

WHEN *ERIE* GOES INTERNATIONAL

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INTRODUCTION

Certain cases live long in the legal imagination. One prime example of this is the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins*,¹ which has been described as “one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems”² and as “a star of the

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¹ 304 U.S. 64 (1938).

² *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

first magnitude in the legal universe.”³ As almost every first-year law student comes to know,⁴ the so-called “*Erie* doctrine”⁵ generally requires federal courts to apply the law of the state in which the court sits, unless the matter before the court is governed by the Constitution, a federal statute, a Federal Rule of Civil Procedure, or a federal practice, such as whether federal damages law should overcome a state practice.⁶ Since the *Erie* decision, the Supreme Court has sought to settle the doctrine’s puzzles in a series of cases (including one in the 2009 Term)⁷ involving the interplay between federal and state laws and procedural rules.⁸

One such *Erie* puzzle involves the choice of applicable substantive law in federal courts when a legal dispute crosses state borders. Which state’s law should apply when the laws of more than one state are potentially applicable to a case? The Supreme Court provided an answer to that question in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, when it held that a federal court must apply not only state substantive law but also state conflict-of-laws rules.⁹ So, for instance, if a case with California and Virginia contacts comes before a Virginia federal district court sitting in diversity,¹⁰ the federal court must apply the conflict-of-laws rules of the

³ BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977). Less fawningly, it has also been described as a “myth” and a “religion” that has “accumulated a fringe of extremists, cultists and fanatics.” See, e.g., Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent: II*, 40 TEX. L. REV. 619, 635 (1962) (“Like a religion, *Erie* . . . has its dissenters and protestants.”); Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 596–97 (2008) (“The old myth is the Court’s original claim that its decision had a valid constitutional basis. . . . [T]he new separation-of-powers myth[] [is that] *Erie* was chiefly concerned with stripping the unguided policymaking authority that federal courts had exercised under *Swift v. Tyson*.”).

⁴ See Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 1015 (1998) (noting that the *Erie* decision is “a key part of the rite of passage through which most of us went and continue to put our students”).

⁵ See generally Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 261–67 (2008) (providing a recent explanation of the doctrine).

⁶ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); see also *Hanna*, 380 U.S. at 465 (explaining that “federal courts sitting in diversity cases . . . are to apply state substantive law and federal procedural law”).

⁷ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that a state may foreclose class action aggregation of state law claims in federal court).

⁸ See, e.g., *Gasperini*, 518 U.S. at 427; *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Burlington N. R.R. v. Woods*, 480 U.S. 1 (1987); *Hanna*, 380 U.S. at 460; *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

⁹ 313 U.S. 487, 496 (1941).

¹⁰ One exception that I note here in the interest of completeness but will not discuss in the main text is that if the case comes before a Virginia federal district court sitting in diversity by way of a transfer of venue, 28 U.S.C. § 1404(a) (2006), the federal district court must apply the conflict-of-laws rules that would have been followed by the transferring court. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (holding that transferee court must apply the law of the transferor court); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (holding that transferee court must apply the law of the transferor

state courts of Virginia, which, depending on the facts of the case, may direct the federal court to apply Virginia substantive law or the substantive law of another state.¹¹ In the Court's view, to do otherwise "would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side" and "would do violence to the principle of uniformity within a state, upon which the [*Erie*] decision is based."¹² This holding, while well settled, is not without vigorous criticism.¹³

Nearly all of the cases considering the *Erie* doctrine have arisen in the context of either federal/state relations (whether federal or state laws and procedural rules control) or state/state relations (whether the laws of State *A* or State *B* control).¹⁴ While the *Erie* doctrine may make sense in the domestic context given that, as a constitutional matter, states and their citizens must be treated equally,¹⁵ another *Erie* question arises in the international context—namely, must a federal court apply the law of a foreign country when directed by state conflict-of-laws rules? What happens when the *Erie* doctrine goes international?¹⁶

The Supreme Court resolved this subpuzzle within the larger *Erie/Klaxon* puzzle in a short, per curiam opinion in *Day & Zimmermann, Inc. v. Challoner*, which held that federal courts must apply state conflict-

court when a defendant moves for transfer).

¹¹ See, e.g., *Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 280 & n.6 (4th Cir. 2009) (explaining Virginia's conflict-of-laws rules); *Limbach Co. v. Zurich Am. Ins. Co.*, 396 F.3d 358, 361–62 (4th Cir. 2005) (illustrating that Virginia's conflict-of-laws rules may direct the application of another state's substantive law).

¹² *Klaxon*, 313 U.S. at 496.

¹³ See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 671–85 (6th ed. 2010) (collecting sources detailing both sides of the debate). But see, e.g., DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 222 (1965) (opposing overruling *Klaxon* because that would lead to "a return to the familiar, mechanical formulas which have always been defended on the thesis (however illusory) that they achieve uniformity and certainty" and "a nostalgic search for a doctrinal lowest common denominator"); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 714 n.125 (1974) (defending *Klaxon*'s implementation of the *Erie* doctrine).

¹⁴ See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Burlington N. R.R. v. Woods*, 480 U.S. 1 (1987); *Hanna v. Plumer*, 380 U.S. 460, 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99, 99 (1945).

¹⁵ See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (noting that the equal protection and privileges and immunities doctrines protect citizens of the several states from discrimination in choice of law).

¹⁶ In this Article, I will use "international conflict of laws" as shorthand for a case in which a U.S. court is asked to apply foreign, non-U.S. law. The discussion that follows will involve the *Erie* doctrine's application to foreign law, which I define as the law of a foreign state (e.g., the United Kingdom or France) as opposed to sister-state law (e.g., the law of California or Virginia), which is also "foreign" law for conflicts purposes but not the foreign law that is the subject here. See, e.g., *id.* at 259 (noting the distinction).

of-laws rules, even when those rules direct the court to apply the substantive law of a foreign country.¹⁷ According to the *Day* Court, “[a] federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.”¹⁸ On account of this mandate, federal courts uncritically apply conflict-of-laws rules of the several states that direct them to apply the substantive law of foreign states.¹⁹

The purpose of this Article is to unsettle the quiescent waters of this *Erie/Klaxon* subpuzzle in private international law cases. It may be asked: If the law is so settled, why unsettle it and perhaps further befuddle generations of lawyers and law students whose only hope has been to find any semblance of consistency in the dictates of the *Erie* doctrine? Three preliminary answers can be given.

First, it is a mistake to treat international and domestic conflict-of-laws cases in the same way because “international choice of law requires more flexibility than domestic choice of law.”²⁰ As will be discussed below,²¹ while the Constitution, the Rules of Decision Act, the Rules Enabling Act, and various policy considerations may require the application of the laws of the several states, these same sources should not be read as similarly and automatically requiring the application of the laws of foreign states because the application of foreign law, unlike sister-state law, is entirely voluntary.²² As one leading scholar has explained, “[t]o apply mechanically a rule developed in interstate cases to an international situation without consideration of its policy relevance is both wrong and dangerous.”²³

Second, the *Erie* doctrine should be updated to meet the realities of private international law litigation today. To the extent there is increased

¹⁷ 423 U.S. 3, 3–4 (1975).

¹⁸ *Id.* at 4. There is a split of authority as to whether this holding applies to courts sitting under original jurisdiction. *Compare* *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 919–20 (9th Cir. 1999) (applying *Erie* principles), *with* *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir. 1996) (applying a federal common law rule).

¹⁹ *See, e.g.*, *Abogados v. AT&T, Inc.*, 223 F.3d 932 (9th Cir. 2000) (applying Mexican law); *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (also applying Mexican law); *Brink’s Ltd. v. S. African Airways*, 93 F.3d 1022 (2d Cir. 1996) (applying South African law); *CenTra, Inc. v. Estrin*, 639 F. Supp. 2d 790 (E.D. Mich. 2009) (applying Canadian law); *Faggionato v. Lerner*, 500 F. Supp. 2d 237 (S.D.N.Y. 2007) (applying French law).

²⁰ Laycock, *supra* note 15, at 260.

²¹ *See infra* Part III.

²² *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 23 (1834) (“[W]hatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.”).

²³ Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1599–1600 (1966).

private international law litigation in U.S. courts,²⁴ these *Erie* questions will arise with more frequency. To the extent they arise, courts should question the mechanistic application of a doctrine announced in the 1930s (and updated to conflict-of-laws cases in the 1940s and 1970s) to the realities of today, especially in light of more recent Supreme Court cases concerning constitutional constraints on choice of law.²⁵

Third, the answer also lies in the fact that the animating ethos of the *Erie* doctrine is perhaps thwarted by its application in private international cases. If the *Erie* doctrine is about separation of powers and federalism,²⁶ then requiring federal courts to uncritically apply foreign law does little to effectuate these goals. Furthermore, state conflict-of-laws rules requiring the application of foreign substantive law might not advance *Erie*'s twin aims: "discouragement of forum-shopping and avoidance of inequitable administration of the laws."²⁷ These aims must be balanced against the strength of having a consistent federal policy. This Article shows through empirical analysis that "forum shopping" might be encouraged by the *Erie* doctrine's application to cases involving foreign law. The discussion of forum shopping uncovers a previously unrecognized connection in the scholarly literature: internationalizing the *Erie* doctrine may in part explain the increased use of the forum non conveniens doctrine by federal district courts.²⁸ Put another way, courts should perhaps critically evaluate whether the application of state conflict-of-laws rules requiring the application of foreign substantive law effectuates *Erie*'s aims.

Surprisingly, little scholarly attention has been paid to this question in recent years. While seminal articles have been written applying the lessons of *Erie* to customary international law²⁹ and have engendered voluminous

²⁴ See, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441 (2003) ("[N]ational courts face transnational issues with increasing frequency."). But see Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (questioning whether, based on currently available empirical evidence, transnational issues are increasing in frequency).

²⁵ See *infra* Part II.B.

²⁶ See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1327 (2001) (categorizing the doctrine as principally about federalism concerns); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974) (same). But see Green, *supra* note 3, at 615–16 (arguing that *Erie* had nothing to do with these concerns but was instead about enumerated powers).

²⁷ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427–28 (1996) (emphasizing the twin aims in classifying law as either "substantive" or "procedural").

²⁸ See *infra* Part III.A.4.

²⁹ E.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

responses,³⁰ only a handful of articles analyze the *Erie* doctrine from the perspective of private international law.³¹ Therefore, part of what this Article seeks to do is evaluate the ongoing debate between Professors Curtis Bradley, Jack Goldsmith, Harold Koh, and others regarding *Erie*'s application to customary international law, as well as to examine their conclusions as applied to private international law cases.³² By proposing a new view of the *Erie* doctrine's applicability to international conflict-of-laws cases, this Article fills a gap in the scholarly literature in an area on the verge of further development by courts.

The Article proceeds in four parts. Part I reviews the present state of the *Erie* doctrine as it relates to conflict of laws. Part II explores the *Erie* doctrine's application beyond the domestic context to international conflict-of-laws cases. After first explaining changes in conflict-of-laws jurisprudence after *Erie* and *Klaxon*, Part II examines the Supreme Court's most recent case on the subject, *Day & Zimmermann, Inc. v. Challoner*,³³ and then explores the constitutional implications of international conflict of laws. Part III examines whether the explained rationales for the *Erie* doctrine are applicable in international conflict-of-laws cases. After

³⁰ See e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 371 (2002).

³¹ See, e.g., Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 280 (1991) (arguing that the "tension created by interpreting *Erie* . . . require[s] reference to state law on a matter primarily dealing with foreign commerce and on which the de facto development of the law is in many ways indistinguishable from other areas of federal common law"); Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 166-67 (1988) ("So powerful is *Erie*'s grip on the American legal imagination that many state and federal courts mechanically apply state law even to issues of international choice of law that implicate the foreign affairs of the United States." (footnotes omitted)); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 125-26 (1997) ("[I]f one accepts the vision . . . that recognition of foreign judgments . . . ought to be part of the law of nations . . . it seems to me that recognition of foreign judgments should be a question of national, not 'state' law."); Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 122 (1993) ("While it is often difficult to determine the precise boundaries of the federal domain in other contexts, foreign affairs and foreign commerce are matters that *Erie* leaves untouched." (footnote omitted)). Other commentators have addressed this issue from a domestic conflict-of-laws perspective. See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 82 (1993); Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 22 (1998); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1718 (1992). My purpose in this Article is to investigate the *Erie* doctrine's application in cases involving international conflict of laws.

³² See *infra* Part IV.

³³ 423 U.S. 3 (1975).

showing that *Erie*'s statutory and constitutional grounds do not constrain the federal courts from developing federal conflict-of-laws rules in international cases, Part III next focuses on *Erie*'s twin aims of avoiding forum shopping and encouraging equal administration of the law. After presenting and analyzing new empirical data regarding the relationship between choice of law and forum non conveniens motions, Part III concludes by discussing the appropriate relationship between the *Erie* doctrine and international conflict of laws. Part IV explores a sounder approach that might be applied by U.S. federal courts through a set of criteria by which courts might respect the *Erie* doctrine while developing specialized federal common law in international conflict-of-laws cases.

I. THE *ERIE* DOCTRINE AND CONFLICT OF LAWS

To understand the relationship between the *Erie* doctrine and private international law cases, it is necessary to focus precisely on what *Erie* and its progeny require in those cases.³⁴ Under the Rules of Decision Act, the substantive laws applied by federal courts sitting in diversity are “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide.”³⁵ Starting with the 1842 case of *Swift v. Tyson*, the Supreme Court read “the laws of the several states” to encompass only state constitutional and statutory law, the construction of that law by state courts, and common law matters of “local” interest.³⁶ Thus, in cases that did not touch on state positive law and matters of a local concern, such as contracts and general commercial law, federal courts were free to look beyond a state’s local common law and apply general common law.³⁷ In 1938, the Court decided *Erie Railroad Co. v. Tompkins*, through which it overruled its decision in *Swift* by announcing

³⁴ By “private international law,” I mean domestic rules concerned with choice of law, jurisdiction of courts, and recognition and enforcement of foreign judgments in cases crossing national borders. What is called “conflict of laws” in the United States is known as private international law throughout much of the rest of the world. See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 1.1 (5th ed. 2010). In this Article, I will use both terms as coextensive.

³⁵ 28 U.S.C. § 1652 (2006). The Rules of Decision Act was originally contained in § 34 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (establishing that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide” will be the “rules of decision . . . where they apply”). For clarity, I note that *Erie*'s dictates go beyond diversity jurisdiction. See *In re Exxon Valdez*, 484 F.3d 1098, 1100 (9th Cir. 2007) (“[T]he basis of a federal court’s jurisdiction over a state law claim is irrelevant for *Erie* purposes. ‘Where state law supplies the rule of decision, it is the duty of the federal courts to ascertain and apply that law.’”).

³⁶ 41 U.S. (16 Pet.) 1, 12–13, 18–19 (1842).

³⁷ See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529–30 (1928) (“No provision of a state statute or Constitution and no ancient or fixed local usage is involved. For the discovery of common-law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises.”).

that “[t]here is no federal general common law.”³⁸ Following *Erie*, federal courts sitting in diversity must apply the law of the state in which they sit, be it positive law or common law, unless there is a federal constitutional, treaty, or statutory provision that controls.³⁹ After first focusing on what the *Erie* doctrine requires, this Part explains the development of the doctrine and its relationship to private international law cases.

