ARTICLE

HORIZONTAL CHOICE OF LAW IN FEDERAL COURT

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Federal courts routinely apply state law. In diversity cases, federal courts apply the state law that the forum state would apply—the so-called Klaxon *rule. Outside of diversity, the vitality of* Klaxon *is far less clear. Federal courts have departed from* Klaxon *when applying state law in cases arising under bankruptcy, admiralty, the Foreign Sovereign Immunities Act, and more. Scholars have called for courts to abandon* Klaxon *in cases arising under the Class Action Fairness Act (CAFA) or consolidated as multidistrict litigation (MDL).*

These departures from Klaxon *might track offhand references to "diversity" in* Klaxon *and other* Erie *cases, but they are inconsistent with jurisdictional and institutional policies of* Erie *and its progeny. The policies of reducing jurisdictional manipulation and the resulting inequities are relevant no matter the basis of federal jurisdiction. And the policies of respecting state interests and constraining federal judicial lawmaking point to state choice-of-law rules whenever the court has decided to apply state law. Taken together, these policies call for the extension of* Klaxon *to any case in which state law applies in federal court—and perhaps to other cases where state law plays a role in federal law.*

Much like Erie *itself, these policy concerns are particularly important given the sociolegal context. In* Erie*, it was the manipulation of diversity jurisdiction that allowed corporate defendants to obtain preferable treatment. Today, it is bankruptcy, CAFA, and MDL that might create those opportunities. Extending* Klaxon *is the*

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only response consistent with the policies of Erie*, the Rules of Decision Act, and the federal jurisdictional statutes. Otherwise, the accident of federal jurisdiction will unjustifiably alter the state law to be applied.*

This is an article about what Professor Burbank might call lawyers' law.[1] *It treats of some difficult problems in a corner of conflict of laws that proceduralists have occupied—where state and federal law vie for space—among them problems that Professor Burbank set out to solve early in his career.*[2] *It treats as well of a decision last Term,*[3] *and a decision two decades ago*[4] *in which the Supreme Court accepted*

1 *See* Stephen B. Burbank, Semtek*, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1027 & n.1 (2002) [hereinafter Burbank, *Semtek*] ("This is an Article about what Justice Jackson would have called lawyers' law.") (citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 2 (1945)).

2 *See id.* at 1027 ("It treats of some difficult problems in a corner of conflict of laws that proceduralists have occupied—where state and federal law vie for space—problems that I set out to solve early in my career.") (citing Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) [hereinafter Burbank, *Interjurisdictional Preclusion*]).

3 Rodriguez v. FDIC, 140 S. Ct. 713 (2020).

4 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

the most controversial of the solutions Professor Burbank proposed fifteen years prior.[5] *More broadly, my hope is to cast some light both on the question whether shopping into federal jurisdiction is a problem worthy of concern today and on the immense contribution of Professor Burbank to procedural scholarship.*[6]

INTRODUCTION

Perhaps the most watched piece of complex litigation in American courts involves the lawsuits arising from the national opioid epidemic.[7] Municipal, state, and other plaintiffs have filed tens of thousands of lawsuits against the manufacturers and distributors of opiates, frequently arising under state law. Countless state law claims have ended up in federal court,[8] variously based on diversity of citizenship jurisdiction, supplemental jurisdiction, federal question jurisdiction, Class Action Fairness Act (CAFA) jurisdiction, federal officer removal, and more.[9] There was even a case filed by the State of Arizona under the original jurisdiction of the Supreme Court of the United States.[10] The district court cases were consolidated in a federal multidistrict litigation (MDL) in the Northern District of Ohio in front of Judge Dan Polster.[11] Then, in 2019, Purdue Pharma filed for bankruptcy in New York and sought

5 *See* Burbank, *Semtek*, *supra* note 1, at 1027-28 ("It treats as well of a decision last Term in which the Supreme Court accepted the most controversial of the solutions I proposed fifteen years ago.") (citing *Semtek*).

6 *See id.* at 1028 ("More broadly, my hope is to cast some light both on the question whether forum shopping between state and federal court is a problem worthy of concern today and on the nature, including the politics, of procedural scholarship.").

7 *See generally In re* Nat'l Prescription Opiate Litig., No. 1:17-2804 (N.D. Ohio filed Sept. 25, 2017) (opioid docket); Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html [https://perma.cc/U6EB-GYBJ] (discussing opioid MDL judge).

8 For more on state court opioid litigation, see Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, 70 DEPAUL L. REV. 245 (2021); and Roger Michalski; *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175 (2019).

9 *See*, *e.g.*, Bd. of Cty. Comm'rs of Seminole Cty., Okla. v. Purdue Pharma L.P., No. CIV-18-372-JWL, 2019 WL 1474397, at *1 (E.D. Okla. Apr. 3, 2019) (removing the case based on diversity of citizenship); Fla. Health Scis. Ctr., Inc. v. Sackler, No. 19-62992-CIV-MARTINEZ, 2020 WL 1046601, at *2-4 (S.D. Fla. Jan. 24, 2020) (removing the case because the issue was a federal question); City of Henderson v. Purdue Pharma L.P., No. 3:19-cv-00067-GFVT, 2020 WL 428112, at *1 (E.D. Ky. Jan. 27, 2020) (removing the case based on supplemental jurisdiction); *In re* Nat'l Prescription Opiate Litig., 327 F. Supp. 3d 1064, 1070–79 (N.D. Ohio 2018) (removing the case based on the doctrine of federal officer removal); Louisa Cty., Va. v. Purdue Pharma, L.P., No. 3:19-cv-00027, 2019 WL 6219872, at *1 (W.D. Va. May 24, 2019) (removing the case because it arose under the Class Action Fairness Act, a federal statute).

10 *See* State v. Sackler, 140 S. Ct. 812 (mem.) (2019); Arizona v. Sackler, Dkt. No. 22O151 (U.S. 2019). *See generally* Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court Over Opioid Crisis*, N.Y. TIMES (July 31, 2019), https://www.nytimes.com/2019/07/31/us/politics/arizona-supreme-court-opioid-sackler.html [https://perma.cc/W59H-576C].

11 *See*, *e.g.*, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

a stay of ongoing litigation, potentially bringing pending claims against it into the bankruptcy proceeding.[12]

Why, you might wonder, did the prior paragraph make so much of the various jurisdictional hooks in the opioid litigation? A claim is a claim is a claim, right?

Not so fast. Anyone who has taken first year Civil Procedure knows (or should know[13]) that federal courts may apply state law—the *Erie* doctrine[14]—and that, when sitting in diversity, the state law to be applied is the law that the forum state's highest court would apply—the *Klaxon* rule.[15] But what we may not tell our Civil Procedure students is that the reach of *Klaxon* beyond diversity is not so clear. Federal courts have departed from *Klaxon* when state law arises in bankruptcy, admiralty, and Foreign Sovereign Immunities Act cases, and in cases within the original jurisdiction of the Supreme Court.[16] Scholars have further called for federal courts to ignore *Klaxon* in CAFA and MDL cases.[17] If these scholars had their way, a state law claim in the opioid litigation might have been governed by different state law when filed in state court, when removed to federal court under CAFA, and when consolidated in a different court as an MDL. And even without the scholarly intervention, a defendant's decision to file for bankruptcy—for example, a so-called mass tort bankruptcy[18]—might have the effect of changing the state substantive law to be applied to pending claims.

This Article argues that these results are at variance with the policies of the *Erie* doctrine; they are inconsistent with the Rules of Decision Act; and they draw no support from the federal jurisdictional statutes. A better approach is to follow *Klaxon* whenever state law applies in federal court—and perhaps in situations where state law is otherwise incorporated into federal law.

Support for this approach comes from both the jurisdictional and institutional policies of *Erie*. The jurisdictional policies of *Erie* are often characterized as the "twin aims" of reducing forum shopping and avoiding the inequitable administration of the laws. These laudable goals are implicated when state law applies in federal court regardless of the basis of federal jurisdiction. Indeed, if we take seriously Justice Brandeis's concern with the social context of jurisdictional manipulation,[19] applying different law

12 *See*, *e.g.*, *In re* Nat'l Prescription Opiate Litig., No. 1:17-2804, 2019 WL 4686815, at *6 (N.D. Ohio Sept. 26, 2019).

13 *See*, *e.g.*, Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 50 (2006) ("All eighteen current civil procedure casebooks cover *Erie*, devoting an average of sixty-three pages to it . . . .").

14 *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

15 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

16 *See infra* Section I.B.

17 *Id.*

18 *See infra* notes 145–46 and accompanying text.

19 *See infra* notes 134–35 and accompanying text.

to CAFA, MDL, and bankruptcy poses particular problems in light of the parties to whom those bases might be available. So although *Erie* cases occasionally talk about the "accident of diversity," the policies of *Erie*, if not construed in a "crabbed or wooden fashion,"[20] sweep more broadly.

The institutional policies of *Erie* also support extending *Klaxon* to these other cases. The *Erie* doctrine embodies two significant institutional policies: the protection of state interests and the desire to constrain federal judicial lawmaking. Extending *Klaxon* to any issue arising under state law furthers these twin institutional aims. *Klaxon* acknowledged that state interests are expressed not only in substantive law but also in choice of law. *Klaxon* also reflected the Supreme Court's concern that federal judges could circumvent *Erie* by smuggling federal lawmaking through the choice-of-law backdoor. *Erie*'s institutional goals do not depend in any way on the basis of federal jurisdiction, and none of the federal jurisdictional statutes suggest any congressional intent to alter the choice of state law in federal court. Indeed, to the extent Congress expressed any opinion on choice of law, it would be in the Rules of Decision Act, which calls for federal courts to apply state law without any mention of the jurisdictional basis.

Importantly, the inconsistent choice-of-law treatment identified in this Article sometimes operates between state and federal courts, and sometimes between bases of federal jurisdiction. As a result, we cannot limit our gaze to federal-state forum shopping, but we also must consider shopping among bases of jurisdiction. Some parties, for example, might be able to choose whether claims are litigated as diversity cases, CAFA cases, MDLs, or in bankruptcy.

This ability to "jurisdiction shop" supports having the same horizontal choice-of-law rule independent of the basis of federal jurisdiction. Because *Klaxon* is not going anywhere,[21] it should extend to all bases of federal jurisdiction when state law applies. This conclusion suggests two versions of this Article's claim. The strong version is that federal courts should follow *Klaxon* when choosing among states' laws, period. The weak version is that, conditional on *Klaxon* being the rule for diversity cases (and many other types of cases), it also should be the rule for all other bases of federal jurisdiction, as a consistent choice-of-law approach is preferred.[22] So even for those who dislike *Klaxon*, this Article suggests that it would be a mistake for that rule to govern some but not all federal cases.

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20 Robertson v. Wegmann, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting) (discussing the Rules of Decision Act); *see* Burbank, *Interjurisdictional Preclusion*, *supra* note 2 (quoting this phrase with respect to the proper interpretation of the Rules of Decision Act). Hart, according to Burbank, had a "crabbed and sterile view" of *Erie*'s social purposes. *See* Burbank, *Semtek*, *supra* note 1, at 1053 n.110.

21 Given the signals from the Supreme Court and the lack of any from Congress, this seems like a reasonable assumption. *See infra* note 51.

22 For more on this weak form, see *infra* notes 170 & 191.

Nothing in this Article, by the way, depends on some quantitative accounting of the frequency with which parties shop for different choice-of-law rules. Indeed, such an accounting is impossible for CAFA and MDL where courts have not (yet?) departed from *Klaxon*. But it must be true that arties care about the law to be chosen—it is what determines whether they will be hanged in Professor Silberman's famous quip.[23] And however frequently parties shop for choice of law, the ability to shop can result in unequal treatment between those with access to particular bases of jurisdiction and those without such access, and it can intrude on state interest and empower federal judges without cause.

The balance of this Article proceeds as follows.[24] Part I briefly reviews the *Klaxon* decision and its critics, before exploring in more detail the areas in which federal courts depart from *Klaxon* or in which scholars have claimed that they should. Part II argues that the *Klaxon* rule should be extended to all cases where state law is applied in federal court. It first shows how the concerns with jurisdictional manipulation that motivated *Erie* are not limited to diversity cases, and that today's *Black & White Taxicab*[25] could involve the manipulation of jurisdiction via bankruptcy, CAFA, or MDL. This Part then details how the jurisdictional and institutional policies of *Erie*, supported by the Rules of Decision Act and the federal jurisdictional statutes, point to the use of *Klaxon* beyond diversity. Part III then proposes tentative extensions of these arguments: courts should follow *Klaxon* when federal common law or a federal statute looks to state law, and federal preclusion law should adopt state law for judgments arising under state law regardless of the basis of federal jurisdiction.[26] In short, *Klaxon* all the way down.[27]

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23 Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

24 I feel tempted here to invoke Professor Burbank's statement about his work on interjurisdictional preclusion: "This is a long article about an exquisitely difficult subject." *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 829.

25 Justice Brandeis in *Erie* cited *Black & White Taxicab v. Black & Yellow Taxicab*, 276 U.S. 518 (1928), as an example of a corporate defendant manipulating federal jurisdiction by changing its citizenship to create diversity.

26 To be more precise, Part III suggests three possible extensions. First, while federal courts have been unclear (at best) about how they select the state law to be adopted as federal common law, I argue that *Klaxon* should inform the horizontal choice of adopted law. Second, for the same reasons that *Klaxon* should apply to state law outside of diversity, *Semtek*'s adoption of state law for preclusion should turn on the source of law rather than the basis of jurisdiction. Third, *Klaxon* should be the presumptive approach when courts are interpreting federal statutes pointing to state law.

27 *See*, *e.g.*, Rapanos v. United States, 547 U.S. 715, 754 n.14 (2006) ("[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle.

I. KLAXON AND ITS DISCONTENTS

A. Klaxon

It always starts with *Erie*.[28] When the *Erie* doctrine calls for the application of state law,[29] it raises a question of horizontal choice of law—an issue, unfortunately for Harry Tompkins, to which the *Erie* Court gave little attention.[30]

Three years after *Erie*, the Supreme Court took up horizontal choice of law in *Klaxon v. Stentor Electric Manufacturing Co.*[31] *Klaxon* was a breach-of-contract case, filed in the District of Delaware. The district court applied New York contract law to the claim. What proved a more vexing question was the law governing prejudgment interest. The district court and court of appeals applied New York law, seemingly following a federal choice-of-law rule.

The Supreme Court unanimously reversed, holding that the choice-of-law question should be answered by forum law (here Delaware law).[32] As the Court observed, "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."[33] More generally, in

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When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.'").

28 The lesson that "all legal questions are *Erie* questions" is one that I learned from Professor Kevin Clermont, but this is not his *Festschrift*, so it is relegated to the footnotes. *See* KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 188 (6th ed. 2021) ("[T]he simple fact is that every question of law in a federal system such as ours is preceded by the choice-of-law problem of whether the legal question is a matter of state or federal law. 'Every question of law' means all tasks of making or applying law, whether by public or private actors. If a police officer or a car driver is trying to determine the speed limit, that person needs first to resolve whether state or federal law governs by determining the choice that the Constitution, Congress, or courts have made or would make.").

29 I refer to the "application" of state law consistent with the distinction between adopting and applying, see generally Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243(2018), and consistent with the Rules of Decision Act's use of "apply." 28 U.S.C. § 1652 (2018). *Cf.* ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 1049-51 (1965) (speaking in terms of "supplementation" and "delineation"). For more on the adoption of state law, see *infra* Part III.

