

## ERIE'S INTERNATIONAL EFFECT

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In his important article, *When Erie Goes International*, Professor Childress addresses the marvelous question of the *Erie* doctrine's application in an international context.<sup>1</sup> In particular, Childress argues that *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>2</sup> which held that a federal court sitting in diversity (or alienage) must borrow the choice-of-law rules of the state where the federal court is located, should not apply when the federal court chooses between state law and the law of a foreign nation.<sup>3</sup> In this Essay, I have three points to make in response—one clarificatory and two critical.

The clarificatory point is that even if Childress is correct, the bulk of the *Erie* doctrine applies unchanged in international cases. Childress's arguments are directed solely to *Klaxon* and international choice of law. The first critical point concerns the merits of Childress's arguments, all but one of which give us no reason to think that *Klaxon* should be abandoned in international cases. The one argument that has any success is that a federal court's choice between state and foreign law implicates federal interests in foreign relations, in particular comity with the foreign nation. These federal interests can indeed override *Klaxon*'s command. But this brings me to my second critical point: Childress exaggerates the extent to which these federal interests will displace *Klaxon*. Whereas he thinks that federal law will preempt much—or perhaps all—state law on international choice of law, I argue that preemption will be rare.

### I. MOST OF *ERIE* STILL APPLIES IN AN INTERNATIONAL CONTEXT EVEN IF CHILDRESS'S ARGUMENTS SUCCEED

Even if the arguments in Childress's article succeed, their effect is relatively narrow. Most of the *Erie* doctrine still applies in an international context. To see why, consider an international *Erie Railroad Co. v. Tompkins*.<sup>4</sup> In the original *Erie*, Tompkins, a Pennsylvania domiciliary, was struck by something protruding from one of Erie's trains—probably an open door—while trespassing on Erie's property in Pennsylvania. He sued

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<sup>1</sup> Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011) (link).

<sup>2</sup> 313 U.S. 487 (1941) (link).

<sup>3</sup> Childress, *supra* note 1, at 1577–78.

<sup>4</sup> 304 U.S. 64 (1938) (link).

Erie, a domiciliary of New York, in federal court in New York.<sup>5</sup> For our international *Erie* case, imagine that the accident had happened in Ontario, Canada or that Tompkins or Erie (or both) had been a domiciliary of Ontario when the accident in Pennsylvania occurred.<sup>6</sup>

*Erie* stands, in part, for the principle that diversity jurisdiction does not give a federal court the power to make federal common law that displaces the state-law right upon which the plaintiff sues.<sup>7</sup> The scope of federal courts' power to make common law is a contested matter,<sup>8</sup> but at the very least it requires the presence of some federal regulatory interest, not just jurisdiction.<sup>9</sup> Childress concedes that this core constitutional principle of *Erie* applies in international cases. He does not suggest that the federal court entertaining our international *Erie* case would have the power to make a federal common law rule governing Erie's duty of care to Tompkins merely because one or both of the parties is a foreign domiciliary or because the event being litigated occurred abroad.<sup>10</sup> His point is solely that federal law should govern the choice between state and foreign law.

*Erie* also stands for a principle of interpretive fidelity. It was not enough that the federal court in *Erie* applied Pennsylvania law. It had to defer to the Pennsylvania Supreme Court's interpretations of that law.<sup>11</sup>

<sup>5</sup> *Id.*

<sup>6</sup> If Erie Railroad or Tompkins was a foreign domiciliary, the source of federal subject matter jurisdiction would be alienage rather than diversity. 28 U.S.C. § 1332(a)(2) (2006) (link). If both were a foreign domiciliary, there might be federal subject matter jurisdiction, provided it was joined to what was otherwise a diversity case, *id.* § 1332(a)(3), or to a federal question action in a manner that gave it supplemental jurisdiction, *id.* § 1367 (link).

<sup>7</sup> *See, e.g.,* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973) (stating that a principle of *Erie* is that the constitutional grant of diversity jurisdiction does not give federal courts the power to develop a "concomitant body of general federal law") (link); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 915–23 (1986) ("[T]he firm holding of *Erie* is that the existence of diversity jurisdiction does not provide a basis for making federal common law."); Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1244 (2011) ("Under *Erie*, federal courts do not possess lawmaking power by virtue of having subject matter jurisdiction."). In fact, this *Erie* principle applies beyond diversity (and alienage) jurisdiction to other circumstances in which a federal court can get jurisdiction over a state law action, such as supplemental jurisdiction or bankruptcy. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (link); Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 663–78 (2004).

<sup>8</sup> Compare Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (tying federal common lawmaking powers closely to the specific intentions of Congress), with Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) (finding power to create federal common law wherever there is a legitimate national governmental interest).

<sup>9</sup> *E.g.,* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (link).

<sup>10</sup> Childress, *supra* note 1, at 1568, 1577–78.

<sup>11</sup> Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938). For a discussion of whether the constitutional duty to defer to the Pennsylvania Supreme Court concerning the content of Pennsylvania law would exist if that court did not *want* federal courts to give it deference, see Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111 (2011) (link).

