ARTICLE

CHOICE OF LAW AND JURISDICTIONAL POLICY IN THE FEDERAL COURTS

TOBIAS BARRINGTON WOLFF†

† Professor of Law, University of Pennsylvania Law School. I am grateful to Clyde Spillenger who shared some of his unpublished work to enrich my understanding of choice of law in the early twentieth century, to Andrew Bradt who generously shared with me the results of some of his own research, to Steve Burbank, Kevin Clermont, Zach Clopton, Kim Roosevelt, Linda Silberman and David Shapiro for their generous attention to this Article in draft, to the faculties at Harvard Law School, NYU School of Law, the University of Michigan Law School, the University of Connecticut Law School and Cornell Law School who permitted me to present the work at earlier stages and enjoy the benefit of their feedback, and to the participants in this symposium at Penn Law School who gave the Article a generous welcome and valuable feedback.

INTRODUCTION

For seventy-five years, *Klaxon v. Stentor Electric Manufacturing*[1] has provided a one-line answer to choice-of-law questions in federal diversity cases: *Erie Railroad v. Tompkins*[2] requires the federal court to employ the same law that a court of the state would select. The simplicity of the proposition likely accounts for the unqualified breadth with which federal courts now apply it. Choice of law doctrine is difficult, consensus in hard cases is elusive, and the anxiety that *Erie* produces over the demands of federalism tends to stifle any reexamination of core assumptions. The attraction of a simple answer is obvious. But *Klaxon* cannot bear the weight with which it has been loaded.

Like *Erie* itself, *Klaxon* combines a core ruling on the limits of federal judicial power with a highly contextual statement of federal jurisdictional policy. Unlike *Erie*, however, *Klaxon* has not benefited from a long line of rulings mapping the boundaries of these respective principles. This doctrinal desuetude is no longer sustainable following the enactment of the Class Action Fairness Act (CAFA).[3] CAFA effectuates a shift in the jurisdictional policy of the federal courts that requires a critical examination of the meaning and scope of *Klaxon*. And by moving increasing numbers of complex state-law cases into federal proceedings that are then consolidated through the multi-district litigation process, CAFA has created increased pressure to undertake that reexamination.

This Article offers a general approach to analyzing choice of law and jurisdictional policy in the federal courts. It begins by placing the spare language of *Klaxon* in analytical context and tracing the multiple lines of doctrine that intersect in the ruling. Those doctrines were undergoing a transformation at the time the Court issued its decision, yet the *Klaxon* Court confined its analysis narrowly, a fact that speaks to the limited scope of its holding. The Article then describes the relationship between federal jurisdictional policy and the elements of modern choice of law and maps the jurisdictional changes that Congress effectuated with CAFA and amplified with the MDL statute. Those changes represent a departure from the policies of the general diversity statute and render some of the core assumptions of the *Erie* doctrine inapposite. The central conclusion of this Article is that federal courts hearing complex cases under the jurisdiction of these specialized federal statutes have the power to develop independent federal

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1 313 U.S. 487 (1941).

2 304 U.S. 64 (1938).

3 Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. § 1711 (2012)).

answers to one key component of the choice-of-law calculus: how to resolve conflicts between the laws of multiple interested states when each would apply its own law to a dispute. Whether federal courts should exercise that power as a matter of policy is a question that this Article leaves for future examination. What is clear, however, is that *Klaxon* does not hold sway in this class of cases.

I. *ERIE* AND THE BIRTH OF MODERN FEDERAL COMMON LAW

A. *The Shift in the Landscape that Surrounded* Erie

To appreciate the limited nature of *Klaxon*'s ruling, one must begin by reading the opinion against the analytical upheaval that was underway at the time it was written and compare the narrowness with which the Court spoke in *Klaxon* to the broad exploration of this shifting landscape that it undertook in contemporaneous rulings. When the Court rejected *Swift v. Tyson*, it set the stage for the creation of modern federal common law. That stage, in turn, provided the proscenium for a reframing of choice-of-law analysis that was already underway.

The 1930s and 1940s were a transformative period in the relationship between state and federal courts. In a handful of years, the business of federal courts sitting in diversity underwent a complete reversal. The era of the Conformity Act[4] and *Swift v. Tyson*,[5] under which federal diversity courts would apply state law to most questions of procedure but general federal common law to many questions relating to liability, came to an end. In its place came the new dispensation of the Rules Enabling Act[6] and the Federal Rules of Civil Procedure, which established the first uniform law of federal procedure for actions at law, and *Erie*, which eradicated the general federal common law and recognized state common-law courts as authoritative expositors of liability rules.

At the same time, choice of law was poised for a revolution. In 1934 and 1935, the work of Joseph Beale culminated, respectively, in the publication of the American Law Institute's (ALI) First Restatement of Conflict of Laws, which Beale drafted,[7] and a treatise on the subject published under Beale's own name.[8] Both works sought to preserve and valorize a rule-based, territorial, vested-rights approach to choice-of-law analysis, but these holding actions quickly proved unsustainable. In 1942, Walter Wheeler Cook published *The Logical and Legal Bases of the Conflict of Laws*, his magnificent

4 Conformity Act of 1872, ch. 255 § 5, 17 Stat. 196, 197 (1872).
5 41 U.S. 1 (1842).
6 Pub. L. No. 73-415, 48 Stat. 1064 (1934).
7 RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).
8 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

account of legal method and purposive interpretation in conflicts analysis.[9] The work of Cook, his contemporary Ernest Lorenzen and successor David Cavers prefigured the more widely-credited work of Brainerd Currie, which would dramatically shift the paradigm of the field twenty years later[10]—a shift in paradigm that had in fact been quietly set in motion in the 1930s when the Supreme Court issued a series of decisions that bookended Beale's work like harbingers, defining the constitutional limits on choice of law in terms of state interests and avoidance of unfair surprise.[11] The Court's iconic 1945 ruling in *International Shoe v. Washington*,[12] effectuating a similar shift in the cognate field of personal jurisdiction that rejected the strict territorialism of *Pennoyer v. Neff*[13] in favor of an approach based on state interests and fundamental fairness, came shortly thereafter.

Developments in the field of federal jurisdiction were also underway. Between 1891 and 1925, Congress implemented a series of reforms that established the system of intermediate circuit courts of appeal with which we are familiar today, unifying the *nisi prius* work of the federal bench into district courts that would thereafter serve as the exclusive courts of original federal jurisdiction for most purposes while giving the circuit courts the last word in most cases and alleviating a decades-long crisis in the workload of the Supreme Court.[14] In the 1920s, motivated in part by this sea change in the structure of the federal judicial system, leading thinkers like Felix Frankfurter and Charles Warren, and also a young Henry Friendly, produced scholarly treatments of the jurisdictional policies of the newly refashioned

9 WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942). The book consisted of an edited collection of previously published essays along with several new additions. The most famous of the previously published works and the intellectual foundation for the project was an essay published in the *Yale Law Journal* for which the book became an eponym. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924). As Professor Cavers wrote in a review of the book, Cook's original essay was a "dramatic triumph over the 'territorial' and 'vested rights' theories" that "stormed his objectives by frontal assault." David F. Cavers, *Cook: The Logical and Legal Bases of the Conflict of Laws*, 56 HARV. L. REV. 1170, 1170-71 (1943) (book review).

10 *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

11 *See, e.g.*, Pac. Emp'rs Ins. v. Indus. Accident Comm'n, 306 U.S. 493, 499-500 (1939) (discussing the full faith and credit obligation of one state to give effect to the laws of another in terms of the interests of the respective states); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) (same); Home Ins. Co. v. Dick, 281 U.S. 397, 411-12 (1930) (imposing due process limitations on a choice of law that would impose unfair surprise upon a litigant).

12 Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

13 Pennoyer v. Neff, 95 U.S. 714 (1877).

14 *See* Felix Frankfurter & James Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 HARV. L. REV. 834, 834-42 & accompanying notes (1927) (laying out the series of statutory reforms by which the responsibilities and jurisdiction of the federal courts were updated).

federal courts that remain important resources to this day.[15] Their work helped to lay the foundation for the understanding that the Court soon embraced in *Guaranty Trust v. York* that its *Erie* decision had articulated "a policy of federal jurisdiction," as Justice Frankfurter would put it when given the opportunity to translate his scholarly work into an opinion for the Court.[16]

That understanding of the *Erie* doctrine was bound up with a newly emerging account of the scope, content and function of federal common law. Following *Erie*, the Court had to reconsider the proper role of federal courts in crafting federal policy in the absence of express congressional direction. In the process, it had to determine what parts of its *Swift*-era jurisprudence would survive in the new order. Contemporaneous with that judicial inquiry, during the 1940s, Professors Hart and Wechsler undertook the monumental scholarly project that would culminate in the 1953 first edition of *The Federal Courts and the Federal System*,[17] the casebook that defined Federal Courts as a coherent field of study distinct from Civil Procedure and worthy of separate attention and facilitated more expansive and sophisticated analysis of the distinctive purpose and function of the federal courts and federal jurisdiction.

From this roiling sea emerged the Court's 1941 decision in *Klaxon*. Short, simple, and containing little analysis, *Klaxon* held that a federal court hearing a case in its diversity jurisdiction was required to apply the same choice-of-law rules that would have governed the case had it been brought in a court of the state in which it sits. *Klaxon* swept away over a hundred years of practice in which the Supreme Court and lower federal courts had issued independent choice-of-law rulings in common law cases. Like so much in the post-*Erie* years, *Klaxon* was a revolution. And, like so much in those years, it was merely an initial statement in a complex field that would require further elaboration. The Sections that follow begin that overdue exposition.

B. *The Changes that* Erie *Wrought*

The revolution that *Erie* brought about in the American legal system operated on multiple levels. Most conspicuously, the decision "overruled a particular way of looking at law," as Justice Frankfurter put it, under which "federal courts [had] deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State

15 *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

16 Guaranty Tr. Co. v. York, 326 U.S. 99, 101 (1945).

17 HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

law," even in cases where Congress was without power to frame federal rules of decision.[18] In rejecting that view, the Court gave voice to principles of federalism and separation of powers that had a constitutional dimension. Soon thereafter, the Court defined the "policy of federal jurisdiction"[19]—"the twin aims of the *Erie* rule,"[20] as the Court would later put it—that has served as the starting point for determining the applicable law in "procedural" disputes in federal diversity courts where judge-made law is the potential source of the federal rule. These matters are well known—they constitute the received wisdom of the *Erie* ruling.

But *Erie* also had a dramatic institutional impact. The ruling transformed the business of the Supreme Court, altering the range of issues that it would have occasion to decide, the supervisory function that it would serve in relation to the lower federal courts, and the certiorari policy that it would follow under the new dispensation. It also required the Court to develop a new vocabulary for describing the proper role of the federal courts in promulgating rules of decision in the absence of express congressional direction. When the Court pronounced that "[t]here is no federal general common law,"[21] it set itself the task of determining which of its *Swift*-era precedents would survive that pronouncement.

A close analysis of the cases decided in the decade following *Erie* finds the Court adopting a conservative approach as it takes the full measure of its paradigm-shifting decision along all these dimensions. The Court acted quickly to realign its institutional relationship with the lower federal courts, updating its policies on certiorari and standards of review to reflect the new reality and, where necessary, exercising a heavy hand of supervision to adapt the lower federal courts to their new task. But the realignment of the doctrines of federal common law came more gradually. The Court permitted itself to be vague about the governing source of law in several early cases in which it was not yet ready to resolve questions of federal power but apparently believed that circumstances required it to grant certiorari and issue a federal answer. And when the Court did provide guidance about the power of the federal courts to issue controlling rules of decision in the absence of express federal authority, it did so slowly and in stages—reaffirming those lines of precedent that survived from the *Swift* era, preserving others under a federal common-law rubric, and speaking in a new way about the role of federal courts in resolving disputes involving competing assertions of state authority.

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18 *Guaranty Tr.*, 326 U.S. at 101-02.

19 *Id.* at 101.

20 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

21 *Erie*, 304 U.S. at 78.

The formalistic language of the *Klaxon* decision reflects little of this unfolding terrain. That fact in itself is revealing. When one understands more fully the set of doctrinal developments in which *Klaxon* was embedded and how those developments were being discussed in contemporaneous decisions, the sparseness of the opinion suggests the limited scope of the issues that the Court resolved. When combined with the questions of choice of law and jurisdictional policy that remained open in cases following *Klaxon*—either reserved expressly by the Court or explored in dictum—a picture emerges of a more dynamic field of play than has previously been acknowledged for choice of law in federal courts.

