Helping Students to Organize Their Thoughts About the *Erie* Doctrine

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If you think you can think about a thing that is hitched to other things without thinking about the things it is hitched to, then you have a legal mind.
-Thomas Reed Powell

INTRODUCTION: THINKING LIKE A LAWYER

This little Essay presents a framework for teaching the *Erie* Doctrine. It is not a grand analysis of the federal courts' puzzle. It does not even offer a wondrously insightful vision of one of the puzzle's colorful pieces. Rather, the purpose is quite modest. The essay simply aims to help students to organize their thoughts about whether a particular legal issue is governed by state or federal law.[1] Given the Essay's limited and wholly heuristic purpose, the usual endless parade of all possible cases and the careful rehearsal of exquisite and finely-tuned factors and considerations are eschewed.

Many years ago and after a long and successful career in legal education, Thomas Reed Powell told a friend, "If you think you can think about a thing that is hitched to other things without thinking about the things it is hitched to, then you have a legal mind."[2] Some have excoriated this passage as an amoral separation of

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1. There are of course other issues regarding the *Erie* Doctrine. *See, e.g.*, RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 597–98 (7th ed. 2015) [hereinafter HART & WECHSLER 7th] (ways of ascertaining state law). When Judge Patrick Higgenbotham and I team-taught Federal Courts, he called ascertaining state law "the Erie Guess." There is nothing unusual about divining the content of a state law. It is the same process that state judges use when choice-of-law principles direct them to another state's law.

2. A. Simpleman, Jr., *Sentimental Metaphors*, 34 UCLA L. REV. 537, 545 n. 17 (1986) (quoting a 1949 letter from Thomas Reed Powell to Robert Schuyler) .

law and morality.[3] No one, however, should read the legal-positivism separation of law and morality as amoral. The last century's leading advocate of legal positivism clearly believed that evil laws should be disobeyed on moral grounds.[4]

There are many understandings of the phrase "thinking like a lawyer." One valuable reading of Powell's advice is that the analysis of complex facts and complex laws should be divided into a series of subcategories. This reading has nothing to do with the separation of law and morality. It is an essential analytical skill for lawyers. Attorneys routinely deal with complex facts and complex laws. In order to grasp the relationship among these complexities, attorneys must divide the complexities into related subcategories.

Take a simple example: the basic cause of action for breach of contract may be analyzed in terms of offer, acceptance, consideration, and breach. Each of these four categories is hitched to the other, but an attorney or student cannot properly organize her understanding of a contracts problem without separating the four categories and analyzing each independently from the others. Many of our students come to school with an intuitive ability to segregate related issues that are hitched together, but some do not. As teachers, we should forthrightly and explicitly encourage our students to understand and embrace the need for independent analyses of subissues that are related to a complex situation. Of course, within these subissues there may be significant difficulties.

So it is with the *Erie* Doctrine. One of the primary values of the present essay is to divide *Erie* problems into easily recognized subcategories that are hitched to each other. These subcategories, by and large, have category-specific guidelines or principles that can be cabined within their walls.

The *Erie* doctrine announced a structural revolution in constitutional law.[5] Before *Erie*, we had the morass of *Swift v. Tyson*.[6] After *Erie*, two new questions arose. First, a more sophisticated approach was necessary to determine whether a particular issue is governed by state or federal law—especially where federal common law may come into play. The present essay addresses this first issue, which I view as a highly specialized choice-of-law problem. Second, the courts had to develop a methodology for determining the content of state law.[7]

In actual litigation, difficult *Erie* questions seldom arise. Determining whether an issue is governed by federal or state law is typically and thankfully accomplished at an almost intuitive level with little or no thought. This shallow, even unthinking, approach is as it should be. If resolving such a fundamental issue frequently required deep thinking, the result would be catastrophic. The purpose of litigation is to resolve disputes on the merits. Worries about choice-of-law issues distract the litigants and the judge from accomplishing that purpose. Moreover, error on a choice-of-law issue is appealable and may set an otherwise carefully considered judgment to naught.

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3. *See, e.g.*, James Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511 (1996); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1018 (2014); Steven Keera, *Take Care of Yourself*, 90 ABA J. 80 (Dec. 2004); Simpleman, *supra* note 1, at 545.

4. H. L. A. HART, THE CONCEPT OF LAW 208-210 (3d ed. 2012).

5. *See* William R. Casto, *Erie Dotrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907 (1988).

6. 41 U.S. 1 (1842); *see also* HART & WECHSLER 7th, *supra* note 1, at 578–84.

7. *See supra* note 1.

As a preliminary matter, we should make certain that the students understand the stakes involved. If an issue is governed by state law, the state lawmakers have final and virtually unreviewable power to legislate a rule dealing with the subject. Federal courts are not authorized to review the wisdom of state rules of decision. If an issue is governed by state law, the content of the rule is finally determined by the wisdom or folly of state lawmakers. If the same issue is governed by federal law, the federal lawmakers have the same final power. As the foregoing suggests, the present essay is founded upon process jurisprudence.[8]

As part of the preliminary discussion of the consequences of the *Erie* choice-of-law decision, a professor also should review the federal courts' power of judicial review. Even if state law controls an issue, a federal court may declare the law to be unconstitutional. Students may confuse judicial review with the entirely unrelated issue of whether federal or state law governs an issue. Many of our students may not have overtly thought about this distinction.