A. *Erie: The End of Federal General Common Law*

Harry Tompkins was proceeding along the right-of-way next to a set of railroad tracks in Hughestown, Pennsylvania.⁴⁰ A train passed him, and he was struck by “something which looked like a door projecting from one of the moving cars.”⁴¹ Upon falling, his right arm was crushed under the wheels of the train, and it was later amputated.⁴² Tompkins’s lawyers recognized that the case, while solid as to the injuries sustained and the ownership of the train in question, presented a complicated question regarding the controlling substantive law.⁴³ Proceeding under Pennsylvania common law presented a problem because the Pennsylvania Supreme Court had recently held that a person using a path that ran along a railroad’s right-of-way was a trespasser.⁴⁴ As such, the railroad owed such a person no duty of care other than the duty to avoid reckless and wanton negligence.⁴⁵ Thus, if pled under Pennsylvania common law in a Pennsylvania state court, Tompkins’s case would have been doomed.

Fortunately for Tompkins, he was a citizen of Pennsylvania and the Erie Railroad was incorporated in New York. Tompkins was thus able to invoke diversity jurisdiction and bring his suit in federal court.⁴⁶ By filing in the Federal District Court for the Southern District of New York, Tompkins could rely on the Supreme Court’s decision in *Swift*, which

³⁸ 304 U.S. 64, 78 (1938).

³⁹ *Id.* at 78–79; ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 327 (5th ed. 2007). As noted, the *Erie* doctrine applies beyond diversity cases. *See, e.g.,* DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151 (1983) (noting that the doctrine applies in any situation in which state law is to be applied in federal court). Given that most private international law cases arise under diversity jurisdiction, my focus in this Article will be on those cases. *See, e.g.,* Whytock, *supra* note 24, at 506 (noting that alienage jurisdiction is “a primary basis for subject matter jurisdiction in transnational litigation”).

⁴⁰ *Erie*, 304 U.S. at 69; EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 95 (2000).

⁴¹ PURCELL, *supra* note 40.

⁴² *Id.* at 96–97.

⁴³ For an interesting, illuminating, and entertaining discussion concerning the entire background of the case, see Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 21 (Kevin M. Clermont ed., 2d ed. 2008). For a more complete review of the case in historical perspective, see PURCELL, *supra* note 40.

⁴⁴ *Falchetti v. Pa. R.R.*, 160 A. 859, 860 (Pa. 1932).

⁴⁵ *Koontz v. Balt. & Ohio R.R.*, 163 A. 212, 214 (Penn. 1932); *Falchetti*, 160 A. at 860.

⁴⁶ *See* 28 U.S.C. § 1332 (2006).

empowered the federal court to apply general common law as opposed to Pennsylvania common law.⁴⁷ General common law imposed a standard of ordinary negligence on the railroad and classified Tompkins as a licensee.⁴⁸ Under this standard, Tompkins prevailed in the district court and on appeal the Second Circuit affirmed.⁴⁹ A petition for certiorari to the U.S. Supreme Court followed, and was granted.⁵⁰

The question before the Supreme Court in *Erie* was not whether the Court should overrule *Swift* and remove the ability of federal courts to apply general common law to matters not touching local concerns.⁵¹ Indeed, each side believed it could prevail under *Swift*. Following his success before the lower courts, Tompkins argued that his case was governed by general common law. The Erie Railroad argued that the Pennsylvania rule was sufficiently “local” in nature so as to be applied in federal court, in line with *Swift*.⁵² Nevertheless, the Court reached out to resolve “[w]hether the oft-challenged doctrine of *Swift* . . . shall now be disapproved.”⁵³

With the question stated that way, Justice Brandeis answered for the Court in the affirmative and gave three grounds for the decision.⁵⁴ First, “recent research of a competent scholar,” Professor Charles Warren, had called into question the construction that the *Swift* Court had given the Rules of Decision Act.⁵⁵ The Court, accepting this view, concluded that the unwritten, as well as written, laws of a state qualified as laws under the Act.⁵⁶

⁴⁷ See *Tompkins v. Erie R.R.*, 90 F.2d 603 (2d Cir. 1937), *rev'd*, 304 U.S. 64 (1938).

⁴⁸ *Id.* at 604.

⁴⁹ *Id.* at 606.

⁵⁰ *Erie R.R. v. Tompkins*, 302 U.S. 671 (1937).

⁵¹ See Brief on Behalf of Petitioner Erie Railroad Co. at 2–3, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (No. 367), 1938 WL 63879, at *1–3. Indeed, the Erie Railroad specifically refused to challenge *Swift*. See *id.* at 27 (“We do not question the finality of the holding of this Court in *Swift* . . . that the ‘laws of the several States’ referred to in the Rules of Decision Act do not include state court decisions as such.”).

⁵² *Id.* at 2.

⁵³ *Erie*, 304 U.S. at 69.

⁵⁴ *Id.* at 71–80. While the *Erie* decision might be examined as an exemplar of legal positivism, I am purposefully focusing here on the precise legal reasons given by the Court for its decision. My reasons for so doing are: (1) federal courts tend not to focus on this jurisprudential argument and (2) simply reading the case as about positivism perhaps misses the mark. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 687 (1998) (“The claimed historical connection [between legal positivism and the *Erie* decision] fails to explain why there was a large temporal gap between the general acceptance of legal positivism and the decision in *Erie*. By itself, this gap makes a causal role for positivism seem doubtful.”).

⁵⁵ *Erie*, 304 U.S. at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923) (arguing, based on evidence of a prior draft of the Act that the words “the laws of the several states” meant “the Statute law” as well as the “unwritten or common law now in use” of the several states)).

⁵⁶ *Erie*, 304 U.S. at 73–74. Many have questioned whether Professor Warren’s and the Court’s

Second, as a matter of policy, the *Swift* rule had prevented the very uniformity it sought to achieve. As the Court explained, “[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.”⁵⁷ In addition, the ability to forum shop under the *Swift* rule inappropriately gave nonresident plaintiffs an advantage over resident defendants.⁵⁸ A nonresident plaintiff suing a resident defendant could forum shop between state court and federal court to find the substantive law most favorable to his case, as Tompkins did. By contrast, although a resident plaintiff suing a nonresident defendant could similarly forum shop between state and federal court, if the resident plaintiff brought suit in state court, the nonresident defendant could remove the suit to federal court.⁵⁹ Thus, resident defendants sued by nonresident plaintiffs might be forced into not only a particular forum but might also face unfavorable substantive law. As one leading commentator has noted, this was “[w]ithout a doubt[] the strongest argument for overruling *Swift*” because “it was unjust that the result in a case depended on the citizenship of the parties.”⁶⁰

The third and final ground the Court relied upon was one of constitutional dimension. “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state . . . whether . . . declared by its Legislature in a statute or by its highest court in a decision”⁶¹ This was so because “no clause in the Constitution purports to confer” the power to create substantive rules of common law “upon the federal courts.”⁶² In other words, because Congress has no power to declare substantive rules of common law applicable to the states, the federal courts similarly have no power.⁶³

conclusion was correct. See, e.g., William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514–15 (1984) (“[Professor Warren’s] conclusion is too broad. Local common, or judge-made, law . . . clearly came within the command of the section. But general common law . . . did not come within the scope either of section 34 or of the *lex loci* principle from which the section was derived.”); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 389 (1964) (“Warren’s conclusion could thus be reached only by an argument, contrary to the one he made, that the change from the original draft was not simply stylistic but had a substantive purpose as well.”).

⁵⁷ *Erie*, 304 U.S. at 74 (footnote omitted).

⁵⁸ *Id.* at 74–75.

⁵⁹ See 28 U.S.C. § 1441 (2006) (permitting a nonresident defendant, but not a resident defendant, sued by a nonresident plaintiff to remove a case filed in state court to federal court).

⁶⁰ CHEMERINSKY, *supra* note 39, at 325.

⁶¹ *Erie*, 304 U.S. at 78.

⁶² *Id.*

⁶³ See Friendly, *supra* note 56, at 395 (noting that “it would be . . . unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not”).

There has been voluminous debate concerning all three rationales for the *Erie* decision.⁶⁴ While scholars have focused on historical evidence used in the decision⁶⁵ and *Erie*'s constitutional source,⁶⁶ my primary focus is on the Court's second rationale—uniformity in the law. The reason for this is that, for better or worse, it is now well established that *Erie* is here to stay as a constitutional or statutory case.⁶⁷ Indeed, no current Justice on the Supreme Court has given any hint of a willingness to reconsider or question the doctrine. In the 2009 Term, for instance, the Supreme Court faithfully applied the first and third *Erie* rationales without objection.⁶⁸ At the risk of a bad pun, for purposes of *Erie*'s statutory and constitutional rationales, that train has left the station, at least as far as the courts are concerned.

By contrast, courts still grapple with the second *Erie* rationale in cases where a federal statute, a Federal Rule of Civil Procedure, or some other federal rule does not resolve the case. In such cases, a court is left with “the typical, relatively unguided *Erie* choice”⁶⁹ that requires a court to assess the state rule in light of *Erie*'s twin aims of “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”⁷⁰ Indeed, these are the precise aims on which the Court has rested the *Erie* doctrine's application to conflict-of-laws cases.⁷¹ The fact that the *Erie* doctrine can be viewed as concerned with these twin aims provides important context for the Court's decision in *Klaxon*, which is discussed in the next section.

⁶⁴ See generally CHEMERINSKY, *supra* note 39, at 321–31 (discussing a collection of sources to explain the debate).

⁶⁵ See, e.g., 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 626–28 (1953); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 866–71 (1953) (examining the history of the first judiciary act); Friendly, *supra* note 56, at 388–89 (“If, as Brandeis said, ‘the more recent research of a competent scholar, who examined the original document . . . [had] established’ that the narrower construction theretofore given the Rules of Decision Act ‘by the Court was erroneous . . .,’ why was that not enough?” (omissions and alteration in original) (quoting *Erie*, 304 U.S. at 72)).

⁶⁶ See, e.g., Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1289 (2007) (noting that “*Erie* rests on ‘constitutional principles which restrain the power of the federal courts to intrude upon the states’ determination of substantive policy in areas which the Constitution and Congress have left to state competence”); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1312 (1985) (“[T]he flaw in the pre-*Erie* federal system was the interference by federal authorities in matters that the Constitution left to the states The vice was not that federal courts were engaged in the making of common law, but rather that federal courts were exercising an authority that Congress had not the power to grant them.”).

⁶⁷ CHEMERINSKY, *supra* note 39, at 327.

⁶⁸ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that a state may foreclose class action aggregation of state law claims in federal court).

⁶⁹ *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

⁷⁰ *Id.* at 468.

⁷¹ See *infra* Part I.B.

B. Klaxon: *Erie's Relationship to Conflict of Laws*

Prior to *Klaxon Co. v. Stentor Electric Manufacturing Co.*,⁷² federal courts held that *Swiftian* general common law also encompassed determinations of conflict of laws.⁷³ As such, federal courts were free to develop their own conflict-of-laws rules in diversity cases. Like the choice of substantive law in *Erie*, this has tremendous impact on a case. To return to the facts of *Erie*, Tompkins's accident occurred in Pennsylvania, but he brought suit in diversity in New York. Post-*Erie*, it was established that the federal district court must apply the laws of the forum state. But does that mean that New York conflict-of-laws rules should also be applied, which might direct a New York court, and thus the federal district court, to apply Pennsylvania law?⁷⁴ If post-*Erie* courts retained the ability to apply general common law to conflict-of-laws decisions, then a federal district court could still disregard the laws of a forum state through application of conflicts rules permitting it to apply another state's law.⁷⁵ *Klaxon* illustrates this dilemma.

In *Klaxon*, suit was brought in Delaware federal district court on a contract that was executed and mainly performed in New York.⁷⁶ A jury awarded the plaintiff \$100,000 and judgment was entered.⁷⁷ The plaintiff then moved to add prejudgment interest based on New York law, which was granted.⁷⁸ On appeal, the Third Circuit held that New York and not Delaware law was applicable because "it is clear by what we think is undoubtedly the better view of the law that the rules for ascertaining the measure of damages are not a matter of procedure at all, but are matters of substance which should be settled by reference to the law of the appropriate state according to the type of case being tried in the forum."⁷⁹

The case presented a new issue to the Court. *Erie* requires the application of the law of the state in which the federal district court sits.⁸⁰ In cases that arise solely within a state, the answer is clear: the law of the

⁷² 313 U.S. 487 (1941).

⁷³ See, e.g., *Dygert v. Vt. Loan & Trust Co.*, 94 F. 913, 915 (9th Cir. 1899) (illustrating a court using common law to develop conflict of laws).

⁷⁴ Friendly, *supra* note 56, at 401 (noting that "counsel were agreed that if state law controlled, Pennsylvania law would govern"). Or, another law might control. See Alfred Hill, *The Erie Doctrine and the Constitution: II*, 53 NW. U. L. REV. 541, 598 (1958) (noting that a New York court using its own choice-of-law rules would not necessarily follow the decisions of the Pennsylvania courts). Interestingly, this question was glossed over by the *Erie* Court. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938) (assuming Pennsylvania's common law applied).

⁷⁵ See, e.g., *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940) (developing the argument in full).

⁷⁶ *Klaxon*, 313 U.S. at 494.

⁷⁷ *Id.*

⁷⁸ *Id.* at 494–95.

⁷⁹ *Id.* at 495–96 (internal quotation mark omitted).

⁸⁰ *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938).

state in which the court sits applies.⁸¹ If a case, however, has contacts with multiple states, the question is whether the federal district court must apply the law of the state in which it sits, all the way down to the precise conflict-of-laws rules of the state, or whether the federal court may invoke general common law to determine which state's law should apply.

The Supreme Court resolved this dilemma in a single paragraph, and held that *Erie's* prohibition

against such independent determinations by the federal courts extends to the field of conflict of laws. . . . 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 [*Erie*] decision is based.⁸²

Furthermore, according to the Court, “[i]t is not for the federal courts to thwart . . . local policies by enforcing an independent ‘general law’ of conflict of laws.”⁸³ As such, the case was remanded with instructions to apply the law of Delaware.

Klaxon does not appear to be constitutionally compelled.⁸⁴ This is perhaps why the Court accentuated in its rationale the *Erie* doctrine's concern with discouragement of forum shopping and avoidance of inequitable administration of the laws.⁸⁵ Interestingly, the approach of *Klaxon* and *Erie* might lead to uniform application of law within a state but nonuniform application of law between federal courts of different states. Likewise, given that there are not uniform conflict-of-laws rules between the several states, this approach could lead to forum shopping between states.⁸⁶ Knowing that federal courts must apply the same conflict-of-laws rules as the state courts in which they sit, parties will understandably forum shop among federal courts to find the state conflict-of-laws principles that will lead to the application of the most favorable substantive law.⁸⁷

⁸¹ *Klaxon*, 313 U.S. at 495.

⁸² *Id.* at 496.

