IS THERE LIFE FOR *ERIE* AFTER THE DEATH OF DIVERSITY?

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A two hundred year era appears to be coming to an end. The federal courts are apparently on the verge of losing their primordial authority to hear disputes between citizens of different states. As this Article goes to press, Congress is taking the final steps toward abolishing diversity jurisdiction as we know it.[1] If this legislation passes and the President signs it, diversity jurisdiction will effectively cease, leaving the federal courts chiefly to the latter-day business of resolving federal questions.[2]

The death of diversity brings fresh hope to countless students of the law because it promises to remove many of the most perplexing and troublesome problems of federal jurisdiction. No longer will

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We are deeply grateful and indebted to Professor John Hart Ely, who, having first lit the way, encouraged us to continue the search.

1. S. 679, now pending in the Senate, would abolish diversity jurisdiction altogether, except over (a) federal interpleader suits between citizens of different states and (b) suits between citizens of a state and aliens of foreign states. Although it is always risky to predict the course of pending legislation, the present Congress may well adopt S. 679 (or something much like it): S. 679 is identical to H.R. 9622, 95th Cong., 2d Sess. (1978), which the House passed during the 95th Congress by a two-thirds vote; H.R. 9622 lapsed in the Senate for lack of action before the date of adjournment. *See* 124 CONG. REC. H1558-61, H1569-70 (daily ed. Feb. 28, 1978). S. 679 is sponsored by Senator Kennedy (D. Mass.), Chairman of the Senate Judiciary Committee. The President of the United States and the Justice Department not only support the movement toward abolishing diversity jurisdiction but specifically endorse S. 679. Statement of Asst. Atty. Gen. Daniel J. Meador to the Senate Judiciary Committee (March 21, 1979) (on file with the *Michigan Law Review*).

2. If S. 679 becomes law, only a very small portion of existing diversity jurisdiction will survive. *See* note 1 *supra*. As a result, the federal courts will be relegated to the remaining eight categories of cases described in article III. Among cases within those remaining categories, more than two-thirds now fall within the first category — cases "arising under [the] Constitution, the Laws of the United States, and treaties made . . . under their Authority." *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, DIRECTOR'S ANNUAL REPORT 172-73 (1977) (note that criminal cases are cases "arising under"). Ironically, while Congress granted the federal courts diversity jurisdiction in the original Judiciary Act of 1789, it did not make a general grant of federal question jurisdiction until the Judiciary Act of 1875. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (now codified at 28 U.S.C. § 1331 (1976)). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844-50 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

law students have to master the rules that govern the definition of citizenship, "completeness" of diversity, "collusion" to create diversity, alignment of parties, and calculation of jurisdictional amount for diversity purposes. Nor will they have to accommodate themselves to the rest of the "enormous infrastructure that has grown up to support and to define the diversity jurisdiction."[3] These bodies of law, like the forms of action of common law, will become virtually obsolescent.[4]

The richest potential bonanza, however, lies elsewhere, for there is a lurking suggestion that the end of diversity means an end to the law and lore of *Erie Railroad v. Tompkins*.[5] The *Erie* doctrine — the principle for determining the relationship between state law and federal law in the federal courts — is the most studied principle in American law,[6] "the keystone of the procedure course taught at every American law school."[7] More than that, it has been the central concern of an entire generation of academic lawyers, "a star of the first magnitude in the legal universe."[8] Hence the question: What happens to *Erie* after the abolition of diversity?

The answer depends upon whom one listens to. One camp argues somewhat as follows:

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3. Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 49 (1968).

4. Not that these bodies of law will become extinct. Obviously, as long as *any* diversity jurisdiction exists, even if limited to interpleader, the federal courts will have to retain rules governing the definition of citizenship, the "completeness" of diversity, etc. Moreover, even if diversity jurisdiction over suits between citizens of different states were abolished altogether, the federal courts would still need such rules to regulate suits between citizens and aliens. Finally, even if jurisdiction over suits involving aliens were abolished, the federal courts would still need many such rules to regulate suits between a state and a citizen of another state, and suits between two states. However, the foregoing classes of litigation are so infrequent that law students will no longer be asked to devote time in law school to mastering their underlying rules. Instead, these rules will become subjects for post-graduate specialization. In short, S. 679 will cause these specialized bodies of learning to drop out of law school in the same way that the Three-Judge Court Act of 1976 (which drastically reduces the conditions for convening three-judge courts) has caused the learning on three-judge courts to drop out of law school. *See* Pub. L. No. 94-381, 90 Stat. 1119 (codified in scattered sections of 28 U.S.C.). For an excellent analysis of the extent to which the abolition of diversity jurisdiction will affect the content of existing bodies of learning, see Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

5. 304 U.S. 64 (1938). For the suggestion that the abolition of diversity jurisdiction will bring an end to *Erie* problems, see U.S. DEPT. OF JUSTICE, COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 13-15 (1977); Hertz, *Misreading the Erie Signs: The Downfall of Diversity*, 61 KY. L.J. 861, 878 (1973); Note, *Eliminating Diversity Jurisdiction: A Short-Term Solution to a Long-Term Problem*, 9 U. TOL. L. REV. 896, 905 (1978).

6. Younger, *What Happened in Erie*, 56 TEXAS L. REV. 1011, 1011-12 (1978).

7. *Id.* at 1011.

8. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

> *Erie* has no meaning for cases outside diversity jurisdiction. *Erie* reflects the principle that the federal courts have an obligation to apply state law whenever their sole reason for hearing a dispute is to provide a fair and impartial forum. Accordingly, the rule in *Erie* is confined to diversity cases, where the only federal interest is in providing a forum free of interstate bias, and perhaps to certain ancillary and pendent claims, which the federal courts have no independent interest in resolving and which are heard solely because of their connection with federal claims.[9]

The other camp sees *Erie* differently:

> *Erie* applies as much in federal question cases as in diversity cases. *Erie* reflects the principle that the federal courts shall apply state law to legal issues, unless a perceived federal interest is sufficient to justify the application of independent federal standards. The existence (or absence) of such federal interests may vary from one type of case to another; but the essential task of assessing those interests to determine whether they support an independent federal rule is always the same, whatever the source of the court's jurisdiction.[10]

Ironically, both camps are correct.[11] The *Erie* doctrine *does* apply in federal question cases as well as in diversity cases; yet its ef-

9. For representative statements of this view, see Burks v. Lasker, 441 U.S. 471, 476 (1979) (the applicability of state law in federal question cases is not " 'controlled' " by *Erie*); Levinson v. Deupree, 345 U.S. 648, 651 (1953) (*Erie* is "irrelevant" in nondiversity cases); Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946) (*Erie* is "relevant" only in cases in which the federal court is enforcing a "right" created by state law); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942) (*Erie* is "inapplicable" in federal question cases); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 466 (1942) (Jackson, J., concurring) (*Erie* has not been "extended" beyond cases in which "federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality"); Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (*Erie* applies only where state law supplies "the *source* of the right sued upon") (emphasis original) (citing H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 690-700 (1953)); HART & WECHSLER, *supra* note 2, at 766 (*Erie* is "inapplicable" except with respect to issues which are "governed" by state law "operating of its own force"); Gorrell & Weed, *Erie Railroad: Ten Years After*, 9 OHIO ST. L.J. 276, 307 (1948) ("The *Erie* doctrine applies only to those cases where jurisdiction is grounded upon diversity of citizenship . . . ."); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799, 803 (1957); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1088 (1964); Note, *Pendent Jurisdiction — Applicability of the Erie Doctrine*, 24 U. CHI. L. REV. 543, 550 (1957).

10. For representative statements of this view, see Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 280-81 (1946); Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 70-71, 85 (1955); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033-34 (1953); Rowe, *supra* note 4, at 969-70.

11. In a trivial sense, the difference between those who believe *Erie* applies only in diversity cases and those who believe it applies elsewhere is simply a matter of semantics. That is, in a trivial sense, it depends merely on whether one defines the *Erie* doctrine to be the rule governing the relationship between state law and federal law in *diversity* cases, or whether one defines it to be the rule governing the relationship between state law and federal law *generally*. The real (and nontrivial) question, however, is whether there are reasons to prefer one definition over the other. It is our purpose to show that the former definition, while not irrational, is misleading because it tends to treat as unique and discrete something that is essentially a part of a larger problem. Hence, the latter, more comprehensive definition is to be preferred.

fects also differ, depending on the source of the court's jurisdiction. Thus, *Erie* has a significantly different meaning in federal question cases than it has in diversity cases, and a significantly different meaning in diversity cases than in pendent-jurisdiction cases.

This controversy about the significance of *Erie* in federal question cases can be traced to a fundamental misconception about the meaning of *Erie* in diversity cases. This misconception finds expression in three frequent and erroneous assertions about what a federal court does in diversity. First, it is commonly assumed that the task under *Erie* is to resolve "conflicts"[12] between federal law and state law by identifying "choice-of-law"[13] principles for "choosing"[14] between the two laws. This way of talking suggests a certain view of the world: It implies that two distinct rules exist (one federal, one state), each valid in itself and each purporting to govern the issue in dispute. Under this view, a federal court's task is, somehow, to choose which of the two valid and facially pertinent rules to apply.

Yet that is obviously nonsense. If a valid and pertinent federal rule exists, then of course it applies, notwithstanding any state rule to the contrary. The supremacy clause says so.[15] The real task under *Erie*, therefore, is not to choose between federal law and state law, but rather to decide if there really is a valid federal rule on the issue.[16] The keystone is not choice, but validity. Is the suggested federal rule valid? If so, then it must govern in the face of a state rule to the contrary. This emphasis on validity is important, because in assessing the validity of a federal rule, one does not weigh federal policies against state policies; one looks exclusively to federal sources of law and weighs federal policies against one another.

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12. Note, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477, 477 (1966).

13. Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 360 (1977).

14. Note, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477, 481 (1966). For emphasis on the "choice" between federal and state law, see HART & WECHSLER, *supra* note 2, at 713; Chayes, *Some Further Last Words on Erie*, 87 HARV. L. REV. 741, 753 (1974); Mishkin, *supra* note 9, at 797.

15. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, § 2.

16. *See* Clark, *supra* note 10, at 280:

Merely to state the question of controlling force between local and federal law within the latter's definite field is, of course, to answer it. By the Constitution, by settled precedent, and by long-continued practice, the latter is supreme. But that is but the beginning stage of our problem. "Render unto Caesar the things which are Caesar's" does not tell us what things are Caesar's.

Second, with respect to these federal sources of authority for determining the validity of federal law, it is commonly said that the Rules of Decision Act[17] limits the authority of the federal courts to create federal law in diversity cases.[18] Again, that is simply untrue. The Rules of Decision Act contains no terms of limitation; nor is it confined solely to diversity cases. On the contrary, it is a statute of general applicability, pertinent in every civil action within a federal court's jurisdiction. Far from being a limitation on the authority of the federal courts, the Rules of Decision Act is an explicit grant of authority: It directs the federal courts to apply state law with regard to any issue that is not governed by a pertinent and valid federal rule. It reminds the federal courts that if a valid federal rule exists — whether constitutional, statutory, or judge-made — the federal rule shall govern. The Act itself contains no standards for determining the validity of suggested federal rules, but rather incorporates by reference whatever external standards exist for determining the validity of federal law. Once a federal district court applies those external standards and determines that no valid and pertinent federal law exists, the Rules of Decision Act instructs it to do what it might otherwise feel unauthorized to do — to apply state law.

Third, it is sometimes said that when a federal court applies state law in a diversity case, it does so not because it chooses to, but because it "must."[19] As some commentators put it, the state law is applied because "it governs of its own force."[20] This, again, is misleading if not mistaken. When a federal court in diversity seeks to identify the appropriate rule of decision, it looks first for a pertinent and valid federal rule. If such a rule exists, the federal court applies

17. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652 (1976).

18. To our knowledge, the Supreme Court has never said any such thing. On the contrary, the Court has always said that the Rules of Decision Act is no more than a declaration of what the law would have been without it. Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945); Erie R.R. v. Tompkins, 304 U.S. 64, 72 n.2 (1938); Hawkins v. Barney's Lessee, 30 U.S. 457, 464 (1831). Nonetheless, commentators characterize the Rules of Decision Act as a substantive limitation on the authority of the federal courts to fashion federal common law. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698, 706-09 (1974); Redish & Phillips, *supra* note 13, at 358, 360-61; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 682-83, 689 (1976); Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1442-44 (1960). *See* text at notes 163-88 *infra*.

19. HART & WECHSLER, *supra* note 2, at 767; Mishkin, *supra* note 9, at 806.

20. HART & WECHSLER, *supra* note 2, at 766. *See also id.* at 768; United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973); Mishkin, *supra* note 9, at 799; Hill, *The Lawmaking Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042 (1967) ("[s]ometimes state law is or should be applied *ex proprio vigore*"). For further discussion, see note 226 *infra* and text at notes 136-42 *infra*.

it, because the supremacy clause tells the court it must. If no valid federal rule exists, the court applies the appropriate state law. But it does so not because the state law governs of its own force, nor because the reference to the state law is constitutionally compelled. It does so because Congress, through the Rules of Decision Act, has chosen to use state law as a federal rule of decision.

To be sure, if the subject matter of the rule of decision falls outside the scope of the federal goverment's enumerated powers, Congress's choice is limited. Since Congress has no authority to create an independent federal rule, it must either authorize the district court to apply state law or instruct the district court to dismiss the case. Although the latter option — not to hear the case — is drastic, it is still entirely feasible. Indeed, Congress is now on the verge of exercising precisely that option by abolishing the diversity jurisdiction of the federal courts. Consequently, when a federal court in diversity now looks to state law for a rule of decision, it does so not because it must, but because the federal government has chosen to further its own purposes by incorporating state law as its own.