30 As Professor Purcell observed, had the *Erie* Court considered the horizontal choice of law and applied a *Klaxon*-like approach, then it likely would have selected New York general law, under which Tompkins may have recovered. *See* Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES (Kevin M. Clermont 1st ed., 2004) at n.145.

31 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). For more background on *Klaxon*, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 770-77 (2012).

32 *Klaxon*, 313 U.S. at 496 ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.").

33 *Id.* at 496-97.

cases in which it applies, the *Klaxon* rule calls for federal courts to follow the horizontal choice of law of the forum state, without exception.[34]

At least three reasons support the *Klaxon* approach. First, a fundamental policy of *Erie* is reducing the incentives for intrastate forum shopping,[35] particularly with reference to matters of substantive law, though it does not track a "substance-procedure" line.[36] As Ed Purcell teaches, the need for intrastate uniformity to counter jurisdictional manipulation by corporate defendants motivated *Erie* in the first place.[37] Soon after *Erie*, it became apparent that choice of law in federal court could be an avenue to undercut this policy goal,[38] as choice of law could lead to different law being applied in state and federal courts.[39] *Klaxon* could be understood, therefore, as a patch on a hole in the *Erie* doctrine through which intrastate disuniformity could have crept.[40]

Second, the *Erie* line embodies a notion of federalism that is attentive to state substantive policies.[41] Choice-of-law rules are expressions of substantive policies.[42] So when we talk about *Erie* respecting the value of federalism, that respect should extend to choice-of-law federalism.[43] To be sure, the application of forum-state choice of law in federal court will lead to horizontal disuniformity. But as Justice Reed said in *Klaxon*, "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

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34 *See*, *e.g.*, *id.*; Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975).

35 *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938) (explaining the Court's decision to overturn the discriminatory *Swift v. Tyson* decision which "made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court"); Hanna v. Plumer, 380 U.S. 460, 467 (1965) (noting that the *Erie* decision was in part a reaction to the practice of forum-shopping in the wake of *Swift v. Tyson*).

36 *See, e.g.*, Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945) (explaining that *Erie* did not draw firm lines between "substantive" and "procedural" laws).

37 *See infra* note 134 and accompanying text (citing Purcell sources and summarizing his views on *Erie*).

38 *See* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847 (2017).

39 *See*, *e.g.*, Guaranty Tr. Co. v. York, 326 U.S. 99 (1945); Hanna v. Plumer, 380 U.S. 460 (1965).

40 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941).

41 *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

42 *See, e.g.*, Russell J. Weintraub, *The* Erie *Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."); Bradt, *supra* note 31, at 775-76. Professor Wolff suggested that this choice-of-law analysis should be divided into inquiries into the reach of a state's law (which is a matter of state interest) and the resolution of conflicts among state laws (which, at least in federal court, is a matter of federal interest). *See* Wolff, *supra* note 38, at 1884. But the resolution of conflicts among state laws is also a matter of state interest, reflected in state rules on choice of law (where they apply).

43 *See*, *e.g.*, Andrew D. Bradt, *Forum Selection After* Atlantic Marine: Atlantic Marine *and Choice-of-Law Federalism*, 66 HASTINGS L.J. 617 (2015); David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732 (1963); Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 345 (1960).

permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors."[44] In other words, horizontal disuniformity is part of *Erie*'s federalism.

Third, among the many lessons Professor Burbank has taught is that one must be cognizant of the institutional interests of judges, which often run toward increasing judicial power.[45] Central to *Erie* is the reining in of federal judicial lawmaking.[46] *Klaxon* furthers this aim too. The mechanical application of forum-state choice of law takes power out of the hands of federal judges, reallocating it to the states (by incorporating state choice-of-law doctrine) and to Congress (by leaving open the possibility for federal choice-of-law legislation).[47]

B. *Not* Klaxon

The *Klaxon* decision has generated much consternation. As Professor Burbank observed, the central objection to *Klaxon* "is a complaint, most prominently associated with Henry Hart, that has been repeated by generations of scholars who have been in Hart's thrall."[48] Hart criticized *Klaxon* because it encouraged interstate forum shopping, a problem he thought could be avoided by federal choice-of-law rules.[49] I could go on at length with other versions of this general criticism and with rejoinders from Purcell, Burbank, Cavers, and others.[50] But Congress and the Supreme Court have

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

45 *See*, *e.g.*, Burbank, *Semtek*, *supra* note 1, at 1054 (referring to federal judges' "perfectly natural desires to maximize their own power and to serve their own institutional interests").

46 *See Erie*, 304 U.S. 64.

47 This argument recalls Cavers's and Currie's earlier defenses of *Klaxon*. These scholars acknowledged that when the forum state was "disinterested," the arguments in favor of *Klaxon* were diminished. But they were reluctant to jettison *Klaxon* even in these situations because the alternative was empowering federal judges to make federal common law rules for choice of law. *See*, *e.g.*, David F. Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the* Klaxon *Problem,* MEMORANDUM FOR THE AMERICAN LAW INSTITUTE STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, (Tentative Draft No. 1 Apr. 30, 1963) at 14; Bradt, *supra* note 31, at 802-04.

48 Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1940 (2006) [hereinafter Burbank, *Couch*] (citing Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512-13 (1954)).

49 *See*, *e.g.*, Hart, *supra* note 48, at 715.

50 *See*, *e.g.*, *infra* note 134 (collecting Purcell sources); Burbank, *Couch*, *supra* note 48; Cavers, *supra* note 43; Cavers, *supra* note 47; Bradt, *supra* note 31; Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579 (2013).

given no indication that they intend to overrule *Klaxon*,[51] so as a concession to the shortness of life,[52] I discuss here the more focused attacks on *Klaxon*.

There is no doubt (at least in my mind) that the *Erie* doctrine governs when state law applies in federal court, regardless of whether the case relies on diversity of citizenship jurisdiction.[53] But what about *Klaxon*? On the same day as *Klaxon*, the Supreme Court decided *Griffin v. McCoach*.[54] *Griffin* applied *Klaxon* to select the applicable state law in a statutory interpleader action that could not have been filed in state court in the forum state.[55] So literally from day one, *Klaxon* was not limited to diversity cases. In addition, a review of lower federal court decisions finds that federal courts follow *Klaxon* not only for diversity cases but also when applying state law in federal question and supplemental jurisdiction cases.[56] And for many other jurisdictional bases, there is no indication that federal courts do anything but *Klaxon*.[57]

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51 *See*, *e.g.*, Day & Zimmermann v. Challoner, 423 U.S. 3 (1975); Bradt, *supra* note 31, at 783 ("The Supreme Court has shown no willingness to overrule *Klaxon*, and the Congress has declined to enact federal choice-of-law rules despite several opportunities.").

52 This is a phrase I can hear in Professor Burbank's voice, and Westlaw tells me he used in eight articles over three decades.

53 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4520 (3d ed.) (2021 Update) ("It frequently is said that the doctrine of *Erie Railroad Company v. Tompkins* applies only in diversity of citizenship cases; this statement simply is wrong.") (footnote omitted); Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540-41 n.1 (1956) ("[D]espite repeated statements implying the contrary, it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.") (internal citation omitted)*; see, e.g.*, Comm'r v. Estate of Bosch, 387 U.S. 456 (1967) (discussing *Erie* in federal question case); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) (citing *Erie* in pendent jurisdiction case). *But see* Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341 (2017).

54 Griffin v. McCoach, 313 U.S. 498 (1941).

55 *Id.*

56 *See*, *e.g.*, Fagin v. Gilmartin, 432 F.3d 276, 282 (3d Cir. 2005) (federal question); Shannon-Vail Five Inc. v. Bunch, 270 F.3d 1207, 1210 (9th Cir. 2001) (federal question); Dykes v. DePuy, Inc., 140 F.3d 31, 39 (1st Cir. 1998) (supplemental jurisdiction); *see also*, *e.g.*, A.K. Stamping Co. v. Instrument Specialties Co., 106 F. Supp. 2d 627, 647 n.28 (D.N.J. 2000) (applying *Klaxon* to supplemental state law unfair competition claims that are related to "copyright, patent, plant variety protection or trademark" claims under 28 U.S.C. § 1338(b)).

Of course, one can find occasional deviations even in these areas. *See*, *e.g.*, Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 791-92 (2d Cir. 1980) (relying on federal choice of law in Edge Act case). *But see* Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC, 797 F.3d 160, n.5 (2d Cir. 2015) (questioning this approach).

57 *See*, *e.g.*, 28 U.S.C. §§ 1337, 1343, 1349, 1361, 1369. With respect to the last of these sections, earlier proposals for multiparty, multiforum jurisdiction included a choice-of-law provision, but it did not appear in the final version. *See id.*; CRS Report For Congress, Multiparty, Multiforum Trial Jurisdiction Act of 2002, P.L. 107-273, Order Code RS20861 (Updated December 10, 2002) (comparing bills). *See generally* Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977 (1994); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992); Thomas Rowe & Kenneth Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986).

But for a few jurisdictional bases, federal courts have charted other courses. And scholars critical of *Klaxon* have argued that federal courts should decline to follow *Klaxon* in certain other categories of cases. The balance of this Section reviews the areas where *Klaxon* is not followed or is under threat.[58]

1. Bankruptcy

Federal courts have exclusive jurisdiction over federal bankruptcy proceedings and concurrent jurisdiction over claims that arise in or relate to the bankruptcy proceeding.[59] This jurisdiction includes what the law calls "core" and "non-core" claims. "Core" claims arise from the Bankruptcy Act or would not exist without it, while "non-core" claims are merely related to the bankruptcy.[60]

Both "core" and "non-core" claims may arise under state law, and state law issues may arise in any bankruptcy proceeding. To give a recent an example, in *Rodriguez v. FDIC*, the Supreme Court held that state law provides the rule for the distribution of tax refunds following a consolidated return, an issue presented in a Chapter 7 bankruptcy.[61] Or to give a more well-known example, the claims at issue in *Northern Pipeline*—a case addressing the constitutionality of bankruptcy court jurisdiction—alleged breach of contract, breach of warranty, misrepresentation, coercion, and duress under state law.[62]

Because bankruptcy proceedings may involve issues of state law, they also may involve the horizontal choice of law. The *Erie* doctrine applies in bankruptcy,[63] but federal courts are split on the application of *Klaxon* in bankruptcy. Some lower courts faithfully apply *Klaxon*.[64] The Ninth Circuit

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58 I omit here what Wright & Miller considers to be the first exception to *Klaxon*, *i.e.*, where application of the forum state's choice-of-law rule would violate the Full Faith and Credit Clause or the Due Process Clause. *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4506 (3d ed.) (2021 Update) (citing *inter alia* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) and Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953)). I do not consider this an exception as much as a constitutional limit.

59 *See* 28 U.S.C. § 1334; 28 U.S.C. § 157.

60 *Id.* Final jurisdiction over non-core claims may not be exercised by federal bankruptcy judges consistent with Article III. *See* Stern v. Marshall, 564 U.S. 462 (2011).

61 Rodriguez v. FDIC, 140 S. Ct. 713 (2020).

62 Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

63 *See generally* Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633 (2004); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931 (2004). I do not here treat the choice between federal and foreign law in bankruptcy. *See*, *e.g.*, Hannah L Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. OF INT'L L. 23, 26-37 (2000).

64 *See*, *e.g.*, *In re* Syntax-Brillian Corp., 573 F. App'x 154, 162 (3d Cir. 2014) ("'The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.'") (quoting *Klaxon*, 313 U.S. at 496); *In re* Payless Cashways, 203 F.3d 1081, 1084 (8th Cir. 2000) ("The bankruptcy court applies the choice of law rules of the state in which it sits."). The Sixth Circuit seems on the fence. *See In re* Dow Corning Corp., 778 F.3d 545, 551 (6th

expressly departs from *Klaxon* for state law issues in bankruptcy cases, applying instead an approach modeled on the Restatement (Second) of Conflict of Laws.[65] The Second and Fourth Circuits say that they follow *Klaxon*, but they permit deviation in service of a strong federal interest,[66] which is inconsistent with the treatment of state law under *Klaxon* and *Erie*.[67] (Followers of the *Erie* doctrine will recognize similarities between this approach and *Kimbell Foods*'s adoption of state law,[68] a topic to which I turn below.)[69] Professor Cross, among others, also has made the case that *Klaxon* should not apply in bankruptcy.[70]

Part of the explanation for the departures from *Klaxon* can be found in Supreme Court dicta. In 1946, the Supreme Court in *Vanston Bondholders Protective Committee v. Green* held that federal law provided the rule of decision on the issue whether to require the payment of interest on unpaid interest.[71] The Court, in other words, concluded that the *Erie* analysis pointed to federal law.[72] In dicta, the Court went on to opine about the appropriate horizontal choice-of-law methodology when a bankruptcy case called for the application of state law, implying that at least under some circumstances a federal court would apply a federal choice-of-law method informed by the

Cir. 2015) ("Although we long ago applied *Klaxon* to a choice of law issue arising under a previous version of the Bankruptcy Code . . . we have not weighed in on the recent circuit split, and we do not address that broad question.").

65 *In re* Miller, 853 F.3d 508, 515-16 (9th Cir. 2017) (citing *In re* Lindsay, 59 F.3d 942, 948 (9th Cir.1995)).

66 *In re* Merritt Dredging Co., Inc., 839 F.2d 203, 206 (4th Cir. 1988) ("We believe, however, that in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."); *In re* Gaston & Snow, 243 F.3d 599, 601-02 (2d Cir. 2001) ("[W]e decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state.").

67 *See* Day & Zimmermann, Inc. v. Challoner, 423 US 3 (1975); *see also* Clermont, *supra* note 29.

68 *See supra* note 29 (distinguishing adoption and application); Clermont, *supra* note 29 (same, in more detail).

69 *See infra* Section III.A.

70 *See* John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 572 (1989).

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

72 The Court stated: "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R. Co. v. Tompkins* has no such implication." *Id*. (internal citation omitted). Professor Wolff takes this language to mean that *Erie* "had no application in bankruptcy." *See* Wolff, *supra* note 38. The validity of this statement depends on what we mean by "*Erie*." If *Erie* means the selection of federal or state law, than this is decidedly not true, for courts sitting in bankruptcy routinely choose between federal and state law. *See supra* notes 61–62 and accompanying text. I read the statement to mean that *Erie* does not require the application of state law on this question. One might, therefore, think about this statement as more akin to *Clearfield*'s statement that "the rule of *Erie R. Co. v. Tompkins* does not apply to this action," even though it essentially applied the prevailing *Erie* method. *See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (internal citation omitted); *see also* Clermont, *supra* note 29 ("[T]he *Clearfield* problem[] is no more than a restatement of the *Erie* problem.").

Bankruptcy Act.[73] Based on this dictum, some have concluded that *Klaxon* does not apply in cases sounding in bankruptcy,[74] and some have pointed to *Vanston Bondholders* as support for broader attacks on *Klaxon*.[75]

There are any number of reasons to discount *Vanston Bondholders*' dicta,[76] including more recent dicta pointing the other way. In the *Rodriguez* decision, for example, the Court cited approvingly to a bankruptcy case from 1979 called *Butner v. United States*.[77] In *Butner*, the Supreme Court addressed what law governed the collection of rents during a bankruptcy. The Court applied state law and, in so doing, made the following observations consistent with the application of *Klaxon*:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."[78]

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73 *Vanston Bondholders*, 329 U.S. at 161-62; *see*, *e.g.*, Wolff, *supra* note 38, at 1877 ("[*Vanston*'s] discussion of the choice-of-law question as involving a balance of the equities among the parties in light of the policies of the interested states appears to have been influenced strongly by the purposes animating the Bankruptcy Act itself.").

74 *See*, *e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4518 (3d ed.) (2021 Update).

