. McAuliffe, 264 P.2d 944, 947 (Ca. 1953) (citing numerous other cases and averring that survivorship of action upon death of tort victim was procedural); Mertz v. Mertz, 3 N.E.2d 597, 599–600 (N.Y. 1936) (finding that immunity of husband for tort damage to wife concerns remedies and procedures to be governed by law of forum state); RESTATEMENT OF CONFLICT OF LAWS § 606 (1934) (stating that the statutory damage cap is procedural).

*See also* LEA BRILMAYER, CONFLICT OF LAWS 28 (2d ed. 1995) (describing the characterization of issue as procedural or substantive as one "that probably most threatened the RESTATEMENT goals of uniformity and predictability . . . . [a]ny judge wishing to apply local law might simply decide that the relevant legal issue was a procedural one"); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 261 (4th ed. 1986) ("[I]t is apparent that [in some cases] the characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons may exist cannot be doubted. The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.").

129 *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

130 *See supra* note 95 and accompanying text.

By contrast, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), discussed *supra* notes 38–45 and accompanying text, the Court stated that the Oklahoma statute of limitations "is a statement of a *substantive* decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751 (emphasis added).

131 Guaranty Trust v. York, 326 U.S. 99, 108–12 (1945).

132 486 U.S. 717 (1988).

claim would be extinct in the state whose substantive law gave rise to it.[133] For these purposes, the statute of limitations was treated as procedural, and therefore the forum state had the power to determine its length and scope.[134]

*Wortman* reiterated what has often been stated: that a rule, here the statute of limitations, may be characterized differently in different contexts. This difference, as explained by Justice Scalia, was best understood by focusing on the purpose for distinguishing between "substance" and "procedure."[135] For *Erie* purposes, characterization was undertaken to obtain substantially similar outcomes in state and federal court.[136] By contrast, in the horizontal setting, the purpose was not to advance uniformity, but rather to ensure respect for the authority of a state to regulate domestic activities by restraining the potential

133 The rule at common law was that a forum state would apply its own statute of limitations. *See* RESTATEMENT OF CONFLICT OF LAWS § 604 (1934). As a further illustration that horizontal choice of law issues are governed by considerations of comity rather than command, it is noteworthy that this rule has been abrogated in the vast majority of states by the enactment of borrowing statutes. *See, e.g.*, UNIFORM CONFLICT OF LAWS—LIMITATIONS ACT § 2, 12 U.L.A. 158 (1996). Forsaking the opportunity to employ their own longer statutes of limitations, the states that have enacted these borrowing statutes instead require the forum to look (with respect to a variety of defined circumstances) to the law of another jurisdiction to determine the appropriate length of time for initiating a lawsuit. *See* Cope v. Anderson, 331 U.S. 461, 466 (1947) (noting that the purpose of borrowing statutes was to require forum court to bar suits "if the right to sue [a defendant] had already expired in another state where the combination of circumstances giving rise to the right to sue had taken place"). *See generally* David Vernon, *Statutes of Limitations in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287 (1960).

134 *See Sun Oil*, 486 U.S. at 728. The Court observed:

> There is no more reason to consider recharacterizing statutes of limitation as substantive under the Full Faith and Credit Clause than there is to consider recharacterizing a host of other matters [including placement of burden of proof] generally treated as procedural under conflicts law, and hence generally regarded as within the forum State's legislative jurisdiction."

*Id.*

135 *See id.* at 726 ("Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.").

136 *See id.* at 726–27 ("In the context of our *Erie* jurisprudence, that purpose is to establish . . . substantial uniformity of predictable outcome[s] between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.").

exercise by other states of legislative power over disputes with which they have minimal or no contacts and interest.[137]

Another illustration of the differences in labeling is found in a leading court of appeals case decided shortly after *Erie*: *Sampson v. Channell*.[138] After an automobile accident in Maine, the plaintiff brought an action in a federal district court in Massachusetts based on the diversity of the parties' citizenship. At issue was whether to apply Maine's rule regarding the burden of proof on contributory negligence, which assigned it to the plaintiff, or Massachusetts's standard, which made it an affirmative defense, with the burden of proof to be borne by the defendant. The First Circuit first concluded that, for *Erie* purposes, the burden of proof was "substantive" and that the federal court therefore had to follow state law;[139] failure to do so would have affected the outcome of the litigation.[140] Then, anticipating *Klaxon v. Stentor*'s[141] requirement that the federal court must use the state's choice of law rules, the court of appeals held that the district court should resolve the burden of proof question in the same way as the Massachusetts court would have.[142] In this second step, the First Circuit concluded that Massachusetts would have characterized the burden of proof issue as "procedural" for choice of law purposes and therefore would have applied forum law, rather than the law of the place of the wrong.[143]

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137 *See id.* at 727 ("The purpose of the substance-procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity but to delimit spheres of state legislative competence.").

138 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

139 The First Circuit relied in part, *id.* at 758, on *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939), a very brief opinion concluding that in an action brought in a federal district court in Texas to remove a cloud on title to land in Texas, when the issue of bona fide purchase for value without notice was raised, the court must apply the Texas rule regarding burden of proof. *See also* Guaranty Trust v. York, 326 U.S. 99, 109 ("[W]e have held that in diversity cases the federal courts must follow the law of the State as to burden of proof.") (citing *Cities Service*).

In stark contrast, as noted *supra* note 134 and accompanying text, in *Sun Oil*, 486 U.S. at 728, the Court indicated in dictum that for conflicts purposes, placement of the burden of proof was *procedural*, and so was "within the forum State's legislative jurisdiction."

140 *See Sampson*, 110 F.2d at 756 ("[T]he greater likelihood there is that litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule, the stronger the urge would be to classify the rule as not a mere matter of procedure but one of substantive law falling within the mandate of the Tompkins case.").

141 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

142 *See Sampson*, 110 F.2d at 760–62.

143 *See id.* at 759.

*Sampson* recognized that there are different concerns at stake in the determination, in the vertical as opposed to the horizontal setting, of whether an issue is procedural or substantive. For *Erie* purposes, both to avoid a substantial difference in outcome between state and federal courts and to maintain respect for the policy judgments made by the state's courts, congruence between the two rules is desirable. This can be achieved in part by treating an issue as "substantive" when its effect on the litigation is "substantial." On the other hand, with respect to state vs. state choices, concern for ease of administration, including ease of determining the applicable rule, and a desire to advance certain policy objectives, will counsel in favor of the forum's use of its own law for a larger number of issues in the litigation. And there is far less of a counterweight to this tendency because, in contrast to the *Erie* setting, there probably will be neither constitutional nor statutory constraints on the state's characterization of marginal issues as procedural.[144]

2. Outcome-Determination

The second approach—the "outcome-determination" test—probably holds out the least likelihood of benefiting from learning derived from the choice of law field. In contrast to the requirements imposed by *Erie* and *Guaranty Trust* on the federal courts, which are in great measure the result of the Constitution and statutory provisions, state courts simply do not feel any comparable imperative merely to provide an "alternate forum" to the litigants, but still to yield a substantially similar result as in another state that has equal or greater contacts with the dispute.

It is true that horizontal choice of law decisions are animated in part by goals of uniformity and predictability of outcome,[145] and these may result in the application of a similar rule—yielding a similar outcome—in the forum state as in another jurisdiction. However, when other values are present—including the forum's interests in some or all of the parties and the events giving rise to the transaction or its

144 As noted *supra* notes 132–37 and accompanying text, in *Sun Oil* the Court held that a state could apply its own longer statute of limitations to an action, even if it lacked the necessary contacts with the dispute for its substantive law to apply. In dictum, the court suggested that a state in that position could also apply its own rules with respect to remedies available, placement of burden of proof, burden of production, sufficiency of the evidence, and privileges.

145 *See* Lauritzen v. Larsen, 345 U.S. 571, 591 (1953) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under appropriate law regardless of the fortuitous circumstances which often determine the forum."); *see also supra* note 2 and accompanying text.

desire to achieve fairness for those parties, or its view of the "better rule" to be applied—these other goals will often be subordinated.[146] In such situations, although the forum will recognize that the result it reaches may well differ from that which would obtain in another jurisdiction, these other values wind up dictating that different outcome. Therefore, while federal courts may find these shared values instructive in filling in some gaps, the differences are more likely to overwhelm the similarities.

### 3. Twin Aims of *Erie*

Horizontal choice of law principles may prove of some limited benefit in obtaining a better understanding of the "twin aims of *Erie*"—discouragement of forum shopping and avoidance of the inequitable administration of the state's laws.

