



State Law in Federal Courts: *Erie* and Its Entailments

Recall the theme of this section—the constitutional framework for U.S. litigation. The two preceding chapters have illustrated the two principal means by which the Constitution creates that framework: It limits the powers of states over defendants, and it enumerates (thereby limiting) the powers of the federal courts. The first limitation appears in the doctrines of personal jurisdiction, the second in those of federal subject matter jurisdiction. The Constitution thus requires state courts to share power with one another and with a federal judiciary. This chapter explores an entailment of that shared power: How does the Constitution ensure that these two court systems respect each other's spheres of power?

The question arises because state and federal courts not only share power, but they exercise overlapping jurisdiction. For example, under modern understandings of personal jurisdiction, several different states—and the state and federal courts in those states—may have jurisdiction to hear a case against a particular defendant. Similarly, state courts can hear cases arising under federal law, and federal courts, sitting in diversity, can hear cases that arise under state law. Under these circumstances both state and federal courts frequently face a question that arises from this overlapping jurisdiction: What law applies to the case before us?

Consider a fairly simple case: Al (from Arizona) sues Barb (from Texas) on a claim for an allegedly unpaid loan for \$100,000; Barb has substantial contacts with Arizona, so she could be sued in a state court either there or in Texas. Moreover, as you have seen in the preceding chapter, the case would also fall under the diversity jurisdiction of the federal courts and so could be filed in federal courts in Arizona and Texas. Suppose that Barb asserts as a defense that the loan violated the usury laws of Texas. Whose law would apply?

This question would arise in whichever court heard the case, and it opens a broad field of inquiry known as

choice of law or *conflict of laws*. *Erie*, an opinion from which this chapter takes its title, involves a subset of these questions: When a federal court sits in diversity jurisdiction, what law does it apply?

This question, though phrased narrowly, opens the door onto a much larger set of questions about the relations of state and federal courts and of constitutional interpretation. Speaking about part of this problem, one distinguished commentator has written, “No issue in the whole field of federal jurisprudence has been more difficult...” Wright, *Federal Courts* 368. This chapter will seek to explain why someone might take that view—but it also seeks to make the problems much less difficult than this quotation implies.

A. STATE COURTS AS LAWMAKERS IN A FEDERAL SYSTEM

1. The Issue in Historical Context

To understand how the issue arises, one needs a very brief historical perspective. The first Judiciary Act provided for federal diversity jurisdiction and also contained a section now codified at 28 U.S.C. §1652 and known as the Rules of Decision Act:

The laws of the several states, except where the Constitution or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.

On its face, one might think that that statute, in effect since the earliest days of the Republic, would resolve the question. Since diversity cases are in federal court only because of the parties’ citizenship, there isn’t any federal law to apply, so one might think that such cases would be “cases where they [i.e., state laws] apply.” The story is not that simple, however, because people have disagreed sharply about what “the laws of the several states” means, and beyond that what “law” means.

These issues emerged in *Swift v. Tyson*, 41 U.S. 1 (1842), the leading pre-*Erie* case, which *Erie* overrules. *Swift* involved a “bill of exchange,” a halfway step between a promissory note and a modern check or credit card. With promissory notes, there are numerous defenses available to anyone sued for breach; with their modern analogues those defenses are much more limited. The substantive issue in *Swift* was how many defenses could be asserted and thus how much like an ordinary contract and how much like a modern check the bill of exchange was. Procedurally and jurisprudentially (the aspects with which we shall be concerned), the issue was which law applied to the substantive question. *Swift* was a diversity case filed in a federal court sitting in New York. New York courts had previously spoken on the substantive issue, ruling that bills were subject to a number of defenses. Were these New York cases part of “the laws” of that state and thus binding on the federal district court? No, held the U.S. Supreme Court in an opinion by Justice Joseph Story, who not only served on the U.S. Supreme Court from 1811-1845 but also taught law and wrote nine influential treatises—all while serving on the Court!

Story’s opinion, which, according to the dissent, reached beyond what was necessary for the decision, said that the New York precedents were not “laws”; thus, the federal courts sitting in diversity were free to ignore them:

But, admitting the doctrine [concerning which defenses could be asserted] to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that [the Rules of Decision Act] furnishes a rule obligatory on this Court to follow the decisions of state tribunals in all cases to which they apply....In order to maintain the argument, it is essential...that the word “laws” [in the Rules of Decision Act] includes within the scope of its meaning the decisions of local tribunals. In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are at most evidence of what the laws are; and are not themselves laws....The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof....[The court said it would be bound by state statutes and by state judge-made law on matters of peculiarly “local” matters but not on more general topics.] Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules on conclusive authority....

Swift went on to reach a conclusion different from that reached by the New York courts on the issue at stake.

In the ensuing century, *Swift* came to be seen by many not only as momentous, but also as pernicious, not because of its holding on the negotiability of bills of exchange, but because of its treatment of state law. For many federal courts, *Swift* became a charter of judicial independence, a declaration that they could ignore state case law. Often decisions in the *Swift* line of cases seemed to favor business interests; one elaborate study argued, “As the number of industrial tort suits continued to increase [from the 1890s on] and Americans endured the most severe depression in their nation’s history, the Supreme Court [used diversity jurisdiction to] shape[] law in ways that enhanced the litigation position of corporate defendants.” Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958*, 245 (Oxford 1992).

Notice that *Swift* reached its conclusion as an interpretation of the Rules of Decision Act, which Congress could

have amended during the years that followed. Congress did not amend the Act. The next step in the story took matters out of Congress's hands.

2. Constitutionalizing the Issue

The *Erie* doctrine arose from a relatively simple dispute. On Thursday, July 26, 1934, Harry Tompkins visited his mother-in-law's house in Hughestown, a village of 2,800 people in northeastern Pennsylvania. He received a ride part of the way home and walked the remaining distance along the railroad tracks of the Erie Railroad, keeping several feet between himself and the tracks. A train passed, and an open door on a refrigerator car struck him and knocked him partially under the train. His right arm was severed. After recovering from his injuries, he sought a lawyer and found 27-year-old Bernard Nemeroff. Although *Swift v. Tyson* was generally understood to benefit corporations, in this case, Nemeroff and his partner, 21-year-old Aaron Danzig, believed that they could turn *Swift* to Tompkins's strategic advantage if they sued the railroad in the federal District Court for the Southern District of New York.

Under Pennsylvania law, for whose application the railroad's lawyer argued, Tompkins was a trespasser and the railroad was therefore liable only for "wanton" negligence, a finding unlikely given the facts. The judge, relying on the freedom given by *Swift v. Tyson*, instead instructed the jury according to the "general law," that the railroad was liable even if it was guilty of only "ordinary" negligence. The jury returned a verdict for Tompkins in the amount of \$30,000 (almost \$500,000 in 2016 dollars). The railroad appealed, but the Second Circuit upheld Tompkins's verdict relying on *Swift v. Tyson*. The railroad then sought a writ of certiorari from the Supreme Court. In the meantime the railroad asked Justice Cardozo to stay the judgment until the Supreme Court could consider the certiorari petition, and Justice Cardozo obliged. The railroad then made Tompkins a settlement offer—\$7,500 plus the withdrawal of its certiorari petition—but Danzig and Nemeroff talked him out of accepting and then hid him from the railroad's lawyers.

The Supreme Court granted certiorari, even though it rarely did so in negligence cases. On April 25, 1938, the Supreme Court decided the case in one of the last opinions written by Justice Brandeis. The decision went unnoticed until Justice Stone wrote privately to Arthur Krock of the *New York Times*, calling to his attention "the most important opinion since I have been on the court."

PERSPECTIVES

Louis D. Brandeis is remembered as much for his career before appointment to the U.S. Supreme Court as for his work as a Justice. Successful both as a law reformer and as a private practitioner, Brandeis liked to describe himself as "counsel to the situation," a concept that has drawn both high praise for the idea of the lawyer as problem-solver, and criticism for its suggestion that he was prepared to lay aside the interests of some clients to pursue his own idea of justice. Indeed, some of those on the losing side of Brandeis's legal practice bitterly opposed his nomination by President Wilson to the Supreme Court, and six months of wrangling preceded his confirmation in 1916. Best known during his life for cases upholding social legislation, Brandeis wrote *Erie* as one of his last opinions for the Court. In rejecting a statutory basis for the holding in *Erie*, Brandeis departed from a general principle he otherwise espoused—deciding cases on non-constitutional grounds if possible, a principle that has come to be known as "the *Ashwander* principle," after *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring).

Notice that the opinion opens portentously: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved..." That "question" might have come as a shock to the parties, since neither the railroad nor Tompkins had raised or addressed it in their briefs (the railroad simply argued that the law of trespass was sufficiently "local" that under *Swift* the federal courts should follow it).