This Article is essentially an elaboration of these three themes. Section I sets forth the fundamental principles, or "axioms,"[21] that determine whether a particular federal rule is pertinent and valid. Once these axioms are understood, it should become apparent that *Erie* problems, if not easy, are not uniquely difficult either; instead, they are the kinds of "ordinary"[22] problems that are commonplace in other areas of law. Section II applies these axioms to cases in diversity to determine the validity of various kinds of federal rules of decision. Section III examines the validity of federal rules of decision in federal question cases, treating separately cases within the exclusive, concurrent, and ancillary jurisdiction of federal courts.

I. Axioms of Federalism

The essential question under *Erie* is: Which law should the federal courts apply in cases within their jurisdiction, state law or federal law? The simple answer is twofold: If the suggested federal law is both pertinent and valid, it applies because the supremacy clause of the Constitution so commands; if the federal law is impertinent or invalid, state law applies because Congress has so directed. These statements are true, regardless of the basis of the federal court's juris-

21. We use "axiom" here in the same sense that Chief Justice John Marshall used the term in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819), where he said of the principle of supremacy, it "may be almost termed an axiom."

22. Ely, *supra* note 18, at 698.

diction. Their obviousness is reflected in the following axioms of our federal regime of republican government.

1. The National Government: The national government is one of limited powers.

The Constitution, in contrast with the earlier Articles of Confederation, creates a national government authorized to act directly upon the people of the United States.[23] A distinctive feature of this national government is that it has only limited powers. The limitations are of two kinds. Some powers, like the power to enact ex post facto laws or to abridge freedom of speech, are explicitly denied to the national government.[24] Others, like the power to regulate intrastate commerce, are implicitly denied to the national government because they fall outside the list of its enumerated powers. The latter principle — that the national government possesses only those powers explicitly or implicitly enumerated[25] in the Constitution — finds

23. The Articles of Confederation established a government that consisted almost entirely of the "United States of America in Congress Assembled" [the so-called "Continental Congress"], a legislative body in which each member state had an equal vote. ARTICLES OF CONFEDERATION, preamble, arts. I, V. *See generally* M. JENSEN, THE ARTICLES OF CONFEDERATION (1940). The Confederation had no executive arm, except for small bureaucratic staffs attached to its standing committees. *See* Guggenheimer, *The Development of the Executive Departments, 1775-1789*, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE EXECUTIVE PERIOD, 1775-1789, at 116 (J. Jameson ed. 1889). The Confederation also had no judicial arm, except for, at first, standing and ad hoc committees of the Continental Congress to hear private prize appeals and territorial disputes between two or more states, and later a court of appeals to hear prize appeals. *See* Swindler, *Of Revolution, Law and Order*, in YEARBOOK 1976, at 16 (W. Swindler ed., Supreme Court Historical Socy. 1976). Consequently, to implement its legislative acts, the Confederation relied for enforcement on enabling legislation and executive and judicial enforcement by the member states. For this reason, it is commonly said that the Confederation acted on states rather than directly on individuals. *See* National League of Cities v. Usery, 426 U.S. 833, 844 (1976) (citing Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1881)). *See also* B. BAILYN, D. DAVIS, D. DONALD, J. THOMAS, R. WIEBE, & G. WOOD, THE GREAT REPUBLIC 302 (1977); C. SELLERS & H. MAY, A SYNOPSIS OF AMERICAN HISTORY 60, 68, 74 (1963). Nonetheless, in some areas the Confederation *did* act directly on individuals. As James Madison pointed out at the time, the Confederation acted "immediately on the persons and interests of individual citizens" both through the judicial orders of its committees and court of appeals in prize cases, and in the seizures, maneuvers, and court martial proceedings of its continental army and navy. THE FEDERALIST No. 40 (J. Madison) 262 (J. Cooke ed. 1961). *See also* Note, *The United States and the Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 164 (1978). In sum, regarding the extent to which the two national governments operated directly on individuals, the difference between the Articles of Confederation of 1781 and the Constitution of 1789 is more a difference in degree than a difference in kind. *See* THE FEDERALIST No. 15 (A. Hamilton) 95-96 (J. Cooke ed. 1961); *id.* No. 16 (A. Hamilton) at 101.

24. U.S. CONST. art I, § 9, cl. 3; amend. I. These limitations on the federal government are found in two places: some are set forth in the text of the Constitution, principally in article I, § 9; others are set forth in amendments to the Constitution, *e.g.*, U.S. CONST. amends. I-XI, XV, XIX, XXIV, & XXVI.

25. The enumerated powers of the national government include not only those explicitly stated in the Constitution, but also those implied therein. *See* The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889). *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION

expression in the tenth amendment: "The powers not delegated to the United States by the Constitution . . . are reserved to the states respectively, or to the people."[26]

2. Federalism-I: The states are governments of reserved powers.

The Constitution reserves to the states exclusive power over all matters that are not delegated to the national government and are not prohibited to them. The prohibitions are of two kinds. Some, like the prohibition on ex post facto laws, apply to both the states and the national government;[27] others, like the prohibition on laws denying equal protection, attach only to the states.[28] The principle of reserved powers is also reflected in the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states . . . ."[29]

3. Supremacy of National Law: Whenever the national govern-

15-28, 41-44 (1972). Indeed, the text of the Constitution justifies including *implied* powers among the enumerated powers of the national government. The Articles of Confederation contained a provision that reserved to the states all "power[s]" not "*expressly* delegated" to the national government. ARTICLES OF CONFEDERATION art. II (emphasis added). When James Madison submitted to the first Congress the draft of what later became the tenth amendment, he rejected the suggestion that the states retain all powers not "expressly delegated" to the national government and, instead, proposed the language now found in the tenth amendment: "The powers not delegated to the United States." J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1803, at 441-42 (Oliver Wendell Holmes Devise History of the United States Supreme Court, vol.1., P. Freund ed. 1971). This conscious omission can be taken as authority that the framers did not intend to limit the national government to "expressly" delegated powers. *See* Jensen, *The Articles of Confederation*, in FUNDAMENTAL TESTAMENTS OF THE AMERICAN REVOLUTION 73 (Library of Congress Symposium 1973). For examples of powers granted by implication to the national government, *see* Illinois v. City of Milwaukee, 406 U.S. 91, 107 (1972) (the article III grant of jurisdiction to the Supreme Court to hear interstate disputes implies a power in Congress to enact rules to govern the resolution of such disputes); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1234-35 (1954) (the article III grant of jurisdiction to the federal courts to hear admiralty cases implies a grant of power to Congress to enact an admiralty law).

26. U.S. CONST. amend. X.

27. U.S. CONST. art. 1, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law"); U.S. CONST. art. 1, § 9, cl. 3 ("No . . . ex post facto Law shall be passed [by Congress]"). The prohibitions attaching both to state governments and to the national government are found in two places: some are set forth in the text of the Constitution, *e.g.*, U.S. CONST. art. I, §§ 9, 10; some are set forth in amendments to the Constitution, *e.g.*, U.S. CONST. amend. XV (prohibiting both the state and the national governments from abridging the rights of citizens to vote).

28. U.S. CONST. amend. XIV. These prohibitions attaching only to the states are, again, found in two places: some are set forth in the text of the Constitution, *e.g.*, U.S. CONST. art. 1, § 10, art. IV; others are set forth in amendments to the Constitution, *e.g.*, U.S. CONST. amends. XIII-XV, XVIII, XIX, XXIV, & XXVI. The powers denied to the states fall into two distinct classes: those powers that the national government also may not exercise, because they fall outside the national government's enumerated powers, and those powers that are denied to the states because, and only because, they are exclusively delegated to the national government. For the significance of this distinction, see note 35 *infra*.

29. U.S. CONST. amend X.

ment enacts a law from within its enumerated powers, that law overrides conflicting state laws.

The Constitution creates a national government superior to its constituent member states. This principle of superiority, or supremacy, can be illustrated by contrast to federal bodies that lack it. Consider, for example, the Continental Congress of 1774-1777 and the interim Congress of 1777-1781, both of which exercised de facto power until the Articles of Confederation were ratified and became legally effective in 1781.[30] These were not central governments possessing independent de jure powers, but a confederation of sovereign states. They were institutions through which thirteen independent American states could act in league with one another and yet retain lawful authority to nullify the enactments of the central congress.[31]

The Constitution, in contrast, created a national government possessing hegemony over its constituent state governments. As long as the national government acts within its enumerated powers, it may supersede the conflicting enactments of any state. The supremacy clause of the Constitution embodies this principle of hegemony:

> The Constitution, and the laws of the United States which shall be made in the pursuance thereof; and all treaties made, or which shall be

30. We use "Continental Congress" to refer to the assembly of delegates from 13 colonies that convened in Philadelphia between September 5, 1774, and November 15, 1777, and acted as an extra-legal forum in which the colonies could debate and agree on common positions. We use "Congress" to refer to the same body for the period between November 15, 1777, when the Articles of Confederation were first approved by the assembled state delegates, and March 1, 1781, when the Articles of Confederation were finally ratified and became effective. The official name of Congress under the Articles of Confederation (March 1, 1781, to March 4, 1789) was the "United States of America, in Congress Assembled." For a discussion of the terminology of the "Continental" Congress, see E. BURNETT, THE CONTINENTAL CONGRESS at vii-viii (1941).

31. The member states retained legal authority to nullify the enactments of the interim Congress, because until the Articles of Confederation were completely ratified on March 1, 1781, the acts of the interim Congress carried no legal effect. After that, of course, the situation was different. The Articles empowered Congress to enact legislation in certain broadly defined areas by either a majority or a two-thirds vote (article IX); once such legislation was adopted, it was made binding upon the member states by the supremacy clause of the Confederation:

> Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual.

ARTICLES OF CONFEDERATION art. XIII.

The "supremacy" of the Articles was well understood at the time. The courts in Massachusetts, for example, interpreted the Treaty of 1783 (which had been negotiated and approved by Congress pursuant to its authority over war and peace under the Articles) to override conflicting state law. *See* Note, *supra* note 23, at 153. Likewise, in *Rutgers v. Waddington*, the New York City Mayor's Court held that insofar as the Treaty of Paris conflicted with an act of the New York state legislature, the former must prevail as the superior law. *See* J. GOEBEL, *supra* note 25, at 131-37; 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 289-419 (J. Goebel ed. 1964).

> made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.[32]

This means, of course, that in deciding whether national law (*i.e.*, "federal"[33] law) or state law governs a particular issue, the sole ques-

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32. The supremacy clause, U.S. CONST. art. VI, cl. 2, contains two distinct elements: (1) A requirement that in conflicts between national law and state law, state law be subordinated and (2) a requirement that national law be given effect directly in national and state courts, without the need for further implementing legislation. The first requirement is discussed in note 34 *infra*. The second requirement — that state and federal judges treat federal law as obligatory and self-executing — is both unusual and significant, because it distinguishes the status of federal law under the Constitution from the status of "federal" law under, say, the United Nations Charter. A U.N. Resolution that has been properly enacted by the appropriate institutions may be "supreme" in the sense that it is a legal norm which is superior in dignity and status to the legal norms of member nations; but it does not follow that U.N. Resolutions are also self-executing and automatically treated as domestic law in the national courts of the member nations. On the contrary, while member nations are always free to accord U.N. Resolutions the status of domestic law if they so choose, the U.N. Charter itself does not require that they do so. Instead, the "law" issuing from the United Nations is not made binding on the national courts of member nations until it has been further implemented or executed by the legislatures or other appropriate bodies of the member nations. Thus, if a member nation refuses to implement a U.N. Resolution (or, if, having once implemented it, the member nation rescinds the implementation), the U.N. Resolution may still possess the force of superior law, but it is no longer a law enforceable in the courts of the member nation. That is, the member nation may be acting illegally and be in breach of its Charter obligations, but the breach is not cognizable in its own courts; the remedy, if any, must be sought in some international tribunal against the breaching government itself. *See* Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973), *noted in* Note, *Congressional Power to Abrogate the Domestic Effect of a United Nations Treaty Commitment*, 13 COLUM. J. TRANSNATL. L. 155 (1974); Schreuer, *The Relevance of United Nations Decisions in Domestic Litigation*, 27 INTL. & COMP. L.Q. 1, 9-14 (1978). For the extent to which "law" of the European Economic Community is made self-executing in the courts of the member nations by the Treaty of Rome, see Sasse, *The Common Market: Between International Law and Municipal Law*, 75 YALE L.J. 695 (1966).

The legal status of federal law under the Constitution is entirely different. The third segment of the supremacy clause itself makes federal law self-executing and binding on each of the state courts, regardless of whether a state "accepts" the federal law by virtue of implementing legislation and regardless of whether the federal law takes the form of a constitutional provision, a treaty, an act of Congress, or an authoritative judicial decision. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Second Employers' Liability Cases, 223 U.S. 1 (1912); Claflin v. Houseman, 93 U.S. 130 (1876); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340-41 (1816). This aspect of supremacy is a logical consequence of the decision to create federal courts that have concurrent jurisdiction with courts of the member states and appellate jurisdiction to review state-court judgments, because it would be peculiar if the two systems of courts shared a common jurisdiction and yet enforced different laws. (Needless to say, the reverse is not true: The decision to make federal law binding in state courts does not, in turn, require the creation of independent federal courts with overlapping jurisdiction, for one could plausibly mandate supremacy in the form of article VI without reference to the existence or nonexistence of independent federal courts).

In sum, the difference between federal law under the Constitution and the law of the United Nations is that while Congress is not *required* to make federal law itself executing and binding in state courts, it *can* do so if it so wishes, while the United Nations cannot even if it does so wish.