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Furthermore, if Pennsylvania law was unsettled, in the sense that no relevant Pennsylvania Supreme Court decisions existed, it had to predict what the Pennsylvania Supreme Court's decision would be.<sup>12</sup> Once again, Childress's article does not cast doubt upon the applicability of this principle in international cases. If the court in our international *Erie* case applies Ontario law, it apparently has an obligation to defer to the decisions of the Court of Appeal for Ontario and, if the matter is unsettled, predict the Court of Appeal's likely decision.<sup>13</sup>

Under *Erie*, jurisdiction is insufficient to give federal courts the power to create federal common law that displaces the state-law right upon which the plaintiff sues. But that does not mean that federal courts sitting in diversity do not have the power to create *procedural* common law—that is, federal common law that regulates the means by which substantive rights are litigated in the federal court system.<sup>14</sup> Nevertheless, the Supreme Court has articulated another *Erie* principle restricting federal courts' power in this area. When entertaining state law actions, they are constrained by the “twin aims of the *Erie* rule”: discouraging forum shopping between state and federal courts and avoiding the inequitable administration of the laws.<sup>15</sup> Unlike the first two *Erie* principles, which are generally understood as constitutionally compelled,<sup>16</sup> the twin aims probably have a statutory source.<sup>17</sup>

Because of the twin aims, federal courts entertaining state law actions

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<sup>12</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 249 (1998) (Kennedy, J., concurring) (link); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (link). For a discussion of this obligation, see Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495–1517 (1997) (link); Green, *supra* note 7, at 1237–51.

<sup>13</sup> Let me be clear that I am not necessarily endorsing the view that these *Erie* principles apply in international cases. I have expressed doubt about whether a federal court applying the law of a foreign nation has the same duties of interpretive fidelity that *Erie* puts upon federal courts when interpreting state law. Green, *supra* note 7, at 1260–61 n.110. Furthermore, just what interpretive fidelity amounts to in connection with a foreign civil law jurisdiction is a difficult issue. Because the decisions by the highest court of appeals in such a jurisdiction are not binding upon lower courts in subsequent cases, it is not clear that the predictive method is appropriate. For an argument that federal courts should use the predictive method for Louisiana law, even though it is a civil law jurisdiction, see Green, *supra* note 11, at 1147 n.155. My current goal, however, is not to discuss whether Childress's assumptions are correct but solely to identify the scope of his argument.

<sup>14</sup> *Cf. Erie*, 304 U.S. at 92 (Reed, J., concurring) (“The line between procedural and substantive law is hazy but no one doubts federal power over procedure.”); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846–78 (2008) (link).

<sup>15</sup> *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965) (link). For a discussion of the twin aims, see Michael Steven Green, *In Defense of the Twin Aims of Erie*, 88 NOTRE DAME L. REV. (forthcoming 2013).

<sup>16</sup> See Green, *supra* note 7, at 1243–44.

<sup>17</sup> Childress agrees with the characterization of the twin aims as nonconstitutional in origin. Childress, *supra* note 1, at 1543. Most argue that the statutory source of the twin aims is the Rules of Decision Act, 28 U.S.C. § 1652 (2006) (link). *E.g.*, John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 722–23 (1974). For an argument that the twin aims have their source not in the Rules of Decision Act but in the statute giving the federal court jurisdiction, see Green, *supra* note 15.

are often obligated to borrow procedural law from the courts of the forum state, since disuniformity would generate forum shopping and inequity. But the twin aims are not dispositive. Even if the difference between a federal common law procedural rule and the forum state's law would frustrate the twin aims, the federal rule can still be used if there are "countervailing" federal interests in its favor.<sup>18</sup>

Nothing in Childress's article casts doubt upon the applicability of the twin aims to international cases. For example, he would surely agree that *Guaranty Trust v. York* remains unchanged.<sup>19</sup> The federal court entertaining our international *Erie* case could not craft its own common law limit on the amount of time Tompkins could wait before suing Erie. The reason is simple: a federal time limit that differed from the forum state's statute of limitations would result in forum shopping and inequity, and no countervailing federal interests in favor of a uniform federal limit exist.

Childress's assumption that the twin aims apply in international cases is evident in his discussion of forum non conveniens. Since federal forum non conveniens doctrine is judge-created, the twin aims limit federal courts' ability to use it in diversity cases. "[I]t is arguable," Childress observes, "that [forum non conveniens] doctrine should be governed by state law in federal diversity actions."<sup>20</sup> To be sure, federal courts addressing this question have generally held that federal standards should be used.<sup>21</sup> But this is because countervailing federal interests have overcome the twin aims, not because the twin aims fail to apply at all.<sup>22</sup>

That the twin aims apply in an international context is no small matter, for it means that countless procedural issues faced by federal courts in international cases will be governed by standards borrowed from the forum state. Some examples are: the tolling of statutes of limitations;<sup>23</sup> preconditions for bringing suit (such as posting a bond,<sup>24</sup> filing a certificate of merit,<sup>25</sup> and submitting the dispute to arbitration<sup>26</sup> or mediation<sup>27</sup>); the availability of attorney's fees if an offer of settlement is refused;<sup>28</sup> hearings

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<sup>18</sup> *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (link); *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001) (link); *Gasparini v. Ctr. for Humanities*, 518 U.S. 415, 431–32 (1996) (link).

