BACK TO THE BASICS OF *ERIE*[1]

by
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INTRODUCTION

The Supreme Court's decision in *Erie Railroad Company v. Tompkins*[2] has burrowed its way so deeply into our legal culture that one may wonder whether, dandelion-like, its roots will resist all efforts at disturbance. But that concern has not stopped a recent wave of scholarship on this pivotal case. Indeed, so much has grown up around the decision that it is easy to forget how straightforward it was. As everyone knows, Justice Louis Brandeis, the decision's author, startled the bar by announcing that the central question in *Erie* was whether to overrule *Swift v. Tyson*.[3] The Court

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[2] 304 U.S. 64 (1938).

[3] *Id.* at 69; Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

went on to hold that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied *in any case* is the law of the State"[4]—in other words, the default rule for federal courts is state law. *Erie* also resolved once and for all that the term "state law" in the Rules of Decision Act includes both positive enactments and state decisional law.[5] These rulings were compelled, the Court said, by the fact that neither Congress nor the federal courts have the "power to declare substantive rules of common law applicable in a State."[6]

One would think that a simple default rule pointing to state law would be easy to apply, but experience proved that it was not. Overnight, the simple *Erie* idea morphed into the unwieldy "*Erie* doctrine." In this paper, I argue that much of the complexity that has encrusted *Erie* is unnecessary. What should have been an uncomplicated standard has become bogged down with needless exceptions to exceptions to exceptions, and in the process the doctrine has drifted away from its animating principles. It is time to consider how we might return to first principles by simplifying the *Erie* doctrine and remaining true to the federalist structure that is the foundation of our Constitution.

I. BEFORE *ERIE*

It is helpful to begin by recalling the legal landscape just before *Erie*. By the time 1938 rolled around, Justice Holmes had written his book *The Common Law*,[7] the Legal Realism movement was in full swing, and the idea that law is a "brooding omnipresence" had become (rightly) derided.[8] It is against that backdrop that the *Erie* Court criticized the rule established in *Swift* as something "rest[ing] upon the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it.'"[9] But was that a good description of the views held by the judges of previous generations, and Justice Story in particular? Perhaps not.

Such a portrayal is neither necessary to *Erie*'s core holding nor fair to the pre-Realist judges. It paints them in a needlessly unflattering light, suggesting that they sat idly in their chambers, seeking guidance from higher authorities, and plucking principles out of the sky. The judges of whom the Court spoke, however, would have laughed at such a picture. The English (and later American) common law those earlier judges knew

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[4] *Erie*, 304 U.S. at 78 (emphasis added).

[5] *Id.*; Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (2012)).

[6] *Erie*, 304 U.S. at 78.

[7] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Boston, Little, Brown & Co. 1881).

[8] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[9] *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

was a system of traditional law, wherein each new question was decided by applying or extending the rules that had been established in earlier cases.[10] This familiar system of precedential lawmaking was a far cry from a legal Ouija Board.

As early as the twelfth and thirteenth centuries, courts in medieval England, "guided by [their] own customs had no difficulty in accommodating to new conditions, and if an adjustment seemed desirable [the court] might expressly announce what it proposed to do in the future."[11] This view persisted over the next several centuries. In 1528, Christopher St. Germain, a sixteenth-century barrister who debated Sir Thomas More on important religious questions, sought to mediate the divide between doctors of divinity and students of common law. In his famous pamphlet *Doctor and Student*, Germain concluded that of the six pillars of English law, the "law of reason" is the primary one.[12] That law, he said, could be broken down into two components. "Primary reason," the first, included such affirmative pronouncements as the prohibitions on murder and deceit, while "secondary reason" arose out of general customs and the maxims of the realm.[13]

The conception of the common law as an incremental and customary body of doctrine was further sharpened in the early seventeenth century. Lord Chief Justice Sir Edward Coke, who famously clashed with King James I on several occasions, argued in 1607 that the King was not qualified to decide legal cases.[14] Coke conceded that "God had endowed His Majesty with excellent science, and great endowments of nature."[15] In his view, however, this divinely inspired knowledge was not enough:

> [H]is Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognisance of it.[16]

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[10] *See* JOSEPH STORY, CODIFICATION OF THE COMMON LAW (1837), *reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 701–02 (William W. Story ed., Charles C. Little and James Brown, Boston 1852).

[11] S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 25 (2003).

[12] CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT 12 (William Muchall ed., Cincinnati, Robert Clarke & Co. 1874) (1518).

[13] J.W. TUBBS, THE COMMON LAW MIND 72–73 (2000) (discussing ST. GERMAIN, *supra* note 12).

[14] *See* Jerome E. Bickenbach, *The 'Artificial Reason' of the Law*, 12 INFORMAL LOGIC 23, 23 (1990).

[15] *Id.* (quoting *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1343 (K.B.), 12 Co. Rep. 64) (internal quotation marks omitted).

[16] *Id.* (quoting *Prohibitions del Roy*, 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64) (internal quotation marks omitted).

Thus Coke, in defining the common law, emphasized the "activity of the judges in constantly refining the law."[17] Thomas Hedley, in a notable speech to the House of Commons, offered a similar description of the nature of common law.[18] He saw the common law as reason approved by the judges to be good and profitable for the commonwealth.[19] The only test by which the common law could be judged, he thought, was "time, which is the trier of truth, author of all human wisdom, learning and knowledge, and from [which] all human laws receive their chiefest strength, honor, and estimation. Time is wiser than the judges, wiser than the parliament, [nay] wiser than the wit of man."[20] John Selden, a parliamentarian in the House of Commons, held a similar view. To him,

> and many of his contemporaries . . . the common law ha[d] been in constant evolution over the centuries, but they do not attach that belief to the notion of immemoriality. In view of the evidence—that many prominent common lawyers of the period recognize that the common law has undergone substantial change over the centuries—it is inaccurate to define the common law mind in terms of a belief in the unchanged, immemorial antiquity of the common law.[21]

Jumping ahead to nineteenth-century America, what stands out is the *lack* of any significant change in this long-held view of the common law as a customary system that evolves using the building blocks of experience. The author of *Swift v. Tyson* himself, responding to a proposal to codify the common law of Massachusetts, expressed views that are consistent with this understanding. He wrote:

> [T]he common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which cannot now be distinctly traced back to any statutory enactments, but which rest for their authority upon the common recognition, consent and use of the State itself.[22]

Continuing, Justice Story recognized that:

> In truth, the common law is not in its nature and character an absolutely fixed, inflexible system . . . . It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to

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[17] J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY: A REISSUE WITH A RETROSPECT 35 (2d ed. 1987).