1. Institutional and Analytical Transitions Following the Ruling in *Erie*

Erie required the Court to address some immediate transitional issues. Cases already in progress before the lower federal courts that had begun under the rule of *Swift* had to be reconsidered. The Supreme Court's own policies on granting certiorari and handling appeals had to be restructured. And there were threshold questions about how broadly the ruling in *Erie* would be applied and how federal courts would go about determining the content of state law. The Court took up many of these questions in the three years between *Erie* and *Klaxon*. At the same time, the Court itself had to learn a new analytical mode and a greater degree of precision in specifying the source of the common law principles that it was applying in commercial disputes, a precision that was surprisingly slow in coming in those transitional years.

One week after *Erie*, the Court handed down its opinion in *Ruhlin v. New York Life Insurance*,[22] a state-law dispute involving a request for rescission of several life insurance policies. Largely forgotten now, *Ruhlin* was one of the standard citations in the Court's *Erie* jurisprudence for a number of years, for it was the case in which the Court first held that the rejection of the general federal common law applied in equity cases as well as actions at law.[23] The Rules of Decision Act (RDA) applied only to "trials at common

22 Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202 (1938).

23 *Id.* at 205. Earlier decisions had also looked to state supreme court opinions on matters of contract interpretation, but as a matter of prudence rather than "power." *Ruhlin* superseded those decisions and held that:

> The decision in [*Erie*] goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity.

Id.

law" until it was amended in 1948 to encompass all "civil actions,"[24] but the Court offered no analysis for its conclusion that *Erie* controlled in such cases as well, perhaps taking it to be a self-evident result of the constitutional component of the ruling or perhaps desiring to avoid broad pronouncements or dense analysis at such an early point in the journey upon which it had embarked. That reticence was apparent in another aspect of the ruling as well: the dispute in *Ruhlin* presented a potential choice-of-law issue, but the Court expressly declined to decide it, a reservation that the *Klaxon* Court would make reference to three years later.[25]

The *Ruhlin* decision also explained the change in the Court's certiorari policy that the rejection of *Swift* occasioned, reflecting *Erie*'s immediate institutional consequences for the business of the Court.

> Had [*Erie*] been announced at some prior date the course of this case might have been different. This court might not have issued a writ of certiorari. Rule 38(5) of the Supreme Court Rules . . . indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that "a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter . . . ." As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.[26]

It would take the Court several years to sort out the role it would play in reviewing decisions of lower federal courts on pure questions of state law, as I discuss below.

In the two weeks after *Ruhlin*, the Court issued four GVR orders granting pending requests for certiorari on federal judgments that had been issued under the general common law of *Swift*, vacating the rulings and remanding

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24 *See* Act of Jun. 25, 1948, Pub. L. No. 80-773, 62 Stat. 944 (1948), which amended the Rules of Decision Act, 28 U.S.C. § 1652 (2012), to substitute "civil actions" for "trials at common law" in describing the ambit of the statute. The change brought the language of the RDA into alignment with the Federal Rules of Civil Procedure, which merged law and equity and specified the "civil action" as the unit of civil litigation in the federal courts. *See* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

25 *See Ruhlin*, 304 U.S. at 208 n.2 ("Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. We do not now determine which principle must be enforced if the Pennsylvania courts follow a different conflict of laws rule." (citation omitted)); *Klaxon*, 313 U.S. at 494 ("The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. We left this open in [*Ruhlin*].").

26 *Ruhlin*, 304 U.S. at 205-06. Professor Hartnett notes the impact of *Erie* in his discussion of the Court's discretionary certiorari practice following enactment of the Judges' Bill of 1925. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1721 n.443 (2000).

for further consideration in light of *Erie* and *Ruhlin*.[27] Those orders signaled to the lower federal courts that they should take it upon themselves to alter course in their pending cases, entertaining petitions for rehearing where necessary in light of the potential change in the governing rule of decision that *Erie* brought. Despite the magnitude of that change, this part of the transitional period appears to have been free of major crises, at least so far as the Court's own caseload reveals. There are only a few cases during this time in which it appears that the Court had to employ its writ of certiorari to discipline resistant circuit courts.[28]

A cluster of questions predictably arose early in the Court's *Erie* cases involving the content of state law: the analytical question of how to determine that content, and the institutional question of how the Supreme Court would treat such determinations by lower federal courts. As to the first, the Court quickly held that, in the absence of controlling decisions by state supreme courts, the federal courts were bound to follow the decisions of intermediate state appellate courts.[29] That ruling committed the Court to the proposition that state law principles have determinate content even in the absence of a

27 *See* N.Y. Life Ins. v. Jackson, 304 U.S. 261, 262 (1938) (GVR order in action to cancel insurance policy on grounds of fraud); Rosenthal v. N.Y. Life Ins., 304 U.S. 263, 264 (1938) (same); Hudson v. Moonier, 304 U.S. 397, 397-98 (1938) (GVR order in negligence action for personal injuries); Mut. Benefit, Health & Accident Ass'n v. Bowman, 304 U.S. 549, 550 (1938) (GVR order for unspecified dispute).

28 The most conspicuous example involved a case in the Fifth Circuit, where the Supreme Court began its opinion reversing that court by explaining, "We granted certiorari in this case to review a judgment in which the Circuit Court of Appeals applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case." Moore v. Ill. Cent. R.R., 312 U.S. 630, 631 (1941) (citations omitted), *overruled on other grounds*, Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972). *Moore* happens to have been the *Erie* ruling that most closely preceded the Court's decision in *Klaxon*.

Another pointed example, also from the Fifth Circuit, came in the earlier case of *Wichita Royalty Co. v. City National Bank of Wichita Falls*. 306 U.S. 103 (1939). The Supreme Court reversed an attempt by the Court of Appeals in *Wichita Royalty* to depart from a Texas Supreme Court precedent that the Circuit had already rejected on general commercial law principles at an earlier (pre-*Erie*) stage of the case. Following *Erie*, the Fifth Circuit stuck to its guns, claiming that an intervening Texas Supreme Court decision had validated its position, but the Supreme Court was having none of it. *See id.* at 109 ("Even if we thought this distinction [upon which the Texas courts had relied] not well taken, nothing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one. That the distinction [in the Texas case] was advisedly made and was not intended to modify the rule announced by the state court on the appeal in this case, appears from the opinions in both cases.").

29 The Court issued three rulings to this effect on the same day, the leading one of which was *Fidelity Union Trust v. Field*. 311 U.S. 169 (1940); *see also* West v. Am. Tel. & Tel., 311 U.S. 223, 236-37 (1940) (applying the same ruling to a case in involving two successive suits between the same parties); Six Cos. of Cal. v. Joint Highway Dist. No. 13 of Cal., 311 U.S. 180, 188 (1940) ("We have fully discussed the principle involved in the cases of [*West*] and [*Fidelity Union Trust*], decided this day, and further amplification is unnecessary.").

controlling decision by the highest state court, rejecting the assumption of several circuits that they remained free to interpret that content for themselves until the state supreme court weighed in.[30] The Court also held that lower federal courts were bound by authoritative state court rulings even when those rulings were issued after judgment had been entered in a federal district court and the case was on appeal—a ruling that rejected *Swift*-era precedents that had relied on the vocabulary of vested rights in favor of a more positivist account of the effect that changes in the law have on a pending judicial proceeding.[31]

The Court's conclusions about its own role in determining the content of state law were less straightforward. *Erie* abruptly ended the Court's status as the final expositor of general common law principles for the federal courts, and the Court vacillated for a few years in defining its new supervisory function. In several cases, the Court rejected circuit court rulings on the content of state law without reciting any obligation to give deference to those rulings, though it is clear that the Court believed the interpretations it was rejecting in those cases were strained.[32] In others, the Court expressed reluctance to revisit the decisions of lower federal courts on questions of state law, though it did not specify how that reluctance would be given formal expression.[33] By 1943, the Court appeared to have settled on a formal plain error standard, pronouncing in *Palmer v. Hoffman* that "[w]here the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."[34] But that pronouncement was short-lived. *Palmer* was not cited for this proposition in any subsequent *Erie* case and appears to have been relied on by the Court on only one occasion for this

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30 As the Court explained in *Fidelity Union Trust*:

> The highest state court is the final authority on state law, but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question . . . whether the question is one of statute or common law.

311 U.S. at 177-78 (citations omitted).

31 Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538, 540-42 (1941).

32 *See, e.g.*, *Wichita Royalty*, 306 U.S. at 109-10 (rejecting Fifth Circuit's interpretation of intervening changes in Texas law).

33 *See, e.g.*, Helvering v. Leonard, 310 U.S. 80, 85-86 (1940) ("The Circuit Court of Appeals held that under New York law the terms of the trust would not be changed 'unless the wife can disaffirm it for fraud, overreaching, or the like.' If the case was here on application of local law under the rule of [*Erie*], we would not be inclined to disturb that finding." (citation omitted)).

34 Palmer v. Hoffman, 318 U.S. 109, 118 (1943).

issue, in an unusual context and decades later.[35] Following *Palmer*, the Court would spend several years expressing its reluctance to disturb the rulings of lower federal courts on matters of state law in terms of its certiorari policy[36] before eventually returning to a principle of deference to the lower federal courts, albeit in vaguer terms than the Court had first used in *Palmer*,[37] coupled with a de facto certiorari policy under which it is now exceedingly rare for the Court to review diversity rulings solely in order to correct errors in state law.

During this same period, the Court's own statements on the sources and content of the law it was applying were surprisingly non-specific in several key decisions. In the first case in which it acknowledged *Erie* in the term following the decision, the Court weighed in on a high-stakes trademark dispute between two manufacturers of breakfast cereal, Kellogg and Nabisco, over their competing shredded wheat products.[38] In a footnote at the outset of the majority opinion, Justice Brandeis observed:

> The federal jurisdiction rests on diversity of citizenship—National Biscuit Company being a New Jersey corporation and Kellogg Company a Delaware corporation. Most of the issues in the case involve questions of common law and hence are within the scope of [*Erie*]. But no claim has been made that the local law is any different from the general law on the subject, and both parties have relied almost entirely on federal precedent.[39]

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35 The lone reference appears in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in a portion of the opinion analyzing and upholding parts of a Pennsylvania law that restricted access to abortion procedures. 505 U.S. 833, 880 (1992).

36 *See, e.g.*, Huddleston v. Dwyer, 322 U.S. 232, 236-37 (1944) (per curiam) ("The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts…").

37 *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 482 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" (quoting Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 499-500 (1985))). This deference is at its strongest when the lower federal courts agree on the construction of state law. *See* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts.").

It should be noted that such deference to lower federal court pronouncements on state law exhibits a degree of tension with the Court's 1991 ruling that federal appeals courts should review the rulings of district courts *de novo* on issues of state law, owing in part to the superior institutional capacity of appeals courts to consider difficult questions of law (and to some skepticism about the "local expertise" rationale for deference). *See* Salve Regina Coll. v. Russell, 499 U.S. 225, 231-39 (1991). It is perhaps in part for this reason that the Court has chosen to be vague in the nature of the deference that it shows, reserving to itself the prerogative to reject lower court interpretations of state law whenever it deems it appropriate to do so.

38 Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111 (1938).

39 *Id.* at 113 n.1.

This is a remarkable finesse for the Court (and the jurist) that had just turned the world of common-law adjudication in the federal courts upside-down. When the Court went on to define the duties that fall on bearers of potentially confusing trademarks—for example when it explained that "[t]he obligation resting upon Kellogg Company is not to insure that every purchaser will know it to be the maker [when consumers eat its shredded wheat] but to use every reasonable means to prevent confusion"—it demonstrated no concern for specifying the source of the law that it was making.[40] Five years before its decision in *Clearfield Trust*,[41] the Court was apparently not yet ready to identify its role in defining rights peripheral to a federal issue (in *Kellogg*, the federal trademark registration provisions),[42] leaving doubt as to which tribunals should consider themselves bound by the principles the Court was articulating. Indeed, in the years immediately following *Kellogg*, some lower federal courts sitting in diversity took the Court's equivocation on the matter as an invitation to use *Kellogg* as something like a general federal common law precedent.[43] *Kellogg* continues as a point of reference in jurisprudence under the Lanham Act[44]—subsequently enacted in 1946[45]—which now defines the rights and duties associated with trademark

40 *Id.* at 121. In another representative passage, the Court speaks to the rights of manufacturers to enjoy the benefits of goodwill generated by their competitors.

> Kellogg Company is undoubtedly sharing in the goodwill of the article known as "Shredded Wheat"; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising presently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.

Id. at 122.

41 Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943).

42 *See Kellogg*, 311 U.S. at 117 n.3 ("The trade-marks are registered under the [federal] Act of 1920. But it is well settled that registration under it has no effect on the domestic common-law rights of the person whose trade-mark is registered.") (citations omitted).

