

## **ERIE STEP ZERO**

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*Courts and commentators have assumed that the Erie doctrine, while originating in diversity cases, applies in all cases whatever the basis for federal jurisdiction. Thus, when a federal court asserts jurisdiction over pendent state law claims through the exercise of supplemental jurisdiction in a federal question case, courts regularly apply the Erie doctrine to resolve conflict between federal and state law. This Article shows why this common wisdom is wrong.*

*To understand why, it is necessary to return to Erie's goals, elaborated over time by the U.S. Supreme Court. Erie and its progeny are steeped in diversity-driven policy concerns: concerns about unequal treatment based on state citizenship and forum shopping figure most prominently. The first concern, while salient in any diversity of citizenship case, simply has no application in cases in which subject matter jurisdiction is founded upon "arising under" jurisdiction. And the second Erie-derived principle, avoiding forum shopping, while relevant to federal question cases, has a different federalism timbre in diversity cases. In diversity cases, forum shopping for certain substantive rules may deprive state courts of the opportunity to adjudicate claims that involve state law through and through. In jurisdiction founded on a federal question, by contrast, litigants are encouraged to resort to the uniformity, experience, and solicitude of federal courts; certain kinds of forum shopping are overtly welcomed, if not encouraged. Thus, this Article shows that Erie applies, but differently, in cases founded on federal question jurisdiction. In so doing, it provides a new framework—what I call, borrowing from administrative law scholarship, "Erie Step Zero"—for considering Erie questions in their proper jurisdictional context, ensuring that federal law is not unnecessarily displaced by a reflexive application of Erie in any case in which a state law claim is presented.*

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## INTRODUCTION

The doctrine introduced by *Erie Railroad Co. v. Tompkins*<sup>1</sup> requires federal courts sitting in diversity jurisdiction to apply state substantive law to resolve state law claims.<sup>2</sup> Almost all scholars and jurists also maintain, however, that *Erie* applies when federal courts sit in federal question—or “arising under”—jurisdiction.<sup>3</sup> This is not surprising, nor is it wrong at a broad level—*Erie* itself said 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.”<sup>4</sup> Yet neither scholars nor federal judges have taken the time to explain the precise role of *Erie* or the Rules of Decision Act (RDA) in diversity cases. Most simply assume that *Erie* applies to RDA problems with the same force regardless of the jurisdictional basis. This Article offers reasons to question that assumption and also is the first to provide a framework placing *Erie* in its jurisdictional context.

The failure to engage with this question is quite understandable. For although it is assumed that *Erie* applies in federal question cases, every *Erie* case decided by the U.S. Supreme Court has arisen through diversity jurisdiction.<sup>5</sup> Lower federal courts therefore have not had the benefit of the

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

2. *Id.* at 79–80.

3. One notable exception will be discussed below. *See infra* Part I.A. *See generally* Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Dearth of Diversity?*, 78 MICH. L. REV. 311 (1980) (arguing that the *Erie* doctrine should apply differently in federal question and supplemental jurisdiction claims).

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

5. *See infra* note 50 and accompanying text. To be clear, by “*Erie* case” I mean every case in which the Court relied upon the *Erie* doctrine to resolve a choice-of-law question. In some federal question cases, the Court has explicitly declined to apply the *Erie* analysis. *See infra* notes 68–92 and accompanying text.

Court's insight when reviewing the numerous cases in which *Erie* and RDA questions arise in the federal question context. In the Court's absence, however, lower courts unfortunately have failed to fill the void with any framework for deciding this question.

Despite the collective unwillingness to address this question in more detail, it is an important one that can arise in numerous contexts outside of what we might call a "true" *Erie* dilemma—where conflict between state and federal law arises in cases in which the sole basis for jurisdiction is diversity of citizenship. First, and certainly most common, are those cases in which state law claims are raised because they share a "common nucleus of operative fact"<sup>6</sup> with a claim over which there is an independent basis for arising under jurisdiction.<sup>7</sup> For the most part, courts have assumed that *Erie* applies without any modification to these pendent state law claims. The second category of cases are undoubtedly much smaller and involve claims created by state law but implicating an essential and substantial question of federal law that is sufficient to create a basis for federal question jurisdiction.<sup>8</sup> Courts have given almost no thought to how *Erie* applies in these cases.

In this Article, I provide a framework for approaching all of these difficult *Erie* questions. The first step is recognizing that the questions we should ask may depend on the jurisdictional context in which the case arises. For instance, in diversity cases, we will usually at some point consider whether the choice between state and federal law is outcome determinative in light of "the twin aims of the *Erie* rule."<sup>9</sup> These twin aims—avoiding forum shopping and inequitable administration of laws based on the citizenship of the parties—have particular resonance in diversity of citizenship jurisdiction. But they do not necessarily translate well to cases in which federal question jurisdiction provides the jurisdictional hook. On the other hand, *Hanna v. Plumer*'s<sup>10</sup> insistence that we think of outcome determinativeness from an ex ante rather than ex post perspective<sup>11</sup> is sensible regardless of the jurisdictional context.

Taking these two insights together, therefore, my proposed framework asks about forum shopping and inequity from an ex ante perspective but

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6. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

7. See 28 U.S.C. § 1367 (2012); *Gibbs*, 383 U.S. 715. These state law claims share a common nucleus with a parallel federal law claim asserted in the plaintiff's complaint or may enter a federal question case as compulsory or permissive counterclaims raised by the defendant. See, e.g., Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295, 303 (2005) (explaining that compulsory counterclaims by definition fall within *Gibbs*'s "common nucleus of operative facts" test); see also *Global NAPs, Inc. v. Verizon New Eng. Inc.*, 603 F.3d 71, 76–77, 88 (1st Cir. 2010) (concluding that § 1367(a)'s language is broader than the "transaction or occurrence" language in Federal Rule of Civil Procedure 13(a)).

8. See generally *Gunn v. Minton*, 133 S. Ct. 1059 (2013); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

9. See *Hanna v. Plumer*, 380 U.S. 460, 468–69 (1965).

10. 380 U.S. 460 (1965).

11. See *id.* at 468–69.

recognizes that arising under jurisdiction serves different purposes than diversity jurisdiction. Whereas diversity jurisdiction makes federal courts available to resolve state law claims in a forum free from bias based on state citizenship, arising under jurisdiction makes federal courts available to resolve federal law issues because federal judges might be more experienced, solicitous, and knowledgeable about federal law and because it serves the federal system's interest in the uniform application of federal law.<sup>12</sup> When state law questions arise in federal question cases, they are almost always intimately connected to the federal issues: perhaps they arise through a state law claim that is part of the federal question claim's "common nucleus of operative fact,"<sup>13</sup> perhaps they arise through a state law claim that contains an embedded and significant federal issue,<sup>14</sup> or perhaps it is necessary to resolve state law issues to resolve a federally created legal claim.<sup>15</sup> In all of these cases, concerns about forum shopping should be focused on those cases in which the choice of a federal forum is motivated by something other than the recognized and beneficial reasons for which we make federal courts available to resolve federal law. Similarly, concerns about inequity should not be focused on citizenship but on the differences in treatment between state law claimants who do or do not have access to federal courts. Finally, to the extent *Hanna* suggested that the balancing of interests introduced by *Byrd v. Blue Ridge Cooperative*<sup>16</sup> was unnecessary or unimportant, examining *Erie* in the context of federal question jurisdiction should bring that balancing back to the fore.

Of course, this issue will be most salient when the choice of law at stake involves an issue that applies throughout the case, as opposed to an issue that is claim specific, or when applying state law will effectively interfere with an important federal interest. Often, where a rule of decision as to a legal issue can be applied to one claim without interfering with the adjudication of another claim, state law can be applied to state claims and federal law to federal claims. But where a legal issue cuts across claims either directly or indirectly, there will be more compelling reasons to apply federal rather than state law. My proposed framework will be most useful in both framing and resolving the conflicts present in each of these situations.

What I suggest here is a different take on a problem that Peter Westen and Jeffrey Lehman addressed more than thirty years ago.<sup>17</sup> Westen and Lehman,

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12. See *Grable*, 545 U.S. at 312 ("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, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.").

13. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

14. See, e.g., *Grable*, 545 U.S. at 313.

15. See *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (making an independent determination of state law in a case founded on the Contract Clause, and not deferring wholesale to the decision of the state's highest court, "in order that the constitutional mandate may not become a dead letter").

16. 356 U.S. 525 (1958).

17. See generally Westen & Lehman, *supra* note 3. Since Westen and Lehman's article, however, no one has attempted to systematically analyze the potentially different role that *Erie* might play in federal question cases. And as I discuss in more detail below, Westen and

however, were concerned with assessing the validity of federal common law rules that might govern federal question disputes, not with the choice between federal and state law, because of their view that the Supremacy Clause required application of any valid federal rule, whether sourced from judge-made law or elsewhere.<sup>18</sup> And when Westen and Lehman addressed the question of supplemental jurisdiction, they only discussed ancillary claims and focused on differing federal and state law rules that could be applied to each claim in a case in isolation.<sup>19</sup> As I discuss in detail below, the problem is far more difficult when application of a state law rule cannot be confined solely to the state law claim, either directly or indirectly.

In Part I of this Article, I lay out the treatment of this topic to date, from both a scholarly and jurisprudential perspective. The orthodox view, rarely challenged on its face, is that *Erie* applies in exactly the same way in federal question cases as it does in diversity cases. As I show in Part II, the basis for this position is questionable: scholars and courts cite to many of the same sources, but a close consideration of them leads, at best, to ambiguity. In Part III, I return to *Erie* and its progeny to show that many of the concerns driving *Erie* were rooted in the specific context of diversity jurisdiction. Some of these concerns have broad application in the federal question context, but the specifics might look different. In Part IV, I propose a framework that contextualizes the *Erie* analysis with respect to the different goals of diversity and federal question jurisdiction. Critical to this framework is recognizing that the first question in resolving a choice-of-law dispute between federal and state law is what I call “*Erie Step Zero*”—one must situate the dispute in its jurisdictional context before moving to the more familiar *Erie* choice of law analysis. Just as in administrative law, where *Chevron* Step Zero emerged to assist courts in determining whether the traditional *Chevron* analysis applies at all to agency interpretations of governing statutes,<sup>20</sup> *Erie* Step Zero offers a methodology for courts to determine whether straightforward *Erie* analysis should apply to particular choice-of-law questions. After introducing the Step Zero concept, I then demonstrate some areas of law in which this framework might prove particularly useful.

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Lehman’s article does not sufficiently attend to the many complexities present in supplemental jurisdiction cases and cases in which original jurisdiction is exercised through § 1331 over a fundamentally state law claim. See *infra* notes 43–49 and accompanying text.

18. See Westen & Lehman, *supra* note 3, at 314.

19. See *id.* at 386 n.218.

20. The “Step Zero” moniker originated in a 2001 law review article. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001). It subsequently was the subject of a close study and critique by Cass Sunstein. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). It continues to occupy the time and attention of administrative law scholars and judges, even though the Supreme Court has never used the term. See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1906 (2015).

### I. THE ROLE OF *ERIE* IN NONDIVERSITY CASES THROUGH THE LENS OF COMMENTATORS AND COURTS

In this part, I survey the scholarly and judicial approach to *Erie*'s application outside of the diversity of citizenship context. Part I.A shows that academics and commentators have almost uniformly stated that *Erie* doctrine applies in the same way to all state law claims in federal court, whatever the basis for federal court jurisdiction. Judicial decisions, reviewed in Part I.B, are generally consistent with the academic consensus, at least on its face. In application, however, I show that some courts have questioned the orthodoxy, although none has provided a coherent framework for applying *Erie* to nondiversity state law claims.

#### A. Survey of Scholarly Commentary

It is now almost universally assumed, within both the academy and the judiciary, that the *Erie* doctrine applies to all state law claims, regardless of whether the basis for jurisdiction in federal court is founded on diversity or federal question.<sup>21</sup> Judge Henry Friendly described the view that *Erie* applied only to diversity cases as an “oft-encountered heresy,”<sup>22</sup> although he acknowledged that the Supreme Court’s jurisprudence, at least as of 1964, had contributed to the blasphemy.<sup>23</sup> The Wright and Miller treatise succinctly states that the view that *Erie* applies only to diversity cases “is simply wrong.”<sup>24</sup> The logic behind this proposition has appeal. As Adam Steinman has noted, to the extent that one believes *Erie* addressed a constitutional problem—federal courts’ power to declare substantive law—its logic is not limited to diversity cases, and neither the RDA nor the Rules Enabling Act (REA) makes a distinction between jurisdictional bases.<sup>25</sup>

Thus, many commentators assert that *Erie* applies to all state law claims presented to a federal court, whether through diversity jurisdiction or

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21. See, e.g., Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1586 n.73 (2012); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1926 (2011) (“It is important to remember that the *Erie* doctrine applies in federal-question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented.”); Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 22 (1988) (“It is also clear that *Erie*’s mandate impinges in areas of pendent and federal question, as well as diversity jurisdiction.”).

22. See Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964) (stating that the idea that “the *Erie* decision was limited to diversity cases” is an “oft-encountered heresy” and that “[t]he correct view” is that “the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law”).

23. *See id.*

24. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4520 (3d ed. 2016) (“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)).

25. See 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, 311–12 (2008).

supplemental state law claims in federal question cases.<sup>26</sup> Moreover, many others assume that *Erie* also applies to all state law issues presented in cases triggering federal question jurisdiction, whether those issues arise through supplemental claims, state law claims implicating a substantial federal issue, or federally created claims in which a state law issue arises on the periphery.<sup>27</sup> In the words of an oft-cited Second Circuit case, under *Erie* it

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26. Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 985 n.2 (2011) (noting that *Erie* applied in diversity cases, supplemental jurisdiction cases, and when there are state-law-created counterclaims, cross-claims, or impleaders); Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1545 n.96 (2011) (“For purposes of completeness, I note that the *Erie* and *Klaxon* rules also apply to state-law claims heard in a federal question case through the exercise of pendent or supplemental jurisdiction.”); Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 618 n.33 (2007) (“[I]t is clear that today RDA is viewed as a choice-of-law statute for diversity cases and when state law otherwise governs of its own force, as when supplemental jurisdiction brings state law claims before a federal court in a federal-question case.” (citation omitted)); JoEllen Lind, *The End of Trial on Damages?: Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 285–86 (2003) (stating that *Erie* applies in federal question cases if the source of law is state law and application does not undermine federal policies).