Notwithstanding constitutional law professors' love of judicial review, state laws are seldom unconstitutional. Moreover, even overturning an unconstitutional state rule is not the same thing as legislating a rule. Judicial review of state law is a negative veto power and does not involve positive legislative authority. There is value in assisting our students to understand this distinction. The Constitution does not dictate the content of state law. Rather, the Constitution dictates that the states may not do certain things. The states—not the federal court—decide what state law is, subject to the limitations of the Constitution. In private correspondence, Justice Oliver Wendall Holmes bluntly wrote that "the state judges and the state legislatures make the state law—we don't."[9]

THE MODEL

This essay uses the Rules of Decision Act to organize our student's thinking.[10] To be sure, the Act is quite circular—even delightfully so. It provides that state laws apply to issues in federal court "in cases where they apply," and this circularity prevents the Act from supplying answers to the most difficult choice-of-law questions. The Act does, however, provide a valuable outline for categorizing issues that arise in litigation.

The Act provides a structural model that is consistent with all cases expressly or implicitly applying the Act in the wake of *Erie*. To repeat, however, the model does not resolve difficult *Erie* issues. It is simply a construct to organize one's thoughts about the various issues. The model is an example of a drafting technique well known to all practicing attorneys. It posits a general rule followed by a series of

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8. The Hart and Wechsler casebook is one of the two canonical texts of process jurisprudence. *See* William N. Eskridge, Jr. & Philip Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994); *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). I must confess that the grotesqueries of the Trump Administration have caused me to recognize a defect in process jurisprudence. *See* William R. Casto, *Robert Jackson's Critique of Trump v. Hawaii*, 94 ST. JOHN'S L. REV. 335 (2020).

9. Oliver Wendell Holmes to Sir Frederick Pollock (Jan. 7, 1909), *reprinted* in HOLMES-POLLOCK LETTERS 157–58 (M. Howe ed. 1941).

10. 28 U.S.C. § 1652.

exceptions. This technique provides a rule for all anticipated or unanticipated situations. Either a situation is an exception, or it is governed by the general rule. To be sure, there will be difficult interpretive problems regarding whether a particular issue fits one of the exceptions.[11] These problems, however, seldom arise with regard to most of the Rules of Decision Act's exceptions.

Although the model is composed of a general rule modified by a short list of exceptions, this fact does not mean that all *Erie* questions are governed by an easily applied set of rules. Most of the questions are, indeed, quite easy, but some are not. The model enables students to concentrate on the difficult questions without cluttering up their minds with rules for the easy questions. The difficult questions require careful and sophisticated thought. The others do not.

The model is easily presented on a chalkboard or via PowerPoint:[12]

General Rule: Every legal issue in federal court is governed by state law.

Exceptions: Federal law governs the following issues:

- "The [United States] Constitution;"
- "Treaties of the United States;"
- "Acts of Congress;"
- Substantive acts of Congress;
- Federal administrative rules;
- Rules-Enabling-Act rules;
- "Cases where [state law does not] apply;"
- Purely procedural rules;
- Non-Rules Enabling Act federal procedural rules; and
- Federal common law.

Under this model, either an issue fits one of the exceptions, or it is governed by state law. Consistent with modern choice-of-law theory,[13] the model requires an issue-by-issue analysis. An issue-by-issue analysis is almost dictated by the tradition that federal law acts interstitially, and that federal laws' purposes frequently are to fine tune standing bodies of state law. [14] In practice, as the model demonstrates, the choice of federal or state law is almost always resolved by a mere glance at the issue.

A. The Federal Constitution

The Constitution exception is quite easy to apply. The only problem is to disabuse the students of the notion that this exception involves the difficult political decision of whether, as a matter of policy and under the plan of the Constitution, a particular issue should be governed by federal or state law. That is definitely NOT what we are talking about. The exception only applies when a specific issue *is*

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11. This problem is especially acute in the federal-common-law exception. *See infra* notes 63–91 and accompanying text.

12. Being an old fogey, I disdain PowerPoint and have resolved never to use it.

13. *See* Willis Reese, *De'pecage: A Common Phenomenon Choice of Law*, 73 COLUM. L. REV. 58 (1973). For example, Restatement (2d) of Conflict of Laws provided that significant contacts are to be evaluated according to their relative importance with respect to the particular issue. *Accord* § 188 (2); § 145 (1) (tort issues).

14. *See* HART & WECHSLER 7th, *supra* note 1, at 448–89.

governed by the Constitution.[15] The difficult problem of whether a particular issue implicates federal interests and should be governed by federal law typically is a political question. Congress and the treaty makers resolve most of these difficult issues under exceptions 2 and 3. In addition, the judiciary plays a significant lawmaking role under exception 4. The Constitution exception applies only when an issue arises in litigation regarding the meaning and effect of the federal Constitution.

An example worth mentioning in class is a case involving the Fourteenth Amendment and an analogous provision of a state constitution. In *Michigan v. Long*,[16] the Court reviewed a search and seizure of an automobile. *Michigan* is a good case because it is easy to understand. The state constitution was quite similar to the Fourth Amendment of the federal constitution. [17] Determining the meaning and effect of the Fourth Amendment, as incorporated in the Fourteenth Amendment, is a federal issue. But the meaning and effect of a state constitution is left to the wisdom of state lawmakers.[18]

B. Treaties

The Treaties exception is a replay of the Constitution exception. Treaties seldom arise in civil litigation and probably are not worth more than ten or fifteen minutes. Therefore, the primary value of discussing this exception is to reaffirm the idea that positive federal rules are governed by federal law. If the meaning and effect of a treaty of the United States arises in litigation, the issue is federal. For class-room purposes, Justice Harlan's concurring opinion in *Zschernig v. Miller* is a good illustration of the exception.[19] The purpose here is not to establish that the meaning and effect of a treaty of the United States is a federal question. Rather, the purpose is simply to demonstrate how the concept works in practice.