Erie Railroad v. Tompkins

304 U.S. 64 (1938)

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved....

First. *Swift v. Tyson* held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story:

[T]he true interpretation of the [Rules of Decision Act] limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and extraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

...The federal courts assumed, in the broad field of “general law,” the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given [the Act], and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.⁵

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* There, *Brown and Yellow*, a Kentucky corporation owned by Kentuckians, and the *Louisville and Nashville Railroad*, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the *Black and White*, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of

Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black and White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift v. Tyson* had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in State courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten “general law” vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called “general law” as to which federal courts exercised an independent judgment. [The opinion cited many fields of law.]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction....

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except 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. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401, against ignoring the Ohio common law of fellow-servant liability: “[N]otwithstanding the frequency with which the doctrine [of *Swift v. Tyson*] has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.”

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,” that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts “the parties are entitled to an independent judgment on matters of general law”:

[B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else....The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, “an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.” In disapproving that doctrine we do not hold unconstitutional §34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Mr. Justice REED.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion except insofar as it relies upon the unconstitutionality of the “course pursued” by the federal courts....

To decide the case now before us and to “disapprove” the doctrine of *Swift v. Tyson* requires only that we say that the words “the laws” [in the Rules of Decision Act] include in their meaning the decisions of the local tribunals....[T]his Court is now of the view that “laws” includes “decisions,” [and] it is unnecessary to go further and declare that the “course pursued” was “unconstitutional,” instead of merely erroneous.

The “unconstitutional” course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate....If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. The Judiciary Article and the “necessary and proper” clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution....

[Dissenting opinion of Justices BUTLER and MCREYNOLDS is omitted.]

Notes and Problems

1. What is the connection between the doctrine announced in the decision and the outcome?
 - a. Under the circumstances of this case, why did it matter to Harry Tompkins (or to the Erie Railroad) whether *Swift* was overruled?
 - b. Tompkins won in the trial court. The U.S. Supreme Court seems to assume that if the tort law of Pennsylvania applied to the facts of the case, the railroad would owe Tompkins only the duty of refraining from wanton or willful negligence. Tompkins had a better chance of preserving his verdict if the railroad owed him a higher degree of care. Tompkins’s lawyers pointed to a different source of law, one requiring such a higher standard of care. What was that source?
2. With the practical consequences framed, turn to the doctrine.
 - a. According to the opinion, what is the source of the federal courts’ duty to follow Pennsylvania judge-made law in this case? The most obvious answer is to point to the Rules of Decision Act, requiring federal courts to apply state law in appropriate cases.
 - b. Yet the opinion states that the Court is overruling *Swift v. Tyson* on constitutional grounds. Notice that the opinion cites no particular phrase or clause of the Constitution, a somewhat unusual omission for a case otherwise insisting that the Constitution provides the basis for its decision.
 - c. Consider two sentences from the opinion, at the start of the part labeled “Third”: “Except 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. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” Do those sentences, which some have described as “structural federalism,” explain how the decision has constitutional roots? The generally accepted answer is that respect for states includes respect for a state’s decision to give part of its lawmaking powers to courts rather than to legislatures. If a state is content to have its judges make some of its laws in the process of adjudicating cases, the federal government—including federal courts—must respect that decision. Those propositions, the

argument continues, are inherent in the federal structure of government, a structure expressed throughout the Constitution, and incorporated by allusion in the Tenth Amendment (since the Constitution did not strip the state courts of lawmaking powers, they retain them). Does that explanation illuminate the idea that *Erie* is a constitutional decision even though the opinion does not rest on any particular clause of the Constitution?

- d. If *Erie* is not a constitutional decision, Congress could change its result. How?

Procedure as Strategy

Swift v. Tyson was often criticized—by Justice Holmes and others—as allowing corporations to manipulate the substantive law to their advantage. Notice, however, that here Harry Tompkins’s lawyers figured out how they could use diversity jurisdiction *against* the railroad. Further notice the irony that Justice Brandeis, often a champion of the “little guy,” makes constitutional law at Tompkins’s expense.

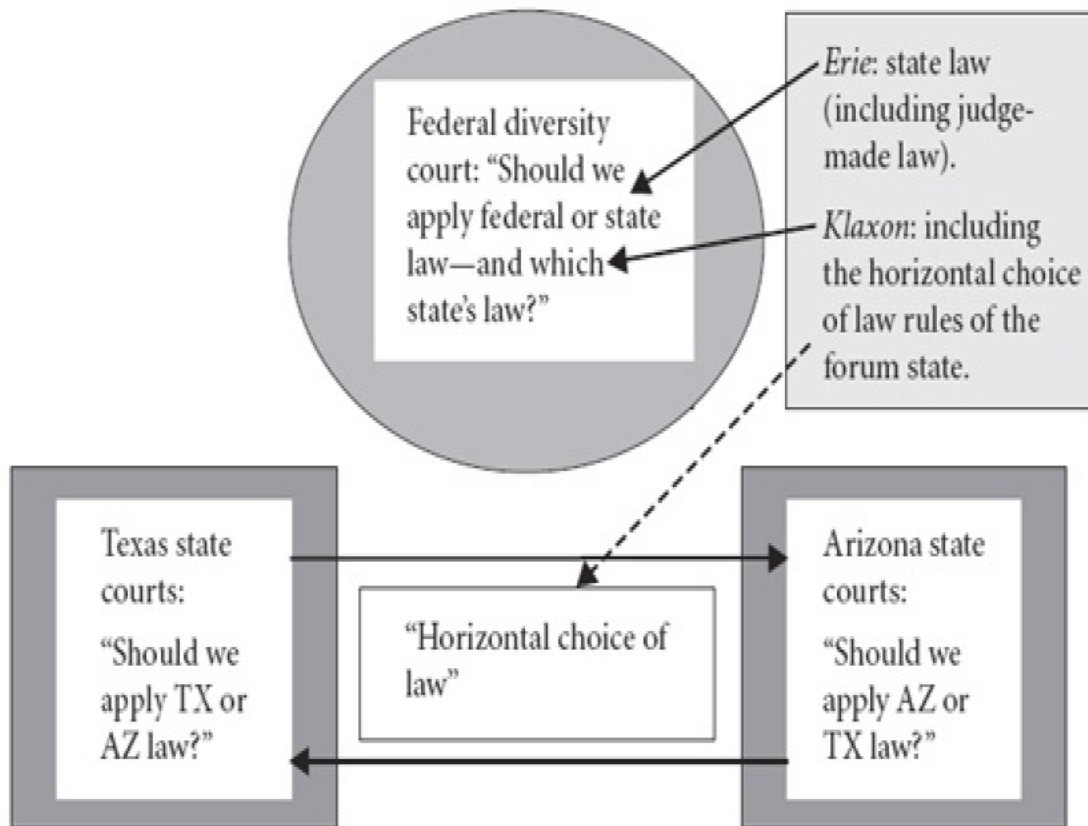
Implications

THE SURPRISING AFTERLIFE OF FEDERAL COMMON LAW

Erie says that “there is no federal general common law.” One can easily understand this sentence to mean more than it does. *Erie* holds only that “general” federal common law may not displace that of the states in areas in which the Constitution rests lawmaking power in the states. But—confined to its proper sphere, federal common law continues to flourish: Think of the hundreds of federal causes of action, in which courts must supplement general statutory or constitutional principles with judge-made common law. For example, Congress granted federal jurisdiction over a broad area of labor law—without providing any guiding substantive principles. The Court held that Congress thereby intended to give federal courts common law powers in this area. *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). In other fields both state and federal courts rely almost entirely on common law. For example, both state and federal courts consult common law to decide on the principles of former adjudication, which you will study in [Chapter 11](#).

In diversity cases, it will be clear that the only source of substantive law must be that of the states, and *Erie* commands federal courts to respect that law, whether made by legislatures or courts. But the *Erie* principle will also apply whenever states supply the governing law, regardless of the basis for federal subject matter jurisdiction. For example, suppose a federal civil rights claim of employment discrimination brought in federal district court, with additional state law claims for breach of contract and state employment statutes, brought under the federal supplemental jurisdiction statute explored in [Chapter 3](#). There’s no diversity in sight, but the principles of *Erie* still apply: The federal courts will look to state law, including state common law, in deciding the state law claims.

3. If one moves from broad constitutional significance back to a more technical plane, one notes that Tompkins’s lawyers filed *Erie* in the Southern District of New York, yet the Court assumed that Pennsylvania law applied. Why?
- Each state has a body of law called its choice of law rules, which specify the circumstances in which courts of that state should follow laws of other jurisdictions, such as those of other states, federal law, or foreign law. Two inferences are possible from the *Erie* Court’s silence on this point. The Court might have thought it absolutely clear that New York courts would have applied Pennsylvania law, or the Court might have thought that the New York conflict of laws rules were irrelevant.
 - A few years after *Erie* came *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), in which the Supreme Court applied *Erie* principles to conflicts rules: Under *Erie* a federal court sitting in diversity must apply the conflicts principles of the *forum state* (legal jargon for the state in which the court sits: in *Erie*, New York was the forum state).