<sup>19</sup> 326 U.S. 99 (1945) (link).

<sup>20</sup> Childress, *supra* note 1, at 1564.

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g., Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002) (link).

<sup>23</sup> *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1981) (link); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (link).

<sup>24</sup> *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (link).

<sup>25</sup> *See Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000) (link).

<sup>26</sup> *See Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979) (link); *Stoner v. Presbyterian Univ. Hosp.*, 609 F.2d 109 (3d Cir. 1979) (link).

<sup>27</sup> *See Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (link).

<sup>28</sup> *See Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273 (10th Cir. 2011) (link).

for a settlement involving a minor;<sup>29</sup> the validity of forum selection clauses,<sup>30</sup> and; methods of calculating attorney's fees,<sup>31</sup> exchange rates,<sup>32</sup> and prejudgment interest.<sup>33</sup> In none of these instances would Childress's argument apply. His argument is solely that *choice-of-law rules* should not be borrowed from the forum state in international cases.

Yet another *Erie* principle concerns the applicability of Federal Rules of Civil Procedure in diversity cases. Here the twin aims are irrelevant. The fact that the difference between the Federal Rule and forum state law results in forum shopping and inequity does not mean the Federal Rule cannot be applied. A Federal Rule's validity depends solely upon two considerations: whether it is within Congress's power to regulate the procedure of federal courts<sup>34</sup> and whether it satisfies the limitations in the Rules Enabling Act<sup>35</sup>—in which Congress delegated its regulatory power to the Supreme Court.<sup>36</sup> The most significant limitation in the Act is that a Federal Rule must not “abridge, enlarge or modify any substantive right.”<sup>37</sup>

Professor Childress gives us no reason to think that the Rules Enabling Act's substantive right limitation does not apply in an international context. The fact that a Federal Rule abridges, enlarges, or modifies a *foreign* substantive right would apparently be as problematic as the fact that it abridges, enlarges, or modifies a state (or federal) substantive right.<sup>38</sup>

In the end, Childress's argument is focused on only one aspect of the *Erie* doctrine: *Klaxon Co. v. Stentor Electric Manufacturing Co.*, which held that a federal court should borrow the choice-of-law rules of the state where the federal court is located.<sup>39</sup> As Childress rightly notes, *Klaxon* was motivated by the twin aims.<sup>40</sup> If federal courts came up with their own choice-of-law rules, the resulting disuniformity with the rules of the forum

<sup>29</sup> See *Burke v. Smith*, 252 F.3d 1260 (11th Cir. 2001) (link).

<sup>30</sup> See *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303 (6th Cir. 2007) (link).

<sup>31</sup> See *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995) (link).

<sup>32</sup> See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (link).

<sup>33</sup> See *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764 (1st Cir. 1994) (link).

<sup>34</sup> *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (power extends to matters “rationally capable of classification” as substance or procedure).

<sup>35</sup> 28 U.S.C. §§ 2071–77 (2006) (link).

<sup>36</sup> *Hanna*, 380 U.S. at 464, 469–74.

<sup>37</sup> 28 U.S.C. § 2072(b) (2006) (link). For a recent discussion of the substantive right provision of the Act, see *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (Scalia, J.) (reading the provision as requiring only that the Federal Rule “really regulates procedure”) (link); *id.* at 1452 (Stevens, J., concurring in the judgment) (arguing that the provision means that a Federal Rule “cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right”); *id.* at 1463 n.2 (Ginsburg, J., dissenting) (accepting Stevens's reading).

<sup>38</sup> Once again, I am not necessarily endorsing this position. It is possible that the substantive rights provision of the Rules Enabling Act was not meant by Congress to apply to foreign rights.

<sup>39</sup> 313 U.S. 487 (1941).

<sup>40</sup> Childress, *supra* note 1, at 1559.

state would generate both vertical forum shopping (between state and federal courts) and inequity.<sup>41</sup> Childress argues, however, that when the choice is between state law and the law of a foreign nation, federal common law choice-of-law rules should be used.

An example is *Banco Nacional de Cuba v. Sabbatino*,<sup>42</sup> in which a federal court in New York had to determine whether the Cuban government's expropriation of a U.S. company's assets should be denied effect. Because the expropriation was valid under Cuban law, this was a choice-of-law issue—namely, whether Cuban or state (presumably New York) law ought to apply.<sup>43</sup> Although it appeared that New York's choice-of-law rules would have chosen Cuban law anyway, the Supreme Court made it clear that the matter was governed by the federal act-of-state doctrine, which mandated the application of Cuban law. *Klaxon* was irrelevant.