Zschernig involved the right of an East German citizen to inherit personal property in Oregon. An applicable bilateral treaty allowed East Germans to inherit the personal property of an American citizen, but an Oregon law would have narrowed the scope of the treaty. Harlan's opinion is a good illustration because it involved private litigation and the problem is easily described in class.[20]

The Constitution exception did not apply because there is no rule of decision in the Constitution dealing with the inheritance of property.[21] There was, however, a clause in the treaty that addressed this issue. The meaning and effect of this clause is

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15. For example, the best known federal-common-law case is *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), which involved the government's rights under a check that it had drawn on its bank. Because no provision of the Constitution deals with the minutiae of negotiable instruments, the case does not fit the Constitution exception. Of course, *Clearfield* does fit the federal-common-law exception. *See infra* notes 67–69 and accompanying text.

16. 463 U.S. 1032 (1983). *See* HART & WECHSLER 7th, *supra* note 1, at 491–94.

17. MICH. CONST. art. I, § 11.

18. The precise issue in *Michigan v. Long* involved parsing the state supreme court's opinion to determine whether it was based upon state or federal law. If the state court's decision was based upon state constitutional law, the Supreme Court would have had no power to review the state court's decision.

19. 389 U.S. 429 (1968). *See* HART & WECHSLER 7th, *supra* note 1, at 709.

20. For another relatively simple treaty case, see *Asakura v. Seattle*, 265 U.S. 332 (1924).

21. Of course, the Supremacy Clause applied, but everyone knows that.

governed by federal—not state—law. Having determined that the treaty conflicted with Oregon law, Harlan applied the Supremacy Clause (a constitutional rule governed by federal law) and concluded that the treaty overrode the state statute.[22]

In considering an alien's right to inherit property, a preliminary issue may arise whether state law in fact bars aliens from inheriting. The meaning and effect of a state law obviously is governed by state law. But the meaning and effect of a treaty is governed by federal law. In litigation involving treaties, an issue occasionally arises whether a treaty is self-executing or non-self-executing.[23] This interpretive problem involves the meaning and effect of the treaty and therefore is governed by federal law. Similarly, suppose in the alien-inheritance case, the treaty applied to "property" but not specifically to "personal property." Resolving the ambiguity would be an interpretive issue involving the meaning and effect of the treaty and therefore would be governed by federal law.

C. Acts of Congress

The beat goes on. What is the meaning and effect of an act of Congress? For example, what is an unlawful conspiracy in restraint of trade under the Sherman Anti-Trust Act?[24] The issue is obviously governed by federal law because it turns on the meaning and effect of an act of Congress. This is easy. The meaning and effect of positive federal law is governed by federal law. In the same litigation, a plaintiff might sue for violation of a state anti-trust act.[25] Interpretating the state statute would not involve the meaning and effect of an act of Congress and therefore would fall under the general rule of applying state law. [26] This is *Michigan v. Long* all over again.[27]

There is, of course, the conundrum of using state law to determine the reach of a federal statute.[28] This riddle, however, is best postponed to the class's consideration of federal-common-law issues where state law does not "apply."[29]

The Rules-of-Decision-Act model subsumes federal administrative regulations under acts of Congress because these regulations involve a delegation of rule-making power from the Congress to the administrative agency. Any issue involving the meaning and effect of a federal administrative regulation is determined by federal—not state—law. Conversely, if a court is seeking to determine the meaning and effect of a state administrative regulation, the issue does not fit any of the exceptions and therefore is determined by reference to the general rule that state law applies.

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22. *Zschernig*, 389 U.S. at 457.

23. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 198–204 (2d ed. 1996).

24. *See* 15 U.S.C. §§1-7 (2010).

25. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 20.8 (4th ed. 2011). Subject matter jurisdiction over the state cause of action could be based on either diversity or supplemental jurisdiction.

26. Nor would interpretation of a state statute involve the meaning and effect of the federal constitution or a treaty of the United States.

27. *See* notes 16–18, *supra*, and accompanying text.

28. *See, e.g.*, *De Sylva v. Ballentine*, 351 U.S. 570 (1956), *noted in* HART & WECHSLER 7th, *supra* note 1, at 678.

29. *See* notes 92–97 *infra*, and accompanying text.

Finally, we turn to the Rules Enabling Act (REA). In many case books, *Guaranty Trust Co. v. York*[30] and *Byrd v. Blue Ridge Elec. Coop., Inc.*[31] precede the REA. These two cases are not worth covering in class.[32] The Act should be treated separately because the Supreme Court in *Hanna v. Plumer* has provided a specific analysis for determining the applicability of REA rules in federal court.[33] For convenience, this essay uses the Federal Rules of Civil Procedure (FRCP) as a proxy for all REA rules.

For a few decades after *Erie*, the courts struggled with the problem of FRCP rules that contradicted otherwise applicable state rules.[34] In *Hanna*, the Court new modelled its approach and in the process rejected "any common-sense substantive-procedure distinction."[35] You may wish to give the students a thumbnail sketch of this distinction. The theoretical substantive-procedure distinction does not work in practice because some state rules are simultaneously substantive and procedural. You also may want to tell your students that in practice, this bidimensional ambivalence typically occurs when the words of a state rule are procedural, but an underlying purpose is substantive.

Hanna is a good example of a bidimensional state rule. The case was a simple tort action against a tortfeasor's estate, and Massachusetts required in-hand service of process on executors within one year of an executor's giving a performance bond. This special rule only applied to wrongful death actions.[36] I joke with the students that in Massachusetts there is a preference for one-armed executors who always keep their remaining hand in their pocket. On the surface, this in-hand provision was obviously procedure, but at the same time, it clearly furthered an immensely important state substantive policy. The one-year statute of limitation keyed to in-hand service provided a bright-line rule for determining when an executor could pay out an estate without fear of a subsequent claim.