75 *See*, *e.g.*, Wolff, *supra* note 38 (relying on this language to call to limit *Klaxon*).

76 For example, the case was decided in 1946, well before *Day & Zimmerman*'s more definitive endorsement of *Klaxon* in 1975. It also was decided during the era where the Court was still working the scope and mechanics of *Erie*. *See*, *e.g.*, *Guaranty Tr. Co. v. York*, 326 U.S. 99 (1945). For those who believe that the Rules of Decision Act plays an important role in *Erie* cases, that statute exclusively referred to common law claims until two years after *Vanston Bondholders*. *See* 28 U.S.C. § 725 (superseded by 28 U.S.C. § 1652). For those who draw their interpretation of *Erie*'s reach from the policies of the relevant federal jurisdictional statute, this case was decided under the Bankruptcy Act of 1898, superseded by the Bankruptcy Reform Act of 1978. Among others, the 1978 statute greatly expanded bankruptcy jurisdiction's reach over state law claims as compared to the era of *Vanston Bondholders*. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52-56 (1982). And finally, it must be said that the Supreme Court takes a much less friendly view toward federal common lawmaking today than it did in 1946. See, *e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4518 (3d ed.) (2021 Update) (making this point about *Vanston Bondholders*).

77 *See* Rodriguez v. FDIC, 140 S.Ct. 713 (2020) (citing 440 U.S. 48 (1979)).

78 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)). For another piece of dictum, see BFP v. Resolution Trust Corp., 511 U.S. 531, 545-55 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.' Otherwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law.") (internal citations and note omitted).

Uniform treatment "within a state" requires the application of *Klaxon*. And the talk about a "different result" and "forum shopping" puts this case squarely in the *Erie-Klaxon* oeuvre.

In any event, without a clear holding from the Supreme Court, some federal courts have deviated from *Klaxon* in bankruptcy cases—meaning that these courts might apply different law than the forum state's courts or than the same federal court would apply under other types of jurisdiction.

2. Admiralty

Next is admiralty. Much of the law of admiralty is federal law, but state law may apply in admiralty cases involving commercial regulation in territorial waters, maritime insurance contracts, environmental issues, safety regulations, and others.[79]

When applying state law in admiralty, federal courts typically eschew *Klaxon* in favor of the federal choice-of-law methodology described in *Lauritzen v. Larsen*, where the Court laid out a test that looks for the sovereign with the most significant "connecting factors."[80]

The dispute in *Lauritzen* concerned a conflict between federal law and a foreign nation's law, and the Court's language suggested its test was specifically designed for cases implicating foreign-country law.[81] Most notably, the Court described the "law of the flag" as "[p]erhaps the most venerable and universal rule of maritime law."[82]

And yet, lower courts have used a *Lauritzen*-like analysis for resolving purely domestic conflicts (*i.e.*, between U.S. states).[83] These courts often work around the awkwardness of applying *Lauritzen* to domestic conflicts by

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79 *See generally* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999); Robert Force, *Choice of Law in Admiralty Cases: National Interests and the Admiralty Clause*, 75 TUL. L. REV. 1421 (2001).

80 345 U.S. 571, 584-91 (1953) (listing the "Place of the Wrongful Act," "Law of the Flag," "Allegiance or Domicile of the Injured," "Allegiance of the Defendant Shipowner," "Place of Contract," "Inaccessibility of Foreign Forum," and "The Law of the Forum" as relevant factors in this analysis).

81 *See, e.g.*, *id.* at 582 ("The criteria [for choice of law in maritime matters], in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the *national interest* served by the assertion of authority.") (emphasis added); *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383 (1959) ("The controlling considerations [in a *Lauritzen* analysis] are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.").

82 *Lauritzen*, 345 U.S. at 584.

83 *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4506 (3d ed.) (2021 Update).

ignoring the original list of "connecting factors" and instead treating *Lauritzen* as calling for interests analysis.[84]

Thus, by applying *Lauritzen*, federal courts sitting in admiralty depart from the *Klaxon* rule. And, again, this means that they may apply different law than the forum state or the same federal court would apply under another jurisdictional basis.

3. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA) is an unusual statute, providing (among others) subject matter jurisdiction, personal jurisdiction, removal, immunities, and immunity exceptions for actions against foreign states.[85] Federal and state courts have concurrent jurisdiction over claims against foreign states,[86] though Congress intended to encourage the litigating of these cases in federal court.[87]

The FSIA has something to say about rules of decision as well. The statute provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[88] This aspect of the FSIA has been described as a "pass-through" for state law.[89] But what state law?[90] Wright & Miller asserts that *Klaxon* does not apply to FSIA cases.[91] The Second and D.C. Circuits use the forum's choice-of-law rule,

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84 *See*, *e.g.*, Goodloe v. Royal Caribbean Cruises, Ltd., 418 F. Supp. 3d 1112, 1128 (S.D. Fla. 2019) ("[T]he *Lauritzen* factors, at their core, aim to identify the state with the most significant relationship to the action.").

85 *See* 28 U.S.C. §§ 1330, 1602–11 (2018); 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3662.2 (4th ed.) (2021 Update).

86 *See*, *e.g.*, Martropico Compania Naviera S. A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), 428 F. Supp. 1035 (S.D.N.Y. 1977) (holding that the FSIA granted the federal district court original, but not exclusive, jurisdiction); WRIGHT & MILLER, *supra* note 85.

87 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497 (1983) ("Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts. . . .").

88 28 U.S.C. § 1606 (2018).

89 *See* Owens v. Republic of Sudan, 864 F.3d 751, 763 (D.C. Cir. 2017), *certified question answered*, 194 A.3d 38 (D.C. App. 2018); Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 12 (2d Cir. 1996) (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 229 (1996), using the "pass-through" language in the context of the Warsaw Convention).

90 Arguably, the FSIA is an example of federal law "adopting" state law as federal law. *See supra* note 29 (distinguishing "adoption" and "application"). In such a circumstance, we would not expect *Klaxon* to govern. *But see infra* Section III.A (discussing a presumption that *Klaxon* governs in these situations). But "arguably" implies that there is another side—*i.e*, the FSIA might be read to call for the direct application of state law. For that reason, I discuss it here.

I do not discuss the Federal Tort Claims Act (FTCA) here because I think it likely falls on the other side of the adoption-application line, and because the FTCA includes a horizontal choice-of-law provision rendering *Klaxon* irrelevant. For more on the FTCA, see *infra* Section III.C.

91 *See* 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3662.4 (4th ed.) (2021 Update).

though they claim that they are not compelled to do so by *Klaxon*.[92] The Ninth Circuit departs from *Klaxon* altogether and applies a federal choice-of-law rule based on the Second Restatement.[93] So although the FSIA calls for foreign sovereigns to be liable "to the same extent as private individuals," federal courts may apply different state law based on a federal choice-of-law rule unavailable to private defendants.

4. Original Jurisdiction

Given its recent star turn,[94] I also should briefly mention the Supreme Court's original jurisdiction. The Supreme Court has exclusive jurisdiction controversies between two or more states, and it has nonexclusive original jurisdiction over actions involving ambassadors, controversies between the United States and a state, or actions by a state against citizens of another state or aliens.[95]

Some of these cases involve state law. As the Court explained in *Kansas v. Colorado*: "Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand."[96] When a state seeks to sue citizens of another state—as in the opioid case filed by the State of Arizona[97]—claims often will arise under state law.[98] And many such cases also could be brought in state or federal-district court.[99]

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92 Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957, 958-60 (2d Cir. 1991); Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 841 (D.C. Cir. 2009). Cassirer v. Thyssen-Bornemisza Collection Foundation, 862 F.3d 951, 961 (9th Cir. 2017); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987). Plaintiffs in *Cassirer* filed a petition for a writ of certiorari on this issue in 2021. Petition for a Writ of Certiorari, Cassirer v. Thyssen-Bornemisza Collection Foundation, 2021 WL 1910232 (U.S. May 6, 2021).

93 Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 961 (9th Cir. 2017); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987). The Supreme Court granted a petition for a writ of certiorari in *Cassirer*. Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 55 (Mem) (Sept. 30, 2021).

94 *See*, *e.g.*, Adam Liptak, *Texas Files an Audacious Suit with the Supreme Court Challenging the Election Results*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/politics/texas-files-an-audacious-suit-with-the-supreme-court-challenging-the-election-results.html [https://perma.cc/NS56-BQHT].

95 28 U.S.C. § 1251 (2018).

96 185 U.S. 125, 146-47 (1902).

97 *See supra* note 10 and accompanying text.

98 *Id.* (citing Arizona law); *see also*, *e.g.*, Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 497 (1971) ("As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth."). *But see id.* at 494 (declining to exercise original jurisdiction in such a case).

99 *See* 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4052 (3d ed.) (2021 Update).

The application of *Erie* and *Klaxon* in original jurisdiction cases is, at best, unclear. Wright & Miller says no,[100] though it mostly relies on cases that predate *Erie* or that apply federal common law.[101] *Ohio v. Wyandotte Chemicals Corp.*, decided in 1971, could be read to imply that *Erie* does not apply in original jurisdiction matters,[102] though Justice Thomas's opinion in *Montana v. Wyoming* could be read to imply that *Erie* would apply.[103] I cannot find any original jurisdiction cases discussing *Klaxon*, meaning that cases such as Arizona's filed directly in the Supreme Court might get different choice of law than if they had been filed in state court or district court.

5. CAFA and MDL

Two of the most important developments in complex litigation this century have been the adoption of the Class Action Fairness Act of 2005 ("CAFA")[104] and the rise of multidistrict litigation ("MDL")[105] from a "disfavored judicial backwater" to the "dominant form of complex litigation procedure."[106] CAFA formally increased the scope of federal jurisdiction in complex cases, and MDL has more informally served as a magnet for complex cases in federal court.[107]

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100 *See id.*; 28 U.S.C. § 1251(b) (2018) (providing original but nonexclusive jurisdiction).

101 *See* WRIGHT & MILLER, *supra* note 99. An earlier treatment of original jurisdiction was agnostic on the application of *Erie* but opposed to the application of *Klaxon*. *See* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 680-85 (1959) (suggesting that *Erie* may apply and, as to *Klaxon*, "it would seem appropriate that it either apply its own choice-of-law rules to find the applicable state law or that it avoid application of the *Erie* doctrine altogether by applying federal common law as it has in the interstate cases").

102 401 U.S. at 498-99 n.3 ("So far as it appears from the present record, an action such as this, *if otherwise cognizable in federal district court*, would have to be adjudicated under state law. *Erie R. Co. v. Tompkins*.") (emphasis added).

103 In footnote 5, Justice Thomas explained that "we find ourselves immersed in state water law" and that "[o]ur assessment of the scope of these water rights is merely a federal court's description of state law." 563 U.S. 368, 377-78 (2011). He then quoted *West v. Am. Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940) for the proposition that "the final arbiter of what is state law." *West* is an *Erie* case, consistent with the idea that the Supreme Court is "applying" state law.

104 Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.). For a wonderful symposium on CAFA in this law review, including contributions of Professor Burbank and many other attendees of this festschrift, see 156 U. PA. L. REV. 1439 (2008).

105 28 U.S.C. § 1407.

106 Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1469 (2015). I decline to partake in the seemingly obligatory recitation of the share of the federal civil docket occupied by MDL. *See* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1306-07 & nn.36-37 (2020).

107 *See generally* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019).

Though neither CAFA nor the MDL statute includes provisions on choice of law—and, indeed, a proposal for one in CAFA was defeated in the Senate[108]—leading scholars have suggested that *Klaxon* need not be followed in cases under these statutes. With respect to CAFA, Professors Burbank, Issacharoff, Marcus, Nagareda, Silberman, and Wolff have (in one form or another) suggested that a federal choice-of-law rule might apply in (at least some) CAFA cases.[109] Professor Sherry wants to ditch *Erie* in CAFA cases, presumably taking *Klaxon* along with it.[110]

With respect to MDL, current law provides that MDL judges should apply the choice-of-law rules that would be applied in the transferor courts.[111] Professors Atwood, Issacharoff, and Wolff suggest that a federal choice-of-law rule might be appropriate in MDL cases.[112] Professor Field also raised questions about *Klaxon* in MDL cases,[113] and Professor Bradt called for a departure from strict adherence to *Klaxon* in "direct filed" MDL cases, though his proposal was designed to bring MDL choice of law in closer alignment

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108 *Proposed Amendments at S. 4 to S. 5*, 109th Cong., 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005); *see* Burbank, *Couch*, *supra* note 48; *see also supra* note 57 (discussing unadopted proposal for a choice-of-law provision for multiparty, multiforum jurisdiction).

109 *See generally* Wolff, *supra* note 38; Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008); Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008); Burbank, *Couch*, *supra* note 48; Richard A. Nagareda, *Bootstrapping in Choice of Law after the Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006) [hereinafter Nagareda, *Bootstrapping*]; Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006) [hereinafter Nagareda, *Aggregation*]; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act,* 106 COLUM. L. REV. 1839 (2006). Professor Silberman would require Congress to say so expressly, while others in this list think CAFA itself provides sufficient basis for a federal choice-of-law rule in some (e.g., Burbank) or all (e.g., Issacharoff) CAFA cases. Of particular relevance to this festschrift, Professor Burbank suggested that CAFA might be grounds for a federal court to depart from *Klaxon* "where [forum] state choice of law doctrine is materially influenced by state policy reflecting a bias in favor of aggregate litigation . . . ." Burbank, *Couch*, *supra* note 48*; see also* Marcus, *supra* at 1815 (seemingly agreeing with Burbank). Professor Kane, meanwhile, supported congressional intervention in choice of law for complex cases more than a decade before CAFA was a reality. *See* Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 312 (1991).

110 *See* Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2139 (2008).

111 *See*, *e.g.*, Bradt, *supra* note 31. Interestingly, current law provides that the selection of the transferee district may affect the content of federal law, as transferee judges may apply their circuit's interpretation of federal law (rather than applying the transferor court's interpretation). *See*, *e.g.*, *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987). *See generally* Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847 (collecting cases applying transferee- and transferor-circuit law).

112 Barbara Ann Atwood, *The Choice of Law Dilemma in Mass Tort Litigation: Kicking Around* Erie*,* Klaxon*, and* Van Dusen, 19 CONN. L. REV. 9 (1986).

113 Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 913-14 (1986).

with how *Klaxon* would operate without the consolidation.[114] (More on this last proposal later.[115])

Some of the arguments for abandoning *Klaxon* in CAFA or MDL cases are revived criticisms of the wisdom of *Klaxon* in the first place.[116] Others seek to bring CAFA or MDL more directly into the analysis: as "affirmative countervailing considerations" in the parlance of *Byrd*;[117] as federal interests informing the creation of federal common law;[118] or as reflecting distinct jurisdictional policies that, unlike the diversity statute, do not point to following forum-state choice of law.[119] It is frequently argued, for example, that CAFA or MDL cases are sufficiently "national" to merit a federal solution to the choice-of-law question.[120]

Professor Wolff's call for federal choice-of-law rules in CAFA and MDL is part of a broader argument about the relationship between federal jurisdictional policy and choice of law. Wolff argued that *Klaxon* began as a narrow holding but has been freighted with significance that was not intended.[121] One of Wolff's key analytical moves was to suggest that the resolution of conflicts among state laws that might plausibly apply is a distinct choice-of-law question to be answered by federal law and with reference to federal interests.[122] He suggested that when the "general diversity statute"

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114 Bradt, *supra* note 31.

115 *See infra* Section II.D.

116 *See supra* notes 48–49 and accompanying text.