43 *See, e.g.*, Skinner Mfg. v. Gen. Foods Sales, 52 F. Supp. 432, 438-40 (D. Neb. 1943) (describing the difficulties of ascertaining Nebraska law on a trademark issue and the "absurdities" produced by attempting a choice-of-law analysis and relying upon *Kellogg* to conclude that "there is no disposition in this state to depart from the generally prevailing rule").

44 The case is cited in disputes under the Act involving advertising and trademark. *See, e.g.*, Kenner Parker Toys v. Tyco Indus., No. 87 Civ. 1136(WK), 1987 WL 124319, at *4 n.3 (S.D.N.Y. Apr. 20, 1987) ("Justice Brandeis' opinion [in *Kellogg*] articulated the doctrines upon which the Lanham Act was based, and continues to be cited for the proposition it formulated.").

45 Lanham Act, Pub. L. No. 79-489, 60 Stat. 427, 444 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141 (2012)).

infringement as a matter of federal law.[46] At the time it was issued, however, the decision left unspecified the source of law that it was applying.

In another dispute, *United States v. Bethlehem Steel*,[47] decided four years later (and still a year before *Clearfield Trust*), the Court again declined to state the sources of law on which it was relying in resolving a major commercial lawsuit, this one between the United States and a shipbuilding company relating to manufacturing services that the company rendered during World War I. The dispute sounded in contract, with the government claiming that Bethlehem had exercised duress and acted in bad faith during a time of exigent need and hence should be denied a portion of the profits for which it had bargained. In ruling against the government, the lower federal courts had applied state law, as they believed *Erie* required.[48] Once again, the Court recognized that there was some question as to what law should govern a case involving rights peripheral to a federal issue (here, contracting with the U.S. government), and once again it declined to decide the issue. Pronouncing broadly on such core contract principles as consideration, unconscionability and duress, the Court claimed that it "need not decide" the source of law in the case because it thought the governing principles to be so well established.[49] Those principles were not so clear to Justice Frankfurter, who dissented on the merits, but even Frankfurter shared in this remarkable lack of attention to the sources of the controlling law.[50] Indeed, in the lower-court opinion in *Clearfield Trust* that the Supreme Court later affirmed, the Third Circuit indicated that the Court had "avoided" this important question in *Bethlehem Steel*.[51] *Bethlehem Steel*, too, was cited for several decades, as a sort of general-law precedent for contract disputes.[52]

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46 *See, e.g.*, Qualitex Co. v. Jacobson Prods., 514 U.S. 159, 164-65 (1995) (citing *Kellogg* in discussion of the "functionality doctrine," which "prevents trademark law . . . from . . . inhibiting legitimate competition by allowing a producer to control a useful product feature.").

47 United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942).

48 *Id.* at 299 n.9.

49 *Id.* at 299-300; *see also id.* at 299 ("[W]e know of no federal or state statute or established rule of law in any jurisdiction inconsistent with the elementary proposition that a promise to build ships is good consideration for a promise to pay a sum of money whether fixed in amount or depending upon the relationship between actual and estimated cost.").

50 *See, e.g.*, *id.* at 326 (Frankfurter, J., dissenting) ("But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequality and injustice?"); *id.* at 326-31 (variously citing to *Swift*-era cases, state-law cases, and cases suggesting a federal common-law rule of decision in discussing the concept of duress).

51 United States v. Clearfield Tr., 130 F.2d 93, 95 n.6 (3d Cir. 1942), *aff'd*, 318 U.S. 363 (1943).

52 *See, e.g.*, *In re* King-Porter Co., 446 F.2d 722, 727 n.9 (5th Cir. 1971) (in contract issue governed by Mississippi law, citing *Bethlehem Steel* along with Corbin on Contracts and various Mississippi authorities on the issue of consideration).

The failure of the Court to specify the exact source of the rule of decision in its cases, even on important issues, is not a failing unique to this transitional period. To note just one conspicuous and more recent example, the Court took sixty-three years following its ruling in *Erie* to explain the source and content of the preclusive effect that attaches to a judgment issued by a federal court sitting in diversity.[53] Nonetheless, these two instances are telling. In both cases, the Court may have felt that institutional concerns impelled it to grant a writ of certiorari and resolve the disputes: *Kellogg v. Nabisco* raised questions about trademark, competition and product development that were pressing enough to lead Congress to enact national standards within a few years of the Court's decision, and *Bethlehem Steel* involved a major wartime contract dispute with the United States as the complaining party. At the same time, it is apparent that the Court was not yet ready to write broadly about the role that preemptive federal common law would play in cases where federal issues were closely mingled with rights traditionally defined by common-law doctrine. And so the Court spoke broadly about trademark infringement and the contractual rights and obligations of the U.S. government without requiring of itself the same discipline that it was demanding of lower federal courts in speaking carefully about sources of law.

2. Federal Common Law

Despite the ambiguity of decisions like *Kellogg* and *Bethlehem Steel*, the Court did begin to provide guidance on the status and content of federal common law—a term that encompasses a broader array of issues than is commonly appreciated. Contemporary discussions of federal common law focus the bulk of their attention on the limited class of cases involving federal liability or regulatory rules that displace contrary state law in both state and federal proceedings and are developed by courts to give voice to "uniquely federal interests"[54] or as extensions or interstitial interpretations of federal statutes. The Court itself sometimes uses the term "federal common law" coextensively with this subset of cases.[55] It is an impoverished vocabulary that threatens to obscure the full range of issues that the Court was forced to rethink upon issuing the *Erie* decision. The judicially crafted doctrines that

53 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (holding that the preclusive effect of a judgment issued by a federal diversity court is governed by federal common law but that the applicable state preclusion law should ordinarily be incorporated by reference barring some strong federal interest calling for a different or distinctly federal rule).

54 Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

55 *Id.* (referring to such preemptive, judicially crafted federal rules of decision as "so-called 'federal common law'").

govern the internal administration of remedies and procedure in the federal courts—equity practice, for example, or *forum non conveniens*—are also the product of federal common law, as are doctrines that provide for the resolution of competing claims of authority between states.[56] Disputes presenting all three types of problem were a vibrant part of the Court's docket in the decade following *Erie*, the latter two even more so than the type of preemptive liability and regulatory rules that the Court authorized in *Clearfield Trust* (and failed to address in *Bethlehem Steel*).

The Court cautiously approached the task of sorting through this cluster of issues during the early years after *Klaxon*, as seen in *D'Oench, Duhme & Co. v. FDIC*,[57] in which the Court again ducked the federal common law question that it had avoided in *Bethlehem Steel* along with a host of related questions concerning choice of law and jurisdictional policy in the federal courts. The case involved a bank note that the FDIC sought to enforce in the face of a defense that the note, as originally issued, was never meant to be called for payment. Decision of the case seemingly required the Court to specify the source of law that would govern that putative defense, which in turn implicated arguments about federal common law and choice of law in a non-diversity case (because both Missouri and Illinois law were potentially applicable, if state law controlled). The Court was unanimous in rejecting the defense, but only Justice Jackson was prepared to be explicit in specifying the analytical underpinnings of that result, chastising his colleagues for their failure to do so.

> I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or in the concurring opinion of Mr. Justice FRANKFURTER. That question, as old as the federal judiciary, is met inescapably at the threshold of this case. It is the one which moved us to grant certiorari, and we could not resort to the rule announced without at least a tacit answer to it.[58]

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56 Federal common law can also operate to carry into effect the procedural policies embodied in the Federal Rules of Civil Procedure and their appellate counterparts through procedural field preemption, even when the text of such provisions do not expressly prescribe that result—a mode of analysis that has been underappreciated and imperfectly rendered in the case law and scholarship in this area. Properly understood, the Supreme Court's decision in *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), in which the Court concluded that a federal diversity court should follow Federal Rules of Appellate Procedure 37 and 38 rather than contrary state law when determining what penalties should accompany an unsuccessful appeal, falls into this category. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25-52 (2010).

57 D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

58 *Id.* at 465 (Jackson, J., concurring).

The Court would wait another year before providing guidance on preemptive federal common law doctrine in *Clearfield Trust*, and its statements on choice of law and jurisdictional policy would come more sporadically.

This subsection will sketch the landscape of federal common law during this transitional period in three stages. It begins with brief accounts of the emergence of federal common law rulings in the internal administration of the federal courts and in the articulation of preemptive liability and regulatory rules. It then examines the array of cases in which the Court discussed the role of the federal courts in framing rules of decision in cases involving competing or overlapping claims of state authority, including a surprisingly rich discussion of the issue in cases like *D'Oench, Duhme* in which choice-of-laws problems arose in a non-diversity context. Although the Supreme Court never issued a ruling expressly carving such cases out of the ambit of the *Klaxon* doctrine, it indicated its appreciation of the distinct doctrinal and jurisprudential forces that might properly govern such a dispute.

a. *Internal Administration of Federal Court Proceedings*

The power of federal courts to develop judge-made law for the internal administration of federal court proceedings, and the circumstances in which those rules of decision must bow to contrary state practice, has become largely synonymous with the "*Erie* doctrine" in modern parlance. The issue was addressed relatively late in the transitional period following *Erie* and, to an extent usually forgotten in contemporary discussions, was enmeshed with other questions of federal power that the Court was still sorting through. The decision in which the Court first spoke meaningfully to the issue, the 1945 ruling in *Guaranty Trust v. York*,[59] is often reduced to a tag line—the "outcome determination" test—and understood in light of the over-simplified account that the Court gave of the case in *Hanna v. Plumer*.[60] In fact, the decision is both nuanced and deft. Justice Frankfurter navigated the Court through a cluster of problems in *Guaranty Trust* that had been producing confusion and conflicting rulings for the seven years that preceded it.

Guaranty Trust involved a representative proceeding, brought in equity under New York law, asserting a breach of fiduciary duty by the defendant financial institution in its dealings with the holders of certain notes. The issue on which the Supreme Court granted certiorari concerned the timeliness of the suit. The defendant claimed that the suit was barred under the New York

59 Guaranty Tr. Co. v. York, 326 U.S. 99 (1945).

60 Hanna v. Plumer, 380 U.S. 460, 467 (1965).

statute of limitations. Plaintiff argued, and the Second Circuit agreed, that a federal court sitting in equity was authorized to apply its own doctrine of *laches* to permit a suit that would be untimely under the statute so long as the defendant would suffer no prejudice from the delay. The Court held that the state statute of limitations was controlling.

Prior to the Court's ruling, the proper treatment of equitable remedies in a post-*Erie* federal proceeding was an unsettled matter. As noted above, the Court had proclaimed just a few weeks after *Erie* that its rejection of the general common law applied with equal force in cases brought in equity, despite the language still present in the Rules of Decision Act at that time that limited the statute to trials at common law.[61] It was clear that federal equity courts sitting in diversity had to look to state decisional law for controlling liability rules. Two years later, however, the Court rejected the application of a state statute of limitations in a federal question case, using language that seemed to preserve a broad role for federal equity powers. The case, *Russell v. Todd*,[62] involved an equitable class proceeding brought under the Federal Farm Loan Act that sought distribution of an insolvent fund among shareholders. The federal statute had no statute of limitations provision, requiring the Court to decide what standard should control questions of timeliness. The defendants claimed the action was barred by the statute of limitations of the state where suit was brought. The Court rejected that argument, instead applying a federal *laches* standard to find the claim timely. In describing the scope of a federal court's remedial equitable powers, the Court emphasized that "[t]he Rules of Decision Act does not apply to suits in equity"—a seeming retrenchment from its broad pronouncement in *Ruhlin* on questions of equitable remedies—and so "the question decisive of this case is what lapse of time will bar recovery in the absence of an applicable federal statute of limitations."[63] The Court then looked to *Swift*-era precedents for a federal answer. It noted the continuing vitality of a line of cases under which federal equity courts had sometimes incorporated state statutes of limitations by reference for certain types of equitable disputes but concluded that those cases were not applicable and instead applied an independent *laches* standard. Acknowledging *Erie* at the close of its analysis, the *Russell* Court said that it had "no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."[64] The pair of cases led Justice Jackson

61 *See* Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205-06 (1938).

62 Russell v. Todd, 309 U.S. 280 (1940).

63 *Id.* at 287.

64 *Id.* at 294.

to note two years later that the effect of *Erie* on disputes falling outside ordinary diversity jurisdiction "seems not to have been definitely settled,"[65] and Justice Frankfurter began his 1945 opinion by noting the issue that *Russell* had left open.[66]

In *Guaranty Trust*, the Court had to disaggregate the questions of equity practice, jurisdiction and federal power that it had finessed in *Russell*. Because the Conformity Act and its predecessor did not apply to suits in equity, the federal courts had been developing their own "forms and modes of proceeding"[67] in equity suits, including remedial doctrines, throughout their institutional history.[68] At the same time, the distinction between concepts of "remedy" and "liability rule" was not always carefully policed in equity practice, particularly under the doctrine of *Swift v. Tyson*, where the federal courts were often free to craft equitable remedies and define rights and obligations without distinguishing carefully between the two.[69] When *Russell v. Todd* strongly reaffirmed the power of federal courts to craft equitable remedies without regard to the Rules of Decision Act, it created uncertainty about the freedom that federal diversity courts might also retain to rely on quasi-substantive equitable doctrines to displace state rules of decision.