[18] TUBBS, *supra* note 13, at 149.

[19] PARLIAMENTARY DEBATES IN 1610 72–73 (Samuel Rawson Gardiner ed., London, John Bowyer Nichols & Sons 1862).

[20] 2 PROCEEDINGS IN PARLIAMENT 1610: HOUSE OF COMMONS 175 (Elizabeth Read Foster, ed., 1966); *see* TUBBS, *supra* note 13, at 150.

[21] TUBBS, *supra* note 13, at 147.

[22] STORY, *supra* note 10, at 701.

> the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country.[23]

This vision of the common law persists today. In writing about the role of the common law, Judge Richard Posner has suggested that "[e]fficiency . . . should be influential in judicial decision-making when judges are called upon to exercise a legislative function."[24] Furthermore, he argues, when a later case is based on the original efficiency-promoting decision, it is more likely also to be efficiency-enhancing.[25] Thus, whether the guiding principle underlying the development of the common law is efficiency, historical fidelity, or something else, the process *itself* is the same cautious and incremental decision-making.

It is against this backdrop—not Justice Holmes's unflattering characterization of pre-Realist thought—that we should consider the decision in *Swift v. Tyson*.[26] In *Swift*, Justice Story needed to define the phrase "the laws" in Section 34 of the Judiciary Act of 1789 (now known as the Rules of Decision Act).[27] He concluded that "[t]he laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority" because "the decisions of Courts . . . are, at most, only evidence of what the laws are; and are not of themselves laws."[28] That is because they "are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."[29] When, 96 years later, Justice Brandeis described the "fallacy underlying the rule declared in *Swift v. Tyson*" as "rest[ing] upon the assumption that there is 'a transcendental body of law outside of any particular State'"[30] he was putting words into Justice Story's mouth. Brandeis's depiction failed to give credit to Story's understanding of the common law as a system of customary law that grows incrementally—one could say *empirically*—and that later cases often re-examine, qualify, or abandon.[31] Serious adherents of Natural Law would admit of no such transience in its principles.

In 1842, when *Swift* appeared, deciding what substantive rule of decision should apply was not the only difficulty facing the federal courts. Rules of procedure also began to confound legal practice in the federal courts. Although those courts had always been free to create their own

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[23] *Id.* at 701–02.

[24] RICHARD A. POSNER, OVERCOMING LAW 132 (1995).

[25] *See id.*

[26] 41 U.S. (16 Pet.) 1 (1842).

[27] Now codified at 28 U.S.C. § 1652 (2012).

[28] *Swift*, 41 U.S. (16 Pet.) at 18.

[29] *Id.*

[30] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

[31] STORY, *supra* note 10, at 701–02.

procedures for proceedings in equity and had done so since 1822,[32] they were initially required in actions at law to apply the procedural rules of the forum state as of the time that state joined the Union. As the nation grew and states undertook ambitious procedural reforms, the rules of procedure in federal court diverged sharply from those applied in the state courts. In response, Congress passed the Conformity Act of 1872.[33] Section 5 of the Conformity Act provided that, except for federal rules of evidence (and the rules of privilege in particular):

> [T]he practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State.[34]

Section 6 similarly provided:

> That in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the court of such State.[35]

To summarize the situation before *Erie*, therefore, there were significant differences between the federal courts and the state courts, from a procedural standpoint in equity cases and from a substantive standpoint to the extent that the evolving common-law doctrines followed by the federal courts diverged from those used in the legal systems of the several states. Whether this created—either sometimes or always—an issue of constitutional dimension is debatable. The *Erie* Court thought so, at least for cases based on the diversity jurisdiction.[36] So let us turn to *Erie* now and see what it actually held, and then we will move on to its elaboration.

II. THE DECISION IN *ERIE*

The 1930s brought momentous change not only for society as a whole through the adoption of the New Deal, but also for the U.S. legal system, and in particular for the niche occupied by the federal courts. In 1934, Congress launched comprehensive judicial reform with the passage

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[32] Process Act of 1792, ch. 36 § 1, 1 Stat. 275. The first procedural rules for actions in equity were promulgated in 1822. Rules of Practice for the Courts of Equity of the U.S., 20 U.S. (7 Wheat.) v, v–xiii (1822). Interestingly, it seems likely that these first rules were drafted by Justice Story. Kristin A. Collins, *A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 273 (2010).

[33] Conformity Act, ch. 255, 17 Stat. 196 (1872).

[34] *Id.* § 5.

[35] *Id.* § 6.

[36] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) ("But the unconstitutionality of the course pursued has now been made clear, and compels us to [overrule *Swift*].").

of the Rules Enabling Act.[37] In 1938, the Federal Rules of Civil Procedure developed under that law took effect, and almost at the same time, the Supreme Court counterpunched with *Erie*. These developments deserve a close look.