As discussed above with respect to "outcome-determination," it is true that in making choice of law determinations, a state may wish to promote uniformity and predictability of outcome and may be reluctant to become a haven for parties seeking the benefit of its own, different legal rules with respect to a dispute with which the state has minimal contacts and therefore has comparatively slight interests in the resolution of the dispute.[147] Similar considerations—of denying

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146 For example, in *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982), in which Michigan rejected the *lex loci delicti* rule in favor of interest analysis, the court stated:

> The principle [sic] argument for following lex loci delicti has always been that it would provide certainty and predictability. . . .
>
> The other argument in favor of lex loci delicti, avoidance of forum shopping, is not a strong argument as against citizens of the forum state who presumably have every reason of convenience and economy to be entitled to service in their own state. To this, of course, can be added the fact that the forum state generally has an interest in seeing that its injured citizens are well-served and that its citizen defendants are afforded every protection that such citizens would have in their own state. Additionally, where both the plaintiff and the defendant are citizens of the forum state, the state where the wrong took place will normally have no interest in the litigation.
>
> The upshot of all of this is that there appears to be no real reason to retain the rule of lex loci delicti, on the one hand, while, on the other hand, there seems to be good reason and practical pressure in Michigan for the forum to apply its own law.

*Id.* at 853–54 (plurality opinion) (Williams, J.).

147 *See, e.g.*, Stuart v. American Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998) ("[P]urpose of the borrowing statute—preventing forum shopping by plaintiffs seeking the holy grail of the longer period—is best served by applying the period of the foreign state"); Aboud v. Budget Rent A Car Corp., 29 F. Supp. 2d 178, 183 (S.D.N.Y. 1998) ("[A]pplication of [forum] law would create the appearance of favoritism to-

the plaintiff the opportunity to engage in forum shopping in search of the state with the most favorable legal rule—may motivate the dismissal of an action on forum non conveniens grounds.[148] And a state may decline to apply its own law to a dispute touching it and another jurisdiction because application of the latter's legal rule will yield a

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ward the local litigant, whereas application of [the place of wrong's] law would not. Favoritism encourages forum shopping, which interferes with the smooth operation of the multi-state judicial system."); Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998) ("[A]doption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping."); Olmstead v. Anderson, 400 N.W.2d 292, 303 (Mich. 1987) ("The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring suit."); Paul v. National Life Ac., 352 S.E.2d 550, 556 n.14 (W. Va. 1986) (to avoid creation of a rule that would be an "invitation to flagrant forum shopping," requiring that "[t]his State must have some connection with the controversy above and beyond mere service of process [in state] before the rule we announce today will be applied"); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985) ("[B]ecause New York has no significant interest in applying its own law to this dispute. . . . application of New Jersey law will enhance 'the smooth working of the multistate system' by actually reducing the incentive for forum shopping and it will provide certainty for the litigants . . . ."); Duke v. Housen, 589 P.2d 334, 344 (Wyo. 1979) (finding that use of borrowing statute to determine limitations period "not only clears up any substantive procedural conflict problem, but eliminates as well the possibility of the plaintiff shopping for a favorable forum in which to revive a dead claim").

In his famous five imaginary cases, which he used as a vehicle to articulate varying approaches to resolving choice of law questions, Professor David Cavers put the following words in "Judge" Erwin Griswold's mouth:

> [An appreciation of the existence and purpose of the conflict of laws] . . . is made apparent when the question of forum shopping is considered . . . .
>
> . . . .
>
> . . . [W]e will not fulfill the objectives of the conflict of laws, unless we can provide rules for cases under which the same cases will be decided the same way no matter where the suit is brought, to the extent that this is possible within the limits of human frailty. We will not always be successful in achieving uniformity, but we will surely have more success if we constantly hold up uniformity of result as a major objective, and recognize that there can be no true justice without it.

DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 22–23 (1965).

148 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) ("[I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. . . . [M]any plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice of law rules are most advantageous.").

"fairer" result.[149] Nonetheless, as just suggested, those values will yield when paramount concerns for application of forum law exist—even if that results in the plaintiff opting for that state as its forum solely to get the benefit of those preferable rules.[150]

Consider as an example the famous line of New York cases in which the state, not having a guest statute, developed its interest analysis by refusing to apply other jurisdictions' guest statutes to accidents occurring in those places and involving New York domiciliaries as plaintiffs.[151] The New York courts could hardly have been unaware that the plaintiffs undoubtedly had chosen to bring their actions in their home state to avoid the application of a guest statute that would have defeated their claims had they instead chosen to sue in the jurisdiction in which the accident took place.[152] But the importance of

149 This analysis may help to explain two New York Court of Appeals decisions, in the transition period between the traditional, territorial approach and interest analysis. *See* Haag v. Barnes, 175 N.E.2d 441 (N.Y. 1961) (stating that because Illinois had the most significant relationship with the parties and their contractual child support agreement, its law should determine whether the plaintiff's rights should be governed exclusively by the agreement); Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954) (holding that English law should govern the terms of a separation agreement between an English couple that was signed in New York after the husband had moved to that state, since England was the "center of gravity" of the dispute and English law would effectuate the parties' intentions). In both *Haag* and *Auten*, the refusal to follow New York's law seemed to result in a "fairer" outcome.

150 *See* QSP, Inc. v. Aetna Cas. & Surety Co., No. 326873, 1998 WL 892997, at *19 (Conn. Super. Ct. Dec. 8, 1998). The court noted:

> Predictability and uniformity of result are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured . . . .

*Id.* *See also* Tkaczevski v. Ryder Truck Rental, Inc., 22 F. Supp. 2d 169, 174 (S.D.N.Y. 1998) (holding that in action by forum resident, application of forum law to accident taking place in another state did "not encourage forum shopping").

151 *See* Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969); Macey v. Rozbicki, 221 N.E.2d 380 (N.Y. 1966); Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). *But see* Dym v. Gordon, 209 N.E.2d 100 (N.Y. 1965) (declining to apply New York rule to accident in which New York domiciliary was injured in Colorado, where both parties had dwelt in Colorado for extended period of time, host-guest relationship was formed in Colorado, and accident involved third party).

152 In fact, in *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), which involved an action by a Canadian resident against a Canadian railroad and a New York resident arising out of a car-train collision in Ontario, the New York Court of Appeals declined to give the plaintiff the benefit of its own no-guest statute rule because

> the failure to apply Ontario's [guest statute] law would 'impair' . . . 'the smooth working of the multi-state system [and] produce great uncertainty

protecting the resident-plaintiff counseled the New York court's choice of the state's no-guest statute rule, even if that clearly resulted in "forum shopping."[153]

Furthermore, there is a substantial difference in the nature of the objection to horizontal versus vertical forum shopping. The right of a plaintiff to choose to file suit in any of the several states in which personal jurisdiction can be obtained over the defendant, followed by the possibility that different legal rules will prevail in those different states, is essentially the product of our federal system, which contemplates that each state remains free, subject only to constitutional constraints, to shape its laws in a variety of ways. Indeed, the Supreme Court has stated that federal courts sitting in diversity cases must defer to and enforce these differences.[154] On the other hand, forum shopping in the *Erie* context is objectionable because it clashes with the *Guaranty Trust* vision of the purpose of diversity jurisdiction as affording merely an alternative (and perhaps more neutral) forum, but not one designed to give the parties a different set of legal rules.[155]

This distinction is at the heart of the rule in *Klaxon v. Stentor*,[156] which, as noted, requires a federal court hearing a diversity case to apply the state court's conflict of law rules.

> Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.[157]

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for litigants' by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his domicile.

*Id.* at 458.

153 *Id.* at 457 ("[I]n *Babcock v. Jackson* . . . we were willing to sacrifice the certainty provided by the old rule for the more just, fair and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in the litigation.").

154 *See* Ferens v. John Deere & Co., 494 U.S. 516, 527 (1989) ("Diversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie*, the federal courts had to replicate them.").

155 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 111–12 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. . . . And so Congress afforded out-of-State litigants another tribunal, not another body of law.").

156 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). The Court also applied this rule in the companion case to *Klaxon*—*Griffin v. McCoach*, 313 U.S. 498, 503–04 (1941).

157 *Klaxon*, 313 U.S. at 496.

The recognition that the plaintiff's choice of forum will be animated in large measure by the legal rules to be applied in that state to her dispute is also reflected in the line of cases requiring, as a constitutional matter, that the forum have at least some minimal contacts with the parties and the litigation before it may apply its law.[158] The plaintiff cannot simply look for that state, of the fifty states, which has the most favorable set of rules and then bring the action there.[159] However, these cases implicitly accept the fact that once these constitutional minima are met,[160] the plaintiff will be free to choose to engage in horizontal forum shopping in search of a state which will, in turn, be able to apply freely its favorable rules to the dispute.

This acceptance of the *plaintiff's* right to engage in *horizontal* forum shopping is further reflected in the rule that, when a lawsuit is transferred pursuant to 28 U.S.C. § 1404(a) from one federal district court to another, the transferee court must apply the law of the transferor forum, i.e., the law that would have been applied in the court originally selected by the plaintiff.[161] The Supreme Court asserted that to do otherwise would allow the *defendant's* opportunity to seek transfer to "create or multiply opportunities for forum shopping."[162]

158 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

159 Of course, the plaintiff's choice is constrained by limits on personal jurisdiction. As the Supreme Court stated in the oft-quoted passage from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), "in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (citation omitted).