27. Roy L. Brooks & Sharon A. Cheever, *The Federal Loan Guarantee Program: A Unified Approach*, 10 J. CORP. L. 185, 221–22, 228 n.312 (1984) (noting that *Erie* applies to nonfederal issues arising in federal question cases); see also 13D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3567.1 (3d ed. Supp. 2016) (“Supplemental claims are governed by state substantive law.”); Campos, *supra* note 21, at 1632 n.73 (stating that *Erie* applies to state law questions in federal question cases); Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 167 n.4 (1988) (noting that *Erie* applies to any issue of state law that has not been expressly or impliedly displaced by federal substantive law); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 284 & nn.221–22 (1994) (stating that federal courts follow state law in diversity cases, supplemental claims in federal question cases, and cases such as due process cases in which the court must first resolve an issue of state law); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 912 n.141 (1986) (noting that *Erie* applies to diversity cases and state law issues in federal question cases); Gluck, *supra* note 21, at 1926 (“In other words, if one agrees that, in the straight diversity case, state methodology should be used to interpret state statutes, then once we distill the fact that many nondiversity cases present essentially identical questions of state statutory interpretation, *Erie* makes clear that the same approach should apply.”); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 785 n.122 (2013) [hereinafter Gluck, *The Federal Common Law of Statutory Interpretation*] (“The *Erie* doctrine applies in federal question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented.”); Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 70–71 (1955) (“This aspect of *Erie* is clearly applicable in the federal courts today whether jurisdiction rests on diversity of citizenship, on the presence of a federal question, or on some other nondiversity ground.”); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297, 319 n.95 (1988) (stating that *Erie*’s application depends on the source of the right sued upon, not upon the basis for jurisdiction); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 78 (1989) (“Even in federal question cases involving state law issues, *Erie* commands that state decisional law be observed.”); Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1489 n.401 (1983) (citing *Gibbs* for the proposition that questions of state law are governed by *Erie* in federal question cases); Adam N. Steinman, *Kryptonite for CAFA?*, 32 REV. LITIG. 649, 684 n.186 (2013) (“*Erie* and

is the “source of the right sued upon,” not the basis for jurisdiction, that determines which law to apply.<sup>28</sup>

This consensus, however, neglects the critical question of *how Erie* applies outside of diversity. To say that *Erie* applies in federal question cases does not necessarily foreclose the possibility that *Erie* could apply differently in different jurisdictional contexts. In the two decades after *Erie* was announced, in fact, many commentators assumed that its role in federal question cases was limited, although they did not explore the depths of its role in supplemental jurisdiction claims. For instance, Sergei Zlinkoff, writing four years after the decision, noted that the underlying policy of *Erie*—avoiding discrimination on the basis of citizenship—did not apply in federal question cases and carried this principle over to supplemental jurisdiction because of the concern that applying multiple sources of law to a single lawsuit would create needless complexity.<sup>29</sup> Six years later, James A. Gorrell and Ithamar D. Weed found it unsurprising that *Erie* had been mostly ignored in federal question cases because they could not present problems of a type similar to *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*<sup>30</sup> and other cases that *Erie* targeted.<sup>31</sup> Like Zlinkoff, Gorrell and Weed recognized the problem of deciding what law to apply in supplemental jurisdiction cases but assumed that state law should apply to be consistent with *Erie*.<sup>32</sup> Along the same lines, Henry Hart read the *Erie*

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the REA are not categorically limited to diversity cases and can apply in federal question cases as well.”); Steinman, *supra* note 25, at 311–12 (criticizing the “oft-stated assumption” that *Erie* applies only in diversity cases); Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 41 (2013) (“State substantive law claims, governed by the *Erie* doctrine, may arise in a federal court in at least three types of cases or controversies: (1) where a state claim is asserted based on diversity jurisdiction; (2) where a state claim is asserted based on supplemental jurisdiction; and (3) where a state claim contains an essential federal element within general federal question jurisdiction.”); Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 310–14, 310 n.22 (1994) (stating that *Erie* applies to diversity cases and state law claims brought pursuant to supplemental jurisdiction, in addition to state law questions “incidental to resolution of the federal question presented”).

28. *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); Harold L. Korn, Professor, N.Y.U. Sch. of Law, Remarks on the Continuing Effect of State Rules of Evidence in the Federal Courts (June 21, 1969), in *A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference Second Judicial Circuit of the United States*, 48 F.R.D. 39, 69 (1969) (“[A]pplication of the *Erie* doctrine depends on the source or nature of the right being asserted, rather than on the basis of the federal court’s jurisdiction, so that although its usual application is in diversity cases, it is neither applicable to all such cases nor limited to them.”).

29. See Sergei S. Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition*, 42 COLUM. L. REV. 955, 987–88 (1942) (“The application of different sources of governing law to various issues in the same lawsuit will create endless complications and result in fine-spun distinctions that will make those generated by *Swift v. Tyson* look like child’s play.”); *id.* at 989 (arguing that “all issues over which federal jurisdiction is sustainable, other than upon the basis of diversity, be governed by federal law, regardless of whether or not diversity is also present in the particular case”).

30. 276 U.S. 518 (1928).

31. See James A. Gorrell & Ithamar D. Weed, *Erie Railroad: Ten Years After*, 9 OHIO ST. L.J. 276, 300–01 (1948).

32. See *id.* at 302–04.

Court's concern with forum shopping to be limited to diversity cases.<sup>33</sup> Others also acknowledged, even if they did not agree, that *Erie*'s role outside of diversity cases was at least up for grabs.<sup>34</sup>

More recent scholarship also considers the possibility that the *Erie* analysis could be more complex in federal question cases. Allan Erbsen, for instance, has suggested that the difference between interests in state law claims arising in diversity and state law claims arriving through supplemental jurisdiction might merit different interpretive methods: forum shopping may be less of a concern in the latter instance, for example.<sup>35</sup> And Erbsen and others have recognized that federalism concerns may play out differently in the two categories of cases.<sup>36</sup> Some scholars have made a similar argument where federal arising under jurisdiction is exclusively vested in federal courts.<sup>37</sup>

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33. See Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954) (noting that forum shopping concerns would evaporate if in-state citizens could remove based on diversity jurisdiction).

34. See Note, *Federal Modification of State Law: Erie and the Bankruptcy Statute of Limitations*, 62 YALE L.J. 479, 479–80 (1953) [hereinafter Note, *Federal Modification of State Law*] (observing that there is “no automatic guide” for whether federal courts must absolutely adhere to state law in nondiversity cases, using cases under the Bankruptcy Act as an example); Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1434 (1960) (observing that in a series of post-*Erie* cases, the Court seemed to “permit a greater intrusion of federal decisional rules in cases involving federal statutes or the United States as a litigant”); Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 128 (1965) (observing that on the day *Erie* was announced, the Court in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), asserted power to make federal substantive law in state law cases filed in state court).

35. See Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 658 n.286 (2013) (stating that federal courts are required to apply *Erie* in federal question cases, but also recognizing that different interests in federal question cases might call for a different theoretical approach, which the author describes as “a fascinating question that merits further scholarship”); cf. William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1410–11 (2012) (arguing against the extension of the *Klaxon* doctrine to federal question cases because of the differing role of forum shopping concerns).

36. See Erbsen, *supra* note 35, at 658 n.286 (“Moreover, supplemental jurisdiction cases might warrant special treatment because federal courts may approach state law differently when it is ‘woven into’ a federal question case rather than when it is part of a ‘head of federal jurisdiction which entails a responsibility to adjudicate the claim on the basis of state law,’ such as the Diversity Clause.” (quoting *McNeese v. Bd. of Educ.*, 373 U.S. 668, 673 & n.5 (1963))); Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PRIT. L. REV. 937, 942 n.11 (1988) (distinguishing between “pure” *Erie* cases and quasi-*Erie* cases in which state law issues are raised through supplemental jurisdiction or because federal law incorporates state substantive law, and stating that federalism concerns may differ between the two situations, resulting in a different application of the line between substance and procedure); cf. Kurt M. Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 663 n.33 (1987) (“There is sufficient authority to support the proposition that the doctrine applies in all actions regardless of the basis of federal jurisdiction unless a sufficient federal interest exists to mandate the application of federal common law.”).

37. See, e.g., Gelfand & Abrams, *supra* note 36, at 978 n.129 (“In the context of diversity, *Erie*'s forum shopping concern is a reaction to the comparison between a diversity case and an identical case in which both litigants happen to be from the same state and a federal court is unavailable. Since the United States is always a party to Federal Tort Claims Act cases, there is no comparable state-court-only case by which to measure forum shopping induced unfairness.”); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1967 n.161 (1991)

Other scholars have acknowledged the possibility that jurisdictional context matters without taking a final position.<sup>38</sup> Abbe Gluck, for example, has criticized federal courts for “explicitly disregard[ing] state interpretive principles in federal question cases,” even as she acknowledged the potential—but minority—view that the *Erie* question might have different application in federal question cases.<sup>39</sup> And very few scholars have embraced the radical proposition that *Erie* only applies in the diversity context, without much, if any, analysis.<sup>40</sup> John Hart Ely, for instance, declared that the RDA (and by implication, *Erie*) “is not applicable in

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(arguing that the *Erie* analysis has little weight in cases in which federal courts have exclusive jurisdiction, thereby taking forum shopping and inequitable administration off the table). There is, for example, some disagreement about *Erie*’s application in bankruptcy cases. Compare Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1307 n.811 (2002) (collecting cases on division in courts between whether to apply federal or state choice-of-law rules in bankruptcy cases), and Louis M. Guenin, *Choice of Law in Usury*, 109 BANKING L.J. 71, 81–82 (1992) (arguing that analysis is “more complicated” where usury arises in federal question cases, particularly bankruptcy), with Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT’L L. 369, 418 (2010) (“The principle in *Erie* was quickly understood to apply not only to diversity cases, but also to incidental issues of private law which arise when a federal court has taken jurisdiction under other grounds—for example, mandating application of state property law to determine proprietary issues which may arise when considering questions of federal law, such as bankruptcy.”).

38. Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 226–27 (2011) (“The determination as to which cases call for the application of state law is also a matter of debate, but may hinge on the particular grant of jurisdiction that allows the case to be heard in federal court.”); Note, *Federal Modification of State Law*, *supra* note 34, at 484–85 (suggesting that policy concerns driving *Erie* may not be applicable outside diversity context); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 680 n.6 (1976) (recognizing arguments about the power of federal courts to create common law in nondiversity cases, but declining to address the issue in detail).

39. See Gluck, *The Federal Common Law of Statutory Interpretation*, *supra* note 27, at 785 n.122 (“Unlike in diversity cases, federal judges do not aim to ‘stand in the shoes’ of state judges in federal question cases and that difference could potentially justify federal judges approaching state statutory questions in federal question cases from a federal, rather than state, interpretive perspective. But this is not the dominant doctrinal view with respect to other questions of state law that arise in federal question cases and so would require an argument for why statutory interpretation methodology should receive special treatment.”); see also Gluck, *supra* note 21, at 1926.

40. See, e.g., Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 612 n.27 (2005) (stating that *Erie* requires federal courts to apply state law doctrine on piercing in diversity cases and “single-factor” doctrine in federal question cases); Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 740 (2000) (arguing that a state court presumption against bifurcation should play a minor role in federal court in part because *Erie* does not apply to federal question cases); Tara L. Haluch, *Treatment of Americans with Disabilities Act Claims When the Plaintiff Is Deceased: A Call for Uniformity*, 48 EMORY L.J. 733, 760 n.187 (1999) (assuming that the procedural-substantive distinction did not apply to Americans with Disabilities Act cases because they are federal question cases); Korn, *supra* note 28, at 74–77 (arguing that state law privileges should be recognized in diversity cases but not federal question cases); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 536 (arguing that *Erie*’s prohibition of federal judge-made common law “is an artifact of diversity jurisdiction,” which cannot be extended to federal courts sitting in federal question cases without achieving “a stunning revision of constitutional understandings”).

nondiversity cases.”<sup>41</sup> The case that Ely relied upon, however, involved a federal question case in which the cause of action was created by federal law.<sup>42</sup>

Despite the scattered recognition that *Erie* might apply differently in federal question cases, however, Westen and Lehman, writing in 1980, are the only scholars to date who have attempted to articulate *how Erie* might function in federal question cases.<sup>43</sup> The authors, predicting an end to diversity jurisdiction based on then-pending legislation, wrote the article with the hope of articulating a function for *Erie* in federal question and supplemental jurisdiction claims, albeit one that was “significantly different” from the doctrine’s function in diversity cases.<sup>44</sup> The bulk of the article is devoted to a reconceptualization of *Erie* in all types of cases and a general defense of a relatively broad role for federal judge-made common law.<sup>45</sup> As to the specific issue covered here—the role that *Erie* plays in federal question cases—the Westen and Lehman article does not offer much in the way of specifics.<sup>46</sup> They note, as I do here, that an *Erie* analysis focused on potential discrimination based on citizenship does not resonate well in federal question cases, and they suggest at least a general outline of an approach to the problem.<sup>47</sup> But when they focus on *how Erie* might work in practice, they address only *ancillary* claims—not supplemental claims generally nor state law claims that implicate federal interests that are sufficiently important so as to justify the assertion of § 1331 jurisdiction—and they explicitly decline to address cases in which one cannot neatly confine choice of law questions to each claim in isolation.<sup>48</sup> Thus, putting aside the merits of Westen and Lehman’s broader claims about the meaning of *Erie*,<sup>49</sup> their article leaves much to be desired in terms of the specific question addressed here.

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41. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 737 n.226 (1974).

42. See *Holmberg v. Armbrecht*, 327 U.S. 394 (1946) (“The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.”).

43. See generally Westen & Lehman, *supra* note 3.

44. See *id.* at 312–14.

45. See *id.* at 330–76. Martin Redish provided a scathing response to these aspects of the Westen and Lehman article. See Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980).

46. Redish, *supra* note 45, at 959 (referring to this portion of Westen and Lehman’s article as “almost . . . an afterthought”).

47. See Westen & Lehman, *supra* note 3, at 378–80. Their approach is based on their reconceptualization of *Erie* as not involving a choice between state and federal law but instead simply an assessment of whether there is valid and pertinent federal law on point. See *id.* at 314–16. It is precisely this characterization of *Erie* that Redish spends considerable time criticizing. Redish, *supra* note 45, at 960–64.

48. See Westen & Lehman, *supra* note 3, at 386–87, 386 n.218.

49. Redish is certainly correct for noting that Westen and Lehman’s conception of *Erie* appears to rest on a misreading of *Hanna*’s modification to *Guaranty Trust*’s outcome-determinative test. Compare Redish, *supra* note 45, at 966–67 (noting that Westen and Lehman appear to assume that the outcome-determinative test is simply whether, *ex post*, a choice between state and federal law will result in a different outcome), with Westen &

To sum up, with the exceptions noted above, the landscape of *Erie* scholarship tends toward an overriding assumption that (1) *Erie* applies to all state law issues (and some federal issues) arising in federal court regardless of the jurisdictional context and (2) *Erie* looks the same in all contexts. And most importantly, even scholars who question the orthodox view have generally failed to address how courts should resolve choice-of-law questions in the supplemental jurisdiction context or where state law claims are subject to original federal question jurisdiction because they involve an embedded substantial federal issue.

### B. Judicial Application of Erie Outside Diversity Contexts

The orthodoxy that characterizes *Erie* scholarship is reflected in the case law as well, at least on the surface. This is striking because *Erie*'s role in federal question cases has only come up in lower federal courts, albeit with some frequency. By contrast, every Supreme Court case to actually apply an *Erie* analysis to a choice-of-law question has been founded on diversity jurisdiction.<sup>50</sup> Nor has the Court ever directly applied the *Erie* analysis to claims based on supplemental jurisdiction.<sup>51</sup> This has not deterred courts

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Lehman, *supra* note 3, at 384 (arguing that “fairness value in diversity is abridged if even a single lawsuit comes out differently because of judge-made rules of procedure”).

50. Without citing to every case in which the Supreme Court has applied *Erie* in a diversity context, in the 205 Supreme Court cases that have cited to *Erie*, only one decision appears to apply *Erie* analysis to a state law question arising in a federal question context. See *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103, 107 (1939). In *Wichita Royalty*, a state law counterclaim was raised in response to a federal claim, and the Court stated, without elaboration, that *Erie* required application of Texas law to the counterclaim. *See id.* Since that decision, while the Court has discussed *Erie* in the federal question context, it has yet to apply *Erie* to the choice-of-law analysis in those cases. *See, e.g., DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) (stating that *Erie* does not compel federal courts to borrow state law to fill in interstitial gaps in federal statutes, but acknowledging that when Congress directs courts to borrow from state law, “*Erie* will ordinarily provide the framework for doing so”); *Burks v. Lasker*, 441 U.S. 471, 476 (1979) (noting that *Erie* does not control in cases premised on a federal cause of action); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971) (noting that whether nonmutuality doctrine applied in federal question cases was a question of federal law and *Erie* did not apply); *Urie v. Thompson*, 337 U.S. 163, 174 (1949) (finding that the meaning of negligence in an FELA case is a question of federal law and not governed by *Erie*); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 162 (1946) (stating that *Erie* does not apply in bankruptcy cases); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943) (holding that *Erie* does not apply in state law claims in which the United States is a party); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (stating that *Erie* does not apply in a case controlled by federal statute); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455 (1942) (acknowledging but not resolving the possibility that the *Klaxon-Erie* choice-of-law doctrine might not apply in federal question cases). *But see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 164 n.2 (1987) (Scalia, J., concurring) (“Contrary to the *DelCostello* Court’s claim, however, neither our decision in [Erie] nor the Rules of Decision Act scholarship underlying it . . . remotely established that that statute applies only in diversity cases.”); *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (implying that state law that related to a federal question suit would be enforceable pursuant to *Erie* in the absence of any conflict with federal policy announced by Congress).