The foregoing discussion relates to the second of the two elements of supremacy. For a discussion of the first element, the requirement that state law be subordinate to federal law whenever the two conflict, see note 34 *infra*.

33. One of the sources of confusion in this area is that we have no precise terminology to

tion is whether the pertinent national or federal law is valid. If it is valid, its application is constitutionally mandated.[34]

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identify the law of the central government. The term "national" and "federal" are used interchangeably to describe its enactments, but neither is entirely accurate. As Professor Martin Diamond has demonstrated, the framers of the Constitution understood "national" to describe a central government that draws its structure and authority not from constituent subdivisions (*e.g.*, states), but in an undifferentiated manner from the nation as a whole; that, however, is not an accurate description of the government established by the Constitution, because some of the governing bodies it establishes (*e.g.*, the Senate) draw their structures and hence their authority from constituent states. On the other hand, the term "federal" was understood to describe a central government that draws its structure and authority exclusively from the authority of constituent states; again, that is not an adequate description of government under the Constitution, because some of the governing bodies it establishes (*e.g.*, the House of Representatives) draw their structure and authority directly from the people. For those reasons, the framers of the Constitution would have said that the central government they were establishing was neither national nor federal, but rather a mixture of the two. *See* Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273 (1977).

34. It is mandated, of course, by the first of the two elements contained in the supremacy clause, U.S. CONST. art. VI, the requirement that state law be subordinated to federal law whenever the two conflict. For a discussion of the second element of supremacy, see note 32 *supra*.

This first element of supremacy reflects the obvious principle that the Constitution creates a central government, and, as such, the law of the central government is superior to the law of its constituent parts. Yet in practice, this principle of supremacy can be divided into two parts: (a) a *formal* notion that, as between federal law and state law, federal law is the superior legal norm; and (b) a *practical* recognition that the central government has institutions at its disposal for enforcing national law and for making its superiority over state law effective. The first half of the principle is not only common, but also necessary. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (the "proposition" that the lawful enactments of the federal government are superior to the laws of the states, "would seem to result *necessarily* from its nature [as a federal government]") (emphasis added). Indeed, every federal or international arrangement between otherwise sovereign states, except those rare arrangements that can be described as truly voluntary or cancellable at will, creates a *formally* supreme federal law. It was true of the Articles of Confederation; it is true of the United Nations Charter, the Treaty of Rome, and every bilateral treaty not cancellable at will. Under each of these international compacts, the constituent states agree to participate in a supernational arrangement that, so long as it operates according to its terms, has the force of law. Explicitly or implicitly, each of them presupposes the same principle of formal supremacy found in the first part of the supremacy clause.

The second half of the principle — the recognition that the central government has the practical means for enforcing supremacy and for making the higher norm effective — is both more variable and more significant. After all, the significant difference between the Constitution and the Articles of Confederation is not that the former contains a supremacy clause and the latter did not, for *both* contain supremacy clauses. The real difference is that the Constitution provides mechanisms for enforcing supremacy upon the states, while the Articles did not: The Constitution provides for the enforcement of federal law through powerful executive and judicial arms of the national government, while the Articles relied almost entirely on the states to enforce federal law.

This does not mean that the existence or absence of enforcement mechanisms is fortuitous, or that formal supremacy is politically unrelated to its practical enforcement; on the contrary, the constituent states were presumably so willing, politically, to agree on formal supremacy precisely *because* the Articles did not provide the means for effective enforcement. This does not mean, either, that federal law under the Constitution has always been absolutely supreme. While federal law under the Constitution has always been more effective and, thus, more "supreme" than federal law under the Articles, federal law under the Constitution has faced crises of its own, including the Kentucky and Virginia Resolutions of 1798, the nullification by South Carolina of 1833, and the secession of the southern states in 1860-1861. *See* E. POWELL, NULLIFICATION AND SECESSION IN THE UNITED STATES (1897). Not until 1865, when the federal government had shown its ability to make federal law supreme nationwide, by force of

4. Federalism-II: In addition to their exclusive powers, the states may exercise concurrent defeasible power over all matters that are not exclusively delegated to the national goverment.

Thus far we have seen that the states possess plenary power over all matters that are not within the enumerated powers of the national government and not otherwise denied them. This raises the question of whether the states may also exercise power concurrently with the national government in the areas delegated to the national government. The answer is that the states may do so unless the power is one of the few powers that are granted *exclusively* to the federal government (such as the power to coin money[35]) and that the federal

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arms if necessary, could one truly say that federal law was not only supreme in theory, but also supreme in practice.

35. U.S. CONST. art. 1, § 10. These reservations of exclusive authority may be either explicit (as with the power to coin money) or implicit. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851) (the commerce clause, while not explicitly reserving to the federal government the exclusive power to regulate interstate commerce, must be understood to do so *implicitly*, at least with respect to some kinds of state regulations).

Admittedly, these powers, which are denied to the states by being exclusively reserved to the national government, are simply a portion of the combined prohibitions on state government previously mentioned. *See* notes 27-28 *supra*. Nevertheless, it is useful to distinguish these present prohibitions from the other prohibitions on state government, because they differ from the others in one important respect: The powers denied to the states because they are denied to *all* governments, and the powers denied *only* to the states but which also exceed the enumerated powers of the federal government, are powers the states may *never* lawfully exercise; in contrast, the powers denied to the states because they are exclusively reserved to the national government are powers that the states *may* exercise if the national government explicitly authorizes them to. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (the states may regulate areas of interstate commerce otherwise within the exclusive authority of the federal government if Congress explicitly authorized them to so regulate). Thus, to say that certain powers are "exclusively" reserved to the national government does not mean the states may *never* exercise them; it means the states may *not* exercise them *until* the national government has properly authorized them to do so. In that respect, the import-export clause simply makes explicit what is implicit in each of the national government's other "exclusive" powers. U.S. CONST. art. I, § 10, cl. 2 (the states shall not impose import or export duties except with the consent of Congress). *See also* U.S. CONST. art. I, § 10, cl. 3 (no agreements between states and foreign powers without congressional consent); art. IV, § 3, cl. 1 (new states may only be formed with congressional consent). In sum, the difference between "concurrent" and "exclusive" powers of the national government is not the difference between powers states may exercise and powers they may not; rather, the difference is between powers states may exercise without waiting for explicit permission from the national government, and powers they may not exercise until such permission is received.

Professor Monaghan has a different view of these exclusive powers: He believes that the states can never lawfully be authorized to exercise them, and that when the Supreme Court permits Congress to authorize the states to exercise powers that the Court has previously ruled to be exclusive it is not because Congress is constitutionally allowed to delegate its exclusive powers to the states, but because Congress may "overrule" the constitutional decisions of the Supreme Court in this area. *See* Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 15 (1975). Professor Monaghan's view in this area is integral to his belief that the Court's constitutional decisions can all be divided into two areas: (1) areas in which the Court "interpret[s]" the "core" policies of the Constitution; and (2) areas in which the Court creates "constitutional common law" by making "debatable" policy choices from the text of the Constitution. *Id.* at 30, 33-34. In area (1), the Court is final; but in area (2), he says, the Court's constitutional decisions can be "overrule[d]" by Congress. *Id.* at 15. Moreover, the "most salient illustrations" of the latter area, he says, are the cases in

government has not explicitly authorized the states to exercise.

This reservation of concurrent power to the states is implied: That some of the enumerated powers of the national government, such as the power to coin money, are explicitly made exclusive implies that the others are not exclusive. Similarly, the existence of the supremacy clause implies that the states are expected to legislate concurrently in the same areas as Congress, because if the states were constitutionally confined to the areas in which their powers are already exclusive, the supremacy clause would be superfluous. Hence, the states have implicit authority to legislate concurrently in areas not exclusively delegated to the national government.

A distinctive feature of this concurrent power, however, is that it is defeasible: Because this power concerns an area that is also within the national government's enumerated authority, and because the national government's enactments are superior to conflicting state regulations, the national government can displace concurrent state legislation any time it so desires. Thus, state law exists within this sphere only at the sufferance of the national government. Stated differently, state law exists in this area only because the national government has explicitly or implicitly chosen to allow it to operate. Whether state law or national law governs in this sphere depends on

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which Congress has been allowed to "overrule" previous Supreme Court decisions by declaring that the states may exercise *concurrently* powers that the Court had previously ruled to be *exclusive, e.g.*, powers over admiralty, interstate commerce, interstate boundaries, and foreign commerce. *Id.* at 15, 17. Thus, Congress may allow the states to exercise a power over interstate commerce the Court had previously ruled to be an exclusive power of Congress because the Court's constitutional ruling should be viewed as an instance not of constitutional "interpretation," but of constitutional "common law." *Id.* at 15, 30.

We are troubled by Professor Monaghan's theory of "constitutional common law" on two grounds: not only is it inconsistent with the conception of judicial review in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), but it is also wholly unnecessary, at least with respect to the constitutional propriety of allowing the states to exercise national power concurrently with the national government. After all, the issue here is not whether a particular power is denied to *all* governments, but whether the power is to be exercised exclusively by the national government alone or by the national government together with the states. Since Congress can always exercise the power alone if it so wishes, and since it can always exercise the power in such a way as to duplicate what would occur if it explicitly permitted the states to exercise the power concurrently, it would be futile and, therefore, absurd to interpret these "exclusive" powers so as to prohibit Congress from explicitly permitting the states to exercise them. Rather, it makes more sense simply to recognize that to label a power "exclusive" *means* the states may not exercise the power until Congress explicitly authorizes them to do so. If that is what these constitutional provisions *mean*, then Congress's conduct is entirely consistent with the Court's construction of them. In other words, if Professor Monaghan finds it necessary to talk about Congress's "overruling" a Court decision, it is only because he makes a prior (and less than self-evident) assumption that the Court's decision should be understood as prohibiting the states from ever acting. If the Court's decision is understood as prohibiting the states from acting until Congress empowers them to do so, it then becomes not only possible for Congress to act consistently with the Court, but inevitable.

For further discussion of Professor Monaghan's notion of "constitutional common law," and the dangers it presents, see note 63 *infra*.

whether the national government intends to create a national rule independent of state law or to adopt state law as its own. If it intends to enact an independent national rule — and if the enactment is otherwise valid — the national rule will always govern. This is a reminder, once again, that the supposed "choice" between national law and state law turns out to be solely an inquiry into the pertinence and validity of the federal rule.[36]

5. The Validity of Federal Law — The Constitutional Standard: National law is not valid unless it is consistent with the norms set forth in the Constitution; the Supreme Court is the final judge of whether a governmental act is consistent with the Constitution.

The principle that the Constitution is the ultimate standard for measuring the legal validity of acts of the national government is inherent in the American notion of a written Constitution.[37] What distinguishes the Constitution from, say, the Declaration of Independence is that the Constitution is a frame of government, an organic charter that defines the institutions and substantive limits of the national government and, in doing so, possesses the force and the authority of positive law.[38] The principle that the Supreme Court is the

36. In other words, the question is precisely the same question one asks under traditional "preemption" analysis: Does there exist a valid and pertinent independent federal law, or does federal law intend to incorporate state law as the prevailing rule of decision? *See* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

37. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 138, 176-77 (1803). This is not to say that there is any sort of logical equivalence between a written constitution and "fundamental law." On the contrary, one can easily imagine a written constitution having only the force of "ordinary" law, as opposed to "fundamental law"; indeed, such was the case among some of the American states during the period immediately following the Revolution. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 273-82 (1969). So, too, one can easily imagine an unwritten constitution that nonetheless has the force of fundamental law. *See* Grey, *Constitutionalism: An Analytic Framework*, in CONSTITUTIONALISM 189, 191, 205 (Nomos No. 20, 1979). By the time the Constitution of 1789 was ratified, however, the American notion of a written constitution had come to be equated with "fundamental law." *See* G. WOOD, *supra*, at 273-82, 306-44; B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-98 (1967).

Saying there is an equivalence between the notion of "fundamental law" and the American notion of a written constitution implies nothing about *who* has final authority to interpret the Constitution. It is simply a statement that once the norms set forth in the Constitution are authoritatively interpreted by the body (or bodies) possessing final authority to construe the Constitution, those constitutional norms possess hierarchical superiority over other legal norms established by the national government. *See* Grey, *supra*, at 194-95.

38. The Declaration of Independence, in contrast to the Constitution, is what Professor Grey would call a constitution possessing "extralegal" status. *See* Grey, *supra* note 37, at 191. By "extralegal" he means a norm that is not only unenforceable in the courts, but not even "legally binding"; that is, they are norms that one may violate without being criticized for action "contrary to law." *Id.* at 192. The same is also true of the preamble to the Constitution. *See* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the

final interpreter of the constitutional validity of acts of the national government is neither obvious nor necessary.[39] Nonetheless, it has become an accepted part of the constitutional structure of the national government by virtue of Chief Justice Marshall's opinion in *Marbury v. Madison*[40] and the nation's implicit and long-standing ratification of his opinion.[41]

6. The Validity of Federal Law — The Legislative Standard: National law is not valid unless it is also consistent with legal norms established by the body possessing final authority to create such norms — i.e., to make law — for the national government; Congress is the legislative branch of the national government and the final judge of whether conduct is consistent with legislative norms.

The Constitution provides for legal norms of two different kinds. The most fundamental norms, such as the right to the "free exercise" of one's religion,[42] are not left to the polity, but rather are set forth in the body of the Constitution itself. The greater share of legal norms,

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United States or any of its Departments"). *But see* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 370-79, 391-401 (1953).

39. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in JUDICIAL REVIEW AND THE SUPREME COURT 43-63 (L. Levy ed. 1967). Raoul Berger, in contrast, has argued it *is* obvious that the framers intended to vest in the Supreme Court the power of final judicial review over acts of Congress, and that they did so by virtue of the language in article III, § 2, clause 1, which gives the Supreme Court jurisdiction over cases "arising under this Constitution." R. BERGER, CONGRESS V. THE SUPREME COURT 49-162, 210-36 (1969). Significantly, however, the evidence Berger marshals, while impressive, does not support the scope of his assertions. At most it shows that the framers intended the Supreme Court to have authority to express its opinion on the constitutionality of acts of Congress — that is, to have the power to "review" the validity of the acts of Congress. But it does not follow that the framers also intended the Supreme Court's judgment in such matters to be *final*. *See* Mason, Book Review, 15 AM. J. LEGAL HIST. 232, 234 (1971) ("Some of the confusion stems from failure to differentiate judicial *review* and judicial *supremacy*.") (emphasis original). In other words, the evidence Berger marshals is also consistent with the possibility that while the framers intended the Supreme Court to review acts of Congress, they also intended that the Court's review not be supreme, and that if Congress responded by reenacting precisely the same statute the Court had invalidated, the Court should then accept the reenactment. *Cf.* R. BERGER, *supra*, at 79-81 (Letter from James Madison to Mr. Brown suggesting a system of judicial review empowering the courts to suspend the effectiveness of a legislative act they deemed unconstitutional, on the understanding, however, that if a newly elected legislature reenacted the same statute, the courts would then accept it); 2 J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 176-78 (1919) (Letter from Chief Justice John Marshall to Justice Samuel Chase suggesting that instead of impeaching Justices for giving "a legal opinion contrary to the opinion of the legislature," Congress would be "better" advised to exercise "appellate jurisdiction" to "revers[e] . . . those legal opinions [which it deems] unsound").

40. 5 U.S. (1 Cranch) 137 (1803).

41. For the argument that judicial review of acts of Congress is now part of our Constitution, not so much because the framers unambiguously put it there, but because the people have acquiesced in it for almost two hundred years, see A. BICKEL, THE LEAST DANGEROUS BRANCH 14 (1962); Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 590 (1958).

42. U.S. CONST. amend I.

however, are not explicitly prescribed. Instead, the Constitution provides for them indirectly, by creating a secondary institution of government competent to establish them. The Constitution vests this secondary, or delegated, competence to establish legal norms for the national government — to make law — in the national legislature. Congress possesses the final authority to "legislate."[43]

Admittedly, to say that Congress's authority to legislate is *final* does not mean it is *exclusive*. The federal courts possess a competence to "make" law by virtue of their constitutional authority to say what the law is. Article III vests them with the "Judicial Power," the power to interpret the law in the course of resolving individual "cases and controversies." This power to interpret the actions and silences of Congress — to "say what the law is"[44] — is an obvious source of lawmaking power. Similarly, the executive branch makes law by virtue of both its constitutional authority to veto acts of Congress and its authority to execute the laws. Nonetheless, while the three branches share lawmaking authority, the Congress has the final say on nonconstitutional matters, because it can displace or override the actions of the other branches.

This axiom can be illustrated by an example from the federal law of antitrust. Following the adoption of the Sherman Act in 1890, the federal courts and the executive branch both "made" law under the Act. The executive branch made law by applying the Act to concerted activity of labor organizations regarding the terms and conditions of employment,[45] and the federal courts made law by corroborating the executive branch on the meaning of the Act.[46] Congress, in turn, responded by enacting the Clayton Act, explicitly exempting labor and labor organizations from much of the Sherman Act.[47] Thus, while the federal judiciary and the national executive inevitably make law in performing their respective functions, the nonconstitutional law they make is subordinate to Congress's final

43. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives").

44. As Chief Justice John Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), "It is emphatically the province and duty of the judicial department to say what the law is."

45. *See, e.g.*, *In re* Debs, 158 U.S. 564 (1895).

46. *See, e.g.*, Loewe v. Lawlor (Danbury Hatters), 208 U.S. 274 (1908). For the proposition that the executive and judicial branches misinterpreted the Sherman Act and that the Act was never in fact intended to apply to labor combinations, see E. BERMAN, LABOR AND THE SHERMAN ACT 3-54 (1930); Boudin, *The Sherman Act and Labor Disputes* (pts. 1-2), 39 COLUM. L. REV. 1283 (1939), 40 COLUM. L. REV. 14 (1940).

47. 38 Stat. 730 (1914) (codified at 15 U.S.C. § 17, 29 U.S.C. § 52 (1976)). *See also* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 303 (1978); 1 *id.* ¶ 229 n.1.

legislative authority.[48]

To be sure, the executive branch may have final rulemaking[49] authority in certain narrowly defined areas. In addition to his power to execute the laws, the President also has independent article II authority to grant pardons, to act as Commander-in-Chief, and to nominate judges and officers of the United States. In exercising these powers, the President not only has implied authority to adopt implementing rules, but his rulemaking authority in these areas may be supreme over the legislature's.[50] Except for these special powers,

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48. The "law" of the federal courts and of the national executive is subordinate to Congress's authority in two senses. It is subordinate in the sense that without altering any previous judicial or executive decrees, Congress can enact legislation, effective prospectively, definitively replacing such "law" with its own considerations of policy. Judicial and executive "law" is also subordinate to Congress's authority in the sense that Congress can often change such "law" even retroactively; that is, Congress can almost always set aside the effect of any executive order or judicial decree by enacting a contrary rule and declaring it retroactive. *See* Bank Merger Act of 1966, 80 Stat. 7 (codified at 12 U.S.C. § 1828 (1976)) (rejecting the Supreme Court's interpretation in United States v. First Natl. Bank, 376 U.S. 665 (1964), of the 1950 amendments to the Clayton Act, by adopting a "new" standard and making it retroactive to all bank mergers effectuated before the effective date of the 1966 Act, including mergers that had been declared invalid by the lower courts). Of course, the Constitution contains some limits on the extent to which Congress can set aside the effect of prior executive or judicial action. Thus, Congress cannot so alter standards of criminal liability as to legislate ex post facto. *See* Dobbert v. Florida, 432 U.S. 282, 292-301 (1977) (retroactive changes in procedure under a death penalty statute are not ex post facto). Nor may Congress enact criminal legislation causing a defendant who has been acquitted to be retried. *See* Burks v. United States, 437 U.S. 1, 16 (1978) (the double jeopardy clause accords "absolute finality to a jury's verdict of acquittal") (emphasis deleted). Nor, in either a criminal or civil case, may Congress enact legislation so specifically directed toward the conduct of particular individuals as to constitute a bill of attainder. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468-84 (1977). Finally, Congress may not enact legislation imposing civil liability on an actor for his past conduct if the liability is so unanticipated as to constitute a denial of due process. *See* Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 14-20 (1976); Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Note, *Retroactive Operation of Death Taxes on Transfers in Trust*, 40 YALE L.J. 1331 (1931). In most cases, these constitutional limitations will not preclude Congress from enacting legislation setting aside the affect of a prior judicial decree. This is particularly so if Congress's action is designed to correct what it believes to be a misinterpretation of prevailing legislative policy by the courts or the national executive; in that event, the "new" congressional enactment will not be so unanticipated as to constitute either a denial of due process or an ex post facto law.

49. By "rulemaking" we mean the prerogative to choose among several alternative policies, where none in particular is constitutionally mandated. An example is the President's power to grant reprieves and pardons. Once the Constitution determines that the President has a certain power to pardon, applicable standards must be formulated for exercising that power. Since, by hypothesis, the Constitution itself has nothing further to mandate concerning the content of these standards, their actual content will depend upon which branch of government has authority to declare them. The branch that possesses the authority to choose a standard from among constitutional alternative standards — whether it is Congress, the President, or the judiciary — can be said to possess "rulemaking" power. In most areas, of course, this rulemaking power is vested in Congress, but the power to pardon is apparently vested in the President. *See* note 50 *infra*.

50. These nonexecutive article II areas in which the President may be supreme include: (1) the power of appointment, *see* Buckley v. Valeo, 424 U.S. 1, 124-37 (1976) (Congress may not itself so completely prescribe the terms on which "officers" of the United States are appointed as to deny the President and other institutions of government any discretion at all in their

however, the President's constitutional authority is confined to the power to execute the laws as they are otherwise defined for him. Accordingly, while the President must ascertain the content of such laws to execute them, his judgments about their content are ultimately subordinate to the institutions possessing final lawmaking authority. It follows, therefore, that in executing acts of Congress, he has only as much discretion as Congress decides to accord him.[51]

The same is also true of the federal courts, with one significant difference: their extraordinary power of judicial review. As part of their power to "say what the law is,"[52] the federal courts possess (by their own determination) the *final* power to say what the Constitution means.[53] As a result, the federal courts possess final rulemaking

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selection); (2) the President's implied power over foreign affairs, *see* United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936) (President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations"); *compare* Goldwater v. Carter, Civ. No. 78-2412 (D.C. Cir., Nov. 30, 1979) (en banc), slip op. at 22-24, 27 (per curiam), *with* dissenting slip op. at 1-59 (MacKinnon, J., dissenting & concurring), *vacated*, 100 S. Ct. 533 (1979); (3) the power to grant reprieves and pardons, *see* Knote v. United States, 95 U.S. 149 (1877) (Congress, by legislation, may not adopt standards of amnesty that frustrate the standards established by the President for use in connection with the power to pardon); (4) the power of Commander-in-Chief, *compare* Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 75-82 (1972), *with* Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 201-16 (1975).

To be sure, this enclave of final rulemaking power is not necessarily confined to the President's so-called "nonexecutive" powers. To exercise even his "executive" function, the President may need a certain modicum of autonomy from Congress regarding the internal decision process of his office. *See* United States v. Nixon, 418 U.S. 683, 703-07 (1975) (President may have a constitutional prerogative to establish rules of confidentiality for communications from his advisors and subordinate officers); Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 16 (1974).

51. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)). *See also* Black, *supra* note 50, at 14 ("The power . . . to take care that the laws be faithfully executed is entirely dependent on the laws").

This issue arose most graphically in connection with the controversy between President Nixon and Congress over the President's impoundment of funds that Congress had appropriated for federal projects. The President argued that, as part of his article II power to execute the laws, he had constitutional autonomy to refuse to spend monies if he concluded that such impoundment of congressionally appropriated funds was in the national interest; moreover, he argued that he had such power even in the face of a congressional directive to spend the appropriated monies. Congress, on the other hand, argued that it possessed the final power to fashion national policy and, therefore, to decide whether federal spending is in the national interest. The Supreme Court did not pass on the constitutional issue, but the lower courts uniformly ruled for Congress, holding that if Congress makes explicit a policy that appropriated monies be spent, the policy is binding on the President and he is obliged to execute it. *See* Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 758-59 n.2 (1979); Abascal & Kramer, *Presidential Impoundment* (pts. 1-2), 62 GEO. L.J. 1549, 63 GEO. L.J. 149 (1974).

52. *See* note 44 *supra*.

53. It does not follow that because the federal courts are conceded to have the power "to say what the law is" in *nonconstitutional* contexts, they must also possess such power in *constitutional* areas, because there is a significant difference between the two. If the popularly elected branches of government disagree with the courts regarding nonconstitutional law, they can correct the courts by enacting legislation; if the popularly elected branches disagree with

power[54] over constitutional law — or, more accurately, over what the federal courts declare to be constitutional law. They are the final judges of the scope and validity of their own power, limited only by political, institutional, and self-imposed restraints.[55]

Within areas of nonconstitutional law, however, the federal courts, like the President, are subordinate to Congress and the other institutions possessing final lawmaking power. While the federal courts themselves may possess some final rulemaking authority in narrow areas regarding their own internal affairs,[56] they are ordinarily limited to hearing "cases and controversies" under the law as it is

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the courts regarding constitutional law, in contrast, they cannot override the courts except by initiating the complex process of constitutional amendment. This difference in the authority of the popularly elected branches to respond to judicial "error" would support a narrower authority in the courts to say what constitutional law is than the authority to say what nonconstitutional law is.

It does not follow either that because the federal courts must have *some* authority to say what the Constitution means in deciding cases arising under the Constitution, they must also possess *final* authority to say what it means. *See* note 39 *supra*.

54. For the meaning of "rulemaking" power, see note 49 *supra*. They possess a rulemaking power because constitutional disputes are presented to a court in a form of a disputed choice of policy that the court is institutionally free to make one way or the other. This rulemaking power is final, because it cannot be overridden except by the courts themselves or by the arduous process of constitutional amendment.

55. It is often said that Congress cannot be the final judge of the constitutionality of its own enactments because it would then be acting as a judge in its own case. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). The fallacy in this view is that it implicitly assumes that the problem of allowing a branch of government to be a final judge of the validity of its own enactments can be avoided by placing the power of constitutional review in the courts. Wherever the power of constitutional review is placed, the branch that exercises it necessarily becomes the judge of its own powers. If there is a justification for placing such power in the federal courts, it is not that the courts can escape the paradox of being judges in their own case, but that, as among the three branches, the judiciary is the "least dangerous." THE FEDERALIST No. 78 (A. Hamilton) 522-23 (J. Cooke ed. 1961). The courts are the least dangerous branch because, among other things, they lack the powers of the purse, they lack the power of the sword, they cannot act until presented with an appropriate case or controversy, they do not control the selection and number of their members, and their members can be removed from office by impeachment.