Notice that insofar as he uses *Sabbatino* as his model, Childress's argument is not that federal choice-of-law rules should be used *in federal court only*. Rather, they should supplant state rules in both federal *and state court*,<sup>44</sup> since the act-of-state doctrine articulated in *Sabbatino* applies in both fora.<sup>45</sup>

## II. ALL BUT ONE OF CHILDRESS'S ARGUMENTS FAIL TO MEET THEIR MARK

Now for the first of two critical points: Professor Childress offers four main arguments in favor of federalizing international choice of law, but only one has any success.

### A. *Horizontal Forum Shopping*

One of Childress's unsuccessful arguments rests upon the entirely accurate observation that the difference in choice-of-law rules between the

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<sup>41</sup> As Justice Reed put it, if federal courts had different choice-of-law rules from the forum state, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Klaxon*, 313 U.S. at 496.

<sup>42</sup> 376 U.S. 398 (1964) (link).

<sup>43</sup> See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 854 (2d Cir. 1962) (link).

<sup>44</sup> Childress's emphasis on *Sabbatino* suggests that the federal choice-of-law rules for international conflicts should be binding upon state courts. See, e.g., Childress, *supra* note 1, at 1567 (quoting favorably Louis Henkin's statement that "[i]nternational conflicts, then, may raise federal questions on which states do not call the tune but must follow the federal lead"); *id.* at 1573 (stating that a "reconsideration of the *Erie* doctrine as applied in private international law cases is in order because where principles of international comity apply as a matter of federal law, they provide 'a principle of decision binding on federal and state courts alike'" (quoting *Sabbatino*, 376 U.S. at 427)). But at one point he hedges his bets, stating that "[f]ederal common law for conflicts cases could be developed as federal common law, which would be binding on the states like the act of state doctrine, or as procedural federal common law, which would not be binding on the states." *Id.* at 1574 n.320.

<sup>45</sup> *Sabbatino*, 376 U.S. at 424–26; see *Roxas v. Marcos*, 969 P.2d 1209, 1249 (Haw. 1998) (link).

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states generates *horizontal* forum shopping between courts in different states.<sup>46</sup> Assume that a California plaintiff injured in Germany by a product made by a California company in California finds German rather than California law to his benefit. A court in California, using its comparative impairment approach to choice of law,<sup>47</sup> would apply California law. But the plaintiff can still get German law by suing in Virginia, which uses the old-fashioned choice-of-law approach, exemplified in the First Restatement,<sup>48</sup> under which the law of the place of the harm applies.<sup>49</sup>

Childress argues that this horizontal forum shopping is a reason to question whether *Klaxon* should apply in international cases.<sup>50</sup> Because *Klaxon* demands that federal courts use the forum state's choice-of-law rules, it solves the problem of vertical forum shopping between federal and state courts only by encouraging horizontal forum shopping between federal courts.

But horizontal forum shopping is not a reason to abandon *Klaxon* in international cases. Justice Reed was quite explicit in his opinion in *Klaxon* that horizontal forum shopping, no matter how prevalent, was not the Court's concern: "Whatever lack of uniformity [the *Klaxon* rule] 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."<sup>51</sup> Childress suggests that vertical forum shopping was emphasized in *Klaxon* only because the Court thought it was a more serious problem than the horizontal version,<sup>52</sup> but Justice Reed's opinion makes it clear that this is not the case.

Furthermore, if discouraging horizontal forum shopping between federal courts was a concern, *Klaxon* would be undermined entirely, not just in cases involving international choice of law.<sup>53</sup> Childress offers no evidence that horizontal forum shopping is more of a problem when the choice is between the laws of a state and a foreign nation than when it is between the laws of two states. He therefore gives us no reason to think that *Klaxon* should be rejected only in international cases.<sup>54</sup>

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<sup>46</sup> Childress, *supra* note 1, at 1560.

<sup>47</sup> See *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976) (link); Symeon C. Symeonides, *Choice of Law in American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 279 (2009) (link).

<sup>48</sup> See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 379 (1934).

<sup>49</sup> Symeonides, *supra* note 47, at 279.

<sup>50</sup> Childress, *supra* note 1, at 1559–60.

<sup>51</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

<sup>52</sup> Childress, *supra* note 1, at 1559.

<sup>53</sup> For criticisms of *Klaxon* for generating horizontal forum shopping, see, e.g., Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 32 (2010) (link); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 38 (1986) (link).

<sup>54</sup> Childress argues that "[e]valuating whether these rationales are correct or even persuasive in the

In addition to being too comprehensive (because it applies beyond international cases), the argument from horizontal forum shopping is also too narrow, for it does not suggest that international choice of law be federalized in *state* court. Of course, we could imagine Childress insisting that horizontal forum shopping between state courts should also be discouraged. But I doubt that he wants to take such a stand, for the result would be that a whole host of procedural issues faced by state courts would be subject to uniform federal common law rules. Assume, for example, that a plaintiff chooses state court in Virginia rather than California because he likes Virginia's longer statute of limitations. If avoiding such horizontal forum shopping were a reason to extend federal law to state courts, a uniform federal rule would preempt Virginia's and California's limitations periods. Childress cannot think that is right.