160 It is noteworthy that the quantum of contacts that a state must have with a dispute, in order to be permitted to apply its law to a dispute, is lower than the minimum contacts that the defendant must have with the forum state to allow it to exercise specific personal jurisdiction. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 215 (1977) ("[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.").

161 *See* Van Dusen v. Barrack, 376 U.S. 612 (1964).

162 Ferens v. John Deere & Co., 494 U.S. 516, 523 (1990) (explaining rationale for *Van Dusen* holding). *See also id.* at 527 ("An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws. . . . [E]ven without § 1404(a), a plaintiff already has the option of shopping for a forum with the most favorable law.").

This difference in attitude towards horizontal and vertical forum shopping is perhaps best illustrated by *Ferens v. John Deere & Co.*[163] The plaintiff, a Pennsylvania citizen, lost his right hand in an accident that occurred in Pennsylvania when it became caught in farm machinery manufactured by Deere. After the statute of limitations for his tort claim had run in Pennsylvania, Ferens brought suit in a federal court in Mississippi,[164] which had a longer statute of limitations.[165] Ferens then made a motion to have the action transferred, pursuant to § 1404(a), to the district court in Pennsylvania. Extending the rule first articulated in *Van Dusen v. Barrack*[166]—which had held that in actions transferred under § 1404(a) pursuant to a motion made by the *defendant*, the transferee court should apply the law of the transferor forum—the *Ferens* Court, in an opinion written by Justice Kennedy, held that a similar result should follow after a motion by the *plaintiff*, so that the federal court in Pennsylvania would apply Mississippi's statute of limitations.

In dissent, Justice Scalia argued that *Erie* and *Klaxon* stood for two policies: uniformity of outcome of litigation conducted within a state and the avoidance of forum shopping. He asserted that these concerns ought not be diminished when the case was heard in a federal court located in a state, such as Pennsylvania, not because it was filed

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In contrast to this limitation on the ability of the *defendant* to engage in forum shopping pursuant to a § 1404(a) motion, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court held that the fact that a defendant might indeed be animated by such considerations in making a motion to dismiss an action on forum non conveniens grounds—thus requiring the plaintiff to recommence the lawsuit in another forum whose law was less favorable to it—would not be a bar to the grant of that motion. The Court observed:

> [T]his possibility [of reverse forum shopping] ordinarily should not enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.

*Id.* at 252 n.19.

163 494 U.S. 516 (1990).

164 Personal jurisdiction and venue were not problems, since Deere did a sufficient amount of unrelated business in Mississippi.

165 Under the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the district court followed Mississippi's choice of law rules; the state courts, in turn, would have applied the Mississippi, rather than the Pennsylvania, statute of limitations.

166 376 U.S. 612 (1964).

there initially, but because of a § 1404(a) transfer pursuant to a motion made by the plaintiff.[167]

Rejecting that view, the majority recognized that the type of forum shopping that led to the preservation of the lawsuit, which under Pennsylvania law would have been extinguished, was *horizontal.* This outcome was the product of Ferens's right to sue in Mississippi (because its courts had general personal jurisdiction over the defendant) and of Mississippi's recognized right to apply its own longer statute of limitations to the lawsuit. *Erie* simply did not deal with this choice and could not affect it.

On the other hand, depriving the plaintiff of the benefit of Mississippi's advantageous statute of limitations, subsequent to the § 1404(a) transfer, would have raised real *Erie* concerns, since that result would occur only when diversity opened the federal courts as an alternative forum. The dissent had argued that *Erie*'s goal of preventing forum shopping would be undermined by allowing Ferens, through the device of a § 1404(a) transfer, to be able to litigate a still-live claim in the federal court in Pennsylvania and thus obtain a result that he could not have achieved had he sued originally in a Pennsylvania state court.[168]

However, the majority focused instead on the initially required vertical congruence between the rule to be applied in the federal and state courts in Mississippi and decided that it should not be upset by the subsequent transfer authorized by a federal statute. That statute had already been construed in *Van Dusen*[169] so as not to deprive parties in the federal courts of the right to opt for a particular state's law, an advantage they could have opted for in the absence of diversity.[170] Justice Kennedy concluded that application of Pennsylvania's statute of limitations here would have undermined the policies underlying *Erie,* since the initiation of a transfer under § 1404(a) would also have

167 Justice Scalia also argued that contrary to the majority's approach, which viewed the case as one that turned on an interpretation of § 1404(a), "the case involves an interpretation of the Rules of Decision Act." *Ferens,* 494 U.S. at 539 (Scalia, J., dissenting). However, notwithstanding the Justice's preference for reliance on textual sources for deciding cases, this approach still left unanswered the key issue: By requiring that the federal court regard "the laws of the several states" as rules of decision, the Act itself does not delineate whether, in a § 1404(a) situation, the transferor's or the transferee's state rule is the referenced "law."

168 *See id.* at 535 ("The plaintiffs were seeking to achieve exactly what *Klaxon* was designed to prevent: the use of a Pennsylvania federal court instead of a Pennsylvania state court in order to obtain application of a different substantive law.") (Scalia, J., dissenting).

169 *See supra* notes 161–62 and accompanying text.

170 *See Ferens,* 494 U.S. at 523.

changed the state law that controlled this diversity case.[171] Furthermore, the fact that the plaintiff had engaged in *horizontal* forum shopping to achieve this result was not fatal.

As already noted, in *Stewart v. Ricoh*, the Court held that § 1404(a), as a validly enacted federal procedural statute, prevails despite potential *Erie* considerations. I have already criticized *Stewart*'s subordination of *Erie* principles because of its irrebuttable presumption of the primacy of such a statute and because of the expansive reading it gave to § 1404(a) to find it controlling.[172] Nonetheless, *Ferens* makes clear that the policies that animate the *Erie* doctrine are simply inapplicable with respect to any attempt to reduce forum shopping in the *state vs. state* setting. *Erie* instead requires that once a lawsuit is properly brought in a federal court in any state, that court will follow (with all necessary qualifications) the law that would have been applied in that state's courts, so as not to give either party an inappropriate incentive to opt for *state vs. federal* court.

The parallel between horizontal choice of law considerations and the second aim of the *Erie* doctrine, avoiding interference with a state's administration of its laws, would appear to be strongest under the somewhat discredited traditional or territorial approach to choice of law, as embodied in the First Restatement.[173] That methodology is predicated in part on the "vested rights" theory,[174] under which the occurrence of certain events gives rise to rights (and obligations) that then exist even prior to their recognition or declaration by a court.[175] Applying this theory, the creation of such a right, as a consequence of a particular event occurring in a state—such as the acceptance of a

171 *See id.* at 526 ("[Section] 1404(a) [is] a housekeeping measure that should not alter the state law governing a case under *Erie*.").

172 *See supra* notes 71–73 & 121–23 and accompanying text.

173 RESTATEMENT OF CONFLICT OF LAWS (1934).

174 "The earlier Restatement treated choice of law in torts and contracts by articulating a closed set of rules derived from vested-rights analysis." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introduction (1971).

175 A leading proponent of the vested rights theory was Professor Joseph Beale of Harvard Law School, who was Reporter for the First Restatement. *See* JOSEPH H. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS §§ 4–5 (1935) ("When a right has been created by law, this right itself becomes a fact. . . . If no law having power to do so has changed a right, the existing right *should everywhere be recognized*; since to do so is merely to recognize the existence of a fact.") (emphasis added); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 62 (1935) ("[L]egal protection of interests of property and person results in the creation of legal rights in persons or personal relations and in things. . . . If my interest in my house is protected by law it becomes my established property."); *see also* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987).

contract offer or harm to a tort victim—results in rights and obligations that ought to be honored not only in that state, but extraterritorially as well.[176]

In fact, however, the First Restatement approach has been much-criticized,[177] as reflected in large measure by the significantly different approaches of the Second Restatement[178] and other post-World War II methodologies; these have supplanted the vested rights theory in the overwhelming majority of states.[179]

However, an invocation of the vested rights theory might have some utility for *Erie* analysis. Under that approach, the failure of the forum to recognize the same elements and defenses in a claim as the state in which the claim arose would affect the very essence of the parties' rights and obligations. By analogy, in a diversity case, the failure of a federal court to uphold the elements and defenses in a claim would interfere with the definition given to the rights and duties regarding that claim by the state that created the claim.

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176 An early description of the creation of a claim by virtue of the law of the place in which the tortious conduct and injury occurred is found in *Cuba Railroad Co. v. Crosby*, 222 U.S. 473 (1912). Justice Holmes advised:

> [W]hen an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. . . . The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it.

*Id.* at 478.

*See also* Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1003–04 (1958) ("According to the vested-rights theory, the choice of law rule is an inexorable command to apply the foreign law or none.").

177 *See, e.g.*, O'Connor v. O'Connor, 519 A.2d 13, 17 (Conn. 1986) ("The vested rights theory of choice of law is an anachronism in modern jurisprudence. Its underlying premise [is] that the legislative jurisdiction of the place where a right 'vests' must be recognized in every other jurisdiction . . . ."); *see also* BRILMAYER, *supra* note 128, at 25–46 (summarizing criticisms of the Bealian approach).