51. The Court has made offhand references to the role of *Erie* and state law in supplemental claims without actually conducting any *Erie* analysis. *See, e.g., Felder v. Casey*, 487 U.S. 131, 151 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). I address

from stating with near certainty that “[t]he principles set forth in *Erie* and its progeny apply *equally* to diversity and federal question cases.”<sup>52</sup> Or, put differently, “it is not the basis of jurisdiction that requires application of the forum state’s choice of law rules, but the source of the claim in question.”<sup>53</sup>

On its face, this looks simple. Many courts assert that state substantive law applies in diversity cases and to supplemental state law claims in federal question cases<sup>54</sup> but that federal law governs adjudication of claims created

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in detail below the widespread misinterpretation of the language in *Gibbs*. See *infra* notes 138–41 and accompanying text.

52. See, e.g., Park v. City of San Antonio, No. SA-03-CA-0491-RF, 2006 WL 2519503, at \*14 n.67 (W.D. Tex. Aug. 16, 2006); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003) (“*Erie* applies irrespective of whether the source of subject matter jurisdiction is diversity or federal question.”).

53. *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 69 n.53 (S.D.N.Y. 2002); see, e.g., *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (“[I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction is founded, which determines the governing law.”); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 643 F. Supp. 1217, 1221 (D.N.J. 1986), *aff’d in part, modified in part*, 834 F.2d 326 (3d Cir. 1987); *Cinnamon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, 835–36 (E.D. Mich. 1963); *In re Hilt*, 175 B.R. 747, 753 (Bankr. D. Kan. 1994) (relying on the *Erie* doctrine and citing the Wright and Miller treatise).

54. *Mason & Dixon Intermodal, Inc. v. Lapmaster Int’l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011) (“When a district court sits in diversity, or hears state law claims based on supplemental jurisdiction, the court applies state substantive law to the state law claims.”); *Barton v. Clancy*, 632 F.3d 9, 17 (1st Cir. 2011) (“A federal court . . . exercising supplemental jurisdiction over a state law claim must apply state substantive law.”); *Equals Int’l, Ltd. v. Scenic Airlines*, 35 F. App’x 532, 534 (9th Cir. 2002) (finding that a state law regarding attorney’s fees applied to a state law claim supplemental to a federal copyright claim); *Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 557 n.27 (1st Cir. 1997) (relying on *Erie* to apply state substantive law to pendent state law contract claims in federal question cases); *Zerman v. Ball*, 735 F.2d 15, 19–20 (2d Cir. 1984) (applying, in a securities fraud case, state choice-of-law rules to determine the law governing the effect of a choice-of-law clause in a securities contract); *Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 429 (3d Cir. 1982) (requiring a court to look to applicable state choice-of-law principles in a state trade secret case brought pendent to a federal patent action); *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) (applying *Klaxon* to pendent jurisdiction claims); *Spottedcorn v. Advanced Corr. Healthcare, Inc.*, No. CIV-11-1096-C, 2011 WL 6100653, at \*1 n.2 (W.D. Okla. Dec. 7, 2011) (discussing choice of law issue in terms of a requirement of attaching affidavits to complaints); *Shannon v. Koehler*, No. C 08-4059-MWB, 2011 WL 10483363 (N.D. Iowa Sept. 16, 2011) (applying federal evidence rules barring the admissibility of a settlement offer rather than the state law that would have permitted admission in a state law claim supplemental to a federal § 1983 claim); *Arvie v. Dodeka, LLC*, No. H-09-1076, 2011 WL 1750242 (S.D. Tex. May 4, 2011) (involving a potential conflict between Federal Rule of Civil Procedure 14 and state law regarding the designation of responsible parties in a state law claim supplemental to a federal Fair Debt Collections Practices Act claim); *Sheasly v. Orr Felt Co.*, No. CV 10-956-PK, 2010 WL 4273230, at \*2 (D. Or. Oct. 25, 2010) (“Whether Sheasley’s lawsuit is construed as a federal question action involving supplemental jurisdiction over a state-law claim or as a diversity action, this court will apply federal procedural law at all times, federal substantive law in analyzing the [Employee Retirement Income Security Act] claim, and Oregon substantive law in analyzing the perceived-disability claim.”), *aff’d*, 10-CV-956-PK, 2010 WL 4961807 (D. Or. Dec. 1, 2010); *id.* at \*3 (noting that state law governed the application of a forum selection clause as it related to the state law claims, whether the basis for jurisdiction was diversity or supplemental jurisdiction to the federal claim); *In re Lease Oil Antitrust Litig. (No. II)*, No. MDL 1206, 2009 WL 5195977, at \*4 (S.D. Tex. Dec. 22, 2009) (noting that it was commonly, but erroneously, assumed that *Erie* only applied in diversity actions when in fact it applied

by the federal sovereign.<sup>55</sup> In perhaps the most difficult area, courts have rarely addressed the choice-of-law analysis where § 1331 jurisdiction arises because a federal question is embedded in a state law claim.<sup>56</sup> Other courts

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regardless of the basis for subject matter jurisdiction to all issues governed by state law), *rev'd and vacated sub nom.* All Plaintiffs v. All Defendants, 645 F.3d 329 (5th Cir. 2011); Tillman v. Georgia, 466 F. Supp. 2d 1311, 1316–17 (S.D. Ga. 2006) (applying state law to determine when an action is commenced in a state law claim that was pendent to a federal question claim); Fondrk v. Westmoreland County, No. Civ.A 04-0900, 2006 WL 1699471, at \*2–3 (W.D. Pa. June 20, 2006) (applying third-party beneficiary law to a state law claim supplemental to a § 1983 claim); Crawford v. Potter, No. Civ. 1:04CV00303, 2005 WL 2452092, at \*3 n.8 (M.D.N.C. Oct. 4, 2005) (applying state law rules of contract interpretation to a supplemental claim to Title VII); SEC v. Elmas Trading Corp., 683 F. Supp. 743, 748–49 (D. Nev. 1987) (relying on *Erie* to apply state contract law in federal question claim), *aff'd*, 865 F.2d 265 (9th Cir. 1988).

55. See Corbello v. DeVito, 844 F. Supp. 2d 1136, 1155 (D. Nev. 2012) (making this observation in a copyright action), *rev'd and remanded*, 777 F.3d 1058 (9th Cir. 2015); West v. N.M. Taxation & Revenue Dep't, No. CIV 09-0631 JB/CG, 2011 WL 5223010 (D.N.M. Sept. 30, 2011) ("When addressing federal questions, the Court does not have to conduct the same analysis that [*Erie*] requires for diversity cases, to determine whether federal law and procedures applies."); McFadden v. Deutsche Bank Nat'l Tr. Co., No. 2:10-cv-03004 JAM KJN PS, 2011 WL 3606797, at \*6 (E.D. Cal. Aug. 16, 2011) (holding that an anti-SLAPP motion may be brought to strike state law claims pending in federal court, whether via diversity jurisdiction or as claims supplemental to federal question claims but not claims "based on federal law"), *report and recommendation adopted*, No. CIV-S-10-cv-3004-JAM-KJN-PS, 2011 WL 4765845 (E.D. Cal. Oct. 7, 2011); D.V. v. Westmoreland Cty. Children's Bureau, No. 07-829, 2008 WL 612744, at \*2 (W.D. Pa. Mar. 3, 2008) ("[H]ere the jurisdiction of this Court arises under 28 U.S.C.A. § 1331, the general federal question statute, obviating the need to undertake the *Erie* choice of law analysis and requiring the application of federal procedural and substantive law."); Brown v. Plainfield Cnty. Consol. Dist. 202, 522 F. Supp. 2d 1068, 1077 n.4 (N.D. Ill. 2007) ("It hardly bears repeating that the *Erie* doctrine applies to diversity cases, while this case is premised on federal question jurisdiction."); Atl. Mut. Ins. v. Napa Transp., Inc., 399 F. Supp. 2d 523, 525 (S.D.N.Y. 2005) (regarding prejudgment interest in Carmack Amendment claim), *aff'd*, 201 F. App'x 19 (2d Cir. 2006); Mobile Gas Serv. Corp. v. Utils. Bd. of Daphne, No. Civ.A. 04-0398-P-M, 2005 WL 2428329, at \*2 (S.D. Ala. Sept. 30, 2005) (finding that attorney's fee claims are governed by federal law in antitrust actions); Boonma v. Bredimus, No. Civ.A.3:05-CV-0684-D, 2005 WL 1831967, at \*6–8 (N.D. Tex. July 29, 2005) (stating that state choice of law rules would apply to state law claims, whether brought under diversity or supplemental to federal question cases and that federal choice of law rules would apply to federal question claims); cf. Berman v. McManus, No. 2:11-cv-00635 MCE KJN PS, 2012 WL 1455088, at \*2 & n.5 (E.D. Cal. Apr. 26, 2012) (noting that a state anti-SLAPP law applies to state law claims brought pursuant to diversity or supplemental to federal question claims but not claims based on federal law); Bulletin Displays, LLC v. Regency Outdoor Advert., Inc., 448 F. Supp. 2d 1172, 1181–82 (C.D. Cal. 2006) (holding that, even though California's anti-SLAPP act was substantive, it did not apply to federal question cases because *Erie* has no application to federal question claims, "only to state law claims in diversity actions and pendent state law claims in federal question cases"); Martinez v. Humana, Inc., No. Civ.A. C-04-95, 2005 WL 1923532, at \*7–8 (S.D. Tex. Aug. 10, 2005) (rejecting the "make whole" doctrine for subrogation in federal question ERISA cases, but citing the Fifth Circuit case, Sunbeam-Oster Co. Grp. Benefits Plan v. Whitehurst, 102 F.3d 1368, 1374 (5th Cir. 1996), accepting the possibility that the issue might be different in a diversity case); Reed v. Norfolk & W. Ry. Co., 635 F. Supp. 1166, 1167 (N.D. Ill. 1986) (applying the federal statute of limitations in a Federal Employers' Liability Act case and describing the contention that *Erie* applies as borderline frivolous); *In re Centerstone Diamonds, Inc.*, No. 2:09-bk-23945-PC, 2014 WL 1330186, at \*4–5 (Bankr. C.D. Cal. Apr. 2, 2014) (holding that a state anti-SLAPP law does not apply to federal question cases).

56. Amoco Chem. Co. v. Tex Tin Corp., 925 F. Supp. 1192, 1201 n.9 (S.D. Tex. 1996) (applying state choice-of-law rules to a state law claim with an embedded federal issue—assuming that *Erie* and *Klaxon* apply); Grynberg Prod. Corp. v. British Gas, PLC, 817 F. Supp.

might simply state without elaboration that *Erie* applies in federal question cases without explaining how.<sup>57</sup>

But this explanation of the role of *Erie* in nondiversity cases has actually almost never been so simple in application. First, the Supreme Court itself has displaced state law with federal common law even when state sovereignty would appear to be at a high point in diversity cases. In *Banco Nacional de Cuba v. Sabbatino*,<sup>58</sup> for example, the Court applied a federal common law doctrine to a diversity case, even though it acknowledged that state law likely would have resulted in the same outcome.<sup>59</sup> The Court felt “constrained to make it clear” that, notwithstanding the *Erie* doctrine, “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.”<sup>60</sup> Indeed, the Court suggested that *Erie* might generally have limited application when issues affecting international relations arise in diversity cases.<sup>61</sup>

Similarly, in *Howard v. Lyons*,<sup>62</sup> a diversity action for defamation, the Court applied a federal common law defense because the statements were made by an officer of the federal government acting in the course of his duties.<sup>63</sup> The question implicated the “effective functioning” of the government, making it a “peculiarly federal concern” that should not be subject to the “vagaries of the laws of the several States.”<sup>64</sup> A more recent example comes from *Boyle v. United Technologies*,<sup>65</sup> a diversity case in which the Court recognized a military contractor defense under federal law that would not have been available under the state law that, had *Erie* applied, should have controlled in the case.<sup>66</sup> The Court in *Boyle* found a “‘significant conflict’ . . . between an identifiable ‘federal policy or interest and . . . state law.’”<sup>67</sup>

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1338, 1361–62 (E.D. Tex. 1993) (holding that Texas pleading law applied to the question of what constituted a “well-pleaded complaint”).

57. FDIC v. Countrywide Fin. Corp., No. 2:12-CV-4354 MRP (MANx), 2012 WL 5900973, at \*14 n.28 (C.D. Cal. Nov. 21, 2012) (citing Steinman, *supra* note 25, at 311–12 for the proposition that “some portions of the *Erie* doctrine likely apply” in federal question cases).

58. 376 U.S. 398 (1964).

59. *See id.* at 425.

60. *See id.*

61. *See id.* *Sabbatino* was overruled by statute. *See* Westen & Lehman, *supra* note 3, at 339–40; *see also* Foreign Assistance Act of 1964, Pub. L. No. 86-633, § 30(d), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2) (2012)).

62. 360 U.S. 593 (1959).

63. *See id.* at 597 (“We hold that the validity of petitioner’s claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress.”).

64. *See id.*

65. 487 U.S. 500 (1988).

66. *See Doernberg*, *supra* note 26, at 655–56.

67. *See Boyle*, 487 U.S. at 507 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

Outside of the diversity context, in federal question cases, the Supreme Court has also found *Erie* inapplicable and federal common law controlling. The same day that *Erie* was decided, for example, the Supreme Court recognized its power to make federal common law in a state law dispute between two Colorado private parties because the case concerned interpretation of an interstate water compact.<sup>68</sup> Similarly, in *Clearfield Trust Co. v. United States*,<sup>69</sup> the Court had to determine whether state law should govern commercial paper obligations for a check drawn on the Treasurer of the United States through the Federal Reserve Bank of Philadelphia. Because of the concern for uniformity in defining the rights and obligations flowing from a check backed by the federal fisc, the Court held that *Erie* did not apply and that it was free to apply federal common law to the dispute.<sup>70</sup>

Cases like *Clearfield Trust* can be understood as providing an exception to the general *Erie* rule when a “distinct federal interest” is at stake.<sup>71</sup> And in the decade or so after *Erie*, these cases were relatively common.<sup>72</sup> In *D’Oench, Duhme & Co. v. FDIC*,<sup>73</sup> the Court declined to decide whether the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>74</sup>—an extension of the *Erie* doctrine—applied where jurisdiction is not based on diversity of citizenship, instead holding that federal law controlled the question of liability because of the federal policy to protect a federal corporation from certain misrepresentations.<sup>75</sup> In his concurrence, Justice Robert Jackson strived to provide a more detailed explanation of the Court’s reasoning.<sup>76</sup> He took the position that *Klaxon* did not control, because (1) the case was not founded on diversity jurisdiction, (2) Congress did not direct the Court to look to state law to answer this question, and (3) application of federal common law is always necessary to “implement[] the federal Constitution and statutes.”<sup>77</sup> Neither the majority opinion nor any of the concurrences argued that federal statutes explicitly required application of the rule adopted

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68. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 101, 110 (1938).

69. 318 U.S. 363 (1943).

70. See *id.* at 366–67.

71. See *Doernberg, supra* note 26, at 648–50 (discussing *Clearfield Trust* in detail).

72. Four years after *Erie*, the Court stated that *Erie* does not control a federal question case and that state law must “yield” when it clashes with federal law and policy. See *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); see also *Deitrick v. Greaney*, 309 U.S. 190, 200–01 (1940) (holding that where a lawsuit is based on federal law, *Erie* has no application because “[t]he extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted”). Ten years after *Erie*, scholars could observe that the *Clearfield Trust* line of cases could be interpreted as indicating that *Erie* is limited to diversity cases, even if the Court had not justified them explicitly on those grounds. See, e.g., Gorrell & Weed, *supra* note 31, at 295.

73. 315 U.S. 447 (1942).

74. 313 U.S. 487 (1941).

75. See *D’Oench, Duhme & Co.* at 456–59.

76. See *id.* at 465 (Jackson, J., concurring) (“I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or in the concurring opinion of Mr. Justice Frankfurter.”).