56. The judicial branch, unlike the executive and legislative branches, possesses no special powers or powers shared with other branches. The President, in addition to his power to "execute" the laws, has the "legislative" power to veto acts of Congress and the "judicial" power to nominate judges. Congress, in addition to its power to "legislate," has the "executive" power to confirm executive officers and the "judicial" power to confirm judicial appointments. The judiciary, in contrast, is confined to its core function of deciding "cases and controversies." *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.1 (1792) (the Congress may not, constitutionally, assign nonjudicial duties to the judiciary). Nonetheless, to exercise its power to declare the law, the federal courts may be constitutionally entitled to an enclave of autonomy. That is, just as the President may have final rulemaking authority to establish standards for internal decisions, *see* note 50 *supra*, so, too, may the federal courts be constitutionally entitled to similar autonomy. *See* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting). For the scope of such autonomy, *compare* Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem In Constitutional Revision*, 107 U. PA. L. REV. 1, 29-33 (1958), *with* Note, *The Speedy Trial Act and Separation of Powers*, 91 HARV. L. REV. 1925, 1928-30 (1978).

This element of the federal courts' internal autonomy is clouded by the federal courts' final

otherwise defined for them. Of course, to exercise the judicial power in nonconstitutional cases and controversies, the courts are empowered to interpret such laws; but their statements regarding a law's content are ultimately subordinate to the institutions possessing final lawmaking power. Accordingly, in "making" or "declaring" nonconstitutional law, the federal courts have only as much discretion as Congress is willing to accord them.

7. Judge-Made Law: The federal courts "make law" by interpreting the laws as otherwise given; the sources of the laws they interpret are twofold — constitutional and nonconstitutional; the difference between the two is that the courts' constitutional interpretations are final, while their nonconstitutional interpretations may be overruled by the institutions possessing final legislative authority.

Aside from their power of judicial review, the federal courts possess no final rulemaking authority, except, perhaps, in narrow areas regarding their own internal affairs.[57] Instead, their power to "make law" is confined to their authority to interpret the laws as otherwise given. This process can be viewed alternatively as "making" law or "finding" law.[58] The essential point, however, is that this authority to define the rules by which cases are decided is interstitial: A federal court can only fill the gaps in the law as otherwise given.[59]

The source of the law being interpreted determines the scope of this power of interpretation. In interpreting the Constitution, the courts are final; their interpretation cannot be set aside by the other branches of government and thus cannot be reversed except by the

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authority to interpret the Constitution. Since the latter sphere of "autonomy" is so comprehensive, it tends to overwhelm the former and bury it from view.

But the two forms of autonomy are conceptually distinct. This becomes evident if one imagines the federal courts without the power of judicial review. Assume, for a moment, that the power of judicial review were removed from the federal courts and placed in, say, a Council of Revision. Even if the federal courts then lacked the autonomy to declare constitutional standards, it is still possible — even plausible — that the Council of Revision would decide that the federal courts were constitutionally entitled to some autonomy over their internal processes of decision.

57. *See* note 56 *supra*.

58. The difference, it seems, depends on whether the deciding judge is making a "fresh choice between open alternatives," H.L.A. HART, THE CONCEPT OF LAW 125 (1961), or whether his choice is itself determined by law, *see* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). *See generally* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest For the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

59. "I recognize without hesitation that judges do and must legislate, but they can do so only *interstitially*; they are confined from molar to molecular motions." Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (emphasis added). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921); Hart, *The Relations Between State Law and the Federal Law*, 54 COLUM. L. REV. 489, 533-34 (1954).

courts themselves or by the process of constitutional amendment. Their interpretations of nonconstitutional law, however, are not final, because their interpretations can be repudiated by the legislative authority. In these nonconstitutional areas, the federal courts speak on behalf of — and in subordination to — the legislative authority.

8. Federal Common Law: The federal courts make nonconstitutional law both by interpreting statutes and by declaring common law; statutory interpretation and common law adjudication differ from one another only in degree; in each case the courts speak for — and are subordinate to — the final authority of the legislature.

It is said that the common law of England was once a rival of Parliament for legal supremacy in England — that the common law as declared by the courts of England was superior to the enactments of Parliament, and that acts of Parliament in conflict with the common law were void.[60] Whether or not that was ever true in England, that is not what "common law" means in America today. When a court in this country acts in a common law capacity, it performs precisely the same function as when it interprets a statute: It legislates "interstitially"[61] by "filling in the gaps left by the legislature,"[62] fully recognizing that the legislature "can by the ordinary legislative proc-

60. The standard reference for this view is Chief Justice Coke's opinion in Doctor Bonham's Case, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1610) (footnote omitted):

> [I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

For differing views on whether Coke meant to be announcing a doctrine of judicial supremacy over Parliament, see Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521 (1969); Gray, *Bonham's Case Reviewed*, 116 PROC. AM. PHIL. SOCY. 35 (1972); Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543 (1938).

Although Coke's dictum in *Dr. Bonham's Case* is not accepted as a rule of English law today, *see* Friedmann, *The Interpretation of Statutes in Modern British Law*, 3 VAND. L. REV. 544, 550 (1950), it may survive in the form of the canon that acts of Parliament in derogation of the common law are to be construed narrowly. *See* Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 440-41 (1950). *See also* Pollock, *Some Defects of Our Commercial Law*, in ESSAYS IN JURISPRUDENCE AND ETHICS 85 (1882) (the attitude of common law courts in England "cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds"). *See, e.g.*, Regina v. Inland Revenue Commrs., *Ex parte* Rossminster, Ltd., [1980] 2 W.L.R. 1, 18-19 (C.A. 1979) (Lord Denning, M.R.) (considering that the act of Parliament at issue here was "passed by a narrow majority" over opposition "by many" who asserted that the act was "a dangerous encroachment on individual freedom," the "duty of the courts [is] to construe the statute as to see that it encroaches as little as possible upon the liberties of the people of England"), *appeals allowed*, 2 W.L.R. at 36-64 (H.L. 1979).

61. *See* note 59 *supra*.

62. Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 50 (1978).

ess correct results it does not approve."[63]

The difference between "common law" and "statutory interpretation" is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree. As the most eminent students of federal jurisdiction put it:

> [T]he very term federal *common law* is not analytically precise. The demarcation between "statutory interpretation" . . . and judge-made law . . . is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates. We will use the term, federal

63. *Id.* It is this feature of common law — that common law is a form of a judge-made law that is subordinate to the legislature and subject to being overruled by it — that Professor Monaghan invokes in formulating the concept of "constitutional common law." *See* Monaghan, *supra* note 35. If we understand Professor Monaghan correctly, constitutional common law is not a weaker or less dignified form of constitutional law, or a form of constitutional law (or nonconstitutional law) that is less binding on the states or on other noncongressional institutions of government than ordinary constitutional law. Rather, it is identical to ordinary forms of constitutional law, with one exception: Because it is based on areas of policymaking and factfinding in which Congress is ultimately more competent than the courts, constitutional common law is a form of constitutional interpretation that can be overruled by Congress (and, presumably, *only* by Congress). In other words, constitutional common law is a particular form of constitutional law that would now be the general form if *Marbury v. Madison* had been decided the other way.

Professor Monaghan's thesis is seductive precisely because of persistent doubts about the propriety and scope of *Marbury*. Nonetheless, it raises several problems. First, the kinds of cases Professor Monaghan believes best support his thesis turn out to be distinguishable. *See* note 35 *supra*. Furthermore, there is a problem as to *who decides* the dividing line between ordinary constitutional law and constitutional common law. If the Supreme Court retains final authority to decide where the line should be drawn, Professor Monaghan's proposal looks no different from what the Court does now. By allowing the Court to designate one of its prior decisions as constitutional common law, Professor Monaghan allows the Court to yield to an intervening act of Congress whenever the Court believes Congress's determination of policy or factfinding is sounder than its own; but, of course, that is a prerogative the Court can and does exercise now. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918), and Carter v. Carter Coal Co., 298 U.S. 238 (1936), following Congress's rejection of *Dagenhart* and *Carter* in its enactment of the Fair Labor Standards Act), ch. 676, 52 Stat. 1060 (current version codified at 29 U.S.C. §§ 201-219 (1976))); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (overruling Coppage v. Kansas, 238 U.S. 1 (1915), following Congress's rejection of *Coppage* in its enactment of the National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1976))). On the other hand, if Professor Monaghan intends *Congress* to decide what is constitutional common law and what is not, his proposal is a complete reversal of *Marbury* because it gives Congress the final authority to decide how much, if any, of the Court's constitutional jurisprudence to accept. In short, Professor Monaghan attempts to divide an indivisible power. Either the Court retains the power to decide how many, if any, of Congress's intervening acts to accept (which is the model of *Marbury*), or Congress gains the power to decide how many, if any, of the Court's decisions to accept (which is the opposite of *Marbury*). But the power of final constitutional review cannot be divided between two branches when one of the branches has the power to decide where the dividing line lies, because whichever branch possesses the latter power ultimately possesses the whole.

> common law, loosely, as most judges and commentators do, to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command.[64]

This distinction between statutory interpretation and common law ultimately collapses because the essential function is the same. The courts in each case fashion law by assessing public policy[65] as reflected in the enactments and silences of Congress, remembering, always, that "Congress can have the last word if it chooses."[66]

This can be illustrated by contrasting the "statutory" law of antitrust with the "common law" of admiralty. In fashioning a federal law of antitrust under the Sherman Act, the courts are said to engage in statutory interpretation because they purport to be construing the statutory standard — "combinations in restraint of trade."[67] In fashioning a federal law of admiralty, on the other hand, the courts are often said to be acting in a common law capacity, because the only relevant organic statute is the one conferring jurisdiction upon them to hear cases in admiralty.[68] Yet there is obviously no essential difference between the two cases. The statutory term, "combinations in restraint of trade," is so vague that it can effectively do nothing but delegate lawmaking authority to the federal courts to fashion a law of antitrust subject to legislative oversight. To describe this process as "statutory interpretation," as opposed to fashioning a common law, is to play with words.[69] Indeed, the implicit delegation of law-

64. HART & WECHSLER, *supra* note 2, at 770. *See also* Bishin, *The Lawfinders: An Essay In Statutory Interpretation*, 38 S. CAL. L. REV. 1, 29 (1965) ("the judicial task in the interpretation of statutes entails the same freedom and the same limitations as do the problems of the . . . Common Law").

65. This task of ascertaining public policy has also been described as ascertaining "public morality" or the "common will." *See* notes 82-83 *infra*.

66. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 17 (1957).

67. 15 U.S.C. § 1 (1976).

68. *See* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954). For a description of federal admiralty law as "federal common law," see D. ROBERTSON, ADMIRALTY AND FEDERALISM 140-41 (1970). Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1512 n.1 (1969). Nowadays, of course, the law of admiralty is significantly and increasingly "confined by statute." H. FRIENDLY, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, in BENCHMARKS 41, 43 (1967). For an example of an effort to define the common law of admiralty in the context of today's statutes, see Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

69. For the suggestion that judicial interpretation of the Sherman Act partakes of federal common law, see United States v. Union Pac. R.R., 353 U.S. 112, 122 (1957) (Frankfurter, J., dissenting); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 262, 272 (2d Cir. 1979) ("the Sherman Act . . . in effect conferred upon the federal courts 'a new jurisdiction to apply a "common law" against monopolizing' "), *cert. denied*, 48 U.S.L.W. 3532 (1980).

Professors Bickel and Wellington have made this same point in contrasting the scope of judicial lawmaking under the Sherman Act with its scope under § 301 of the Labor Manage-

making power in admiralty was even more definite and precise than in antitrust, because the delegation in admiralty occurred against the backdrop of an existing and well-developed body of maritime law, which the courts could assume Congress intended them to consult, while the Sherman Act was enacted in a vacuum and in derogation of the common law.

To be sure, the policies behind many statutes are more explicit than the policies underlying the Sherman Act. But even with relatively specific statutes it would be a mistake to assume that the courts merely announce a decision already made by the legislature. Every act of statutory interpretation is an assessment of what Congress would want done in a case on which Congress did not directly vote.[70] As Judge Learned Hand stated:

> When we ask what Congress "intended," usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and impute to them how they would have dealt with the concrete occasion.[71]

Courts perform this same function in fashioning common law, although with legislative direction that is, perhaps, less precise. In both cases, however, the courts "are 'standing in' for the legislature"[72] and, within the bounds of stare decisis, they should try to behave as the legislature has wished them to behave.[73]

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ment Relations Act, 29 U.S.C. § 185 (1976). Although the former is commonly described as statutory interpretation, and the latter as federal common law, the courts "make antitrust law under statutes not very much more explicit for the conditions of this day than section 301." Bickel & Wellington, *supra* note 66, at 26.

70. *See* Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500-01, 505, 507 (1979); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71, 881-82, 884 (1930). *But cf.* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes On Adjudication*, 83 YALE L.J. 221, 264 (1973) (arguing that although courts, in interpreting statutes, should not substitute their views of "policy" for the legislature's views of policy, courts can and should substitute their views of "principle" for the legislature's).

71. United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952), *aff'd.*, 345 U.S. 979 (1953).

72. Ely, *supra* note 62, at 50. *See also* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1058 (1978); Lehman, *supra* note 70, at 507.