⁸³ *Id.*

⁸⁴ *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 636–37 (7th Cir. 2002) (noting that *Klaxon* is not based on the Constitution); see also Friendly, *supra* note 56, at 402 (“[I]n my view, the constitutional basis of *Erie* does not apply to choice of law issues even when diversity is the sole basis of federal jurisdiction and *a fortiori* when it is not.”).

⁸⁵ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

⁸⁶ See, e.g., Chow, *supra* note 31, at 179 n.69 (noting that “by requiring uniformity between federal and state courts on any conflicts issue, *Klaxon* eliminates the possibility of forum shopping between state and federal courts, but at the same time, creates the possibility of forum shopping between different states”).

⁸⁷ See Borchers, *supra* note 31, at 121 (arguing that a modern “tendency to allow state courts to apply forum law . . . coupled with an easing of the constitutional limitations on personal jurisdiction that began in 1945[] means that plaintiffs have a strong incentive, and the ability, to engage in interstate forum shopping” (footnote omitted)).

This is particularly problematic today. Given that the majority of states use conflict-of-laws rules that allow them to apply forum law⁸⁸ and that loosened standards for acquiring personal jurisdiction often provide many potential fora in which to sue,⁸⁹ parties are allowed to forum shop their way to the most favorable substantive law.⁹⁰ Notwithstanding these policy problems, the Court has favored parity between federal courts sitting within a state and that state's forum courts over the creation of a federal common law of conflicts law that would prevent forum shopping between federal courts.⁹¹ It also determined that such a result was part of "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."⁹²

The Court's statement about constitutional limitations will become key in the context of the *Erie* doctrine's application to international cases raising conflict-of-laws issues. In fact, many international cases stretch the bounds of a state's constitutional authority to adjudicate.⁹³ Furthermore, many international cases are surely not matters of "local policy," but rather are cases that touch on national policies.⁹⁴ Thus, there is room under these cases to develop limited federal common law in cases involving international conflict of laws. I will return to these arguments after exploring *Erie*'s international dimensions,⁹⁵ which is the subject of Part II.

II. *ERIE* GOES INTERNATIONAL

This Part focuses on the application of the *Erie* doctrine to international conflict-of-laws cases. After first explaining the changes in conflict-of-laws thought that occurred after *Erie* and *Klaxon* were decided, this Part examines the Supreme Court's most recent case on the subject. It

⁸⁸ HAY, BORCHERS & SYMEONIDES, *supra* note 34, § 1.10 tbl.3.

⁸⁹ *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁹⁰ *Cf.* Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1724 (2006) ("[The Class Action Fairness Act's] legislative history is replete with evidence of concern over aggressive state choice-of-law practices that can result in the application of a single state's law in a multistate or nationwide class suit.").

⁹¹ *See* Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191, 1194 (1967).

⁹² *Id.* at 1192.

⁹³ *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981).

⁹⁴ *See, e.g.*, Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954) ("Why is it an offense to the ideals of federalism for federal courts to administer, between citizens of different states, a juster justice than state courts . . . ? Was Hamilton wrong in saying that the assurance of the due administration of justice to out-of-state citizens is one of the great bonds of federal union?").

⁹⁵ *See infra* Part IV.

then explores the constitutional implications of international conflict of laws.

A. *Klaxon and International Conflict of Laws*

Klaxon was decided in the 1940s and the Supreme Court made reference to it with approval in both the 1950s and 1960s.⁹⁶ During this time, however, the entire field of conflict of laws underwent a revolution that changed the way courts and scholars viewed conflict-of-laws cases.⁹⁷ At the time *Erie* and *Klaxon* were decided in 1938 and 1941, respectively, conflict-of-laws analysis was generally mechanical. Under the First Restatement of Conflict of Laws, courts applied relatively strict jurisdiction-selecting rules that focused on identifying a last-triggering event in a factual situation to determine which state's substantive law would be applied to a given case.⁹⁸ For example, returning to *Erie*'s facts, the general jurisdiction-selecting rule for torts cases was to apply the law of the place in which the wrong occurred.⁹⁹ Given that Tompkins was injured in Pennsylvania, under the First Restatement, Pennsylvania's substantive law would be applied to Tompkins's case, wherever it was filed.¹⁰⁰ The rationale for this was that when Tompkins was injured in Pennsylvania, a right vested that he carried with him regardless of the jurisdiction in which he filed suit.¹⁰¹ Assuming New York conflict-of-laws rules followed the First Restatement for actions sounding in tort,¹⁰² the New York federal district court under *Erie* and *Klaxon* would be required to apply the substantive law of Pennsylvania because that is what the New York state courts would have done.¹⁰³

⁹⁶ *Van Dusen v. Barrack*, 376 U.S. 612, 628 (1964); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956). For purposes of completeness, I note that the *Erie* and *Klaxon* rules also apply to state-law claims heard in a federal question case through the exercise of pendent or supplemental jurisdiction. See, e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (*Erie*); *Balt. Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 681 (7th Cir. 1986) (*Klaxon*).

⁹⁷ See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 1* (2006) (discussing the "phenomenon" referred to as a "revolution" in . . . the law of conflict of laws in the United States").

⁹⁸ See, e.g., RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 377 (1934) (withdrawn 1971) [hereinafter RESTATEMENT (FIRST)] ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); *id.* § 378 ("The law of the place of wrong determines whether a person has sustained a legal injury."); see generally JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935) (explaining in detail the First Restatement approach to torts and other substantive areas of law).

⁹⁹ RESTATEMENT (FIRST), *supra* note 98, § 377.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., 1 BEALE, *supra* note 98, § 8A.8 (noting that "the chief task of the Conflict of Laws [is] to determine the place where a right arose" and which law created it).

¹⁰² RESTATEMENT (FIRST), *supra* note 98, §§ 377–378.

¹⁰³ See *supra* note 74.

Under this mechanical formulation, judges were prevented from exercising discretion to impose their views on state substantive law through the choice-of-law process.¹⁰⁴ Furthermore, when *Erie* and *Klaxon* were decided, conflict-of-laws approaches throughout the United States had coalesced around the widely accepted First Restatement,¹⁰⁵ which meant that there was little difference from forum to forum as to which state's substantive law should govern.¹⁰⁶ Therefore, it would not matter if Tompkins filed his case in a New York or New Jersey federal district court because under the First Restatement all federal courts would be required under the *Erie/Klaxon* rule to apply Pennsylvania state substantive law to the case. Viewed in this light, there was little incentive for a plaintiff like Tompkins to forum shop because “[a]s long as the rules [of the First Restatement were] applied consistently, the same substantive law should apply to identical facts, resulting in identical outcomes” no matter where the case was filed.¹⁰⁷

Because conflict-of-laws rules in the several states had reached a level of uniformity, the Court's decision in *Klaxon* made sense. The *Klaxon* rule prevented someone in Tompkins's shoes from forum shopping in hopes of finding more favorable substantive law not through general common law—which *Erie* circumscribed—but through the conflict-of-laws process—which *Klaxon* confined. Thus, the *Klaxon* rule did much to encourage the equal administration of justice and prevent forum shopping.¹⁰⁸

By the middle of the twentieth century, however, this mechanical view of conflict of laws had been rejected.¹⁰⁹ In addition to being challenged on intellectual grounds,¹¹⁰ the First Restatement approach was challenged on

¹⁰⁴ See *Klaxon Co. v. Stentor Elec. Mfg. Corp.*, 313 U.S. 487, 496 (1941) (“We are of opinion that the prohibition declared in *Erie* . . . against . . . independent determinations by the federal courts[] extends to the field of conflict of laws. . . . Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”).

¹⁰⁵ Borchers, *supra* note 31, at 120.

¹⁰⁶ For instance, in tort cases the place of injury would govern. RESTATEMENT (FIRST), *supra* note 98, §§ 377–78. In contracts cases, the place of acceptance would govern. *Id.* §§ 311, 332. No matter what forum was chosen, therefore, the applicable substantive law would be the same.

¹⁰⁷ Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1374 (2004). *But see* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 559 (1989) (noting that escape devices might permit judges to deviate from these clear and consistent rules).

¹⁰⁸ See *Klaxon*, 313 U.S. at 496.

¹⁰⁹ See Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087–88 (1956) (noting that by the middle of the twentieth century “the theory of ‘vested rights’ ha[d] been brutally murdered”).

¹¹⁰ The legal realists argued that Beale's approach substituted an artificial, metaphysical theory of vested rights as a cover for what the courts actually did in cases. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 181 (1933) (criticizing the theoretical justifications for the vested rights approach); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 746 (1924) (same).

practical grounds. Under the First Restatement, the way in which the substantive law applied to a case depended on how the court characterized the problem—as a tort, contract, etc. Yet, the First Restatement did not precisely detail how such characterizations were to be made by the courts.¹¹¹ So, for instance, a court might characterize a case sounding in tort as one sounding in contract in order to escape what it viewed as inappropriate substantive tort law.¹¹²

To return yet again to poor Tompkins's case, if he could convince the court (or if the court convinced itself) that his case was not a case sounding in tort (therefore implicating Pennsylvania law), but instead was one sounding in contract and therefore implicating another state's law,¹¹³ Tompkins might have been able to encourage the court to apply the more favorable substantive law of another state. Thus, the possibility that a court might characterize a factual scenario under one or another of the First Restatement's various substantive doctrines in order to apply substantive law that it deemed to reach a better result—so called “escape devices”¹¹⁴—defeated the primary benefit of the vested rights doctrine, which was consistency of application.¹¹⁵

Because of these problems, when *Erie*'s relationship to conflict of laws again came before the Court in the 1970s, the leading conflict-of-laws approach was no longer the vested rights doctrine but was instead interest analysis doctrine.¹¹⁶ Rather than relying on mechanistic rules susceptible to judicial manipulation, interest analysis generally focused on the question of whether a state had an interest in the outcome of a dispute that would justify the application of its law to the case.¹¹⁷ The issue before the Court in *Day*

¹¹¹ See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 65[b][1] (3d ed. 2002).

¹¹² See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928); *Cortes v. Ryder Truck Rental, Inc.* 581 N.E.2d 1, 4 (Ill. App. Ct. 1991).

¹¹³ While torts were governed by the place of injury, RESTATEMENT (FIRST), *supra* note 98, §§ 377–78, contracts were generally governed under the First Restatement by the place of contracting, *id.* §§ 311, 332. Assuming New York's substantive law was better for his case, Tompkins would have to argue that there was a contractual relationship with the Erie Railroad entered into in New York. Lurking behind this creative manipulation is, of course, the similar manipulation of law that the *Erie* Court sought to curb by limiting a federal district court's ability to engage in general common law. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹¹⁴ RICHMAN & REYNOLDS, *supra* note 111, § 65[b][1]; see also HAY, BORCHERS & SYMEONIDES, *supra* note 34, §§ 3.4–3.5 (discussing this practice).

¹¹⁵ See, e.g., Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 464 (1924) (“What each [state] will do [in a conflict-of-laws scenario] will depend solely upon its own positive law . . . and not upon any inherent principles of ‘jurisdiction’ limiting its powers. Its choice . . . will . . . be purely pragmatic—as to what, all things considered, it is desirable to do.”).

¹¹⁶ See Linda J. Silberman, Commentary, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 80 n.259 (1978) (describing interest analysis around this time as the “dominant mode of analysis in modern choice of law theory”); see generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188–282 (1963) (setting out the theory of interest analysis).

¹¹⁷ CURRIE, *supra* note 116, at 183–84.

& *Zimmermann, Inc. v. Challoner* was whether *Klaxon* would be moderated to take account of this change in conflict-of-laws thought.¹¹⁸

The facts of *Day* illustrate the problem. During the Vietnam War, a howitzer round that was manufactured in Texas prematurely exploded in Cambodia, injuring a soldier from Wisconsin and killing a soldier from Tennessee.¹¹⁹ The injured soldier brought a diversity suit against the manufacturer in Texas.¹²⁰ The question before the court was which law was to be applied. The choice of substantive law mattered because Cambodian law would require proof of fault, whereas Texas, Wisconsin, Tennessee, and Pennsylvania law, the other relevant jurisdictions with connections to the case, applied strict liability.¹²¹ The district court applied the substantive law of Texas under *Erie* and the conflict-of-laws rules of Texas under *Klaxon*.¹²² Concluding that similarly situated Texas courts would have applied the law of the place of injury, the district court applied Cambodian law.¹²³

On appeal, the Fifth Circuit held, consistent with interest analysis, that Cambodia had no interest in the case because it “is indifferent to the protection of American manufacturers.”¹²⁴ As such, the court reasoned that

[t]his is a case in which the policies of all jurisdictions having an interest in the dispute will be carried out through application of Texas [substantive] law. . . . However controlling state law may be in most diversity cases, it does not extend so far as to bind a federal court to the law of a wholly disinterested jurisdiction.¹²⁵

The Fifth Circuit disregarded the state conflict-of-laws rules of Texas, finding that Cambodia had no interest in the case, and instead opted for a conflict-of-laws methodology of its own that directed the court to apply forum (Texas) substantive law, which permitted recovery.¹²⁶

The Supreme Court reversed in a short per curiam opinion, without hearing oral argument.¹²⁷ The Court stated that the Fifth Circuit either “misinterpreted our longstanding decision in *Klaxon* . . . or else determined for itself that [*Klaxon*] was no longer of controlling force in a case such as

¹¹⁸ 423 U.S. 3, 3–4 (1975).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* The district court was correct as a matter of Texas conflicts law. On remand, the Fifth Circuit concluded that, at the time the case was tried, the Supreme Court of Texas would have applied Cambodian law. *Challoner v. Day & Zimmermann, Inc.*, 546 F.2d 26, 26 (5th Cir. 1977).

¹²⁴ *Day & Zimmermann, Inc. v. Challoner*, 512 F.2d 77, 80 (5th Cir. 1975), *vacated*, 423 U.S. 3 (1975).

¹²⁵ *Id.* at 80–81.

¹²⁶ *Id.* at 81.

¹²⁷ *Day*, 423 U.S. at 4.

this.”¹²⁸ The Court thus reaffirmed that under the *Erie* doctrine, federal courts sitting in diversity must apply the law of the state in which they sit, including that state’s conflict-of-laws rules,¹²⁹ even when those rules direct the court to apply foreign law.¹³⁰

B. International Conflict of Laws and the Constitution

There is an important wrinkle to this international conflict-of-laws analysis that has received little sustained attention:¹³¹ state conflict-of-laws rules must be applied so that those rules are “within the limits permitted by the Constitution.”¹³² It is important to remember that *Klaxon* was decided when the dominant conflict-of-laws methodology focused on the jurisdiction where a particular event occurred.¹³³ Under this method, a state court applying its conflict-of-laws rules would focus on an act—such as the place of injury in a tort case—to localize the jurisdiction whose law should be applied in a given case.¹³⁴ Such an approach sought to find the one

¹²⁸ *Id.*

¹²⁹ While *Klaxon* speaks to diversity cases, its logic has been expanded to include pendent jurisdiction over state claims as well. See e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (advising federal courts to use careful discretion before exercising jurisdiction over state claims). While the focus of this Article is on diversity cases, different conflict-of-laws rules may be used in federal question contexts. In particular, federal common law conflict-of-laws rules may be applied, as opposed to state conflict-of-laws rules, in federal question cases. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 749–50 (4th ed. 2007) (noting the possibility of applying federal common law in federal question cases).