77. See *id.* at 470–72.

by the Court—Justice Jackson rested his views on the “policy” behind the act creating the FDIC.<sup>78</sup>

Following the lead of *Clearfield Trust*, in case after case, the Court has declined to rely upon *Erie* in federal question cases that involve state law issues, whether in tort cases,<sup>79</sup> corporate law,<sup>80</sup> calculation of damages,<sup>81</sup> or for statute of limitations questions,<sup>82</sup> to give just a few examples. The explanations that the Court has relied upon for applying federal common law in all of these cases, regardless of their jurisdictional basis, revolve around a conclusion that the issues involved are “matters essentially of federal character” rather than the issues of local interest protected by *Erie*<sup>83</sup>—that application of state law will undermine interests in uniformity<sup>84</sup> or the federal fisc.<sup>85</sup> At times, the Court explicitly has stated that *Erie* does not apply in federal question cases, at least where there are no state law claims asserted through supplemental jurisdiction.<sup>86</sup> The logic of *Clearfield Trust* does not apply in every case that implicates federal interests, but these cases help frame the relevant considerations. In *Miree v. DeKalb County*,<sup>87</sup> for example, the plaintiff brought a diversity case regarding an aircraft crash. Although the Court recognized a general federal interest in the regulation of air travel, and although the United States was a party to the contract at issue in the case (but not a party to the case), the Court found that state law governed the question of whether the defendants were liable on a third-party beneficiary theory under the contract.<sup>88</sup> Key to the resolution of *Miree* was

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78. See *id.* at 473–75.

79. See *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (applying federal common law because the case involved government-soldier relations). The Court of Appeals had applied state law, relying on the *Erie* doctrine, *id.* at 303 n.4, but the Court, extending the logic of *Clearfield Trust*, held that where a case involved the “duties imposed upon the United States and the rights acquired by it,” federal law should govern, *id.* at 305.

80. See *Burks v. Lasker*, 441 U.S. 471, 476 (1979) (holding that *Erie* does not apply to resolve questions of the power of disinterested directors to terminate a derivative suit because “we proceed on the premise of the existence of a federal cause of action”).

81. See *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980) (holding that federal common law governs assessment of damages in Federal Employers’ Liability Act cases).

82. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946). The *Holmberg* Court distinguished *Guaranty Trust* as a case involving the “duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State,” rather than a federal court tasked with enforcing an equitable right created by Congress. *Id.*

83. See *Boyle v. United Techs.*, 487 U.S. 500, 511–12 (1988); *Burks*, 441 U.S. at 477 (using federal common law because rules “impact significantly upon the effectuation of federal rights”); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Standard Oil*, 332 U.S. at 307.

84. See *Standard Oil*, 332 U.S. at 309–10; *Holmberg*, 327 U.S. at 395.

85. See *Standard Oil*, 332 U.S. at 310–11; *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366–67 (1943).

86. *Burks*, 441 U.S. at 476 (“Since we proceed on the premise of the existence of a federal cause of action, it is clear that ‘our decision is not controlled by [*Erie*],’ and state law does not operate of its own force.” (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942))).

87. 433 U.S. 25 (1977).

88. See *id.* at 29 (“While federal common law may govern even in diversity cases where a uniform national rule is necessary to further the interests of the Federal Government . . . the

the Court's conclusion that it would have no "direct" impact on the United States or the federal fisc.<sup>89</sup> *United States v. Kimbell Foods, Inc.*<sup>90</sup> is another more recent example of a case in which federal law was found to govern the creation of substantive law but in which the Court found that absent congressional lawmaking, the best course was to adopt state law as a default rule.<sup>91</sup> The Court arrived at its decision after determining that there was no demonstrated need for national uniformity, that application of state law would not "frustrate . . . federal interests," and that disregarding state law would unseat settled expectations.<sup>92</sup>

One could read all of these cases as interpretations of the RDA's language directing the application of state law rules of decision "in cases where they apply" but not "where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."<sup>93</sup> And scholars have recognized that in some cases, the Supreme Court has implied that the RDA has no relevance to federal question cases.<sup>94</sup> But when doing so, the Court has not explicitly addressed the question of whether it is applying the RDA but finding that federal statute controls or whether it is just ignoring the RDA because application of state law would undermine enforcement of a federal right.<sup>95</sup> As Henry M. Hart once observed, distinguishing among these options is difficult because the RDA "seems almost perversely uninformative."<sup>96</sup> In any event, however one views the role of the RDA (and I will say more about this later), the Supreme Court has regularly found that *Erie*'s principles either do not apply or are limited in federal question cases and other cases in which federal interests are at stake. But the Court has never actually conducted an *Erie* analysis for state law claims that themselves are the basis of § 1331 jurisdiction or that are brought as supplemental claims to an original federal question claim.

Lower courts have demonstrated a similar tendency to resolve choice of law questions in tension with the orthodox statement that *Erie* applies equally in federal question cases. For instance, the Foreign Sovereign Immunities Act provides federal jurisdiction over state law claims when those claims are asserted against foreign powers. On the simple rule enunciated above, *Erie* should call for the application of state substantive law to resolve those claims, but courts considering the question often turn first to federal common law to

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application of federal common law to resolve the issue presented here would promote no federal interests even approaching the magnitude of those found in *Clearfield Trust.*").

89. *See id.*

90. 440 U.S. 715 (1979).

91. *See id.* at 740.

92. *See id.* at 728–29, 734, 739–40; *De Sylva v. Ballentine*, 351 U.S. 570, 580–81 (1956) (looking to state law for the definition of the word "children" as used in Copyright Act because the law of domestic relations is an area of traditional state regulation); Joshua M. Koppel, *Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation*, 1 STAN. J. COMPLEX LITIG. 171, 189–90 (2012).

93. 28 U.S.C. § 1652 (2012).

94. John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 553–55 (1989).

95. *See id.* at 553–54.

96. *See* Hart, *supra* note 33, at 504.

determine which substantive law governs.<sup>97</sup> And, just as in *Erie* scholarship, some courts have carved out certain areas—for example, bankruptcy and choice of law in transfers—in which the simple rule applying *Erie* to all conflicts is contested. In bankruptcy cases, some courts have found that *Erie* principles do not apply as a formal matter, even as the courts decided cases using *Erie*'s guideposts.<sup>98</sup> Others have found that *Erie* principles apply directly.<sup>99</sup> And others have stated that federal law applies without exception.<sup>100</sup>

Transfers also bring up difficult issues. In *Van Dusen v. Barrack*,<sup>101</sup> the Supreme Court held that when a diversity case is transferred from one district to another, choice of law should be determined by reference to the state in which the transferor court sits.<sup>102</sup> The justification for this rule is founded in the logic of *Erie*—as the Court stated, “[W]e should ensure that the ‘accident’ of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.”<sup>103</sup> Less well examined is what should happen when a case is transferred from one federal court to another but the case is based on federal question jurisdiction. At least two lower courts have found that in such a case, there is no reason to apply *Erie* principles—instead, because jurisdiction is founded on a federal question, the law of the transferee court may be applied to the dispute.<sup>104</sup> However, several

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97. See, e.g., Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991); Barkanic v. Gen. Admin. of Civil Aviation of the People’s Republic of China, 923 F.2d 957, 959–61 (2d Cir. 1991) (choosing to apply state choice of law principles but only after applying federal common law and determining that using state law would best accord with congressional intent in enacting the Foreign Sovereign Immunities Act).

98. See, e.g., *In re Gillissie*, 215 B.R. 370, 377–78 (Bankr. N.D. Ill. 1997) (“The Court is not exercising any jurisdiction based on the diversity of the parties under 28 U.S.C. § 1332, (which diversity of citizenship does not exist in any event as all parties to these disputes are Illinois residents), but rather is exercising its bankruptcy jurisdiction under 28 U.S.C. § 1334 and the automatic reference rule of the District Court, Local General Rule 2.33(A), by which all bankruptcy cases and related adversary proceedings are automatically referred to the bankruptcy judges comprising the adjunct unit of the District Court known as the Bankruptcy Court via 28 U.S.C. § 151. Thus, the Court is not obliged to decide the matters at bar as would a federal district trial court using state substantive law in a diversity case, as *Erie* requires, because the federal questions under §§ 363(h), 522 and 544(b) must be decided utilizing federal bankruptcy jurisdiction along with the Illinois state exemption and fraudulent conveyance avoidance issues.”); see also *In re Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980) (holding, in a federal bankruptcy proceeding where disposition of a federal question requires reference to state law, that federal courts are not required to apply state choice of law rules but are instead free to apply the law considered relevant to the pending controversy).

99. See, e.g., *In re Hilt*, 175 B.R. 747, 753 (Bankr. D. Kan. 1994) (relying on the *Erie* doctrine and the Wright and Miller treatise); *In re Conner Corp.*, 127 B.R. 775, 777–78 (Bankr. E.D.N.C. 1991) (finding that *Erie* generally applies to issues of state law in bankruptcy but that *Clearfield Trust* calls for the application of federal law to commercial paper issues that govern the rights and duties of the United States).

100. See, e.g., *In re Powerburst Corp.*, 154 B.R. 307, 310 (Bankr. E.D. Cal. 1993) (applying federal choice of law rules in resolving a contract law issue).

101. 376 U.S. 612 (1964).

102. See *id.* at 636–37.

103. See *id.* at 638.

104. See *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987) (“There is no room in the federal system of review for rote acceptance of the decision

courts have applied the *Van Dusen* approach to transfers involving federal law conflicts with little or no analysis.<sup>105</sup>

Courts have also failed to apply the basic principle uniformly in cases involving supplemental jurisdiction. Choice of law regarding rules of evidence, estoppel, fee shifting, and jury instructions have been resolved in varying ways. Some courts, applying the intuition that *Erie* applies regardless of the basis for jurisdiction, have concluded that state law controls.<sup>106</sup> Others have applied federal law.<sup>107</sup> A number of circuits have held that the federal law of privilege governs where the evidence sought is relevant to both federal and state law claims.<sup>108</sup> Indeed, in the lead up to the

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of a court outside the chain of direct review."); *Greyhound Fin. Corp. v. Willyard*, No. 87-C-0911B, 1989 WL 201094, at \*14 (D. Utah Dec. 26, 1989) ("The court declines to apply the *Van Dusen* holding to litigation based on federal question subject matter jurisdiction.").

105. See, e.g., *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1046 (9th Cir. 2012) (collecting cases); *In re Plumbing Fixtures*, 342 F. Supp. 756, 758 (J.P.M.L. 1972) ("It is clear that the substantive law of the transferor forum will apply after transfer."). See generally Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 692 n.100 (1984) (citing cases extending *Van Dusen* to federal conflicts of law).

106. See, e.g., *Bradley v. City of Ferndale*, 148 F. App'x 499, 511 (6th Cir. 2005) (looking to state law to determine if a denial of immunity is subject to interlocutory appeal, where the state law claim is supplemental to the § 1983 claim); *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 759 (7th Cir. 2003) (applying state law to a jury instructions issue involving a state law claim in which there was federal question jurisdiction); *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 837–38 (9th Cir. 2001) (applying state law to a determination of attorney's fees in a state law claim when the court was sitting in diversity); *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (applying state law to determine the fee award where plaintiff in a civil rights case prevailed on federal and state causes of action); *Alvarado v. Fed. Express Corp.*, Nos. C 04-0098 SI, C 04-0099 SI, 2008 WL 2340211 (N.D. Cal. June 5, 2008) (holding that federal law would govern an award of fees for a verdict based solely on Title VII, but applying *Erie* doctrine because verdicts were based on both federal and state law claims); *Chin v. DaimlerChrysler Corp.*, 461 F. Supp. 2d 279, 283 (D.N.J. 2006) (applying state law regarding attorney's fees in a case in which supplemental jurisdiction was exerted over state law claims).

107. See, e.g., *Lydon v. Bos. Sand & Gravel Co.*, 175 F.3d 6, 11–13, 12 n.3 (1st Cir. 1999) (applying the federal law of judicial estoppel to a state law claim that had been removed based on complete preemption by the Labor Management Relations Act); *Tucker v. United States*, 143 F. Supp. 2d 619, 622–25 (S.D. W. Va. 2001) (applying federal privilege law to a Federal Tort Claims Act claim and to a pendent claim based on state law, based both on the interpretation of Federal Rule of Evidence 501 and principles of uniformity); see also *McDaniel v. Smith*, No. CV507-79, 2008 WL 4425305, at \*10–11 (S.D. Ga. Sept. 30, 2008) (applying federal law to the question of when service must be effectuated in a case in which a state law claim was asserted as pendent to a federal claim; the court asserted that *Erie* has no application at all in cases in which § 1331 is the basis for jurisdiction); *Park v. City of San Antonio*, No. SA-03-CA-0491-RF, 2006 WL 2519503 (W.D. Tex. Aug. 16, 2006) (involving attorney's fees in a state law claim supplemental to a § 1983 claim); *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 63 F. Supp. 2d 1127, 1129–30 (N.D. Cal. 1999) (applying anti-SLAPP law to state law claims asserted pendent to federal question claims but not to federal question claims); *In re Combustion, Inc.*, 161 F.R.D. 51, 53–54 (W.D. La.), aff'd, 161 F.R.D. 54 (W.D. La. 1995) (finding federal law applied across the board in part because the relevant statutes both provided for exclusive jurisdiction).

108. See, e.g., *Hancock v. Hobbs*, 967 F.2d 462, 466–67 (11th Cir. 1992) (holding that federal privilege law supplies the rule of decision in a federal civil rights case, even if witness testimony is relevant to pendent state law claims); *Hancock v. Dodson*, 958 F.2d 1367, 1372–73 (6th Cir. 1992) (applying federal privilege law to all claims in a federal civil rights case with pendent state law claims); *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987)

adoption of Federal Rule of Evidence 501, the Senate Judiciary Committee was concerned about how courts would apply the rule in federal question cases with supplemental state law claims.<sup>109</sup> In contrast to the circuits that held otherwise, Federal Rule of Evidence 501 states that where state law “supplies the rules of decision,” privilege claims should be governed by state law.<sup>110</sup> In *Wm. T. Thompson Co. v. General Nutrition Corp.*,<sup>111</sup> the court explained that “applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable” and, therefore, held that “when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule.”<sup>112</sup> And a federal court in Florida rejected application of state law on cost shifting to a state law claim because it would undermine enforcement of the federal claim that provided the basis for jurisdiction.<sup>113</sup>

Only a few courts have recognized that the *Erie* doctrine might apply differently in federal question cases. A court in the Eastern District of Pennsylvania has suggested that the role of state law may differ in federal question and diversity cases, even where the state law claim is pendent to a federal question claim.<sup>114</sup> And a court in the Southern District of New York rested on federal common law in a federal question case involving a state law claim even though a party alleged diversity of citizenship as an alternative ground for jurisdiction.<sup>115</sup> A district court in New Jersey also has suggested

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(applying federal privilege law where the evidence relates to both the state and federal claims in a RICO action with pendent state law claims); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (applying federal privilege law to all claims in a federal antitrust action with pendent state law claims); *Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981) (holding that federal law controls on the question of privilege, notwithstanding the presence of a state law claim, in a federal antitrust action).

109. Martin I. Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923, 958–60 (1975) (detailing the history of the adoption of Federal Rule of Evidence 501, and noting that many commentators, and the Senate Judiciary Committee, worried over how the Rule should apply in federal question cases with pendent state law claims—some of the critics thought that it was possible that witness testimony would be admitted on some claims but not others, although relevant to both).

110. FED. R. EVID. 501; *see also In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at \*6–7, \*15 (S.D. Ill. Apr. 12, 2011) (MDL action).

111. 671 F.2d 100 (3d Cir. 1982).

112. *See id.* at 104. Likewise, within the Fourth Circuit, the court in the class action case of *Lewis v. Capital Mortgage Investments*, 78 F.R.D. 295, 313 (D. Md. 1977), rejected the argument that state law supplies the rule of decision simply because there was a pendent state law claim.

113. *See Keesee v. Bank of Am.*, NA, 371 F. Supp. 2d 1370, 1376–77 (M.D. Fla. 2005) (holding that a state law on cost shifting did not apply, regardless of any *Erie* analysis, because it would undermine federal law or diminish a federal right), *abrogated by* *Menchise v. Akerman Senterfitt*, 532 F.3d 1146 (11th Cir. 2008).