### B. *The Rules of Decision Act*

The most intriguing of Childress's arguments for federalizing choice of law in an international context relies upon the observation that the Rules of Decision Act refers only to state and not to foreign law. The Act reads:<sup>55</sup>

The laws of the *several states*, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.<sup>56</sup>

The Act directs federal courts to apply the laws of the several states, not the laws of *foreign nations*. Childress argues that, to the extent that *Klaxon* has its source in the Act, it should not apply when a federal court is considering whether foreign law should be used.

That the Rules of Decision Act does not refer to foreign law is a marvelous insight and potentially of great importance in understanding the Act's purpose and scope. But it cannot justify an argument against *Klaxon* in international cases. As Childress himself concedes,<sup>57</sup> *Klaxon* probably does not have its source in the Act.<sup>58</sup> The Act ensures that federal courts

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domestic context is not my purpose here, for the federal courts do not question the continuing relevance of *Erie* [and *Klaxon*] to their domestic analyses." Childress, *supra* note 1, at 1555. But federal courts do not question the continued relevance of *Erie* and *Klaxon* to their *international* analyses either. If Childress's argument against *Klaxon* convinced federal courts in an international context, it should convince them in a domestic context as well.

<sup>55</sup> *Id.* at 1555–57.

<sup>56</sup> 28 U.S.C. § 1652 (2006) (emphasis added) (link).

<sup>57</sup> Childress, *supra* note 1, at 1555.

<sup>58</sup> For an argument that the twin aims of *Erie*, and thus *Klaxon*, do not have their source in the Act, see Green, *supra* note 15.



respect their preexisting constitutional obligation to use applicable state law.<sup>59</sup> For example, the Act compelled the federal court in *Erie* to apply Pennsylvania law concerning Erie's duty of care to Tompkins, because Pennsylvania law applied to the case and was not preempted by any federal statute or common law rule.

*Klaxon* therefore cannot have its source in the Act, for a forum state's choice-of-law rules cannot apply—and do not purport to apply—to cases faced by federal courts. Assume that in our international *Erie* case New York choice-of-law rules would have selected Ontario rather than Pennsylvania law. New York surely does not have the power to compel a federal court in New York to choose Ontario law as well.<sup>60</sup> *Klaxon* has its source in the twin aims and not in the Rules of Decision Act. Federal courts must *borrow* New York's choice-of-law rules as a means of avoiding forum shopping and inequity. Thus, the fact that federal courts' obligations under the Act do not extend to foreign law does not mean that the twin aims cannot obligate a federal court to apply foreign law if the courts of the forum state would do so.

Furthermore, even if one sets this problem aside, the argument is too narrow; it addresses only *federal courts'* obligations, since only their obligations are addressed by the Act. No interpretation of the Act's scope can justify the displacement of state choice-of-law rules in state court.

### C. *Forum Non Conveniens*

Childress's third unsuccessful argument for federalizing choice of law in international cases is that using forum state choice-of-law rules improperly “thrusts federal courts into undertaking forum non conveniens analyses.”<sup>61</sup> An important factor in favor of dismissal under forum non conveniens is that the court must apply foreign law, particularly when the content of that law is difficult or uncertain. Childress argues that, in the international context, *Klaxon* results in too many federal courts dismissing actions on forum non conveniens grounds because the forum state's choice-of-law rules require them to apply foreign law. These dismissals, Childress

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<sup>59</sup> *E.g.*, *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 162 (1987) (Scalia, J., concurring) (“It directs federal courts to follow state laws only ‘in cases where they apply,’ which federal courts would be required to do even in the absence of the Act.”) (link).

<sup>60</sup> In saying that a state's choice-of-law rules cannot extend to federal courts within its borders, I set aside the question of the extent to which a state's choice-of-law rules might limit the territorial scope of *the state's own causes of action* wherever they are brought. For example, New York choice-of-law rules might limit the territorial scope of New York causes of action when brought in federal or sister state court. For the view that choice-of-law rules can generate such limits, see Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1005–08 (1991); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1884 (2005) (link). For a criticism, see Green, *supra* note 11, at 1162–67; Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. (forthcoming 2013) (link).

<sup>61</sup> Childress, *supra* note 1, at 1561.

argues, can frustrate federal interests.<sup>62</sup> The problem is particularly acute for federal courts in states that accept the First Restatement, which can require that foreign law be used simply because a triggering event (such as the harm) occurred abroad, however minimal the foreign nation's interests actually are. As a solution, Childress suggests a federal choice-of-law approach that is more sensitive to the interests of the relevant jurisdictions.<sup>63</sup>

One virtue of this argument is that it can explain why federal choice-of-law rules should apply in *state* as well as federal court. If state courts, relying on their own choice-of-law rules, continued to dismiss on forum non conveniens grounds, federal interests would still be frustrated.<sup>64</sup>

But the argument is ultimately unsuccessful. Even if we assume that the excessive number of dismissals frustrates federal interests, it remains unclear why federalizing choice of law is the appropriate response. The problem, after all, is wrongful dismissal, not the application of foreign law. The most focused way of protecting federal interests, therefore, would be to create a federal common law rule that limits a court's ability to dismiss on forum non conveniens grounds simply because foreign law applies.