178 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Intro. Note to § 7 (1971) ("The vested rights approach of the original Restatement has been rejected in the present Chapter [dealing with wrongs].").

179 In the face of this "revolution," it should be stressed that a number of jurisdictions adhere to the territorial approach. Professor Symeon Symeonides, who prepares a very helpful annual survey of choice of law doctrine, indicates that as of 1997, eleven states follow the traditional approach with respect to torts conflicts, and an overlapping group of ten states follow that approach for contracts conflicts. *See* Symeon Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 266 (1998) (table).

However, there are several problems with this analogy. First, at the horizontal level, the extent of enforcement of any "vested right" would be based primarily on recognition of the interests of the *parties* in the claim and in any defenses; it is their rights and obligations that "vested" on the occurrence of the choice of law triggering event. By contrast, when applying this second "aim" of *Erie*, the federal court's principal obligation is to respect the interests of the *jurisdiction* that gave rise to the claim.[180] Nonetheless, the proposition that certain elements of a claim may be transcendent, regardless of the forum in which that claim is tried, would help illuminate this second branch of the *Erie* policy.

Second, and more significantly, even to the extent that the vested rights theory survives its multiple criticisms, its philosophical underpinnings are fundamentally inconsistent with *Erie*. By adopting the implications of Justice Holmes's famous observation that the "common law is not a brooding omnipresence in the sky"[181] and by concluding that judge-made rules are equally "law," Justice Brandeis's opinion squarely rejected any suggestion that a particular kind of claim could exist in the abstract, even prior to a judicial declaration of rights under those circumstances.

The more modern choice of law methodologies also embody some aspects of this concern for other states' administration of their laws. Thus, "interest analysis," discussed below,[182] is based in large measure on respect for, and potential deference to, the interests that another state has in the parties and the dispute and thus in seeing that its laws are applied to that dispute. As the next Section of this Article suggests, in an *Erie* context, the federal courts' recognition that the interests of the state predominate, or even more powerfully, that the interest of the federal court in applying federal law is insignificant, should result in the application of state law in the majority of cases. That outcome would be consistent with the *Erie* goal of avoiding interference with the state's administration of its laws.

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180 *See* BRILMAYER, *supra* note 128, at 41 ("[T]he modern school of governmental interest analysis . . . [employs] a commitment to the recognition of state policy interests (as opposed to the recognition of private vested rights) . . . .").

181 Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). *Erie* quoted at length from Justice Holmes's similar statements in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–72 (1910) (Holmes, J., dissenting). *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

182 *See infra* notes 193–208 and accompanying text.

4. Balancing Federal and State Interests

In undertaking an *Erie* analysis, consideration of the interests of the state and the federal courts presents the most tantalizing potential for importation of approaches used in the choice of law field.[183] Conflicts law has seen a revolution in the past half century. Traditional choice of law rules, reflected in the First Restatement, are essentially territorial. Under this methodology, the court looks to an identifying element of the claim—for example, the place of the last event necessary to make the defendant liable for an alleged tort,[184] the place where the contract was accepted,[185] the place where the parties were married,[186] the state in which the corporation was incorporated,[187] and so forth—and then applies that state's law to the dispute, theoretically irrespective of the content of the conflicting legal rules or its effect on the outcome of the litigation. In other words, this approach searches first for a jurisdiction whose law will apply and then obtains the legal rule therefrom.

Since the 1950s, a number of alternative approaches have been suggested.[188] Forsaking the territorial approach, the majority of states have adopted some variety of these alternatives. While these newer methodologies differ, they all share one significant contrast to the First Restatement approach: they bring an identification (and occasional balancing) of the policies or goals that would be advanced by the conflicting legal rules into the forefront of the choice of law analysis.

Employing these more modern approaches, some states now look to the law of the jurisdiction with the "most significant relationship" with the transaction and the parties;[189] others look to the law of the

183 Professor Weinberg has undertaken an analogous inquiry in Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992), in which she asserts that interest analysis may be useful in harmonizing cases which have applied such doctrines as preemption and federal supremacy to clashes between national and local substantive policies.

184 *See* RESTATEMENT OF CONFLICT OF LAWS §§ 377–90 (1934).

185 *See id.* §§ 311–72.

186 *See id.* §§ 121–36.

187 *See id.* §§ 152–202.

188 In his dissent in *Ferens*, Justice Scalia noted that Professor Robert Leflar had identified "10 separate theories of choice of law that are applied, individually or in various combinations, by the 50 States." Ferens v. John Deere & Co., 494 U.S. 516, 538 n.2 (1990) (Scalia J., dissenting). Undoubtedly numerous other approaches have been advocated unsuccessfully.

189 This is the general principle used in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). *See id.* § 145(1) (torts), § 188(1) (contracts), § 222 (property).

jurisdiction with the preponderance of contacts;[190] some states attempt to determine which jurisdiction would be most aggrieved or most seriously impacted if its rule were *not* applied;[191] yet other states apply the "better rule" to the situation, which, not surprisingly, is almost always forum law.[192] Most importantly for this Article, many states now seek to identify the interests that the several jurisdictions would have in seeing their rule of law applied to the dispute, and analyze and then sometimes weigh these interests in opting for the appropriate legal standard.

A complete description of interest analysis not only is beyond the scope of this Article; in many respects it is impossible. The seeds of this approach are found in a series of articles written by Professor Brainerd Currie in the 1950s and '60s.[193] Since then, many other academics have criticized, defended, modified, and refined interest analysis, so that it hardly bears the hallmark of a unified doctrine.[194] The treatment that interest analysis has received in the courts has been equally divergent. Given the primarily common law nature of choice of law rules, it is not surprising that different states have used different parts of this methodology; and, even within a single state, there have been variations, not only at different times, but also for different types

190 This is sometimes referred to as the "center-of-gravity" approach. *See, e.g.*, Haag v. Barnes, 175 N.E.2d 441, 443 (N.Y. 1961); Auten v. Auten, 124 N.E.2d 99, 101 (N.Y. 1954).

191 This doctrine is sometimes referred to as "comparative impairment." *See infra* note 205 and accompanying text.

192 *See, e.g.*, Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973) (adopting suggestions in Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966), and proposing application of better rule of law as one of five considerations); *see also* Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 456 (Ark. 1977); Clark v. Clark, 222 A.2d 205, 208–09 (N.H. 1966); Albert A. Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Laws*, 53 VA. L. REV. 847 (1967). Clearly, this approach has little or no application in an *Erie* setting.

193 *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (collecting articles).

194 The secondary literature on interest analysis is voluminous. *See, e.g.*, John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Herma Hill Kay, *Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980); Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317 (1982); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983); Russell J. Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984); *see also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994).

of cases. Thus, although I know that I run the risk of being charged with gross oversimplification of this complex area, I offer here a brief outline of the key aspects of interest analysis in the choice of law context; hopefully this will be sufficient to provide a predicate for its possible application in the *Erie* setting.

States do not have interests merely in the abstract, either in certain conduct or in certain parties. Instead, these interests are reflective of the policies giving rise to and embodied in the states' legal rules. Therefore, as an initial step, after determining that there is a difference between the legal rules that two (or more) states would apply to the issue in question, the court must attempt to identify the goals or policies that the conflicting rules seek to further.[195] This inquiry may involve the examination of a combination of legislative history, judicial opinions, secondary literature, and other sources.[196]

The court must then attempt to identify the several states' interests in having their rules applied to the dispute and the extent to which these interests would be affected if a different rule were applied. These interests may arise out of a number of contacts or affiliations of the competing states: the accident took place in the state; the property in dispute is located in the state; the will was executed in the state; the defendant is incorporated in or is doing business in the state; one or more of the parties reside in the state or is employed

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195 By focusing on the importance of evaluating a clash in light of the "twin aims" of *Erie*, *Hanna*, which was the next major case after *Byrd*, suggests a lesser role for assessment of the state's interest. But, while requiring that the determination of the strength of a state's policies must be done in context, *Hanna* nonetheless recognizes the importance of those interests:

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would likely cause a plaintiff to choose the federal court.

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

196 Professor Currie described this process as follows:

> When it is suggested that the law of a foreign state should furnish the rule of decision, the [forum] court should, first of all, determine the governmental policy expressed in the law of the forum . . . . This process is essentially the familiar one of construction or interpretation . . . .
>
> . . . .
>
> If necessary, the court should similarly determine the policy expressed by the foreign law . . . .

there; and so on. These interests typically will reflect a combination of objectives: deterring, promoting, or regulating certain kinds of conduct within the state (for example, enhancing safety on the highways, facilitating transfer of interests in property, promoting commercial transactions, and so forth); protecting or affording compensation to certain groups of persons (including domiciliaries, corporations, women, and infants); and imposing duties or burdens on other persons.[197]

The court will next determine whether the different interests of the states with these contacts or affiliations present a "false conflict," a "true conflict," or fall into some other category. A "false conflict," as the name implies, arises when analysis of the putative interests of one of the concerned states reveals that its policies would not in fact be implicated by the application of the legal rule of another jurisdiction.[198] In these situations, the forum is instructed to follow the rule of the only state with a true interest in the outcome of the dispute.[199]

One possible route in this analysis, with important implications for vertical choice of law situations,[200] is that the court may downplay the importance of one state's (usually the forum's) interests, thereby converting a seemingly "true conflict" into a "false conflict."[201] In fact, this willingness to minimize the interests of one's own state is not

197 CURRIE, *supra* note 193, at 183–84.

The identification of "interests" is one of the most difficult, and problematic, aspects of interest analysis. Since a state arguably has an "interest" both in regulating conduct taking place within its borders and in protecting and regulating its domiciliaries (whether as plaintiff or defendant), the location of relevant events in the state and the domicile of the parties can often control the presence or absence of "interests." While further discussion of this point in the horizontal setting is beyond the scope of this Article, it suggests the related difficulty of identifying federal and state interests in the context of an *Erie* analysis.