114. *See Reitz v. Dieter*, 840 F. Supp. 353, 354–55 (E.D. Pa. 1993) (noting that the applicability of a Pennsylvania attorney’s fees provision may be different in diversity cases than in federal question cases, even in a case in which a state law claim was pendent to a federal claim).

115. *See Monroy v. Citibank, N.A.*, No. 84 CIV. 1040 (MJL), 1985 WL 1768, at \*2–4 (S.D.N.Y. June 21, 1985) (relying on federal common law in a case in which jurisdiction is

that questions about the scope of the Federal Rules of Civil Procedure arise in diversity cases, but not federal question cases—the distinction was unnecessary to resolution of the case, however.<sup>116</sup> A court in the District of Connecticut held that federal choice-of-law rules should apply where jurisdiction was founded on both diversity and the presence of a federal question,<sup>117</sup> in part because the case involved application of a law that was enacted prior to the *Erie* decision.<sup>118</sup> The court accepted that this could mean that results would differ if the case were sitting solely in diversity but argued that the Supremacy Clause would not tolerate applying state law.<sup>119</sup>

The assumption that *Erie* applies regardless of the grounds for jurisdiction was not always seen as obvious.<sup>120</sup> Part of the confusion rested on the question of whether *Erie* was a decision founded on constitutional law or simply an interpretation of the RDA.<sup>121</sup> The Supreme Court itself in 1947 stated, in the estoppel context, that federal courts sitting in diversity must follow state law and state policy but that this is not necessarily the case for federal courts sitting in federal question jurisdiction.<sup>122</sup>

## II. EXAMINING THE BASES FOR THE ORTHODOX VIEW

As established in Part I, the scholarly and judicial community is almost completely united in adherence to the position that *Erie* doctrine applies in the same way to state law claims, whatever the basis for federal court jurisdiction. And when one examines the relevant scholarship and jurisprudence in detail, the sources for this common and accepted wisdom are nearly always the same. To support the claim that pendent state law claims in federal question cases are governed by *Erie*, most scholars and courts look to *United Mine Workers v. Gibbs*,<sup>123</sup> the Supreme Court's seminal

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founded on a federal question through the Edge Act, 12 U.S.C. § 632 (2012), but in which the claim was created by state law; jurisdiction had also been alleged under the alternative ground of diversity).

116. See *Fitzgerald v. Gann Law Books, Inc.*, 956 F. Supp. 2d 581, 586 (D.N.J. 2013) (suggesting that a question about the scope of the Federal Rules of Civil Procedure arises in diversity cases, not federal question cases).

117. See *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 425 F. Supp. 81, 88 (D. Conn. 1977) (holding that federal choice of law rules should apply in a case in which the court exercised federal question and diversity jurisdiction).

118. See *id.* at 88 (noting that when the relevant federal law was passed, *Swift* was still good law).

119. See *id.* at 85 (“I assume that whatever substantive law is found to be applicable in the exercise of this Court’s federal question jurisdiction should govern the lawsuit, even though a contrary result might be reached if only diversity jurisdiction existed. It seems to be a fair inference from the Supremacy Clause that whatever decision a federal court is impelled to reach in the exercise of its federal question jurisdiction must prevail over contrary results that would be reached if the Court were functioning essentially as a state court in the exercise of diversity jurisdiction.”).

120. *In re Longhorn Sec. Litig.*, 573 F. Supp. 278, 280 & n.1 (W.D. Okla. 1983) (describing “jurisprudential uncertainty in the post [*Erie*] universe”).

121. See *Seaboard Fin. Co. v. Davis*, 276 F. Supp. 507, 512–13 (N.D. Ill. 1967).

122. See *Angel v. Bullington*, 330 U.S. 183, 192 (1947) (“Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State.”).

123. 383 U.S. 715 (1966).

supplemental jurisdiction decision.<sup>124</sup> In support of the view that *Erie* requires the application of state law in certain federal question cases, regardless of which sovereign created the cause of action, many scholars and judges turn to Hart & Wechsler,<sup>125</sup> the Wright and Miller treatise,<sup>126</sup> *Commissioner v. Bosch*,<sup>127</sup> or *United States v. Standard Oil*.<sup>128</sup> As will be discussed below (and as already has been discussed in the case of *Standard Oil* and related cases),<sup>129</sup> however, not one of these sources adequately explains or even supports the views expressed by the vast majority of scholars and judges.

The treatises are relatively uninformative. The Wright and Miller treatise states succinctly that the view that *Erie* applies only to diversity cases “is simply wrong,”<sup>130</sup> citing to a Second Circuit decision that itself cites to Hart and Wechsler.<sup>131</sup> The Wright treatise also cites to *Gibbs* and *Bosch*, among other opinions.<sup>132</sup> Hart and Wechsler observe that the understanding that *Erie* applies regardless of the basis of jurisdiction “has gained general acceptance.”<sup>133</sup> The two cases principally relied upon, *Gibbs* and *Bosch*, require more discussion but do not clarify matters.

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124. See, e.g., Childress, *supra* note 26, at 1545 n.96 (citing *Gibbs* and stating that *Erie* applies to state law claims heard in federal court via supplemental jurisdiction); Dorf, *supra* note 27, at 284 & nn.221–22 (citing *Gibbs*, 383 U.S. at 725) (stating that federal courts follow state law in diversity cases, supplemental claims in federal question cases, and cases involving due process where the court must first resolve an issue of state law); Matasar, *supra* note 27, at 1489 & n.401 (citing *Gibbs* for the proposition that questions of state law are governed by *Erie* in federal question cases); Yonover, *supra* note 27, at 310 n.22; see also *Fondrk v. Westmoreland County, No. Civ.A. 04-0900, 2006 WL 1699471, at \*2* (W.D. Pa. June 20, 2006); *Kline v. Sec. Guards, Inc.*, 159 F. Supp. 2d 848, 851 (E.D. Pa. 2001).

125. See, e.g., Campos, *supra* note 21, at 1586 n.73; Chow, *supra* note 27, at 166 n.4; Gluck, *supra* note 21, at 1926 n.87; Gluck, *The Federal Common Law of Statutory Interpretation*, *supra* note 27, at 785 n.122.

126. See, e.g., Gluck, *supra* note 21, at 1926; see also *Ohio Valley Envtl. Coal., Inc. v. Marfork Coal Co.*, 966 F. Supp. 2d 667, 678 n.6 (S.D. W. Va. 2013) (citing the Wright and Miller treatise for the proposition that it “simply is wrong” to maintain that *Erie* applies only in diversity cases); *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 643 F. Supp. 1217, 1221 (D.N.J. 1986) (citing the Wright and Miller treatise), aff’d in part, modified in part, 834 F.2d 326 (3d Cir. 1987); *In re Hilt*, 175 B.R. 747, 753 (Bankr. D. Kan. 1994) (same).

127. 387 U.S. 465 (1967); see, e.g., Saunders, *supra* note 36, at 722 n.33 (citing *Bosch*, 387 U.S. 456); see also *Fondrk*, 2006 WL 1699471, at \*2 (citing *Bosch*, 387 U.S. 456); *Hernas v. City of Hickory Hills*, 507 F. Supp. 103, 105 (N.D. Ill. 1981) (citing *Bosch*, 387 U.S. at 461).

128. 382 U.S. 301 (1947); see, e.g., Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYUL. REV. 811, 845 (citing *Standard Oil*, 332 U.S. at 307).

129. See *supra* notes 79–96 and accompanying text (noting that the Court has consistently declined to apply the *Erie* doctrine in federal question cases even where state law claims and issues were present).

130. See *supra* note 24.

131. *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (“But despite 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.” (citing HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 690–700 (1953))).

132. 19 WRIGHT & MILLER, *supra* note 24, § 4520 nn.6, 9 & 11.

133. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 589 (7th ed. 2015).

#### A. United Mine Workers v. Gibbs

The Supreme Court's decision in *Gibbs* is frequently cited by both courts<sup>134</sup> and commentators<sup>135</sup> in support of the proposition that *Erie* applies to state law claims brought in federal court through pendent jurisdiction. In *Gibbs*, the principal question involved whether subject matter jurisdiction even existed for state law claims between nondiverse parties when those claims related in some way to claims that were created by federal law and amenable to arising under jurisdiction.<sup>136</sup> The Court famously held that if the state law claims shared a "common nucleus of operative fact" over claims for which there was an independent basis for subject matter jurisdiction, a federal court could exercise supplemental jurisdiction.<sup>137</sup>

While confirming the jurisdictional power of federal courts to assert pendent jurisdiction, the *Gibbs* Court also gave lower courts discretion to decline to exercise that power. Explaining the reason for this discretion, the Court stated that if "considerations of judicial economy, convenience and fairness" do not justify the assertion of pendent jurisdiction, "a federal court should hesitate to exercise jurisdiction over state claims, *even though bound to apply state law to them.*"<sup>138</sup> To support the concluding clause, the Court cited *Erie*, and it is this sparse language that many scholars and courts rely on for the proposition that *Erie* translates seamlessly from diversity cases to claims present in federal court via supplemental jurisdiction.

It should be clear from this discussion that the language relied upon did not purport to apply *Erie* to pendent state law claims but was phrased in the abstract. This on its own may be insufficient to question the reliance placed on *Gibbs*, but the Court's treatment of the substantive issues in the case, virtually ignored by the commentators, raises serious questions. In *Gibbs*, it must be remembered, the jury found against the plaintiff on his federal law claims but awarded damages for state law claims for conspiracy and an unlawful boycott. After the Court found that the district court permissibly retained jurisdiction over the state law claims, it reversed liability under state law. In so doing, the Court applied a federal statute, section 6 of the Norris-LaGuardia Act, to limit the reach of state law, without any *Erie* or RDA analysis.<sup>139</sup> Indeed, the Court acknowledged that section 6 essentially established a higher burden of proof for such claims brought against labor unions, whether sourced in state or federal law.<sup>140</sup> Thus, even in *Gibbs*, the

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134. See, e.g., *Fondrk v. Westmoreland County*, No. Civ.A. 04-0900, 2006 WL 1699471, at \*2 (W.D. Pa. June 20, 2006); *Kline v. Sec. Guards, Inc.*, 159 F. Supp. 2d 848, 851 (E.D. Pa. 2001).

135. See *supra* note 124 and accompanying text.

136. *United Mine Workers v. Gibbs*, 383 U.S. 715, 721 (1966).

137. *Id.* at 725. Supplemental jurisdiction doctrine evolved substantially from *Gibbs* until Congress enacted 28 U.S.C. § 1337. Judicial Improvement Act of 1990, Pub. L. No. 101-650, tit. 3, § 310, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1337 (2012)). The *Gibbs* nucleus test was essentially codified in § 1337(a).

138. See *Gibbs*, 383 U.S. at 726 (emphasis added) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 64 (1938)).

139. *Id.* at 735–42.

140. See *id.* at 736–37.

Court did not simply consider itself bound to apply state law, and only state law, to pendent state law claims, despite the abstract language relied upon so heavily by courts and commentators.<sup>141</sup>

### B. Commissioner v. Estate of Bosch

If *Gibbs* is the case cited for the proposition that *Erie* applies with equal force in supplemental jurisdiction cases, *Bosch*, a 1967 tax case, plays the same role for those who insist that *Erie* applies with equal force in federal question and diversity cases.<sup>142</sup> A close read of *Bosch*, however, suggests the contrary. In *Bosch*, the Supreme Court addressed the validity of a tax deduction under 26 U.S.C. § 2056(b)(5), which permits “marital” deductions against the estate tax.<sup>143</sup> Central to the case was whether the decedent’s wife validly executed an instrument related to the disposition of an inter vivos trust.<sup>144</sup> A state trial court, in a separate proceeding, had determined that the execution was valid under state law, and the Supreme Court was therefore compelled to determine the extent to which this state law determination was binding in the federal tax court proceeding.<sup>145</sup>

To answer this question, the Court turned first to congressional intent regarding the federal tax provision at issue, not to *Erie*.<sup>146</sup> The Court

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141. Nor is there any evidence that the Court’s internal deliberations considered the issue that scholars have taken to be resolved by *Gibbs*. None of the Court’s internal conference notes or correspondence indicate that any of the Justices were focused on the *Erie* question. Justice William Brennan’s initial draft of the opinion, which was never circulated, contained the language and citation to *Erie* referenced above, as did the first opinion circulated to his colleagues on March 3, 1966. Two additional drafts were circulated to the Court, but neither of them included different language regarding *Erie*. The only notable difference involved the discussion of section 6 of the Norris-LaGuardia Act. The initial uncirculated draft and the March 3 draft both omitted any reference to there even being a dispute about whether Norris-LaGuardia applied to the state law claims. The draft circulated March 24, however, included the following implicit recognition of a dispute (also found in the final opinion):

Petitioner vigorously contends that § 6 applied to the state claims in this case; that, on this record, it cannot be charged with having participated in or authorized the violence of August 15–16; and that its acts once it learned of the violence fell short of what would be necessary to show either ratification of the violence or any intent to build its picketing campaign upon the fears the violence engendered. We agree.

*Gibbs*, 383 U.S. at 735; see also United Mine Workers v. *Gibbs*, No. 243, draft op. at 19 (U.S. Mar. 24, 1966). “Petitioner vigorously contends” is apparently a reference to the United Mine Workers’ merits brief, which addressed a few pages to establishing that section 6 of Norris-LaGuardia applied to the state law claims (again without specifying the RDA). Brief for Petitioners at 32–36, *Gibbs*, 383 U.S. 715 (No. 243), 1965 WL 115405, at \*32–36.

142. See, e.g., Jack Moore, *United States v. White: The Second Circuit Validates an IRS Role in Policing State Probate Practice*, 56 BROOK. L. REV. 669, 681–82 (1990); Saunders, *supra* note 36, at 663 n.33 (“There is sufficient authority to support the proposition that the doctrine applies in all actions regardless of the basis of federal jurisdiction unless a sufficient federal interest exists to mandate the application of federal common law.” (citing Comm’r v. Estate of *Bosch*, 387 U.S. 456 (1967))); Yonover, *supra* note 27, at 310 n.22.

143. See *Bosch*, 387 U.S. at 459–61.

144. *Id.* at 473; see also Moore, *supra* note 142, at 681 n.75.

145. See *Bosch*, 387 U.S. at 464.

146. Indeed, the Court recognized that some lower courts had found that the question was parallel to, if not controlled by, *Erie* principles. See *id.* at 463 (citing Faulkerson’s Estate v. United States, 301 F.2d 231 (7th Cir. 1962), as an example of this view). After identifying

examined the legislative history regarding the enactment of the marital deduction and noted that it “used very guarded language in referring to the very question involved here,” stating that “‘proper regard,’ not finality” should be given to state court interpretations of *inter vivos* instruments.<sup>147</sup> The Court then turned to the RDA, and the associated *Erie* doctrine, to note that its reading of congressional intent was “in keeping” with the policies enunciated therein.<sup>148</sup> And it finally closed with the language that most commentators have focused on over the years:

This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State’s highest court is the best authority on its own law. . . . In this respect, [a federal court hearing a case involving application of a federal statute in which an underlying issue of state law is presented] may be said to be, in effect, sitting as a state court.<sup>149</sup>

This language, taken out of context, might suggest that *Erie* controls all questions of state law presented in federal question cases, but the discussion preceding it suggests the contrary. Moreover, the Court followed this key language with the observation that its approach in this case “would be fair to the taxpayer *and* protect the federal revenue as well,”<sup>150</sup> suggesting the relevance of these variables to its consideration of the question.

The dissenting opinions in *Bosch* also suggest that a straightforward application of the *Erie* doctrine did not resolve the issue. Justice William Douglas, writing alone, argued that the Court was, in fact, departing from the *Erie* doctrine by permitting a federal court to ignore a state court decision simply because it was not announced by the state’s highest court.<sup>151</sup> Under his interpretation of the Court’s prior decisions, unless there was reason to suspect fraud or otherwise question the validity of the state court determination, *Erie* required its application to a case like *Bosch*.<sup>152</sup> Justices John Marshall Harlan II and Abe Fortas, by contrast, found *Erie* and the RDA to provide “relevant guidance” but read the Court as adopting a rule founded not solely on *Erie* but also on federal interests in tax collection.<sup>153</sup> The risk of the majority’s view, according to these dissenters, could be “widely

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this view, the Court stated, “We look at the problem differently,” understanding it instead as a question of legislative intent. *Id.*

147. *Id.* at 464 (quoting S. REP. NO. 80-1013, pt. 2, at 4 (1948)).