This proposed federal rule would be very limited in its effect. First of all, it would apply only when dismissal would frustrate federal interests. Second, even when this new rule does apply, it would not preempt state choice-of-law rules, but would simply demand that the court not dismiss the case on forum non conveniens grounds. If the court retained jurisdiction, federal interests would be satisfied even if it ended up applying foreign law. A court would have to change its choice-of-law approach only when it concluded that the burden of applying foreign law was too great to retain jurisdiction. Finally, the federal rule would impact *all* states' choice-of-law approaches, not merely those that follow the First Restatement. This federal rule could just as easily force a court to give up its Second Restatement approach if that approach recommended foreign over state law. Nothing in Childress's argument suggests that state choice-of-law rules should be preempted by a federal choice-of-law approach that is sensitive to state interests.

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<sup>62</sup> Some examples are when the foreign court will also refuse to entertain the action or an American court must subsequently face the question of whether the foreign judgment should be enforced. *Id.* at 1562–65. Although I question whether federal interests are commonly implicated in such cases, I will ignore the matter here.

<sup>63</sup> *Id.* at 1574–76.

<sup>64</sup> Childress offers another explanation of why courts are dismissing too often on forum non conveniens grounds: they take the mere *possibility* that foreign law applies as a reason to dismiss, without engaging in the choice-of-law analysis to determine whether the matter is really governed by foreign law. *Id.* at 1565–66. But this criticism of courts does nothing to support federalizing international choice of law. If courts are dismissing without engaging in the appropriate choice-of-law analysis, the problem cannot be solved by changing the analysis. Courts will dismiss too often whatever the choice-of-law rule is.

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

Occasionally Childress argues against *Klaxon* applying in international choice-of-law cases on the premise that “the application of foreign law, unlike sister-state law, is entirely voluntary.”<sup>65</sup> This is puzzling. Childress cannot mean that an American court cannot be constitutionally obligated to apply foreign law. As he is clearly aware, a court can be required by due process to choose the law of a foreign nation over the law of a state.<sup>66</sup> Indeed, to the extent that a court faces a choice-of-law decision at all—even in an entirely domestic context—its choice to apply a particular jurisdiction’s law must be *voluntary* in the sense that it is constitutionally optional. For example, if a court uses its choice-of-law rules to determine whether it should apply California or Virginia law, it cannot be the case that it is constitutionally permitted to apply only one of those states’ laws. Although Childress’s point here is unclear, my guess is that by saying that the choice of foreign law is “voluntary,” he is arguing that the choice implicates federal concerns about comity and international relations. If so, it is connected to the argument I discuss in the next section.

### III. EVEN WHERE CHILDRESS’S ARGUMENTS SUCCEED, PREEMPTION OF STATE CHOICE-OF-LAW RULES BY FEDERAL COMMON LAW WILL BE RARE

In the end, Childress’s best argument for federalizing international choice of law does not have to do with forum shopping, the Rules of Decision Act, or forum non conveniens. His best argument is this: unlike the choice between the laws of two states, the choice between state and foreign law can implicate federal interests in foreign relations, in particular comity with the foreign nation.<sup>67</sup> As was the case in *Sabbatino*,<sup>68</sup> these federal interests can justify uniform federal choice-of-law rules applicable in both federal and state courts.

Although Childress is clearly right on this point, I think he exaggerates the extent to which displacement of state choice-of-law rules will occur. Whereas Childress thinks that federal law will preempt much—or perhaps all—state law on international choice of law, I doubt that preemption will extend much further than cases like *Sabbatino*.

In general, a state’s choice-of-law rule will frustrate U.S. foreign relations only when it recommends *state* law over foreign law. After all, it is the refusal to apply foreign law that might offend the foreign nation, inspiring retaliation that would adversely affect American interests.<sup>69</sup> That

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<sup>65</sup> *Id.* at 1534; *see also id.* at 1556.

<sup>66</sup> *Id.* at 1549–54.

<sup>67</sup> *Id.* at 1573–74.

<sup>68</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>69</sup> Technically, these federal foreign relations interests are not confined to cases in which an American court chooses between foreign and state law. Cases in which the court chooses between the laws of two foreign nations are also a concern. Furthermore, federal interests might even arise in cases

was the case in *Sabbatino*, in which the federal act-of-state doctrine recommended that Cuban rather than New York law govern the dispute. The failure to apply Cuban law would have frustrated American foreign relations.<sup>70</sup> To be sure, federal interests might occasionally recommend the application of state rather than foreign law. The failure of the foreign nation to respect American law in similar circumstances in the past might make it in the United States' interest to retaliate by refusing to apply foreign law. To the extent that state choice-of-law rules recommend foreign law, they would be preempted by a uniform federal choice-of-law rule. But such situations would be unusual.