117 Nagareda, *Bootstrapping*, *supra* note 109, at 681-82 (citing *Byrd*); Nagareda, *Aggregation*, *supra* note 109, at 1920-21 (citing *Byrd*). *But see* Burbank, *Couch*, *supra* note 48, at 1949 ("Well, yes, but the Court has not cited [*Byrd*] very often, and the thrust of its *Erie* jurisprudence since *Byrd* has been a repudiation of the balancing process *Byrd* seemed to authorize, which in any event balanced one federal policy against another, *not* 'federal and state interests.'").

118 *See*, *e.g.*, Wolff, *supra* note 38.

119 *See*, *e.g.*, Nagareda, *Aggregation*, *supra* note 109, at 1911 ("The choice—whether aggregation or forum should alter substantive law—presents a question about the proper meaning of CAFA *as a manifestation of legislative authority*."); Issacharoff, *supra* note 109, at 1870 ("[T]he object is to craft a sensible choice of law rule that corresponds to the identified national scope of the underlying conduct, the jurisdictional predicate for cases brought into federal court under CAFA."); Burbank, *Couch*, *supra* note 48, at 1950 ("CAFA certainly works a radical change in jurisdictional policy for the cases within its reach.").

120 *See*, *e.g.*, Issacharoff, *supra* note 109; *see also infra* notes 210–215 and accompanying text.

121 *See* Wolff, *supra* note 38, at 1848 ("*Klaxon* cannot bear the weight with which it has been loaded."); *id*. ("*Klaxon* combines a core ruling on the limits of federal judicial power with a highly contextual statement of federal jurisdictional policy.").

122 *See id*. at 1884 ("[A] core structural feature of choice of law [is] the distinction between the geographic scope of state law, which is a matter of substantive state policy, and the method of resolving conflicts when the laws of more than one state extend their geographic reach to cover a given dispute, which is a question of interstate relations. The interstate relations question—the resolution of conflicts among interested states—is a federal issue. The *Klaxon* Court concluded that it should incorporate a state rule of decision to answer that question in order to satisfy the jurisdictional policies of the general diversity statute. But the issue is federal in character.").

applies,[123] this federal interest is balanced against the twin aims of *Erie* to produce the *Klaxon* rule. But in CAFA and MDL cases, Wolff argued that federal interests point to federal law, as those statutes demonstrate stronger federal interests and (perhaps) less concern for the twin aims.[124]

As in bankruptcy, admiralty, FSIA, and original jurisdiction cases, these scholarly proposals—by abandoning *Klaxon*—call for federal courts to apply different state law depending on the procedural vehicle in which the case appears in federal court.

II. APPLYING STATE LAW

This Part argues that federal courts should apply *Klaxon* whenever state law applies in federal court—regardless of the basis of jurisdiction.[125] This proposal calls for a change in the law with respect to bankruptcy, admiralty, FSIA, and original jurisdiction cases, and it calls for resistance against scholarly proposals to depart from *Klaxon* in CAFA and MDL cases.

First, the jurisdictional policies of *Erie*—the twin aims of reducing forum shopping and avoiding the inequitable administration of the laws[126]—are not limited to diversity cases. I use the term "jurisdiction shopping" to describe the ability of parties to shop into particular bases of federal jurisdiction. Jurisdiction shopping can lead to the inequitable administration of the laws when different types of jurisdiction entitle parties to different choice-of-law rules. To avoid these results, the same choice-of-law rule must apply

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123 Although readers will understand what Professor Wolff means by the "general diversity statute," this label does raise the question at what level of generality should one identify jurisdictional policies. Should we consider 1332(a)(1) alone, 1332(a), 1332(a) and the removal statute's forum-defendant rule, all of 1332 (including CAFA)? As explained below, I do not see choice-of-law policy in any of these provisions, so these are questions I feel comfortable dodging.

124 *See* Wolff, *supra* note 38, at 1883 ("CAFA rejects the policy of federal jurisdiction bound up in the general diversity statute, replacing it with an invitation to litigants to shop for a federal forum in order to obtain a different result in service of targeted federal goals . . . . *Klaxon* does not foreclose the development of a federal rule of decision in resolving conflicts between the local policies of interested states. Such conflicts present a question of interstate relations that is particularly appropriate for federal resolution. *Hinderlider*, *Vanston Bondholders*, and *D'Oench, Duhme* together invite a fresh examination of the proper role of independent federal choice-of-law standards under the new jurisdictional regime of the federal class action."); *id.* at 1890 ("CAFA encourages results-oriented forum shopping. It marks a fundamental shift away from the jurisdictional policy of the *Erie* doctrine."). For my concerns with these descriptions of CAFA and *Erie*, see *infra* notes 187–191 and accompanying text.

125 The overall conclusion here shares much with earlier work of Professor Green, see Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1917 (2013) ("[T]he twin aims should be used whenever a federal court entertains an action under state law, no matter what the source of jurisdiction."), though the road travelled differs considerably. In part due to the different analyses, the extensions in the next part differ markedly from Green.

126 *See*, *e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965).

regardless of the basis of federal jurisdiction. That rule is *Klaxon*.[127] This proposal is not only consistent with *Erie* and its progeny but also with the federal jurisdictional statutes and the Rules of Decision Act.[128]

Second, recognizing that the *Erie* doctrine also reflects institutional policies, I further argue that the extension of *Klaxon* outside of diversity is consistent with the twin institutional aims of *Erie*: the protection of state interests (a federalism policy) and a reduction in the power of federal judges to make law (a separation-of-powers policy). These policies also point to the application of *Klaxon* whenever state law applies in federal court.[129]

This Part concludes with a slight departure from strict adherence to *Klaxon* to account for horizontal forum changes, building on the elegant solution proposed by Professor Bradt.[130]

A. *Jurisdictional Policies*

Erie is a statement of "a policy of federal jurisdiction."[131] The most common articulation of the jurisdictional policies of *Erie* is some version of the "twin aims," which the Court later described as "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[132] Scholars disagree about the source and force of the twin aims, but I think no one disputes that they are relevant to questions posed by *Erie* cases.[133]

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127 *See infra* Section II.A.

128 *See infra* Section II.B.

129 *See infra* Section II.C.

130 *See infra* Section II.D.

131 Guaranty Tr. Co. v. York, 326 U.S. 99, 101 (1945)*; see also*, *e.g.*, Burbank, *Interjurisdictional Preclusion*, *supra* note 2; Wolff, *supra* note 38.

132 Hanna v. Plumer, 380 U.S. 460 (1965). Professor Burbank offered various formulations of the jurisdictional policy of *Erie*, though they typically read something like "federal policy against different outcomes on the basis of citizenship." Burbank, *Semtek*, *supra* note 1; Burbank, *Interjurisdictional Preclusion*, *supra* note 2 (same). I would note, however, that Burbank's analysis sometimes speaks in terms of "citizenship" but other times speaks in terms of "state law" or "state substantive rights." *See*, *e.g.*, Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 796 ("The interest of the federal judiciary in efficiency is unquestionable and unquestionably powerful. Particularly when state substantive rights are involved, however, it is important that federal judges not be given free rein to define and pursue that interest."). As readers can tell, I am more congenial to the latter formulation. *See infra* notes 265-71 and accompanying text (making this point with respect to adoption of state law).

Professor Kramer offered a different set of jurisdictional policies, also congenial with my analysis here. He wrote: "The guiding policy, drawn from *Erie* and reflected in the Rules of Decision Act, is that the mere existence of federal jurisdiction does not justify modifying the parties' substantive rights under state law." Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996). Or, if one prefers the language of fairness, "it is unfair to change a party's rights because lawyers and judges find it expedient to structure a lawsuit one way rather than another." *Id*.

Professor Green agreed that the twin aims are jurisdictional policy, but he disassociated them from *Erie*. *See* Green, *supra* note 125.

133 *See*, *e.g.*, Green, *supra* note 125 (collecting sources and offering his own analysis).

One of the many lessons I learned from Professor Burbank is that you cannot understand *Erie* without reading Ed Purcell.[134] Among many other things, Purcell ably demonstrated that *Erie* must be understood in context. Here is Purcell summarizing that context:

> Disturbed by the mushrooming tactical escalation and the compounding waste of social resources, Brandeis began exploring ways to impose greater order and efficiency on litigation practice. He experimented with the Commerce Clause, the Full Faith and Credit Clause, and even the politically dangerous Due Process Clause as devices to minimize incentives for interstate forum shopping. Erie was a part of his overall campaign. Abolishing the general federal common law would eliminate a major incentive for intra-state forum shopping and reduce the utility of a variety of popular manipulative tactics. That achievement, in turn, would mean that courts and litigants could concentrate their efforts on addressing the substantive merits of disputes. The result would be to simplify litigation practice, conserve social resources, and rationally order the overall business of the nation's judicial system.[135]

As Purcell explained, the concerns undergirding *Erie* related to jurisdictional manipulation and the inequities that resulted. In the *Swift* era, exemplified by cases such as *Black & White Taxicab*, a popular type of jurisdictional manipulation involved corporate defendants manipulating citizenship to get cases into federal court where they would have access to business-friendly federal common law.[136] Such cases directly implicated *Erie*'s twin aims.

I have no quarrel with those who read *Erie* as responding to the manipulation and resulting inequities that arose from the "accident of diversity."[137] That was the context in which it was decided. But it would be a mistake, in my view, to understand *Black & White Taxicab* as the only version of this phenomenon.

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134 *See*, *e.g.*, Burbank, *Semtek*, *supra* note 1 (citing EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 181 (1992); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 43 (2000); Edward A. Purcell, Jr., *Brandeis,* Erie*, and the New Deal "Constitutional Revolution"*, 26 J. SUP. CT. HIST. 257 (2001); Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679 (1999)).

135 Purcell, *Brandeis*, *supra* note 134, at 272.

136 *Id.*; Erie R.R. v. Tompkins, 304 U.S. 64, 73 (1938) (citing Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928)).

137 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), (citing *Erie*).

Even in the early days of *Erie*, the twin aims were not limited to cases like *Erie* itself.[138] *Erie* was a damages case, but the Supreme Court quickly extended its reach to equity.[139] The Supreme Court also extended *Erie* to interpleader,[140] bankruptcy,[141] and pendent jurisdiction.[142] In each of these situations, the Court was worried about forum shopping and inequitable administration.

The situations that concern this Article are not just about getting cases into federal court, but about getting cases into federal court under particular bases of jurisdiction—what I call "jurisdiction shopping."[143] As we know, federal courts may hear state law claims (not to mention state law issues) under various bases of jurisdiction other than diversity of citizenship. If those bases of jurisdiction offer different choice-of-law rules, then parties will have incentives to get under or out of those bases—by shopping either between state and federal court, or between types of jurisdiction within federal court. This is not to say that parties are motivated entirely by choice of law. Instead, the claim is that different choice-of-law rules may affect party choice, and when they do, the resulting treatment is inequitable.[144]

To be more specific, let's begin with bankruptcy. In 2005, Professor Gibson identified more than 70 firms that had used bankruptcy to respond to

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138 To be sure, not all of the attributes of diversity apply externally. For example, the "forum defendant rule" bars removal by a properly served forum defendant when the only basis of federal jurisdiction would be diversity. *See* 28 U.S.C. § 1441(b). But these differences do not imply that the policies of *Erie* are limited to the diversity context. For more on the federal jurisdictional statutes, see *infra* Section II.B.

139 The Court applied *Erie* to equity in *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202 (1938), backtracked in *Russell v. Todd*, 309 U.S. 280 (1940), but then reaffirmed *Erie*'s application in *Guaranty Tr. Co.*, 326 U.S. at 100. Though *York* does not explicitly rely on *Klaxon*, I see no reason to think that it departs from it. In fact, in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1948), among others, the Supreme Court noted the applicability of *Klaxon* in equity.

140 *See* Griffin v. McCoach, 313 U.S. 498, 503 (1941) (applying *Erie* and *Klaxon*).

141 *See* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946) (applying state law in a bankruptcy proceeding as *Erie* would require). *See generally* Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953); Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633 (2004).

142 United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); *see also* Felder v. Casey, 487 U.S. 131, 151 (1988) ("Under *Erie R. Co. v. Tompkins*, when a federal court exercises diversity or pendent jurisdiction over state-law claims, '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.'") (internal citation omitted).

143 This issue has been my concern with MDL-specific rules of procedure addressed in other work, Clopton, *supra* note 106.

144 Indeed, we cannot look at current rates of jurisdiction shopping for CAFA and MDL, because under current law there is no special choice-of-law rule. If there were, I claim, then we should expect an increase in jurisdiction shopping. *See* Clopton, *supra* note 106 (making a similar point about MDL shopping). And there is no doubt that the number of cases potentially qualifying for CAFA and MDL is substantial. *See supra* note 106 (declining on principle to cite MDL's share of civil docket).

mass tort litigation.[145] "Mass tort bankruptcies" have only become more important since that time, and we have seen a rise in bankruptcies in the face of environmental liabilities as well.[146] More concretely, as mentioned above, Purdue Pharma filed for bankruptcy in the face of thousands of pending state-law claims in state and federal courts arising from the opioid epidemic.[147] Under current doctrine, pending claims brought into a bankruptcy proceeding would get their state law based on a special federal choice-of-law rule, potentially switching from the forum state's choice of law in state court or federal court sitting in diversity (*Klaxon*). The option to declare bankruptcy in the face of mass tort or environmental litigation,[148] therefore, has a similar effect as the "accident of diversity" under *Swift*.

We should expect comparable results if federal courts followed scholars' suggestions for complex cases. Take CAFA.[149] We know that plaintiffs are trying to structure state actions to avoid removal under CAFA; this maneuver was part of the story that led to the Supreme Court's decision on personal jurisdiction in *Bristol-Myers Squibb*.[150] Imagine that CAFA jurisdiction changed the substantive law to be applied in federal court. If that were true, getting into (or out of) CAFA jurisdiction would have a substantial effect on the fortunes of the parties.[151] This would be true in situations when the choice

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145 S. ELIZABETH GIBSON, FED. JUD. CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 1 (2005), https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf [https://perma.cc/YPJ2-6G37]; *see also* Samir D. Parikh, *The New Mass Torts Bargain*, 90 FORDHAM L. REV. (forthcoming 2022); Troy A. McKenzie, *Toward a Bankruptcy Model for Non-class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012); G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge"*, 84 IOWA L. REV. 753, 765-83 (1999); Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369 (1985); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984). Professor Gibson explained that "[b]eginning in 1982 with the chapter 11 filings of two asbestos products manufacturers—Johns-Manville Corporation and UNR Industries, Inc.—bankruptcy courts have become a forum for companies seeking the resolution of pending and threatened mass tort litigation against them under chapter 11 of the Bankruptcy Code." Gibson, *supra*, at 1. For a discussion of mass tort bankruptcies before the 1980s, see Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59 (2016) (discussing *Ringling Brothers*).

146 *See*, *e.g.*, Lindsey Simon, *Bankruptcy Grifters* 131 Yale L.J. (forthcoming 2022); Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REG. 766 (2021); Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137 (2019).

147 *See supra* note 12 and accompanying text.

148 When parties have the choice to declare bankruptcy or not, they almost certainly consider the law to be applied if they do. *See supra* subsection I.B.1.

149 Please.

150 Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017)*; see also* Bradt & Rave, *supra* note 107; Howard M. Erichson, John C. P. Goldberg & Benjamin C. Zipursky, *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV HEADNOTES 54 (2020).