148. *See id.*

149. *Id.* at 456.

150. *See id.* (emphasis added).

151. *See id.* at 466 (Douglas, J., dissenting).

152. *Id.* at 471 (“[W]here, absent [fraud, collusion, or other indications of unreliability], a state court has reached a deliberate conclusion, where it has construed state law, the federal court should consider the decision to be an exposition of the controlling state law and give it effect as such.”).

153. In explaining their disagreements with both the majority opinion and Justice Douglas’s dissent, Justices Harlan and Fortas noted that the latter placed too much reliance on the importance of “uniformity in the administration of law within each of the States,” while the former placed too much weight on the “hazards to the federal fisc from dubious decisions of lower state courts.” *Id.* at 477–79 (Harlan, J., dissenting).

destructive both of the proper relationship between state and federal law and of the uniformity of the administration of law within a State.”<sup>154</sup>

Thus, *Bosch* did not, as many commentators and courts suggest, adopt *Erie*’s rule and apply it wholesale to state law issues raised in federal question cases. Rather, the Court looked to both congressional intent regarding the particular substantive federal statute at issue and salient federal interests to conclude that, in the particular context of *Bosch*, interpretations of state law should be determined by reference to the decisions of the state’s highest court.

### III. ERIE AND THE NUANCED SUBSTANTIVE/PROCEDURAL INQUIRY

To this point, I have shown that there is an orthodox view that *Erie* controls in federal question cases, that courts and commentators have generally failed to examine what this means when state law and federal law are intertwined, and that the bases for the orthodoxy are insufficient. To move to a different framework, however, requires a return to *Erie* and its progeny. All of the *Erie* jurisprudence discussed herein revolves around the meaning of the RDA, which provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.<sup>155</sup>

The RDA was originally enacted as section 34 of the Judiciary Act of 1789, and has remained essentially unchanged since that time.<sup>156</sup> There was recognition from the start that vesting concurrent jurisdiction over state law claims in both federal and state courts could present the possibility of conflicts.<sup>157</sup> Much ink has been spilled regarding whether *Erie* itself correctly divined the RDA’s drafters’ intended resolution of such conflicts,<sup>158</sup> but, for the purposes of this Article, I take *Erie*’s interpretation of the RDA as a given.

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154. *Id.* at 480. Thus, Harlan and Fortas argued that state court determinations of state law should be controlling, regardless of their procedural level unless the state court proceeding was not “genuinely” adversarial. *Id.* at 481.

155. 28 U.S.C. § 1652 (2012).

156. It was codified as part of the U.S. Code in 1948, at which time Congress made clear that it applied to equitable claims as well as legal claims. See Act of June 25, 1948, ch. 646, 62 Stat. 944 (codified at 28 U.S.C. § 1652).

157. See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1487 n.232.

158. Compare Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923) (providing the argument relied upon by the *Erie* Court, based on legislative history of the RDA), with W. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 126–48 (1990) (“The one thing that can be said with assurance is that Section 34 was not intended to apply exclusively to diversity proceedings; that it was not intended to direct the application of the law of particular states in diversity proceedings; and that it was not intended to apply to suits in equity. In short, on its historical basis, *Erie* is dead wrong.”), and Holt, *supra* note 157, at 1506–07 (arguing in support of Ritz’s interpretation).

The central questions regarding application of the RDA have revolved around *when* a federal court must apply state law and *which* state law it must then apply. In *Swift v. Tyson*,<sup>159</sup> a case founded on diversity jurisdiction, the Court held that federal courts are bound to apply state law but only to the extent that the state law was found in positive law. Where state law was found only in the common law decisions of state courts, by contrast, the *Swift* Court held that there was no requirement that federal courts follow those state court decisions.<sup>160</sup> As the *Swift* Court conceptualized it, state court decisions “are, at most, only evidence of what the laws are, and are not, of themselves, laws.”<sup>161</sup> *Swift* thus famously ushered in the era of federal common law.<sup>162</sup>

For nearly one hundred years, federal courts were free to apply their own interpretation of common law principles, even in diversity cases, but in *Erie*, the Supreme Court overruled *Swift*.<sup>163</sup> For the *Erie* Court, *Swift* was wrong because it was based on a misinterpretation of the RDA, created perverse outcomes, and was based on an unsupportable vision of the power of federal courts.<sup>164</sup> Thus, after *Erie*, it was commonly understood that, whatever the source of state law, the RDA required that state law be applied, where applicable.

But therein, of course, lay the rub: Just when could a federal court rely on federal law, whether created by statutes, the newly christened Federal Rules of Civil Procedure, or even federal common law? *Erie*’s progeny clarified the answer to this question. First, in *Guaranty Trust Co. v. York*,<sup>165</sup> another diversity case, the Court held that, to the extent that a federal court was choosing between clashing federal and state law, the RDA only required the application of state substantive law.<sup>166</sup> This nuance was absent in *Erie*, except to the extent that Justice Stanley Reed’s concurrence predicted the problem,<sup>167</sup> because the state law applied in *Erie*—relating to the obligations owed by a railroad company to a trespasser or invitee—was indisputably substantive. But in *Guaranty Trust*, the Court had to address whether the conflict at issue—relating to a statute of limitations—was substantive, in which event the RDA required the application of state law, or procedural, which would permit a federal court to apply its own law, whatever the source.<sup>168</sup> The Court ultimately suggested that, to the extent that a choice between federal and state law would change the outcome of the litigation, it must be deemed substantive and the state law must be applied.<sup>169</sup>

*Guaranty Trust*’s outcome-determinative test was overly simplistic, in large part because parties were unlikely to quarrel over the choice between

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159. 41 U.S. 1 (1842).

160. *Id.* at 18–19.

161. *Id.* at 18.

162. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 60 (2006).

163. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79–80 (1938).

164. Molot, *supra* note 162, at 71–80.

165. 326 U.S. 99 (1945).

166. *Id.* at 107–08.

167. See *Erie*, 304 U.S. at 91–92 (Reed, J., concurring).

168. *Guaranty Tr.*, 326 U.S. at 107–08.

169. *Id.* at 109.

federal and state law *unless* it changed the outcome of the case. In three decisions after *Guaranty Trust*, all announced in 1949, the capaciousness of the outcome-determinative test proved troublesome, especially as it related to the clash between state laws and the Federal Rules of Civil Procedure. Thus, in *Ragan v. Merchants Transfer & Warehouse Co.*,<sup>170</sup> the Court held that Federal Rule of Civil Procedure 3's statement that an action "commenced" with its filing did not determine the tolling of the statute of limitations in a diversity case, where Kansas law provided that an action "commenced" for the purpose of tolling when it was served on the defendant. And in *Cohen v. Beneficial Industrial Loan Corp.*,<sup>171</sup> the Court held that the RDA required that a federal court apply a New Jersey statute requiring a plaintiff in a shareholder derivative suit to post a bond even though the applicable Federal Rule of Civil Procedure contained no such requirement. Similarly, in *Woods v. Interstate Realty Co.*,<sup>172</sup> the Court held that a Tennessee corporation could not bring a diversity action in a federal court in Mississippi if, by virtue of its failure to qualify to do business in that state, the Mississippi state courts would bar such an action. In all three of these cases, the Court applied *Guaranty Trust*'s outcome-determinative test to determine the *Erie* question, and in all three cases, the Court displaced federal law.

The Court added another layer to the *Erie* analysis in *Byrd v. Blue Ridge Cooperative*,<sup>173</sup> another diversity case in which the Court displaced state law in favor of conflicting federal law. In *Byrd*, the critical question was whether the plaintiff was considered a "statutory employee," in which case he was prohibited from suing his employer in tort and was limited to recovery delineated by South Carolina's workers' compensation scheme.<sup>174</sup> South Carolina vested fact-finding authority as to this question to a judge, whereas federal law would permit the parties to invoke their Seventh Amendment right to a jury trial on the question.<sup>175</sup> In *Byrd*, the Court equivocated as to whether the conflict between state and federal law was "outcome-determinative" as that term had been used in *Guaranty Trust*<sup>176</sup> but nonetheless found that resolving the *Erie* question involved the additional step of considering whether federal interests in applying federal law outweighed countervailing state interests.<sup>177</sup> In *Byrd* itself, the Court found that there was essentially no articulated state interest that justified vesting fact-finding authority with the judge, while the federal interest resided in the Seventh Amendment, making the balancing inquiry relatively straightforward.<sup>178</sup>

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170. 337 U.S. 530 (1949).

171. 337 U.S. 541 (1949).

172. 337 U.S. 535 (1949).

173. 356 U.S. 525 (1958).

174. *Id.* at 527–28.

175. *Id.* at 533–37.

176. Compare *id.* at 537 (suggesting that the difference was outcome determinative), with *id.* at 539–40 (suggesting the opposite).

177. *Id.* at 540.

178. *Id.* at 538–39.

After *Byrd*, the *Erie* analysis involved a three-step process. First a federal court was required to determine whether a conflict existed between federal law and state law. If no conflict existed, then no further *Erie* inquiry was necessary. If a conflict was found, the court asked whether it was outcome-determinative. A negative answer resulted in application of federal law, on the theory that the conflict only implicated substantive (and hence state-law-derived) rights if it was outcome determinative. Even outcome-determinative conflicts, however, required a third inquiry—*Byrd*'s balancing of federal versus state interests to determine whether, even in the face of an outcome-determinative conflict, federal law should govern.<sup>179</sup>

One could conceptualize this inquiry as serving at least two, somewhat different, purposes. First, the resort to *Byrd* balancing could be a means of operationalizing the RDA's instruction that state law applies in federal court "except where the Constitution or treaties of the United States or Acts of Congress *otherwise require or provide*."<sup>180</sup> The difficulty with this conception is that the *Erie* analysis applies whether the source of state law is positive law or judge-made common law.<sup>181</sup> A competing conception of the work that this *Erie* analysis accomplishes is that, by asking whether there are significant state interests at stake in what appears to be an outcome-determinative conflict, the Court is essentially double-checking the intuition that outcome-determinative conflicts are substantive. On this account, the absence of state interests behind a rule that is outcome-determinative likely indicates that it does not vindicate substantive judgments.

To this point, the Court had addressed *Erie* in cases that involved conflicts between state law and federal law of all kinds, both positive law and common law, without any suggestion that the source of federal law affected the analysis. But in *Hanna v. Plumer*,<sup>182</sup> the Court introduced two new innovations in the *Erie* analysis, one of which is central to this Article. First, and of less interest for these purposes, the Court clarified that, where the source of federal law in any federal-state conflict is created by statute or a Federal Rule, the "relatively unguided" *Erie* analysis was not applicable.<sup>183</sup> Instead, a reviewing court must ask whether the positive law forecloses application of the competing state law and, if so, whether the Constitution (and in the case of Federal Rules of Civil Procedure, the Rules Enabling Act) authorizes the federal positive law in question.<sup>184</sup>

More importantly for the purposes of this Article, however, the *Hanna* Court also further clarified that the *Erie-Guaranty Trust-Byrd* analysis governed conflicts between state law and federal judge-made law.<sup>185</sup> Most significantly, the Court stated that the outcome-determinative test introduced

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179. For an example of *Byrd* balancing, see *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 67–69 (1966), where the Court declined to rely on federal common law in a diversity action because there was "no significant threat to any identifiable federal policy or interest."

180. 28 U.S.C. § 1652 (2012) (emphasis added).

181. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

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

183. *Id.* at 470–72.

184. *Id.* at 471.

185. *Id.* at 468–69.

by *Guaranty Trust* was not as simple as had been suggested. The question was not whether choosing state or federal law in the particular case would alter the outcome—as previously noted, if it were, then nearly every conflict presented to a court would pass the test. Instead, the Court stated that courts must answer the outcome-determinative question in light of *Erie*'s twin aims: reducing both forum shopping and inequitable outcomes based on the citizenship of the parties.<sup>186</sup>

The Court's reasoning was founded on the relationship between diversity jurisdiction and the *Erie* doctrine. First, the Court emphasized that the *Swift* doctrine had undermined the very purpose of diversity jurisdiction, which was to level the playing field between citizens and noncitizens of a state.<sup>187</sup> Because *Swift* made choice of law turn on whether the case was brought in federal or state court, it gave the out-of-state citizen-plaintiff the power to determine choice of law with the initial filing decision.<sup>188</sup> Thus, *Erie*'s concern, highlighted by *Hanna*, about the inequitable administration of the laws was directly tied to the mechanics of diversity jurisdiction. *Erie*'s concern about forum shopping, also highlighted by *Hanna*, was less directly tied to diversity jurisdiction. Nonetheless, *Erie*'s concern seemed to be that parties had manipulated their own citizenship to create diversity jurisdiction so as to take advantage of a particular rule that would be applied under the *Swift* doctrine.<sup>189</sup> Nowhere did the Court in *Hanna* or *Erie* discuss concerns about forum shopping in the context of federal question cases.

Since *Hanna*, little has changed with the *Erie* analysis, at least in its outline. Disagreements have arisen about how to apply some of the principles developed from *Erie* through *Hanna*, but the principles themselves remain constant. The result the Court arrived at in *Gasperini v. Center for Humanities, Inc.*,<sup>190</sup> for example, may have been unorthodox, but its analysis was basically consistent with what has been described so far.<sup>191</sup> And *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance*<sup>192</sup> involved not the “relatively unguided” *Erie* analysis, which is the focus of this Article, but interpretation of the Rules Enabling Act analysis introduced in *Hanna*.

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186. *Id.*

187. *Id.* at 467.

188. If the out-of-state plaintiff wished to take advantage of the state rule, she would file in state court, preventing the in-state defendant from removing. 28 U.S.C. § 1441(b)(2) (2012) (prohibiting removal on diversity grounds if the defendant is a citizen of the state in which suit was brought). If the out-of-state plaintiff sought the benefit of the federal rule, she would file in federal court, where the defendant could not shift the case to state court.

189. *Erie R.R. v. Tompkins*, 304 U.S. 64, 73 (1938) (discussing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)); *see also Hanna*, 380 U.S. at 467 n.8 (citing *Black & White Taxicab*, 276 U.S. at 518).

190. 518 U.S. 415 (1996).

191. The Court first applied *Hanna*'s outcome-determinative test before it turned to *Byrd* balancing. *Id.* at 428–32.

192. 559 U.S. 393 (2010).

#### IV. INTRODUCING *ERIE* STEP ZERO

To this point, I have shown that there is an orthodox view that *Erie* applies to all state court claims that arise in federal court, whatever the basis for jurisdiction, but that courts and commentators rarely have paid attention to whether *Erie* analysis should function in precisely the same way across different jurisdictional contexts. Moreover, the *Erie* doctrine itself has been justified by policies and concerns that are hard to translate outside of the diversity context. The purpose of this part is to situate *Erie* analysis in the nondiversity context and provide some examples of how *Erie* might function differently outside of § 1332's diversity jurisdiction.

In the conventional account, regardless of jurisdictional context, *Erie* analysis consists of a number of steps, beginning with asking whether the area in which state law and federal judge-made law conflict can be characterized as obviously substantive or arguably procedural.<sup>193</sup> To take account of the insight I am advancing here, one must start earlier, at “*Erie* Step Zero,” at which we must situate the conflict in its jurisdictional context. For the purposes of this analysis, there is no need to revisit *Erie* analysis in its purest form—where state law arises solely in the context of diversity jurisdiction. Traditional *Erie* analysis is well equipped to address these conflicts. Instead, there are two different jurisdictional contexts that I will focus on here—state law claims that arise as supplemental claims in a federal question case and state law claims over which a district court may assert original jurisdiction because the claim implicates a substantial federal interest. In these contexts, we are presented with three choices: apply *Erie* analysis as if the case were a diversity case, not consider *Erie* (or the RDA) at all, or find a way to translate the concerns of *Erie* and its progeny into the federal question context.