198 *See, e.g.*, Hurtado v. Superior Court, 360 P.2d 906 (Cal. 1974) (stating that because Mexico had no interest in applying its limitation of damages rule in wrongful death action between Mexican plaintiff and California defendant, California, as both forum state and jurisdiction with interest in deterring conduct of its domiciliaries, properly applied its own law); Bernkrant v. Fowler, 522 P.2d 666 (Cal. 1961) (noting that because forum had no interest in applying its own law to dispute, it applied the law of other state).

199 *See* Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242 (1963) ("If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.").

200 *See infra* notes 216 & 247 and accompanying text.

201 *See, e.g.*, Schultz v. Boy Scouts of Am., 480 N.E.2d 679 (N.Y. 1985); Bernkrant v. Fowler, 360 P.2d 906 (Cal. 1961); People v. One 1953 Ford Victoria, 311 P.2d 480 (Cal. 1957).

dissimilar from the methodology described above,[202] which can be used to find an absence of a clash between state law and a federal rule.

On the other hand, a "true conflict" will exist if two (or more) jurisdictions have a significant interest in the application of their rule to the litigation or in its outcome. A number of alternatives have been offered for resolving these situations. Professor Currie suggested that the result was simple—apply the law of the forum state.[203] Other courts and academics suggest that a balancing or weighing is appropriate, with the court applying the law of the jurisdiction with the strongest interest.[204] A twist on this approach, sometimes called "comparative impairment," suggests that the court should apply the law of the state whose interests would be most impaired if its rule were *not* followed.[205] Other courts may seek to apply the "better rule" or the one that most advances a fair and just outcome.[206]

Finally, there is a third situation—the so-called unprovided-for case—in which the analysis reveals that neither state has a true or substantial interest in the outcome of the litigation. Here, a court might either apply its own law[207] or may seek to identify a different interest (e.g., compensation of victims) common to both jurisdictions.[208] However, it is doubtful that this category will have implications for the

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202 *See supra* notes 116–24 and accompanying text.

203 Professor Currie suggested that the forum should see if a "more moderate and restrained interpretation of [its] policy or interest . . . may avoid conflict." Currie, *supra* note 199, at 1242. However, "[i]f upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum." *Id.* at 1242–43. He asserted dogmatically that "[f]or the real problems, in which the forum's interests are at stake, there can be no judicial solution except application of the law of the forum." *Id.* at 1242.

204 *See* Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964) (deciding, after weighing interests of two states and finding both interests to be substantial, that forum's public policy dictated application of forum law).

205 *See* S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co., 641 F.2d 746, 749 (9th Cir. 1981) ("Where significant interests conflict, the court must assess the 'comparative impairment' of each state's policies . . . . The law applied will be that of the state whose policies would suffer the most were a different state's law applied.") (describing California's approach and citing other cases); *see* Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 896 (1998) (same); Sommer v. Gabor, 40 Cal. App. 4th 1455, 1468 (1995) (same); Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978) (same); Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976). The seminal article advocating this approach is William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 6–22 (1963).

206 *See supra* note 192 and accompanying text.

207 *See, e.g.*, Erwin v. Thomas, 506 P.2d 494 (Or. 1973).

208 *See* Hurtado v. Superior Court, 522 P.2d 666 (Cal. 1974).

*Erie* situation since there at least one of the jurisdictions, most likely the state, will have some interest in the application of its rule.

Having briefly summarized this methodology, the question is whether interest analysis may usefully be applied to vertical choice of law decisions. I begin with a brief look at the quasi-interest analysis used in this area by the Supreme Court.

Although *Byrd* and the first part of *Gasperini*[209] came to opposite results with respect to the trial judge-jury relationship—*Byrd* applied federal law, while *Gasperini* opted for use of the state rule—both reflect examples of characterizing the situation (whether correctly or not) as a "false conflict." In *Byrd*, the Supreme Court not only emphasized the strong federal interest in using a jury as decisionmaker, but significantly downplayed South Carolina's reasons for using the judge[210] to make these determinations.[211] By contrast, in that first

209 The part concerning the standard applicable to review by the trial judge of the jury's verdict.

210 *See supra* notes 110–13 and accompanying text. In fact, the state may have had more significant interests. As suggested by Professor Howard Erichson of Seton Hall Law School, South Carolina may have determined that for its workers' compensation system to operate successfully, administrative relief must be exclusive. Allowing workers to get judicial relief on a "technicality," because they found sympathetic jurors willing to sanction this circumvention, would interfere with the tradeoffs involved in making workers' compensation the exclusive remedy for on-the-job accidents.

211 In reviewing a draft of this Article, Professor William Richman of the University of Toledo College of Law offered a more nuanced view of the Court's interest analysis in *Byrd*. Because Justice Brennan substantially downplayed the significance that South Carolina attached to its choice of the judge to determine the plaintiff's status as a statutory employee, Professor Richman suggests that instead the appropriate weighing is between two competing *federal* policies—the previously described federal interests in favor of use of juries and in uniformity across the federal system, versus a competing federal interest, which is implicated by the *Erie* doctrine, in deferring to the state's chosen legal rule. Presumably the *Byrd* Court opted for use of the jury because the former federal interests outweighed the latter.

Support for Professor Richman's reading of *Byrd* is found in Justice Brennan's statement that "[w]e do not think that the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 540 (1958) (footnote omitted). This suggests that some form of "balancing" must take place, and that if there were a greater likelihood of a difference in outcome—thereby implicating more strongly the federal courts' *Erie* interests—the other federal interests might yield.

Analogously, it is certainly true that in a horizontal setting, the forum state may well find that either its, or the other state's, interests do not all point in the same direction. *See, e.g.*, Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964). Therefore, I agree that it is equally appropriate in the vertical choice of law setting to acknowledge that the federal interests may be conflicting and that the strength of those interests may be diluted.

part of *Gasperini*, the Court not only noted New York's "dominant interest" in its more expansive review by the trial judge of jury decisions and the consequent reduction of excessive jury verdicts,[212] but also appeared to minimize the federal interest in using its "shocks the conscience" test.[213]

On the other hand, the second portion of *Gasperini*, in which the Supreme Court insisted on following the federal standard with respect to *appellate* review of jury verdicts, evidences a "true conflict." The express language of the New York statute, requiring a heightened degree of judicial review, was directed at its appellate courts; in fact, the extension of that same degree of review to the state trial courts, which was involved in the first part of the case, was the product of judicial interpretation. As the Court noted, this legislation was the result of the New York legislature's concern about excessive jury verdicts and was not dissimilar from statutory caps on damage awards. Nonetheless, the Court concluded that the federal policies at stake, limiting appellate review of jury verdicts, trumped New York's interests.[214]

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However, there certainly must be room in this "balancing" process also to take account of the state's interests. In any event, as I note at the end of this Article, the use of either of these approaches will result in increased deference to state law in many *Erie* situations.

212 The Court described the heightened standard of judicial review of jury verdicts as "part of a series of tort reform measures" enacted by the State Legislature, and quoted from then-Governor Mario Cuomo's statement, on signing the bill, depicting this provision as a step to "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 424 (1996).

213 In fact, there certainly are strong federal interests that could have been offered for adhering to the "shocks the conscience" standard of review. Use of the state standard increases the likelihood that a jury verdict will be set aside, that appeals from that decision will occur, and that second trials will have to take place. It would not be unreasonable for the federal courts to prefer a rule that would minimize these burdens on an already busy court system. Justice Ginsburg's failure even to mention these concerns highlights the gaps in the Court's analysis and illustrates why this case is not a clear-cut "false conflicts" situation.

214 In *Gasperini*, 518 U.S. at 437, the Court cited two of its earlier decisions, which seemed to point to federal law as the standard to be used by *both* the *trial* and *appellate* courts in reviewing jury verdicts. *See* Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (per curiam) ("The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law . . . .") (citing *Hanna* and *Byrd*); Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 278–79 (1989) ("Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.") (citing *Donovan*). Although *Gasperini* then referred to New York's "dominant interest" in the use of its "deviates materially" standard, there was no attempt either to

These cases suggest an obvious conclusion: as with horizontal analysis,[215] the resolution (and elimination) of *Erie* questions can best be achieved by attempting to moderate the interest of one of the jurisdictions and thus maximize the kinds of clashes that can be characterized as "false conflicts."[216] This will then yield the "easy" answer: apply the rule of the jurisdiction—state or federal government—with the only "real" interest.