151 *Cf. Hanna*, 380 U.S. at 468, n.9 (asking "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").

is between CAFA and state court, or when the choice is between CAFA and some other type of federal jurisdiction in which *Klaxon* applied.[152]

An MDL-only choice-of-law approach would do the same. Parties would have even more reason to support or oppose consolidation,[153] and to support or oppose particular transferee districts and judges.[154] The inequities here could be within a single MDL: plaintiffs consolidated from different transferor courts might gain or lose in the choice-of-law manipulation. (The same could be said of a mass-tort bankruptcy, by the way.)[155] MDL shopping also implicates the Judicial Panel on Multidistrict Litigation, a group of seven judges handpicked by the Chief Justice of the United States that has nearly unfettered discretion to decide whether and where to consolidate cases.[156] If *Klaxon* did not apply in MDL, then the Panel's decision about the appropriateness of consolidation could have the effect of changing the state law to be applied.[157]

Jurisdiction shopping is also possible under other forms of jurisdiction. There are cases in which some parties litigating state law claims have the ability to shop into (or out of) supplemental jurisdiction,[158] federal question jurisdiction

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152 For example, Professor Silberman offered this example: "[C]onsider a class action in which all plaintiffs who reside in the forum state—for example, Texas—sue over conduct engaged in by a California defendant. The defendant is subject to jurisdiction in Texas, and the events in question and the plaintiffs all have strong connections with Texas . . . . [I]f the aggregate amount is met, the action comes within CAFA." Silberman, *supra* note 109, at 2028*; see also* Marcus, *supra* note 109 (making a similar point about over-inclusivity). Note that Silberman's hypothetical case also would qualify for jurisdiction under Section 1332(a), so how federal jurisdiction is characterized would have consequences for the choice of law.

153 I have written elsewhere about how MDL-specific rules of procedure would (unjustifiably) create incentives for parties to try to get into or out of an MDL based on their procedural preferences. *See* Clopton, *supra* note 106.

154 For more on this process, see generally Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713 (2019); and Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUDS. 424 (2013).

155 *See supra* notes 145–146 and accompanying text.

156 *See* 28 U.S.C. § 1407; Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017). If MDL came with different choices of law, then the ability to persuade the Panel to consolidate cases would determine whether an attempt to jurisdiction shop would be successful. *See* Clopton, *supra* note 106 (raising concerns with increased stakes for the Panel); *see also* Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905 (2018) (making a similar argument regarding public law MDLs).

157 *See* Clopton, *supra* note 106 (raising a similar concern about MDL-specific procedure).

158 *See* 28 U.S.C. § 1367.

(*e.g.*, *Grable*-type claims),[159] FSIA jurisdiction,[160] original jurisdiction,[161] and admiralty.[162] This is nothing new. Then-Professor now-Judge Fletcher wrote about an early 19th century squabble involving Justice Story (and others) that revealed concerns with jurisdiction shopping in admiralty.[163]

Now the relevance of *Klaxon* should come into focus. Parties can strategically declare bankruptcy; they can plead cases into or out of CAFA, directly or on removal; and they can support or oppose consolidation in an MDL. If these jurisdictional bases entailed a change in the relevant law, then those parties with the ability to access those types of jurisdiction would be treated differently. In other words, jurisdiction shopping and inequitable administration. And it was no accident that this Section emphasized bankruptcy, CAFA, and MDL—mass torts are candidates to be today's *Black & White Taxicab*.[164]

As Professor Burbank explained (channeling Purcell channeling Brandeis), "[*Erie*] reflected its author's deep concern about the waste and

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159 *See* 28 U.S.C. § 1331; Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law . . . .").

160 The FSIA does not create exclusive federal court jurisdiction, so parties might shop from state to federal court. Moreover, private defendants who might plausibly claim to be agencies or instrumentalities of a foreign state (for example, due to stock ownership) might shop between FSIA and diversity jurisdiction in order to obtain more favorable law. *See*, *e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (discussing foreign state ownership interests).

161 Many cases within the nonexclusive original jurisdiction of the Supreme Court could be filed in state court or federal district court. *See supra* note 99.

162 Consider a maritime insurance dispute between a Connecticut insurer and a Texas shipper. The Texas shipper sues in Texas state court, and the insurer removes. This dispute looks a typical diversity-of-citizenship cases, under which *Klaxon* would direct the choice of law. But if defendant removed pursuant to admiralty jurisdiction instead, then the choice-of-law approach would shift from *Klaxon* to *Lauritzen*, even though the underlying dispute would be the same. This is a manipulative tactic to gain access to federal law because of the accident of admiralty.

163 William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of* Marine Insurance, 97 HARV. L. REV. 1513 (1984). The dispute arose around *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), a circuit court decision in which Justice Story found concurrent admiralty jurisdiction over maritime contracts. According to Fletcher, "[t]hose who opposed *De Lovio*—most notably, Justice William Johnson of the Supreme Court and James Kent, recently retired from the New York courts—primarily objected to the expansion of federal jurisdiction. This was an issue of genuine importance because, under *De Lovio*, parties of nondiverse citizenship could bring into the federal admiralty forum claims that would otherwise have been confined to state forums because of lack of diversity." *Id.* at 1551-52 (internal notes omitted). Meanwhile, diverse parties would have had a choice between admiralty and diversity in these cases.

164 David Marcus, among others, has noted the parallels between *Swift* and CAFA. *See generally* David Marcus, Erie*, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007). For more on the social context of modern procedure, see, for example, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016). And for more on the rise of aggregate litigation, see, for example, Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5 (1991).

unfairness that corporate defendants created by jurisdictional manipulation designed to wear out their opponents and to take advantage of different substantive law."[165] The policy of *Erie*, in other words, is that the *accident of federal jurisdiction* should not change the laws of the several states in cases where they apply. For this policy to obtain, the *Klaxon* rule must apply not to diversity of citizenship alone but whenever *Erie* calls for the application of state law.

Or to say it another way, the *Erie* doctrine—broadly defined to include issues of preemption, Reverse *Erie*, etc.[166]—points to a preference for symmetry in the law applied in state and federal court. We might depart from that preference when the Constitution (*e.g.*, Article III) or Congress (*e.g.*, the Rules Enabling Act) prescribes rules applicable to only federal or state courts. And we might tolerate other minimal departures when the issues are relatively minor, hence all of the talk of "outcome determination."[167] In the absence of those circumstances, *Erie*'s twin aims point to symmetry.[168] Sometimes that symmetry means federal law, as when federal interests call for uniform answers.[169] But when *Erie* requires the application of state law, symmetry is achieved only by *Klaxon*—regardless of the basis of federal jurisdiction. Even if *Klaxon* were not your preferred rule on a clean slate, as long as *Klaxon* is the rule for diversity cases, then we need to extend *Klaxon* to other areas to avoid incentivizing jurisdiction shopping and the inequitable administration of the laws.[170]

B. *Jurisdictional Policies and Non-*Erie *Sources*

The previous Section argued that the twin aims, as articulated by the Supreme Court, apply equally outside of diversity cases. But not all scholars treat the jurisdictional policies of *Erie* as free-standing judicial creations.[171] If the twin aims have other sources, then perhaps those sources justify limiting *Klaxon*'s reach.

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165 Burbank, *Couch*, *supra* note 48.

166 *See generally* Clermont, *supra* note 13 (defining *Erie* broadly).

167 *See*, *e.g.*, Guaranty Tr. Co. v. York, 326 U.S. 99 (1945); Hanna v. Plumer, 380 U.S. 460 (1965).

168 Similarly, in another context, Professor Gluck observed that "[t]he driving notion behind *Klaxon* is the idea of state-/federal-court [*sic*] decisionmaking-process uniformity." Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1930 (2011).

169 This could be Congress, or it could be federal courts when federal law wins in the *Erie* analysis, such as in *Clearfield Trust*. *See infra* Section III.A (discussing *Klaxon* in light of the *Erie-Clearfield* choice).

170 This is the weak version of my argument mentioned above. *See supra* note 22 and accompanying text.

171 *See*, *e.g.*, Green, *supra* note 125 (arguing that the twin aims are best understood as products of the jurisdictional statutes); Wolff, *supra* note 38 (pointing to the "general diversity" statute).

Federal Jurisdictional Statutes. One potential source would be the federal jurisdictional statutes. And, indeed, critics of *Klaxon* are quick to latch on to references to the diversity statute in *Erie* cases. So for the sake of argument, let us assume that the federal jurisdictional statutes are the font of *Erie*'s jurisdictional policies.[172] Perhaps, then, the federal jurisdictional statutes suggest a narrower reading of the twin aims that is limited to diversity cases, which would then suggest limiting *Klaxon* to those cases as well.

In short, the jurisdictional statutes make no such suggestion. That is not to say they cannot, though. As Professor Burbank explained: "There is usually no serious question about Congress's constitutional power to prescribe uniform federal law for interstate activities. There should be no question at all that, in the absence of such uniform federal statutory law, Congress has constitutional power to prescribe choice-of-law rules specifying the states whose laws shall govern such activities."[173]

But Congress's power to prescribe choice-of-law rules does not tell us whether Congress has exercised such power. And, if it is fair to describe Congress as "knowing" things, Congress knows how to prescribe horizontal choice-of-law rules. For example, the Federal Tort Claims Act chooses the law of the state of the act or omission,[174] and a defeated amendment to CAFA proposed a federal choice-of-law rule for cases under that statute.[175]

The federal jurisdictional statutes at issue in this Article, however, do no such thing. To be sure, there are arguments that these jurisdictional statutes embody some jurisdictional policies.[176] Some of these statutes reflect

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172 I take up below what the federal jurisdictional statutes tell us about *Erie*'s institutional policies. *See infra* Section II.C.

173 Burbank, *Couch*, *supra* note 48; *see also* Kane, *supra* note 109; Michael Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L. J. 1 (1991). This position, though, is not universally held. For one enunciation, and for citations to more, see Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1725 (2006) ("[A]lthough the Full Faith and Credit Clause clearly grants Congress plenary power to develop or authorize the development of independent choice-of-law rules binding in both state and federal courts, federal power under Article III is far more limited. Because choice-of-law rules define substantive rights, Article III cannot properly be read to authorize the use of independent choice-of-law rules, but instead requires application of the whole law of a state—that is, the choice-of-law rules and internal law of a state—selected without regard to its content. Thus, if Congress wishes to displace state choice-of-law rules in diversity cases, it must enact—or authorize federal courts to develop—choice-of-law rules under the Full Faith and Credit Clause.") (internal footnotes omitted)).

174 28 U.S.C. § 1346(b)(1).

175 S. Amendment 4 to S. 5, 109th Cong., 151 Cong. Rec. S1215 (daily ed. Feb. 9, 2005); *see* Burbank, *Couch*, *supra* note 48.

176 The policies of any jurisdictional statute are subject to debate. Though scholars and judges are quick to assign purposes to the diversity statute, for example, it should be acknowledged that "[t]he proposition that diversity was necessary to protect out-of-state litigants from bias in state courts emerged as a post-hoc explanation and has translated to only a few minor elements of the statutory framework over the years." *See* Wolff, *supra* note 38 (citing Purcell). For my part, these

jurisdictional policies that favor more federal law—which informs the vertical *Erie* problem, but not the horizontal choice when state law is to be applied.[177] Some of these statutes reflect jurisdictional policies unrelated to the *Klaxon* question. To over-generalize, CAFA is about advantaging federal judges applying federal procedure (aggregation);[178] state law claims in supplemental jurisdiction,[179] bankruptcy,[180] and others are about efficiency and liberal notions of claim joinder;[181] FSIA is about immunity from suit and about federal forums;[182] Supreme Court original jurisdiction may be about a dignified tribunal, a geographically convenient court, or the enforcement federal law against the states;[183] and MDL is about efficiency and convenience

revelations about the supposed purposes of the diversity statute should give us pause in yoking the jurisdictional policy of *Erie* to that statute, but as this Section suggests, I find that all relevant sources point to the same policy, making any one source less consequential.

177 For example, Wright & Miller suggests that the original jurisdiction of the Supreme Court itself is a justification for federal common law. 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE. § 4052 (3d ed.) (2021 Update).

178 Burbank, *Couch*, *supra* note 48; Marcus, *supra* note 109, at 1767 ("Identifying the stated jurisdictional policy of the Class Action Fairness Act of 2005 (CAFA) is not difficult. Congress said that the Act was designed to redress overreaching by state courts handling multistate class actions, to ensure that these cases involving nationally important issues could be brought into federal court, and to provide protections for class members.") (internal footnote omitted)).

179 *See*, *e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("[Pendent jurisdiction's] justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co. v. Tompkins*."). *See generally* Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding Confusion or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L. J. 943 (1991).

180 *See*, *e.g.*, Green, *supra* note 125, at 1924-1925 ("[F]ederal bankruptcy jurisdiction was created as an alternative to the presumptive state fora in order to address a deficiency in state court jurisdiction. In the case of bankruptcy jurisdiction, the deficiency is a collective action problem. Each creditor would prefer to be the first to bring an independent state court action against the debtor, in order to get relief before the debtor's assets are exhausted. To allow for an efficient and equitable distribution of these assets—and to protect the debtor herself—it is crucial that all litigation by and against the debtor be controlled by one court.").

181 *See*, *e.g.*, Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 271-272 (1939); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules,* 89 COLUM. L. REV. 1 (1989); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995) (on Calder mobiles).

182 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497 (1983) ("Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts . . . .").

183 *See*, *e.g.*, California v. Arizona, 440 U.S. 59, 65-66 (1979) (dignified tribunal); Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (geography); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) ("[T]he grant of original jurisdiction constitutionally establishes a federal judicial role in assuring state compliance with federal law . . . .").

within the federal court system.[184] Nothing in these statutes suggests a policy of changing the content of state law where it applies. Once state law wins in the *Erie* balance, these statutes have little to say about New York versus Delaware versus Texas.[185]

Here I should pause for a moment to address the counterpoints from Professor Wolff, who has thought deeply about these same questions and came to different conclusions.[186] Wolff wrote the following about CAFA:

> The Class Action Fairness Act instructs federal courts to employ its targeted grant of jurisdiction to protect defendants against abusive state-court litigation, protect the interests of class members, safeguard national economic interests, and prevent excesses of state power. The statute has the purpose and expectation that removing class actions from state to federal court will produce different results in the adjudication of state-law claims because federal courts will employ different certification standards and will apply the underlying substantive law more fairly. *In other words, CAFA encourages results-oriented forum shopping. It marks a fundamental shift away from the jurisdictional policy of the Erie doctrine.*[187]

I respectfully dissent from Wolff about both "results-oriented forum shopping" and "a fundamental shift."

First, although CAFA might encourage some results-oriented forum shopping, that charge could be made of any provision for concurrent jurisdiction (inviting plaintiffs to forum shop) and any provision allowing for removal or transfer (inviting defendants to forum shop). Merely asserting that CAFA encourages results-oriented forum shopping, therefore, does little to demonstrate that it should be treated differently than other jurisdictional statutes.

More importantly, Wolff suggested that CAFA represented a shift away from the policy of *Erie*, presumably because it encouraged forum shopping where *Erie* sought to discourage it. But the *Erie* doctrine is not concerned with all results-oriented forum shopping. The *Erie* doctrine is not addressed to results-oriented forum shopping that is driven by differences that arise from the Federal Rules of Civil Procedure or by differences that arise from the behavior of federal judges or juries—which, you might notice, are exactly

184 *See* 28 U.S.C. § 1407(a); Bradt, *supra* note 156, at 845.

185 Or, in the words of Professor Green: "It is highly probable that all other forms of federal jurisdiction for state law actions are, like diversity, created by Congress to address particular deficiencies with the presumptive state fora. Congress creates federal jurisdiction for state law actions for reasons, and these reasons must be that something about state court jurisdiction is inadequate." Green, *supra* note 125, at 1917. Again, nothing here about deficiencies in state *choice of law*.