¹³⁰ See, e.g., *Abogados v. AT&T, Inc.*, 223 F.3d 932 (9th Cir. 2000) (applying Mexican law); *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (also applying Mexican law). Many circuit courts have found that if the laws in question do not conflict, then a conflict-of-laws analysis is unnecessary and the federal court may apply the law of the forum state. See, e.g., *Prudential Ins. Co. of Am. v. Kamrath*, 475 F.3d 920, 924 (8th Cir. 2007) (“We need not decide whether Missouri law or New York law applies in this case because the outcome would be the same under either law.”); *Lambert v. Kysar*, 983 F.2d 1110, 1115 (1st Cir. 1993) (also stating the conflict-of-laws analysis is unnecessary); *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984, as amended 1985) (same). But see *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (“Choice of law analysis is necessary because Berg’s claim is more likely to fail under Pennsylvania law.”).

¹³¹ For one of the rare exceptions, see Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review, and International Conflict of Laws*, 25 *CARDOZO L. REV.* 2089, 2092–93 (2004) (“[U]ntil recent years, private international law was an island, detached from constitutional considerations in general, and from those related to constitutional review in particular. But times have changed. [G]lobalization has increased the importance of questions concerning the enforcement of foreign judgments and the laws of foreign nations.” (footnote omitted)). For a related look at the constitutional implications for enforcement of foreign judgments, see generally Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 *WM. & MARY L. REV.* 1159 (2007).

¹³² *Klaxon Co. v. Stentor Elec. Mfg. Corp.*, 313 U.S. 487, 496 (1941).

¹³³ See, e.g., *RESTATEMENT (FIRST)*, *supra* note 98, § 42 (“As used in the Restatement of this Subject, the word ‘jurisdiction’ means the power of a state to create interests which under the principles of the common law will be recognized as valid in other states.”).

¹³⁴ *Id.* § 377.

territorial sovereign whose law required application as a matter of jurisdiction.¹³⁵ This was because the first question for purposes of the First Restatement was to determine the one jurisdiction that produced a vested right.¹³⁶ In so doing, this approach amounted to a constitutional exercise of state jurisdiction,¹³⁷ because by virtue of a state having a significant territorial contact with a case, such as being the place of injury in a tort case, the application of that state's law would be constitutional.¹³⁸

As courts moved away from a rigidly territorial approach to conflict of laws, various constitutional issues were raised.¹³⁹ An important gloss on the constitutional limitations imposed on states when applying modern conflict-of-laws methodologies was supplied by the Court in *Allstate Insurance Co. v. Hague*.¹⁴⁰

¹³⁵ See *id.* § 6 (“The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or other interests created in the former state.”).

¹³⁶ See, e.g., 2 BEALE, *supra* note 98, § 377.2 (explaining the approach in the context of torts).

¹³⁷ See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 562 (1997) (“Prior to the 1930 case of *Home Insurance Co.[.] v. Dick*, the predominant territorial-vested-rights theory of Joseph Beale’s First Restatement had been virtually constitutionalized by the Supreme Court, under the rubric of the Due Process and Full Faith and Credit Clauses.” (footnote omitted)); Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1631 (2008) (“Shortly after its case law regarding the Due Process Clause, the Supreme Court began to apply the Full Faith and Credit Clause for choice of law as a duty to recognize foreign law—first as a strict duty to apply foreign law, and later as a duty to balance the regulatory interests of the various states.”).

¹³⁸ See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (suggesting that the place of injury rule was required by the Constitution); *W. Union Tel. Co. v. Brown*, 234 U.S. 542, 545–46 (1914) (same); see also Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1635 (2005) (noting that the place of injury “seemed a significant contact in a tort case”).

¹³⁹ See, e.g., James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 185–86 (1976) (“Other [constitutional clauses] have been used . . . to provide limitations on a state’s choice of law. These include the commerce clause, the privileges and immunities clause . . . and the equal protection clause. However, the only provisions successfully invoked with any regularity are the due process and the full faith and credit clauses.” (footnotes omitted)); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2503 (1999) (“If the ‘choice-of-law’ question is conceived of in terms of interstate recognition of rights . . . it becomes immediately apparent that the Constitution has obvious relevance. The problem is how to accommodate both local and federal aspects of the issue.”).

¹⁴⁰ 449 U.S. 302 (1981). There were various precursors to the Court’s modern analysis of the relationship between conflict of laws and the Constitution. See, e.g., *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939) (“[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 540–41 (1935) (noting that while the Due Process Clause prevents a state from restricting or controlling contracts entered into and to be performed outside of the state, the Constitution does not forbid a state from exercising control over a contract entered into in that state but intended to be performed elsewhere); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 375–78 (1918) (holding that the Fourteenth Amendment’s guarantee of freedom of contract prevented a Missouri court from applying one of that state’s statutes to invalidate a contract validly entered into in New York and governed by that state’s law).

The plaintiff's husband, Ralph Hague, was killed in Wisconsin when a motorcycle on which he was a passenger was hit by a car.¹⁴¹ The drivers of both cars were Wisconsin residents, as was Mr. Hague, who worked in Minnesota, just across the Wisconsin state line.¹⁴² After the accident, the plaintiff moved to Minnesota, where she remarried, and a Minnesota probate judge appointed her administrator of her deceased husband's estate.¹⁴³ While none of the operators of the vehicles involved had insurance, Mr. Hague had three policies, each for \$15,000, which included uninsured motorist coverage.¹⁴⁴ Mrs. Hague sued Allstate in Minnesota state court "seeking a declaration under Minnesota law that the \$15,000 uninsured motorist coverage on each of her husband's three automobiles could be 'stacked' to provide a total coverage of \$45,000."¹⁴⁵ Although the Minnesota trial court agreed that Wisconsin law prevented stacking, it entered summary judgment for the plaintiff because "Minnesota choice-of-law rules required the application of Minnesota law permitting stacking" and the anti-stacking rule was "inimical to the public policy of Minnesota."¹⁴⁶ The Minnesota Supreme Court affirmed.¹⁴⁷

The sole issue before the U.S. Supreme Court was whether a Minnesota state court's choice to apply Minnesota law to the case was constitutional.¹⁴⁸ While the Court recognized in a sharply divided plurality opinion written by Justice Brennan that more than one state's law could be applied to controversies with multistate contacts, it announced that the Constitution requires that a "[s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."¹⁴⁹ The Court did not make it totally clear in what circumstances state interests would be created. On the facts of the case, the Court simply found it enough that Mr. Hague was a member of the Minnesota workforce, that Allstate was present and doing business in Minnesota, and that Mrs. Hague entered Minnesota prior to beginning the litigation.¹⁵⁰ Given this rule and the contacts with the state of Minnesota, the Court concluded that the application of Minnesota law did not violate the Constitution.¹⁵¹

¹⁴¹ *Allstate*, 449 U.S. at 305.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 306.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 307.

¹⁴⁹ *Id.* at 313.

¹⁵⁰ *Id.* at 313–19.

¹⁵¹ *Id.* at 320.

Thus, the Supreme Court explicitly recognized that in order to comport with the Constitution, a state must have some significant interest in the application of its law to the facts of a case. It need not be the only state with an interest, or even the state with the most significant interest; just a state with a significant connection to the case to make the application of its law constitutional.¹⁵²

Four years after *Allstate*, the Court applied this rule to invalidate a state court's choice of law in the case of *Phillips Petroleum Co. v. Shutts*.¹⁵³ That case involved a class action consisting of approximately 28,000 members who owned land in eleven states.¹⁵⁴ The class action was brought in Kansas state court.¹⁵⁵ Less than 3% of the plaintiffs and 1% of the leases at issue in the case had any "apparent connection to the State of Kansas."¹⁵⁶ Nevertheless, the Kansas state courts "applied Kansas contract and Kansas equity law to every claim in th[e] case."¹⁵⁷

Speaking for the Court, then-Justice Rehnquist applied the *Allstate* test. First, a court must consider whether there is a conflict between the laws competing for application.¹⁵⁸ Were there no conflict between the laws of Kansas and Texas (the laws competing for application), "[t]here c[ould] be no injury in applying Kansas law."¹⁵⁹ Finding a conflict between these laws, Justice Rehnquist relied on *Allstate* to explain that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁶⁰ Finding few significant contacts with Kansas supporting the application of its law to all claimants, the Court concluded "that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."¹⁶¹

¹⁵² HAY, BORCHERS & SYMEONIDES, *supra* note 34, § 3.23.

¹⁵³ 472 U.S. 797 (1985).

¹⁵⁴ *Id.* at 799.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 815.

¹⁵⁷ *Id.* at 814.

¹⁵⁸ *Id.* at 816.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 818–19 (internal quotation marks omitted).

¹⁶¹ *Id.* at 822. To be clear, the Supreme Court has been less than pellucid regarding whether the Full Faith and Credit Clause or the Due Process Clause, or both, constrain choice of law. *See, e.g.,* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) (full faith and credit); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (due process). It appears, however, that this is a distinction without a difference, for the Court views the clauses as imposing similar requirements. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 n.3 (1988); *id.* at 735 n.2 (Brennan, J., concurring); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). In any event and for the purposes of this Article's emphasis on foreign law, the Due Process Clause is the only relevant clause, because the Full Faith and Credit Clause does not apply to laws beyond the several states. *See id.* at 322 n.4 (Stevens, J., concurring) ("The Full Faith and Credit Clause, of course, was inapplicable in *Home Ins. Co.* because the law of a foreign nation, rather than of a

These cases should be viewed in light of *Home Insurance Co. v. Dick*,¹⁶² the Court's only case involving the constitutional relationship between international conflict of laws and state choice of law.¹⁶³ As with *Erie* and *Klaxon*, *Dick* was decided when mechanistic choice of law was in its heyday. In *Dick*, the plaintiff brought suit in a Texas state court against three companies: one Mexican insurance company that had insured his tugboat while in Mexican waters and two New York companies that had reinsured the original Mexican insurer.¹⁶⁴ On account of a fire, the plaintiff sought recovery for the loss of his tugboat. The defendants moved to dismiss, asserting that the action had not been filed according to a clause in the insurance contract, valid under Mexican law, that required suit to be brought within one year.¹⁶⁵ The plaintiff argued that the policy's limitations period was invalid under Texas law, which set a two-year limitations period.¹⁶⁶ The Texas state courts agreed with the plaintiff, allowing the case to go forward under the Texas statute of limitations.¹⁶⁷

On appeal, the U.S. Supreme Court reversed, holding that the Texas court's rejection of the contract terms, valid in Mexico, violated due process.¹⁶⁸ In the Court's view,

nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All acts in relation to the making of the contracts of re-insurance were done there or in New York.¹⁶⁹

Because of this, Texas lacked the constitutional "power to affect the terms of the contracts so made"¹⁷⁰ because Texas was without the power to affect "the rights of parties beyond its borders having no relations to anything done or to be done within them."¹⁷¹ Appearing to embrace the territorial conflict-of-laws rules of the First Restatement, the Court rejected the application of Texas law.¹⁷²

sister State, was at issue . . .").

¹⁶² 281 U.S. 397 (1930).

¹⁶³ See Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 296 n.6 (noting that the "due process standards applied to state international choice of law come from the Fourteenth Amendment").

¹⁶⁴ *Dick*, 281 U.S. at 402.

¹⁶⁵ *Id.* at 403.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 405.

¹⁶⁸ *Id.* at 407–10.

¹⁶⁹ *Id.* at 408.

¹⁷⁰ *Id.*

¹⁷¹ *Cf. id.* at 410 (limiting the Texas courts' power as a policy consideration).

¹⁷² See Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37, 44.

Read in light of *Allstate* and *Shutts*, however, *Dick* now seems to stand for the proposition that a state may not apply its law unless it has a significant contact with the case.¹⁷³ The Constitution, in other words, does not require the application of a foreign state's law. State courts, and thus federal courts applying state conflict-of-laws rules under *Klaxon* and *Day*, are not constitutionally required to apply foreign law so long as the application of another law (even forum law) evinces "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁷⁴

Importantly, these cases dealt only with the ability of state courts to apply their own laws to certain factual scenarios. Based on the Court's reasoning, it nonetheless seems clear that since a state court cannot apply forum law unless it comports with the Constitution, a federal court sitting in diversity may similarly not do so. Likewise, because a state court must apply law "in a constitutionally permissible manner," it should also be true that a state court may not apply the law of another forum, and neither may a federal district court, unless that forum would meet this test.¹⁷⁵ It should also be the case that these decisions apply in cases where a forum court is applying foreign law.¹⁷⁶ Foreign law cannot be applied by either a state or federal court unless it is constitutional to do so.¹⁷⁷

At bottom, the mechanical application of a state's conflict-of-laws rules by a federal district court is constrained by the Constitution. The uncritical application of state conflict-of-laws rules that direct the court to apply foreign law is thus fraught with constitutional difficulties, including whether the application of foreign law would violate U.S. due process limits on legislative jurisdiction.¹⁷⁸ In light of this, courts should question the mechanistic application of the *Erie* doctrine in private international law cases. Before explaining in greater detail what a new approach would look like, Part III examines the rationales for applying the *Erie* doctrine in international cases.

III. INTERNATIONALIZING *ERIE*

By way of review, it is beyond doubt that the *Erie* doctrine requires a federal court sitting in diversity to apply the law of the state in which it

¹⁷³ See HAY, BORCHERS & SYMEONIDES, *supra* note 34, §§ 3.21, 3.26, 3.48; Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 694.

¹⁷⁴ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); cf. Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51, 68–69 (1987) (arguing that interest analysis in choice-of-law decisions in which courts decide which state's law to apply "should not be constitutionally required").

¹⁷⁵ HAY, BORCHERS & SYMEONIDES, *supra* note 34, § 3.48 (quoting *Hague*, 449 U.S. at 313 (quotation marks omitted)).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ BORN & RUTLEDGE, *supra* note 129, at 422.

sits.¹⁷⁹ The reasons for this are constitutional, statutory, and policy driven.¹⁸⁰ Courts are similarly required under *Klaxon* to apply the conflict-of-laws rules of the state in which they sit.¹⁸¹ The reasons for this are to prevent an end-run around the dictates of *Erie* and for the same policy reasons as those laid out in *Erie*: to prevent forum shopping and to encourage equal administration of the law.¹⁸² Evaluating whether these rationales are correct or even persuasive in the domestic context is not my purpose here, for the federal courts do not question the continuing relevance of *Erie* to their domestic analyses.¹⁸³

My purpose in this Part is to instead examine whether these rationales apply in the international context. After showing that *Erie*'s statutory and constitutional grounds do not constrain the ability of a federal court to develop federal conflict-of-laws rules in international cases, I next focus on the twin aims of *Erie*: avoiding forum shopping and encouraging equal administration of the law. The discussion of forum shopping uncovers a previously unrecognized connection in the scholarly literature: internationalizing the *Erie* doctrine may in part explain the increased use of the forum non conveniens doctrine by federal district courts. I conclude this Part by discussing the appropriate relationship between the *Erie* doctrine and international conflict of laws.