However, if a choice between state and federal law is identified as a "true conflict," the analysis must then differ. The Currie approach of always applying forum law as the default[217] cannot be employed since that slights potentially superior state interests merely because some federal interests are also present. Instead, the federal court may first engage in a balancing or weighing of these interests.

Then, I propose that when the policies and the consequent interests are genuinely evenly balanced (or even in close balance), the federal court should defer to the state rule. Because of this, I would assert that the second part of *Gasperini*—in which the Court had identified strong interests on the part of New York in the use of its rule—was incorrectly decided and that the Supreme Court should have required deference to the state rule at both the trial and the appellate levels.

I recognize the difficulties in applying the approach I suggest. Unfortunately, as with other aspects of conflicts analysis, there are no firm guideposts in the *Erie* setting, either for identifying state and federal interests or for differentiating "false" from "true" conflicts. Furthermore, the characterization process lends itself to manipulation. Nonetheless, I believe that good faith consideration of the policies underlying *Erie*, and of the numerous differences identified throughout this Article between horizontal and vertical analysis, would advance the goal of maximizing the "false conflicts" category, thereby minimizing *Erie* problems.[218]

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reconcile its holding with these earlier statements or to explain why that state interest trumped only at the district court level.

215 *See supra* notes 188–202 and accompanying text.

216 This was indeed the route encouraged by Professor Currie in his proposed "Restatement" of choice of law. *See* Currie, *supra* note 199, at 1242. ("If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.").

217 *See supra* note 203 and accompanying text.

218 There are almost as many variations on interest analysis and other policy-based approaches as there are states that have adopted these methodologies. So as to avoid the creation of any additional *Erie*-type problem, the federal courts should use their

Because of the differences in interests in the horizontal choice of law context compared to state vs. federal issues, characterization of a "clash" as a "false conflict," and subsequent deference to the state rule, should be the norm. This is, in large measure, the result of the fact that in an *Erie* situation, the kinds of contacts of the state and of the federal government giving rise to these interests are themselves quite different. In this vertical setting, since by definition the claim arises under the law of one (or more) states, that state must have some contacts with the matter in dispute to form the basis for that claim. By contrast, the federal contacts are limited and the federal interest arises only from its role as the place in which the dispute is being resolved—affording the parties an alternative forum for resolving a dispute,[219] perhaps freer from the parochialism that might characterize the state courts—but with the federal courts having no particular interest in the substantive outcome of the dispute.[220]

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own uniform kind of interest analysis, rather than having to defer to the choice of law methodology of the state courts in the chosen forum.

219 Under various circumstances, even the asserted interest of the federal system in providing a forum may be limited. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the defendants had initially removed wrongful death claims, which grew out of an airplane crash in Scotland, to federal court. After a transfer to another district court pursuant to § 1404(a), the defendants then made a motion—which was granted by the district court—to have the actions dismissed on forum non conveniens grounds. Upholding that dismissal, the Supreme Court asserted that "Scotland has a very strong interest in this litigation," *id.* at 260, while the benefits to American citizens of imposing liability on the defendants were likely to be insignificant. The Court therefore concluded that "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 261. However, as discussed below, see *infra* notes 223–26 and accompanying text, the standard of whether to dismiss on grounds of forum non conveniens should be a *federal* one.

220 A similar analysis would apply in a *Wortman*-type situation, where the forum state, while having sufficient contacts with the defendant to be able to exercise personal jurisdiction, lacked the requisite contacts for its substantive law to apply. Nonetheless, *Wortman* concluded that the state still could apply its statute of limitations to that transaction. Presumably, the forum state's legitimate interests included the use of its own procedural rules in its courts, whether out of concern for uniformity or for ease of administration.

An older, classic choice of law case, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), further illustrates the point. In an opinion by Justice Brandeis, the Court concluded that the absence of sufficient contacts by Texas, the forum state, with a dispute arising under an insurance policy issued in Mexico, and where the insured event occurred in Mexico, meant that Texas' attempt to apply its own contract law violated the Due Process Clause. Although the Court did not speak in those terms, it might also have concluded that Texas did not have the requisite interest in the dispute for its substantive rules to apply. In contrast, anticipating *Wortman* and other later cases, Justice Brandeis did acknowledge that Texas "may prescribe the kind of

In addition, in the horizontal situation, because there is a built-in prejudice for application of the forum's own law, the court will often tilt the scales towards strengthening its own state's interests and downplaying those of other states. By contrast, in the *Erie* setting, the federal court's weighing of the conflicting interests should be more neutral, thus leading to a greater frequency of "false conflicts."

It is true that in some cases there will be legitimate federal interests. Support for application of the federal rule will be particularly strong when a constitutional provision (such as the Seventh Amendment)[221] or a federal statute[222] lurks in the background. In most areas, however, the federal interests are smaller.

Some consideration must be given, however, to a different kind of interest, which was discussed in *Byrd*: the strong federal interest in maintaining an independent system of judicial administration, including such essential characteristics as the allocation of certain responsibilities to the jury. In the second part of *Gasperini*, although the Court in fact did little to articulate actual federal concerns for applying the federal standard of review at the appellate level, it could have pointed to such interests as maintaining a particular relationship between trial and appellate judges, perceptions about the comparative skills of those judges (including the better ability that trial judges have to view the evidence), and a desire to reduce somewhat the workload of the federal appellate courts.

This kind of interest might also be present in a reverse-*Guaranty Trust* situation. Assume that there had been a relevant federal statute of limitations that had been shorter than New York State's statute. The federal interests in cutting off stale claims and in controlling the docket of the federal courts should be sufficient to permit application of federal law, even if that yields a different outcome than would have prevailed in the state court. Similarly, although it is a close question for me, I believe that the federal courts' legitimate interests in controlling their dockets by dismissing an action with minimal connections to the United States, and that could be far better heard in a foreign court,[223] would probably support resolving the question left open in

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remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies." *Id.* at 409.

221 As already noted, this was the case in *Byrd* and *Gasperini*.

222 *Cf.* Stewart Org., v. Ricoh Corp., 487 U.S. 22 (1988) (holding that the court must apply a validly enacted federal procedural statute) (discussed *supra* notes 68–73 and accompanying text).

223 I have characterized the forum non conveniens determination as a choice between American and foreign courts because the assertion that a court in another dis-

*Piper Aircraft*[224]—whether the federal or state standard of forum non conveniens should be used in a diversity action[225]—in favor of the former.[226]

In contrast, however, state law should control if it differs from federal common law principles with respect to forum selection clauses or choice of law provisions. I have already criticized the Supreme Court's decision in *Stewart v. Ricoh* for ignoring Alabama's policy of refusing to defer to the parties' contractually agreed-upon choice of forum, and instead concluding that § 1404(a) was dispositive of the question.[227] It follows that in the absence of a federal statute, the federal interest in controlling its docket by dismissing the lawsuit should be found inadequate to outweigh a state's determination that such actions should properly be heard in a court in the state rather than—as would occur after a forum non conveniens dismissal—in the courts of a foreign country.[228]

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trict in the United States is preferable would normally be treated under 28 U.S.C. § 1404(a) (1994).

224 Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

225 *See id.* at 248 n.13.

226 In *Piper*, the Court stated that courts making a forum non conveniens analysis should apply the "private interest factors" and "public interest factors" previously identified in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947). *Piper*, 454 U.S. at 241. The private interests would presumably be similar in both state and federal court. However, the federal courts' unique concern for the public interests, which included "administrative difficulties flowing from court congestion," *id.* at 241 n.6, and "the unfairness of burdening citizens in an unrelated forum with jury duty," *id.*, would be strong support for application of a federal standard.

Although unresolved by the Supreme Court, the overwhelming majority of lower federal courts to have considered the question agree with this conclusion. *See* Seguros Comercial Am. S.A. v. American President Lines, Ltd., 105 F.3d 198, 199 (5th Cir. 1996); Rivendell Forest Prods., Ltd. v. Canadian Pac., Ltd., 2 F.3d 990, 991–92 (10th Cir. 1993) (citing cases); *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1153–59 (5th Cir. 1987) ("[T]he interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal forum non conveniens in diversity cases."), *vacated on other grounds sub nom.* Pan Am. World Airways v. Pampin Lopez, 490 U.S. 1032 (1989); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218–19 (11th Cir. 1985) (applying federal rule, although "[w]e recognize that the application of the federal, rather than the state, forum non conveniens rule alters the outcome of this case"), *cert. denied*, 474 U.S. 948 (1985); Marsin Med. Int'l, Inc. v. Bauhinia, Ltd., 948 F. Supp. 180, 189 (E.D.N.Y. 1996); Proyectos Orchimex de Costa Rica v. E.I. duPont de Nemours & Co., 896 F. Supp. 1197, 1200 (M.D. Fla. 1995); Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 145 (E.D. Tex. 1992).