186 *See generally* Wolff, *supra* note 38.

187 *Id.* at 1889-90 (emphasis added).

the types of results-oriented forum shopping encouraged by CAFA.[188] In other words, CAFA is about results-oriented shopping among issues to which *Erie* and *Klaxon* do not call for state law to apply.[189]

Indeed, none of these jurisdictional statutes (including CAFA) says anything about horizontal choice of law that differentiates them from the diversity statute to which *Klaxon* applies.[190] At a minimum, therefore, there is no basis in the jurisdictional statutes to apply *Klaxon* in diversity cases and federal choice-of-law rules elsewhere. So, again, even if *Klaxon* is not your preferred rule, the policies of *Erie* point to consistent choice-of-law treatment across types of jurisdiction, and *Klaxon* is the only candidate to do so under current law.[191]

More generally, I would say that there should be a presumption against reading jurisdictional statutes to disrupt state choice-of-law rules. This is not exactly a presumption against preemption[192] or an invocation of the elephant-in-a-mousehole doctrine,[193] but the common-sense idea that jurisdictional statutes are about jurisdiction (and not about choice of law). This commonsense idea has a parallel notion: choice-of-law statutes are about choice of law. And it is to a choice-of-law statute that I turn next.

The Rules of Decision Act. Another potential basis for *Erie*'s jurisdictional policies is the Rules of Decision Act (RDA). Here, too, the RDA supports my reading of *Erie*'s policies and the concomitant call to follow *Klaxon* whenever state law applies in federal court.

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188 *See* Burbank, *Couch*, *supra* note 48, at 1950 (CAFA "enable[ed] litigants in cases of a certain aggregate size and in which there is minimal diversity to have access, even at the behest of an in-state defendant, either to a different law (of "procedure"), or at least to courts that have a different attitude toward aggregate litigation . . . "); *cf.* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008) (arguing that *Erie* should permit less forum shopping for procedure).

189 Professor Burbank argued that CAFA "authorized the sort of jurisdictional manipulation that *Erie* jurisprudence sought to foreclose, enabling litigants in cases of a certain aggregate size and in which there is minimal diversity to have access, even at the behest of an in-state defendant, either to a different law (of 'procedure'), or at least to courts that have a different attitude toward aggregate litigation, and in any event access to a potentially different outcome on the certification question." Burbank, *Couch*, *supra* note 48, at 1950. I dissent (respectfully, of course) from the characterization of "the sort of jurisdictional manipulation that *Erie* jurisprudence sought to foreclose." As Professor Burbank suggested later in the sentence that the type of jurisdiction shopping CAFA addressed was related to procedure. To me, that is *not* the sort of jurisdiction shopping to which *Erie* was addressed, since the Rules Enabling Act ensured that federal and state cases could apply different procedures even when *Erie* called for the application of the same substantive law.

190 *See supra* note 51 (noting that *Klaxon* is here to stay for diversity cases).

191 This is the weak form of my argument that I have mentioned throughout—*i.e.*, the need for a single horizontal choice-of-law regime in federal court calls for the extension of *Klaxon*.

192 *See*, *e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504 (1992).

193 *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

The role of the RDA in *Erie* cases has never been entirely clear. Professor Burbank has ably argued that it is a false dichotomy to ask whether *Erie* was interpreting the RDA or something else.[194] He also argued strenuously for taking the RDA seriously, though he was careful to suggest that his solutions (*e.g.*, to interjurisdictional preclusion) were consistent with the RDA but did not depend on it.[195] I take the same position: The RDA supports my reading of *Klaxon*'s wider application, though readers who choose to ignore the RDA are free to jump to the next heading.[196]

Professor Burbank's views about how to take the RDA seriously are also applicable here. He wrote: "We may quickly dispense with the Court's suggestion, based on language in *Erie*, that the [Rules of Decision] Act is confined to diversity cases. That suggestion finds no support in the language of the Act, in history, or in the Court's own fumblings with the Act in nondiversity cases."[197] I could not have said it better myself. The RDA speaks about the laws of the several states as providing the rules of decision in federal court where they apply. Not a word about jurisdictional basis. The original RDA was limited to cases at law, which to me implies that Congress considered the scope of this choice-of-law statute, but chose not to ground it in the jurisdictional bases found elsewhere in the Judiciary Act. And despite some "fumblings," the Court has looked to the RDA outside of diversity.[198]

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194 Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 788 ("The debate about the wisdom of the course taken in diversity cases after *Erie* has included the question whether, in effecting a policy against different outcomes on the basis of citizenship, the Court was interpreting the Rules of Decision Act or something else. The dichotomy is false. The policy against different outcomes on the basis of citizenship is a 'policy of federal jurisdiction'; it evidently derives from the act of Congress conferring diversity jurisdiction on the federal courts. In considering whether the Constitution or acts of Congress (including the Rules Enabling Act) require the application of federal law, the federal courts must consider both policies grounded in those sources pointing towards a federal rule and policies pointing to the application of state law.").

195 *Id.* at 796 ("The Rules of Decision Act is the common vehicle [for assessing the relationship of federal and state law], and it is time to take the statute seriously."). Of course, Burbank is not alone on this point. *See*, *e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989); Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637 (1998).

196 *See*, *e.g.*, Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) ("It is time to pay final respects to the Rules of Decision Act."). Readers who think that the RDA is simply redundant of *Erie*, or that it merely restates the law that would apply without it, are also welcome to skip ahead, but with less alacrity than those who reject the RDA outright. *See*, *e.g.*, Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 999 n.45 (2011) ("The RDA merely declares the status quo, while incorporating by reference the principles that the more recent *Erie* jurisprudence has continued to define.").

197 Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 760.

198 Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895) (Rules of Decision Act "itself neither contains nor suggests . . . a distinction" between federal-question cases and diversity cases);

But wait, you might say, *Klaxon* announced a rule of federal common law, so the *Klaxon* rule is among the situations where state law does *not* apply. There are at least two reasons to take seriously the RDA in horizontal choice of law. First, one might agree with Professor Burbank who read "the Rules of Decision Act as speaking directly to the circumstances in which it is permissible to fashion or apply federal common law."[199] I have more to say about federal common law below.[200]

Second, even if one does not read the RDA as "speaking directly" to federal common lawmaking, the policies of the RDA are consistent with this Article's analysis. The RDA is consistent with the jurisdictional policy (discussed above) that seeks to avoid affecting state-created rights based on the accident of federal jurisdiction. And the RDA is consistent with the institutional policies (discussed below) that seek to protect state interests and to limit the power of federal judges.[201] Or, to coin a phrase, the *Klaxon* approach operates "under the influence, if not the command," of the RDA.[202] And again, there is absolutely nothing in the RDA to suggest that it applies differently depending on the basis of jurisdiction.

Legal Context. Finally, any fair analysis of the role of *Klaxon* must account for the context in which *Klaxon* applies. That context further supports my reading of the policies of *Erie* and *Klaxon*.

First, *Klaxon* incorporates state choice of law only if the choice is consistent with the Constitution. Principles of due process and full faith and credit limit the acceptable choices of law.[203] Concerns about the most egregious intrusions on state sovereignty or individual rights need not be directed to horizontal choice of law in federal court—the Constitution handles those issues in other ways.[204]

D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 469-70 (1942) (Jackson, J., concurring). For other scholarly treatments, see Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at n.116 (collecting sources).

199 *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 789.

200 *See infra* Sections III.A & B.

201 The quotation from Burbank in the prior paragraph continued: "The natural tendency of institutions to seize the moment to expand their power is thus bounded by a requirement of resort for authority to policy choices made on other occasions through different, more democratic, processes." *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 790. This policy of the RDA points toward *Klaxon* whether or not it so requires.

202 Quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958).

203 *See*, *e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) and Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE. § 4506 (3d ed.) (2021 Update).

204 These constitutional limits on state choice of law also may make it difficult to interpret some of the earlier cases that suggested that *Klaxon* does not apply outside of diversity. For example, in his concurring opinion in *Vanston Bondholders*, Justice Frankfurter ignored Kentucky's choice-of-law rule, but there is reason to suspect that this position reflected Frankfurter's concern about the constitutionality of Kentucky rule, rather than any particular view about *Klaxon*. *See* Wolff, *supra* note 38.

Second, *Klaxon* applies only when a federal court has decided that state rather than federal law applies. In other words, cases implicating a strong federal interest may not even reach *Klaxon*.[205] Professor Wolff, for example, made much of cases such as *Hinderlider* in which the Supreme Court acknowledged a strong federal interest in resolving interstate conflicts.[206] Wolff translated this interest into a call for federal choice-of-law rules in certain circumstances. But, of course, *Hinderlider* accommodated the federal interest by applying preemptive federal substantive law to the interstate water dispute.[207] This approach makes sense—it would be odd to have a rule protecting a strong federal interest in resolving interstate conflicts that only applied in diversity cases in federal court, when such issues also could arise in a state court[208] or in federal court under any type of jurisdiction (not just in diversity cases).[209] Only uniform federal law, not horizontal choice of law, could do the trick.

This last point merits further attention in the context of complex litigation. One of the arguments against *Klaxon* in CAFA and MDL (and bankruptcy, for that matter) is that those disputes involve national problems that require national solutions.[210] I dispute the premise that these cases always involve national problems.[211] But even if they did, that would not support departures from *Klaxon*. There may be national controversies that require national solutions, but a federal choice-of-law rule—for example, the law of the home of the defendant[212]—is not a national solution. Instead, it is a single-state solution, just relying on a different method of selecting the state.[213] And it would be even less "national" because it would apply only in federal court

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205 *See*, *e.g.*, Clearfield Tr. Co. v. U.S., 318 U.S. 363, 366-70 (1943).

206 *See* Wolff, *supra* note 38, at 1886 ("[T]he interstate relations question of how to resolve a conflict among multiple state laws that all purport to govern the same dispute is distinctively federal. It is analogous to the resolution of competing state-law claims over the flow of interstate rivers that was addressed in *Hinderlider*—a clash of conflicting state interests arising from overlapping extensions of state law.").

207 *See* Hinderlider v. La Plata Co., 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

208 *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006).

209 *Hinderlider* itself clarified that the interstate conflict in that case was a federal question. *See* 304 U.S. at 111 ("Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.").

210 *See supra* note 120.

211 *See*, *e.g.*, Clopton, *supra* note 106 (demonstrating the variety of cases in MDLs); Silberman, *supra* note 109 (describing the "overinclusiveness of the cases brought into federal court under CAFA" with respect to federal choice of law).

212 *See*, *e.g.*, Issacharoff, *supra* note 109 (making such a proposal).

213 *See*, *e.g.*, Silberman, *supra* note 109 (making a similar point).

(not state courts),[214] and it would apply only to parties proceeding in the aggregate (not as individuals).[215] The true "national" solution is uniform federal law—but by the time we get to *Klaxon*, that is water under the bridge.

C. *Institutional Policies*

Erie is a statement of jurisdictional policy, but it is not only a statement of jurisdictional policy. *Erie* also is a statement of institutional policies along two dimensions: federalism and the separation of powers.[216] These policies also point to the application of *Klaxon* outside of diversity. This Section takes them in turn.

Protecting State Interests. The *Erie* doctrine is a federalism doctrine. Although there may be debates about the relative importance of federalism in *Erie*, I think it is beyond peradventure that *Erie* and its progeny were concerned with protecting state interests.[217] The Rules of Decision Act also invokes a federalism principle when calling for the application of state law.[218]

Klaxon, too, is about federalism. As Justice Reed explained for the majority in *Klaxon*:

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214 *See*, *e.g.*, Kramer, *supra* note 132, at 578 n.122 ("Note that my argument also suggests that any federal choice-of-law rules should apply . . . in both state and federal courts. It may be, in other words, that state law in the area of choice of law should be displaced because federal rules will do a better job umpiring conflicts among the states. But if Congress enacts choice-of-law rules, it should make those rules applicable in both state and federal courts.").

215 *See*, *e.g.*, *id.* at 578 ("[I]t is unfair to change a party's rights because lawyers and judges find it expedient to structure a lawsuit one way rather than another. Whatever rights I have if I litigate individually should be the same if, for reasons of convenience and efficiency, I am asked to litigate with others."); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967, 1000 (1995) ("[C]ourts never have viewed the policies that underlie the *Van Dusen* line of cases as inapplicable or overridden where cases were consolidated, and I do not see that calling the consolidation a single civil action should change that.").

216 For one prominent recognition of these policies, see Redish, *supra* note 195, at 767 ("[I]t is incorrect to suggest . . . that the issue of federal common law gives rise primarily to problems of federalism, rather than to those of separation of powers. In this context, the two structural political values are inextricably intertwined. The legislature, traditionally more responsive to state concerns than the federal judiciary, has chosen to protect federalism interests by legislatively limiting federal judicial power to supplant state law. In light of the existence of the Rules of Decision Act, then, whether or not a ban on judicial common law making power is politically advisable is not, within our structure of separation of powers, a matter for judicial resolution.").

217 Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938). *See also* Burbank, *Couch*, *supra* note 48, at 1946("A central premise of the *Erie* decision is that federal courts have no authority to second-guess state lawmaking institutions, picking and choosing which state institution's legal products will apply as rules of decision under the Rules of Decision Act."); Redish & Phillips, *supra* note 195 (criticizing the preoccupation with forum shopping and litigant equality, when the key question is about "the need to preserve a balance of state and federal interests within the federal system"); Clermont, *supra* note 13, at 4 (characterizing *Erie* as part of "the megadoctrine on the governing law in a system of federalism").

218 28 U.S.C. § 1652.

> Whatever lack of uniformity [the *Klaxon* rule] 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. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. 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. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.[219]

In short, *Klaxon* furthers *Erie*'s institutional policy of federalism by respecting state interest reflected in state choice of law.

Importantly, even though the *Klaxon* decision itself mentions diversity,[220] its federalism policy is not limited to diversity cases. More precisely, two principles lead to the conclusion that *Klaxon*'s federalism policy should apply outside of diversity.

The first principle, which almost goes without saying, is that whatever interest a state has in its law being applied, that interest is agnostic about the basis of federal jurisdiction. Why does a state care if a plaintiff pleads a state law claim under diversity or CAFA or any other type of federal jurisdiction?

The second principle is that states have an interest not only in the application of their substantive law but also in the application of their choice of law.[221] Or to say it another way, a state's choice of law reflects state policy. In the quotation above, the *Klaxon* Court acknowledged that states are free to make independent policy choices, and that those choices include the selection of another state's laws.[222] This view is also consistent with modern notions of choice of law.[223]

Putting these together, a state's interest in its choice of law is agnostic as to the basis of federal jurisdiction. If a state decides the best policy is to follow *lex loci delicti* or the most significant relationship for torts, that policy judgment would obtain whether the case is filed in state court, removed to federal court on diversity, removed to federal court on some other basis, consolidated into an MDL, or swept into a bankruptcy proceeding.

In theory, the basis of federal jurisdiction could give us a clue about the strength or content of the *federal interest* against which this state interest is

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219 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941).

220 *Id.* at 496.

221 *See supra* notes 41–44 and accompanying text (collecting sources and explaining this principle).

222 *See supra* note 219 and accompanying text.

223 *See*, *e.g.*, Bradt, *supra* note 31 (citing Cavers and others).

balanced.[224] But once a federal court has gotten to the point of choosing among state laws, it has concluded that, on balance, state interests win out. Nor is there anything in the jurisdictional statutes to suggest that they reflect different preferences about horizontal choice of law depending on the basis of jurisdiction.[225] Respecting state interest, therefore, requires extending *Klaxon*.