Statutes of limitations are classic servants of two masters. They traditionally have been viewed as procedural,[37] and they serve obvious procedural purposes.[38] In addition, however, they serve substantive purposes. They enable persons otherwise subject to potential liability to allocate their thoughts and property without fear of potential liability.[39]

A minor substantive purpose of the in-hand rule, apparently, was to make an executor's life easier and thereby encourage people to serve as executors. There was,

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30. 326 U.S. 99 (1945). *See* HART & WECHSLER 7th, *supra* note 1, at 598–602.

31. 356 U.S. 525 (1958). *See* HART & WECHSLER 7th, *supra* note 1, at 608–09.

32. *Guaranty Trust* has been overruled. *Byrd* is rarely relevant. *See* notes 52–60, *infra*, and accompanying text.

33. 380 U.S. 460 (1965).

34. See HART & WECHSLER 7th, *supra* note 1, at 569–75; 598–609.

35. 380 U.S. at 466.

36. *Id.* at 461–62.

37. *See* EUGENE F. SCOLES, PATER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 3.9 (3d ed. 2000).

38. They guard against stale cases in which "memories have failed, witnesses have died or disappeared, and evidence has been lost." Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)*; accord,* Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980). They also conserve judicial assets by allowing courts to concentrate on nonstale cases.

39. A "statute of limitation establishes a deadline after which the defendant may legitimately have peace of mind." Walker v. Armco Steel Corp., 446 U.S. at 740.

however, a far more significant purpose. A modified market system like the United States heavily relies upon the free flow of property and services, but a death creates an economic interregnum in which the decedent's estate is withdrawn from the market. Until an estate is paid out, it is essentially frozen.[40] An earlier pay out allows the property to be returned to the market. The free flow of property and services is the most important economic value in our country.

In *Hanna*, the Court ruled that the FRCP should be applied and gave the back of its hand to the state's significant substantive interests. We do not mind the federal government's overturning a state's interests when the federal policy makers disagree with state policy. That is a bed rock principle of the Supremacy Clause. But in *Hanna*, the state was seeking to further completely unobjectionable and quite laudable policies. Nevertheless, the Court overturned the state's laudable policy to enable efficient litigation in federal court.[41] The state's important substantive policies became collateral damage.

The Court provided a clear and easily applied rule for considering *Erie's* effect on the FRCP. The FRCP apply without regard to manifestly important and laudable state substantive interests. If an FRCP rule is "rationally capable of classification as [procedural]," the rule overrides state law.[42] In considering this test, a professor should explain the origin of the FRCP. The Rules are created by a group of respected federal judges, respected litigators, and respected professors who specialize in civil procedure. Assuming that this group is trying to provide desirable rules of civil procedure, it is inconceivable that they would recommend a procedural rule that is not "rationally capable of classification as [procedural]."[43]

To be sure, concentrating upon *Hanna's* "arguably procedural" rationale ignores the REA provision that its "rules shall not abridge, enlarge or modify any substantive rights."[44] This superficially troubling provision should, at most, only be mentioned in class. As an historical fact, "no [FRCP] rule has [ever] been held invalid, on its face or as applied, under the Rules Enabling Act."[45]

The courts sometimes mitigate *Hanna's* procrustean solution through a nuanced interpretation of the FRCP. It turns out that on occasion, a federal court can apply both the FRCP and a state rule. There is no problem with doing so if the state and federal rules do not conflict.

In class, Professor Wechsler delighted in noting the Court's strained interpretation in *Palmer v. Hoffman*.[46] In that negligence case, the state allocated the burden of proof on contributory negligence to the plaintiff, but FRCP 8(c) provided that contributory negligence was an affirmative defense. The state rule was procedural, but it also had the substantive purpose of allocating the risk of loss caused by negligent conduct. The Court ruled that both rules could be applied. Rule 8(c) applied only to the burden of pleading, which left room to apply the state law on

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40. Presumably the estate's money would be invested in a money-market fund, but even that would severely restrict the money from being used to participate in the market.

41. The state's rule of in-hand service would still apply in state court, but that is scant solace to executors. The Court viewed the Massachusetts rule as a "threat to the good uniformity of federal procedure." *Id.* at 467.

42. *Hanna*, 380 U.S. at 466.

43. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

44. 28 U.S.C. § 2072(b).

45. HART & WECHSLER 7th, *supra* note 1, at 573;624.

46. 318 U.S. 109 (1943). *Palmer* preceded *Hanna* by a few decades.

burden of proof. Under this approach, the defendant is required by the FRCP to raise the issue, and having done so, the plaintiff must prove the absence of contributory negligence.

Walker v. *Armco Steel Corp*. is a more recent example of interpreting an FRCP rule to avoid conflict with a state rule.[47] Like *Hanna*, *Walker* involved a bidimensional state statute of limitations with an in-hand service requirement. This time, however, the Court noted the substantive purpose of statutes of limitation.[48] Under state law, the statute was not tolled until the decedent was actually served. In contrast, FRCP Rule 3 provides: "A civil action is commenced by filing a complaint with the court."[49]

The *Walker* Court construed Rule 3 as not applying to a state statute of limitations. The Court noted, in particular, that nothing in the history of creating the rule suggested that it was intended to govern state statutes of limitation.[50] Therefore the state and federal rules were not in conflict, and both could be applied. The Courts interpretation of Rule 3 was also supported by *stare decisis*.[51]

A few students may become lost in the interior logic of applying both the federal and the state rule. They may wonder why both rules could not have been applied in *Hanna*. In truth, this was physically possible. As a practical matter, however, there was an unavoidable conflict between the federal rule and the state rule. If there has been an in-hand service of process, no attorney would waste time on a redundant service pursuant of the Rule 4. Moreover, the *Hanna* Court held that Rule 4 implicitly provided that if the rule is followed, in-hand service of process is not necessary.[52]

D. Issues Where State Law Does Not Apply

There is no unifying principle in this final group of exceptions. It is a catch-all category. As a practical matter in dealing with a nuanced problem, there must be a catch-all category.