In a portion of his opinion in *Guaranty Trust* that is often forgotten in contemporary discussions, Justice Frankfurter clarified the status of federal equity practice following *Erie*:

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65 D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 467 n.3 (1942) (Jackson, J., concurring).

66 *See* Guaranty Tr. Co. v. York, 326 U.S. 99, 100 (1945).

67 Conformity Act of 1872, §5, 17 Stat. 197 (1872).

68 The power to craft equitable doctrines and remedies traces back to the second Congress, which enacted legislation authorizing the federal courts to employ traditional equitable doctrines and craft such new doctrines (either by decision or through rules promulgated by the Supreme Court) as they deemed expedient. Here is the relevant text:

> *And be it further enacted*, That the forms of writs, executions and other process . . . shall be the same as are now used in . . . [courts] of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively . . . .

An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses, § 2, 1 Stat. 275, 276 (1792) (emphasis in original).

69 As Justice Frankfurter notes, however,

> it may fairly be said that the federal courts gave greater respect to State-created 'substantive rights' in equity than they gave them on the law side, because rights at law were usually declared by State courts and as such increasingly flouted by extension of the doctrine of Swift v. Tyson, while rights in equity were frequently defined by legislative enactment and as such known and respected by the federal courts.

Guaranty Tr., 326 U.S. at 104 (citation omitted).

> From the beginning, there has been a good deal of talk in the cases that federal equity is a separate legal system. And so it is, properly understood. The suits in equity of which the federal courts have had cognizance ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery. But this system of equity derived its doctrines, as well as its powers, from its mode of giving relief. In giving federal courts cognizance of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.[70]

To be fully descriptively accurate, Frankfurter might have written, "nor did the federal courts ever *properly* claim" such a power, since many federal courts (including the Second Circuit in *Guaranty Trust* itself) often made broad assumptions about the substantive prerogatives that equity afforded them. Nonetheless, with this passage and the analysis that surrounded it, the Court confirmed the continuing ability of federal diversity courts to develop and apply equitable doctrines in diversity cases so long as they gave effect to the parties' rights and obligations as defined by state law.[71]

In the better-known portions of his opinion, Justice Frankfurter then explained that the relevant line between "right" and "remedy" would be defined with reference to the jurisdictional policy that the Court had embraced for diversity cases in *Erie*. "Equitable relief in a federal court is of course subject to restrictions," Frankfurter wrote, and the fact that "a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts."[72] Rather, it is those differences in remedial practice that would "substantially affect the enforcement of the right as given by the State" that call for the application of state law, because "[t]he nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in federal

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70 *Id.* at 105 (internal quotation marks and citations omitted).

71 The Court's desire to maintain the consistency and stability of its equity precedents can be seen in the closing passage of the majority opinion:

> Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But insofar as these general observations go beyond that, they merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin. And so, before the true source of law that is applied by the federal courts under diversity jurisdiction was fully explored, some things were said that would not now be said. But nothing that was decided . . . needs to be rejected.

Id. at 112.

72 *Id.* at 105-06.

court instead of in a state court a block away, should not lead to a substantially different result."[73]

Nothing like this analysis had appeared in the Court's cases in such a fully realized form in the seven years leading up to *Guaranty Trust*. In several rulings (including *Klaxon*, as I discuss below), the Court had defined certain doctrines as "substantive" by way of holding that they fell within the ambit of *Erie*.[74] In another case, the Court indicated (without further analysis) that state law must control "as to both substantive and procedural rights of the parties . . . where, as in this case, it controls decision."[75] And in two cases, *Sibbach v. Wilson & Co.* and *Palmer v. Hoffman*, the Court had begun to define the capacity of the newly authorized Federal Rules of Civil Procedure to displace contrary state law—expansively and with wooden formalism in *Sibbach*;[76] with more nuance and moderation in *Hoffman*.[77] But *Guaranty Trust* was the first occasion on which the Court provided an analytical framework that would support the promulgation of judicially crafted doctrines for the internal administration of federal court proceedings while also identifying those circumstances when the *Erie* doctrine might require such federal doctrines to bow to state law.

Given the significance of that innovation, it is perhaps not surprising that the Court was slow to provide further refinement. Soon after *Guaranty Trust*, the Court issued a pair of rulings, both involving cases filed in New York, in which it translated another judicially crafted doctrine for the administration of federal proceedings past the *Swift–Erie* divide: *forum non conveniens*.[78] The second ruling, *Gulf Oil v. Gilbert*, has proven durable and remains a standard point of reference in federal *forum non* cases.[79] The Court's ruling in

73 *Id.* at 108-09.

74 *See, e.g.*, Cities Servs. Co. v. Dunlap, 308 U.S. 208, 212 (1939) ("We cannot accept the view that the [burden of proof in action for ownership of land] was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely.").

75 *See* Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (per curiam) (requiring adherence to state law in determining whether a mandatory tax levy may be imposed to satisfy defaulted bonds).

76 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("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.").

77 *See* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) ("Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply.") (citations omitted).

78 *See* Gulf Oil v. Gilbert, 330 U.S. 501, 512 (1947) (holding that "the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community."); Williams v. Green Bay & W.R. Co., 326 U.S. 549, 559-60 (1946) (holding that "it was improper to dismiss the case on the grounds of *forum non conveniens*").

79 With the enactment of the federal venue transfer statute, 28 U.S.C. § 1404 (2012), the federal *forum non* doctrine has come to apply almost exclusively in international cases where the alternative forum would be a non-U.S. court; inconvenient domestic cases are handled through venue transfer.

Guaranty Trust helped confirm the power to develop an independent federal standard for *forum non*. But the Court ducked the *Erie* question in both cases, declining to decide whether the jurisdictional policy of federal diversity might require application of state *forum non* standards in some instances (a question that the Supreme Court has still not addressed). In the earlier ruling, *Williams v. Green Bay & W.R. Co.*, the Court noted a Second Circuit decision holding that *Erie* required federal diversity courts "to apply the local rule of forum non conveniens," but it "reserve[d] decision on that question" because, it said, New York *forum non* doctrine would produce the same result in that case.[80] The following year, *Gulf Oil* found the lower courts still struggling with these questions, with the district court holding that local law controlled the *forum non* analysis and the Second Circuit rejecting that argument and applying a federal standard that adopted a restrictive reading of *Williams* and a narrow rule.[81] The Supreme Court used *Gulf Oil* to provide more guidance on the content of the federal *forum non* standard, but it once again declined to say what would happen if state and federal standards diverged, issuing a caveat similar to the one in *Williams*.[82]

In short, it took seven years for the Court to settle on an approach to the promulgation of federal common law doctrines geared toward the internal administration of federal court proceedings (and applicable only in those courts). Slowly and with uneven results, the Court separated out the elements of *Erie* that sounded in federalism and the limits of federal power from those that flowed from the jurisdictional policy of the general diversity statute. Even thereafter, it applied this new approach with caution. Ten years out, the Court was prepared to reaffirm the doctrine of *forum non conveniens* as a

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Nonetheless, the Court continues to rely upon *Gulf Oil*. *See, e.g.*, Piper Aircraft v. Reyno, 454 U.S. 235, 255-61 (1981) (embracing *Gulf Oil* and applying its treatment of public and private interest factors to uphold a district court's entry of dismissal in an international dispute).

80 *Williams*, 326 U.S. at 558-59.

81 *See Gulf Oil*, 330 U.S. at 503; Gilbert v. Gulf Oil, 153 F.2d 883, 884-85 (2d Cir. 1946), *rev'd*, Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

82 As the Court stated in *Gulf Oil*:

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U.S. at 509 (citations omitted).

It bears remarking, once again, the surprising analytical recklessness in this way of proceeding. *See supra* notes 20–22 and accompanying text (discussing the Court's willingness to pronounce rules of decision in major cases without specifying the source of law). If federal diversity courts were in fact bound by local standards of *forum non conveniens*, then the *Gulf Oil* Court could simply have vacated the Second Circuit's decision and remanded with instructions to review, for abuse of discretion, the district court's assessment of the New York doctrine.

matter of federal power, but unready to explain how the doctrine should be measured against the jurisdictional policies that govern a diversity case.

b. *Preemptive Liability and Regulatory Rules*

The doctrine most commonly associated with the term "federal common law"—judicially crafted liability and regulatory rules that uniformly displace contrary state law, regardless of forum—developed unevenly in the transitional years. As discussed above, the Court exhibited caution in developing rules aimed at enforcing important federal interests, leading to analytically unsatisfying decisions like *Bethlehem Steel*, before it embraced the doctrine squarely in *Clearfield Trust*. At the same time, the Court was more confident in promulgating interstitial rules in cases that were governed by a federal statute but as to which "Congress ha[d] not specifically provided for the present contingency," leaving certain "details to judicial implication."[83] And the Court showed nuance in defining the relationship between federal law and state standards. In a variety of contexts, the Court found that federal law provided the rule of decision but would incorporate state law by reference when federal interests did not demand an independent standard.

The Court's quick reaffirmation of the power to develop interstitial rules—rules of decision in cases governed by federal statute but involving circumstances not specifically contemplated by the statutory text[84]—is not surprising, as it is perhaps the least adventuresome type of preemptive federal common law. Even so, *Erie*'s tectonic shift was great enough to leave even this question in doubt before the Court weighed in. In *Deitrick v. Greaney*, the Court heard an appeal involving a promissory note held by a national bank in receivership. The enforceability of the note was uncertain under a federal statute, the National Bank Act.[85] The Court read the statute expansively "in the light of its purposes and policy"[86] to empower the bank's receiver to secure payment on the note. Counsel on both sides of the dispute had assumed that *Erie* might require them to measure the legality of the note under state law standards, since the matter was not explicitly dealt with under the Bank Act. The Court rejected that assumption, explaining: "[t]he extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal

83 Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 349-50 (1939) (applying federal common law as an extension of a treaty in order to permit an award of interest on wrongfully collected taxes, an outcome that applicable state law would have prohibited).

84 The use of the term "interstitial" in this setting appears to have been coined by Justice Holmes. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) ("I recognize . . . that judges do and must legislate, but they can do so only interstitially.").

85 *See* Deitrick v. Greaney, 309 U.S. 190, 191-93 (1940).

86 *Id.* at 198.

policy which it has adopted . . . ."[87] The Court would go on to reiterate the proper role of the federal courts in articulating interstitial federal common law in several subsequent cases. One of its strongest statements comes in *Sola Electric v. Jefferson Electric*,[88] a dispute involving the ability of a patent licensee to challenge a price-fixing clause that lay at the intersection of the federal patent laws and the Sherman Antitrust Act. In explaining the federal character of the question, the Court wrote:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by [*Erie*]. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.[89]

Even as it confirmed the post-*Erie* power of the federal courts to develop preemptive rules of federal common law, the Court also went out of its way to inflect that power with the federalism principles to which *Erie* had given voice. Consider *Board of Commissioners of Jackson County v. United States*.[90] *Jackson County* presented the question whether a Native American was entitled to interest on taxes that a state had collected from her in violation of a federal treaty. Writing for the Court, Justice Frankfurter rejected the Kansas law that would have forbidden such interest on taxes and found that a federal rule of decision was necessary to give proper effect to the treaty. He went on to hold, however, that such interest was equitable in nature—available only when fairness demanded, not compensation as of right—and that an award of interest was not warranted in this case.[91] There was thus no need for the Court to specify the interest rate that would apply. Nonetheless, the Court reached

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87 *Id.* at 200-01 (citation omitted); *see also id.* at 200 ("A point much discussed in brief and argument, upon the assumption that local law will guide our decision is whether, by Massachusetts law, respondent is precluded from setting up the illegality of the transaction as a defense to his note." (citation omitted)).

88 Sola Elec. v. Jefferson Elec., 317 U.S. 173 (1942).

89 *Id.* at 176 (citations omitted).

90 Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343 (1939).