Please, dear reader, do not infer from the shortness of this discussion that it is unimportant. The *Erie* doctrine is deeply concerned with federalism. Some have argued that it is primarily a federalism doctrine.[226] *Erie*'s federalism policy flows directly into *Klaxon* based on the (correct) assumption that state choice of law is reflective of state policy. Any other outcome would be a backdoor to undercut the protection of state interests, by claiming to apply state law but then allowing federal law to choose among the states.[227]

Constraining Federal Judges. Professor Burbank observed that federal judges possess "perfectly natural desires to maximize their own power and to serve their own institutional interests."[228] *Erie* and *Klaxon* are checks on those natural desires, disempowering federal judges in favor of Congress and the states.

Turning first to *Erie*, Brandeis's rejection of federal general common law was a conscious attack on the power of federal judges.[229] As Purcell observed, Brandeis's "fundamental goal" in *Erie* was "restructuring the constitutional balance between Congress and the federal courts."[230] *Erie* did not eliminate all federal common law, but it stood for the proposition that *Swift* allowed too much of it.[231] And to the extent that *Erie* is yoked to the RDA,[232] the decision can be understood as constraining judges in favor of following a congressional directive.[233]

Erie alone was not a sufficient bulwark against federal judicial lawmaking.[234] As Professor Wolff pointed out, *Erie* was threatened by equity (to which there was a dispute whether *Erie* would apply) and by choice of law

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224 *See supra* notes 205–09 and accompanying text.

225 *See supra* notes 178–85 and accompanying text.

226 *See supra* note 217.

227 In this way, departures from *Klaxon* might fit Professor Spencer's definition of "anti-federalist" procedure. *See* A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233 (2007).

228 Burbank, *Semtek*, *supra* note 1. To be sure, federal judges at time have incentives to abstain or other seemingly contract their power. But asserting a new federal choice-of-law rule undoubtedly would fit into Burbank's description.

229 Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

230 *See* Purcell, *supra* note 30.

231 304 U.S. 64.

232 *See supra* notes 194–96 and accompanying text.

233 *See*, *e.g.*, Burbank, *Interjurisdictional Preclusion*, *supra* note 2; Redish, *supra* note 195.

234 See Burbank, *Couch*, *supra* note 48, at 1948 ("Here, as in its federal common law jurisprudence more generally, the Court has preferred to maximize its own power by neglecting statutes that might be thought to constrain or channel exercises of that power, including the Rules of Decision Act, the very statute it construed in *Erie* . . . .").

(which would give federal judges the ability to make law by other means).[235] The Supreme Court defended *Erie*'s institutional policy by bringing equity under its sway and by taking choice of law out of federal judges' hands.[236] *Klaxon* thus constrains federal judges but not federal legislators, who may adopt federal choice of law.[237]

To be sure, the move in *Klaxon* also had the result of giving more power to state judges (who often make state choice of law). But as Professor Burbank remarked, "[w]hen state substantive rights have been in question, from the perspective of purposes or effects, federal judges have not in the past been permitted to act with the autonomy of state judges."[238] It also should be mentioned that the federal separation of powers has been replicated in all the states. States may choose to give their courts more or less lawmaking power, and many states have decided to make judges more directly subject to the democratic process.[239]

In any event, *Erie* and *Klaxon* embody a policy of constraining federal judges. And if anything, the attitude of the Supreme Court toward federal common lawmaking has only gotten more hostile since those decisions.[240] For

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235 *See* Wolff, *supra* note 38. As to choice of law, Wolff writes: "The threat that conflicts doctrine posed to the core holding of *Erie* was perhaps not as great as that posed by equity practice, since choice of law putatively requires a selection among state liability regimes rather than the independent definition of the parties' rights that equity could entail. Still, the characterization of doctrines as 'procedural' rather than 'substantive'—the type of dispute that gave rise to both *Klaxon* and *Sampson*—gave courts leeway in shaping and defining the rights of parties, and the Court clearly wanted to yoke federal diversity courts firmly to state policy to prevent mischief in general diversity cases." *Id.* at 1880-81.

236 *Id.* Professor Gluck observed that state statutory interpretation may be yet another area in which federal judges may skirt the constraints of *Erie,* see Gluck, *supra* note 168, and Professor Little observed the same about the *Erie* guess. *See* Laura E. Little, Erie*'s Unintended Consequence: Federal Courts Creating State Law*, 52 AKRON L. REV. 275, 285 (2018).

237 The approach here is congenial with a RDA approach, as the RDA's reference to state law provides a mechanical alternative to federal judicial choice of law. Or as Professor Burbank remarked, "The natural tendency of institutions to seize the moment to expand their power is thus bounded by a requirement of resort for authority to policy choices made on other occasions through different, more democratic, processes." Burbank, *Interjurisdictional Preclusion*, *supra* note **Error! Bookmark not defined.**, at 7902.

238 *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 796. For a comment on Professor Burbank's reference to "state substantive rights" here and elsewhere, see *infra* notes 291-93 and accompanying text.

239 *See generally*, *e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001). Professor Redish reached a similar point from a different vantage. He argued that, at the time of the framing, states' rights advocates were more concerned with overreach by the federal judiciary than the federal legislature, given the states' more direct representation in Congress. Redish, *supra* note 195, at 791-92. Such an interpretation of the RDA also points to constraining federal judges more than federal legislators or state judges.

240 *See*, *e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4518 (3d ed., 2019) (discussing *Vanston Bondholders*). This historical trend also might

example, the Court in *Rodriguez* reminded that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States."[241]

The remaining question is whether this separation-of-powers policy is tied to diversity jurisdiction. The answer, again, is no. There is nothing in *Erie*, the jurisdictional statutes, or the RDA to support the claim that federal judges should have freer hands to alter state choice of law based on the type of jurisdiction. Again, those jurisdictional bases may call for more or less federal law, but they do not speak to federal judge's ability to choose among state laws.

* * *

The jurisdictional policies of *Erie* support the extension of *Klaxon* because it is the presence of state law in federal court—not any basis of jurisdiction—that implicates the twin aims of *Erie*. Jurisdiction shopping and inequitable administration are risks whenever the basis of federal jurisdiction determines the horizontal choice of law. The institutional policies of *Erie*—the twin aims of federalism and the separation of powers—further support applying *Klaxon* across the board. *Klaxon* supports state substantive interests where they are reflected in state choice of law, and *Klaxon* works to constrain federal judges when they seek to make mischief with respect to state law in federal court. Whether we locate these principles in *Erie*, the RDA, or elsewhere, they have force independent of the basis of federal jurisdiction.

D. *Direct Filing and the Spirit of* Klaxon

Before leaving the discussion of *Klaxon* and applied state law, I must pause on an unusual set of situations that seemingly creates a tension between the arguments of this Section and the *Klaxon* rule. That is, cases in which a quirk of federal practice leads them to be filed in a forum state other than the one where they would have been filed under normal circumstances.

Two common situations come to mind.[242] First, in multidistrict litigation, some MDL judges have encouraged a practice called "direct filing" in which the defendants waive any objections to filing directly in the MDL court, rather than having plaintiffs file in a proper venue and then seek transfer into

inform our reading of precedent such as *Vanston Bondholders*, which suggested in dicta a role for federal courts in choosing law in bankruptcy. 329 U.S. 156 (1946).

241 Rodriguez v. FDIC, 140 S.Ct. 713, 717 (2020).

242 A less common situation is the original action in the U.S. Supreme Court. It would be odd if all such actions applied the choice of law of the District of Columbia. I would adopt this Section's proposal for such actions as well.

the MDL.[243] Second, in bankruptcy, earlier examples have focused on situations such as Purdue Pharma where pending state law claims are dragged across the country into a bankruptcy, typically in the debtor's home state.[244] But some potential claims will not be filed before the bankruptcy, and are later filed directly in the bankruptcy proceeding.[245]

The challenge in these situations is that direct filing into the MDL or the bankruptcy proceeding permits the jurisdictional manipulation and resulting inequities that *Klaxon* sought to avoid.

Never fear, Professor Bradt has offered a thoughtful solution to MDL direct filing that also can be adopted for bankruptcy. Bradt suggested that every direct-filed MDL complaint should include a declaration of the plaintiff's hypothetical filing court (a "home venue"), to be selected among those courts where the case could have been brought.[246] Similarly, state law claims raised in the first instance in bankruptcy might include a "home venue" declaration.[247] The home venue declaration would allow the court to follow the choice of law of the state in which the case would have been filed—that is, *Klaxon* in spirit.

This solution tracks the approach taken in transferred cases under *Van Dusen v. Barrack*,[248] and it is consistent with this Article's policy arguments—it limits jurisdiction shopping, respects the states, and constrains federal judges. In response to concerns with plaintiff manipulation, note that the "home venue" must be one in which the case could have been brought.[249]

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243 *See*, *e.g.*, *In re* Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 904 (E.D. La. 2007). *See generally* Bradt, *supra* note 31 (describing this process in detail).

244 *See supra* note 12 and accompanying text.

245 Professor Green described the situation thusly: "Bankruptcy proceedings will generally be brought in the district of the debtor's residence (for an individual) or state of incorporation, principal place of business, or location of assets (for a business). The bankruptcy court in that district will have jurisdiction over all of the debtor's property, no matter where it is located, and nationwide service of process is available. Thus, it can entertain a state law action even though the action could not have been entertained by a forum state court." Green, *supra* note 125, at 1925.

246 Bradt, *supra* note 31. Bradt identified at least one court that had adopted this solution. *See In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., MDL No. 07-1873, 2012 WL 1580761, at *1 (E.D. La. May 4, 2012).

This is not to suggest that plaintiffs would be prohibited from waiving this option or from negotiating with defendants regarding the choice of law. Instead, the proposal here is to make the "home venue" designation the default rule against which such negotiations would occur.

247 Professor Green offered a judge-driven solution, asking the court to determine if there is a singular venue where the case would have been brought. *See* Green, *supra* note 125. If so, Green called for *Klaxon* as applied to that court. If not, then Green countenanced federal choice of law. Professor Cross also asked the judge to determine where the case would have been filed. *See* Cross, *supra* note 70. I prefer applying Bradt's solution to bankruptcy for all of the reasons I support *Klaxon*: further reducing jurisdictional manipulation; further protecting state interests reflected in choice of law; and further constraining federal judges.

248 376 U.S. 612 (1964).

249 *Cf.* 28 U.S.C. § 1404(a) (limiting venue transfers to courts where the case could have been brought).

Defendants should have the ability to challenge the hypothetical home venue in what would amount to a hypothetical motion to dismiss under Rule 12(b).[250]

These small tweaks extend *Klaxon* functionally, while my proposals above extend it formally. Taken together, this Part argues that (actual or declared) forum-state choice of law should govern whenever state law applies in federal court. This approach responds to jurisdictional manipulation while also supporting the federalism and separation-of-powers policies of the *Erie* doctrine, the RDA, and the federal jurisdictional statutes.

III. EXTENSIONS: FEDERAL COMMON LAW, SEMTEK, AND CONGRESS

The foregoing analysis called for federal courts to follow *Klaxon* when state law applies directly. But these cases are not the only instances in which state law makes an appearance in federal court. This Part draws on the lessons above to—more tentatively—call for the further extension of *Klaxon* into cases involving federal common law, interjurisdictional preclusion, and congressional direction.[251] I will take each of these in turn.

A. *Federal Common Law*

At the end of the *Erie* analysis, sometimes a federal court will decide that federal law applies.[252] That federal law may take the form of federal common law, thus raising the question: What is the content of the federal common law?

Early decisions from the Supreme Court did not provide clear guidance, but eventually the Supreme Court settled on an approach exemplified in *United States v. Kimbell Foods*.[253] *Kimbell Foods* is a case about the priority of contract liens arising from federal loan programs. An *Erie* analysis led the Court to conclude that federal common law governed. "Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules," the Court explained.[254] The Court saw two options: "adopt state law" or "fashion a

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250 Bradt, *supra* note 31.

251 To careful readers, I would acknowledge that interjurisdictional preclusion is a species of federal common law, and that Congress may call for the application or adoption of state law, but I choose these categories because they are useful in spelling out the analysis here.

252 *See*, *e.g.*, Clearfield Tr. Co. v. United States, 318 U.S. 363, 366-69 (1943). This federal law should apply in state court, per "Reverse Erie" or preemption. *See* Clermont, *supra* note 13. I do not take up here examples of "federal procedural common law" that apply only in federal court. *See*, *e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

253 440 U.S. 715 (1979). *See generally* Clermont, *supra* note 29; Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

254 440 U.S. 715.

nationwide federal rule."[255] The Court has since suggested that adopting state law is the presumptive choice.[256]

Adopted state law is different than the applied state law of Part II in a number of respects.[257] For one, while federal courts may not create exceptions to applied state law, they may create exceptions to adopted state law to protect federal interests.[258] A review of "adoption" decisions from federal courts of appeals revealed that these exceptions are real but rare.[259]

A second asserted feature of "adoption" cases is that they do not necessarily follow forum-state choice of law—that is, they do not necessarily follow *Klaxon*.[260] The Supreme Court in *Kimbell Foods* and later cases did not specify a clear approach to horizontal choice of adopted law,[261] and court-of-appeals decisions on adopting state law have not done so either.[262] Indeed, the most common approach seems to be identifying the state law to be adopted without explanation.[263]

This lack of clarity should be remedied. At a minimum, it would be helpful if federal courts announced more clear guidance on how to adopt state law.

Moreover, at least when there is no obvious federal interest in any particular choice of law approach, I suggest that federal courts presumptively follow *Klaxon* for selecting the state law to be adopted. This *Klaxon* approach would still permit federal courts to craft exceptions to protect federal interests. But unless the federal court can articulate such an interest with

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255 *Id*. *See generally* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4518 (3d ed.) (2021 Update).

256 *See*, *e.g.*, *Kimbell Foods*, 440 U.S. 715; Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991); Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507(2001); O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 80-81 (1994); United States v. Yazell, 382 U.S. 341, 356-57 (1966); *see also* Clermont, *supra* note 29, at 258 (describing the adoption of state law as a "rebuttable presumption").

257 *See generally*, Clermont, *supra* note 29.

258 *See Kimbell Foods*, 440 U.S. 715. For the clearest example in a Supreme Court case, see United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (creating an exception to state law that discriminated against the federal government's rights in land).

259 *See* William French Erie*'s* Other Horizontal Choice of Law (unpublished manuscript) (on file with author) (collecting examples)*; see*, *e.g.*, Davilla v. Enable Midstream Partners L.P., 913 F.3d 959, 967-68 (10th Cir. 2019).

260 *See generally*, Clermont, *supra* note 29.

261 *Semtek* is an adoption case, directing that federal preclusion law in diversity cases should adopt the law that the forum state would have applied. Preclusion is a special case because it involves a separate, prior proceeding, so I do not think it is particularly persuasive for other adoption cases—though note that my proposal is consistent with *Semtek*'s *Klaxon*-like approach. *See infra* note 289 and accompanying text. I have more to say on *Semtek* and how its rule should be updated *infra* Section III.B.

262 *See* French, *supra* note 259.