Some have suggested that *Klaxon* was a missed opportunity to redefine diversity jurisdiction, arguing that the federal courts, as a neutral forum, would be well suited to decide which state’s law should apply. Subsequent cases have, however, suggested that the Supreme Court thinks *Klaxon* well embedded. *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding that even when a case is transferred to a federal court in another state it “takes with it” the substantive law and choice of law rules of the state where it was originally filed).

4. Much of the Court’s discussion in *Erie* is devoted to the evils of forum shopping. By “forum shopping” the Court seems to mean the practice of a litigant’s selecting one rather than another court in which to sue, in the hope that the court will in some way treat the litigant more favorably than another court that might have heard the case. For example, under *Swift v. Tyson* there were several circumstances in which federal courts would enforce contracts that state courts would have refused to enforce. In such an instance, a plaintiff hoping to enforce such an agreement would “shop” for a forum (in this case the federal courts) that would enforce it.
 - a. What’s wrong with different outcomes? If a federal judge believes that she has come up with the proper solution to a particular legal problem, doesn’t it deny justice to the parties to rule to the contrary simply to imitate the state court’s predicted result?
 - b. What’s wrong with forum shopping? *Erie* seems to assume that forum shopping between state and federal courts is the major problem. At the time of *Erie*, Tompkins could have sued the railroad in Pennsylvania, in New York, and perhaps in several other states where it did business; each of those states would likely have taken a slightly different approach to his case. Seven years after *Erie*, the Court decided *International Shoe*, thus giving its constitutional blessing to an extended jurisdictional reach for state courts. With this extension, plaintiffs will often have a choice of several different states in which to sue a defendant, and those states may have different substantive laws. So, one might understand *Erie* not as a demonization of forum shopping, but as a limitation on the power of federal courts to decide the law applicable to state law disputes.
5. *Erie* was the first civil case heard by Judge Mandelbaum, the trial judge. Judge Mandelbaum was a product of New York machine politics and, over strong protest from the bar, was appointed to the bench by President Roosevelt. Before his appointment, Mandelbaum had visited the federal courthouse only once, to see what it looked like. His notes, penned in the margin of his copy of the Supreme Court’s *Erie* opinion and reported in

Irving Younger, *Observation: What Happened in Erie*, 56 Tex. L. Rev. 1011, 1030 (1978), suggest a different perspective on the case: “Because the Swift Tyson case[,] although before this case I never knew of its existence to be truthful[,] and for the confusion this decision brought about, it might have been better to leave it alone and stand by good old Swifty.”

PERSPECTIVES

1938 Was a Tough Year to Be a Lawyer

Erie—decided in 1938—changed the way federal courts thought about judge-made law. The same year brought another, even bigger, change: 1938 was the year in which the Federal Rules of Civil Procedure became effective. As you will see throughout this course, those rules transformed procedure in many ways. You may have wondered what procedures the federal courts followed before the Rules. The answer comes in two tiers. A federal statute, known as the Conformity Act, ordered the federal courts to follow whatever procedural rules existed in the state where the federal court sat. So a federal court in New York would follow New York procedural rules and a federal court in California would follow that state’s procedural regime—*mostly*. It’s “mostly” because alongside the state procedures decreed by the Conformity Act existed a separate set of rules for the federal courts when they were “sitting in equity”—considering whether to order an injunction or establish a receivership, to use two common examples. These separate equity rules were necessary because not all state courts had equitable jurisdiction. The Rules Enabling Act, 28 U.S.C. §2072, which empowered the Federal Rules of Civil Procedure, also repealed the Conformity Act and “merged” law and equity, making separate equity rules unnecessary. And—that same year saw *Erie*, which overruled *Swift v. Tyson* and the regime it represented. One imagines a lot of lawyers staying up late on many nights trying to understand the brave new world they had entered.

B. THE LIMITS OF STATE POWER IN FEDERAL COURTS

Having struggled with the constitutional ambiguities, you may be distressed to learn that, constitutional basis aside, *Erie* was an easy case for the application of the principle it announced. The remainder of this chapter will consider decisions in which the issue is how to apply the *Erie* doctrine—decisions that require a more subtle look at what that case held.

Erie established that federal courts sitting in a diversity action were bound to replicate state practice in some circumstances. Which circumstances? Though *Erie* did not say so, its setting suggested that at the very least federal courts sitting in diversity should observe state substantive law, whether made by legislatures or by courts. But what about other “laws”? For example, were federal courts sitting in diversity bound to apply state statutes of limitations? If the courts of the state in question did not generally enforce arbitration agreements, could federal courts nevertheless do so if authorized by a federal statute? If a suit in state court could be decided only by a judge, was a federal court precluded from using a jury? If a state statute required personal service of process, did that requirement also apply to process served in a federal diversity action? If a state court were bound to refuse to honor a contractual forum selection clause, were federal courts sitting in that state required to do likewise? If a state legislature orders its appellate courts to reduce excessive damages awarded by juries, does a federal appellate court have the same power?

In the years since *Erie*, the Supreme Court has addressed each of these questions (as well as others) in an effort to mediate between opposing principles: that *Erie* requires deference to state courts as lawmaking bodies; and that federal courts are an independent judicial system. Justice Reed’s concurrence in *Erie* raised but did not resolve the question: “The line between procedural and substantive law is hazy, but no one doubts federal power over procedure.” Notice that many of these questions involve issues that could be described as “procedural.” As you read the next cases, consider whether it is true that “no one doubts” federal power over procedure.

1. Interpreting the Constitutional Command of *Erie*

Guaranty Trust Co. v. York

Mr. Justice FRANKFURTER delivered the opinion of the Court....

[Plaintiffs sued a bond trustee in a federal diversity action alleging misrepresentation and breach of trust. New York substantive law governed. Defendant invoked the New York statute of limitations, which had run. Plaintiffs argued that the statute of limitations did not bar the suit because it was on the “equity side” of federal court. The courts of equity had traditionally considered the length of time elapsing between the maturing of a claim and the bringing of suit but had not thought themselves strictly bound by statutes of limitations. Referring to that equitable tradition, the Second Circuit ruled that plaintiffs’ suit was not barred. The Supreme Court disagreed.]

Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies. In overruling *Swift v. Tyson*, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a “brooding omnipresence” of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was “between Citizens of different States” under Art. III, §2 of the Constitution of the United States....

This case reduces itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties....

And so the question is not whether a statute of limitations is deemed a matter of “procedure” in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

It is therefore immaterial whether statutes of limitation are characterized either as “substantive” or “procedural” in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court....

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion. So ordered.

[The dissenting opinion of Justice RUTLEDGE is omitted.]

Notes and Problems

1. *Guaranty Trust* displays a ferocity that impedes analysis.
 - a. The opinion sharply attacks the proposition that if something is “procedural” it is not governed by the rule in *Erie*. Why? The main opinion in *Erie* had asserted no such proposition; is Justice Frankfurter disputing Justice Reed’s concurrence about federal power over procedure?
 - b. Even in the midst of this attack, however, Justice Frankfurter conceded that federal courts need not follow state law that “concern[ed] merely the manner and means by which a right to recover is...enforced.” Isn’t this conceding that Justice Reed was right?
 - c. As you read the rest of the cases in the *Erie* line, consider whether they don’t come down to the question of defining “the manner and means by which a right to recover is...enforced.” (A procedure casebook can be excused for omitting “merely” from the phrase.)
2. To solve the problem of distinguishing between such “manner and mode” issues and the other “substantive” kind, *Guaranty Trust* proposed what came to be known as the “outcome-determinative test.” A state rule that was outcome-determinative was to be followed, no matter how it might be labeled. What does that mean? The standard paper sizes are 8 1/2" × 11" and 8 1/2" × 14". If a litigant offered the clerk of a federal district court a

complaint typed on 8 1/2 × 14-inch paper, but the clerk refused to accept it on the grounds that the rules required shorter paper and the filing cabinets couldn't hold paper 14 inches long, would you call the rule invoked by the clerk substantive because it was outcome-determinative? After all, the plaintiff might very well win in state court but can hardly win in federal court if the complaint can't be filed. If you conclude that the "paper size" rule is not substantive for *Erie* purposes, how would you modify the outcome-determinative rule to exclude cases of this sort?