1. Purely procedural rules

Perhaps the existence of purely procedural state rules (i.e., without a substantive purpose) is not worth covering. There is, however, some value in reminding the students of the special and limited purpose of procedural rules. As a general matter, state procedural rules present no problem whatsoever. For example, how many days does a defendant have to answer a complaint? There is no conflict between a state rule and a federal rule in this situation. A state creates procedural rules for its own courts and not for another state's courts or for the federal courts. Moreover, if there were a conflict, the Supremacy Clause would trump the state rule in federal court. If

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47. 446 U.S. 740 (1980). *See* HART & WECHSLER, *supra* note 1, 619–20.

48. *Id*. at 740.

49. Fed. R. Civ. P. 3

50. *Walker*, 466 U.S. at 750 n.10. This footnote merely mentions the problem without suggesting Rule 3's effect on statutes of limitation.

51. *Id*. at 748–50, *citing* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

52. *Hanna*, 380 U.S. at 470.

you wish, you may note that the FRCP does not apply in state court because the federal rules are intended to regulate federal and not state courts.

2. Non-REA Federal Procedural Rules

The "twin aims of *Erie*" is a bright and shiny pebble in the *Hanna* opinion,[53] but it has virtually no significance in actual litigation. It certainly is insignificant for any of the substantive issues of positive federal law[54] or federal common law.[55] In these cases, federal law governs an issue whether it is in state or federal court. Nor is it relevant to the FRCP. To be sure, a federal non-REA procedural rule might conflict with a state rule, and in this situation, the twin aims are relevant. This situation, however, is a *rara avis.*

The doctrine of *forum nonconveniens* (FNC) presents a rare sighting. *Piper Aircraft Co*. v. *Reyno*,[56] which I call "scotch on the rocks,"[57] is the leading case. In *In Re Air Crash Disaster near New Orleans*, the federal court considered whether Louisiana's rejection of FNC should override the federal rule.[58] The court turned to the twin aims to analyze this problem.[59] You also might mention the *Byrd* balancing concept in this limited context.[60] The arguments are capably presented in the *en banc* Fifth Circuit opinion. Whether the case is worth covering in class is debatable. The game may not be worth the candle. In a four-hour course, the issues might be covered but surely not in a three-hour course. The same is true of *Gasperini v. Center for Humanities, Inc.* in which the court considered a bidimensional state rule of appellate review.[61]

3. Federal Common Law

The final exception to applying state law is a wild card. Federal common law is the most difficult piece of the *Erie* puzzle. Unlike all the other exceptions requiring the application of federal law,[62] federal common law is not based upon positive federal law. It does not present itself with the word federal stamped on its forehead. The federal courts have to decide whether to legislate a federal rule of decision without positive guidance from other federal law makers. This decision is essentially political.

Because the exception involves the federal courts' political discretion, it defies principled definition. In practice, however, it is possible to bring some order to this unruly mob. The basic problem is an absence of positive guidance from the more

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53. *Id*. at 468.

54. *See* notes 15–48, *supra*, and accompanying text.

55. *See* notes 63–87, *infra*, and accompanying text.

56. 454 U.S. 235 (1981). The Court left open the question of whether "state or federal law of [FNC] applies in a diversity case." *Id*. at 298 n.13.

57. The case involved an airplane crash in the Scottish Highlands.

58. 821 F.2d 1147 (5th Cir. 1987) (*en banc*).

59. *Id.* at 1157–59; 1181–84 (Higgenbotham, concurring).

60. Byrd v. Blue Ridge Rural Elec. Corp., Inc., 356 U.S. 525 (1958).

61. 518 U.S. 415 (1996). *See* HART & WECHSLER, *supra* note 1.

62. Except for the *rara avis* of federal non-REA procedural rules. *See* notes 53–57, *supra*, and accompanying text.

political branches of government. Therefore, the judiciary must exercise independent political judgment in legislating judge-made rules. You may tell students that we call it federal common law because it involves judicial legislation. At this stage of their studies, some students may uncritically think that the phrase has something to do with the English common law. In theory, the Supreme Court's authority to legislate federal common law is almost limitless.[63] For example, Justice Brennan used to tell his law clerks, "with five votes around here you can do anything."[64]

In practice, however, the Court and the inferior courts have practiced political restraint. They have exercised their inherent legislative power only when they have concluded that there is an obviously strong argument to do so—not just an argument but a strong argument. Therein lies the difficulty: how to determine whether there is a strong argument regarding any particular issue. After a long career of teaching, a capable law professor and university president once concluded that "every proposition is arguable."[65] Separating weak from strong arguments inevitably requires the sound exercise of judgment based upon considerable experience in our professional legal society. Therefore, most students are—by definition—incompetent to do so. Nevertheless, there are judicial precedents that enable our students to glimpse the process.

a. *Step one: legislative jurisdiction*. Long ago, Professor Alfred Hill developed a useful idea for determining whether, in the absence of a positive federal rule, an issue should be governed by federal common law—not state law.[66] He reasoned that because some areas are so inherently federal, the states should be preempted from power to regulate. Professor Hill described his idea as constitutional preemption. It is unclear whether he meant that the Constitution requires preemption or simply that under the plan of the Constitution, preemption makes sense. In these fields of preemption, there must be rules of decision to regulate activities. Therefore, the rules must come from the federal government. If Congress has not provided a rule, the courts must legislate a rule.