A. *Erie's Rationales Applied to International Conflict of Laws*

1. *The Rules of Decision Act.*—The Court's first rationale for the *Erie* doctrine was that the Rules of Decision Act required the application of the positive and common laws of the several states.¹⁸⁴ While the Court has never clearly rested *Klaxon* and its progeny on this rationale,¹⁸⁵ some brief remarks on this rationale in the context of international conflict of laws are in order.

Even assuming that the Act would apply to domestic conflict of laws,¹⁸⁶ its applicability to international conflict of laws is questionable.

¹⁷⁹ *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938).

¹⁸⁰ *See id.* at 74–80.

¹⁸¹ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹⁸² *Id.*

¹⁸³ *See, e.g.*, *Lafferty v. St. Riel*, 495 F.3d 72, 76–77 (3d Cir. 2007); *Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409 (5th Cir. 2006).

¹⁸⁴ *Erie*, 304 U.S. at 71–74.

¹⁸⁵ *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 32 (1963) (“In *Klaxon* . . . the Supreme Court held that a federal district court, when enforcing state-created rights, must make initial reference to the whole law of the state in which the court is physically located. It so held without making . . . reference to the language, history, or purpose of the Rules of Decision Act . . .”).

¹⁸⁶ *But see, e.g.*, Horowitz, *supra* note 91, at 1209 (“If, in resolving a conflict of state laws, a ‘court is to seek a [choice-of-law rule] . . . which would either reflect . . . multi-state policies or provide the basis for . . . accommodation of the laws’ conflicting purposes,’ a supreme federal law of conflict of

Under the Act, the substantive laws to be applied by federal courts sitting in diversity are “[t]he laws of the several states, except where the Constitution or treaties of the United States” shall “otherwise require or provide.”¹⁸⁷ A foreign state is not one of the several states referred to in the Act. Furthermore, at the time the Act was enacted, there was general agreement that the application of foreign law by U.S. courts, be they federal or state, was not required. As Justice Joseph Story detailed in his seminal *Commentaries on the Conflict of Laws*, it is “an essential attribute of every sovereignty[] that it has no admitted superior[] and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as a matter of right.”¹⁸⁸ Justice Story also stated that “[w]hatever extra-territorial force [laws] are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy, other nations are disposed to yield to them.”¹⁸⁹ Such “respect” is offered as an “imperfect,” as opposed to “absolute,” obligation to apply foreign law.¹⁹⁰ As Douglas Laycock has explained, “[h]ow U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power.”¹⁹¹ So, even to the extent that the Act required the application of the positive and common law of the several states, it cannot be said that it similarly required the application of foreign law.¹⁹²

The Court’s failure to even consider this in *Klaxon* is perhaps due to the fact that Justice Story’s comity doctrine had been replaced by the time of *Erie* with Joseph Beale’s “vested rights” approach, which was influential during the first half of the twentieth century.¹⁹³ Under the “vested rights” approach, the forum court gives effect to any right that had “vested” within the territory of a foreign sovereign.¹⁹⁴ According to Beale, “the chief task of the Conflict of Laws [is] to determine the place where a right arose and the

laws should . . . be the source of the choice-of-law rule.” (first omission in original) (footnote omitted)).

¹⁸⁷ 28 U.S.C. § 1652 (2006). The Rules of Decision Act was originally contained in § 34 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (establishing that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide” will be the “rules of decision . . . where they apply”).

¹⁸⁸ STORY, *supra* note 22, § 8.

¹⁸⁹ *Id.* § 7.

¹⁹⁰ *Id.*; see generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010) (analyzing the obligation to apply foreign law in conflict-of-laws thought).

¹⁹¹ Laycock, *supra* note 15, at 259.

¹⁹² See, e.g., Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 20 (1991) (noting that for Story “comity did not obligate courts to apply foreign law”).

¹⁹³ HAY, BORCHERS & SYMEONIDES, *supra* note 34, § 2.10.

¹⁹⁴ See *supra* Part II.A.

law that created [the right].”¹⁹⁵ In so arguing, Beale abandoned the comity doctrine and “rejected the role of the forum as ultimate policymaker in private international cases.”¹⁹⁶

Even assuming this was the view that the *Klaxon* Court was operating under, it still does not compel, as a statutory matter, the conclusion that conflict-of-laws rules directing a federal court to apply foreign law must be applied. The Act explicitly requires the application of either the “laws of the several states” or federal law.¹⁹⁷ The last phrase of the Act directs federal courts to apply state rules, even those directing the application of foreign law, “in cases where they apply.”¹⁹⁸ This phrase leaves open the question of which law “applies,” which is the conflict-of-laws question.¹⁹⁹

2. *The Constitutional Argument.*—Another rationale given by the Court for the *Erie* doctrine, and likewise never examined in *Klaxon* and *Day*, was that the Constitution prevented federal courts from making general common law.²⁰⁰ In the Court’s view, because Congress has no power to declare substantive rules of common law applicable to the states, the federal courts similarly have no power.²⁰¹ *Klaxon* intimates *Erie*’s constitutional analysis by explaining that “the prohibition declared in *Erie* . . . against such independent determinations by the federal courts extends to the field of conflict of laws . . . It is not for the federal courts to thwart [state] . . . policies by enforcing an independent ‘general law’ of conflict of laws.”²⁰²

But the Court in *Klaxon* failed to consider, as it failed to consider in *Day*, whether Article III would authorize Congress or the courts to create general federal conflict-of-laws rules. As Patrick Woolley has argued, “[t]here can be no question that the federal government must have *some* authority with respect to choice of law under Article III of the Constitution” and as such “there is no reason to think that federal courts in diversity cases are constitutionally compelled to apply the whole law of the state in which they sit.”²⁰³ Courts and other commentators have similarly recognized

¹⁹⁵ BEALE, *supra* note 98, § 8A.8.

¹⁹⁶ Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 284–85 (1982).

¹⁹⁷ 28 U.S.C. § 1652 (2006).

¹⁹⁸ *Id.*

¹⁹⁹ *See, e.g.,* Baxter, *supra* note 185, at 41 (“The phrase ‘in cases where they apply’ has a quality of deliberate flexibility that suggests the drafters did not think it wise to attempt specification of the cases to which any one state’s law would apply.”).

²⁰⁰ *See* *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[N]o clause in the Constitution purports to confer . . . power [to promulgate general common law] upon the federal courts.”).

²⁰¹ *Id.* at 78–79; *see also* Friendly, *supra* note 56, at 395 (noting that “it would be . . . unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not”).

²⁰² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

²⁰³ Woolley, *supra* note 90, at 1759–60.

this.²⁰⁴ And, as noted above, it is hard to construct a constitutional argument requiring federal courts to apply foreign law when its application by U.S. courts is voluntary, which is the near universal position of all modern conflict-of-laws theories.²⁰⁵

Furthermore, while the *Erie* doctrine is now well known for the proposition that “[t]here is no federal general common law,”²⁰⁶ that statement is subject to qualification.²⁰⁷ While there may be no “general common law” as existed at the time of *Swift*, there certainly are limited areas of “specialized” common law to be applied constitutionally by the federal courts after *Erie*.²⁰⁸ These areas differ from *Swift*’s general common law because they fall within areas of unique federal competence, such as foreign affairs, as opposed to purely local and state concerns.²⁰⁹ Indeed, as one scholar recently noted, there are many areas of procedural common law that seemingly fall outside of *Erie*’s dictates.²¹⁰ Given the foreign affairs implications for international conflict of laws, it is questionable whether *Erie*’s constitutional argument is fully applicable to international conflict-of-laws cases.²¹¹

²⁰⁴ See, e.g., *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 636 n.10 (7th Cir. 2002) (stating that “[w]e do not mean to intimate that *Klaxon* is constitutionally compelled”); Friendly, *supra* note 56, at 401–02 (“For Congress to direct a federal court sitting in State A whether to apply the internal law of State A, B, C, or to use its own judgment . . . can well be said to be ‘necessary and proper’ to enabling federal judges to function . . . in a way that [prescribing law] . . . is not.”).

²⁰⁵ See Laycock, *supra* note 15, at 259 (“How U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power.”); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 567 (2006) (“*Klaxon* should not be seen as a broad precedent for incorporating local law on matters that general American jurisprudence *could* govern. Not only is its apparent rationale quite narrow, but *Klaxon* itself illustrates the dangers of letting the local law of individual states govern matters that seem intrinsically federal.”); Young, *supra* note 30, at 471 (acknowledging that state court application of foreign law is voluntary but warning that “[s]tate court refusals to apply international law may . . . undermine the ability of the federal political branches to conduct foreign policy and therefore raise significant constitutional issues not present in the domestic context”).

²⁰⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

²⁰⁷ Indeed, on the very same day the *Erie* decision was announced, the Court announced another case, also written by Justice Brandeis, applying federal common law. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

²⁰⁸ Judge Friendly is credited with first proposing this distinction. See Friendly, *supra* note 56, at 405 (“The clarion yet careful pronouncement of *Erie*, ‘There is no federal general common law,’ opened the way to what, for want of a better term, we may call specialized federal common law.” (quoting *Erie*, 304 U.S. at 78)).

²⁰⁹ See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943). An extensive body of federal common law derives from federal legislation that impliedly authorizes federal common law. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

²¹⁰ See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 819–35 (2008) (comparing and contrasting substantive and procedural common law).

²¹¹ I will develop these arguments more completely *infra* Part IV.

3. *Forum Shopping*.—The Court has never relied on the above rationales to support the application of the *Erie* doctrine to international conflict-of-laws cases. Instead, the Court's stated rationale in *Klaxon* was that a contrary rule would (1) defeat the *Erie* doctrine by allowing courts to escape the application of forum law through the conflict-of-laws process and (2) encourage nonuniformity and forum shopping.²¹² *Klaxon*'s rejection of a federal conflict-of-laws rule for federal diversity cases was "prompted by a preference for intrastate uniformity over interstate uniformity because intrastate forum shopping was perceived as the more serious and more likely evil."²¹³

There are serious questions as to whether these rationales are effectuated by the application of the *Erie* doctrine to transnational cases. In fact, the very application of forum conflict-of-laws rules may encourage forum shopping even though uniformity is encouraged between federal and state courts sitting in the same state. It has been noted that, "the last thirty years have seen a growing torrent of" cases filed in the United States with international and foreign issues.²¹⁴ This growth may be due in part to a foreign plaintiff's ability to forum shop his way into a U.S. court in hopes of finding a more favorable forum.²¹⁵ Utilizing alienage jurisdiction²¹⁶ and permissive personal jurisdiction doctrines,²¹⁷ foreign plaintiffs can file their cases in various U.S. courts.²¹⁸ This gives plaintiffs the choice of several conflict-of-laws rules leading to the application of various substantive laws. A smart plaintiff would thus compare the conflict-of-laws rules of several states, determine which rule would require the federal court sitting in

²¹² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); see also *supra* Parts I.B, II.A.

²¹³ Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027–28 (2008).

²¹⁴ HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* v (2008).

²¹⁵ See Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) ("[M]odern choice-of-law approaches give plaintiffs an incentive to sue in a forum that has more generous tort laws than the place of injury.").

²¹⁶ 28 U.S.C. § 1332(a)(2) (2006) (permitting suits between non-U.S. citizens and U.S. citizens).

²¹⁷ See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); ARTHUR T. VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW* 191 (Martinus Nijhoff Pubs., 2003) ("The analysis employed in [*International Shoe*] increases the number of available forums, with the result that ordinarily a plaintiff's forum is produced.").

²¹⁸ While both domestic and foreign plaintiffs may request that a court apply foreign law, domestic plaintiffs are less likely to do so. Cf. Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 721 (2009) (noting that there exist "strong biases favoring domestic over foreign law, domestic over foreign litigants, and plaintiffs over defendants" (footnote omitted)). But see *id.* at 722 (arguing that supporters of the "strong bias" view "underestimate the influence of choice-of-law doctrine on judges' decisions and overestimate the extent of bias in those decisions").

diversity to apply the most favorable substantive law (be it foreign or domestic), and then file suit in the most favorable court.²¹⁹

For example, a foreign plaintiff seeking to have foreign law applied to an injury sustained abroad might choose to file a lawsuit against a California corporation in Virginia or another state (where the corporation is subject to personal jurisdiction) that still follows the First Restatement²²⁰ because the First Restatement's conflict-of-laws rules would direct the federal court to apply the substantive law of the place of injury and thus foreign law.²²¹ The choice to forum shop away from California's "comparative impairment" approach²²² would thus be made if Virginia's conflicts rules were more favorable to the plaintiff and resulted in the application of favorable substantive law to the plaintiff's case.²²³ Of course, a plaintiff might prefer to have California's conflicts rules applied if foreign law were not helpful to the plaintiff's claim. Thus, a serious criticism of the *Klaxon/Day* line of cases is that they might actually encourage forum shopping in international cases.²²⁴ While there is some recent empirical evidence calling into question the significance of the forum-shopping problem in transnational cases,²²⁵ the fact that the rationale for the Court's decisions in these cases is not effectuated by the rule is problematic.

4. *An Unintended Consequence: Forum Non Conveniens.*—There is also cause for concern because the problem of forum shopping is being resolved not through the application or nonapplication of foreign

²¹⁹ See, e.g., Martha Minow, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 51, 59 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992) (explaining the "strategic behavior entailed in forum shopping").

²²⁰ See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231–32 tbl.1 (2010) (listing the conflict-of-laws rules of the several states).

²²¹ See, e.g., *Hodson v. A. H. Robins Co.*, 528 F. Supp. 809, 823 (E.D. Va. 1981) (finding "that the Virginia rule in personal injury actions is that the law of the place of the injury, the *lex loci delicti* [sic], will control" and thus that "[s]ince plaintiffs' injuries were incurred in England, the laws of that country must be applied in the present cases").

²²² See, e.g., *Pubali Bank v. City Nat'l Bank*, 777 F.2d 1340, 1343 (9th Cir. 1985) (finding under California's "comparative impairment test" that California had the greatest interest in a breach of contract and fraud action brought by a foreign bank against a California bank, and thus California law applied).

²²³ See, e.g., Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 383 (2006) ("The law regularly provides more than one authorized, legitimate forum To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff."); Ghei & Parisi, *supra* note 107, at 1372 ("[P]laintiffs will generally seek to file claims in jurisdictions where the expected net gain is the largest. The amount of litigation is likely to be positively correlated with the extent to which the jurisdiction's laws favor plaintiffs.").

²²⁴ See, e.g., FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 13 (collecting sources).