A. The Rules Enabling Act and the Federal Rules of Civil Procedure

Although the Conformity Act modernized practice and procedure in the federal courts,[38] it was not able to spare those courts from the same problems that the states were experiencing. Around the turn of the twentieth century, the various state procedural codes, most of which derived from New York's Field Code,[39] began to receive increasingly negative reviews.[40] The codes were "criticized . . . for being unnecessarily rigid and elaborate," and because the codes were legislative rather than court-promulgated, amendment was difficult.[41] Some critics were skeptical of the legislatures' ability ever to develop efficient procedural rules, charging that they were "'the catspaw of a few intriguing lawyers' who sought only 'to serve selfish ends.'"[42]

After much debate and the interruption of the Great Depression, Congress finally resolved this procedural puzzle in 1934 by enacting the Rules Enabling Act,[43] which launched an effort to craft a new set of procedural rules for the federal courts. In 1937, the drafters' work was complete[44] and Supreme Court resolved, as expressed in the new Rule 2, that there would be "one form of action—the civil action,"[45] and that the centuries-old divide between law and equity would be abolished. The Court also decided that the new Federal Rules of Civil Procedure would take effect one year later, in 1938.[46] In that year, *Erie* was decided.

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[37] Rules Enabling Act, Pub. L. No. 73-415, § 1, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)); *see* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1003 at 22 n.11 (3d ed. 2002).

[38] Nudd v. Burrows, 91 U.S. 426, 441 (1875) ("The purpose of the [Conformity Act of 1875] is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality.").

[39] *See* Thomas A. Shaw, Jr., *Procedural Reform and the Rule-Making Power in New York*, 24 FORDHAM L. REV. 338, 338–39 (1955) ("Field's code was adopted by some thirty American jurisdictions and profoundly influenced the English practice provisions adopted in the Supreme Court of Judicature Act of 1875 . . . .").

[40] *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 28 (2000).

[41] *Id.*

[42] *Id.* at 29 (quoting John H. Wigmore, Editorial Note, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 278 (1928).

[43] Rules Enabling Act, Pub. L. No. 73-415, § 1, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

[44] PURCELL, *supra* note 40, at 135.

[45] FED. R. CIV. P. 2.

[46] *See* PURCELL, *supra* note 40, at 29.

B. The Decision in Erie Railroad Company v. Tompkins

Erie has been described as the rare "decision of the Supreme Court that embodied the well-considered and fundamental constitutional theory of only a single justice."[47] Justice Brandeis was a strong opponent of the Federal Rules of Civil Procedure.[48] He was the only Justice to dissent from their approval.[49] He did so because he viewed the rules as overreaching and rigid; worse, he saw them as yet another example, like the National Industrial Recovery Act, of the needless centralization of authority.[50] Brandeis saw in *Erie* the opportunity to overrule *Swift* and counterbalance the new Civil Rules by decentralizing substantive—rather than procedural—decision-making authority.[51]

In writing his opinion, as I already have noted, Justice Brandeis adopted Justice Holmes's criticism of *Swift v. Tyson* as resting on the faulty assumption that all pre-Realist judges viewed common law-making as the adoption of "a transcendental body of law."[52] Even if we disregard the problems already reviewed with this account, there can be no doubt that *Erie* was designed to, and did, clear up much of the confusion that the *Swift* rule had caused. By 1938, Brandeis wrote, "the mischievous results of the doctrine had become apparent."[53] He was not alone in this viewpoint. Charles Warren (among others) sharply criticized *Swift*, noting that "no decision of the Court has ever given rise to more uncertainty."[54] "[I]nstead of preventing a discrimination against a non-citizen," Warren argued, "[*Swift*'s rule] results in discrimination in their favor and against the citizen; and instead of making one law for all in a State, [it] makes different law for citizen and non-citizen."[55] In other words, one cannot have it both ways: the system can *either* maximize harmony across all federal courts in the country, *or* it can maximize harmony between the federal and state courts within one state, but it cannot do both. The only question on the table is which option to select. Critics in the 1930s were troubled that *Swift*'s rule introduced uncertainty over legal rules and obligations at a time when interstate commerce was growing rapidly.[56] And, as Justice Brandeis pointed out in *Erie*,[57] there were egregious examples

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[47] *Id.* at 114.

[48] *Id.* at 135.

[49] *Id.*

[50] *Id.* at 135–36.

[51] *Id.* at 136.

[52] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

[53] *Id.* at 74.

[54] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 88–89 (1937).

[55] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 85 (1923) (emphasis omitted).

[56] *E.g.*, WARREN, *supra* note 54, at 89.

[57] *See Erie*, 304 U.S. at 73 & n.6.

of abusive forum shopping, such as the one found in *Black & White Taxicab v. Brown & Yellow Taxicab*, where a corporation was allowed to create diversity jurisdiction by the simple expedient of dissolving itself in one state and re-forming in another before suing.[58]

Determined to sort out the confusion wrought by *Swift*, Justice Brandeis took the debate up a notch when he suggested that there was actually a constitutional problem with the *ancien régime*.[59] The law, he said, "does not exist without some definite authority behind it."[60] For cases brought under state causes of actions, that authority derives from the State.[61] Justice Brandeis observed that what *Swift* actually had done was to convert a grant of jurisdiction—diversity jurisdiction—into a license for judges to exercise lawmaking authority.[62] Noting the absence of any other provision in the Constitution granting power to the federal government to legislate in the traditional common-law areas, he concluded that the inference from jurisdiction to law-making competence was "an unconstitutional assumption of powers by courts of the United States."[63]

C. What Erie *Said*

With the benefit of hindsight, it is possible to discern at least two central features of the *Erie* decision. First, as Justice Reed's concurrence highlights, the decision presupposed a sharp line between the substantive rules of decision and the authority of the Court to adopt its own rules of procedure.[64] Justice Reed thus foresaw the question whether *Erie* might restrict the scope of the authority the Court had just received from the Rules Enabling Act, and in so doing, call into question some or all of the Federal Civil Rules. Second, on questions of substance, the *Erie* Court set the default to the state rule of decision.[65] Only if the Constitution or an Act of Congress dictated otherwise—and these are of course both positive sources of federal law—would state law yield.[66] If matters had stayed here, then the *Erie* rule would have been straightforward. But they did not, and the results have spawned a new set of problems.

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[58] 276 U.S. 518, 523–24 (1928).

[59] *See Erie*, 304 U.S. at 78.

[60] *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 553 (Holmes, J., dissenting)) (internal quotation marks omitted).