The first and second options are not compelling. As to the first, as I have discussed above, if conducting *Erie* analysis requires consideration of the twin aims of *Erie* as defined by *Hanna*, many complications would ensue. For *Hanna* may seek to reduce the incentive to forum shop as much as possible, but the premise of federal question jurisdiction is that some forum shopping is normatively acceptable, if not good.<sup>194</sup> We make federal courts available to vindicate federal interests because we think that federal courts have more experience applying federal law, are more solicitous of federal interests, and will strive for uniformity in application.<sup>195</sup> Similarly, to the extent that *Hanna* focuses on the potential effect that choice of law will have

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193. See *supra* Part II.

194. See, e.g., Sidney Schenckier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U. L. REV. 245, 254–55 (1980) (stating that one purpose of Reconstruction was to provide a federal forum for resolution of federal claims); see also Doe v. City of Chicago, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994) (stating that forum shopping is not a concern in arising under cases).

195. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

on inequitable treatment according to citizenship, this concern does not exist in the context of federal question jurisdiction.<sup>196</sup>

As to the second possibility, simply ignoring *Erie* principles and the RDA in nondiversity cases is unsupported by the language of the RDA and the jurisprudence discussed above.<sup>197</sup> The difficulty, however, lies in crafting a middle ground between these two extremes.

To do so, it is worthwhile to return to *Hanna*, which can guide the inquiry in two distinct ways. First, *Hanna* clarifies that when one looks at outcome determinativeness, one should be looking *ex ante* rather than *ex post*—disputes over choice of law will always be outcome determinative *ex post* because the parties would not be arguing about them otherwise. Second, *Hanna* suggests that we should construct our choice of law rules to reduce inappropriate forum shopping and to minimize inequitable treatment of litigants.

Translating *Hanna* into the federal-question context, then, requires that our outcome-determinative test consider factors other than citizenship and the risk that fundamentally state law claims will be driven into federal court to take advantage of substantive law derived from federal sources. Rather than inequity based on citizenship, we should be focused on potential inequity based on the happenstance that a litigant is able to bring a state law claim into a federal forum simply because it overlaps with the factual and legal contours of a federal question claim or simply because it implicates the need to resolve a substantial federal issue.<sup>198</sup> We also would want to avoid adjudicating state law claims differently simply because a litigant has chosen to frame them as supplemental claims to a federal question anchor if the litigant also could have brought them independently as diversity claims.<sup>199</sup> And we might

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196. Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 704 (2009) (“A federal court enforcing legal principles established by the federal Constitution or by federal statute is not generating general common law in the forbidden *Erie* sense. . . . Its doing so does not raise the worry that litigants with similar claims in state courts may receive substantively different outcomes than those in federal court, the ‘mischievous results’ that prompted *Erie* in the first place.” (footnote omitted)).

197. One could argue that state law does not “apply” in federal question cases and that therefore the RDA is inapplicable, but this begs the question.

198. Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527, 557 (2003) (arguing that *Erie* is better characterized as a policy against “treating any litigant who can take advantage of federal jurisdiction differently from those who cannot”).

199. Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087–88 (1964) (“If such were the rule, not only could a party determine the outcome of litigation by a choice of federal or state forum but under some circumstances he could determine it by a choice of federal question or diversity jurisdiction.”). A district court decision in a 1942 trademark case is the first, and only, opinion to consider this question in the unique jurisdictional context where jurisdiction over state law unfair competition claims could be founded on both diversity and supplemental jurisdiction. See Nat'l Fruit Prod. Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 501–05 (D. Mass. 1942), *aff'd*, 140 F.2d 618 (1st Cir. 1944). That opinion began by noting that *Erie* required a close analysis of the choice of law to be applied to the unfair competition claims because the Supreme Court had not yet applied *Erie* beyond diversity cases. The court recognized the arguments in favor of using federal common law in an unfair competition claim pendent to a trademark claim and did not dispute

further distinguish federal question cases where exclusive jurisdiction is present because in that case it is less likely that a litigant has exercised the choice to bring supplemental state law claims in federal court simply to take advantage of choice of law dynamics.<sup>200</sup>

As to forum shopping, we should be on the lookout for cases in which parties choose federal court for reasons other than those recognized as valid for the purposes of arising under and supplemental jurisdiction. The motivation for bringing pendent state law claims in federal court may have nothing to do with forum shopping but instead may relate to efficiency goals or rules of preclusion, which create an incentive to bring the claims together in the same jurisdiction.<sup>201</sup> Indeed, if the federal question claim is the moving force in the litigation, the litigant who invokes supplemental jurisdiction may fundamentally be motivated by the desire to “resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”<sup>202</sup> This choice is one to be supported, not one that should arouse suspicion. And to the extent that forum shopping might be present, it would likely be filtered out by a district court’s application of 28 U.S.C. § 1367(c)(2), which authorizes a district court to decline the exercise of supplemental jurisdiction when the pendent claim “substantially predominates” over the federal question claim.<sup>203</sup> When federal question jurisdiction is exercised over a state law claim that requires resolution of a significant issue of federal law, § 1367 will not operate to weed out cases in which state law substantially predominates, but *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*<sup>204</sup> and its progeny will likely function in the same way.<sup>205</sup>

After one has conducted this outcome-determinative test, modified for federal question jurisdiction, there still is the potential that *Byrd* balancing should play a role. To be sure, if a court decides that the choice between

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its power to do so, but ultimately it concluded that in the absence of statutory direction, and given that the pendent claim also was brought pursuant to diversity jurisdiction, it would apply state law. *Id.* at 503–05. The district court was no doubt influenced by its confidence that Massachusetts state courts had developed a sophisticated common law for treatment of unfair competition claims, but a fair reading of the court’s analysis leaves the impression that this was not dispositive. *Id.* at 504.

200. Stein, *supra* note 37, at 2006 n.161 (making the argument in the context of exclusive jurisdiction).

201. Erbsen, *supra* note 35, at 658 n.286.

202. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005).

203. Some ancillary claims, such as third-party claims, may look differently in this light. In those cases, neither rules of preclusion nor mandatory joinder rules require that such claims be brought in federal court, although efficiency considerations may favor including them.

204. 545 U.S. 308 (2005).

205. In *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), the Court described *Grable* as a case in which the federal issue was “dispositive of the case.” *Id.* at 700. In *McVeigh*, by contrast, the primary issues were “fact-bound and situation-specific,” causing the Court to question why it should “place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum.” *Id.* at 701. Similarly, in *Gunn v. Minton*, 133 S. Ct. 1059 (2013), the Court made clear that a federal issue must be substantial both from the parties’ perspective and, more importantly, from the perspective of the “federal system as a whole.” *Id.* at 1066. Therefore, cases that are heard under the *Grable* gloss on § 1331 will by definition involve important federal interests.

federal and state law is not outcome determinative, then it will be free to apply the federal rule. If a court decides that the choice is outcome determinative, however, it should move to *Byrd* balancing to determine whether federal interests are sufficiently important to outweigh the state interest in applying its rule. For if one is concerned that *Hanna*'s analysis gives short shrift to federal interests in diversity cases,<sup>206</sup> one should presumably be at least as concerned when we move to the federal question context.<sup>207</sup>

I concede that as a bottom-line matter, this analysis may result in courts declaring that some rules are "substantive" for diversity purposes but not for federal question purposes, which will be troubling to some. Some scholars already recoil against the related idea of having "dual readings" of the Federal Rules of Civil Procedure depending on whether the basis for jurisdiction is diversity or federal question.<sup>208</sup> But the Supreme Court itself has acknowledged at times that the line between substance and procedure might differ depending on whether jurisdiction is based on diversity or the presence of a federal question.<sup>209</sup>

Lower courts have implied the same at times,<sup>210</sup> but there is little consistency in how courts have addressed the question. Many courts, applying the intuition that *Erie* applies regardless of the basis for jurisdiction, have concluded that state law controls both the federal and supplemental state law claims, even if they would have disregarded state law were the federal

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206. Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 360 (1977) (criticizing *Hanna* precisely because it shifted focus from the balance between federal and state interests prioritized in *Byrd* to avoidance of forum shopping and litigant inequity).

207. Cf. *id.* at 384 ("It would be unwise, however, to purchase a possibly greater degree of predictability through use of the *Hanna* test where the price is the exaction of inescapable costs on the federal system.").

208. See Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 125 (2011).

209. *Levinson v. Deupree*, 345 U.S. 648, 652 (1953). In *Levinson*, the Court held that federal practice regarding amendments to pleadings applied to an admiralty case but recognized that the issue might be analyzed differently were jurisdiction founded on diversity. *Id.* ("Whether, if this were a diversity case, we would consider that we are here dealing with 'forms and modes' or with matters more seriously affecting the enforcement of the right, it is clear that we are not dealing with an integral part of the right created by Kentucky.").

210. For example, when lower courts heard Telephone Consumer Protection Act (TCPA) cases under diversity jurisdiction, as they had assumed that the TCPA did not create a federal cause of action, they applied *Erie* to choice of law disputes. See, e.g., *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 183–84 (E.D.N.Y. 2007), aff'd, 618 F.3d 214 (2d Cir. 2010), overruled on other grounds, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393 (2010). After the Supreme Court clarified that the TCPA does create federal question jurisdiction, see *Mims v. Arrow Fin. Servs. LLC*, 565 U.S. 368 (2012), however, lower courts felt free to disregard *Erie*, see, e.g., *Bailey v. Domino's Pizza, LLC*, 867 F. Supp. 2d 835, 839–40 (E.D. La. 2012). Even outside of the TCPA context, courts have recognized the possibility that a state law could be substantive for diversity but not federal question contexts. See, e.g., *Doe v. City of Chicago*, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994) (discussing the role of a state law affidavit of merit requirement).

claim brought on its own.<sup>211</sup> And some, while acknowledging the force of the argument that there is a difference between the jurisdictional contexts, ask if providing a different approach for such questions is justifiable as a practical matter.<sup>212</sup> But the lower courts have been forced to address this question without sufficient guidance from the Supreme Court or commentators. Therefore, this Article offers some examples of when my proposed analysis will and will not affect choice-of-law conclusions.

Before turning to some specific examples of how *Erie* Step Zero might have back-end choice-of-law consequences, let me first suggest the circumstances in which my framework will not alter outcomes. For example, in the supplemental jurisdiction context, if it is possible to isolate and apply state law to state claims and federal law to federal claims, then traditional *Erie* analysis should likely control. If, however, the choice of law relates to an issue that cuts across claims or if applying state law will indirectly interfere with or prejudice the adjudication of federal claims, then this analysis offers reasons to question the traditional *Erie* analysis. In those circumstances, *dépeçage*<sup>213</sup> may not be available and a court will have to choose whether to follow state or federal law. Some examples follow.

#### A. Erie Step Zero and Privilege Law

One of the most common areas in which a conflict between state and federal law has arisen in federal question cases with supplemental state law claims is privilege law.<sup>214</sup> Indeed, in the debate regarding the adoption of Federal Rule of Evidence 501, the Senate Judiciary Committee was concerned about how the Rule 501 would be applied in federal question cases

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211. Bradley v. City of Ferndale, 148 F. App'x 499, 511 (6th Cir. 2005) (looking to state law to determine if denial of immunity is subject to interlocutory appeal where a state law claim is supplemental to a § 1983 claim); Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 759 (7th Cir. 2003) (applying state law to a jury instructions issue involving a state law claim in which there was federal question jurisdiction); *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 838 (9th Cir. 2001) ("[A] federal court sitting in diversity applies state law in deciding whether to allow attorney's fees when those fees are connected to the substance of the case."); Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1478 (9th Cir. 1995) (applying state law to determine the fee award where a plaintiff in a civil rights case prevailed on federal and state causes of action); Alvarado v. Fed. Express Corp., Nos. C 04-0098 SI, C 04-0099 SI, 2008 WL 2340211, at \*4 (N.D. Cal. June 5, 2008) ("If the jury had based its verdicts solely on Title VII, federal law would govern the award of fees. Because the jury verdicts were based on both federal and state law claims, however, the *Erie* doctrine dictates that state law governs the issuance of attorney fees."); Chin v. DaimlerChrysler Corp., 461 F. Supp. 2d 279, 283 (D.N.J. 2006) (applying state law regarding attorney's fees in a case in which state law claims were supplemental to claims under the Magnuson-Moss Warranty Act).

212. See, e.g., Erbsen, *supra* note 35, at 658 n.286 (acknowledging possible difference in interpretive approaches, but inviting analysis of whether "such confusing differences are necessary in practice").

213. *Dépeçage* is a choice of law technique in which rules from different legal systems are used for different aspects of a lawsuit. See, e.g., Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 794 n.8 (2d Cir. 1980).

214. Kaminsky, *supra* note 109, at 948 (recognizing that the question of privileges becomes more difficult when there are supplemental state law claims in a federal question case).

with pendent state law claims.<sup>215</sup> But Rule 501 did not resolve the problem, stating unhelpfully that where state law “supplies the rules of decision,” privilege claims should be governed by state law.<sup>216</sup> The intent was to incorporate *Erie* analysis into Rule 501 because there was some question about whether state law as to privileges would be considered “substantive” under *Hanna*.<sup>217</sup> This works fine in a diversity case but not in a federal question case with pendent state law claims, because states recognize privileges from disclosure that could limit both the information disclosed during pretrial discovery and the evidence presented at trial.<sup>218</sup> If state law privileges were applied during pretrial discovery to bar access to information relevant to a federal question claim, it could substantially interfere with enforcement of a federal right. If it were enforced during trial, such that relevant statements were not admissible at all, even on federal law claims, or certain statements were admissible on certain claims but not others, it would either directly or indirectly interfere with distinct federal interests.

Using the framework proposed here, however, would clarify how courts should resolve these issues. For example, if the state law privilege barred access to evidence or discovery that was relevant only to the state law claim, it could be enforced in full—in this circumstance, there would be no conflict between applying state and federal privilege law. To the extent that there is a conflict, however, one could rely on the modified *Erie* analysis to resolve it. Do we expect, *ex ante*, that a federal forum was chosen so as to take advantage of the federal privilege laws in the adjudication of the state law claim? Is there a concern about inequity in the application of state privilege law because of the happenstance that in this case the state law claims share common facts with a federal question claim? Even if the answers to these questions suggest that the choice of law is outcome determinative, how should the federal interests be balanced against those of the state? Without suggesting an answer to these questions, if enforcement of the state law privilege law will have an impact throughout the entire case, it is more likely that a court should choose to enforce federal common law.

As it turns out, most courts have come to a similar conclusion. Some courts have held that federal law applies across the board to both the federal claim and pendent state law claims.<sup>219</sup> Others have held that the federal law

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215. *Id.* at 958–60 (detailing rulemakers’ concern that Federal Rule of Evidence 501 might apply differently depending on the jurisdictional basis of the claim).

216. FED. R. EVID. 501; *see also In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at \*1 (S.D. Ill. Apr. 12, 2011) (MDL action).

217. *See H.R. REP. NO. 93-650*, at 9 (1973) (stating that privilege rules should be considered substantive for *Erie* purposes); *see also In re Grand Jury Investigation*, 918 F.2d 374, 379 n.6 (3d Cir. 1990); *Laxalt v. McClatchy*, 116 F.R.D. 438, 446 (D. Nev. 1987); *Theodore Campagnolo, The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 500 (2002); Korn, *supra* note 28, at 75.

218. Rule 501 applies to all stages of a civil proceeding, not just at trial. *See FED. R. EVID. 1101(c)*.

219. *See Tucker v. United States*, 143 F. Supp. 2d 619, 622–25 (S.D. W. Va. 2001) (applying federal privilege law to a Federal Tort Claims Act claim and to a pendent state law

of privilege governs where the evidence sought is relevant to both federal and state law claims, an outcome more consistent with my proposed framework.<sup>220</sup> But more difficult questions remain, particularly in the context of state law claims for which there is original jurisdiction because of an embedded substantial federal issue. In those cases, it may be impossible to apply state privilege law to part of the claim and federal privilege law to the rest, but it may also be difficult to define which sovereign provides the rule of decision. Applying my framework, however, it seems unlikely that one should even conclude that the choice between federal and state law is outcome determinative in the relevant sense, for the very reason that federal jurisdiction is available for the claim is because of the benefits of having a federal forum to adjudicate an important federal issue.