263 *See id*. This approach recalls Judge Brandeis's breezy assertion that Pennsylvania law applied in *Erie*—a choice that would not have accorded with *Klaxon* had that case been on the books. *See supra* note 30 and accompanying text.

specificity, it should adopt state law consistent with the choice of law of the forum state.[264]

To begin, I should acknowledge that the case for adoptive *Klaxon* is weaker than for applied *Klaxon* based on the values discussed above. Jurisdiction shopping between bases of jurisdiction is not an issue here.[265] Federalism still points to respecting forum state choice of law,[266] but the federalism interest must be weaker when the law being applied is federal law.[267] Constraining federal judges also supports using *Klaxon*'s mechanical approach for adoption,[268] though having already authorized federal judges to make common law, this horse is at least partway out of the barn. That said, an unguided ability to choose among state laws is exactly the institutional concern present in *Klaxon*,[269] and current practice in the federal courts suggests that federal judges are unguided in their selection of adopted state law.[270] The rote use of *Klaxon* for adoption would be a dramatic improvement on this dimension.[271]

Of course, using *Klaxon* for adoption would mean that federal law would apply differently depending on where a case is filed. While this horizontal disuniformity is permitted for applied state law,[272] it is possible that there is a federal interest in avoiding it for federal common law.

To my mind, the questions are how strong is this interest and what weighs against it. As to the strength of the interest, observe that adopted state law exists only where Congress and the federal courts have not opted for uniform

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264 Though beyond the scope here, I also would query whether, in adoption cases, federal courts should not repair to the "*Erie* guess." *See*, *e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed.) (2021 Update). Professor Clermont suggested that this is not required in adoption cases, but perhaps it should be. *See* Clermont, *supra* note 29, at 261.

265 *See supra* notes 143–63 and accompanying text.

266 *See supra* notes 217–27 and accompanying text.

267 Relatedly, if one believed that the Rules of Decision Act played a role in the content of federal common law, then it too would point to *Klaxon* here. *See*, *e.g.*, Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 789 ("The approach advocated here regards the Rules of Decision Act as speaking directly to the circumstances in which it is permissible to fashion or apply federal common law. It has the obvious effect of imposing discipline on the first of those processes.").

268 *See supra* notes 228–41 and accompanying text.

269 *See supra* note 237 and accompanying text.

270 *See supra* notes 260–63 and accompanying text.

271 *Klaxon* is also a focal point around which courts can easily converge, rather than expecting disparate federal choices to settle on predictable approaches without Supreme Court or congressional guidance. *Cf.* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020) (documenting the varied approaches in the states). And, indeed, reviewing the case law on adopted state law reveals that the federal courts have not articulated anything even approximating a consistent approach. *See supra* notes 260–63 and accompanying text.

272 *See supra* note 44 and accompanying text.

federal law.[273] And when a federal contract is at issue, adopted state law is relevant only if government did not specify the choice of law in the contract.[274] Even when adopted state law governs, any particularized federal interest could be protected via exceptions.[275] These outlets for federal interests imply that, in the remainder where adopted state law governs, the federal interest in uniform adoption is not strong.

As to the countervailing interests, in addition to the (weaker) arguments about federalism and the separation of powers mentioned above, using *Klaxon* for adoption has a number of advantages. Within disputes, *Klaxon* produces consistency across claims. Consider, for example, a contract provision releasing liability for all potential claims arising from an environmental accident. For claims arising under state law, the validity of the release will be determined by the state law that the forum state would apply.[276] For claims arising under federal law (*e.g.*, under CERCLA[277]), federal common law would adopt state contract law on releases.[278] Which state's law? Only using *Klaxon* for adoption would ensure that the same state's contract law would apply to the same release in the same case.[279] *Klaxon* thus avoids inconsistency within disputes.

With or without multiple claims, using forum-state choice of law may help reduce the disruption of state law. In *Kimbell Foods*, the Court suggested that a strong argument for adopting state law is to avoid interference with "important and carefully evolved state arrangements designed to serve multiple purposes."[280] When more than one state's laws could apply, some risk of interference is unavoidable,[281] but courts should aim to minimize it. Judges

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273 *See supra* notes 205–09 and accompanying text.

274 *Kimbell Foods* itself is a case involving federal contracts, see *supra* notes 253–55 and accompanying text, and many adoption cases are decided against the backdrop of federal contracts. *See* French, *supra* note 259.

275 *See supra* notes 258–59 and accompanying text.

276 This would be true in state court (applying forum state choice of law) or federal court (following *Klaxon*).

277 42 U.S.C. §§ 9601–9675.

278 *See*, *e.g.*, ASARCO, LLC v. Union Pac. R. Co., 762 F.3d 744 (8th Cir. 2014) ("So long as they do not jeopardize federal goals, parties should be free to waive contribution protection through contracts governed by state law.").

279 A dozen states would look to the place of contracting, while the others would follow some form of "modern" choice-of-law analysis. *See generally* Symeonides, *supra* note 271.

280 United States v. Kimbell Foods, 440 U.S. 715, 729-30 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 353 (1966)) (internal quotation marks omitted). This is a quotation about state commercial law, but I think it applies just as well to many other areas in which federal law adopts state law.

281 To elaborate: If federal common law adopted state law in a way that was forum-agnostic, then there would be disuniformity when a forum state would treat the provision differently under state law than it would be treated under federal law (adopting state law). If federal common law adopted state law by following the forum state's choice of law, then there would be disuniformity

could attempt to divine which state's laws are most likely to apply in all potential cases, and then use this divination as the basis for federal choice of law.[282] Alternatively, federal courts could treat the existence of an actual case litigating the issue as a proxy for where litigation is likely to occur—thus they would adopt the law that the forum state would choose. In this way, adoptive *Klaxon* might minimize intrusions on state law more reliably than privileging some forum where claims might be litigated in some other case.

Incorporating *Klaxon* into adopted state law also smooths out—and, dare I say, improves—the spectrum of *Erie* doctrines. Currently, there is a discontinuity where *Erie* chooses between state and federal law. On one side of the line is applied state law and state choice of law (*Klaxon*), and on the other is adopted state law and independent federal choice of law (not-*Klaxon*). If *Klaxon* were the presumptive rule in adoption cases, however, then the *Erie* spectrum might look like this: Where state interest is greatest, state law (and *Klaxon*) applies directly. As state interest is reduced or federal interest increases, we move into adopted *Klaxon*, where the only practical difference is that the federal court can create exceptions to protect specific federal interests.[283] Then we move into the territory where federal law adopts state law independently—that is, where there is a federal interest in the choice-of-law method.[284] Finally we transition to uniform federal law supported by strong federal interests.

This smoothed-out *Erie* has more than theoretical appeal. Perhaps most importantly, it lowers the stakes of the closest *Erie* questions. Rather than having courts choose between applied *Klaxon* and adopted something else, those cutting-edge *Erie* decisions only would affect whether the court can create exceptions. This makes the "outcomes"—that is, the content of the relevant law—more predictable, because it would almost always be the same no matter which side of the *Erie* line the Court decided that the issue fell.[285] This approach also makes the *Erie* inquiry more concrete. In these close cases, the real question is whether there are specific federal interests that need protection via an exception, permitted for adoption (but not pure *Klaxon*).

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when claims could be filed in multiple forums (with different choice-of-law regimes). Again, it is impossible to identify an adoption rule that does not create the risk of some disuniformity or another.

282 In many cases, this prediction would align with forum-state choice of law, because there is often consensus (or near consensus) on choice-of-law questions. It is only in cases where there is reasonable disagreement—and where there is no federal-interest exception—that this choice matters.

283 This aspect of *Kimbell Foods* should remain good law. *See supra* notes 258–59 and accompanying text.

284 For example, perhaps federal air-pollution law includes a preference for regulating air pollution at the source, in which case there would be a federal interest in the choice of adopted law in favor of the law of the place of emission.

285 I say "almost always" because of the availability of exceptions, but of course those would be exceptional.

In this way, the *Klaxon* approach to adoption has the effect of retroactively validating what was a misleading statement of law from Justice Scalia in *O'Melveny & Myers v. FDIC*.[286] In *O'Melveny*, the Supreme Court held that federal common law incorporated California law regarding the imputation of knowledge to the FDIC. The Court spent time determining whether an exception to California law was warranted, indicating that it was adopting rather than applying state law. But at one point, Justice Scalia downplayed the adopt-apply distinction: "it is of only theoretical interest whether the basis for that application [of California's rule] is California's own sovereign power or federal adoption of California's disposition."[287] This flip remark was wrong because applied and adopted state law operate differently with respect to the horizontal choice of law. But Justice Scalia's statement reflects what this paper argues the law should be. There is something appealing about the approach of *O'Melveny*—which turns the knife's edge of the *Erie* doctrine into a (mostly) theoretical inquiry, other than the ability to create exceptions when concrete federal interests are on the line.

For these reasons, courts should presumptively follow forum-state choice of law when adopting state law as federal common law.

B. *Preclusion*

Semtek v. Lockheed Martin was "complexity on stilts."[288] For present purposes, we can jump to its holding: Uniform federal common law governs the preclusive effect of federal court judgments in federal question cases, and federal common law adopts the preclusion law that would be applied by forum-state courts in diversity cases (citing *inter alia Klaxon*).[289]

This holding drew heavily on the work of Professor Burbank, though "the author of the Court's opinion, well aware of the origins of that solution, chose not to acknowledge its provenance."[290] Burbank grounded his argument in the Rules of Decision Act and *Erie*, and he tied it to the sorts of policies discussed above. For example, Burbank explained: "Preclusion rules may implicate substantive policies; they have dramatic effects on substantive rights. When state substantive rights have been in question, from the perspective of purposes or effects, federal judges have not in the past been permitted to act

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286 512 U.S. 79 (1994).

287 *Id.* at 85.

288 Burbank, *Semtek*, *supra* note 1, at 1047.

289 Semtek, 531 U.S. at 507-08.

290 Burbank, *Semtek*, *supra* note 1, at 1055. The Court, though, did not read Professor Burbank closely enough. *See id.* at 1051-52 (explaining that the Supreme Court did not consider when F2 may depart from F1's preclusion law for reasons of full faith and credit).

with the autonomy of state judges. Rather, they have been required to do what judges of a particular state would do."[291]

I suspect readers know where I am going. Burbank's quoted statement speaks of state substantive rights, but the Court's opinion speaks of "diversity" cases. To be fair, at many points, Burbank also suggested that federal preclusion law should adopt state law in "diversity" cases.[292] But as detailed above, I am not persuaded that the type of jurisdiction—as opposed to the source of law—is the right dividing line. Therefore, I would suggest revising the *Semtek* approach to turn not on the basis of jurisdiction but on the source of law.[293] So, for example, if a federal court issued a judgment on a state law claim in an admiralty case or a *Grable*-style federal question case, forum-state preclusion law should be adopted as federal common law.

I felt confident with this solution until an exchange with Professor Clermont, who pointed out to me the challenge of applying this approach in a case with a mix of federal- and state-law claims.[294] Though my initial intuition was that the content of preclusion law in such a case also should be mixed—federal law applying to federal claims; adopted state law applying to state claims—Professor Clermont rightly observed that preclusion law applies to judgments (not claims), and attempting to label the claims and issues as "state" or "federal" could present administrative difficulties in some cases.[295]

Based on this exchange, I do not offer a full-throated endorsement of a uniform rule for the adoption of state preclusion law for any state law *claim* in federal court. Instead, I suggest that at a minimum federal preclusion law should adopt state law in any case where all claims arise under state law, and I encourage courts to consider whether in "mixed cases" there may be a role of state preclusion law.[296] I also encourage readers—including those luminaries participating in this symposium—to devote their considerable intellects to the preclusive effect of "mixed judgments" generally, even those

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291 Burbank, *Interjurisdictional Preclusion*, *supra* note 2, at 796.

292 *See*, *e.g.*, *id.* at 636 ("[I]t is extremely difficult, under a traditional federal common law analysis or a Rules of Decision Act approach, to justify either across-the-board uniform federal preclusion rules for diversity judgments adjudicating matters of state substantive law, or the borrowing of state preclusion rules only when they implicate substantive state policies.").

293 As Professor Burbank said, "[t]he Court need not apologize for past transgressions, but it should set its house in order." *Id.* at 762.

294 Professor Gardner raised the added complexity of cases in which the court was unclear about the source of law, for example where state and federal law were the same. Decades from now at her festschrift, I hope some newly minted legal scholar takes up this question.

295 Had this exchange been with Professor Burbank, he might have said that "'even the most luminous analytic framework' can blind us." *Id.* at 736 (quoting Chayes).

296 For one analysis of the questions shortly after *Semtek*, see generally Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527 (2003).

arising from a simple two-party case in which a plaintiff invokes federal question and diversity jurisdiction on related claims.[297]

C. *Congress*

Sometimes Congress makes the call to apply or adopt state law.[298] The Federal Tort Claims Act calls for federal courts to use "the law of the place where the act or omission occurred."[299] The Outer Continental Shelf Lands Act directs courts to use the law of "adjacent States."[300] Federal Rules of Evidence 501 and 601 call for federal courts to choose state privilege and competency law as related to state law claims.[301] Arguably, the Rules of Decision Act,[302] the Full Faith and Credit Act,[303] and the old Process and Conformity Acts[304] also involved Congress choosing state law.

Congressional direction that state law governs raises horizontal choice-of-law questions. Sometimes Congress answers the question directly, as in the Federal Tort Claims Act.[305] But other times, such as in the Federal Rules of Evidence, Congress is silent. For all of the reasons that readers are sick of reading, I suggest a presumption that statutes calling for the adoption or application of state law should be read to incorporate *Klaxon*'s choice-of-law method.[306] This presumption can be overcome by congressional intent, but without such intent, *Klaxon* governs.

One difficult question for some of these statutes is whether Congress is calling for the application or adoption of state law. And, indeed, I was careful not to say "apply" or "adopt" in my description of the various statutes above. One virtue of my approach is that this distinction becomes far less

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297 I do not refer here to cases raising federal questions and supplemental state law claims, but a case in which there is a federal claim and a related state law claim between citizens of different states seeking more than $75,000.

298 *See generally* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012).

299 28 U.S.C. § 1346(b)(1); *cf. supra* note 90 and accompanying text (discussing FSIA).

300 43 U.S.C. § 1333(2)(a); *see also* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 480 (1981).

301 Fed. R. Ev. 501 & 601.

302 28 U.S.C. § 1652.

303 *See*, *e.g.*, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (Process Act of 1792); Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197 (Conformity Act of 1872).

304 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94 (Process Act); Act of June 1, 1872, ch. 255, 17 Stat. 196 (Conformity Act); see Clermont, *supra* note 29.

305 Statutes such as the FTCA raise a different question: whether to incorporate the state's whole law (including its choice of law), or its internal law. In *Richards v. United States*, 396 U.S. 1, 11 (1962), the Supreme Court held that the FTCA looked to the whole law of the selected state. For reasons explained above, I concur this with result. *See supra* Section III.A.

306 I would apply the same presumption to a Federal Rule adopted through the Rules Enabling Act process if it called for state law but did not specify which state. Presently, the Federal Rules pointing to state law include a choice-of-law directive. *See*, *e.g.*, Fed. R. Civ. P. 64(a) (incorporating provisional remedies "under the law of the state where the court is located").

important—*Klaxon* governs either way, unless the statute adopts state law and there are concrete federal interests necessitating an exception. In all other situations, the federal court would choose the same state law regardless how the choice is characterized.[307]

CONCLUSION

Erie and *Klaxon* are the product of the "accident of diversity," but the accident is that the Supreme Court addressed issues of state law in cases that arose under that head of jurisdiction. The policies of *Erie* are implicated whenever state law appears in federal court. Avoiding jurisdiction manipulation and related inequities, respecting state interests, and limiting federal judicial lawmaking are aims that are relevant beyond diversity. Particularly in an era when some of the most socially consequential state law claims are brought under CAFA, bankruptcy, and MDL, staying true to the policies of *Erie* means relying on *Klaxon* in these cases as well.

307 *See supra* Section III.A.