3. *Guaranty Trust* not only decided a lawsuit; it also asserted that *Erie* marked a revolution in legal thought, a rejection of "Law... as a 'brooding omnipresence' of Reason," a view presumably attributed to those judges (perhaps especially to Justice Story) who had adhered to *Swift v. Tyson*. *Erie* and *Guaranty Trust* asserted that such a view was not only jurisprudentially bankrupt but historically false—that the understanding of the Rules of Decision Act held by its framers was in accordance with that enunciated by *Guaranty Trust* and *Erie*. That understanding exercised a powerful influence over the *Erie* line of cases following *Guaranty Trust*. Consider four such cases.

<i>Case</i>	<i>Issue</i>	<i>Outcome: State or Federal Law/ Practice?</i>	<i>Opinion's Explanation</i>
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	When does lawsuit begin for statute of limitations purposes; when complaint filed (Rule 3) or when defendant served (KS practice)?	State law followed.	"We cannot give [the claim] longer life in the federal court than it would have had in the state court . . . consistently with <i>Erie R. Co. v. Tompkins</i> ."
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)	NJ statute required small shareholder suing corporation to post bond for expenses; Rule 23.1 did not so require.	State law followed.	"[T]his statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, it creates a new liability

<i>Case</i>	<i>Issue</i>	<i>Outcome: State or Federal Law/ Practice?</i>	<i>Opinion's Explanation</i>
			[for litigation expenses] where none existed before. . . .”
Woods v. Interstate Realty Co., 337 U.S. 535 (1949)	MS statute barred out-of-state corporations not paying MS taxes from suing in state courts; should federal diversity court do so?	State law followed without discussing Rule 17(b), which suggests that the governing law should be that of the state of company's incorporation.	“[W]here in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court.”
Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956)	VT barred arbitration of employment practices; federal statute arguably required arbitration.	State law followed.	“If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”

4. The cases in Note 3:
 - a. Each involved a conflict between a state practice and an arguably applicable federal statute or rule of procedure. In all cases the state practice prevailed.
 - b. Represent a high-water mark of *Erie*-compelled deference to state courts. Starting only two years after *Bernhardt Polygraphic*, the last of the series, the Court began to retreat from its almost reflexive bowing to state law.
 - c. Might all be wrongly decided. Later cases have questioned several of these results. From the late 1950s onward the *Erie* cases broke with the pattern of invariably favoring state practice and suggested a different framework for analyzing the *Erie* problem, in the process retreating from *Guaranty Trust*.

Byrd v. Blue Ridge Rural Electric Cooperative

356 U.S. 525 (1958)

Mr. Justice BRENNAN delivered the opinion of the Court.

[Plaintiff was injured while on a construction job for defendant; he sued in tort. Although plaintiff was employed by an independent contractor, defendant contended plaintiff was doing the same work as defendant's regular employees and, therefore, was a "statutory" employee whose exclusive remedy was under the South Carolina Workmen's Compensation Act.]

[Presenting evidence on the statutory employee defense,] respondent's manager testified on direct examination that three of its substations were built by the respondent's own construction and maintenance crews. When pressed on cross-examination, however, his answers left his testimony in such doubt as to lead the trial judge to say, "I understood he changed his testimony, that they had not built three." But the credibility of the manager's testimony, and the general question whether the evidence in support of the affirmative defense presented a jury issue, became irrelevant because of the interpretation given [the state statute] by the trial judge.]

[The Court first decided that the lower courts had incorrectly interpreted the state statute.]

II

A question is also presented as to whether on remand the factual issue is to be decided by the judge or by the jury. The respondent argues on the basis of the decision of the Supreme Court of South Carolina in *Adams v. Davison-Paxon Co.*, that the issue of immunity* should be decided by the judge and not by the jury.

...

The respondent argues that this state-court decision governs the present diversity case and "divests the jury of its normal function" to decide the disputed fact question of the respondent's immunity under §72-111. This is to contend that the federal court is bound under *Erie R. Co. v. Tompkins* to follow the state court's holding to secure uniform enforcement of the immunity created by the State.

First. It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in *Adams v. Davison-Paxon Co.* to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.

The Workmen's Compensation Act is administered in South Carolina by its Industrial Commission. The South Carolina courts hold that, on judicial review of actions of the Commission under §72-111, the question whether the claim of an injured workman is within the Commission's jurisdiction is a matter of law for decision by the court, which makes its own findings of fact relating to that jurisdiction. The South Carolina Supreme Court states no reasons in *Adams v. Davison-Paxon Co.* why, although the jury decides all other factual issues raised by the cause of action and defenses, the jury is displaced as to the factual issue raised by the affirmative defense under §72-111....We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity, *Guaranty Trust Co. v. York*, and not a rule intended to be bound up with the definition of the rights and obligations of the parties....

Second. But cases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., *Guaranty Trust Co. v. York*; *Bernhardt v. Polygraphic Co.* Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity

is decided by a judge or a jury. Therefore, were “outcome” the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command¹⁰—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations, see, e.g., *Guaranty Trust Co. v. York*, supra, cannot in every case exact compliance with a state rule¹²—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts....Perhaps even more clearly in light of the influence of the Seventh Amendment, the function assigned to the jury “is an essential factor in the process for which the Federal Constitution provides.”...

Third. We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow, cf. *Guaranty Trust Co. v. York*, supra, or even the strong possibility that this would be the case. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome....

Reversed and remanded.

[The opinions of Justices WHITTAKER, FRANKFURTER, and HARLAN are omitted.]

Notes and Problems

1. State the holding of *Byrd*.
2. *Byrd* could have been decided under the criterion of *Guaranty Trust*: Unlike previous cases in which the outcome-determinative test had been applied, using a jury rather than a judge in these circumstances might, but would not necessarily, determine the outcome of the case. The Court thus seemed to be going out of its way to find another analysis by which to approach *Erie* problems. That process continued in the next case in this line, to which we now turn.

2. De-constitutionalizing *Erie*

Under both *Guaranty Trust* and *Byrd*, *Erie* questions are constitutional matters; whether federal courts should follow the state practice is a constitutional question. That framing of the issue is consistent with *Erie* itself, which rejected the invitation to reach its decision as an interpretation of the Rules of Decision rather than the Constitution. The next case, while purporting to overrule none of the cases in the *Erie* line, reframes the issue as one of statutory rather than constitutional interpretation. It puts the Rules—and the Rules Enabling Act, 28 U.S.C. §2072—at the front of many *Erie* issues, leaving the Constitution in the background.

Hanna v. Plumer

380 U.S. 460 (1965)

Mr. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The question to be decided is whether, in a civil action where the jurisdiction of the United States district court is based upon diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4[(e)(2)(B)] of the Federal Rules of Civil Procedure.

[The case arose out of a diversity suit for personal injuries. The defendant was the estate of one of the

drivers involved. The issue arose because Massachusetts law provided that suits against an estate required personal service of process on the estate's executor. Process was instead served under Rule 4[(e)(2)(B)], which allowed for the summons and complaint to be left with a competent adult at the residence of any defendant. Defendant was served by leaving the summons and complaint with his wife at his residence. The district court and First Circuit, citing *Ragan* (see the chart in Note 3 supra [page 270](#)), ruled that the claim should be dismissed because plaintiff had failed to comply with the state method of serving process within the applicable statute of limitations.]

We conclude that the adoption of Rule 4[(e)(2)(B)], designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service. Accordingly, we reverse the decision of the Court of Appeals.

The [version of the] Rules Enabling Act, 28 U.S.C. §2072 [then in effect] provide[d] in pertinent part:

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury....*

Under the cases construing the scope of the Enabling Act, Rule 4[(e)(2)(B)] clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the "practice and procedure of the district courts." "The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*...

Thus were there no conflicting state procedure, Rule 4[(e)(2)(B)] would clearly control. However, respondent, focusing on the contrary Massachusetts rule, calls to the Court's attention another line of cases, a line which—like the Federal Rules—had its birth in 1938. *Erie R. Co. v. Tompkins*, overruling *Swift v. Tyson*, held that federal courts sitting in diversity cases, when deciding questions of "substantive" law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act....

Respondent, by placing primary reliance on *York* and *Ragan*, suggests that the *Erie* doctrine acts as a check on the Federal Rules of Civil Procedure, that despite the clear command of Rule 4[(e)(2)(B)], *Erie* and its progeny demand the application of the Massachusetts rule....

In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. "Outcome-determination" analysis was never intended to serve as a talisman. *Byrd v. Blue Ridge Cooperative*. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule.

The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court....The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift v. Tyson*. That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of constitutional problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4[(e)(2)(B)] governs, the litigation will continue. But in this sense every procedural variation is "outcome-determinative."...[I]t is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.

There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that

the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law....(Here, of course, the clash is unavoidable; Rule 4[(e)(2)(B)] says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts.) At the same time, in cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach*.

Nor has the development of two separate lines of cases been inadvertent. The line between “substance” and “procedure” shifts as the legal context changes....It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state “substantive” law and federal “procedural” law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions....

Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.... Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act. Rule 4[(e)(2)(B)] is valid and controls the instant case.

Reversed.

Mr. Justice BLACK concurs in the result.

Mr. Justice HARLAN, concurring....

Erie was something more than an opinion which worried about “forum-shopping and avoidance of inequitable administration of the laws,” although to be sure these were important elements of the decision. I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.¹ And it recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.

The shorthand formulations which have appeared in some past decisions are prone to carry untoward results that frequently arise from oversimplification.... To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether “substantive” or “procedural,” is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

The Court weakens, if indeed it does not submerge, this basic principle by finding, in effect, a grant of substantive legislative power in the constitutional provision for a federal court system, and through it, setting up the Federal Rules as a body of law inviolate....So long as a reasonable man could characterize any duly adopted federal rule as “procedural,” the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State’s substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute. Whereas the unadulterated outcome and forum-shopping tests may err too far toward

honoring state rules, I submit that the Court’s “arguably procedural, ergo constitutional” test moves too fast and far in the other direction....

[Justice HARLAN, applying his test to the facts of the case, found the federal rule controlling, not because it was a Rule, but because it would have at most a negligible effect on the parties’ out-of-court behavior.]

WHAT’S NEW HERE?

- *Byrd* and *Hanna* reach similar results: Both hold that the federal court need not behave as a state court would if it were hearing the case. Moreover, both enunciate multi-tiered “tests” for determining whether federal or state practice should prevail. And they complement each other in one respect: *Hanna*, narrowly construed, tells a federal court what to do when a Rule or federal statute dictates the federal practice; *Byrd* deals with a federal practice not dictated by a specific federal statute or Rule.
- Though complementary, the two cases diverge sharply in their texture. *Byrd* is nuanced, “soft,” and, in many cases, indeterminate—and grounds its analysis directly in the Constitution. *Hanna* is hard-edged and more determinate—and insists that a statute—the Rules Enabling Act—is as important as the Constitution in many *Erie* cases.

Notes and Problems

1. Briefly explain how in *Hanna* the state and federal practices diverged and why the federal court could disregard the state practice.
2. Consider a federal practice flowing from a federal Rule or statute.
 - a. *Hanna* says that the analysis in that situation is relatively easy:
 - i. Is the statute or Rule constitutional? One can hear in this question an echo of *Erie* with its assertion that Congress could not constitutionally dictate tort law to the states. The converse proposition is that Congress can dictate rules of procedure to the federal courts it creates. If the statute is constitutional and tells a federal court to do something, the court must follow the provisions of that statute.
 - ii. At that point, the *Erie* issue ceases to be directly constitutional, becoming instead a matter of statutory construction: What does the governing statute tell the federal court to do? In the case of a Federal Rule of Civil Procedure, the analysis requires two steps, because the Rules are not themselves statutes but a delegation to the Supreme Court to make statute-like rules.
 - iii. Theoretically, one must consider whether the initial delegation (in the Rules Enabling Act, 28 U.S.C. §2072) was constitutional; the few cases to consider the question have said it is. E.g., *Sibbach v. Wilson*, 312 U.S. 1 (1941).
 - iv. One must then ask two questions.
 1. Does the Rule promulgated under the authority of the Rules Enabling Act in fact fit its description: “rules of practice and procedure”?
 2. Is the procedure specified in the Rule constitutional? (For an easy negative example, suppose that Rule 65 allowed seizure of real property without notice or special circumstances.)
 - v. If the Rule passes both these tests, then it must be applied, even if it differs from the state practice in a significant way. If the Rule fails either test (that is, if it is not “procedural” as the Rules Enabling Act uses that term or if it is unconstitutional), then the state practice applies.
 - b. Justice Harlan’s concurrence expresses skepticism about the “tests” a Rule must pass. In fact, no case has ever held a Rule to be beyond the scope of the Rules Enabling Act, though some have suggested that particular Rules (e.g., Rules 23, 68) come close to the line. Nor has any Rule ever been held unconstitutional, though several have been revised in light of constitutional developments that might have made them subject to attack. See, for example, Rule 65(b), which was revised in the wake of due process cases like *Fuentes v. Shevin*, *infra* [page 331](#). Does this record prove Harlan correct?
 - c. To test your understanding of this scheme, apply it to the facts of *Hanna* itself, explaining the source of the conflict between state and federal practice and the reason for following the federal practice.

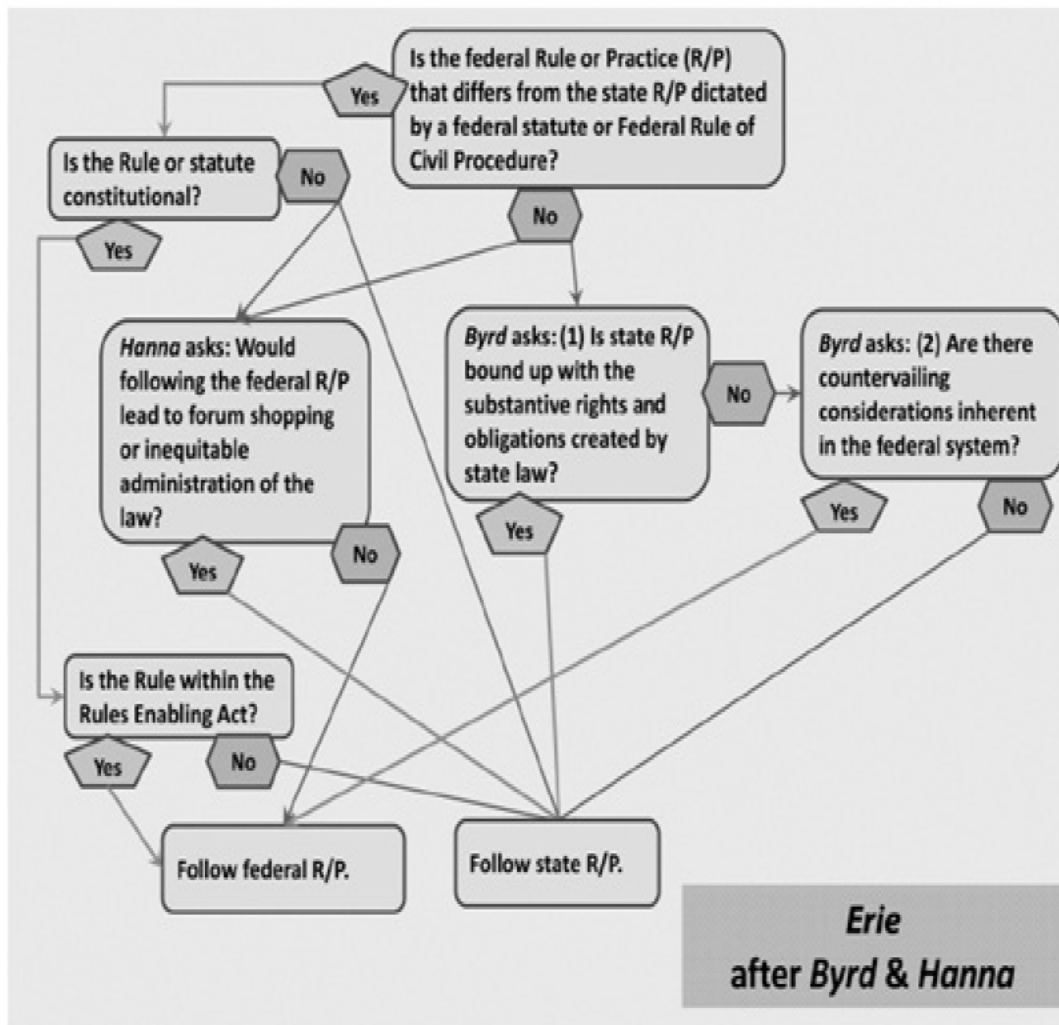
3. Now suppose the federal practice in question is just that—a “practice,” not required by any Rule or statute. What then?
- a. Some examples of such federal “practices”:
 - i. In many state courts, lawyers are free to roam about the courtroom in addressing a jury, while most federal judges ask lawyers to stay firmly anchored behind the lectern.
 - ii. Another might be differences in the manner in which prospective jurors were questioned: Many states, either by law or custom, permit extensive conversations between jurors and lawyers during jury selection; no statute or Rule governs the matter, but in many federal courts judges do all the questioning and do so very quickly.
 - b. *Byrd* and *Hanna* would approach that question in different ways. *Byrd* asks whether the practice in question is “bound up with the substantive rights and obligations created by state law” and, if not, whether there is a countervailing interest inherent in the federal system. In the case of the voir dire practice, the answer to the first question will almost always be “no” and to the second “yes.” *Hanna* asks first whether the practice in question flows from a Rule (no, for voir dire) and, if not, whether following the federal rule would lead to forum shopping or inequitable administration of the law. For voir dire, the answer is uncertain (in some cases, one can imagine a lawyer believing it important to get a good feel for the jury); if, however, the answer is no (that lawyers wouldn’t choose between state and federal court over such a small matter), then *Hanna* arrives at the same outcome—follow federal voir dire practice—by a different route than *Byrd*.
 - c. *Hanna* did not overrule *Byrd*, which it cited with approval. Both cases suggest an approach to a federal practice not dictated by a federal statute or Rule. One finds courts citing both.