227 *See supra* notes 71–73 and accompanying text.

228 While there is disagreement among the lower federal courts on this question, the position for which I argue is admittedly inconsistent with the majority view. *Compare* Haynsworth v. The Corporation, 121 F.3d 956, 961–62 (5th Cir. 1997) (stating

Another set of clashes which could benefit from analysis under this methodology is differences in remedies, and specifically situations in which federal courts have traditionally afforded equitable remedies unavailable under state law. Although Justice Frankfurter specifically noted in *Guaranty Trust* that federal courts were not bound by the state's definition of remedies,[229] it would appear to be inconsistent

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that federal law applies in both diversity and federal question actions to determine enforceability of forum selection clauses and choice of law provisions); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) ("In federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law."); Spradlin v. Lear Siegler Management Servs. Co., 926 F.2d 865, 867 (9th Cir. 1990) (same); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) ("Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature."); Manetti-Farrow, Inc. v. Gucci, Am., Inc., 858 F.2d 509, 512–13 (9th Cir. 1988) ("[F]ederal procedural interests raised by forum selection clauses significantly outweigh the state interests.") (citing numerous cases); Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066, 1069 (8th Cir. 1986) ("In affirming the position . . . that forum selection is a procedural matter, we support a policy of uniformity of venue rules with the federal system."); *and* Kline v. Kawai Am. Corp., 498 F. Supp. 868, 871 & n.1 (D. Minn. 1980), *with* Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 852 (8th Cir. 1986) (holding that because "choice of forum is an important contractual right of the parties" and "[b]ecause of the close relationship between substance and procedure in this case we believe that consideration should be given to the [state's] public policy") (receding from *Sun World Lines*); General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356–57 (3d Cir. 1986) (discerning no "strong federal interest or policy that would displace state law" regarding interpretation of forum selection clause). *See* Lambert v. Kysar, 983 F.2d 1110, 1116 & n.10 (1st Cir. 1992) (declining to resolve "daunting question whether forum selection clauses are to be treated as substantive or procedural for *Erie* purposes"); Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada), Ltd., 859 F.2d 4, 7 (3d Cir. 1988) (same); *see also* International Software Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 114–15 (1996) (applying, in case removed by defendant from state court, federal standards based on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), to evaluate deference to be paid to forum selection clause and holding that dismissal, rather than § 1404(a) transfer, was required, since contract required suit to be brought in *state* court in another state); Alexander Proudfoot Co. v. Thayer, 877 F.2d 912, 916–19 (11th Cir. 1989) (holding that state law, rather than federal law, governs enforceability of clause in contract consenting to personal jurisdiction).

*See generally* Stanley E. Cox, *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517 (1995) (presenting hypothetical on issue whether federal or state law controls forum selection clauses, and including views of eight conflicts scholars); Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087. 1134–39 (1989); Stein, *supra* note 51; Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for* Erie *Purposes*, 89 COLUM L. REV. 1068 (1989); Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663 (1997).

229 Guaranty Trust Co. v. York, 326 U.S. 99, 105–06 (1945).

with the "twin aims" of *Erie* to allow a plaintiff to choose a federal court to obtain an injunction or specific performance in situations in which the state court, confronting the same facts, would deny that relief. And, allowing that relief would interfere with the state's interests in defining not only duties, but rights between the parties, in a situation in which the federal court had no strong countervailing interest.[230]

These situations all present the importance of identifying a federal interest, which then is balanced against the state interest. Among the potential federal concerns, in addition to those already discussed, are interests in protecting the plaintiff, or in applying the "better" or "fairer" legal rule,[231] in promoting horizontal uniformity of law, or in allowing practitioners and judges to predict with greater certainty the substantive legal rule that will be applied in the federal courts. But, because of the absence of power by the federal courts to create "general common law," *Erie* itself forecloses those latter considerations.[232] Recognition of the limited legitimacy of these purported interests demonstrates that in most cases, true federal interests will in fact be limited.

Another frequently invoked federal interest is the achievement of uniformity of result across the federal system. However, the importance of this goal has recently been downplayed by the Supreme Court in several non-*Erie* contexts,[233] and is further undermined by the flexibility, now under attack, that has been given to individual dis-

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230 *See generally* David Crump, *The Twilight Zone of the* Erie *Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court A Block Away"?*, 1991 WIS. L. REV. 1233.

231 *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980). Redish noted:

> [I]t does not automatically follow that the federal court's interest in conducting its business in what it deems the fairest and most efficient manner should *never* be relevant in a refined balancing test. Certainly there is some legitimate interest in allowing a court to decide for itself how most fairly to conduct its procedures. A court's integrity is to a degree dependent upon its authority to control matters that are intimately bound up with its daily internal operations.

*Id.* at 194.

232 That is not to say that the federal courts' procedural interest is not linked with its concern that substantive justice should be achieved. *Cf.* FED. R. CIV. P. 1 ("[Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

233 In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), the Court squarely rejected the argument that the "powerful federal interest in seeing that the federal statute is given uniform interpretations," *id.* at 815, supported conferring jurisdiction on the federal trial courts to exercise jurisdiction over a state-created cause of action in which a federal issue was assertedly an essential element.

trict courts to promulgate local rules[234] or to opt-out of having to use various Federal Rules.[235] Yet other possible federal interests include striving toward reduction of cost and advancing the convenience and ease of application of laws.[236] The problem is that these latter putative interests are universal—they are present in all cases (federal question and diversity alike), and they usually are shared by the state courts as well as the federal courts.[237] Thus, in many ways, the invocation of these purely procedural interests should be recognized as a makeweight.

Indeed, this paucity of legitimate, substantial federal interests in the *Erie* setting can be usefully contrasted with the existence of real federal interests in situations justifying the creation and application of "federal common law." In *United States v. Standard Oil Co.*,[238] the Supreme Court weighed the potential imposition of liability on a private party who had negligently injured an American soldier whose hospitalization and other costs had then been borne by the federal government. Although noting that this 1947 case was the first time since *Erie* that the Court was "asked to create a new substantive legal liability without legislative aid and as at the common law,"[239] it stressed that this case presented markedly different considerations than *Erie*.[240]

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In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Court declined to create a federal common law rule to govern the imputation of knowledge by corporate officers to a corporation, rejecting potential reliance on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity." *Id.* at 88.

234 *See* FED. R. CIV. P. 83 (requiring that "local rule[s] shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 and 2075").

235 *See, e.g.*, FED. R. CIV. P. 26(a) (permitting court to provide by order or local rule that required disclosure rules will not apply).

236 *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 357 (1991) (noting "federal interests in predictability and judicial economy").

237 An example of a strong federal procedural interest that is not shared by the state courts, and that supports application of the federal rule, is found in *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991). Federal judge-made law permitted the imposition of penalties on contumacious parties in situations where such sanctions were unavailable under state law. Asserting that the ability to impose those sanctions was necessary to vindicate federal judicial authority, the Court stated that "[w]e do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie, Guaranty Trust Co.* and *Hanna*." *Id.* at 55 (quoting from court of appeals decision, Nacso, Inc. v. Chambers, 894 F.2d 696, 705 (5th Cir. 1990)).

238 332 U.S. 301 (1947).

239 *Id.* at 302.

240 *See id.* at 307 ("[T]he *Erie* decision, which related only to the law to be applied in the exercise of [diversity] jurisdiction, had no effect, and was intended to have

In *Erie*, the federal courts had to follow state law because the subject matter of the dispute involved "matters essentially of local interest and state control."[241] Although the Court in *Standard Oil* eventually decided not to impose liability,[242] it nonetheless identified and contrasted the situations in which federal common law could appropriately be created: matters "vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings."[243]

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none, to bring within the governance of state law matters exclusively federal . . . ."); *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 334 (1981) ("The Court [in *Erie*] . . . did not there upset, nor has it since disturbed, a deeply rooted, more specialized federal common law that has arisen to effectuate federal interests embodied either in the Constitution or an Act of Congress.") (Blackmun, J., dissenting) (footnote omitted); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) ("The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law . . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.") (distinguishing *Erie*).

241 *Standard Oil*, 332 U.S. at 307 ("It was the so-called 'federal common law' utilized as a substitute for state power, to create and enforce legal relationships in the area set apart in our scheme for state rather than for federal control, that the *Erie* decision threw out. Its object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.").

As noted above, see *supra* note 34, it is likely that today the Supreme Court would conclude that the Congress has power to legislate with respect to the duty owed by interstate railroads to persons walking on their rights-of-way. It still does not follow that in the absence of such legislation, the federal courts have the ability to create rules in this area pursuant to their common law powers. Even if the Constitution does not dictate this result—and the absence of such power may be inferred from the arguably limited grant of authority in Article III for the Congress to create inferior lower courts, but not vesting them with such "law-making" power—this result must flow from the Rules of Decision Act.

242 The Court ultimately concluded that congressional inaction dictated that the question of liability should be resolved legislatively rather than judicially. *See id.* at 311–17.