It is odd, therefore, that Childress emphasizes as problematic those cases in which state choice-of-law rules choose *foreign* law. He seems primarily worried about states that use the First Restatement, which can recommend foreign law without considering the interests of the relevant jurisdictions.<sup>71</sup> But the fact that a state's choice-of-law rules are insensitive to state (and foreign) interests does not, on its own, implicate any federal interests that could justify federal choice-of-law rules.

Consider *Day & Zimmermann, Inc. v. Challoner*,<sup>72</sup> which Childress offers as a case where federal choice-of-law rules might be appropriate.<sup>73</sup> *Day* was a product liability suit on behalf of two soldiers—one domiciled in Wisconsin and the other in Tennessee—concerning a defective howitzer round manufactured in Texas that injured them in Cambodia. The Supreme Court held that the federal court in Texas entertaining the actions was compelled by *Klaxon* to use Texas's First Restatement choice-of-law approach. As a result, the federal court probably had to use the law of Cambodia, the jurisdiction in which the harm occurred.

*Day* is not a case in which federal interests recommend federalizing choice of law. To be sure, such interests might justify the creation of a *substantive* federal common law rule. Product liability suits against military contractors can discourage them from doing business with the federal government. There is a good argument, therefore, for a federal rule prohibiting or limiting such actions. This substantive rule would preempt all competing law—state and foreign—in a suit against a military contractor.<sup>74</sup> But that is not Childress's argument. He argues instead that federal interests recommend a federal choice-of-law rule—which in *Day* would choose

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in which an American court is determining which of two states' laws ought to apply, because a foreign nation might be offended by the application of one of the state's laws to its domiciliary or to an event within its borders.

<sup>70</sup> *Sabbatino*, 376 U.S. at 436–37.

<sup>71</sup> Childress, *supra* note 1, at 1546–49.

<sup>72</sup> 423 U.S. 3 (1975) (link).

<sup>73</sup> Childress, *supra* note 1, at 1548–49, 1565, 1569–79.

<sup>74</sup> Indeed, later the Supreme Court came to such a conclusion. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512–13 (1988) (link).

Texas, Wisconsin, or Tennessee law—rather than Cambodian law.<sup>75</sup>

It is unclear why federal interests would recommend such a rule. The reason cannot be that Cambodia would be offended by the federal court's choice-of-law decision, for that would happen only when Cambodian law was *not* chosen. Granted, if the United States had already adopted a policy of retaliating against Cambodia for the failure of its courts to apply American law, federal foreign policy interests would recommend that American courts apply state law. But it is hard to see how even that unusual scenario would apply in *Day*. Any retaliatory policy directed against the Cambodian government would have been a waste of time—at the time *Day* was decided Cambodia was being overrun by the Khmer Rouge.

The other possible federal interests, as we have seen, are the negative consequences of frequent dismissals on forum non conveniens grounds. Hamstrung by *Klaxon* into applying Cambodian law, the federal court might refuse to take jurisdiction of the case. As we have seen, however, there is a more restrained solution to the problem than a federal choice-of-law rule—namely, a federal rule discouraging dismissal.

In his article, Childress has a tendency to endorse—under the guise of vindicating *federal* foreign policy interests—a federal choice-of-law rule that is sensitive to *state* interests.<sup>76</sup> He does not explain, however, why insensitivity to state interests harms the federal government. For this reason, he has given us little reason to believe that federal preemption of state choice-of-law rules would occur with any regularity.

It is possible, however, that Professor Childress is not really recommending that a uniform federal choice-of-law rule be used for all international cases. Although he thinks international choice of law should be federalized, he sometimes suggests that the forum state's choice-of-law rules—including the rules of First Restatement states—will usually be incorporated into this federal law. The forum state's rules will be used, “not because of compulsion under *Erie* and *Klaxon* but because so doing does not thwart federal objectives.”<sup>77</sup>

Under this reading, Childress is not recommending a wholesale change in the choice-of-law rules used in international cases. His point is instead that the rules that are used should be reconceptualized. State rules will be used, in both state and federal courts, only because they have been incorporated into federal common law.

The incorporation of state law into federal common law is a frequent

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<sup>75</sup> Childress, *supra* note 1, at 1569–79.

<sup>76</sup> *Id.* at 1574, 1576.