Professor Hill's categories of preemption were interstate controversies, admiralty, proprietary transactions of the United States, and foreign relations. The operative consideration under his analysis was that if the area were left to state lawmakers, the rules' content would be left to the wisdom of state lawmakers. Another way to look at the preemption idea is that some law must regulate these transactions. If state law is preempted, federal common law is the only law game left in town.[67] The same analysis is applicable in the case of statutory preemption,[68] but

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63. *See, e.g.*, Louise Weinberg, *Federal Common Law*, 83 NW. U.L. Rev. 805 (1989).

64. KIM EISLER, THE LAST LIBERAL 178 (1993) (quoting Brennan). *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

65. DAVID LABAN, ETHICS AND HUMAN DIGNITY 192 (2007) (quoting Kingman Brewster).

66. Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUMBIA L. REV. 1024 (1967).

67. "If states are denied competence in a particular area, the federal courts are obliged to fashion the applicable law as best they can in the absence of guidance from the political branches." Hill, *supra* note 66, at 1070.

68. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (noted in HART & WECHSLER, *supra* note 1, at 700–01).

there the existence and scope of preemption is a matter of *ad hoc* statutory interpretation.[69]

The five categories of preemption stem from the simple idea that on reflection, some legal issues should not be left to the possibly parochial and the inevitably nonuniform wisdom of state law makers. A good example is that federal law governs the proprietary transactions of the United States. The federal government exercises enormous regulatory power, and when it does so, its regulations fall into exceptions 1, 2, and 3 of the Rules-of-Decision-Act model. In addition to its regulatory authority, the federal government is, itself, an independent proprietary entity operating in our society. The government writes checks, employs people, buys and sells property, lends money, etc. Professor Hill believed that federal law should regulate these proprietary transactions.

If state law governs the federal government's many proprietary transactions, the wisdom of state law makers would determine the rights and liabilities of the United States. In this situation, applying state law would stand the basic power structure of the Constitution on its head. Intuitively we all immediately grasp the idea that under the plan of the constitution, the states—as a general rule—should not be allowed to regulate the activities of the federal government. This idea, however, is not strictly a constitutional rule. The Congress and the President acting together may, if they wish, subject the operations of the federal government to state control.[70]

The basic Supreme Court decision on the government's proprietary transactions is *Clearfield Trust Co*. v. *United States*.[71] We all know the facts. The case boiled down to rights and liabilities of the government regarding a forged check that the government drew upon its bank account. The Court noted that the government operated in every state of the Union and therefore needed a uniform federal law to regulate its rights and liabilities. This analysis is ultimately founded on the Supremacy Clause.[72] Under the plan of the Constitution, only the federal government can legislate uniform nationwide rules.[73]

Many have given the back of their hands to *Clearfield Trust's* allusion to the federal government's need for a uniform national law.[74] The stronger argument in

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69. *See* HART & WECHSLER, *supra* note 1, at 677–85.

70. For example, the Federal Tort Claims Act subjects the federal government to limited tort liability under circumstances in which a private person would be subject to liability in that jurisdiction. 28 U.S.C. § 1346(b).

71. 318 U.S. 363 (1943).

72. *Id.* at 367.

73. The most comprehensive and successful state effort to legislate uniform nationwide rules is the Uniform Commercial Code, but even the UCC is not entirely uniform from state to state. *See* William F. M. Hicks, Comment, *Uniformity: Uniformity of the Uniform Commercial Code*, 8 B.C. INDUS. & COM. L. REV. 568, 574–78 (1967). I joke in Contracts that, like Voltaire's Holy Roman Empire, the UCC is neither uniform, nor [strictly] commercial, nor a code.

74. See, for example, Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964), where Judge Henry Friendly queried why the federal government needed uniformity, but J.C. Penny did not: "[T]he question persists why it is more important that federal fiscal officials rather than Pennsylvanians dealing in commercial paper should have the solace of uniformity." *See also* O'Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994); United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979). In Professor Hill's comprehensive analysis, uniformity is the dog that did not bark in the night.

Clearfield Trust turns on the issue of whether states should be empowered to regulate the rights and liabilities of the United States regarding its proprietary operations.

A number of the preemption categories coincidently implicate the erroneous notion that a grant of federal subject matter jurisdiction implies a grant of law-making power.[75] If this notion is legitimate, why does diversity jurisdiction not empower federal courts to legislate common law? Or what about the federal district courts' exclusive jurisdiction over suits against consuls or vice consuls of foreign states?[76] To be sure, a reasonable argument might be made that consular litigation implicates foreign-policy concerns. But this reasonable argument is not grounded upon the mere grant of subject matter jurisdiction. These jurisdiction cases are more intelligible if they are viewed as involving matters in which a strong case for federal common law can be made without regard to the existence of a jurisdictional statute. The same underlying concern supports both lawmaking and subject matter jurisdiction.[77]

Admiralty cases involve a grant of subject matter jurisdiction. The federal courts have always had admiralty jurisdiction, and today admiralty law is viewed as federal common law.[78] The original constitution and implementing congressional grants of jurisdiction clearly indicate that the Founders believe that these cases implicated important national and federal interests. These underlying interests simultaneously justify federal jurisdiction and the legislation of a federal common law of admiralty.