[61] *See id.*

[62] *See id.* at 71–72.

[63] *Id.* at 78–79 (quoting *Black & White Taxicab*, 276 U.S. at 553 (Holmes, J., dissenting)) (internal quotation marks omitted).

[64] *See id.* at 91–92 (Reed, J., concurring).

[65] *Id.* at 78 (majority opinion).

[66] *Id.*

III. AFTER *ERIE*—THE "DOCTRINE"

Cases since *Erie* have touched on at least three major questions. First is the question familiar to all Civil Procedure students: How does one "sort" cases into those in which state law applies, and those in which the federal rule (a term that has been used broadly) applies? Second, if state law applies, how does a federal court determine the content of that law? For the purposes of this paper, that question (vexing as it can be) can be set aside. Lastly, and of greatest interest, is the third: If we have decided that federal law governs, when and how should federal courts fashion a rule? Federalism concerns run through all three of these questions: How can the federal judiciary reconcile its independent authority as part of a separate sovereign with *Erie*'s proclamation that the default rule is that state law provides the rules of decision?

A. Defining the Sorting Function

1. Early Cases and the Development of "Outcome Determination"

The first set of cases decided in the years immediately following *Erie* attempted to clarify the line between substance and procedure. The Court found a little of both. For example, in *Cities Service Oil Co. v. Dunlap*, it ruled that the burden of proof "relate[d] to a substantial right" and was thus a question of substantive law on which the federal courts were obliged to follow state rules of decision.[67] Four years later, in *Palmer v. Hoffman*, the Court expanded on this ruling, explaining that although Federal Rule of Civil Procedure 8(c) requires a defendant to *plead* contributory negligence as an affirmative defense, whether such negligence has been established *at trial* is to be determined under the governing state-law standard, including state rules dictating which party bears the burden of proof on that point.[68] In other words, the pleadings are governed by federal rules, but the substantive trial standard is provided by the state. Similarly, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, the Court found that there was no "'general law' of conflict of laws," and that federal courts thus had to apply the forum state's choice of law rules.[69] As it said, a state has a sovereign "right to pursue local policies diverging from those of its neighbors."[70]

But the Court did not always opt for state law. In *Sibbach v. Wilson & Co.*, it ruled that Federal Rule of Civil Procedure 35 did not implicate the substantial privacy rights of a litigant when it subjected her to a required physical or mental examination.[71] It therefore held that the federal pro-

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[67] 308 U.S. 208, 212 (1939).
[68] 318 U.S. 109, 116–17 (1943).
[69] 313 U.S. 487, 496 (1941).
[70] *Id.*
[71] 312 U.S. 1, 14 (1941).

cedural rule prevailed over a contrary state rule in the forum state.[72] In so ruling, the Court unhelpfully said that in order to determine whether a civil rule was valid under the Rules Enabling Act, and thus applicable in federal court under *Erie*, "[t]he test must be whether a rule *really* regulates procedure."[73] The importance of the right, it thought, was too vague to serve as a useful metric.[74]

Not surprisingly, the question immediately arose how to decide whether a rule "really" regulates procedure. The Court's first stab at elaboration came in *Guaranty Trust v. York*.[75] There, it took another look at the purpose of the decision in *Erie*, noting that *Erie* overruled *Swift* because the latter case had rested on the mistaken idea "that there was 'a transcendental body of law'" and because *Swift*'s rule had led to aggressive forum shopping.[76] Focusing on the second point, *Guaranty Trust* concluded that state law should apply whenever application of a contrary rule would "significantly affect the result of a litigation."[77] Applied to the facts of the case, the Court ruled that state statutes of limitations were "substantive" and thus applicable in federal court.[78] This, the Court hoped, would "insure that . . . the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."[79] This came to be called the "outcome-determination" test.[80]

The *Guaranty Trust* test was, to put it kindly, seriously incomplete. The Court recognized this in time, although it has never completely laid this test to rest. More than 40 years after *Guaranty Trust*, in *Felder v. Casey*, the Court was looking into the question whether a state notice-of-claim statute had to be used in a federal civil rights case that is being adjudicated in state court.[81] It conceded that states were generally free to impose their own rules of procedure, but it ruled that they may not unduly burden federal rights by applying procedural requirements that have an "outcome-determinative" impact on the federal cause of action.[82] It therefore found that the state law was preempted because it was inconsistent with federal law.[83]

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[72] *Id.* at 13–14.

[73] *Id.* at 14 (emphasis added).

[74] *See id.*

[75] 326 U.S. 99 (1945).

[76] *Id.* at 101–03, 111–12 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

[77] *Id.* at 109.

[78] *Id.* at 109–12.

[79] *Id.* at 109.

[80] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 466–68 (1965).

[81] 487 U.S. 131, 134 (1988).

[82] *Id.* at 151.

[83] *Id.* at 134.

2. Byrd*,* Hanna*, and "Arguably Procedural"*

Although the Court has continued to invoke the idea of outcome determination when faced with state courts adjudicating federal rights—the so-called reverse-*Erie* line of cases[84]—it quickly rejected this test for federal courts sitting in diversity, for the obvious reason that almost *any* procedural glitch could determine the outcome of litigation. The test thus failed at its one and only job: to separate cases (or issues) for which federal law should apply from those that should use a state rule of decision.