<sup>77</sup> *Id.* at 1574. That Childress is speaking of state choice-of-law rules being *incorporated* into federal common law in this passage is strongly suggested by his citation of *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991) (link) and *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). Incorporation into federal common law occurred in both cases. Childress, *supra* note 1, at 1574 n.319.

phenomenon.<sup>78</sup> For example, because state laws are drafted with an eye to local conditions, federal courts sometimes incorporate state standards into federal law because doing so allows the content of the federal law to adapt to conditions in the state.<sup>79</sup> Using state standards can also avoid the confusion that an independent federal standard would produce among citizens who are accustomed to their state's laws.<sup>80</sup> State standards can even be used for the simple reason that, being relatively well-developed, borrowing them allows federal courts to avoid the difficult and uncertain work of articulating a uniform federal rule for the first time.<sup>81</sup>

But Childress does not explain why state choice-of-law rules should be incorporated into federal common law. As he describes it, state rules should be used when “so doing does not thwart federal objectives.”<sup>82</sup> This is insufficient to justify incorporation. State law standards are not incorporated into federal common law when their use does not thwart federal objectives. They are incorporated when their use *further*s federal objectives. Consider a federal court that borrows state standards for a federal law because state standards were drafted with an eye to local conditions. This is rightly described as incorporation because using state standards serves the interests standing behind the federal law, by allowing the law to adapt to local conditions.<sup>83</sup> In contrast, consider *Erie Railroad Co. v. Tompkins*.<sup>84</sup> Although using Pennsylvania law did not frustrate federal interests, *Erie* was not a case in which state law was incorporated into federal common law. The reason is that using Pennsylvania law did not *further* federal interests. Indeed, the notion that state law is incorporated into federal common law whenever the use of state standards does not frustrate federal interests threatens the very idea that state law ever applies of its own force.<sup>85</sup>

My point is not that the distinction between state law being incorporated into federal law and applying of its own force is suspect.<sup>86</sup> There is a meaningful difference between the two. If state law applies of its own force, the authority on the state law standard is the state's supreme court. In contrast, if federal law incorporates state standards, federal courts—in particular the United States Supreme Court—are the authority on

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<sup>78</sup> For a discussion see Green, *supra* note 7, at 1281–85; Field, *supra* note 7, at 958–60; Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 808–10 (1957).

<sup>79</sup> See *Reconstruction Fin. Corp. v. Beaver Cnty.*, 328 U.S. 204, 208–09 (1946) (link).

<sup>80</sup> See *Kamen*, 500 U.S. at 98–99; *DeSylva v. Ballentine*, 351 U.S. 570, 580–82 (1956) (link).

<sup>81</sup> *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (“[T]he readymade body of state law” is adopted “as the federal rule of decision.”) (link).

<sup>82</sup> Childress, *supra* note 1, at 1574.

<sup>83</sup> See *Reconstruction Fin. Corp.*, 328 U.S. at 208–09.

<sup>84</sup> 304 U.S. 64 (1938).

<sup>85</sup> See Green, *supra* note 7, at 1282–83; Field, *supra* note 7, at 973–77.

<sup>86</sup> For a discussion of such skepticism, see Green, *supra* note 7, at 1282.

the incorporated standard.<sup>87</sup>

It is precisely for this reason that Childress's reconceptualization of international choice of law would be so disruptive. Assume, for example, that an international choice-of-law case is brought in state court in New York. If New York's choice-of-law rules were really incorporated into federal common law, the New York court would be bound by how the United States Supreme Court had interpreted New York's rules. To refuse to respect these interpretations would be a violation of its obligation under the Supremacy Clause. The New York court could diverge from past Supreme Court interpretations only if it thought the Supreme Court would follow any new interpretation it adopted.<sup>88</sup>

Fortunately, such absurd consequences can be avoided by insisting that state choice-of-law rules are incorporated into federal common law only when their use *further*s federal interests. And—to repeat—Childress has not provided us with evidence that this occurs in a significant number of cases.

The title of Childress's article suggests that he seeks to reevaluate whether the disparate set of principles that are commonly called “the *Erie* doctrine” apply in international cases. As it turns out, his real focus is narrower: whether *Klaxon* is binding on a federal court when choosing between state law and the law of another nation. Although most of his arguments fail to cast doubt on *Klaxon* in such cases, one argument based on the example of *Sabbatino* does meet its mark. When a state's choice-of-law approach would frustrate federal foreign policy interests, preemption by a federal common law choice-of-law rule is appropriate. What is missing in Childress's article is a reason to think that federal preemption would occur beyond a narrow set of cases like *Sabbatino*.

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<sup>87</sup> See Green, *supra* note 7, at 1281–82; Field, *supra* note 7, at 964; Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–22 (1964). I emphasize the United States Supreme Court because of uncertainty concerning whether state courts have a duty to abide by lower federal courts' interpretations of federal law. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (“The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.”) (link); Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 839 (2005) (link).

<sup>88</sup> Of course, Childress might be arguing that the international choice of law is federalized in federal court only. See *supra* note 44. If so, then it would be trivially true that any use of the forum state's choice-of-law rules would be due to incorporation into federal common law, since the forum state's rules cannot legitimately extend to federal courts. See *supra* note 60 and accompanying text. But under such a reading, the analogy Childress draws with *Sabbatino* would be lost. Furthermore, incorporation would be true in all choice-of-law cases faced by federal courts in diversity—including cases where the federal court chooses between two states' laws. Childress would no longer be able to claim that international choice of law is distinctive.