Implications

In your constitutional law course, you will study federal “preemption,” a phrase used to describe what happens when federal law occupies a space so completely that it “preempts,” that is, displaces or pushes out state law that might otherwise govern. For example, if Congress today passed a statute defining the law of trespass on the tracks of railroads in interstate commerce, that federal statute would preempt the state law that would otherwise govern. It may be helpful to think of *Hanna* as a preemption case: When a federal statute or Rule defines procedure in some area, that federal law preempts state law that might otherwise govern.

For federal law to preempt, the federal law must be constitutional and otherwise valid. To preempt, according to standard doctrine, a federal law must in some sense be intended to displace state law. *Hanna*’s requirement that a Rule must be valid under the Rules Enabling Act sets forth a test of validity for a Rule—a precondition for its preemptive power.

Byrd deals with a softer form of preemption, in which there is no explicit statute or Rule that displaces state practice, only a “custom.” *Byrd*’s underlying idea seems to be that for the federal courts to constitute an independent judicial system, they must be free to adopt a series of such “practices” (*Byrd* called them “affirmative countervailing considerations”), even when they depart from what a state court would do. Those might include a number of small matters: *Byrd* thus protects a number of such small customs that do not rise to the level of law, allowing them to displace analogous state court customs that diverge from their federal counterparts.



3. Determining the Scope of Federal Law: Avoiding and Accommodating *Erie*

Under *Hanna's* reading of *Erie*, many “*Erie*” questions will not require resorting to the Constitution because Congress by statute or Rule will have told federal courts what to do in the situation. So long as the statute is constitutional (and the Rule conforms to the Rules Enabling Act), the choice of law problem is solved: Federal procedure governs. The difficulty arises when a federal court has to decide whether a federal statute that *might* occupy the area really does or when, by contrast, a federal statute or Rule should be construed not to conflict with a state practice. A number of pre-*Hanna* cases, described supra at pages [270-71](#), raised this issue. Consider some post-*Hanna* examples.

- Federal Rule of Appellate Procedure 38 allows—but does not require—an appellate court to punish frivolous appeals with extra costs. Alabama had a statute that automatically added a 10 percent penalty to an unsuccessful appeal of an award of money damages. In *Burlington Northern R. v. Woods*, 480 U.S. 1 (1987), the Court held that the federal Rule governed in federal courts, reasoning that the discretionary character of Appellate Rule 38 clashed with the mandatory state statute.
- States have varied in their willingness to enforce forum selection clauses. Alabama had a statute making such a clause unenforceable; did that statute govern in federal diversity litigation? No, said *Stewart Org. v. Ricoh*, 487 U.S. 22 (1988). The state statute was displaced by 28 U.S.C. §1404 (which you met in [Chapter 2](#)), which gives the federal courts discretionary power to move litigation to another district in the interests of justice

and for the convenience of the parties. The *Stewart* Court said that a federal court considering such a transfer motion should weigh all the factors, including the forum selection clause, rather than giving automatic effect to the state’s ban of forum selection clauses. *Atlantic Marine Construction* (supra [page 195](#)) suggests that such forum selection clauses should in most cases be enforced—via §1404.

- By contrast, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), struggled to accommodate both state and federal interests. The Reexamination Clause of the Seventh Amendment prohibits federal Circuit Courts of Appeals from re-examining jury verdicts except as permitted at common law. A New York statute required state appellate courts to decide if jury damage awards exceeded “reasonable compensation” and to adjust them downward if they did. The U.S. Supreme Court held that both state and federal interests could be accommodated by allowing the federal *district* courts to conduct such reviews.
- New York has a statute prohibiting class actions that aggregate statutory penalties—so an individual can sue for a \$1,000 statutory penalty, but ten thousand such persons cannot sue as a class, seeking \$10,000,000 in damages. In *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), the Court held that Federal Rule 23, which defines the requirements for bringing federal class actions, displaced the state statute. As the majority saw it, Rule 23 sets forth the requirements for class certification; because it says nothing about forbidding classes seeking to aggregate statutory penalties, a federal court deciding whether to certify a class should focus exclusively on the Rule’s requirements. In dissent, Justice Ginsburg, the author of *Gasperini*, argued that it would be possible to accommodate both the Rule and the state statute, by permitting a class action, but not a class seeking to aggregate statutory penalties.

The next case decides that a state practice overcomes *both* a Rule and what *Byrd* called “affirmative countervailing considerations” of the federal judicial system. It concerns a topic—claim preclusion—addressed in [Chapter 11](#). For those who have not yet considered the issue, claim preclusion (also referred to as *res judicata*) bars relitigation of the same claim after there has been a final judgment on the merits of that claim in a prior proceeding. Different states have different interpretations of the reach of claim preclusion, just as they have different interpretations of contract and tort doctrines. A court deciding whether a claim has been precluded by a prior proceeding should answer the question by applying the law of the jurisdiction that decided the first case. So, imagine that Anna sues Betsy for slander in New York state court, and summary judgment is entered for Betsy. If Anna brings a second suit against Betsy for slander in California, and Betsy seeks a judgment dismissing the case on grounds of former adjudication, the California court should apply New York’s *res judicata* doctrine to determine the preclusive effect of the New York case. The next case considers what law to apply when the first court is a federal district court sitting in diversity. Should the preclusive effect of the federal diversity action be governed by state or federal law?

Semtek Intl. Inc. v. Lockheed Martin Corp.

531 U.S. 497 (2001)

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.

I

Petitioner filed a complaint against respondent in California state court, alleging breach of contract and various business torts. Respondent removed the case to the United States District Court for the Central District of California on the basis of diversity of citizenship, and successfully moved to dismiss petitioner’s claims as barred by California’s 2-year statute of limitations. In its order of dismissal, the District Court, adopting language suggested by respondent, dismissed petitioner’s claims “in [their] entirety on the merits and with prejudice.”...Petitioner [then]...brought suit against respondent in the State Circuit Court for Baltimore City, Maryland, alleging the same causes of action, which were not time barred under Maryland’s 3-year statute of limitations....Following a hearing, the Maryland state court granted respondent’s motion to dismiss on the ground of *res judicata*....The [Maryland] Court of Special Appeals affirmed, holding that, regardless of whether California would have accorded claim-preclusive effect to a statute-of-limitations dismissal by one of its own courts, the dismissal by the California federal court barred the complaint filed in Maryland, since the *res judicata* effect of federal diversity judgments is prescribed by federal law, under which the earlier dismissal was on the merits and claim preclusive....

II

Petitioner contends that the outcome of this case is controlled by *Dupasseur v. Rochereau*, 88 U.S. 130, 135 (1875), which held that the res judicata effect of a federal diversity judgment “is such as would belong to judgments of the State courts rendered under similar circumstances,” and may not be accorded any “higher sanctity or effect.” Since, petitioner argues, the dismissal of an action on statute-of-limitations grounds by a California state court would not be claim preclusive, it follows that the similar dismissal of this diversity action by the California federal court cannot be claim preclusive. While we agree that this would be the result demanded by *Dupasseur*, the case is not dispositive because it was decided under the Conformity Act of 1872 [the pre-Rules legislation] which required federal courts to apply the procedural law of the forum State in nonequity cases....

Respondent, for its part, contends that the outcome of this case is controlled by Federal Rule of Civil Procedure 41(b), which provides as follows:

[Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.*]

Since the dismissal here did not “[state] otherwise” (indeed, it specifically stated that it *was* “on the merits”), and did not pertain to the excepted subjects of jurisdiction, venue, or joinder, it follows, respondent contends, that the dismissal “is entitled to claim preclusive effect.”

Implicit in this reasoning is the unstated minor premise that all judgments denominated “on the merits” are entitled to claim-preclusive effect. That premise is not necessarily valid [as the meaning of the phrase has evolved]....

In short, it is no longer true that a judgment “on the merits” is necessarily a judgment entitled to claim-preclusive effect; and there are a number of reasons for believing that the phrase “adjudication upon the merits” does not bear that meaning in Rule 41(b)....

And even apart from the purely default character of Rule 41(b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules “shall not abridge, enlarge or modify any substantive right,” 28 U.S.C. §2072(b)....In the present case, for example, if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court’s extinguishment of that right (through Rule 41(b)’s mandated claim-preclusive effect of its judgment) would seem to violate this limitation.