In *Bernhardt v. Polygraphic Co. of America*, the Court, applying *Guaranty Trust*, ruled that the enforceability of a contract provision mandating arbitration would depend on state law rather than the Federal Arbitration Act.[85] The Court stated that "[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action."[86] Reflecting on the nature of arbitration, the Court concluded that such a proceeding differed vastly from a traditional courtroom trial.[87] Thus, because "the outcome of litigation might depend on the courthouse where suit is brought," state law applied.[88]

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., decided only two years later, marked a significant departure from the course set out in *Guaranty Trust* and *Bernhardt*.[89] *Byrd* highlighted the crucial defect in the outcome-determination rule: It failed to account adequately for the federal judiciary's independent authority over its own procedural priorities.[90] (Put differently, the *Guaranty Trust* approach failed to give sufficient weight to the fact that Article III expressly contemplates an independent federal court system, and thus by implication it also recognizes that courts must be able to organize themselves.)[91] *Byrd* presented the question whether a case brought in federal court under diversity jurisdiction should be tried by a jury (as is required by federal law) or by a judge (as was required by the state under the governing standard).[92] Declining to decide the case on straightforward Seventh Amendment grounds,[93] the Court likened the effect of a jury trial to the choice of alternative forum it had addressed in *Bernhardt*.[94] Although the Court conceded the possibility that "the outcome would be substantially affected by whether the issue . . . is decided

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[84] *See, e.g.*, Johnson v. Fankell, 520 U.S. 911, 921 (1997); *Felder*, 487 U.S. at 138.

[85] 350 U.S. 198, 203 (1956).

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] 356 U.S. 525, 539–40 (1958).

[90] *Id.* at 536–37.

[91] *See id.* at 537.

[92] *Id.* at 526, 533–35.

[93] *See* Simler v. Conner, 372 U.S. 221, 222 (1963) (per curiam) (holding the Seventh Amendment applies in diversity jurisdiction cases).

[94] *Byrd,* 356 U.S. at 537.

by a judge or a jury," this was not enough to resolve the case.[95] Instead, the Court decided that it had to balance "the federal policy favoring jury decisions" against both the "state rule" and the interest in maintaining consistency of result between the federal and state forum.[96] In a somewhat surprising decision, the Court concluded that the federal policy in favor of jury trials had to prevail, because the concern for state policies "could not disrupt or alter the essential character or function of a federal court."[97]

It seems unlikely that after *Byrd*, *Bernhardt* would come out the same way. The Supreme Court has emphasized repeatedly that the Federal Arbitration Act reflects an important legislative determination over the scope of the judiciary's authority.[98] Forcing a federal court to hear a case that would otherwise be directed to arbitration could elevate a state policy over an essential congressional limitation on the court's jurisdiction. Similarly, in *Cohen v. Beneficial Industry Loan Corp.*—another pre-*Byrd* case—the Court required the use of a New Jersey statute holding an unsuccessful shareholder-plaintiff liable for the defendants' attorneys' fees.[99] After *Byrd*, it is not so clear that the Court would have ruled the same way, given the importance of the American Rule for attorneys' fees.[100]

These thought experiments aside, the Court completed in *Hanna v. Plumer*[101] what it had started in the *Byrd*. Deciding whether the standard for the adequacy of service of process was to be set by federal or state rules, the district court in *Hanna* ruled that state law applied, citing to *Guaranty Trust* and *Ragan*.[102] The Supreme Court reversed, expressly repudiating the "[o]utcome-determination" inquiry from *Guaranty Trust* in this context.[103] It supplanted that standard with a test that sorted cases by whether the federal rule at issue governs a matter that is, in the words of Justice Harlan, "arguably procedural."[104] In so doing, it underscored the idea that there are certain irreducible powers that go along with the institution of a court.

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[95] *Id.*

[96] *Id.* at 538.

[97] *Id.* at 539.

[98] *See, e.g.*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) (per curiam).

[99] 337 U.S. 541, 555–57 (1949).

[100] *See* F.D. Rich Co. v. United States *ex rel* Indus. Lumber Co., 417 U.S. 116, 129–30 (1974).

[101] 380 U.S. 460 (1965).

[102] *Id.* at 461–62. *See* Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530 (1949); Guar. Trust Co. of New York v. York, 326 U.S. 99 (1945).

[103] *Hanna*, 380 U.S. at 464, 466–67.

[104] *Id.* at 476 (Harlan, J., concurring) (internal quotation marks omitted); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

In *Hanna,* the Court balanced *Erie*'s stated policy of guarding against unconstitutional assumptions of power by judiciary[105] against the Constitution's explicit "grant of power over federal procedure," ruling that wherever there is a direct conflict between state law and a relevant Federal Rule of Civil Procedure, the federal rule should apply.[106] The *Hanna* modification has the practical effect of reversing *Erie*'s presumption in favor of state rules of decision, at least for anything covered by a federal rule and that falls in the gray area between substance and procedure.

3. The Gasperini *Puzzle*

Finally, there is the unusual decision in *Gasperini v. Center for Humanities, Inc.*[107] *Gasperini* involved the applicability of a New York remittitur statute that contained both procedural and substantive elements: it was substantive in its standard for assessing excessiveness of a verdict (and thus whether remittitur was necessary); but it was procedural insofar as it assigned decision-making authority to the state's appellate division rather than the trial court.[108] The Supreme Court found that this structure was "out of sync with the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment."[109] The Court had in mind the Reexamination Clause of the Seventh Amendment, which severely limits the role of appellate courts in reviewing jury verdicts.[110] Rather than say, as it did in *Byrd*, that the allocation of functions between judge and jury, or for that matter between trial and appellate courts, is something that inevitably goes along with the choice of a court system,[111] the Court strained to find a middle ground. It came up with a Rube Goldberg-like rule under which, in a case in federal court, New York's substantive interest in controlling excessive verdicts would be handled by the federal trial court, while the federal court of appeals would be permitted to review the lower court's decision, but only for abuse of discretion.[112] It did so over the dissents of four Justices, who found neither authority nor reason to craft this hybrid structure.[113]

The Court reached a result that bent over backwards to implement the state's policy. It did so, however, at the price of complicating the sorting inquiry. Putting to one side the substantive standard for remittitur, the New York statute in *Gasperini* was nothing more or less than a jury control device. *Byrd* makes clear that the federal courts are entitled to divide responsibilities between judge and jury their own way.[114] The Seventh

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[105] *Erie*, 304 U.S. at 79.
[106] *Hanna*, 380 U.S. at 473–74.
[107] 518 U.S. 415 (1996).
[108] *Id.* at 426.
[109] *Id.*
[110] *Id.* at 432–34.
[111] *See supra* notes 97–102 and accompanying text.
[112] *Gasperini*, 518 U.S. at 437–38.
[113] *Id.* at 447–48 (Stevens, J., dissenting); *id.* at 448–58 (Scalia, J., dissenting).
[114] *Byrd*, 356 U.S. at 537.