73. It is sometimes said that the courts "should try to behave as (good) legislatures behave." Ely, *supra* note 62, at 50. While this statement may be correct, it is misleading insofar as it suggests that judges should act just as legislators do. Judges are *not* legislators and, in theory and justification, what judges do is very different from what legislators do. *See* Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991, 1044-46 (1977); Weiler, *Two Models of Judicial Decision-Making*, 1968 CAN. B. REV. 406. In holding judges to the standard of a good legislator, one is using a metaphor that does not represent the way legislators *actually* behave or, even, the way legislators are supposed to behave. Instead, one is stating that within the parameters of stare decisis and consistently with prevailing legislative guidelines (neither of which is binding on real legislators), judges should reach the result they consider the "best," R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 202 (1975), or the "wisest," Tate, *The Law-Making Function of the Judges*, 28 LA. L. REV. 211, 220 (1968), or the most "just,"

Now it might be argued that statutory interpretation differs from common law because courts acting in a common law capacity are bound by principles of stare decisis — that is, by precedent. The obvious problem with this argument, however, is that courts are similarly bound in cases of statutory interpretation, and for the very same reasons. Once a court has construed a statute, it is bound to adhere to that construction because "important policy considerations" favor "continuity and predictability"[74] and "equal treatment of similarly situated litigants,"[75] and because the legislature is always ready and able to correct any interpretations it disagrees with.[76] To be sure, the policies favoring stare decisis are not so strong as to compel a court to adhere to a rule of statutory construction it considers fundamentally unsound. Courts can and do legitimately overrule themselves on matters of statutory construction.[77] But, significantly, they do so just as they would overrule themselves on matters of common law. They weigh the interests underlying stare decisis against the interests in correcting their own prior error, while taking into account that the legislature itself can "cure"[78] any nonconstitutional errors it considers unacceptable.

It might also be argued that statutory interpretation differs from common law because decisions of statutory interpretation may be broad and expansive, while decisions of common law are confined to the facts at hand. This distinction, too, cannot be sustained. When a court construes a statute, it proceeds just as it would in declaring the common law. It decides the immediate case before it by identifying an applicable principle that is almost always broader than the imme-

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Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 7-99 (A. Simpson ed. 1973). The reason judges should act as good legislators is not because the legislature *actually* wishes them to, but again, because a *good* legislature would wish them to; that is, they are obliged to act as good legislators because that standard is simultaneously consistent with the nature of the judiciary and with the hegemony of the legislature.

For a discussion of where judges look for evidence of the standard that determines what is "best" or "wisest," see notes 82-83 *infra* and accompanying text. *See also* Greenawalt, *supra*; Greenawalt, *supra* note 58.

74. Boys Markets, Inc. v. Retail Clerks Union, Local 710, 398 U.S. 235, 240 (1970).

75. 398 U.S. at 257 (Black, J., dissenting).

76. Swift & Co. v. Wickham, 382 U.S. 111, 133-34 (1965) (Douglas, J., dissenting). *See e.g.*, Flood v. Kuhn, 407 U.S. 258, 269-85 (1972) (stare decisis restrains the Court from overruling an admittedly eccentric interpretation of the Sherman Act).

77. *See generally* Schaeffer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12-18, 24 (1966).

78. *Id.* at 13. The availability of the legislature as an ever-present alternative forum for correcting "errors" in statutory interpretation induces courts to give greater weight to precedent than they would if the courts themselves were the only potential forum for correcting their own errors. Thus, in interpreting the Constitution, the courts are less bound by stare decisis and more willing to disregard precedent, because the legislature is not deemed competent to override judicial interpretations. *See* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 215-19.

diate facts at hand, recognizing that when new cases arise that appear to be controlled by the general principle, the court may decide them differently, provided that it can reformulate the general principle in such a way as to account rationally for the differences in result.

This is not to deny any meaningful distinction between statutory interpretation and common law adjudication. As previously stated, they differ in the extent to which they take directions and guidance from the legislature. But this is not a sharp divide either in method or theory; it is a difference in degree. Even the purest instance of statutory interpretation involves some nonministerial exercise of judgment,[79] just as the purest instance of common law adjudication occurs in the context of surrounding legislative policy.[80] In each case, within the constraints of stare decisis, the court must conform to existing legislative policy, just as it must continually amend and modify its course of decisions to account for changes in legislative policy.[81] In each case, too, the court must fill in gaps in legislatively declared policy by making its best judgment of what represents, not its personal morality or some universal morality, but the "political morality"[82] of the society for which it speaks — or what Learned Hand called "the common will."[83]

9. The Validity of Federal Common Law: Federal common law is measured by the same standard of validity as federal statutory interpretation; the measure in each case is whether the law as declared by the courts is consistent with prevailing legislative policy.

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79. Bishin, *supra* note 64, at 28 & n.112, 29; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("Anything that is written may present a problem of meaning"); Tate, *supra* note 73, at 218, 227-28, 232-33. *See also* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("the *inevitable* incompleteness presented by *all* legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts") (emphasis added).

80. *See* Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 345 (1949). In addition, see United States v. Moore, 486 F.2d 1139, 1249, 1255-56 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting).

81. *See* Frankfurter, *supra* note 79, at 527 ("today cases not resting on statutes are reduced almost to zero"); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1037 (1967) ("In virtually all government litigation . . . it is possible to find some sort of legislation, direct or delegated, somewhere in the background"); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12, 14 (1936).

82. Dworkin, *How To Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37, 41-42. *See* B. CARDOZO, *supra* note 59, at 142; R. SARTORIUS, *supra* note 73, at 89-91.

83. But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. . . . He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

L. HAND, THE SPIRIT OF LIBERTY 109 (3d ed. 1960).

For a description of the various sources to which judges look to ascertain the common will, see Bishin, *supra* note 64, at 29.

In one sense, a judicial act of statutory interpretation can never be "invalid." As long as the court reaches its decision in the course of resolving cases or controversies by accepted "judicial" methods,[84] its decision carries the weight of law until either reversed by a higher court or repudiated by the legislature.[85] In describing an act of statutory interpretation as invalid, therefore, we do not mean that it is not entitled to respect or compliance. Rather, we mean that it is incorrect in the sense that it is based on an erroneous assessment of prevailing legislative policy. To say that an act of statutory interpretation is invalid is to say that the decision either is likely to be repudiated by the legislature or would be repudiated if the legislature were to enforce existing legislative policy.[86]

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84. A court is not a legislature and, hence, cannot proceed by legislative methods; rather, to speak authoritatively, it must proceed by "judicial" processes. That is, it is confined to making law through the resolution of "cases and controversies" by a process of "presumptive adherence to precedent and commitment to a course of principled development." Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1132 (1978). This is, perhaps, what Justice Jackson had in mind when he said that courts may create "common law," provided they base it upon the "source materials of the common law." D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

85. The legislature may repudiate the judicial decision either prospectively or retroactively. For a discussion of the limits of retroactive legislation, see note 48 *supra*.

86. This test of validity contains two alternative elements. The first element — that an act of statutory interpretation is invalid if the legislature is likely to repudiate it — can be deduced from the legislature's stature as final judge of the content of its own nonconstitutional enactments. If a court can reasonably conclude from existing evidence of legislative intent that the legislature wishes its enactments to be given a certain interpretation and will repudiate any contrary ruling, and if the court can embrace that interpretation without violating principles of stare decisis, it would be futile, wrong, and unfair for the court to do otherwise: futile, because the legislature can be expected to set it aside; wrong, because the court would be superimposing its judgment in an area in which it is supposed to give effect to legislative judgment; and unfair, because the court would be treating the litigants before it differently from the way the legislature intends and differently from the way future litigants will be treated after the legislature repudiates the court's interpretation.

The second element — that an act of statutory interpretation is invalid if the legislature would repudiate it if the legislature were to attend to it — can be deduced from a combination of the first element with the recognition that it is harder for a legislature to enact a bill than to block one. Enactment requires a far greater consensus. *See* Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1567-68, 1570 (1977); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 817-29, 840-46 (1974). Accordingly, if the courts were motivated only by the fear of actually being legislatively overruled, they would feel free to disregard their best assessment of what legislators probably desire and to substitute their own judgment instead, except where their own judgment so dramatically departed from what legislators desired that the legislature could be expected to overrule them. Such substitution of judicial judgment for legislative judgment — based on an unprincipled exploitation of legislative "inertia" — is improper, because the very justification for the court's authority in this area is to give effect to legislative will. *See* H. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 233 (1967).

This latter point can be illustrated by the history of the Rules of Decision Act. For a hundred years following Swift v. Tyson, 41 U.S. (6 Pet.) 1 (1842), the federal courts interpreted the Rules of Decision Act to mean that the federal courts in diversity cases had authority to create general federal common law. While the Supreme Court later found that interpretation both "erroneous" and "unconstitutional," Erie R.R. v. Tompkins, 304 U.S. 64, 72, 79 (1938),

The same is also true of common law. In fashioning federal common law, the federal courts speak on behalf of the legislature and, accordingly, cannot make any law that Congress itself could not make. That was the famous constitutional problem regarding *Swift v. Tyson* that Justice Brandeis adverted to in *Erie Railroad v. Tompkins*.[87] The federal courts had interpreted *Swift* to mean (or, more likely, misinterpreted it to mean)[88] that they could adopt a *federal* common law in diversity cases that differed from the *state* common law of the forum, and that they could fashion such a federal law in all areas of regulation, without a reference to subject matter. That interpretation of *Swift*'s holding was unconstitutional, because it accorded the federal courts more extensive authority to make law than Congress itself possessed. There is no such thing as valid *general* federal law, because the federal government is one of limited legislative powers. Accordingly, there is no such thing as valid *general* federal *common law*, because courts acting in a common law capacity possess only as much power as the legislature possesses. Hence, in fashioning common law, the federal courts have two alternatives: They may declare *general* common law, provided they do so on behalf of, and in the name of, the states, which do possess general lawmaking authority;[89] or they may declare independent *federal*

Congress had never repudiated it, presumably because the issue was either too complex or too unimportant to spur legislative action. Yet it does not follow from Congress's silence that the doctrine of *Swift* must have been valid. On the contrary, if it was "invalid" in 1938, it was invalid in 1842, and it could and should have been regarded as invalid during that intervening century, regardless of whether Congress was actually likely to overrule it.

87. 304 U.S. 64, 78-80 (1938) (discussing Swift v. Tyson, 41 U.S. (6 Pet.) 1 (1842)). *See generally* Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

88. It is not obvious that Justice Story intended in *Swift* to create a *federal* common law rule that differed from *state* common law rules. Rather, he probably would have said that he was identifying *the* common law rule, and that he was justified in applying a version of that rule different from the rule applied in the state courts, because his version was more accurate and, therefore, more in accord with what the state courts were *really* seeking and desiring. *See* Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1026-32 (1953). In other words, Justice Story did not view himself as creating federal law in contradistinction to state law. He assumed the area was one in which the state law (rather than federal law) governed, and he further assumed that in the absence of a state statute, the state courts intended to adhere to what Story viewed as *the* common law. He simply believed he was more successful in identifying *the* common law (and, therefore, state law) than the state courts were.

89. Assume, for example, that a state legislature decides that federal judges are more able and perceptive in creating judge-made rules than the judges of its own state courts; assume, too, that the legislature responds by directing the state courts to apply whatever rules the federal courts formulate while sitting in diversity. If a federal diversity court in such a state were then to fashion comprehensive judge-made rules differing from the judge-made rules being applied in the state courts, it would be acting entirely properly, because it could legitimately claim to be applying *state* common law rather than *federal* common law. Admittedly, this situation is not very plausible nowadays, but ironically it does not differ significantly from what Justice Story envisaged the situation to be in 1842. *See* note 88 *supra*.

common law, provided they confine their lawmaking to areas in which Congress itself may legislate. But they may not fashion a general federal common law, any more than Congress could enact a general federal law.[90] Insofar as they attempted to do so under *Swift*, the common law they declared was invalid.

Thus far we have considered one of the two principal grounds for declaring common law invalid: that the law as declared by the courts exceeds the scope of what the legislature is constitutionally capable of delegating to them. But that is not the only way common law may be invalid. As with statutory interpretation, common law is also invalid (as the term is used here) if it transgresses what the legislature intends by its implicit delegation of lawmaking power to the courts. The interplay between Congress and the federal courts regarding the Act-of-State doctrine illustrates this second type of invalidity. *Banco Nacional de Cuba v. Sabbatino*,[91] a diversity case, presented the question of whether the federal courts, in resolving a claim filed by the Cuban government in the name of a nationalized company, would review the validity of the Cuban government's action nationalizing the American-owned company. The Supreme Court decided that although no federal constitutional or statutory provision was implicated, federal policies governed the issue. Accordingly, drawing support from the enactments and silences of Congress, the Court fashioned a rule of federal common law known as the Act-of-State Doctrine — a rule requiring federal courts to abstain from passing on the validity of sovereign acts of foreign governments. Congress immediately responded by qualifying the Court's rule and replacing it with a narrower standard of abstention.[92] In effect, Congress declared the common law rule announced by the Court to be invalid.[93]

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90. *See* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977) (the federal courts may not create federal common law in areas in which there is no federal source of power). Professor William Crosskey believed, in contrast, that the federal courts do have authority both under the Constitution and under the Rules of Decision Act to create general federal common law, 2 W. CROSSKEY, *supra* note 38, at 711-937, but only because he also believed Congress has plenary constitutional power to create general federal law. *See generally* 1 *id.* For a critical review of Crosskey's thesis, see Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954).

91. 376 U.S. 398 (1964).

92. Foreign Assistance Act of 1964, Pub. L. No. 86-633, § 30(d), 78 Stat. 1009, 1013, *reenacted as amended*, 79 Stat. 653 (current version at 22 U.S.C. § 2370(e)(2) (1976)).