²²⁵ Whytock, *supra* note 24. *But see infra* Part III.A.4 (updating empirical evidence).

substantive law, but through the procedural doctrine of forum non conveniens.²²⁶ One consequence of internationalizing the *Erie* doctrine is that it thrusts federal courts into undertaking forum non conveniens analyses, and one result of the mechanistic application of the *Erie* doctrine to international cases may be increased use of forum non conveniens dismissals by federal district courts.²²⁷ The forum non conveniens doctrine empowers a federal district court to dismiss a transnational case in favor of an alternative foreign court “when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.”²²⁸

In making the decision about whether to dismiss a case on forum non conveniens grounds, a court must evaluate various public and private factors, which include, among other things, the location of the evidence and witnesses, the plaintiff’s motive in bringing suit in the forum, and various issues of judicial administration, such as docket congestion.²²⁹ A court may choose to dismiss under forum non conveniens even though it has jurisdiction over the case and, under recent Supreme Court caselaw, a court may dismiss even without determining whether it has jurisdiction.²³⁰

While the Supreme Court has declined to catalogue all of the circumstances where dismissal would be proper,²³¹ one of the leading rationales for allowing a court to dismiss on forum non conveniens grounds is that international cases would require complicated applications of foreign law.²³² Indeed, many lower courts have given this factor substantial and decisive weight in the forum non conveniens analysis.²³³ While this factor is not conclusive,²³⁴ the Court has emphasized that the doctrine “is designed

²²⁶ See, e.g., Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 87 (2009).

²²⁷ See, e.g., John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 489 (2000) (recognizing the relationship between the “explosion of international civil litigation in U.S. courts” and the doctrine of forum non conveniens); Whytock, *supra* note 24, at 495 (similarly recognizing the relationship).

²²⁸ *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (alterations in original) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 446–48 (1994)).

²²⁹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6, 259–60 (1981); see also BORN & RUTLEDGE, *supra* note 129, at 393–98 (explaining the various factors that come into play).

²³⁰ See, e.g., *Sinochem*, 549 U.S. at 429.

²³¹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

²³² See *id.* at 509; see generally CURRIE, *supra* note 116, at 356–58 (discussing the invocation of forum non conveniens to avoid the application of unfamiliar foreign law).

²³³ E.g., *Scottish Air Int’l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1234–35 (2d Cir. 1996); *Ilusorio v. Ilusorio-Bildner*, 103 F. Supp. 2d 672, 679 (S.D.N.Y. 2000).

²³⁴ See *Piper*, 454 U.S. at 251, 259–60.

in part to help courts avoid conducting complex exercises in comparative law. . . . [T]he public interest factors point towards dismissal where the court would be required to ‘untangle problems in conflict of laws, and in law foreign to itself.’”²³⁵

There has been a significant increase in forum non conveniens decisions.²³⁶ Between 1990 and 2005, there were roughly 691 (about 43 per year) reported transnational forum non conveniens decisions by federal courts.²³⁷ Overall, the courts dismissed in favor of a foreign forum in about 50% of these cases.²³⁸ In cases where a foreign plaintiff was involved, the dismissal rate was higher, at 63%.²³⁹ As Christopher Whytock explained in the most recent study of the subject, “the signal seems to be that foreign plaintiffs are twice as likely to have their suits dismissed” compared to domestic plaintiffs.²⁴⁰ One potential reason for these results is that federal courts are resisting the application of foreign law that may be required under the *Erie* doctrine because they do not wish to “untangle” complicated problems of foreign law required by state conflict-of-laws rules. To the extent that forum non conveniens decisions appear to be driven by the biases of district court judges as opposed to legal standards,²⁴¹ which is contestable,²⁴² that bias is perhaps accounted for by the presence of foreign law in the case. Put another way, perhaps federal district court judges are dismissing suits on forum non conveniens grounds to avoid cases involving the application of foreign law. At a minimum, Whytock’s study confirms that the presence of foreign law in a case may have a significant impact on a court’s decision to dismiss.²⁴³ Foreign law is generally present in a case

²³⁵ *Id.* at 251.

²³⁶ Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1092 (2010).

²³⁷ Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* 15 (Feb. 28, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033.

²³⁸ *Id.* at 16.

²³⁹ Whytock, *supra* note 24, at 503. This is likely accounted for by the fact that in conducting the forum non conveniens analysis a court may give less deference to a foreign plaintiff’s choice of forum under Supreme Court caselaw. See *Piper*, 454 U.S. at 255–56 (“When the home forum [is] chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign . . . this assumption is . . . less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.”). While not my concern here, I note that such a demonstrated disparity between domestic and foreign plaintiffs may itself have implications for U.S. foreign relations. See BORN & RUTLEDGE, *supra* note 129, at 380 (noting that a failure to afford equal access to the courts may violate various treaties to which the United States is a signatory); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 281–82 (5th ed. 2006) (same).

²⁴⁰ Whytock, *supra* note 24, at 503–04.

²⁴¹ Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 603 (2007).

²⁴² Whytock, *supra* note 218, at 721–22.

²⁴³ See *id.* at 765 tbl.2 (comparing domestic and foreign law results).

because the *Erie* doctrine requires its application under state conflict-of-laws rules. Application of the *Erie* doctrine to international cases, therefore, may lead federal courts to dismiss cases in which state conflict-of-law rules require the application of foreign law, especially if the plaintiff is foreign and federal courts might prefer foreign fora for international cases even when the cases are appropriately within their jurisdiction.²⁴⁴

It is possible that the invocation of the forum non conveniens doctrine will grow in future years in light of recent Supreme Court precedent encouraging the doctrine's use.²⁴⁵ In fact, a search of cases invoking the doctrine after the Supreme Court's decision in *Sinochem*²⁴⁶ confirms that motions to dismiss on grounds of forum non conveniens are on the rise. While Whytock's study showed about a 50% dismissal rate, approximately 43 cases per year, for the period between 1990 and 2005, which is before the Court's *Sinochem* decision,²⁴⁷ research conducted for this Article starting in 2007, after the Court decided *Sinochem*, presents a more nuanced picture.²⁴⁸

Since *Sinochem*, 83 reported cases have raised the issue (about 20 per year).²⁴⁹ Of those, 52% were dismissed. Of these dismissals, 84% explicitly recognized that a reason for dismissal was the application of foreign law.²⁵⁰ These numbers likely underreport the real impact of the doctrine on cases before the federal courts. Since 2007, federal courts have increasingly dealt with these issues through unpublished opinions—going from reporting 45% of these cases in 2007 to only 15% in 2010.²⁵¹ Indeed, during the timeframe of Whytock's study, the reporting rate was closer to 45%.²⁵² While the dismissal rate for unpublished decisions hovers around

²⁴⁴ See, e.g., Lear, *supra* note 241, at 561 (“Following Justice Thurgood Marshall’s lead in *Piper* . . . federal judges presume that the accident forum has the greatest interest in adjudicating a foreign injury dispute. This presumption applies across the board.”).

²⁴⁵ See Robertson, *supra* note 236, at 1089.

²⁴⁶ *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422 (2007).

²⁴⁷ Whytock, *supra* note 237, at 15–16.

²⁴⁸ See Memorandum from Donald Earl Childress III (Aug. 18, 2011) (on file with author). In short, the approach was as follows: First, the Westlaw database was searched for all U.S. district court cases raising the term “forum non conveniens” between March 5, 2007 (the date of the *Sinochem* decision) and April 1, 2011. Second, all decisions were then reviewed and cases that were not actual decisions by U.S. federal district courts granting or denying a forum non conveniens motion in favor of a foreign forum were discarded. Third, these cases were then analyzed to yield the results explained in the text above.

²⁴⁹ The average is reached by taking into account data from March 5, 2007 to April 1, 2011. *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² This number was reached by comparing the number of published cases to unpublished cases during the time of Whytock’s study. This statistic suffers from some incompleteness, as there is no good denominator because not all published and unpublished cases are included in the available databases. In short, it is complicated to estimate publication rates based on current databases.

50%, what is striking is that there were 223 such cases since *Sinochem*.²⁵³ Of these unreported cases, 73% explicitly recognized the application of foreign law as a reason for dismissal.²⁵⁴ In sum, there have been a total of approximately 306 cases since *Sinochem* with an average of 75.5% recognizing foreign law as an important factor in dismissing the case.²⁵⁵ Therefore, courts may be resisting application of foreign law under the *Erie* doctrine through the forum non conveniens doctrine, and the trend to do so is growing with courts pushing such decisions to unreported cases.

Elizabeth Lear has documented the problems raised by this growing use of the forum non conveniens doctrine. Lear argues that “[t]he federal courts treat the [forum non conveniens analysis] as a less analytically demanding form of choice of law analysis” that “obscures the significant American interests at stake in the adjudication of foreign injury claims.”²⁵⁶ Rather than conduct a standard conflict-of-laws analysis, the process is short-circuited by the potential application of foreign law.²⁵⁷ Judges, resisting the application of foreign law and perhaps feeling required to apply foreign law under state conflict-of-laws rules, dismiss cases even though, because a conflict-of-laws analysis was never conducted, foreign law might not be applicable to the case at bar.²⁵⁸ Put simply, one result of the mechanistic application of the *Erie* doctrine to international cases may be an increased use of forum non conveniens dismissals by federal district courts.²⁵⁹

This is especially problematic as it relates to the *Erie* doctrine. Because no federal forum non conveniens statute exists, it is arguable that the doctrine should be governed by state law in federal diversity actions.²⁶⁰ However, the Supreme Court has avoided deciding the status of the doctrine on this issue.²⁶¹ While the trend of the caselaw is to treat the doctrine as a federal rule of procedural law in federal courts,²⁶² this uncertainty has real-

²⁵³ See Memorandum from Donald Earl Childress III, *supra* note 248.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Lear, *supra* note 241, at 568–70.

²⁵⁷ See, e.g., *McNeil v. Stanley Works*, 33 F.App’x 322, 324–25 (9th Cir. 2002) (noting that no choice-of-law determination is needed when a case is dismissed on grounds of forum non conveniens).

²⁵⁸ See BORN & RUTLEDGE, *supra* note 129, at 422 (“Both the location of the disputed conduct and the competing national interests are key considerations in contemporary U.S. choice of law standards.”).

²⁵⁹ At least one leading commentator has similarly recognized this connection. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 212 (2001) (noting that forum non conveniens implicates choice of law).

²⁶⁰ BORN & RUTLEDGE, *supra* note 129, at 428.

²⁶¹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 509 (1947).

²⁶² See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (finding that state courts are “are not bound by the federal common-law venue rule . . . of *forum non conveniens* . . . [b]ecause the doctrine is one of procedure rather than substance”); *Gilbert*, 330 U.S. at 502 (holding that a district court “has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*”).

world implications because state forum non conveniens law sometimes differs from the Supreme Court's analysis in *Piper*.²⁶³ As such, the doctrine may itself defeat *Erie*'s aims by encouraging forum shopping: Plaintiffs will understandably forum shop for state courts that do not have forum non conveniens doctrines, or for state courts that have different and more favorable doctrines than federal courts.²⁶⁴

* * *

In sum, the manipulation of conflict-of-laws rules by a federal court seeking to thwart the substantive law of one state in favor of the substantive law of another state certainly raises an issue of constitutional import.²⁶⁵ It is less obvious that similar constitutional concerns are raised when a federal court is required by state conflict-of-laws rules to apply foreign law. It does not obviously violate principles of federalism for a federal court to make an independent determination of whether a foreign substantive rule of law should be binding, especially considering that the application of foreign law is voluntary. Furthermore, and contrary to the Court's rationales for its decisions in *Klaxon* and *Day*, nonuniformity and forum shopping are encouraged by the application of the *Erie* doctrine to international cases. The expansion of globalization and jurisdiction affords plaintiffs almost unlimited choice concerning where to bring suit. Because states have various approaches to choice of law, "[t]his combination means that even a state with no connection to the particular transaction can use its choice of law approach to select the law or laws applicable to the transaction."²⁶⁶ Put another way, because a litigant will have the benefit of various conflict-of-laws rules, depending upon the conflict-of-laws rules of the state in which the case is filed, litigants will be encouraged to forum shop. *Erie*'s application to foreign law, whatever the rationale, is at best "attenuated" due to the international dimension of choosing foreign law.²⁶⁷

This attenuated relationship may have led courts to seek recourse in the doctrine of forum non conveniens to avoid the application of foreign law. What is striking, however, is that many forum non conveniens decisions never conduct a conflict-of-laws analysis.²⁶⁸ So, a defendant might alert a

²⁶³ BORN & RUTLEDGE, *supra* note 129, at 428; *see generally* *Piper*, 454 U.S. at 235.

²⁶⁴ BORN & RUTLEDGE, *supra* note 129, at 431.

²⁶⁵ *See* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1861 n.142 (2005) ("A federal court disregarding state choice-of-law rules would no more be applying the law of that state than would a federal court applying one section of a state statute while ignoring another. Whatever constitutional bar exists to the latter practice also forbids the former.")

²⁶⁶ Silberman, *supra* note 213, at 2028.

²⁶⁷ *See* Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 965 n.2 (1958).

²⁶⁸ Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV.

federal district court to the potential relevance of foreign law by making a forum non conveniens motion. Reflexively assuming that foreign law is applicable, a court may dismiss the case in favor of a foreign forum. While foreign law may be applicable, it might be the case that the district court could apply forum law or some other state's law under state conflict-of-laws rules. Thus, to the extent that conflict-of-laws analyses are not being conducted by district courts before determining forum non conveniens motions, courts may be dismissing cases under the mistaken belief that foreign law must be applied.²⁶⁹ This may mean that the federal courts are needlessly closing their doors to transnational cases on account of a mistaken analysis of the underlying substantive law.²⁷⁰

B. Should the Erie Doctrine Apply in International Cases?

The *Erie* decision left open the question of whether the doctrine should be applied in international cases. The question of whether state law, federal common law, or foreign law should guide the courts in international cases is thus not a new question.²⁷¹ In fact, the ink was barely dry on the *Erie* decision when a leading scholar first recognized that the case might have profound, and in some cases pernicious, implications if applied in international cases. Writing the year after the decision was issued, Philip Jessup argued forcefully that any attempt to expand the *Erie* decision to international cases

should be repudiated by the Supreme Court. Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.²⁷²

Jessup's concern was directed at the application of the *Erie* doctrine to customary international law.²⁷³ Following Jessup, another esteemed

309, 356–57 (2002).

²⁶⁹ *See id.* at 358 (“[I]t is possible to find examples of cases where forum non conveniens dismissal appears to follow automatically from the conclusion that foreign law was applicable.”).

²⁷⁰ *Cf.* Robertson, *supra* note 236 (examining the problems with closing U.S. courts to transnational cases).

²⁷¹ *See, e.g.,* LEA BRILMAYER ET AL., AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 289 (1986) (“The resolution [of conflicts with an international component] is a particularly delicate matter because the confrontation between laws and policies of the United States and foreign states are often sharper and more complex than any analogous showdown between two states.”).

²⁷² Philip C. Jessup, Editorial Content, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939). Jessup was not specifically speaking about international conflict of laws because *Erie* had not yet been applied there, although he did reference conflict of laws in a footnote, thus anticipating *Erie*'s application in those cases. *Id.* at 741 n.3.