A federal common law of interstate disputes is like admiralty.[79] The mere grant of subject matter jurisdiction cannot be viewed as empowering the creation of federal common law. Instead, underlying concerns regarding the mechanism of litigation require the creation of federal common law. Leaving these disputes to state law would be ludicrous. A moment's thought leads to the easy conclusion that the states

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He briefly noted the Court's reference to uniformity, Hill, *supra* note 61, at 1037, but never again mentioned this consideration.

75. *See* HART & WECHSLER 7th, *supra* note 1, at 686–701.

76. 28 U.S.C. §1351. For example, a Consul might be sued for failure to pay money due under a contract. Consuls are not protected by Diplomatic Immunity. They have only a limited immunity that extends solely to acts taken as part of their consular duties. *See* William S. Dodge & Chimène I. Keitner, *Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 FORDHAM L. REV. 677, 700 (2021).

77. *See* HART & WECHSLER 7th, *supra* note 1, at 689. The law of collective bargaining agreements is another field of federal common law that could be viewed as stemming from a grant of subject matter jurisdiction. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See* HART & WECHSLER 7th, *supra* note 1, at 700–01. The best justification, however, is based upon the history of American labor relations. From the 1870s through the 1920s, the United States experienced an extremely violent and enormously costly civil war between labor and management. Finally, in the 1930s Congress enacted comprehensive labor reforms to bring peace to the workplace. *See* William R. Casto, *The Steel Workers Trilogy as Rule of Decision Applicable by Analogy to Public Sector Collective Bargaining Agreements: The Tennessee Valley Authority Paradigm*, 26 B.C. L. REV. 1, 29 n. 224 (1984). A key component of this reform was the collective bargaining agreement enforceable through arbitration. Under the laws of some states, prospective agreements to arbitrate are not enforceable. *See* HART & WECHSLER 7th, *supra* note 1, at 701.

78. *See* HART & WECHSLER 7th, *supra* note 1, at 689–95.

79. *See id*. at 696–700.

should not be empowered to create the governing rules of decision. The problem is which state's law should apply. If a choice-of-law principle, hopefully federal, selects one state or another, the selected state's legislature should immediately enact a rule of decision allowing the selected state to prevail. Again, both subject matter jurisdiction and federal common law are based upon the same underlying considerations.[80]

Issues involving international law and the foreign policy of the United States are another prime example of matters that individual states should not be empowered to control. The leading case is *Banco Nacional De Cuba v. Sabbatino*, which involved a common-law rule affecting foreign policy.[81] The case turned upon the lawfulness of Cuba's expropriation of property in Cuba. Under the Act-of-State doctrine, an American court, in some circumstances, is not allowed to assess the lawfulness of a foreign government's actions.[82] The doctrine has a direct impact on the United States' relationship with foreign countries, and the Court decided that the scope of the doctrine is a federal question. To rule otherwise would have entrusted the doctrine to the varying parochial policies of the individual states. For the same reason, issues of customary international law, unregulated by treaties of the United States, are also federal questions.[83]

Like Justice Holmes' definition of cases arising under federal law,[84] Professor Hill's idea of preemption is more useful for inclusion than exclusion.[85] *Boyle v. United Technologies Corp* is difficult to squeeze into his five fields of preemption.[86]

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80. Id. at 416–19.

81. 376 U.S. 398 (1964).

82. *Id.* at 427.

83. *See* Hill, *supra* note 66, at 1057–59, 1066–67; HART & WECHSLER 7th, *supra* note 1, at 712–717. In this regard, we are considering customary international law—not treaties of the United States. Some have ingeniously argued that customary international law should not be treated as federal law. *See* HART & WECHSLER 7th. *supra* note 1, at 715. This argument should be viewed as an example of Kingman Brewster's understanding that in American law "every proposition is arguable." *See supra* note 60 and accompanying text. Suffice it to say that modern Supreme Court decisions do not support this notion. More significantly, if international law is not federal law, what is the basis for a federal court to review and correct a state court decision regarding the content of customary international law?

84. *See* HART & WECHSLER 7th, *supra* note 1, at 817.

85. Hill did not advance his idea as an exclusive rule. Hill, *supra* note 66, at 1080.

86. 487 U.S. 500 (1988). *See* HART & WECHSLER 7th, *supra* note 1, 666–76. In *Boyle*, the Court considered whether a government contractor should be granted a government contractors tort defense in a products liability action against the contractor. The case was a wrongful death action by a military helicopter pilot based upon a design defect. Because the case did not involve the rights or liabilities of the United States, it was not a proprietary transaction case. Nevertheless the Court ruled that the manufacturer was protected by a federal-common-law government-contractor defense.

Boyle is not a good teaching case. The Court loosely grouped together an assortment of relevant (but not pertinent) cases and considerations and then simply ordained that the issue was controlled by federal common law. *Id.* at 505–13. A more plausible justification would have been to ask whether a special tort defense is needed to protect federal contractors who merely follow the government's procurement specifications. Surely the need for such a defense should not be left to the wisdom and care of state lawmakers.

Having ruled that the defense should not be left to state law, the Court then crafted a

The same is true of *Semtek Int'l., Inc*. v. *Lockheed*, which involved the preclusive effect in subsequent state-court litigation of a federal court's prior judgment. [87] The *Semtek* Court concluded that the matter turned on the respect to be accorded federal judgments by state courts. The obvious conclusion was that the meaning and effect of a federal judgment is a federal issue: "whether a Federal judgment has been given due force and effect in the state court is a Federal question."[88]

b. *Step Two*: *legislating federal common law*. When federal common law is viewed as a highly specialized choice-of-law doctrine, a two-step process is inevitable. First, a court must determine whether an issue is controlled by state law or federal law. Second, if a court determines that an issue is governed by federal law, the court must fashion the applicable federal rule.[89] This two-step process adds a complicating variable to the *Erie* doctrine.