91 *Id.* at 349-50, 352-53.

out to decide the issue, finding in an extended discussion that federal law should adhere to state standards in such a case unless strong federal policies required otherwise:

> Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, Congress has left us free to take into account appropriate considerations of "public convenience." . . . With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy [citing *Swift*-era cases]. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions.[92]

This was Justice Frankfurter's first statement on the interplay between federal and state policy following his appointment to the Court, and it prefigured the approach that he would adopt in *Guaranty Trust* six years later. Indeed, the Court's decision the following year in *Clearfield Trust* operated in dialogue with rulings like *Jackson County*. In articulating the need for a uniform federal rule to govern transactions involving commercial paper issued by the U.S. government, *Clearfield Trust* rejected the proposal to "absorb" state law as a governing federal standard and looked to its own *Swift*-era precedents for a distinctively federal standard.[93]

Still, the Court's account of its role in promulgating preemptive federal common law during this period often had a more formalistic quality. In the 1942 case of *Garrett v. Moore-McCormack Co.*,[94] one of the first "reverse-*Erie*" rulings, the Court heard an appeal from the Pennsylvania Supreme Court in a case involving the federal Jones Act. The Pennsylvania court had applied state law on a burden-of-proof question, which it viewed as a "procedural"

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92 *Id.* at 351-52 (citations omitted).

93 As the Court explained:

> In our choice of the applicable federal rule we have occasionally selected state law. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here . . . . The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty . . . . The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of [*Swift*], represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

318 U.S. 363, 367 (1943) (citation omitted).

94 317 U.S. 239 (1942).

matter, finding that the burden rested on the plaintiff to disprove the validity of a release he had executed that would prevent recovery even though the rules of federal admiralty practice would place the burden on the defendant to sustain the release. The Supreme Court explained that "the obligation on law courts . . . to enforce substantive rights arising from admiralty law" generally included an obligation "to do so in a manner conforming to admiralty practice" and found this requirement to be binding on state courts as a matter of federal law.[95] In asking whether the burden-of-proof issue came under this principle, the Court began its analysis with a statement about the capacity of rules of practice "substantially to alter the rights . . . established in federal law," a formulation that prefigured *Guaranty Trust* to a small extent, but it then rested its holding on the formalistic substance–procedure dichotomy that the *Guaranty Trust* Court would later reject.[96]

3. Competing or Overlapping Claims of Interested States

Some of the most intriguing early statements by the Court on federal common law are to be found in cases that involved competing or overlapping claims of interested states. About a half dozen of the Court's cases fit this description in the decade following *Erie*, though only one—*Hinderlider*—spoke to the issue as part of its square holding.[97]

The dispute in *Hinderlider* involved competing claims between Colorado and New Mexico over the flow of water from the La Plata River. The river originates in Colorado, flows into New Mexico, and serves as an important source of irrigation water for both states. In 1925, Congress gave its consent to an interstate compact between the two states that provided a formula by which the waters would be apportioned when supply ran short. Supply ran short in 1928 and the Colorado official responsible for administering the Compact diverted the river's water away from the facilities owned by the

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95 *Id.* at 243-44.

96 That formalism is captured in the closing paragraphs of the opinion:

> The Pennsylvania Supreme Court has concluded that in solving problems of procedural, as distinguished from substantive, law, the law court may apply its own doctrine; and that the locus of burden of proof presents a procedural rather than a substantive question.
>
> Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action at law is incompatible with the conclusion of the court below. The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.

Id. at 248-49.

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

La Plata River & Cherry Creek Ditch Company so that it would be available to New Mexico users downstream. The Ditch Company sued, claiming that its rights to water from the river should be measured with reference to Colorado law—specifically, with reference to an 1898 state court judgment that had applied Colorado law and purported to establish the rights of all claimants, awarding the Ditch Company a right to water access that the Compact was now interrupting. The Ditch Company claimed that the Compact was unconstitutional (and hence could be ignored), either because such compacts could never bind private citizens or because this particular Compact deprived the Ditch Company of its vested rights under the earlier judgment without due process or proper compensation.[98]

Prior to *Hinderlider*, a long line of cases had established a doctrine of "equitable apportionment" under which the claims of competing states to the flow of a river had to be resolved with due regard to the interests of each. In such cases, the Court had held, adventitious circumstances that might place one state in a position of advantage—such as the greater power of the upstream state to exercise physical dominion over the flow waters of the river—could not be permitted to govern the outcome. "The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other."[99] The greater ability of one state to exercise physical power over the water could not be decisive under this doctrine, since "[b]oth States have real and substantial interests in the River that must be reconciled as best they may."[100]

A significant part of the Court's holding in *Hinderlider* involved a reaffirmation of this equitable apportionment doctrine in the new world of *Erie*, which the Court handed down on the same day. The Court rejected the Ditch Company's argument about its vested rights in the judgment, even though it was willing to assume that the company had acquired a cognizable property right in the earlier state proceeding,[101] explaining that the doctrine of equitable apportionment superseded state law and hence that any rights the company had acquired in conjunction with the 1898 decree were necessarily subject to that doctrine.[102] The Court then clarified the source of law for equitable apportionment in a passage explaining the basis for its jurisdiction to hear the appeal from the Colorado court. Equitable apportionment, the Court said, "is a question of 'federal common law' upon

98 *See id.* at 95-99.

99 Wyoming v. Colorado, 259 U.S. 419, 466 (1922).

100 New Jersey v. New York, 283 U.S. 336, 342-43 (1931).

101 *Hinderlider*, 304 U.S. at 102.

102 *See id.* at 108-09 ("As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898, in the Colorado water proceeding did not award to the Ditch Company any right greater than the equitable share.").

which neither the statutes nor the decisions of either State can be conclusive."[103] Although one could have deduced the federal common law status of equitable apportionment from the fact that the Court had not previously viewed itself as bound by state statutory enactments in the cases it decided under *Swift*, the reason for reiterating that proposition on the day that *Erie* was handed down is obvious.

Like many of the cases discussed in this subsection, *Hinderlider* was an occasion for the Court to identify a line of precedent that would continue to be good law following *Erie*. But the character of this case was distinctive. As with disputes between states over territorial boundaries (to which the Court drew an explicit parallel),[104] the occasion for the development of federal common law in *Hinderlider* was framed as a resolution of the competing claims of interested states.

The Court has not yet identified circumstances under which the principle that drove the result in *Hinderlider* would justify the promulgation of independent choice-of-law rules for use in the federal courts. But it has recognized the connection between the two doctrines and repeatedly left the issue open. Most conspicuously, in *D'Oench, Duhme*, the Court tied the holding of *Klaxon* to questions of jurisdictional policy. As discussed above, *D'Oench, Duhme* involved a claim on a note held by an FDIC-insured bank. The Court ultimately held that this question was governed by a rule of federal common law, but the lower federal courts had assumed that state law controlled, requiring them to resolve a choice-of-law question.[105] The court of appeals applied a "general law" of conflicts to find that, as between Illinois and Missouri, the status of the note should be governed by Illinois law.[106] Shortly after this ruling the Supreme Court decided *Klaxon*, and the potential conflict with the circuit court's treatment of the choice-of-law issue in *D'Oench, Duhme* prompted the Court to grant certiorari in that case.[107]

Because the Court found that the status of the note must be governed by a federal regulatory rule, it did not decide the choice-of-law question. In

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103 *Id.* at 110. Interestingly, there was some doubt at the time as to whether the interpretation of the interstate compact itself would have been governed by federal law. *See id.* at 110 n.12 ("The decisions [of this Court] are not uniform as to whether the interpretation of an interstate compact presents a federal question." (citations omitted)).

104 *See id.* ("Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.").

105 Jurisdiction came from the Federal Reserve Act, which conferred power on the FDIC to "sue or be sued in any court of law or equity, State or Federal," a provision that was treated as an independent grant of subject-matter jurisdiction. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455 (1942) (internal quotation marks omitted) (citing 12 U.S.C. § 264(j)).

106 *Id.*

107 *Id.* at 455 ("We granted the petition for certiorari . . . because of the asserted conflict between the decision below and [*Klaxon*]." (citations omitted)).

reserving that question, however, the Court tied its recent holding in *Klaxon* to the policies underlying the generic diversity provision.

> We held in [*Klaxon*] that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules "would do violence to the principle of uniformity within a state" upon which [*Erie*] was based. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under [the Federal Reserve Act, quoted above]. Whether the rule of the Klaxon case applies where federal jurisdiction is not based on diversity of citizenship, we need not decide. For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question . . . .[108]

In a concurring opinion, Justice Frankfurter went a half step further, drawing the connection between the choice-of-law question and the federal role in resolving disputes between competing, interested states that the Court had recognized in *Hinderlider*. Frankfurter was not convinced that it was necessary to articulate a federal regulatory rule in the case, since he believed that the result would be the same no matter the source of law.[109] Expanding upon that view, Frankfurter acknowledged the argument that *Klaxon* had no application where the clash of state interests arose outside the influence of traditional diversity policy, using *Guaranty Trust* and *Hinderlider* to frame the distinction:

> There is no federal statute to override either the Missouri law as to estoppel or the Illinois law which treats respondent as a holder in due course [both of which would result in judgment in favor of the FDIC]. Were this Court, in the absence of federal legislation, to make its own choice of law, compare [*Guaranty Trust*] and [*Hinderlider*], decided the same day as [*Erie*], Illinois or Missouri law would furnish the governing principles.[110]

Frankfurter ends this passage by citing to a series of early post-*Erie* cases, including *Jackson County*, in which the Court had found that federal law was controlling but incorporated state law by reference to provide the governing standard.[111] For Justice Frankfurter, in other words, the proposition that a federal court operating outside the policies of the general diversity statute might develop independent choice-of-law rules was a direct extension of federal rulings that referee the competing policies of interested states

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108 *Id.* at 455-56 (citations omitted).

109 *See id.* at 462 (Frankfurter, J., concurring) ("Whether the case is governed by the law of one state or the other, or by 'federal common law' drawn here from one state or the other, the result is the same.").

110 *Id.* at 463-64.

111 *See id.* at 464 (citing, inter alia, *Jackson County*, Royal Indemnity Co. v. United States, 313 U.S. 289 (1941)).

(*Hinderlider*) and absorb state law as a matter of federal common law to reduce intersystem friction (*Jackson County*). The implication—a step beyond what Frankfurter wrote—is that each may play a role when the policies of the general diversity statute do not control.

Four years later, in a remarkable passage in *Vanston Bondholders Protective Committee v. Green*,[112] the Court explored the relationship between choice of law and federal jurisdictional policy even more explicitly. The appeal in *Vanston Bondholders* arose from a bankruptcy proceeding. The bankrupt entity, Inland Gas, had defaulted on a mortgage bond. The holder of the bond demanded payment of the principal, interest on the principal, and interest on the unpaid interest. At issue in the case was whether the court should order payment of interest on interest, particularly when doing so would leave other creditors unpaid. The lower federal courts believed that *Erie* required them to answer this question with reference to state law, which meant either Kentucky or New York law. The court of appeals noted that the question whether *Klaxon* controlled in a case not governed by the general diversity statute remained open and it looked to Kentucky precedents and to some of the Supreme Court's pre-*Erie* cases on choice of law in conducting its analysis, concluding that both called for the application of New York law, which would invalidate the payment.[113]

The Supreme Court affirmed on different grounds. The Court acknowledged the proposition that the validity and enforceability of creditors' claims against a bankrupt entity must be measured against state law in the absence of a federal rule. "In determining what claims are allowable and how a debtor's assets shall be distributed," however, the Court held that "a bankruptcy court does not apply the law of the state where it sits."[114] The holding in *Erie* was an expression of the jurisdictional policy associated with the general diversity statute, the Court explained, and had no application in bankruptcy.[115] In the Bankruptcy Act, Congress granted federal courts the authority "to determine how and what claims shall be allowable on equitable principles."[116] The Court went on to reaffirm several pre-*Erie* precedents and held that the payment of interest on interest would not be equitable in this case.

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

113 *See In re* Am. Fuel & Power Co., 151 F.2d 470, 475-79 (6th Cir. 1945) (reviewing past opinions and concluding that "[t]he most that has been developed from such investigation is conflict. We have found no guidance to decision save in the opinions of the highest court of New York."), *aff'd on other grounds*, 329 U.S. 156 (1946). The Supreme Court gives a somewhat oversimplified account of the Sixth Circuit's reasoning. *See Vanston Bondholders*, 329 U.S. at 160-61 (discussing the circuit court's holding).

114 *Vanston Bondholders*, 329 U.S. at 162.

115 *Id.* at 162-63.