93. This is not to say that a court must necessarily be deemed to have created "bad" or "invalid" law every time a legislature chooses to overrule the court on a matter of nonconstitutional policy. On the contrary, the legislature's action may be its first foray into an area of longstanding judicial activity in which the courts had an obligation to adhere to precedent. Sometimes, too, the legislature's departure from judicial policy can be explained on the ground that the legislature speaks for a new constituency or for a change in values by an existing

Now, to say that the federal rule of *Sabbatino* was invalid does not mean that the Court acted in bad faith or that the rule was not entitled to legal recognition until Congress acted. Rather, it means the Court's decision was wrong. It was bad law — an incorrect assessment of public policy in an area in which the legislature has the final say. It was invalid in the same sense that an act of statutory interpretation is invalid when it conflicts with the legislature's true intent. In each case, the federal courts are standing in for the legislature and declaring the rule they believe the legislature would want adopted, subject always to congressional oversight.[94] When the federal courts misidentify public policy — when they misperceive the law as implicitly expressed through the enactments and silences of the legislature — they err in exercising their delegated lawmaking powers. In that sense, the law they make can be said to be invalid.

Now, it is sometimes said that when the federal courts create common law where Congress does not desire it, they act not only wrongly, but unconstitutionally.[95] This point has been made about a particular issue in *Erie Railroad*: While Congress probably had the constitutional power to enact a federal law governing a railroad's liability to users of its rights of way, it had no legislative *desire* to create such a federal law. Consequently, so the argument goes, when the lower federal court in *Erie* created such a rule in the face of legislative desire to the contrary, it acted unconstitutionally; it violated the constitutional principle of separation of powers by usurping the "legislative Powe[r]," a power that article I of the Constitution vests in Congress.[96]

The trouble with this argument is that it converts every judicial

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constituency that the courts could not properly anticipate. The departure at times can also be explained by the legislature's ability to draw lines and make distinctions that a court, forced to proceed on neutral principles, cannot. *See* H. FRIENDLY, *supra* note 68, at 46. Nonetheless, there are some instances, such as the *Sabbatino* situation, in which a legislative enactment of considerable generality falls so promptly upon a judicial decision of first impression, that one can reasonably conclude that the court erred in its judgment of public policy.

94. *See* Ely, *supra* note 62, at 50. *See also* United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979) (the task for the federal courts, in fashioning federal common law, is "to effectuate congressional policy"); Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 255 (1974) (in fashioning a "federal common law regarding enforcement of collective-bargaining agreements," the federal courts should not announce what *they* "might find to be the most desirable rule, irrespective of congressional pronouncements," but should derive federal common law " 'from the policy of our national labor laws' ").

95. *See* R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW, 53, 60, 133-34 (1977); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 887 n.16 (1965). Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1086 (1964).

96. *See* Mishkin, *Some Further Last Words on Erie — The Thread*, 87 HARV. L. REV. 1682, 1683 (1974).

mistake of legislative interpretation into a constitutional violation. Every time a court misconstrues an act of Congress, it makes law that Congress does not want made; yet it hardly seems useful to say that the court is thereby also usurping the legislative power of Congress under article I.[97] If the constitutional conception of separation of powers is useful at all, it should be reserved for the most egregious abuses of statutory interpretation. The same is also true of errors in the creation of common law because, conceptually, the two functions are identical.

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The foregoing nine axioms are principles of universal relevance to the conduct of federal courts. Because they speak to the ultimate nature of "Our Federalism,"[98] they should guide the analysis of all federal court decisions, regardless of the source of the federal court's jurisdiction. Perhaps more to the point of this Article, they also illuminate the relationship between *Erie*'s lessons in diversity cases and its implications for federal question cases.

II. Axioms in Diversity

The *Erie* inquiry in diversity cases is essentially the same as in any other case: Is there a valid and pertinent federal rule governing the issue in question? If such a rule exists, the federal court must apply it, because the axiom of supremacy dictates that federal law always governs in the face of conflicting state rules to the contrary; if such a rule does not exist, and if the federal court is not to dismiss

97. Why would one ever want to elevate judicial errors of this kind into matters of constitutional magnitude? No functional advantage inheres in doing so. The issue never arises until a court first acknowledges that it has transgressed its derivative lawmaking competence by creating common law where the legislature wishes none to exist. Once the error is acknowledged, however, the court can always correct it in the name of its delegated responsibility to enforce prevailing legislative policy, without resorting to additional *constitutional* grounds. Indeed, nothing is gained by invoking constitutional grounds to correct the error, because the constitutional argument has no content independent of the court's acknowledged misassessment of prevailing legislative policy.

Moreover, this is not an area in which a constitutional ground for decision would give the court greater freedom from stare decisis (and, hence, the greater freedom to acknowledge and overrule its prior error) than a nonconstitutional ground. Since courts are ordinarily final regarding interpretation of the Constitution and, as such, the sole bodies capable of correcting errors in constitutional interpretation, they are generally more willing to acknowledge constitutional error than nonconstitutional error. Significantly, however, the supposed constitutional error at issue here — the error of creating common law where the legislature does not desire it — is *not* the kind of error which the courts are alone in being able to correct, because the legislature itself can correct it anytime it so chooses, simply by enacting superseding legislation. Accordingly, this particular constitutional error is not one that should be accorded the freedom from stare decisis that constitutional errors ordinarily enjoy. If one persists in framing the argument in constitutional terms, it cannot be for functional reasons, but must be for reasons of emphasis.

98. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

the case for lack of jurisdiction, the federal court must apply an appropriate state rule. Diversity cases are distinctive only because the standards governing the validity of federal law are different in them than in cases in federal court on other jurisdictional grounds. As a result, a federal rule that is valid (and, hence, applicable) in a federal question case might be invalid (and, hence, inapplicable) in a diversity case.

To understand how *Erie* operates in diversity cases, it is important to distinguish between the *pertinence* of federal rules and their *validity*. To say a federal rule is "pertinent" means that it was intended or designed to govern the issue at hand — that the rule's purposes would be served by applying it. To say a rule is "valid" means that it has been adopted in conformity with the legal norms controlling the creation of federal law — that it is consistent with the Constitution and other organic statutes regulating the formation of federal law. These combined qualities of pertinence and validity are necessary and sufficient for the proper application of a federal rule: If either quality is absent, a federal rule cannot be lawfully applied; if both are present, the federal rule must be applied.

To illustrate the distinction between pertinence and validity, as well as their combined importance, consider *Ragan v. Merchants Transfer Co.*[99] *Ragan* was a diversity suit brought in a district court in Tennessee. The plaintiff filed his complaint with the clerk of the court within the period provided by the applicable statute of limitations, but he did not succeed in serving the defendant with the summons and complaint until after the period of limitation had lapsed. The defendant moved to dismiss the action on the basis of a Tennessee state rule requiring that process be actually *served* within the limitation period; the plaintiff opposed the motion on the basis of rule 3 of the federal rules of civil procedure, which, he said, required only that actions be *filed* within the limitations period.

Obviously, if the plaintiff was correct in contending that rule 3 pertained to tolling statutes of limitations in diversity cases and that the rule thus pertaining was valid, the district court was obliged to apply it in the face of the state rule to the contrary. On the other hand, if either of these contentions was erroneous, then the rule was either irrelevant or nonexistent, or both. In that event, if the district court were not to dismiss the case for lack of jurisdiction, it would be obliged to apply an appropriate state rule — in this case the Tennessee rule.

99. 337 U.S. 530 (1949).

The first question in *Ragan*, therefore, was whether rule 3 was pertinent to tolling the limitations period. On its face rule 3 appeared to address the issue: It provided that "an action is commenced by the filing of a complaint." The lower courts both held that the rule was intended to govern the "commencement" of actions for purposes of statutes of limitation. Nonetheless, despite the apparent pertinence of the rule, the Supreme Court held that the rule had more limited purposes. The rule was designed, it said, to define the commencement of an action for purposes other than tolling limitation periods.[100] In other words, the Court held that as far as the federal rules of civil procedure were concerned, no pertinent federal rule governed the commencement of actions for purposes of statutes of limitation.

If the Court had found that rule 3 was intended to govern limitation periods, it would then have had to decide whether the rule, so construed, was authorized; that is, whether the Court had the constitutional and legislative authority to apply rule 3 in a diversity suit to toll a limitation period that had lapsed under state law. This question was difficult in *Ragan*; indeed, the Court may have deliberately construed rule 3 narrowly in order to avoid deciding whether a broader construction would be valid.

To decide the validity of rule 3, the Court would have had to decide, initially, whether the rule conformed to the standards set forth in the Rules Enabling Act,[101] the organic statute by which the rule had been adopted; specifically, the Court would have had to determine whether rule 3, so construed, was a "procedural" rule that did not "abridge, enlarge, or modify any substantive right" within the meaning of the Act. Then, if the rule satisfied the statutory test of validity, the Court would also have had to decide whether the Rules Enabling Act, so construed, conformed to the constitutional

100. 337 U.S. at 533, *explained in* Hanna v. Plumer, 380 U.S. 460, 470 n.12 (1965). Commentators disagree over whether *Ragan* was a correct or wise interpretation of rule 3. *Compare* Ely, *supra* note 18, at 729-33, *with* Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 748-50 (1974). The Supreme Court has granted certiorari to consider whether *Ragan's* construction of rule 3 ought to be overruled. *See* Walker v. Armco Steel Corp., 592 F.2d 1133 (10th Cir. 1979), *cert. granted*, No. 78-1862, 48 U.S.L.W. 3186 (October 1, 1979).

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

Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice . . . and until the expiration of ninety days after they have been thus reported. 28 U.S.C. § 2072 (1976).

standard governing the authority of Congress to adopt rules in diversity cases. Specifically, it would have had to decide whether rule 3 fell within either Congress's explicit authority to create lower federal courts and to vest them with diversity jurisdiction or its implicit power to enact legislation "necessary and proper" to further those explicit powers.[102]

Pertinence and validity are both important because if either of them is absent federal law cannot govern, while if both of them are present federal law must govern. The two qualities are also interrelated because the lawmaking authority may wish its rule to pertain to only as many situations as it validly can. Or (as in *Ragan*) a court's finding of pertinence may be influenced by its misgivings regarding validity. Nonetheless, as between the two, validity presents the greater problem: The ultimate challenge in most *Erie* cases (again, as in *Ragan*) is not to ascertain what the federal lawmaking authorities want or intend to do, but rather to determine what they are allowed to do. We shall examine the validity of federal laws in diversity cases by drawing examples from each of the four paradigmatic sources of federal law: the Constitution, federal statutes, federal rules of civil procedure, and federal common law. We begin with constitutional rules, which can be invalidated only by other constitutional rules of greater dignity, and end with federal common law, which can be invalidated by federal law from any of the three other sources.

A. *Constitutional Rules*

The simplest of all *Erie* cases are those involving constitutional rules, because the validity of such rules can hardly ever be drawn into question. Constitutional rules are valid because, by definition, no higher law exists by which they could be deemed invalid (except for the rare case in which a constitutional provision adopted later in time overrides an earlier one).[103] Consequently, the only *Erie* question regarding a constitutional rule is whether the rule is pertinent — that is, whether it is intended to cover the issue at hand. If the rule is pertinent, then it obviously governs, because pertinent and valid federal rules always displace state rules to the contrary.

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102. For a discussion of the standards of validity contained in the Rules Enabling Act and the standards of validity under the Constitution for diversity cases, see text at notes 144-59 *infra*.

103. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976) (suggesting that the fourteenth amendment is inconsistent with the eleventh amendment and, to that extent, overrules it).

This analysis can be illustrated by *Byrd v. Blue Ridge Rural Electric Cooperative*.[104] The plaintiff, Byrd, brought a diversity suit in South Carolina against the Blue Ridge Electrical Cooperative for personal injuries sustained while working for an independent contractor under contract to Blue Ridge. Blue Ridge defended on the ground that Byrd was an "employee" of Blue Ridge within the meaning of the South Carolina Workmen's Compensation Act and, as such, was relegated exclusively to his administrative remedies under the Act. The *Erie* question turned on who should decide whether Byrd was a statutory "employee" of Blue Ridge: Byrd argued that the issue was one for the jury under the seventh amendment, and that the seventh amendment rule ought to apply in the face of a state rule to the contrary; Blue Ridge argued that the issue was one for the judge under South Carolina law, and that state law ought to apply. The Supreme Court ruled for Byrd, holding that "the influence . . . of the Seventh Amendment assigns the decisions of disputed questions of facts to the jury,"[105] and that this "federal policy favoring jury decisions of disputed fact questions"[106] should not "yield"[107] to the contrary "state rule."[108]

The only genuine question in *Byrd*, as we shall see, was whether the seventh amendment was pertinent to determining whether Byrd's status should be decided by judge or jury. Most commentators assume that Byrd's status was the kind of issue that the framers of the seventh amendment intended to be left to the jury. If these commentators are correct in their assumption, that should end the matter,

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104. 356 U.S. 525 (1958).

105. 356 U.S. at 537. The Supreme Court equivocated about the sources of the rule in *Byrd*. On the one hand, the Court attributed the rule to the "influence . . . of the Seventh Amendment"; on the other hand, the Court balked at calling the rule a constitutional "command" and, instead, called it a "federal policy." 356 U.S. at 537 n.10, 538. Despite the Court's ambivalence, we shall assume here that the "federal policy" of *Byrd* does derive from the seventh amendment. *See* HART & WECHSLER, *supra* note 2, at 738; Redish & Phillips, *supra* note 13, at 386-88; Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEXAS L. REV. 549, 557-58 & n.45 (1957). *See also* note 118 *infra*. If our assumption turns out to be mistaken, however, it is of little significance. If, for example, it turns out that *Byrd* derives from, say, special federal common law, it simply means that *Byrd* is an example of a *common law* rule rather than a *constitutional* rule, and that the reader should transpose the discussion of *Byrd* from the constitutional discussion here to the common law discussion later. *See* text at notes 160-99 *infra*. It also means that our criticism in this section of the "constitutional" rule of *Byrd* should be viewed as criticism of the "common law" rule of *Byrd*, because if we are right that the federal government has no conceivable constitutional interest in how South Carolina distributes policy making between judge and jury, it follows that the federal government has no conceivable common law interest in such allocation either. *See* note 118 *infra*.