In *Semtek*, the Court first determined that the preclusion issue presented a federal question. Then the Court turned to the task of fashioning the details of a federal preclusion rule. As a matter of policy, the Court decided to adopt the preclusion rules of the state in which the federal court sat.[90]

In the context of preclusion, adopting state law makes a good deal of sense. As a matter of judicial economy, the Court should not be tasked with reinventing a wheel when state judges have already fashioned perfectly serviceable preclusion wheels. Similarly, the Congress in the Federal Tort Claim Act adopted state tort law and thereby spared the Court from fashioning a comprehensive federal doctrine of common-law tort law.[91]

The adoption of state law presents a WTF moment for some (most?) students. What is the difference between applying state law as state law and adopting state law to answer a federal question? The Court has evinced some confusion over this distinction.[92]

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common-law defense. *Id.* at 513. This lawmaking aspect of *Boyle* is a little more valuable as a teaching case. The Court could have held that although the issue is governed by federal law, the federal common-law rule is that there is no defense. *See* United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947); *see also infra* notes 98–101 and accompanying text. This approach would have kicked the issue to Congress.

The argument might be made that leaving the issue to Congress is not practicable because "Congress [is not] equipped, with respect to matters of the order of magnitude in [*Boyle*]. To assume sole responsibility for the constructive elaboration and application of legal principles." HART & WECHSLER 7th, *supra* note 1, at 664. Perhaps so, but in terms of process jurisprudence the best approach to resolving the problem would be the negotiation of an acceptable indemnification clause between the contractors and the government.

87. 531 U.S. 497 (2001); *see* HART & WECHSLER 7th, *supra* note 1, at 620–21, 1367–69.

88. *Semtek*, 531 U.S. at 507 (quoting Deposit Bank v. Frankfort, 191 U.S. 499, 514–515 (1903)). This decision "is not surprising in light of the clear federal interest in the integrity and effect of federal court judgments." HART & WECHSLER 7th, *supra* note 1, at 1369.

89. *Accord* Friendly, *supra* note 74, at 410; Paul J. Mishkin, *The Variousness of "Federal Law"*: *Competence and Direction in the choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802–03 (1957).

90. *Semtek*, 531 U.S. at 508–09.

91. *See supra* note 70 and accompanying text.

92. O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994); HART & WECHSLER 7th, *supra* note 1, at 663; *see also* Boyle v. United Technologies Corp, 487 U.S. 500, 507 n. 3 (1988). The *O'Melveny* Court noted that "if [state law] *is* applied it *is* of only theoretical interest

Semtek explains the distinction's significance. State law was incorporated but not if state rules conflicted with federal interests.[93] If state law applied because the states have legislative jurisdiction over the matter, state law could be set aside only as a matter of judicial constitutional review. To be sure, this could be done, but it would require needless contortions of constitutional law. In contrast, the *Semtek* model is based upon federal common law, which is far more flexible.

In another case, the Court adopted state law to control the rights of "children" under the Federal Copyright Act.[94] The issue, which involved the meaning and effect of a federal statute, was obviously federal, but there was nothing in the statute's language or legislative history to suggest whether illegitimate children were "children" entitled to rights under the Act. The Court cited no legislative history on the definition of "children." The Court held that the "scope of a federal right is, of course, a federal question."[95] Nevertheless, the Court looked to state law to define the rights of children but with a caveat: State law would apply but not if it is "entirely strange to those familiar with [the term's] ordinary usage."[96]

The *De Sylva* Court's caveat rejecting "entirely strange" state law cannot be supported as a matter of constitutional judicial review.[97] There is no limitation in the Constitution regarding "strange laws." Under our Constitution, states are free to enact "entirely strange" laws.

Another aspect of the two-step wrinkle in federal common law is exemplified by *United States v. Standard Oil Co. of California*.[98] In that case, a soldier was injured by the defendant's negligence, and the United States sued to recover damages it suffered as a result of injuries to the soldier.[99] The case obviously involved the proprietary interests of the United States, and the Court held that the availability of the tort cause of action was controlled by federal—not state—common law. But when the court turned to the existence of the cause of action, the Court held that as a matter of federal common law the government was not entitled to its claimed cause of action.[100] The *Boyle* case could have been decided this way.[101]

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whether the basis for the application is [the state's] own sovereign power or federal adoption of [the state's] disposition." *O'Melveny*, 512 U.S. at 85. Because the Court held that the matter at issue was not governed by Federal common law, this "theoretical" distinction was irrelevant. *Id.*

93. For example, the Court noted that if "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 processess might justify a contrary federal rule." *Semtek*, 531 U.S. at 509.

94. *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956).

95. *Id*. at 580.

96. *Id* at 581.

97. To be sure, the "entirely strange" limitation could be viewed as an appropriate interpretation of the statutory term "children." I prefer to use the analysis in the text because it is so easy for students to grasp.

98. 332 U.S. 301 (1947). *See* HART & WECHSLER 7th, supra note 1, at 663-65.

99. For example, the government lost the services of its employee and also paid hospitalization costs.

100. 332 U.S., at 316–17.

101. *See supra* note 86.

CONCLUSION

This essay's *Erie* model is based upon the general rule and exceptions of the Rules-of-Decision Act, all of which are hitched together in a common project of divining whether a particular issue is controlled by state or federal law. In analyzing a particular issue, students (and lawyers) should classify the problem into one of the exceptions and think about the guidelines for that specific exception.