Amendment applies to cases brought in federal court under diversity jurisdiction,[115] and *Hanna* establishes that the federal rules apply whenever the matter at issue is arguably procedural.[116] Whether or not some facet of litigation represents an "essential characteristic" of the federal judiciary is beside the point. *Hanna*'s "arguably procedural" test represents the Court's balancing of the interests embodied in *Erie* and the Rules of Decision Act against the Constitution's explicit "grant of power over federal procedure."[117] The New York policy was procedural, and so it should have given way to the mechanisms provided by federal law for the control of excessive verdicts.

B. Fashioning Federal-Common-Law Rules of Decision

Even if the court decides that federal law will displace the competing state rule, its troubles are not over. At that point, the federal court is faced with the task of giving content to the applicable rule—in other words, how exactly does the court create and apply federal rules of decision.

Before turning squarely to this problem, we must return briefly to the problem of sorting. *Hanna* appears to give federal courts a comprehensive rule for when to apply state law and when to apply federal law. But it does not. There is at least one class of cases for which the Court has grafted an exception onto *Hanna*'s rule: Even where a case presents an unambiguously substantive question and is not a federal-question matter (and thus one might think is controlled by state law), the Court will apply federal law even in the absence of any governing statute or constitutional provision if the litigation implicates "uniquely federal interests."[118] This means, as a practical matter, that federal common law may be created in these areas. The Supreme Court has described these cases as those "narrow areas [that are] . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[119]

This special class of cases for which federal common law may permissibly be crafted seems to come from out of the blue, yet it has wide support on the Court. By defining such large classes of cases for the domain of federal law, the Court has stretched *Hanna*'s reversal of *Erie*'s presumption in favor of state law considerably. This set of cases often presents special problems when the Court then tries to give content to that federal rule. By hypothesis, there is no federal statute that applies direct-

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[115] *Gasperini*, 518 U.S. at 432.

[116] Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring).

[117] *Id.* at 474 (majority opinion).

[118] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

[119] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (citation omitted).

ly; if there were, then the question would not arise. What is a court (either federal or state) to do in such a case? A few examples of "uniquely federal interests" illustrate how the problem is being approached now.

1. United States as a Party

The first group of cases that have presented "uniquely federal interests" are those that involve the "obligations to and rights of the United States."[120] In these cases, the courts have understood their task to be to fashion federal rules of decision. *Clearfield Trust Co. v. United States*, which involved commercial paper, inaugurated this line.[121] In determining whether state or federal law applied to the question of whether notice of a forgery had been unduly delayed, the Court found *Erie*'s rule inapplicable.[122] It did so because, it said, "[t]he authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state."[123] By process of elimination (and in notable contrast to *Erie*'s assumed default rule in favor of state law) the Court reasoned that "[t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources."[124] The idea seems to have been that the federal government's constitutional authority to act in the open market gives it the authority to create a set of special rules that apply only to the United States.

In giving content to the federal rule applicable in *Clearfield Trust*, the Court mentioned a common, but rather convoluted, practice in which it engages: "[i]n . . . [choosing] the applicable federal rule we have occasionally selected state law."[125] That practice at least leads back to state law in the end, albeit with a federal detour. But the Court did not adopt that approach in *Clearfield*. It held instead that the "vast scale" of the United States' participation across the "several states" indicated that "[t]he application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty."[126] Astonishingly, the Court expressly resurrected *Swift v. Tyson* "as a convenient source of reference for fashioning federal rules applicable to these federal questions" and created a specially applicable rule.[127]

Since *Clearfield*, in cases where the Court has concluded that federal law applies, it has usually wended its way back to state law through the borrowing device. In *United States v. Kimbell Foods, Inc.*, for example, it first relied on *Clearfield* to determine that "the priority of liens stemming from

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[120] *Boyle*, 487 U.S. at 504.
[121] 318 U.S. 363, 366 (1943).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 367.
[126] *Id.*
[127] *Id.*

federal lending programs must be determined with reference to federal law," even absent a federal statute that explicitly set such priorities.[128] But then, faced with the job of giving content to this "federal rule," the Court decided to "reject generalized pleas for uniformity" and to turn instead to state laws.[129] It is hard to understand what is being accomplished by the borrowing device. It certainly finds no support in *Erie*.[130] By any other name, it is still the creation of general common law for the subset of cases in which the United States is participating in private markets. But if federal common law is proper for this group, then in what other areas should it be used? Even if a court could spot a uniquely federal interest, how is it to determine whether that interest is so substantial as to warrant the creation of federal common law—whether a special, tailor-made rule as in *Clearfield*, or a borrowed rule, as in *Kimbell Foods*? Had the Supreme Court chosen to stick with the original formulation in *Erie*, this problem would not arise. Instead, state law would apply, unless and until Congress decided that federal legislation was necessary.