116 *Id.*

This holding rendered it unnecessary for the Court to address the lower court's application of *Klaxon* to the proceedings. But the Court addressed the issue nonetheless in an extended passage worth reproducing in its entirety:

> What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law. But obligations, such as the one here for interest, often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the state with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states. Certainly the part of this transaction which touched New York, namely, that the indenture contract was written, signed, and payable there, may be a reason why that state's law should govern. But apparently the bonds were sold to people all over the nation. And Kentucky's interest in having its own laws govern the obligation cannot be minimized. For the property mortgaged was there; the company's business was chiefly there; its products were widely distributed there; and the prices paid by Kentuckians for those products would depend, at least to some extent, on the stability of the company as affected by the carrying charges on its debts. But we need not decide which, if either, of these two states' laws govern [sic] the creation and subsistence and validity of the obligation for interest on interest here involved. For assuming, *arguendo*, that the obligation for interest on interest is valid under the law of New York, Kentucky, and the other states having some interest in the indenture transaction, we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act.[117]

There is much to observe about this passage. Framing the problem as a dispute among states possessing "significant contacts" that must be "balance[d] . . . in order best to accommodate the equities among the parties to the policies of those states" represents a categorical departure from the jurisdiction–selecting rules of the vested rights approach to choice of law that predominated in Kentucky, and in every other state at this time. In this respect, the Court appears to have taken up the suggestion of the Securities and Exchange Commission, which urged the Court to disregard the conflicts rules of Kentucky and instead adopt an alternative rule of reference under

117 *Id.* at 161-62 (footnote and citations omitted).

which the claim would be allowed so long as "the covenant would . . . be upheld in the courts of any State 'having a substantial relationship to the transaction.'"[118] Despite the formal separation that the Court drew between the enforceability of the covenant under state law and the federal rule that governs the distribution of assets in bankruptcy, its discussion of the choice-of-law question as involving a balance of the equities among the parties in light of the policies of the interested states appears to have been influenced strongly by the purposes animating the Bankruptcy Act itself.

In a separate concurrence, Justice Frankfurter chastised the majority for declaiming so broadly on the choice-of-law issues and succumbing to the "beguiling tendency" of conflicts "problems . . . to be made even more complicated than they are."[119] He provided a characteristically clear and precise account of the relationship between federal rules of claim administration in bankruptcy and the enforceability of underlying obligations under state law. As to choice of law, he limited his discussion to a few short sentences, indicating that the Court need not have reviewed the decision of the Sixth Circuit on that question in resolving the dispute.[120] Even so, in the brief passage in which he speaks to the issue, Justice Frankfurter, too, disregards the choice-of-law rules of Kentucky altogether in identifying the law of the state that would govern the enforceability of the disputed covenant.[121]

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118 *Id.* at 168 (Frankfurter, J., concurring in the judgment) (citing the briefs of the SEC).

119 *Id.* at 169.

120 *Id.* at 172.

121 Frankfurter's approach to the question may have been influenced by what appears to be an aggressive view about the constitutional limits on the ability of any state other than New York to apply its laws to the question:

> The covenant for interest on interest was entered into by the parties in New York. The dominant place of performance was also New York. In the circumstances, if the words of the indenture created an obligation, they did so only if the law of New York says they did. Williston, Contracts § 1792. If New York outlawed such a covenant neither Kentucky nor Delaware nor the States in which the bonds were sold or where bondholders reside could give effect to an obligation which never came into being. Compare *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178.

Id. at 171.

In *Yates*, the Court (per Justice Brandeis) had held that Georgia violated the Full Faith and Credit Clause when it applied Georgia law to deny enforcement to a contract made and enforceable in New York, even though the complaining party had relocated to Georgia, because most of the relevant events at the time of contracting were centered in New York (and none were centered in Georgia). *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 183 (1936) (holding that "faith and credit must be given to its provisions as fully as if the materiality of this specific misrepresentation . . . had been declared by a judgment of a New York court."). The Court would later cut back significantly on the holding of *Yates*, essentially limiting that case to the proposition that a post-occurrence change of residence, without more, cannot support the application of the law of the new residence. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310-11 (1981) (plurality opinion) (holding that *Yates* did not govern the Court's decision in *Allstate*). Even at the time, however,

Vanston Bondholders, *D'Oench, Duhme* and the other cases discussed in this subsection did not set forth controlling principles for the resolution of choice-of-law disputes in suits governed by a jurisdictional policy other than that embodied in the general diversity statute. But those cases do make one thing clear. Ten years after the Court's decision in *Erie*, the issue remained wide open.

C. *Federal Common Law and* Klaxon

When *Klaxon* is considered in the light of the rulings issued during the decade following *Erie*, a picture emerges of a decision with more limited scope and more discrete purposes than the received account of the ruling suggests. There is no reason to think that the Court intended *Klaxon* to be the final word on the role of federal courts in the promulgation of choice-of-law rules.

The dispute in *Klaxon* involved a question of characterization. The parties had entered into a contract for the sale of a business in which the purchasing party agreed to use best efforts "to further the manufacture and sale of certain patented devices."[122] Things did not go well, the disappointed party sued in Delaware federal court, and the jury returned a verdict of $100,000. The plaintiff then sought an award of interest on the judgment and the question arose whether the availability of interest should be governed by the law of Delaware (the forum) or the law of New York (which had controlled the rights of the parties under the contract). A characterization of the issue as "procedural" would lead to the application of Delaware law; "substantive" would mean New York. The lower courts applied general conflicts principles to the question rather than looking to Delaware choice of law and found that New York law applied.

The Supreme Court reversed and remanded with instructions that the lower courts determine what law Delaware state courts would apply. The entirety of its analysis explaining that ruling is contained in the following paragraph:

> We are of opinion that the prohibition declared in [*Erie*], against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based.

Justice Frankfurter's citation to *Yates* was an aggressive one, since the transaction in *Vanston Bondholders* had a strong contemporaneous nexus to Kentucky.

122 Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 494 (1941).

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.[123]

In a footnote, the Court noted with approval a recent decision by the First Circuit, *Sampson v. Channell*, which had reached the same conclusion.[124]

This was the Court's first extended statement on choice of law following *Erie* and one of its primary tasks was to foreclose a potential avenue by which lower federal courts might circumvent *Erie*'s core holding by continuing to employ independent judgment in an area of law where the line between liability rules and the independent prerogatives of the forum could be difficult to define. The Court's contemporaneous rulings on the equity powers of the federal courts provide a useful point of comparison in this regard.

In *Ruhlin*, *Russell* and *Guaranty Trust*, the Court grappled in stages with the status of federal equity practice following *Erie*. Within weeks of the decision in *Erie*, *Ruhlin* issued the broad and unqualified pronouncement that suits in equity, like suits at common law, were controlled by *Erie* as a matter of "power" and hence must be governed by state law.[125] This ruling parallels the first line of the Court's analysis in *Klaxon*, where the Court held that the core *Erie* ruling applies to choice of law as a categorical matter. The quasi-substantive nature of equity practice had threatened to act as an invitation for federal courts to continue shaping the primary rights and duties of litigants according to general law principles even following *Erie*, a possibility that the *Ruhlin* Court acted quickly to prevent. Just so in *Klaxon*, where the Court eliminates any doubt as to whether *Erie* applies to conflicts questions at all.

In *Russell v. Todd*, decided two years after *Ruhlin*, the danger of circumventing state liability rules was not present—the rights and duties of

123 *Id.* at 496-97 (footnote and citations omitted).

124 *Id.* at 496 n.2 (citing Sampson v. Channell, 110 F.2d 754, 759-62 (1st Cir. 1940)). *Sampson* was a fractured opinion, with the author of the lead opinion writing only for himself, a second member of the panel concurring only in the result, and the third dissenting.

125 *See* Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938) (noting that "[t]he decision in [*Erie*] . . . settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court.").

the parties were defined by federal statute, and federal jurisdiction did not depend on the general diversity statute. The *Russell* Court took that occasion to reassert the independent remedial prerogatives of the federal courts, pronouncing that the Rules of Decision Act as it then existed did "not apply to suits in equity"[126] and hence that the timeliness of an equity proceeding would be assessed under the federal doctrine of *laches*.[127] "The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state courts afford," the Court said, and "the jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice."[128] Although the Court went on to hold that the *laches* doctrine should often look to state law as a point of reference when determining the timeliness of a request for a federal equitable remedy, it made a point of framing that proposition as a matter of federal remedial policy.[129] It took five more years for the Court in *Guaranty Trust* to disaggregate and state clearly the elements of this question that it had been conflating in earlier rulings: (1) the source of the law that provides the governing liability or regulatory rule in an equity proceeding; (2) the power of the federal courts to promulgate independent judge-made rules on remedial and procedural matters; and (3) the role that jurisdictional policy plays in striking a balance between federal and state prerogatives. *Guaranty Trust* provided the coherent guidance for the proper role of federal equity practice in different types of cases that had been lacking. The movement from *Ruhlin* to *Russell* to *Guaranty Trust* marked a passage from broad pronouncement to qualification and retrenchment to fully realized explanation on the question of federal equity powers under the *Erie* doctrine.[130]

At the time *Klaxon* was decided, the Court was, so to speak, still at the *Ruhlin* stage of this progression. The threat that conflicts doctrine posed to the core holding of *Erie* was perhaps not as great as that posed by equity practice, since choice of law putatively requires a selection among state liability regimes rather than the independent definition of the parties' rights that equity could entail. Still, the characterization of doctrines as "procedural" rather than "substantive"—the type of dispute that gave rise to both *Klaxon*

126 Russell v. Todd, 309 U.S. 280, 287 (1940).

127 *Id.* at 289.

128 *Id.* at 286.

129 *See id.* at 288-91.

130 Professor Hart draws this connection in a glancing fashion in the article in which he framed his critical response to *Klaxon*. Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 n.76 (1954) (noting "[t]wo of the most influential, but interestingly different, statements of the governing criterion" for eliminating forum shopping in *Klaxon* and *Guaranty Trust*).

and *Sampson*—gave courts leeway in shaping and defining the rights of parties, and the Court clearly wanted to yoke federal diversity courts firmly to state policy to prevent mischief in general diversity cases.[131] The *Klaxon* Court's observation about the "lack of uniformity this may produce between federal courts in different states" closely tracks the description the *Ruhlin* Court provided three years earlier of the change that *Erie* would occasion in the Court's certiorari policy.[132] And the *Klaxon* Court's reference to the federal policy of diversity jurisdiction—"the principle of uniformity within a state upon which the *Tompkins* decision is based"—reflects the passage of those three years and the gradual incorporation of considerations of jurisdictional policy under the general diversity statute into the Court's analysis, as was evident in *Russell* and *Guaranty Trust*.[133]

Also at play in 1941 was the Supreme Court's relationship with lower courts in scrutinizing choice-of-law determinations. The Court's involvement in choice of law was undergoing a significant change during this period. The 1930s brought a series of decisions in which the Court defined more aggressive constitutional limitations on state choice of law, raising the prospect of a significantly increased federal role in supervising state choice-of-law policy. Given the timing of the *Erie* decision, there was the potential for federal courts to replace the substantial role they had played in defining choice of law under the general common law of *Swift* with a similar role under a newly robust constitutional doctrine.

By the close of that decade, however, the Court was retreating from any such expansion of its role, interpreting the Full Faith and Credit and Due Process Clauses with increasing deference to state prerogatives. In *Klaxon* itself, the plaintiff had argued that the application of forum law instead of New York law to the question of interest on the judgment would violate full

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131 Professor Roosevelt points out that characterization issues, while not uncommon in disputes during this period, are an anomalous type of problem in choice of law and that lends itself more readily to the kind of formalistic approach that the Court took in *Klaxon*:

> *Klaxon* is a decision about the status of choice-of-law rules under *Erie*, but it features the esoteric and somewhat confusing example of substance-procedure characterization. Characterization is a persistent problem in choice of law, but it is not the main focus. Instead, choice-of-law rules primarily do two things, corresponding to the two steps of the model set out earlier. First, choice-of-law rules set the scope of state law. They determine who can claim rights under state law—what people, where, and in what circumstances. In this function, they are what I call "rules of scope." Second, they resolve conflicts between state laws. They determine which of two conflicting rights under different states' laws will prevail. In this function, they are what I call "rules of priority."

Roosevelt, *infra* note 141, at 18.

132 *See supra* notes 26–27 and accompanying text.

133 Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941).

faith and credit, but the Court rejected the argument out of hand.[134] The Court's simple, short and broadly worded ruling in *Klaxon* was consistent with the determination it had apparently made during this period to get the federal courts out of the choice-of-law business in mine-run diversity cases.[135]

In the decades following *Klaxon*, the Court has lost sight of the limited scope of its 1941 ruling and the careful reservations it made at the time about the impact of jurisdictional policy on choice of law in the federal courts, instead treating *Klaxon* as a categorical doctrine admitting of no exceptions. In *Day & Zimmerman v. Challoner*, for example, the Court reviewed a ruling of the Fifth Circuit that had grappled with the choice of applicable law in a diversity case between American citizens arising out of an injury suffered in Cambodia while U.S. military forces were engaged in armed combat with North Vietnam.[136] Declining to recognize the potential impact of federal interests and international law on a dispute of this character, the Court summarily reversed in a per curiam opinion without hearing argument, finding that its holding in *Klaxon* applied "by parity of reasoning" because this was "a diversity case" and no further analysis was required.[137] This desuetude has occurred in the name of federalism, but it is a misplaced and unthinking species of federalism that has failed to give proper voice to significant federal interests.