Moreover, as so interpreted, the Rule would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938), by engendering “‘substantial’ variations [in outcomes] between state and federal litigation” which would “likely...influence the choice of a forum,” *Hanna v. Plumer*. See also *Guaranty Trust Co. v. York*. With regard to the claim-preclusion issue involved in the present case, for example, the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods. Out-of-state defendants sued on stale claims in California and in other States adhering to this traditional rule would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.¹ We think the key to a more reasonable interpretation of the meaning of “operates as an adjudication upon the merits” in Rule 41(b) is to be found in Rule 41(a)(1)(B)], which, in discussing the effect of voluntary dismissal by the plaintiff, makes clear that an “adjudication upon the merits” is the opposite of a “dismissal without prejudice”:

[Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.*]

The primary meaning of “dismissal without prejudice,” we think, is dismissal without barring the defendant from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself....

We think, then, that the effect of the “adjudication upon the merits” default provision of Rule 41(b)—and, presumably, of the explicit order in the present case that used the language of that default provision—is simply that, unlike a dismissal “without prejudice,” the dismissal in the present case barred refile of the same claim in the United States District Court for the Central District of California. That is undoubtedly a

necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts.²

III

Having concluded that the claim-preclusive effect, in Maryland, of this California federal diversity judgment is dictated neither by *Dupasseeur v. Rochereau*, as petitioner contends, nor by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue. Neither the Full Faith and Credit Clause, U.S. Const., Art. IV, §1, nor the full faith and credit statute, 28 U.S.C. §1738, addresses the question. By their terms they govern the effects to be given only to state-court judgments (and, in the case of the statute, to judgments by courts of territories and possessions). And no other federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action....

It is left to us, then, to determine the appropriate federal rule. And despite the sea change that has occurred in the background law since *Dupasseeur* was decided—not only repeal of the Conformity Act but also the watershed decision of this Court in *Erie*—we think the result decreed by *Dupasseeur* continues to be correct for diversity cases. Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court. This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits. See *Gasparini v. Ctr. for Humanities, Inc.* As we have alluded to above, any other rule would produce the sort of “forum-shopping...and...inequitable administration of the laws” that *Erie* seeks to avoid, since filing in, or removing to, federal court would be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal. See *Guaranty Trust Co. v. York*.

This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests. If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule. No such conflict with potential federal interests exists in the present case. Dismissal of this state cause of action was decreed by the California federal court only because the California statute of limitations so required; and there is no conceivable federal interest in giving that time bar more effect in other courts than the California courts themselves would impose.

Because the claim-preclusive effect of the California federal court’s dismissal “upon the merits” of petitioner’s action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California’s law of claim preclusion (the content of which we do not pass upon today), the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts. The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

WHAT’S NEW HERE?

- An early post-*Erie* case, *Klaxon v. Stentor*, noted supra at [page 265](#), found in *Erie* the command that a federal court applying state substantive law should also apply that state’s choice of law rules.
- *Semtek* takes the idea one step further—and finds that the scope of a federal judgment based on state law should be the same as that judgment *would have had* if a state court had entered it.
- *Semtek* also represents another in a line of cases that confront a Rule—in this case Rule 41(b)—that appears to decide the issue, but then works rather hard to find that the Rule does not apply to the facts before it.
- Before *Semtek* many would have said that Rule 41(b)—with its provision that such dismissals “operate[] as an adjudication on the merits”—did what the opinion says it doesn’t: require that such dismissals had claim-preclusive effect, as they indeed do in nondiversity cases.
- Instead, the opinion says, this language only prevents the plaintiff from refiling a claim in *that same* court. Whether or not you find this interpretation convincing, note that it’s part of the holding: The opinion can get to the common law of preclusion only after it has steered around the Rule 41 issue.

Notes and Problems

1. Understand the issue before the Court.
 - a. Unlike any of the *Erie* cases we have so far encountered, this was not a question of the law to be applied by a federal court in a diversity action. It was instead a question of how a state court, in a subsequent case, should understand a federal judgment in a diversity action. Specifically, the question was whether the state court should look to federal law preclusion doctrine in deciding the scope of the federal diversity judgment. Held: No; instead the second court should give the diversity judgment the same scope *as if* it had been rendered by a state rather than a federal court.
 - b. Further, bear in mind that in claims that might plausibly be brought in several states, states often apply their own statute of limitations. So, if the *Semtek* claim had remained in a California state court, which had concluded that the statute of limitations had run, one can imagine the plaintiff's refiling in Maryland and having Maryland decide to apply its longer statute of limitations.
 - c. Thus put, *Semtek* might sound like an application of *Guaranty Trust*. Suppose California courts wouldn't insist that Maryland treat their judgment of dismissal as binding on Maryland; the outcome should not be different just because defendant took advantage of diversity and removed the case to a federal court in California. As *Hanna* said, rules should not create incentives to shop for a federal forum in diversity cases.
2. The preceding note leaves Rule 41 out of the discussion.
 - a. The Maryland court thought Rule 41 required it to give broad application to a federal judgment. Moreover, the Maryland court was correct in one respect. As you will see in [Chapter 11](#), federal courts have regularly said that involuntary dismissals under Rule 41(b) bar not only the claim pleaded but all claims arising from the transaction or occurrence behind the pleaded claim. To see the breadth of this doctrine, suppose the claim in question had arisen under federal law, and the federal court had dismissed with prejudice, and that the plaintiff then sought to bring a related claim under state law, in state courts. The state courts would be required to bar the claim. *Federated Dept. Stores v. Moitie*, 452 U.S. 394 (1981), so holds.
 - b. It would have been relatively easy to write an opinion saying that these were circumstances under which *Erie* required Rule 41 to give way. What led the Court instead, in a relatively rare unanimous *Erie* case to go in the other direction, ruling instead that a Rule 41 dismissal only "bar[s] the defendant from returning later, to the same court, with the same underlying claim"? Perhaps the Court wanted to avoid a situation in which the outcome would be different depending on whether the case was removed from the California state court. The result of *Semtek* is that the judgment has the same scope as if the case had not been removed. In that sense it harks back to *Guaranty Trust* and to the concerns of *Erie* itself.
 - c. But that reading of Rule 41 creates a problem in non-diversity cases. Suppose a plaintiff brings a federal claim in federal court, and, as in *Semtek*, suffers a Rule 41(b) dismissal on the grounds that the statute of limitations has run. Taking the passage quoted in [Note 2b](#) literally, plaintiff then files the same case in another federal court, hoping to persuade it that the statute has not run. Is the second federal court bound by *Semtek* to consider the question anew? Or is the plaintiff bound by issue preclusion (treated in detail in [Chapter 11](#))—one federal court has already decided the statute ran, and that's that?
3. Finally, notice that some of *Byrd*'s concerns surface in the opinion. Suppose a federal court sitting in diversity dismisses a case under Rule 41(b) for plaintiff's repeated failure to comply with scheduling guidelines. The state courts operate under a much more relaxed scheduling regime. Plaintiff refiles his complaint in state court and, when defendant moves to dismiss on *res judicata* grounds, cites *Semtek*. What result? The federal dismissal should bar the refiling of the claim in state court. It is critically important to the federal court system to be able to enforce scheduling deadlines. Sanctions for noncompliance would be meaningless if a plaintiff could suffer a dismissal under Rule 41(b) and simply refile in state court. The opinion gives just such an example of a situation in which federal interests would dictate following the federal rather than state rule.

Note: Interpreting State Law: An Entailment of Erie

Erie requires federal courts sitting in a diversity action to use state law under various circumstances. That holding requires the federal court to declare state law. Sometimes determining the answer will be a simple matter: A recent state supreme court case has carefully defined it, or the matter is covered in an authoritative statute.

But the question can be far more difficult. What happens if there is no precedent on point, or the only available precedent is some years old, and the area of law has recently shown signs of change? Or what if the question is

complicated by a horizontal choice of law problem like the one that brought forth Judge Henry Friendly's quip: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960). For a state trial judge, such a situation presents difficulties, but she at least has the assurance that if she is wrong, the state appellate courts will straighten things out. Federal judges, compelled to follow *Erie*, generally lack that assurance, because a federal court's erroneous interpretation of state law cannot be appealed to a state court.

What, then, should the federal district judge do? Should she predict what the state court would probably do under such circumstances? Should she act as she thinks a state court should act in these circumstances, even if she thinks they would not behave that way? For that matter, which state court should the federal district court seek to resemble—the state trial court, which is often hesitant to depart from precedent—or the state supreme court?