#### B. Erie Step Zero and Affidavits of Merit

Many states require that an affidavit of merit be filed contemporaneously with a complaint or shortly after a complaint has been filed when a claim relates to medical malpractice.<sup>221</sup> Most courts have concluded that these requirements are substantive for *Erie* purposes and therefore have applied them in diversity cases.<sup>222</sup> Yet courts have not required that an affidavit be filed to support a claim based on federal law that involves deficient medical care, such as an Eighth Amendment violation for deliberate indifference.<sup>223</sup> Where state law claims for deliberate indifference are joined to a federal question claim, my proposed framework provides a simple solution: an affidavit of merit may be required under state law to pursue the state law claim but not to pursue a claim based in federal law. Even though many state's affidavits of merit define the cases to which the rule applies broadly enough to encompass constitutional claims for deliberate indifference,<sup>224</sup> applying the state law across the board would significantly interfere with federal interests.

#### C. Erie Step Zero and Cost Shifting

Several courts have held, in the supplemental jurisdiction context, that the *Erie* doctrine requires that state law govern awards of attorney's fees in cases

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claim, based both on interpretation of Rule 501 and principles of uniformity); *In re Combustion, Inc.*, 161 F.R.D. 51, 53–54 (W.D. La.), *aff'd*, 161 F.R.D. 54 (W.D. La. 1995) (finding that federal law applied across the board in part because the relevant federal statutes both provided for exclusive jurisdiction).

220. See *supra* note 108.

221. See Meryl J. Thomas, Note, *The Merits of Procedure vs. Substance: Erie, Iqbal, and Affidavits of Merit as MedMal Reform*, 52 ARIZ. L. REV. 1135, 1139 (2010) (surveying state statutes and reporting that more than a third of states have adopted this requirement).

222. See, e.g., Larca v. United States, 302 F.R.D. 148, 158 (N.D. Ohio 2014) (collecting authorities).

223. See, e.g., Jackson v. Grondolsky, No. 09-5617 (NLH/KMW), 2012 WL 960450, at \*13 (D.N.J. Mar. 20, 2012); Doe v. City of Chicago, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994).

224. See, e.g., OHIO REV. CODE ANN. § 2305.113 (West 2015).

where a judgment is based on both federal and state claims.<sup>225</sup> The framework I propose here would raise questions about this approach. For it is well recognized that, in areas such as Title VII, for instance, fee- and cost-shifting provisions are part and parcel of effective enforcement of the statutory regime.<sup>226</sup> Thus, if applying state fee-shifting rules to federal law claims undermined those substantive goals, it may be inappropriate to do so. It may be that in cases that have common facts, costs and fees attributable to a state law claim are indistinguishable from those attributable to a federal law claim. But if that is the case, one still needs a valid reason to choose state law over federal law to govern cost shifting.

#### D. The Boundaries of Erie Step Zero

There are other examples in which *Erie* Step Zero might apply, such as commencement of an action for statute of limitations purposes,<sup>227</sup> the availability of remedies such as an anti-SLAPP motion,<sup>228</sup> application of forum non conveniens doctrine,<sup>229</sup> or the impact of settlement releases and assignability of interests.<sup>230</sup> Consider the dispute at issue in *Town of Newton v. Rumery*<sup>231</sup>: there the Court addressed whether a release-dismissal agreement purporting to bar a person from filing a civil rights action in return for a prosecutor's dismissal of pending criminal charges was invalid as against public policy. The Court rejected the First Circuit's per se rule invalidating such agreements and held that the bar should apply in that case because the would-be plaintiff had voluntarily entered into the agreement, there was no evidence of prosecutorial misconduct in obtaining the agreement, and no indication that enforcement of the agreement would

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225. See *supra* note 211.

226. See, e.g., SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 4, 62 (2010); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 793–94 (2011); cf. *Chambers v. Nasco, Inc.*, 501 U.S. 32, 55–56 (1991) (concluding that the district court acted within its discretion in a diversity case by invoking its inherent power and assessing attorney's fees and expenses as a sanction for a party's bad faith litigation conduct, and rejecting an *Erie* challenge to the district court's action).

227. Although state law governs commencement in diversity cases, see *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980), federal law governs commencement in federal question cases, see *West v. Conrail*, 481 U.S. 35, 39 n.4 (1987). While it may be possible to apply state and federal law simultaneously in some supplemental jurisdiction cases, a court would have to make a choice in those cases in which § 1331 jurisdiction is asserted over a state law cause of action.

228. *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 63 F. Supp. 2d 1127, 1129–30 (N.D. Cal. 1999) (applying anti-SLAPP law to state law claims asserted pendent to federal question claims but not to federal question claims).

229. The Supreme Court has, for instance, declined to decide whether forum non conveniens analysis is a matter of state or federal law in diversity cases. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981). But it has at least implied that it should be considered procedural even if state courts might displace federal forum non conveniens law in admiralty and other cases. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 454 & n.4 (1994).

230. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 528–31 (2006) (arguing that "general law," labeled as federal common law, is operative in cases implicating interstate disputes, rights and obligations of the national government, customary international law, and maritime law).

231. 480 U.S. 386 (1987).

“adversely affect the relevant public interests.”<sup>232</sup> The Court, however, left open the question of whether such agreements might be unenforceable in other cases.<sup>233</sup> And in a case like *Rumery* itself, in which the plaintiff had brought § 1983 and pendent state law claims, a difficult question could arise if we assume that state law would apply to the state law claims and federal law—invalidating the agreement—would apply to the § 1983 claims.<sup>234</sup>

Nonetheless, there will be limits to our willingness to permit federal court to displace state law in the examples I have provided. For instance, mere recourse to the argument that uniformity is better when federal law is involved should not typically be enough, absent a showing of how disuniformity would interfere with the effective operation of federal law.<sup>235</sup> And when we examine the potential for conflict between federal and state interests, we might look for more than inconsistency and instead look for a more direct clash.<sup>236</sup> We might also be concerned if applying federal law would “preclude[] the execution of state laws by state authority in a matter normally within state power.”<sup>237</sup> Balancing of state and federal interests will almost always be central to the inquiry.<sup>238</sup>

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232. *Id.* at 397–98.

233. *Id.* at 398 & n.10; see, e.g., *Vallone v. Lee*, 7 F.3d 196, 198 (11th Cir. 1993) (distinguishing *Rumery* because the plaintiff presented evidence that he had been coerced into signing the agreement); see also *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1210 (3d Cir. 1993) (distinguishing *Rumery* on voluntariness and public interest grounds).

234. In *Livingstone*, the court assumed, in the absence of briefing, that state contract law would govern the state law claims but concluded that the outcome would be the same under both federal and state law. See *Livingstone* 12 F.3d at 1209 n.6. In a Northern District of Ohio case, the parties did not address a similar question, and the court made no assumption about which law would apply to the state law claims. See *Kinney v. City of Cleveland*, 144 F. Supp. 2d 908, 910 n.1 (N.D. Ohio 2001). A court in the District of Puerto Rico appears to have assumed that its analysis of waiver law for the purposes of § 1983 was sufficient to permit supplemental jurisdiction claims to go forward as well. *Valle Colon v. Municipality of Maricao*, No. 09-02217(PG), 2011 WL 1238437, at \*13 (D.P.R. Mar. 23, 2011). And a Northern District of Oklahoma court relied on the potential merit and value of the plaintiff’s federal and supplemental state law claims to distinguish *Rumery* and invalidate the waiver as applied to all claims. See *Spradlin v. City of Owasso*, No. 12-CV-497-JED-FHM, 2014 WL 1664974, at \*4 (N.D. Okla. Apr. 25, 2014).

235. Helen Hershkoff, *Shady Grove, Duck-Rabbits, Clear Statements, and Federalism*, 74 ALB. L. REV. 1703, 1720–22 (2011) (criticizing the Court’s implicit “clear statement” rule applied in *Shady Grove* and proposing alternative approaches to balancing federal interest in uniformity against “important state substantive concerns”); Theresa C. O’Loughlin, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 840–41 (1976) (proposing that courts should look at whether a lack of uniformity would interfere with “the functioning of a specific federal program” by making it administratively impracticable or if disuniformity would conflict with the federal program).

236. O’Loughlin, *supra* note 235, at 838 (arguing that federal law should control if state law operates as “a direct negation of particular purposes of the federal program”; otherwise, courts should balance federal and state interests).

237. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (declining to use a uniform federal rule in a rate regulation case).

238. Kaminsky, *supra* note 109, at 939 (arguing that federal courts should balance the particular federal interests involved in a given case against the rationale of the relevant state evidentiary privilege when deciding which privilege law to apply in federal question litigation); O’Loughlin, *supra* note 235, at 829–30.

At the same time, however, it should be clear that my proposal does not necessarily run afoul of federalism concerns. Even in diversity cases, the Court has recognized that federal common law can displace state law.<sup>239</sup> There also is federal power to displace state law to the extent it is necessary to make the exercise of supplemental jurisdiction more effective. Take Justice Antonin Scalia's opinion for the Court in *Jinks v. Richland County*.<sup>240</sup> In that case, a South Carolina county argued that 28 U.S.C. § 1367(d), which tolls the statute of limitations for state law claims brought initially in federal court over which a district court declines to exercise supplemental jurisdiction, was unconstitutional because it displaced a state statute of limitations.<sup>241</sup> The Supreme Court held that § 1367(d) was within Congress's power, despite the fact that it affected a right that was "substantive" within the meaning of *Erie*, for two reasons: (1) it "promotes fair and efficient operation of the federal courts and is therefore conducive to the administration of justice" and (2) "it eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact.'"<sup>242</sup> My proposal here takes the intuitions from *Jinks* and suggests that that power could be exercised, through the RDA, in federal question cases.

This reasoning, of course, does not eliminate the separation of powers problem implicitly raised by *Erie* and its progeny when judges stray further from the explicit dictates of a statute or from the dictates of the Rules Enabling Act.<sup>243</sup> There are forceful arguments against an expansive judicial role in creating federal common law, particularly when state sovereignty is threatened as a result. And this approach to *Erie* questions has had impact beyond traditional choice-of-law conflicts. The view that *Erie* compels application of state law in federal question cases has undoubtedly contributed to the general skepticism of federal court lawmaking power even outside of traditional *Erie* conflicts. Thus, whether it be filling gaps in a statutory framework in federal question cases,<sup>244</sup> inferring a damages remedy from the

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239. See *supra* notes 58–67.

240. 538 U.S. 456 (2003).

241. The petitioner in *Jinks* initially filed a § 1983 claim in federal court with supplemental state law claims. *Id.* at 460. The district court granted summary judgment on the § 1983 claims and declined to exercise jurisdiction over the state law claims. *Id.* Petitioner refiled in state court but had her jury verdict reversed by the South Carolina Supreme Court, which reasoned that § 1367(d) could not toll South Carolina's statute of limitations, because it interfered with the state's sovereignty. *Id.*

242. *Id.* at 462–63 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

243. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982) ("Nothing could be clearer from the pre-1934 history of the Rules Enabling Act that the procedure/substance dichotomy . . . was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress."); see also Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 757–59 (1986) [hereinafter Burbank, *Interjurisdictional Preclusion*].

244. See *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) ("Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards or when express provisions in analogous statutory schemes embody congressional

Constitution,<sup>245</sup> or implying a private right of action from a federal statute,<sup>246</sup> federal courts are increasingly hesitant to exercise what might be associated with the common-law-making power exercised in the pre-*Erie* period.<sup>247</sup>

Despite the force of these arguments, substantial criticism has been levied against the argument that *any* lawmaking power exercised by the federal courts is inconsistent with separation of powers principles.<sup>248</sup> And even scholars who argue for an extremely formal and limited role for federal common law—stemming from a principle such as “judicial federalism”—acknowledge that the RDA’s “require or provide” language is broad enough to tolerate some federal common law.<sup>249</sup> Or, as Professor Steve Burbank put

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policy choices readily applicable to the matter at hand. Otherwise, we have indicated that federal courts should ‘incorporat[e] [state law] as the federal rule of decision,’ unless ‘application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.’” (alterations in original) (citations omitted) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)); *see also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting) (tracing the *Erie* doctrine to reluctance to fill in gaps); Mark J. Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543, 573 n.156 (acknowledging that state law might inform the law of contribution in federal securities law cases, even if *Erie* does not apply, because federal courts may still look to state law for the rule of decision when the federal statute is silent); Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107, 142 (2012) (noting that the Court has relied on *Erie* to cast doubt on federal courts’ power to fill in interstices in federal question cases, “unless federal courts’ authority to do so is clearly contemplated by a federal statutory scheme”). *But see* Lind, *supra* note 26, at 285–86 & nn.146–51 (citing examples of federal question cases in which courts declined to adopt state law comparability review of damages awards because of a conflict with federal common law).

245. *Carlson v. Green*, 446 U.S. 14, 39 (1980) (Rehnquist, J., dissenting) (analogizing the jurisprudence of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to federal common-law-making power “repudiated” by *Erie*); Berzon, *supra* note 196, at 703–04 (arguing that the conflation of *Bivens* jurisprudence with pre-*Erie* federal common law misreads *Erie* because when enforcing the Constitution or federal statutes, there is no need to worry over whether “litigants with similar claims in state courts may receive substantively different outcomes than those in federal court”).

246. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (linking *Erie* to a “significant rethinking” of the role federal courts play in implying private rights of action); *id.* at 730–31 n.19 (suggesting that “more expansive common law power related to 28 U.S.C. § 1331” might be inconsistent with *Erie*); Cannon v. Univ. of Chi., 441 U.S. 677, 742 (1979) (Powell, J., dissenting) (arguing that *Erie* compels the abandonment of the implied right of action doctrine of *Cort v. Ash*, 422 U.S. 66 (1975)); *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (“As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie*.”).

247. Looking just at *Bivens* jurisprudence, for example, the Supreme Court has refused since 1980 to recognize any new *Bivens* cause of action. *See generally* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens After Minneci*, 90 WASH. U. L. REV. 1473 (2013).

248. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498–502 (1987) (“[T]he structure of the Constitution, the apparent expectations of the Framers, and two hundred years of Supreme Court practice establish the authority of federal courts to make law, subject to legislative override.”).

249. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 31–32 (1985) (“A more cautious conclusion would be that the Rules of Decision Act is at least consistent with what is conventionally thought of as ‘interpretation’—enforcing the intentions of the draftsmen of the text.”). For Merrill, however, judicial displacement of state law by federal common law is only appropriate when “inability to impose a federal common law rule could frustrate specifically intended federal policies.” *Id.* at 34. Merrill identifies

it slightly differently, “If the Constitution or acts of Congress, fairly read, provide for or require federal common law, state law does not apply” within the meaning of the RDA.<sup>250</sup> In that sense, the proposal I present here could be viewed as one method for determining when federal law requires or provides for federal common law.

#### CONCLUSION

For too long, courts and commentators have assumed that *Erie* analysis applies to RDA problems in nondiversity cases without fully elaborating on what that means. My goal in this Article is to show that we need a different framework for addressing RDA problems in federal question cases, one that takes some of the broad insights from *Erie* and its progeny but translates them across jurisdictional lines. *Erie* Step Zero provides this structure, focusing on the specific forum shopping, inequity, and balancing concerns that can be implicated outside of the diversity context so as to ensure that courts do not reflexively displace federal law *in any case in which a state law claim is presented*. Although my proposed framework may not result in radically different outcomes in federal question cases, I hope that it provides a better guide to decision making.

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three specific instances in which this circumstance might justify the assertion of common-law-making power: first, and easiest to square with the RDA, are those situations in which statutory interpretation based on the specific intentions of the drafters provides the applicable federal rule; second is where a uniform federal rule is “necessary . . . to preserve or effectuate some other federal policy that can be derived” from the drafters’ intentions; and third is where the drafters’ intentions provide evidence that federal courts have been given “reasonably circumscribed” lawmaking power. *Id.* at 47.

250. Burbank, *Interjurisdictional Preclusion*, *supra* note 243, at 757–59, 762.