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134 *See id.* at 497-98 ("Nothing in the Constitution ensures unlimited extraterritorial recognition of all statutes or of any statute under all circumstances").

135 On the same day that it issued its decision in *Klaxon*, the Court also handed down *Griffin v. McCoach*, 313 U.S. 498 (1941), a life insurance dispute in which the insurance company initiated a federal interpleader proceeding to determine which among several competing claimants were entitled to payment. As the case came before the Court, the remaining dispute involved the estate and one claimant, and the resolution of the dispute depended on whether the law of New York or Texas would govern. With no attention to the role of the interpleader statute in defining the jurisdictional policies that govern such a proceeding, the Court treated the dispute as a simple "diversity of citizenship case[]" and applied its sibling ruling in *Klaxon* without further analysis. *McCoach*, 313 U.S. at 503.

McCoach has long been criticized by Conflicts scholars for treating the interpleader proceeding before it as indistinguishable from a generic diversity action. The interpleader statute includes a targeted grant of jurisdiction that embodies policies distinct from those in the general diversity statute. *See* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2063-66 (2008) (analyzing the jurisdictional policies of the interpleader statute). An extended critique of *McCoach* will have to wait for future work, but the interpleader statute is a strong candidate for the mode of analysis I develop here.

136 Day & Zimmerman v. Challoner, 423 U.S. 3 (1975) (per curiam), *reversing* Challoner v. Day & Zimmerman, 512 F.2d 77 (5th Cir. 1975). I thank Steve Burbank for bringing this case to my attention.

137 *Id.* at 4.

II. CHOICE OF LAW AND *KLAXON* TODAY

With the enactment of the Class Action Fairness Act and the expanded use of the MDL statute, the federal courts must reengage. CAFA rejects the policy of federal jurisdiction bound up in the general diversity statute, replacing it with an invitation to litigants to shop for a federal forum in order to obtain a different result in service of targeted federal goals.[138] The jurisdictional policy of the general diversity statute does not control in such cases, and neither does the holding of *Klaxon*. *Klaxon* and *Erie* do still stand for the proposition that state law must define the primary rights, duties and obligations of the parties in this class of cases. That element of the *Erie* doctrine reflects limitations on the power of the federal courts that have constitutional foundations. But *Klaxon* does not foreclose the development of a federal rule of decision in resolving conflicts between the local policies of interested states. Such conflicts present a question of interstate relations that is particularly appropriate for federal resolution. *Hinderlider, Vanston Bondholders*, and *D'Oench, Duhme* together invite a fresh examination of the proper role of independent federal choice-of-law standards under the new jurisdictional regime of the federal class action.

Professor Linda Silberman has done some of the leading work mapping the significance of choice of law for aggregate litigation and the impact that choice-of-law rules can have in either facilitating or limiting class certification.[139] She makes a case for uniform federal choice-of-law rules in disputes that come into federal court via the Class Action Fairness Act, drawing on the broad purposes of the Act and its goal of defeating opportunistic forum shopping.[140] Though I do not share all of her conclusions, the intellectual history set forth in the previous Part and the methodological analysis that follows seek to offer a scaffolding for the type of argument that Professor Silberman explores, which will be an increasing focus of attention in coming years.

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138 *See, e.g.*, Stephen B. Burbank, *The Class Action Fairness Act in Historical Context*, 156 U. PA. L. REV. 1439, 1528 (2008) ("With eyes not blinded by fictions, the reason for federal subject matter jurisdiction in such a case might seem to be a desire to give the corporate defendants a choice to seek, not a neutral forum, but a more favorable forum."); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006) (examining the shift in jurisdictional policy that CAFA entails).

139 *See, e.g.*, Linda J. Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008).

140 *See generally* Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54 (2009).

A. *Choice of Law and Federal Common Law in the Modern Era*

The general methodology for analyzing choice of law in light of changing federal jurisdictional policies begins with a more careful account of the Court's ruling in *Erie*. That ruling operates in two distinct modes. It expresses principles of federalism and the separation powers that limit the power of federal courts to create substantive law, and it articulates a policy of federal jurisdiction that governs what powers federal diversity courts retain in their capacity as an independent judicial system and when they should employ those powers. These concepts map onto a core structural feature of choice of law: the distinction between the geographic scope of state law, which is a matter of substantive state policy, and the method of resolving conflicts when the laws of more than one state extend their geographic reach to cover a given dispute, which is a question of interstate relations. The interstate relations question—the resolution of conflicts among interested states—is a federal issue. The *Klaxon* Court concluded that it should incorporate a state rule of decision to answer that question in order to satisfy the jurisdictional policies of the general diversity statute. But the issue is federal in character.

The distinction between state substantive policy and interstate relations in choice-of-law analysis was coming more sharply into focus in the years surrounding *Klaxon*. During the 1930s, the Court reframed the constitutional limits on state choice of law around governmental interests and the avoidance of unfair surprise to litigants. The new paradigm marked a major shift away from decades of prior case law in which the Court had described constitutional limits on state choice of law as a product of the inherent limits on a state's ability to exercise legislative power outside its territorial boundaries. That earlier doctrine also informed *Pennoyer v. Neff*, which described the constitutional limits on state adjudicatory jurisdiction as a necessary concomitant to limits on state legislative power, and it became entwined with the Court's early due process rulings on the limits of state police power in the period leading up to the *Lochner* era.

This shift toward a constitutional doctrine of state interests and fairness prefigured the cognate shift in choice of law among the states in the second half of the twentieth century. Ideas of state interest and fairness had always been present when choice of law was framed in terms of territorial power and vested rights. Those concepts had never been developed into a fully realized approach to choice-of-law analysis; rather, they occupied a peripheral role, serving an explanatory or critiquing function. The constitutional cases provided a more fully realized vocabulary for the development of comprehensive choice-of-law systems around these values. At the same time, they gave states de facto encouragement to adopt approaches to choice of law in which the points of reference for selecting the applicable law would

harmonize with the points of reference for determining whether the law selected was constitutionally permissible. A large majority of states have now adopted approaches to choice of law that are framed around state interests and fairness, and the few states that hold onto *lex loci* approaches must do so within those constitutional strictures.

With this reframing of choice of law, a common analytical thread now runs through the modern approaches: choice of law distinguishes between the geographic scope of a state law and the method for selecting the applicable law when two or more states would apply their law to a dispute. In the scholarly literature, Professor Kramer has articulated the distinction most clearly. He explains that the geographic scope of a law—the physical locations where the state intends its law to apply—is an element of the law's substantive content in the same way as the elements specifying the people or entities that the law will regulate or the activities it will cover:

> A lawsuit with multistate contacts is still just a lawsuit: the plaintiff still alleges that because something happened, he is entitled to a remedy; the court must still determine whether the facts alleged are true, and whether, if these facts are true, some rule of positive law confers a right to recover. Making this determination is still a problem of interpretation. The only difference is that some of the facts are connected to different states, and the court must determine if that affects whether the law or laws at issue confer a right. While this determination may be difficult, it does not alter the nature of the problem confronting the court, which remains to decide what rights are conferred by positive law.[141]

The method for resolving conflicts, in contrast, involves a policy of interstate relations. When two or more states extend their laws to cover a dispute—when the laws of multiple states overlap in geographic scope as well as subject matter—then there is a clash of authority within our federal system. The resolution of that clash implicates the administration of power among states. Left to their own devices, of course, states come up with ways of resolving those disputes. When they do, they are making interstate relations law in the absence of federal direction.[142]

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141 Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 290 (1990). Professor Kim Roosevelt, who serves as the Reporter for the ALI Project on the Third Restatement of the Conflict of Laws, has long embraced this account of choice of law and has provided an account of *Erie* and the *Klaxon* doctrine that is broadly in line with the analysis that follows. *See generally* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *to* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1 (2012).

142 My approach here is consistent with that developed by Professor Roosevelt. *See* Roosevelt, *supra* note 141, at 16-23. Professor Roosevelt gives much greater attention to the practical implementation of his approach than I do to mine. As I indicate below, that task remains for me in future work.

These distinct components of choice of law implicate distinct components of the *Erie* doctrine. The geographic scope of state law is a matter of internal state policy and so is the sole prerogative of the states. This is the constitutional dimension of *Erie*, which recognizes the quasi-sovereign status of states and their role as authoritative expositors of their own substantive policies. The federal government has no power to alter the contents of those state policies. Federal law can constrain or displace state law in many ways, but it cannot modify the internal content of state law.[143] In contrast, the interstate relations question of how to resolve a conflict among multiple state laws that all purport to govern the same dispute is distinctively federal. It is analogous to the resolution of competing state-law claims over the flow of interstate rivers that was addressed in *Hinderlider*—a clash of conflicting state interests arising from overlapping extensions of state law. These are questions of coordination, aptly described in a passage from another dispute over an interstate waterway that the *Hinderlider* Court embraced.

> New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may.[144]

As its first act of clarification in specifying the sources of controlling law following *Erie*, the *Hinderlider* Court indicated that such questions of resolving conflicts among competing exercises of state authority are the subject of federal common law.

When the general diversity statute is the basis for federal jurisdiction, *Klaxon* and *Guaranty Trust* hold that the federal common-law power to answer such questions must be balanced against the policies that are distinctive to general diversity: avoidance of results-oriented forum shopping and arbitrary differences in outcome between diverse and non-diverse litigants. *Klaxon* answered that balance of policies by incorporating forum-state choice of law by reference. As the Court had put the matter two years earlier, "the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was

143 *See* New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeer state legislative processes and compel States to enact specific laws).

144 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 103 (1938) (quoting New Jersey v. New York, 283 U.S. 336, 342-43 (1931)).

not deemed inconsistent with federal policy."[145] In the case of *Klaxon*, the Court found the absorption of state law to be mandated by the policies of the general diversity statute.

In the seventy-five years since *Klaxon*, the interstate judicial system has produced reasons to question the wisdom of that answer in general diversity cases.[146] The proliferation of approaches to choice of law and the preference that many courts exhibit for the law of the forum produced rampant horizontal forum shopping that a uniform approach to choice of law in federal diversity courts might have diminished, though the Court's radical reform of general jurisdiction in *Daimler AG v. Bauman*[147] may now mitigate that problem significantly.[148] But whatever its wisdom, *Klaxon*'s answer was always driven by jurisdictional policy.

Now that Congress has enacted a substantially different policy of federal jurisdiction in CAFA, it becomes necessary to revisit the interstate relations question in choice of law. *D'Oench, Duhme* indicated as much shortly after *Klaxon* was decided, and *Vanston Bondholders* framed the appropriate mode of analysis. *Vanston Bondholders* distinguished between the nature and validity of competing claims in a bankruptcy proceeding (analogous to determining questions of geographic scope in a choice-of-law dispute) and the resolution of conflicting claims of equitable priority (analogous to resolving a conflict among competing state laws).[149] The former had to be controlled by state law.

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145 Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 351-52 (1939) (citing Brown v. United States, 263 U.S. 78 (1923)).

146 Major figures in the fields of conflicts and federal courts began framing the standard critiques in the middle part of the twentieth century. Professor Hart questioned the content of the federal policy that would demand strict adherence to state choice of law in federal diversity cases. Hart, *supra* note 130, at 514 n.86 ("It is difficult to understand what federal policy required, in *Klaxon*, the denial to a New York plaintiff forced to bring suit in Delaware of interest on a verdict which the New York and perhaps other state courts would have allowed, merely because Delaware state courts would not have allowed it."). Professor Baxter staked out an aggressive position that the Full Faith and Credit Clause and its implementing legislation *ex proprio vigore* called for a uniform approach to choice of law that would control in federal courts and state courts alike. William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 32-33 (1963) ("At least after *Erie*, the full-faith-and-credit clause should have been interpreted to dictate the initial choice-of-law reference in every case, whether in a state or federal court.").

147 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760-61 (2014) (rejecting the "doing-business" standard of general jurisdiction and adopting a more restrictive approach that measures a corporate defendant's relative contacts in each state and permits general jurisdiction only where the corporation is most "at home"—a standard typically met only where the defendant is incorporated or has its principal place of business).

148 *See generally* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675 (2015).

149 The relevant passage from *Vanston Bondholders* reads:

> What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law .... In

The latter was governed not by state choice of law but by the distinctive policies of the controlling federal bankruptcy statute. As the next Section explains, the Class Action Fairness Act calls for a similar analysis.