²⁷³ *Id.*

scholar, Louis Henkin, recognized in the 1960s that the doctrine might have ramifications for conflict of laws. As he explained, “[w]hen the law of a foreign country is concerned, the choice of law rules hardly are a matter of primarily local policy and concern; they impinge on national interests and the foreign relations of the United States.”²⁷⁴ According to Henkin, “[i]nternational conflicts, then, may raise federal questions on which states do not call the tune but must follow the federal lead.”²⁷⁵

The Supreme Court similarly recognized this in *Banco Nacional de Cuba v. Sabbatino*, a case involving whether the Court would sit in judgment over an act done by the Cuban government that arguably violated international law.²⁷⁶ The Court noted that the effect to be given to the act of a foreign state is controlled by federal law, even in a diversity action.²⁷⁷ Explicitly taking up Jessup’s argument, the Court explained that

[w]e could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation. New York has enunciated the act of state doctrine in terms that echo those of federal decisions Thus our conclusions might well be the same whether we dealt with this problem as one of state law . . . or federal law. However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.²⁷⁸

Although the act of state doctrine has been limited by Congress and the Court,²⁷⁹ *Sabbatino* stands for the proposition that federal courts have authority in cases related to foreign affairs to fashion federal common law

²⁷⁴ Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM L. REV. 805, 820 n.51 (1964).

²⁷⁵ *Id.*

²⁷⁶ 376 U.S. 398 (1964).

²⁷⁷ *See id.* at 424.

²⁷⁸ *Id.* at 424–25 (footnotes omitted).

²⁷⁹ 22 U.S.C. § 2370(e) (2006); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

conflict-of-laws rules²⁸⁰ and that state courts are required to apply such rules as a matter of federal law.²⁸¹

The fact that *Sabbatino* involved a conflict-of-laws rule bears reemphasis.²⁸² The decision should not be read as authorizing federal courts to create federal common law, especially of a substantive form, in any case touching foreign affairs. Indeed, the issue of whether customary international law has the status of self-executing federal law to be ascertained and applied by federal courts has been the subject of recent scholarly debate.²⁸³ The so-called “orthodox view,” articulated by Harold Koh and others, is that “[c]ustomary international law is considered to be like common law in the United States, but it is federal law.”²⁸⁴ As such, it has the status of self-executing federal common law and is to be “applied by courts in the United States without any need for it to be enacted or implemented by Congress.”²⁸⁵ In a seminal article critiquing Professor Koh’s position, Curtis Bradley and Jack Goldsmith argued that, post-*Erie*, a federal court could no longer apply customary international law in the absence of some domestic authorization by the Constitution or political branches.²⁸⁶

²⁸⁰ See Chow, *supra* note 31, at 169 (arguing that “when the use of state law to decide international choice of law issues may compromise significant federal interests, federal and state courts should apply a federal common law rule that preempts state law”).

²⁸¹ BORN & RUTLEDGE, *supra* note 129, at 767 (collecting cases).

²⁸² See, e.g., Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT’L L. 175, 178 (1967) (“If there were no act of state doctrine, a domestic court in a case like *Sabbatino* would decide it on ‘conflicts’ principles. . . . The act of state doctrine, however, says that foreign ‘law’ . . . must govern certain transactions and that no public policy of the forum may stand in the way.”); Henkin, *supra* note 274, at 805, 809 (noting that the “Act of State” doctrine articulated in *Sabbatino* “might have been part of the federal common law of that time, a special principle of conflict of laws applicable in the federal courts”).

²⁸³ See, e.g., Bradley, Goldsmith & Moore, *supra* note 29, at 869 (describing the debate).

²⁸⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. d (1987) (“International agreements of the United States other than treaties, and customary international law, while not mentioned explicitly in the Supremacy Clause, are also federal law and as such are supreme over State law.” (citation omitted)). For a more in-depth review of the debate, see Koh, *supra* note 30, at 1825–26; Young, *supra* note 30, at 367–70.

²⁸⁵ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); see also *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (exemplifying the application of the approach); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (same).

²⁸⁶ Bradley & Goldsmith, *supra* note 29; see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 671 (1986) (“[C]ustomary international law has not traditionally been applied by American courts There is no basis for the notion that it is a kind of constitutional common law, suitable as a doctrinal vehicle for restraining acts of the political branches.”); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 47–48 (1995) (“Longstanding judicial construction of the reach of executive authority in the area of international relations establishes that an attempt by the federal courts to control foreign policy determinations in order to enforce international law is . . . a judicial usurpation.”).

The *Sabbatino* decision has been central to these arguments because the Court used federal common law in that case. Those arguing for the orthodox view have used the case for the general proposition that federal courts may create federal common law in the case of customary international law.²⁸⁷ The revisionists have argued that the case should not be read that broadly,²⁸⁸ noting that the Court has explicitly recognized more recently that even in the foreign relations context, “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”²⁸⁹

In my view, *Sabbatino*’s holding is modest—it is that federal courts may fashion federal common law conflict-of-laws rules in international cases, but only in some limited circumstances that implicate important national foreign policy concerns. The following Part will proceed with that holding in mind. Regardless of what that case means for customary international law, the case shows that the uncritical application of the *Erie* doctrine to international cases is questionable. At a minimum, as Jack Goldsmith has noted, in light of *Sabbatino*, the scope of *Day*’s “holding with respect to choice of law in transnational cases is uncertain.”²⁹⁰ What to do with the uncertainty of that holding is the subject of the next Part.

IV. INTERNATIONAL *ERIE* AND PRIVATE INTERNATIONAL LAW

The foregoing analysis calls into question the strict command of *Klaxon*, as interpreted in *Day*, requiring a federal district court to apply the conflict-of-laws rules of the state in which it sits even when those rules point the court to an application of foreign law. The question, of course, is why should this small ounce of clarity in the murky waters of *Erie* be clouded once again? The answer is that changed circumstances since the *Klaxon* and *Day* decisions were issued counsel in favor of a reconsideration of the doctrine’s application to international conflict-of-laws cases. After showing the problem that exists when *Erie* is applied in private international law cases, I offer a sounder approach that could be employed by courts.

²⁸⁷ See, e.g., Koh, *supra* note 30, at 1847 (“The *Sabbatino* Court found such federal common lawmaking to be justified by explicit constitutional grants and the need to maintain national uniformity in areas of uniquely federal interest.”).

²⁸⁸ See, e.g., Bradley, Goldsmith & Moore, *supra* note 29, at 886 (“[Revisionists] noted that the application of a [customary international law] of human rights as federal common law would be contrary to the post-*Erie* requirement that federal common law conform to the policies of the federal political branches.”).

²⁸⁹ *Id.* at 902 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004)).

²⁹⁰ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634 n.78 (1997).

A. *The Uniqueness of Private International Law for Erie's Aims*

There have been a significant number of cases raising international conflict-of-laws issues in recent years.²⁹¹ The most recent study reviewing federal cases from 1990 through 2005 found that there were approximately 200 cases during that period that raised the issue of whether foreign law should be applied in tort cases.²⁹² Additionally, the real number could be higher, given that the study excluded cases where a choice-of-law decision was not made by the court.²⁹³ At a minimum, the Whytock analysis explained earlier²⁹⁴ shows the substantial impact of foreign law questions on cases filed in federal courts. Indeed, from 1990 to 2005, the Whytock study reported that 85 decisions were made regarding international conflict of laws in the context of motions to dismiss on grounds of forum non conveniens.²⁹⁵ To the extent that the issue is being raised, many courts have reflexively applied the law of foreign states as if it were the law of the several states.²⁹⁶ Overall, courts applied foreign law in 63% of all cases, 91% of forum non conveniens cases, and 45% of cases outside of the forum non conveniens context.²⁹⁷ Or, courts dismissed international cases on grounds of forum non conveniens without conducting a conflict-of-laws analysis, which is not accounted for in the recent Whytock study.²⁹⁸ Recent trends showing an increased recourse to forum non conveniens motions also suggest that this question is increasingly important. Furthermore, foreign law is frequently applied without the court asking a question implied by the

²⁹¹ Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 302 (2008) (noting that "in the coming years, the American legal system likely will continue to confront steady growth in the volume of litigation with an international dimension"); Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369, 455 (2010) (noting that with the advent of globalization, international disputes and the attendant conflict-of-laws issues have become more frequent); Whytock, *supra* note 218, at 755 & n.188 (detailing the results of a study of published international tort cases in which choice-of-law issues arose between the years 1990 through 2005, with a sample size of 213 cases).

²⁹² Whytock, *supra* note 218, at 755. Whytock's study is the most recent empirical study on the issue. His article focused on tort cases because (1) prior studies similarly focused on these cases and (2) such cases are the "principal battlefield of the so-called choice-of-law revolution." *Id.* at 755 n.186 (internal quotation marks and citation omitted).

²⁹³ *Id.* at 755 n.188.

²⁹⁴ See *supra* Part III.A.4.

²⁹⁵ Whytock, *supra* note 218, at 755.

²⁹⁶ The confusion of interstate and international conflicts analysis abounds throughout the scholarly literature, even though there are important differences in these types of cases that call for different analyses. Laycock, *supra* note 15, at 259; see also Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717, 723 (1957) ("Parallel and contributory to a possible divergence between the laws of international and interstate conflicts is the fact that the treatment of the former, both as to scope and merits, may not only differ from that of interstate conflicts, but even as to each foreign country involved.").

²⁹⁷ Whytock, *supra* note 218, at 765 tbl.2.

²⁹⁸ *Id.* at 755 n.188.

Klaxon Court itself: Is it constitutional to apply the law of the foreign state?²⁹⁹ That question, in light of the Court's decisions in *Hague* and *Shutts*, seemingly requires that a federal district court engage in some analysis to ensure that the relevant foreign state has some interest in the application of its law to the case.³⁰⁰ Courts have likely resisted this for fear that such inquiries might guide them back into general common law.

In addition to these reasons, a reconsideration of the *Erie* doctrine's application to international conflicts cases is in order because the several states employ different conflict-of-laws regimes. This means that the *Erie* doctrine's twin aims of "discouragement of forum shopping and avoidance of inequitable administration of the laws"³⁰¹ may be frustrated in international conflicts cases as foreign plaintiffs forum shop for the most favorable substantive law within a patchwork of inconsistent approaches to conflicts law. In contrast to the simple and clear rules that were nearly universally employed by the several states at the time *Erie* and *Klaxon* were decided, the states now employ a variety of conflict-of-laws approaches.³⁰² What follows is a brief overview of the present methodologies employed by the several states that illustrates the need for more clear and consistent federal rules.

To begin with, fourteen states—Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming—continue to apply the First Restatement in whole or in part to torts and contracts cases.³⁰³ For cases that raise international conflict-of-laws issues and are filed in diversity in federal district courts in these states, therefore, there is a strong possibility that, under *Klaxon* and *Day*, the federal district court would be required to apply foreign law. Even beyond these states, foreign law might be necessary to apply under more modern conflict-of-laws rules that are employed in the majority of states, even though there might be varying degrees of contact necessary with the foreign state to justify the application of its law.³⁰⁴ Only two states apply the law of the forum to all cases sounding in tort—Kentucky and Michigan—while other states or districts, such as California and the District of Columbia, apply a version of interest analysis that strongly favors the application of forum law.³⁰⁵ All

²⁹⁹ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495 (1941).

³⁰⁰ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981); see also *supra* Part II.B (explaining the Courts' analyses in these cases).

³⁰¹ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427–28 (1996) (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)); *Hanna*, 380 U.S. at 468.

³⁰² See *supra* Part II.A.

³⁰³ *Symeonides*, *supra* note 220.

³⁰⁴ See *id.* at 23031 (exploring in detail the theories of conflict of laws currently used by state courts).

³⁰⁵ *Id.* at 230–31 tbl.1.

other states use some form of balancing, usually following the Second Restatement, which may direct the court to apply foreign law or forum law depending on the circumstances of the case.³⁰⁶

Compounding this mishmash of conflict-of-laws rules at the state level are recent cases showing that federal district courts are resisting application of foreign law. As explained earlier, forum non conveniens is now a growing trend in international litigations.³⁰⁷ The ostensible reasons for this are that courts dismiss a complaint in favor of a foreign forum having more connection to the case. These dismissals are evidence that domestic federal courts are resisting the application of foreign law. When federal district courts dismiss on grounds of forum non conveniens, they usher in “boomerang litigation” and secondary battles in enforcement of judgment proceedings. Boomerang litigation occurs when a U.S. court dismisses a case in favor of a foreign forum and then that forum is unable or unwilling to hear the case.³⁰⁸ The case then comes back before the U.S. court. In other words, a case bounces back and forth between jurisdictions without ever reaching the merits, which is highly inefficient as a matter of judicial administration.³⁰⁹

In the enforcement-of-judgments context, if the case proceeds to trial and judgment in a foreign forum, the judgment creditor will seek execution of the judgment and attachment of the debtor’s assets in a U.S. court. This means that U.S. courts end up having to entertain resolution of the case in enforcement proceedings. These proceedings, however, do not afford the U.S. court the opportunity to retry the case.³¹⁰ U.S. courts are generally bound by the foreign judgment, unless that judgment violates certain circumscribed grounds, such as fraud or violations of U.S. due process standards.³¹¹

³⁰⁶ *Id.*

³⁰⁷ See *supra* Part III.A.4.

³⁰⁸ M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 *BYU INT’L L. & MGMT. REV.* 21, 22 (2007); see also Cortelyou Kenney, Comment, *Disaster in the Amazon: Dodging “Boomerang Suits” in Transnational Human Rights Litigation*, 97 *CALIF. L. REV.* 857, 864 (2009) (“Seeking to evade the prospect of massive foreign judgments, corporate defendants subvert the very proceedings they originally sought via [forum non conveniens] by attempting to return cases to the forum that granted dismissal.”).

³⁰⁹ Cf. Kenney, *supra* note 308, at 876 (“[B]oomerang suits complicate judgment enforcement in . . . ways . . . reflective of the inherent difficulties posed by simultaneously litigating the same set of issues in different countries.”).

³¹⁰ See, e.g., *Weininger v. Castro*, 462 F. Supp. 2d 457, 476 (S.D.N.Y. 2006) (“The insufficiency of evidence in support of a claim is not, in itself, a basis for a collateral due process attack on a judgment. . . . [O]therwise, the enforcing court would inevitably be required to reexamine the merits of the original controversy, which is plainly not proper in an enforcement proceeding.” (internal quotation marks omitted) (quoting *McCloud v. Lawrence Gallery, Ltd.*, No. 90 Civ. 30(KMW), 1991 WL 136027, at *17 (S.D.N.Y. July 12, 1991)).

³¹¹ See, e.g., BORN & RUTLEDGE, *supra* note 129, at 1015 (noting that section 4(b) of the Uniform Foreign Money Judgments Recognition Act “sets forth six . . . grounds that *permit*, but do not require, a

On account of these problems, the *Erie* doctrine's twin aims are frustrated because the present state of affairs encourages forum shopping and inequitable administration of the laws. In the next section, I construct an approach for courts to employ in international conflict-of-laws cases.

B. Internationalizing Erie in Private International Law Cases

U.S. courts apply foreign law when appropriate, not out of compulsion but out of comity. As explained by Justice Story,

[a] state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. It may recognise, and modify, and qualify some foreign laws; it may enlarge or give universal effect to others. It may interdict the administration of some foreign laws; it may favour the introduction of others.³¹²

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.”³¹³ Judicial actions implicating international comity by definition implicate foreign relations; and there is

no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the “concern for uniformity in this country's dealings with foreign nations” that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.³¹⁴

The definition and enforcement of what comity requires is accordingly one of those “few areas involving ‘uniquely federal interests’” that are “so committed by the Constitution and laws of the United States to federal control” that federal law must supply the rules of decision.³¹⁵

U.S. court to deny recognition [of a foreign money judgment]. These . . . include lack of notice, fraud, public policy, existence of an inconsistent judgment, violation of forum selection clause, and inconvenient forum”).