Even if one grants for the sake of argument that special considerations might justify a unique set of common-law rules for cases in which the United States is a party, the Court's more recent cases have strayed beyond these limits. In *Boyle v. United Technologies Corp.*, the Court found that federal law applies under the "uniquely federal interests" exception not because the case "involve[d] an obligation to the United States under its contract" but because of the "'uniquely federal' interest . . . [in] civil liabilities arising out of the performance of federal procurement contracts."[131] The government's interest in the performance of its procurement contracts, the Court announced, justified the creation of a separate set of federal-common-law rules for *its contractors*.[132]

Boyle's assessment of uniquely federal interests is hard to reconcile with other post-*Erie* cases. In *Day & Zimmermann, Inc. v. Challoner*, the Supreme Court held that its ruling in *Klaxon*—that choice-of-law rules are substantive state law principles that apply in diversity cases—applied to a case brought by a military service member against the manufacturer of a defective artillery round.[133] Although *Challoner* might be set aside as presenting a narrow question on choice-of-law rules, its factual background acknowledges that "the Federal Government's interest in the procurement of equipment is implicated . . . ."[134]

In the end, the existence of a set of free-floating federal-common-law rules that apply when the United States is a party to litigation seems contrary to the Court's rationale in *Erie*. Apart from Article III's grant of ju-

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[128] 440 U.S. 715, 726 (1979).
[129] *Id.* at 727, 730.
[130] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).
[131] 487 U.S. 500, 504–06 (1988).
[132] *Id.*
[133] 423 U.S. 3, 4 (1975) (per curiam).
[134] *Boyle*, 487 U.S. at 506.

risdiction to the federal courts in "Controversies to which the United States shall be a Party,"[135] there seems to be no justification for the creation of federal common law that is specially applicable to the federal government (and its contractors). Instead, in cases involving the United States (for which, incidentally, no one questions the power of Congress to enact appropriate legislation), the substantive rule of decision should come from the same positive law that provides the cause of action.

2. Admiralty Jurisdiction

In addition to cases in which the United States is a party, there is also a long tradition of developing federal common law for suits brought under the federal judiciary's maritime jurisdiction. The Supreme Court has consistently held that, in large part, "[a]dmiralty law is judge-made law."[136] Most recently, in *Exxon Shipping Co. v. Baker*, the Court took the lead in developing a special rule for punitive damages in maritime law.[137] This was an area, it said, "which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."[138] The Court felt free to reach far back into the common law—citing even to the Code of Hammurabi—to arrive at the uncontroversial proposition that punitive damages "are aimed not at compensation but principally at retribution and deterring harmful conduct."[139] After an extensive canvass of state and federal mechanisms for controlling excessive punitive damages, the Court created its own common law rule: "a 1:1 ratio . . . is a fair upper limit in such maritime cases."[140]

Where does this authority to develop common law for maritime cases come from? The Court provided a direct answer to this question in *Norfolk Southern Railway Co. v. Kirby*: "Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty *jurisdiction* to federal courts."[141] That is, according to the case law, the federal courts' constitutional authority to *entertain* maritime cases gives it the authority to *create rules* that govern those cases.

But why, if this is so, is the grant of diversity jurisdiction different? Why in particular does it not carry with it the power to create rules? *Erie* thought it clear that any effort to assert that additional power would raise serious constitutional questions.[142] One answer might lie in *Erie*'s observa-

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[135] U.S. CONST. art. III, § 2.
[136] Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979).
[137] 554 U.S. 471, 501–14 (2008).
[138] *Id.* at 489–90.
[139] *Id.* at 491–92.
[140] *Id.* at 513.
[141] 543 U.S. 14, 23 (2004) (emphasis added).
[142] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

tion that law "does not exist without some definite authority behind it."[143] In diversity cases, *Erie* said that this authority is *state* authority,[144] but that assertion does not explain why this should be so. Just as the Court has seen powerful reasons for a uniform, nationally binding law of admiralty, one could make an argument for a uniform, nationally binding law for disputes between citizens of different states. (Indeed, Justice Story believed that such an argument was compelling.)[145]

Article III extends the judicial power to federal courts in "all Cases of admiralty and maritime Jurisdiction."[146] In order for the federal courts to have the authority to create common-law rules in admiralty, this constitutional provision must be the "definite authority" that supports such law-making authority. Indeed, some of the staunchest defenders of the Court's authority to make maritime common law have admitted as much.[147] Professor Monaghan has suggested that this justification for the authority to make maritime law would essentially convert the Court's maritime jurisprudence into a narrow branch of constitutional interpretation.[148] But, under this view, the Court's repeated pronouncements that its maritime rulings can be displaced by statute[149] could not be squared with *Marbury v. Madison*.[150] In the end, it is harder than one might think to explain why the grant of maritime jurisdiction in Article III should be interpreted broadly as a grant of federal law-making power.[151]

If Article III does not provide the "definite authority" that supports the courts' law-making power in admiralty, what does? It is hard to find anything, if one is both consistent and a purist about the scope of Article III. *Erie* says that the conversion of a jurisdictional grant into law-making power is "an unconstitutional assumption of powers by the courts of the United States."[152] Read literally, this means that a grant of jurisdiction,

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[143] *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

[144] *Id.* at 79.

[145] JOSEPH STORY, DIGESTS OF THE COMMON LAW (1826), *reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 406–07 (William W. Story ed., Charles C. Little and James Brown, Boston 1852).

[146] U.S. CONST. art. III, § 2.

[147] *See, e.g.*, Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 711 (2008).

[148] Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 761–62 (2010).

[149] *See, e.g.*, Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 21 (1963) ("[S]ince Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone.").

[150] Monaghan, *supra* note 148, at 761–65.

[151] *Id.* at 767–68.

[152] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

unaccompanied by authority from Article I or another part of the Constitution, is insufficient to confer the affirmative power to create law. Unless there is something special about diversity jurisdiction—something that the Court did not mention in *Erie*—it is hard to find a principled reason to treat the grant of admiralty jurisdiction so differently. This point is only reinforced when one recalls that the state courts, through devices such as the "savings to suitors" clause, have concurrent jurisdiction over many maritime cases.[153]

3. Interstate and International Cases

The last group of cases that present uniquely federal interests are the "disputes implicating the conflicting rights of States or our relations with foreign nations."[154] This area differs from both diversity and admiralty in one important respect: here, there is a textual basis in the Constitution and in a number of statutes that, taken together with historical developments leading up to the adoption of the Constitution, can support a conclusion that a federal institution may legitimately elaborate rules for the field.