243 *Id.* at 307. The Court further distinguished this category from the *Erie* situation:

> [E]xcept 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 judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the Erie ruling.

*Id.* at 309–10.

*See also* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) ("In deciding whether rules of federal common law should be fashioned, normally the guiding prin-

Subsequent decisions have made clear that this standard is not easily met: there must be substantial federal interests to justify the creation of federal common law.[244] Situations where such law may be created are "few and restricted,"[245] and are "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'"[246]

This insistence on strong and genuine federal interests as a condition for the creation of federal common law would suggest that the situations in which meaningful federal interests exist in an *Erie* setting are limited and that many assertions of a federal interest can eventually be reduced to "false conflicts."[247] Thus, one conclusion from this analysis would be the creation of a presumption that most clashes

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ciple is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.").

The importance of uniformity as a federal interest is reflected in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952). A railroad fireman brought an action under the Federal Employers' Liability Act in state court; one issue was the validity of a release given by the employee. After a jury verdict for the plaintiff, the trial court, applying state law, granted the defendant's motion for a judgment notwithstanding the verdict. In reversing that ruling, the Supreme Court initially stated that the "validity of releases under the . . . Act raises a federal question to be determined by federal rather than state law," *id.* at 361, because "only if federal law controls can the federal Act be given the uniform application throughout the country essential to effectuate its purposes." *Id.* Without mentioning *Erie*, the Court also asserted "that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." *Id.* at 363.

244 *See* Illinois v. City of Milwaukee, 406 U.S. 91, 105 n.6 (1972) ("[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law.").

245 *See* Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) ("As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating [*Erie*]. The instances where we have created federal common law are few and restricted.").

246 O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (quoting *Wallis*, 384 U.S. at 68) (adding that "[o]ur cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision"). *See* Atherton v. FDIC, 519 U.S. 213, 224–25, (1997) (declining to create federal common law rule in absence of "significant conflict with, or threat to, a federal interest").

247 By analogy, the Court has insisted that preemption of state law in the face of allegedly inconsistent federal law will "occur only where a particular state requirement threatens to interfere with a specific federal interest." Lohr v. Medtronic, Inc., 518 U.S. 470, 500 (1996). Previously, the Court had stated that preemption would occur if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

present "false conflicts" and that therefore state law should be followed when it differs from federal judge-made law.

However, there will nonetheless be situations that present "true conflicts." Three steps are once again needed to make use of the methodologies drawn from the conflicts area to resolve these *Erie* situations. In each case, the federal courts must clearly define the policies underlying the conflicting rules. They must then identify the competing state and federal interests implicated by the application of those rules. And finally, they must begin to develop clearer standards for balancing those interests.[248]

For example, in the first part of *Gasperini*, the Supreme Court was sensitive to identifying the nature of New York's "dominant interest" in the heightened standard of review—the "false conflicts" situation.[249] By contrast, the portion of the decision dealing with appellate review—the "true conflicts" situation—described the presence of "countervailing federal interests," based in part on the "essential characteristics" of the federal system. However, the Court's identification of the purported source and nature of these federal interests[250] (in contrast to their absence at the trial level), as well as the apparent absence of strong state interests, stands as an excellent example of the

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248 *But see* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4508, at 242 (2d ed. 1996) ("The major difficulty with the Byrd analysis stemmed from the fact that there is no scale on which the balancing process called for by the Court can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the value of preserving uniformity of result with the state court. Even if there were such a scale, the weights to be placed upon it must be whatever the judges say they are.").

249 *See supra* notes 114 & 212–13.

250 The Court merely stated, in conclusory form, that there was a strong federal interest in restricting federal appellate review of jury decisions:

> Parallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment.
>
> . . . .
>
> Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)'s "deviates markedly" check.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 426 (1996).

Yet apart from the Seventh Amendment concerns, it is hardly clear why limiting appellate review to a determination whether the trial court's failure to set aside a verdict was an "abuse of discretion" constitutes an "essential characteristic" of the federal system any more so than the standard of review at the trial level.

Some of the reasons for following the federal standard that could have been offered are set forth *supra* note 213 and accompanying text.

*ipse dixit* approach to law rather than an attempt at genuine analysis.[251] Therefore, the opinion provides little insight into how another court would ascertain whether such interests existed in other situations.[252]

Of equal importance, what is to happen after the federal and state interests are identified and defined and a true conflict remains? The resolution of "true conflicts" is among the most difficult tasks in choice of law analysis. I have deliberately chosen neither to synthesize previously offered solutions[253] nor to offer yet another new approach. Instead, the hoped-for contribution of this Article is the demonstration that additional coherence can be given to *Erie* analysis by the invocation of horizontally derived, policy-based choice of law analysis. I would expect that a combination of the choice of law experiences of the state courts in the last three decades, and the various suggestions of numerous academics, would allow the federal system to develop its own formulae for resolving conflicts in the vertical setting.

As already indicated, this proposed avenue of inquiry often will require a balancing or weighing of competing policies and interests. But far greater specificity will be needed with regard to the weight to be given to each of the factors on the two sides of the scale. It is true that many other areas of law are also characterized by "three part or four part tests"[254] or a "balancing analysis"[255] (and that these ap-

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251 *See* Rowe, *supra* note 109, at 986 ("More consequential for where *Erie-Hanna* analyses stand after *Gasperini* is the unanswered question of what constitutes an "essential characteristic of the federal judicial system" or a "countervailing federal interest" in a judge-made federal procedural rule, calling for consideration of state and federal interests as well as likely outcome effects and leading to balancing or accommodation.").

252 An issue similar to that at stake in *Gasperini* was noted, but then left unresolved, in *Dick v. New York Life Insurance Co.*, 359 U.S. 437 (1959): "whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship," *id.* at 444–45. Because the issue had not been properly briefed or argued, and because it was not clear that the federal and state standards differed, the Court decided to leave resolution of this question to a subsequent case. The analysis above, however, would support the prevailing lower court view of this question—that the use of a uniform federal standard is sufficiently important, and that the standard is one of the "essential characteristics" of a federal trial, such that an inconsistent state standard should *not* govern. 9A WRIGHT ET AL., *supra* note 248, at § 2525 (collecting cases)

253 *See supra* notes 203–06 and accompanying text.

254 *See, e.g.*, Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24–29 (1981) (determining whether "fundamental fairness" requirement of Due Process Clause compels appointment of counsel for indigent persons in parental status termination proceeding involves balancing of three factors and then weighing them against specified presumption); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557

proaches have been subject to substantial criticism). But as is also true with too many of those, all we know from *Byrd* and *Gasperini* are the outcomes, with no suggestion of how the balancing was done.

Thus, if this approach is to be helpful, the Court will have to describe how the weighing is to be performed, and not merely cough out the result. This part of interest analysis could be very useful, but only if past results do not appear to be arbitrary and if future results have some measure of predictability. Finally, I reiterate my proposed solution when this analysis indicates that the federal and state policies and the consequent interests are genuinely evenly balanced (or even in close balance): the federal court should defer to the state rule.[256]

## CONCLUSION

This inquiry was undertaken in an attempt to determine the extent to which learning from the conflict of laws realm might help inform *Erie* analysis. Since both horizontal and vertical choice of law questions involve choosing between the legal rules of two jurisdictions,[257] at first blush it would seem that there would be significant spillover. Yet, in many respects the differences are more significant than the similarities.

Nonetheless, the invocation of some of the methodology from the conflicts area should prove beneficial both in eliminating some, and resolving other, vertical choice of law questions. First, the interest analysis approach and its attempt, through the identification of "false conflicts," to dispose of some putative conflicts would help to reduce the number of cases that raise *Erie* problems and thus would minimize the situations in which the full *Hanna* analysis will be required. Second, with regard to that subset of cases involving clashes between state

(1980) (four part test for measuring protection given to commercial speech); Lemon v. Kurtzman, 403 U.S. 602 (1971) (three part test for determining violations of Establishment Clause); United States v. O'Brien, 391 U.S. 367 (1968) (three part test, focusing on time, place, and manner, to evaluate scope of protection under Free Speech Clause).

255 *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Pickering v. Board of Educ., 391 U.S. 563 (1968); Sherbert v. Verner, 374 U.S. 398 (1963).

256 In an article written twenty-five years ago, John R. Leathers suggested that "the problems of the true conflict [may be partially avoided] by virtue of [the] position that the choices involved in *Erie* and its progeny are all false conflicts." Leathers, *supra* note 108, at 793. Retreating from this, he then proposed that when interest analysis revealed "both relevant state and federal policies on a particular issue . . . the central government must be supreme." *Id.* at 824. As indicated, my conclusions differ on both counts.

257 In the horizontal setting, the rules of more than two states may be involved, but that is of no significance for *Erie* purposes.

rules of a procedural nature and federal judge-made law, learning drawn from more modern policy-based choice of law principles would help to resolve the choice where "true conflicts" exist by providing a methodology for reconciling these interests. The use of this approach should impart greater predictability and rationality to vertical choice of law situations. As a practical matter, it also would probably result in more frequent application of the state's rule.