The same predicament faces the federal courts of appeals. On appeal from the district court's judgment, a federal court of appeals must do its best to decide what the state appellate courts would do when faced with the same appeal. Nor may the courts of appeals simply defer to the district court. *Salve Regina College v. Russell*, 499 U.S. 225 (1991) (federal court of appeals required to review de novo district court's determination of state law).

Under such circumstances, one finds federal courts of appeals making such statements as, "Because we are persuaded by a careful review of the Ohio decisional law, as well as other relevant sources,* that the Supreme Court of Ohio would not construe its statute of limitations so as to preclude recovery in this case, we [do likewise]." *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 659 (3d Cir. 1980). Holdings based on such predictions of state court views are awkward, especially if the predictions later turn out to be wrong.

Consider, for example, the tangle in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), cert. denied, 423 U.S. 1079 (1976). Driver and three passengers were involved in a collision with a truck driven by an independent contractor hauling wheat for Cook. Driver and Passengers each brought actions. Two of the suits were removed to federal courts; the third remained in state court. In the federal court actions defendants won a summary judgment on the basis of 30-year-old state-law precedent relieving Cook of responsibility for the negligence of an independent contractor; the case was affirmed on appeal. Meanwhile, the state trial court had also granted summary judgment—on the basis of the same precedent—but plaintiff appealed to the state supreme court, which overruled the precedent. The state supreme court decision became final more than three years after the original federal appeal.

Six months later, the two federal plaintiffs moved to vacate the federal appellate decision under Rule 60(b), which permits the reopening of a final judgment under limited circumstances. See [Chapter 11](#). In setting aside the federal judgment, the court of appeals emphasized that there had been "divergent results from a common vehicular accident," that plaintiffs had been forced into the federal courts, and that plaintiffs had received substantially different results in the federal courts than they would have in the state courts, in violation of the *Erie* principle.

Contrast *Pierce* with *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994), cert. denied, 513 U.S. 1001 (1994). In 1987, plaintiff invoked diversity jurisdiction to sue a New York art dealer to recover a Monet painting stolen from his family during World War II. The federal court ruled that DeWeerth had failed to satisfy what it understood to be the showing of reasonable diligence in locating stolen property required by state law. Four years later the New York courts in a similar case held that a showing of reasonable diligence was not required under the relevant statute. DeWeerth moved to reopen his federal judgment under Rule 60(b), the same Rule used in *Pierce*. The Second Circuit sharply rejected the attempt:

Erie simply does not stand for the proposition that a plaintiff is entitled to reopen a federal court case that has been closed for several years in order to gain the benefit of a newly announced decision of a state court, a forum in which she specifically declined to litigate her claim.

In an effort to render cases like *Pierce* and *DeWeerth* less frequent, several states have adopted a process called *certification*. In certification the federal court asks the state supreme court for an answer to a question about state law. In cases like *Pierce* and *DeWeerth*, if the state appellate court announced that it was changing the law, a federal diversity court could do likewise. There are, however, several defects in this system. First, the state must have a certification procedure; some do not. Even when the procedure is available and is used, the results are not always satisfactory. Sometimes state courts do not accept the invitation to answer the question about state law. Other times they answer, but in terms that leave the federal courts as perplexed as they were before. Part of the problem flows from the circumstance that the certification process does not simply pass the whole case to the state supreme court (as review, explain why that would violate the premise of diversity jurisdiction). Instead, the federal court frames a question of law that it asks the state court to clarify. But, in a common law system, legal issues often lie deeply embedded in factual contexts, so it is entirely possible for a state court to "answer" a question about state law but leave the federal court entirely unsure how to apply it to the case at hand.

Assessment Questions

- Q1.** Before *Erie*, which was decided in 1938, federal courts...
- A. Followed state procedural law.
 - B. In “arising under” cases followed federal law.
 - C. In diversity cases felt free to ignore state case law.
 - D. Interpreted “laws” in the Rules of Decision Act (28 U.S.C. §1738) to include only state statutes.
- Q2.** When Justice Brandeis wrote in *Erie* of the “unconstitutionality of the course pursued” by the federal courts during the regime of *Swift v. Tyson*...
- A. He referred to the Court’s recent reinterpretation of the Commerce Clause.
 - B. He referred to the Full Faith and Credit Clause.
 - C. He wasn’t clear what exact portion of the Constitution he had in mind.
- Q3.** The *Erie* principle—announced in *Erie* and developed in later cases—that federal courts must in appropriate circumstances follow state decisional law as well as state statutes...
- A. Applies only in diversity cases.
 - B. Applies whenever state law governs a claim or defense.
 - C. Does not require a federal court to ignore a Federal Rule of Civil Procedure.
 - D. Requires a federal court to observe state choice of law rules as well as state substantive law.
- Q4.** A federal court sitting in diversity in the Southern District of New York issues a final judgment dismissing the case. Plaintiff refiles the case in a California state court, and defendant pleads former adjudication as a defense. Which of the following statements are accurate?
- A. If a New York court would treat the judgment as precluding a second suit, the California court should also preclude it.
 - B. California is free to apply its own law of preclusion, and to permit the case to proceed if that is what its law would permit.
 - C. If that dismissal was a sanction for failure to obey discovery orders, the dismissal will bar another action even if both New York and California courts would have permitted that action to go forward.

Analysis of Assessment Questions

- Q1.** A, B, C, and D are all correct responses. A is correct because the “Conformity Act,” repealed when the Federal Rules came into effect in 1938 (the same year as *Erie*), directed the federal courts to follow the procedural law of the state in which the federal court sat. B is correct—then as now: When federal substantive law governs, a federal court will apply it. C is correct, at least in cases governed by “general law”: That’s the holding of *Swift v. Tyson*. D is correct because that’s how *Swift* interpreted the Rules of Decision Act, and that interpretation stood until it was overruled in *Erie*.
- Q2.** C is the only correct response. C is correct because most commentators think the best explanation of *Erie*’s constitutional basis rests not on a specific clause but of constitutional “structure”: The Constitution assumes that states have broad lawmaking powers and that they’re entitled to let their courts (as well as their legislatures) do that lawmaking—and that the federal courts should respect their choices. A and B are wrong because the opinion nowhere references either of these clauses.
- Q3.** B, C, and D are correct. A is wrong because the *Erie* principle will apply whenever state law supplies a claim or defense—as, for example, in a federal question case that includes state law claims brought in under supplemental jurisdiction. B is correct for the reasons explained in A. C is correct (that’s the holding of *Hanna v. Plumer*), though a careful lawyer would note that the courts have sometimes construed Rules in unexpected ways to avoid a conflict with state law (e.g., *Ragan v. Merchants Transfer*, noted at [page 270](#), as well as

Semtek). D is correct because that's the holding of *Klaxon v. Stentor*, discussed at [page 265](#).

- Q4.** A and C are the correct responses. A is correct because that is what *Semtek* commands. C is correct because, as noted in *Semtek*, it will sometimes be necessary to give a federal judgment scope that might differ from that of the state, “where state law is incompatible with federal interests.” The hypothetical in C comes from *Semtek* itself: “If, for example, state law did not accord claim-preclusive effect for willful violation of discovery orders, federal courts’ interests in the integrity of their own processes might justify a contrary federal rule.” The hypothetical assumes that “might” is included in an excess of caution by Justice Scalia.

5. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923).

* [The employer would be immune from a tort suit if the worker were covered by workers’ compensation, which bars tort actions against employers.—EDS.]

10. Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action.

12. This Court held in *Sibbach v. Wilson & Co.* that Federal Rule of Civil Procedure 35 should prevail over a contrary state rule.

* [The current version of §2072 is substantially identical in all respects relevant to this case.—EDS.]

1. Since the rules involved in the present case are parallel rather than conflicting, this first rationale does not come into play here.

* [At the time of the decision, the text of Rule 41(b) read:

Involuntary Dismissal Effect Thereof

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.—EDS.]

1. Rule 41(b), interpreted as a preclusion-establishing rule, would not have the two effects described in the preceding paragraphs—arguable violation of the Rules Enabling Act and incompatibility with *Erie R. Co. v. Tompkins*—if the court’s failure to specify an other-than-on-the-merits dismissal were subject to reversal on appeal whenever it would alter the rule of claim preclusion applied by the State in which the federal court sits. No one suggests that this is the rule, and we are aware of no case that applies it.

* [At the time of the decision, the text of Rule 41(b) read:

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.—EDS.]

2. We do not decide whether, in a diversity case, a federal court’s “dismissal upon the merits” (in the sense we have described), under circumstances where a state court would decree only a “dismissal without prejudice,” abridges a “substantive right” and thus exceeds the authorization of the Rules Enabling Act. We think the situation will present itself more rarely than would the arguable violation of the Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion; and if it is a violation, can be more easily dealt with on direct appeal.

* [What other sources could be relevant? Presumably only ones that the Ohio appellate courts themselves would find persuasive.—EDS.]