It is easy to forget in how many places the Constitution indicates that the federal government is to be the sole seat of authority in matters of foreign relations. They include:

> Article I, § 8, cl. 3—"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."
>
> Article I, § 8, cl. 10—"To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."
>
> Article II, § 2—"The President shall be Commander in Chief of the Army and Navy of the United States . . . .
>
> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ."
>
> Article II, § 3—"[H]e shall receive Ambassadors and other public Ministers . . . ."
>
> Article III, § 2—"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and *Treaties* made . . . to all Cases affecting Ambassadors . . . to Controversies between two or more States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

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[153] 28 U.S.C. § 1333(1) (2012). That section's "savings to suitors" clause leaves state courts with concurrent jurisdiction over most *in personam* maritime causes of action. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222 (1986).

[154] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

The developments leading up to the ratification of the Constitution support the idea that the federal judiciary has the power to create federal rules of decision to implement these grants of power and responsibility. The Constitution was drafted to supplant the Articles of Confederation. One of the Articles' key deficiencies was in the area of foreign relations. Materials from the Constitutional Convention support the proposition that the drafters firmly believed that coordinated control over foreign relations is an essential part of the central government's responsibility.[155] The Federalist Papers provide additional support for the conclusion that there is judicial authority in particular to make and develop laws that relate to international relations. In Federalist No. 11, Alexander Hamilton wrote passionately about the power of the union in matters of foreign relations.[156] In Federalist No. 83, Hamilton wrote even more precisely about the role of judiciary:

> I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations. . . . Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries.[157]

This suggests that judges may, consistent with "considerations of public policy," articulate rules to govern "cases which concern the public peace with foreign nations."[158]

On the basis of this authority, the Supreme Court has developed several important rules that govern foreign and interstate relations. Some notable examples include the maxim that statutes should not be interpreted in a way that conflicts with international law, first articulated by Chief Justice John Marshall in *Murray v. The Charming Betsy*;[159] the treatment of the Act of State doctrine in *Banco Nacional de Cuba v. Sabbatino*;[160] and the principles to which the Court turns when it exercises its jurisdiction to adjudicate disputes touching on the states in their sovereign ca-

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[155] *See* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION AS REPORTED BY JAMES MADISON 126–27, 191–92 (Jonathan Elliot ed., 1827).

[156] *See generally* THE FEDERALIST No. 11 (Alexander Hamilton).

[157] THE FEDERALIST No. 83, at 412–13 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[158] *See id.*

[159] 6 U.S. (2 Cranch) 64, 118 (1804).

[160] 376 U.S. 398, 400 (1964).

pacity, as it did in resolving a question about Montana's title to certain riverbeds in *PPL Montana, LLC v. Montana*.[161]

Indeed, Justice Harlan's language in *Sabbatino* leaves little room for debate that international law presents a federal question, suitable for elaboration in the federal courts in a manner very like the way that the courts have expanded on the broad words of the Sherman Act for antitrust cases or the broad principles of labor law.[162] There is, to be sure, a school of thought that holds that *Erie* consigned the rules of customary international law to the states,[163] but the implications for the nation's foreign relations and international personality of that view are troubling. And in any event, that view is hard, or maybe impossible, to reconcile with *Sabbatino,* where Justice Harlan wrote:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.[164]

In short, there are a number of situations in which the Supreme Court has shied away from the rule announced in *Hanna*. Even where a case presents a substantive question (something that is not even arguably procedural) and it is difficult to find a source of federal law-making authority, the Court has chosen to apply federal common law. As I have noted, the Court itself has selected the areas that warrant this treatment: cases implicating the "uniquely federal interests" that surround the "obligations to and rights of the United States";[165] suits in the admiralty and maritime field;[166] and "interstate and international disputes implicating

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[161] 132 S. Ct. 1215 (2012).

[162] *See Sabbatino*, 376 U.S. at 425. *See also* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328–29 (1990) (discussing the Court's expansion of Sherman Act jurisdiction); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62–67 (1986) (discussing the expansion of federal question jurisdiction and the preemptory effect of federal labor laws).

[163] *See, e.g.*, Phillip C. Jessup, Editorial Comment, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 742 (1939); Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 884–85 (2007).

[164] *Sabbatino*, 376 U.S. at 425 (citations omitted).

[165] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

[166] *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

the conflicting rights of States or our relations with foreign nations."[167] It is these exceptions that have posed the most difficult problems in the post-*Erie* world. In some instances, it is not clear why state law cannot serve as the default, unless or until Congress enacts appropriate legislation, and in other instances, it is hard to explain why a jurisdictional grant supports the creation of federal common law in some fields but not in others.

CONCLUSION

A simplified *Erie* doctrine would still require the first step of the traditional sorting process: the federal court (or in reverse *Erie* cases, the state court) would need to decide whether the rule at issue relates to case processing, or if it relates to primary behavior—put more traditionally, if the rule is procedural or substantive. If it is procedural (or as *Hanna* put it, "arguably" procedural), then the forum is entitled to use its own rule, even if that rule has some impact on the ultimate outcome of the case. If the rule is substantive, then the court must decide which body of law to apply—federal law or state law. If there is an applicable federal statute, or a directly applicable constitutional provision or treaty, then federal law governs. In the absence of a federal source of law, however, *Erie*'s default rule should be reinstated: state law should apply. The convoluted device of using federal law, but then turning around and saying that federal law will borrow from state law, is not worth the complexity and should be abandoned. The fields presently carved out for federal law on the ground of unique federal interest should also be re-examined. Perhaps it is permissible for the federal courts to build a federal common law of international relations, given the strong textual support in the Constitution for exclusive federal rules at that level. But it is hard to justify the other areas of unique federal interest without undermining the principle that prompted the Court to overrule *Swift v. Tyson*: a jurisdictional grant is not an invitation to create substantive rules of law.

These changes would place some pressure on Congress to legislate in areas of federal interest that it has left alone up until now, but the long-term gains of clarity in the system would outweigh any short-term disruptions. The federal courts could then function without worrying whether they were overstepping the boundaries of what Judge Henry Friendly called the "new" federal common law.[168] Operating within the boundaries of legislatively and constitutionally conferred substantive rules, they would once again be able to strike the balance between federal law and state law that *Erie* contemplated.

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[167] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

[168] *See* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).