B. *Jurisdictional Policy and the Class Action Fairness Act*

CAFA substantially expands the scope of diversity jurisdiction over class actions and similar proceedings. The statute authorizes jurisdiction based on an aggregate amount in controversy of five million dollars and minimal diversity (subject to narrow exceptions) while eliminating barriers to removal so that class actions filed in state court can more readily be brought to federal court.[150] It is the largest targeted expansion of diversity that Congress has enacted, and the change in statutory text carries with it a shift in jurisdictional policy that departs significantly from the general diversity statute.

Case law describing the jurisdictional policy of the general diversity statute has always rested on spare textual foundations. The diversity clause in Article III was not the subject of any recorded discussion in the Constitutional Convention[151] and much of the criticism of the clause during the ratification debates involved a fear that never materialized: the assumption that the subject-matter jurisdiction of state courts and federal courts would be mutually exclusive rather than concurrent.[152] The proposition that diversity was necessary to protect out-of-state litigants from bias in state courts emerged as a post-hoc explanation[153] and has translated to only a few

> determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the state where it sits. *Erie* . . . has no such implication.

329 U.S. 156, 162 (footnote and citations omitted).

150 28 U.S.C. §§ 1332(d), 1453 (2012).

151 *See* Friendly, *supra* note 15, at 484-87 (describing the limited nature of the record of debate over diversity jurisdiction in the Constitutional Convention).

152 *See* THE FEDERALIST NO. 82 (Alexander Hamilton) (emphasizing that state courts would retain concurrent jurisdiction over cases that fell within the diversity grant of Article III); Friendly, *supra* note 15, at 487-504 (surveying debates over the federal courts in state conventions).

153 Chief Justice Marshall's classic statement, characterizing diversity jurisdiction as a response to "apprehensions" about local bias that the Constitution "indulges," appears in the opinion by which the Court opened the doors of diversity to corporate litigants through a judicially crafted fiction about the putative citizenship of shareholders.

> A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.
>
> The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views

minor elements of the statutory framework over the years.[154] Rather, as Professor Purcell has explained, diversity policy has always been a judicial creation with the occasional congressional ratification or adjustment coming long after the course was set.[155] A statute that implements a major shift in diversity doctrine is thus a significant event, and the changes in statutory text require a close examination of concomitant changes in underlying policy.[156] The Class Action Fairness Act instructs federal courts to employ its targeted grant of jurisdiction to protect defendants against abusive state-court litigation, protect the interests of class members, safeguard national economic interests, and prevent excesses of state power.[157] The statute has the purpose

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> with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of U.S. v. Deveaux, 9 U.S. (6 Cranch) 61, 87 (1809); *see also* EDWARD PURCELL, LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 127-47 (1992) (describing the significance of *Deveaux* in the early development of corporate diversity litigation); Friendly, *supra* note 15 (discussing this passage in conjunction with the popular opposition to diversity during the ratification debates).

154 These are the terms prohibiting removal based on diversity by in-state defendants: 28 U.S.C. § 1441(b)(2) (2012), which does not apply under the Class Action Fairness Act; 28 U.S.C. §1332(d), a former term limiting diversity jurisdiction to cases involving an in-state party (which was included in section 11 of the Judiciary Act of 1789 but removed not long thereafter). *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789) ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, . . . [and] the suit is between a citizen of the State where the suit is brought, and a citizen of another State."). Another former term required parties to show actual bias before removing based on diversity, which Congress enacted in 1866, see Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 558-59, but later eliminated when it proved too difficult to administer. *See also* Whitney R. Harris, *Survey of the Federal Judicial Code—The 1948 Revision and First Interpretive Decisions*, 3 SW. L.J. 229, 239-42 (1949) (detailing changes to the removal statute in the 1948 amendments to Title 28 including the elimination of removal "upon the ground that prejudice or local influence will prevent the defendant from obtaining justice in that state court").

155 *See* Purcell, *supra* note 153 (discussing removal based on diversity jurisdiction). The Court recently emphasized the minimal role of the statutory text in setting the policies of the federal arising under statute, as well. *See* Merrill Lynch v. Manning, 136 S. Ct. 1562, 1570-71 (2016) ("[T]he test for § 1331 jurisdiction is not grounded in that provision's particular phrasing . . . [and] does not turn on § 1331's text.").

156 *See, e.g.*, Burbank, *Aggregation on the Couch*, *supra* note 138, at 1941–44 (noting the consequences of CAFA's impact on jurisdictional policy); Burbank, *CAFA in Historical Context*, *supra* note 138, at 1525–33 (discussing the fact that federal forums may be more favorable for corporate defendants in CAFA cases).

157 *See* Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. § 1711 (2012)) (discussing the purposes of the CAFA amendment). *See generally* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2037-39 (2008) (discussing CAFA's statements of purpose); *id.* at 2054-72 (describing the significance of targeted jurisdictional grants aimed at safeguarding specific congressional policies and analyzing the parallels between CAFA's expansion of federal jurisdiction and the doctrine of protective jurisdiction).

and expectation that removing class actions from state to federal court will produce different results in the adjudication of state-law claims because federal courts will employ different certification standards and will apply the underlying substantive law more fairly. In other words, CAFA encourages results-oriented forum shopping. It marks a fundamental shift away from the jurisdictional policy of the *Erie* doctrine.

As of this writing, the Court has made just one clear statement about the impact of the CAFA on broader questions of jurisdictional policy in cases that come into federal court under its provisions. That statement is small and has no direct bearing on *Erie* or choice of law, but it does signal the Court's recognition that CAFA carries with it a distinctive set of purposes. In *Dart Cherokee Basin Operating Co. v. Owens*,[158] the Court heard an appeal in a CAFA case to decide what burden a defendant bears in pleading the amount in controversy in a notice of removal. The language of the removal statute tracks Rule 8 of the Federal Rules of Civil Procedure, requiring a "short and plain statement of the grounds for removal,"[159] a fact that suggests that defendant's statement of the amount in controversy in the notice of removal might be governed by the same "plausibility" standard that the Court recently adopted for pleading claims. However, the Tenth Circuit and many other lower federal courts apply a "presumption against removal" in the administration of the removal statute, and that jurisdictional policy led some courts (including the district court in *Dart Cherokee*) to conclude that removal required an even more demanding standard than "plausibility" when defendant alleges the prerequisites for jurisdiction. The Court rejected that argument, concluding that the parallel between § 1446(a) and Rule 8 was deliberate and indicated Congress's intent to have the same standard apply.

On the "presumption against removal"—which the Court itself has never embraced or rejected—the majority found that such a doctrine would not affect the result even if it were assumed to exist in ordinary diversity cases. *Dart Cherokee* was removed to federal court on the basis of CAFA jurisdiction, the Court explained, and the specialized diversity provisions of CAFA entailed a jurisdictional policy different from that of the general diversity statute.

> In remanding the case to state court, the District Court relied, in part, on a purported "presumption" against removal. App. to Pet. for Cert. 28a. *See, e.g.*, *Laughlin*, 50 F.3d, at 873 ("[T]here is a presumption against removal jurisdiction."). We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no anti-

158 Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547 (2014).

159 28 U.S.C. § 1446(a) (2012).

> removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court. See *Standard Fire Ins. Co.*, 568 U.S., at——, 133 S.Ct., at 1350 ("CAFA's primary objective" is to "ensur[e] 'Federal court consideration of interstate cases of national importance.' " (quoting § 2(b)(2), 119 Stat. 5)); S.Rep. No. 109–14, p. 43 (2005) (CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.").[160]

CAFA applies a distinctive set of jurisdictional policies to cases brought into federal court under its provisions—policies that differ from those applicable in "mine-run diversity cases."[161] Congress both contemplated and intended that litigants would move interstate class actions into federal court in order to seek an outcome different from the one they could expect in state court. Though Congress did not make federal jurisdiction exclusive and deprive state courts of the power to hear national class actions altogether, it enacted a jurisdictional provision that judged state courts to be inadequate tribunals for the resolution of such disputes because of the results they produced. In other words, CAFA encourages results-oriented vertical forum shopping. The portions of *Erie* and its progeny that rest on the policies of the general diversity statute do not hold sway in CAFA cases.

III. Institutional Policy and Implementation

The foregoing analysis describes the power of federal courts to craft choice-of-law rules for the resolution of state-law conflicts in CAFA cases. Congress's decision to supersede the jurisdictional policy of the general diversity statute brings cases governed by CAFA outside the rule of *Klaxon*.

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160 *Dart Cherokee*, 135 S. Ct. at 554. The Court made a similar statement about CAFA in Standard Fire Ins. v. Knowles, 133 S. Ct. 1345 (2013), though in a less conclusive manner. In *Knowles*, a plaintiff attempted to defeat CAFA jurisdiction by filing in state court and stipulating that the total amount in controversy would be less than $5,000,000 for the entire class. The Court rejected the effort, drawing on earlier rulings involving not-yet-certified classes to hold that a putative class representative cannot bind absent class members to a stipulation of fact. *See id.* at 1349 ("Neither a proposed class action nor a rejected class action may bind nonparties." (citing Smith v. Bayer Corp., 131 S. Ct. 2368, 2380 (2011)); *id.* ("[A] nonnamed class member is [not] a party to the class-action litigation *before the class is certified*." (quoting Devlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting))). In rejecting the plaintiff's attempt to argue around this proposition, the Court explained that "[t]o hold otherwise would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Id.* at 1350 (citation omitted). The invocation of CAFA's jurisdictional purposes is conspicuous, but here its purpose is to reaffirm a proposition first articulated in non-CAFA class litigation, rather than to draw a contrast with potentially applicable doctrine in non-CAFA cases.

161 *Dart Cherokee*, 135 S. Ct. at 554.

But important questions remain to be resolved. Should federal courts employ that power, or should they continue to incorporate state choice of law by reference when resolving genuine conflicts in CAFA cases? If federal courts do undertake to craft choice-of-law rules in CAFA disputes, what principles should guide them in crafting these conflict-resolution rules? A thorough examination of these questions must await future work. For now, I offer these brief initial observations.

The constraint that *Klaxon* imposed was a product of the jurisdictional policies of the general diversity statute. The power that federal courts have to craft choice of law in CAFA cases is a product of the distinct policies embodied in that more targeted grant of jurisdiction. It follows that the policies underlying CAFA—a preference for federal certification standards and a desire to avoid harm to "class members with legitimate claims and defendants that have acted responsibly"—must guide whether and how federal courts employ that power.[162] Guide need not mean exclusively dictate. CAFA is the starting point in asking whether federal courts should employ the power to adopt their own methods for resolving conflicts of state law, but other federal policies may influence the question. Congress created a powerful consolidation tool in the MDL statute, for example, aiming to promote efficiency and fairness in pre-trial proceedings when large numbers of related cases are filed around the country. Simplification of the choice-of-law calculus when considering dispositive motions in consolidated MDL proceedings could promote those purposes. Determining whether federal courts should embrace this new role will require careful attention to the entire complex of federal policies surrounding this class of cases.

The actual task of crafting choice-of-law rules in this class of cases may also prove difficult. A federal court must be attentive to the distinction between the geographic scope a state gives to its law and the resolution of genuine conflicts when more than one state would apply its law to a given dispute. The former remains the exclusive province of the states. In some instances, states will answer these questions of scope directly—in the text of a statute or the construction of its law by appellate decision. But states often do not have occasion to address questions of geographic scope, and even when they do, they may not distinguish carefully between geographic scope and the resolution of genuine conflicts. In a state that uses the First Restatement, for example, the jurisdiction–selecting rules may not draw any such distinction, requiring a difficult exercise in legal forensics to isolate questions of scope. Professor Kramer took a first pass at investigating these questions in his work on the subject and his insights will be helpful.[163] But the imperative to

162 The Class Action Fairness Act § 2(a)(2)(A), Pub. L. No. 109-2, 119 Stat. 5 (2005).

163 *See* Kramer, *supra* note 141.

distinguish between geographic scope and the resolution of conflicts will be even greater here, since federal courts would only have authority to speak to the latter question.[164]

CONCLUSION

Klaxon has provided a simple answer to a complicated question since the earliest days of the post-*Erie* era. That answer has always depended on the jurisdictional policies of the general diversity statute. When Congress supersedes those policies with a targeted jurisdictional provision in a particular class of cases, *Klaxon* no longer controls. The Class Action Fairness Act of 2005 requires the federal courts to return to first principles on choice of law and jurisdictional policy. Deciding whether to use the power to craft federal choice of law in CAFA cases, and how to use that power if they do, are questions that require more thought and study. But the power exists.

164 Professor Roosevelt makes a fine start tackling these difficult questions in one section of his article on *Erie* and choice of law. *See* Roosevelt, *supra* note 141, at 40–50. Much more work remains to be done in that vein.

* * * * *