³¹² STORY, *supra* note 22, § 23.

³¹³ Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964).

³¹⁴ Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25); *see also, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (invalidating substantive state law where its enforcement by state courts could “disturb foreign relations”). There is no question that “complete power over international affairs is in the national government,” and it “cannot be subject to any curtailment or interference on the part of the several states.” *United States v. Belmont*, 301 U.S. 324, 331 (1937); *see also, e.g.*, *Zschernig*, 389 U.S. at 436 (asserting that “international relations” is a “matter[] which the Constitution entrusts solely to the Federal Government”).

³¹⁵ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *see also, e.g.*, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (clarifying that federal law governs “international disputes implicating . . . our relations with foreign nations”); *Sabbatino*, 376 U.S. at 425 (“[Issues

It should be noted that federal courts sitting in diversity and faced with international conflict-of-laws questions need not develop federal conflict-of-laws rules, even though cases may touch on important international, and thus federal, concerns. As recognized in *Shutts*, the conflict-of-laws process is only implicated when there is a conflict between the laws of competing jurisdictions.³¹⁶ If there is not a conflict, the court may apply forum law, assuming that law has at least some constitutional connection to the case.³¹⁷

If there is a conflict, the role of the federal court should be to critically evaluate whether the application of a state's conflict-of-laws rule supports federal objectives.³¹⁸ Should it support federal objectives, it is well established that federal district courts may apply state law, as *Sabbatino* notes, not because of compulsion under *Erie* and *Klaxon* but because so doing does not thwart federal objectives.³¹⁹ As such, a federal court may choose to follow state conflict-of-laws rules directing it to apply foreign law or some other law because the application of that law would not negatively impact federal interests.

It is useful to pause here to take stock of the foregoing analysis before offering a new approach. In two post-*Erie* cases, *Klaxon* and *Day*, the Supreme Court required not only the application of state substantive law by federal courts sitting in diversity, but also the state conflict-of-laws rules of the forum court, even when those rules direct the application of foreign law. To the extent that *Klaxon* rests on sound jurisprudential underpinnings because it effectuates *Erie*'s command to apply state law, that same rationale is less applicable in the international context. In the international context, the federal courts have a special competence to create federal common law to effectuate national interests. As such, *Sabbatino* permits a federal district court to develop specialized federal common law in international conflicts cases.³²⁰ To the extent there is a conflict between the

implicating] our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”).

³¹⁶ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985).

³¹⁷ *See, e.g., Prudential Ins. Co. of Am. v. Kamrath*, 475 F.3d 920, 924 (8th Cir. 2007); *Nelson v. Sandoz Pharm. Corp.*, 288 F.3d 954, 963 (7th Cir. 2002).

³¹⁸ *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232–33 (11th Cir. 2004) (noting that federal common law, and not the *Erie* doctrine, applies to litigation that implicates the nation's foreign relations).

³¹⁹ *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (“[F]ederal courts should ‘incorporat[e] [state law] as the federal rule of decision,’ unless ‘application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.’” (alterations in original) (citation omitted)); *cf. Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (noting that “federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests”).

³²⁰ Federal 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. *See, e.g., Barrett, supra* note 210, at 819–35 (2008) (comparing and

laws contending for application making it necessary for the court to conduct a conflict-of-laws analysis, there are two analyses that must be conducted.

First, the court must analyze the relevant factual contacts to the foreign forum. This would ensure that the application of foreign law would comport with the constitutional requirements explained in *Hague* and *Shutts*.³²¹ Second, the court must undertake a further inquiry to determine whether the application of foreign law will effectuate not just local state interests but also national federal interests. If the court concludes that national interests are not effectuated or if it concludes that the application of foreign law would be unconstitutional, it must locate a jurisdiction that has the requisite constitutional contacts with the case such that the application of that jurisdiction's law would effectuate national interests. In so doing, a court may adopt the law of the forum, not because it is required by *Klaxon* and *Day* but because it makes sense in terms of the federal interests implicated by the case. In fact, there might be many benefits in utilizing forum law, such as ease of application and general knowledge on the part of the court. Or, the court may set out to craft a conflicts rule for the case. A court would not be left to totally write on a clean slate because most federal courts recognize that for purposes of federal conflicts law the Second Restatement controls.³²² Furthermore, courts could look to the development of the law in the several states.³²³ In practice, the approach would be as follows.

First, in cases where parties have chosen or stipulated to foreign law, the court should apply foreign law so long as it is constitutional and does not frustrate federal policies.³²⁴

Second, in cases where parties have not chosen foreign law but that law is the only law that has any significant contact with the case, a court should engage in a constitutional/federal policy analysis. Simply because a party has chosen to file a case in the United States does not give the federal court the requisite significant contact to satisfy constitutional standards.

contrasting substantive and procedural common law and explaining forum non conveniens as an example of procedural common law).

³²¹ See *supra* Part II.B.

³²² See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005) (refusing to apply the logic of *Klaxon* to the choice-of-law question because of the international complexion of the case and instead looking to Ninth Circuit caselaw as well as the Second Restatement to craft a federal common law rule); see also, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *cert. denied*, 540 U.S. 1045 (2004), *vacated on other grounds*, 374 F.3d 1384 (9th Cir. 2004) (illustrating that the court looked to the Second Restatement to determine choice-of-law rules); *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332–33 (D.C. Cir. 2003) (same).

³²³ See, e.g., *Hisrich v. Volvo Cars of N. Am., Inc.*, 226 F.3d 445, 449 n.3 (6th Cir. 2000) (illustrating the relevance of “restatements of law . . . and the majority rule among other states” in resolving underdeveloped questions of law).

³²⁴ See, e.g., *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 133–34 (2d Cir. 1997) (“[W]here the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry.”).

Indeed, such cases might be appropriate for forum non conveniens. Because the forum and the United States as a whole may have no significant interest in the case, it might be more convenient to try the case elsewhere. Such a limited role for forum non conveniens may alleviate some of the concerns that have been recently expressed about the doctrine's use.³²⁵

Third, if foreign law is selected in a state that follows the First Restatement and if there are contacts with the forum state or another U.S. state, the court could apply a federal conflict-of-laws rule. In so doing, a court would concern itself not just with forum interests but with the interests of the U.S. writ large that are implicated by the court's decision. If the court finds that federal interests would not be advanced by the application of the state's conflicts rules, it may again choose to dismiss in favor of a foreign forum or it may apply another law that would effectuate those interests.

Fourth and finally, in a case where there are multiple contacts because the case has been filed in a state that engages in some form of interest analysis, a federal court should seek to accommodate the varying federal interests at stake in the case. In developing federal policy, it would be useful to look at the laws of the several states, the Second Restatement, and the ongoing development of the common law.³²⁶ Of course, this approach would not prevent Congress from stepping in to remedy these problems.

While this approach is preferable to the present approach employed by courts, it is not without objections. The primary objection can be seen in recent writings regarding the application of customary international law by federal courts. As noted, perhaps the leading commentators on this point have been Curtis Bradley and Jack Goldsmith.³²⁷ They have argued that the requirements of the *Erie* doctrine apply in full force to international matters implicating customary international law.³²⁸ The reasons advanced for this are threefold.

They argue in the first place that *Erie*'s "embrace of legal positivism . . . requires federal courts to identify the sovereign source for every rule of decision. Because the appropriate 'sovereigns' under the U.S.

³²⁵ See *supra* Part III.A.4.

³²⁶ See *In re Air Crash Disaster Near Chi., Ill.* on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981) (illustrating such an approach); see also Lea Brilmayer, *The Problem of Provenance: The Proper Place of Ethical Reasoning in Selection of the Applicable Law*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* (Donald Earl Childress III ed., 2011) (articulating a common law approach to private international law).

³²⁷ See Bradley & Goldsmith, *supra* note 29, at 852–55. Interestingly, Jack Goldsmith has made a slightly different argument in another article. See Goldsmith & Walt, *supra* note 54, at 687 ("The claimed historical connection [between legal positivism and the *Erie* decision] fails to explain why there was a large temporal gap between the general acceptance of legal positivism and the decision in *Erie*. By itself, this gap makes a causal role for positivism seem doubtful.").

³²⁸ Bradley & Goldsmith, *supra* note 29, at 853–54.

Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law.”³²⁹ Second, they argue that *Erie* evinces a legal realist view of judicial decisionmaking.

In the rhetoric, if not the reality, of the *Swift* regime, judicial decisionmaking was not a form of lawmaking. *Erie* rejected this view when it interpreted the term “laws” in the Rules of Decision Act to include state judicial decisions. The recognition that courts “make” law when they engage in common law decisionmaking also formed a basis for the Court’s conclusion that the development of an independent general common law by federal courts was “an unconstitutional assumption of powers.”³³⁰

Third, they explain that

Erie did not eliminate the lawmaking powers of federal courts—it changed them. Federal court development of general common law was illegitimate not because it was a form of lawmaking, but rather because it was *unauthorized* lawmaking. Thus, federal judicial lawmaking is consistent with *Erie* if it is legitimately authorized. Since *Erie*, federal courts have determined that such authorization exists in a variety of circumstances.³³¹

But the critique they offer, while powerful in the context of customary international law, does not necessarily lend itself to private international law cases. First, in applying conflict-of-laws rules, courts are applying law that has a basis in state authority. The conflict-of-laws process is a process that directs a court to the application of a state’s law; it does not determine the content of that law. As such, conflict-of-laws analysis is designed to help a court choose which sovereign’s law should control the case. Furthermore, and as they note, the law to be applied by the federal courts is either federal law or state law. What role does foreign law have in their analyses, especially when state conflict-of-laws rules require its application? That open question illustrates that *Erie*’s concern with positivism is more about positive federal and state law than it is about the application of foreign law.

Second, regarding the argument that *Erie* rejected the ability of federal courts to make common law, in the private international law context federal courts have at least some limited power to create federal common law. It does not, therefore, amount to an unconstitutional assumption of powers for courts to develop federal common law in this limited area. As Caleb Nelson has explained, “[p]roperly understood . . . *Erie* does not deny the ability of lawyers and judges, drawing upon precedents and practices followed in diverse jurisdictions, to distill rules that are available for legal recognition and that are sufficiently determinate to be ‘law-like.’”³³² In any

³²⁹ *Id.* at 852.

³³⁰ *Id.* at 854 (footnotes omitted).

³³¹ *Id.* at 855.

³³² Nelson, *supra* note 205, at 504.

event, the gist of Bradley and Goldsmith's trenchant argument is that federal courts should not be in the business of creating law post-*Erie*, even in cases of an international dimension given that such powers are committed to the political branches. I agree, but note that the application of foreign law by U.S. courts operating under state conflict-of-laws rules poses a similar dilemma. That dilemma is that the court may be required to apply the law of a country for whom it does not speak. There may be good reasons for the court to apply foreign law—comity, fairness, party expectations, or international relations concerns—but the court should not be forced to do so under the *Erie* doctrine. Indeed, forcing a federal court to apply foreign law may lead to forum non conveniens dismissals that do not effectuate the important federal goals at stake in international cases.³³³

Finally, 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.”³³⁴ Judicial actions implicating international comity by definition implicate foreign relations; and there is

no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the “concern for uniformity in this country's dealings with foreign nations” that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.³³⁵

The definition and enforcement of what comity requires is accordingly one of those “few areas involving ‘uniquely federal interests’” that are “so committed by the Constitution and laws of the United States to federal control” that federal law must supply the rules of decision.³³⁶

This approach would clarify and systematize much of the judicial decisionmaking in this area. As noted above, courts are frequently reticent to deal with cases involving foreign parties or injuries.³³⁷ Their reticence is in part due to the problems they face in applying foreign law. That is why

³³³ See *supra* Part III.A.4.

³³⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

³³⁵ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25); see also, e.g., *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). There is no question that “complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.” *United States v. Belmont*, 301 U.S. 324, 331 (1937); see also, e.g., *Zschernig*, 389 U.S. at 436 (stating that “international relations” is a “matter[] which the Constitution entrusts solely to the Federal Government”); *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”).

³³⁶ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); see also, e.g., *Texas Indus.*, 451 U.S. at 641 (federal law governs “international disputes implicating . . . our relations with foreign nations”); *Sabbatino*, 376 U.S. at 425 (issues implicating “our relationships with other members of the international community must be treated exclusively as an aspect of federal law”).

³³⁷ See *supra* Part III.A.4.

many courts choose to dismiss cases on grounds of forum non conveniens. While we are still early in the renewed use of this doctrine, it is possible that the negative impact of dealing with cases through that doctrine will come to the forefront in years to come. While it may have been the case in the past that many cases dismissed under the doctrine were never refiled in a foreign court,³³⁸ today many cases are indeed brought in foreign fora after dismissal.³³⁹ These cases later end up before U.S. courts in enforcement of judgment proceedings. At that point in the process, the federal court is not supposed to undertake a searching review of the application of foreign law to the facts of the case, but rather is to make sure that the judgment was rendered in an appropriate fashion. Thus, federal courts may tie their hands in resolving disputes by dismissing cases under the doctrine of forum non conveniens for fear of applying foreign law, only to be required to apply foreign law on the back end through the enforcement of judgments process. It would be better for courts to deal with the foreign law issue up front rather than through such a cursory and belated review.

Another hope would be that some consistency would be provided in international cases. As mentioned above, there are various inconsistent rules being applied by the several states in this area.³⁴⁰ Consistency in this area would do much to encourage *Erie*'s twin aims of discouraging forum shopping and encouraging a more equal administration of the laws. Finally, this approach would advance the cause of separating domestic from international conflicts.³⁴¹ In separating these cases, more appropriate rules and approaches could be developed for transnational cases.

CONCLUSION

This Article has explored the questions raised by the application of the *Erie* doctrine in international conflict-of-laws cases. Besides showing that the *Erie* doctrine should not be read as automatically requiring the uncritical application of foreign law in international conflicts cases, it has put forward a suggested approach through which courts might more forthrightly engage in analyzing international conflicts cases. Part of the important problem identified in this Article is that the internationalization of the *Erie* doctrine may be one way to account for the increasing and problematic use of the forum non conveniens doctrine in modern caselaw. Further work remains to be done to fine tune this approach in actual cases, and this Article should thus be seen as a first step in that direction. Further work also remains to be done analyzing the continued application of foreign law in domestic cases and the relationship of those decisions to the doctrine of forum non

³³⁸ See, e.g., BORN & RUTLEDGE, *supra* note 129, at 415–17.

³³⁹ See, e.g., Robertson, *supra* note 236.

³⁴⁰ See *supra* Part IV.A.

³⁴¹ Laycock, *supra* note 15, at 259; see also Ehrenzweig, *supra* note 296, at 723.

conveniens. Notwithstanding these issues, the hope is that by bringing the question more explicitly to the forefront in scholarly study it will lead to better outcomes in international conflict-of-laws cases adjudicated by courts.