106. 356 U.S. at 538.

107. 356 U.S. at 538.

108. 356 U.S. at 538.

because the validity of the seventh amendment cannot be questioned. A constitutional rule requiring that a jury decide an issue can never be invalid unless the seventh amendment itself has been superseded by a later constitutional provision. Because they assume the pertinence of the seventh amendment to the issue in *Byrd*, and because constitutional rules are definitionally valid, commentators, not surprisingly, regard *Byrd* as self-evident:

> The question presented [in *Byrd*] — whether to apply federal law, which required that a jury decide the issue in dispute, or state law, which had a judge decide it — could have been decided . . . on seventh amendment grounds pure and simple. The Court shunned this straightforward course, however, and indicated that choices between state and federal law were thenceforth to be resolved by balancing the relevant state and federal interests. The opinion exhibits a confusion that exceeds even that normally surrounding a balancing test, and lower courts understandably experienced considerable difficulty in applying it.[109]

In truth, *Byrd was* a difficult case, not because of any doubts about the validity of the seventh amendment, but because of questions regarding its pertinence. The commentators who consider *Byrd* to have been constitutionally mandated make a four-step argument: (1) the seventh amendment has the same meaning in diversity cases as in cases based on other sources of federal jurisdiction; (2) the seventh amendment restricts the ways a law may distribute functions between judge and jury; (3) the determination of Byrd's status as an "employee" within the meaning of the Sourth Carolina Workmen's Compensation Act was a function that the seventh amendment allocates to the jury; (4) the law of South Carolina, which treated the plaintiff's status as a question for the trial court, was unconstitutional because it allocated to the court a function that the seventh amendment allocates to the jury.

This argument has superficial appeal because steps (1) and (2) are now accepted,[110] and (4) follows ineluctably from the preceding

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109. Ely, *supra* note 18, at 709 (footnotes omitted). *See* HART & WECHSLER, *supra* note 2, at 738; Boner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEXAS L. REV. 509, 514-15 (1962); Friendly, *supra* note 87, at 403 n.95; Leathers, *Erie and Its Progeny As Choice of Law Cases*, 11 HOUS. L. REV. 791, 812 (1974); Whicher, *supra* note 105, at 559; Note, *The Erie Doctrine and Federal Rule 13(a)*, 46 MINN. L. REV. 913, 928 n.78 (1962); 43 MINN. L. REV. 580, 587 (1959); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 691 n.66 (1976).

110. *See* Simler v. Conner, 372 U.S. 221 (1963) (the seventh amendment has the same meaning in diversity cases); Pernell v. Southall Realty, 416 U.S. 363 (1974) (Act of Congress, which provides that certain landlord-tenant disputes shall be tried to the court rather than to a jury, is unconstitutional because it allocates to the court what the seventh amendment allocates to the jury).

It should be noted that *Simler* was neither self-evident nor inevitable. The issue in *Simler* was whether a federal court in diversity should have applied a federal standard or a contrary

three. The problem is step (3), the assumption that the issue in *Byrd* was one that the seventh amendment requires be left to the jury. The assumption is false because the issue in *Byrd* — whether an employee of an independent contractor is an "employee" of the contractor's employer within the meaning of the South Carolina Workmen's Compensation Act — was a matter of legislative *policy* on which the South Carolina legislature had the final say. The legislature was free to decide that issue for itself, to delegate its resolution to judges, or to delegate its resolution to the jury to decide case by case. Since the South Carolina legislature intended judges to resolve the issue as a matter of "law," no legitimate function was left for a jury to perform.

The fallacy in step (3) follows from a failure to distinguish between the two different functions that juries perform, functions that are often misleadingly thrown together under the rubric "factfinding." On the one hand, a jury is said to find "facts" when it seeks to resolve disputes regarding historical phenomena, such as whether a

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state standard to determine whether an issue in dispute was "legal" (and, hence, triable to a jury) or "equitable" (and, hence, triable to the judge). If the action in *Simler* had been brought in the courts of the state, state law would have treated it as equitable and thus not triable by right to a jury; if, on the other hand, the action had been an ordinary federal-question case in federal court, the seventh amendment would have treated it as legal and thus triable by right to a jury. The question, therefore, was whether the ordinary seventh amendment standard for defining actions as legal was pertinent to a diversity suit that state law would have treated as equitable.

Although the *Simler* Court held that the seventh amendment has the same meaning in diversity suits as in comparable federal-question suits, the Court could reasonably have held to the contrary. It could have held that although the seventh amendment requires that federal-question suits "at common law" be tried to a jury, the seventh amendment does not by itself mandate jury trials for diversity suits that would be tried to a court under the law of the state where the federal court sits. The seventh amendment — not being applicable to the states and not being based on any fear that the states will subvert the institution of trial by jury — has nothing at all to say about how the states allocate decisions between judge and jury. Accordingly, if a state has provided that an action be tried to a judge rather than a jury, it is hard to see why the seventh amendment would require that it be tried to a jury, simply because the action is brought in diversity. The latter is even harder to understand when it is recalled that the purpose of diversity jurisdiction is to provide an impartial federal tribunal in places where state tribunals might otherwise discriminate against noncitizens. If a federal court is required to impanel a jury of local residents to decide a diversity suit that would be tried to a judge in the courts of the state, the federal court may be giving vent to precisely the kind of localistic bias that diversity jurisdiction is designed to counteract.

To suggest (as we do) that *Simler* could reasonably have been decided the other way does not mean that there are no distinct federal interests in trying to a jury diversity suits that would be tried to a judge under state law; nor does it mean that the federal government is constitutionally precluded from giving effect to those interests. It means, rather, that those interests are not so dominant as to dictate the conclusion that the seventh amendment *requires* that they prevail over the countervailing interest in not adopting federal rules that cause diversity suits to come out differently in federal court than they would in the courts of the state. Hence, if Congress concluded that the federal interest in jury trials overrides the countervailing interest in similar outcomes, it would remain free to provide by statute for jury trial in all diversity suits — or in all diversity suits "at common law" — but the seventh amendment should not be deemed to require Congress to do so.

defendant was driving at a speed in excess of posted limits at the time of an automobile accident. On the other hand, a jury is also said to find "facts" when it decides how a given legal standard relates to such phenomena, such as whether the defendant acted unreasonably in exceeding the speed limit in order to get his wife to the hospital in time to deliver their baby.

The difference between these two kinds of "factfinding" is that when the jury performs the first kind, it acts as a detective, but when it performs the second kind, it acts as a policymaker. The jury as a detective makes *empirical* statements about the world based on evidence that is invariably less than conclusive; as a detective, the jury performs a core function that cannot be shifted to the judge without raising serious constitutional problems.[111] In contrast, the jury as policymaker pronounces normative or legal standards to govern the particular parties before it. In deciding whether the defendant's known conduct was reasonable, the jury performs the same kind of policymaking function the legislature performed in enacting the "reasonableness" standard in the first place. It seeks to determine not how the parties to the litigation actually behaved (because it presumably knows that now), but how parties so behaving ought to be treated by the law. Moreover, the jury performs the latter function because — and only because — the legislature has chosen to delegate a portion of its policymaking responsibility to the jury.

The issue in *Byrd* — whether an employee of an independent contractor is an "employee" of the contractor's employer for purposes of South Carolina's Workmen's Compensation Act — was a "fact" of the latter kind. No one disputed the empirical nature of the plaintiff's work or the empirical relationship between his work and the defendant's own employees' work, or the empirical relationship between the employer and the defendant.[112] The real question was

111. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447-48 (1830).

112. The Fourth Circuit Court of Appeals held that there was no genuine dispute of historical fact, because even if one resolved all issues of credibility in favor of the plaintiff, the defendant was still entitled to a directed verdict. Blue Ridge Rural Elec. Coop. v. Byrd, 238 F.2d 346, 350, 356 (4th Cir. 1956). *See also* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 551-56, 558-59 (1958) (Frankfurter, J., dissenting). Although the Supreme Court also based its reversal in *Byrd* on the additional grounds (1) that the defendant should have an opportunity to introduce new evidence upon retrial and (2) that an issue of credibility remained in dispute, the Court was willing to assume, *arguendo*, that *no* historical facts were in dispute. That is, the Court based its new-trial order on the independent and alternative ground that the defendant was entitled to retry the case to a jury even if he had *no* evidence to present and even if *no* issues of credibility remained in dispute. 356 U.S. at 531-32. Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959), is evidence that the latter rationale in *Byrd* was no idle dictum, because the *Magenau* Court (following *Byrd*) ordered that the case be retried to a jury even though no empirical issues were in dispute. *See* 360 U.S. at 278; 360 U.S. at 281 (Frankfurter, J., dissenting).

whether or not a person in the plaintiff's position should be relegated to the compensatory provisions of the Workmen's Compensation Act. Needless to say, South Carolina's legislature could have resolved that issue itself by explicitly providing in the Act that employees of independent contractors are also employees of the contractor's employer for workmen's compensation purposes. If the legislature had proceeded in that fashion, it would have eliminated any question of whether the issue was one of "law" for the judge or "fact" for the jury. The issue would have been one of "law" because the legislature's definition would have left no policymaking role for the jury.

By the same token, instead of trying to define all the policies and subpolicies of workmen's compensation by itself, South Carolina's legislature was free to parcel out the policymaking function — to announce a general policy, while delegating to state court judges the function of ascertaining the subpolicies of the statute case by case. The legislature, in other words, was free to establish a general standard, leaving judges to interpret the standard in specific cases. That, of course, is precisely what the South Carolina legislature had done, according to the highest court in the state. A finding that the plaintiff's employment status in *Byrd* was a question of "law" to be decided by a judge meant that the legislature intended to delegate to judges, rather than to juries, the function of establishing workmen's compensation policy with respect to such persons, a function the judges were to perform by interpreting the statute. Since that is what the legislature of South Carolina intended (or, more accurately, what the Supreme Court *assumed* the legislature intended),[113] the issue of the plaintiff's employment status should have been left to the judge. The issue was one of "law" for the judge because the legislature plus its delegatees, the judges, had fully occupied the area of policymaking, leaving no policymaking role for the jury.[114]

113. 356 U.S. at 533-36 (discussing Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957)). It is no accident that the Supreme Court felt bound in *Byrd* by the South Carolina court's construction of South Carolina law. Although the federal courts have jurisdiction to construe state law in the course of deciding diversity suits, they may not substitute their own interpretations of state law for definitive interpretations by the courts of the state, except, perhaps, to prevent state-court discrimination against noncitizens. *See generally* Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

114. This can be further illustrated by an example from the law of negligence. Assume that in addition to providing a general "reasonable man" standard, a state legislature *explicitly* provides that the violation of criminal statutes regulating the operation of automobiles shall be treated as negligence per se; assume, too, that a defendant in that state is now sued in a federal court in diversity for injuries arising out of an accident caused by his speeding. Obviously, the federal court there would not leave it to the jury to decide as a matter of "fact" whether the defendant had been negligent, but rather would recognize that the legislature had defined the defendant's conduct to be negligent as a matter of "law."

Now assume that the situation is altered and that the legislature has *not* explicitly spoken

Now, it might be argued that while a legislature is free to retain policymaking functions for itself, it is not free to delegate such functions to judges or juries at will, and that if it delegates such functions at all, it must delegate them to the jury. The reason for this, so the argument goes, is that the seventh amendment establishes a preference that juries, rather than judges, make policy.

Two serious problems undermine the foregoing argument. First, while the seventh amendment clearly expresses a preference that juries, not judges, perform the detective function, it cannot be said clearly to contain such a preference with respect to the policymaking function.[115] Second, if the seventh amendment were so construed, it would produce absurd results. No federal judge could ever instruct a jury in any kind of case — state or federal — on his interpretation of a statute; by giving such an instruction, the judge would be substituting his judgment of the statute's meaning for the jury's. The most he could do is instruct the jury in the language of the statute, without adding any explanation of the statute's meaning. If judges are to retain their unquestioned authority to interpret statutes by filling in the subpolicies that are implicit in the general language of a statute,

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on the matter of negligence per se, but (as commonly is true) has delegated to trial and appellate judges the responsibility of ascertaining its policy in that respect; in other words, assume that the state courts conclude that the legislature *implicitly* intended such criminal violations to be treated as negligence per se. The result here is, obviously, the same as in the previous hypothetical case: it would be wrong to allow a jury to decide that conduct is nonnegligent after the legislature has been authoritatively found to have intended the conduct to be treated as negligent. The courts of the state decide what the legislature intended; once they decide that the legislature has fully occupied the area of policymaking, the area becomes one of "law" for application by the judge, and no policymaking role remains for the jury under the guise of "fact." *See* Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 281-82 (1959) (Frankfurter, J., dissenting).

This analysis is not necessarily inconsistent with the pre-*Erie* decision in Herron v. Southern Pac. Co., 283 U.S. 91 (1931) (where empirical issues relating to a defense of contributory negligence are not in dispute, a federal court in diversity may decide the issue itself rather than follow the state law and practice of leaving the issue to the jury), because *Herron* was essentially the converse of *Byrd*: The question in *Herron* was not whether a federal diversity court should allocate to a jury a policymaking function that state law left to the court, but whether a federal diversity court should allocate to itself a policymaking function that state law left to the jury. The latter question is different from the former, because if one adhered to state law in each case, one would take policymaking away from the jury in the former case (*Byrd*), while imposing it upon the jury in the latter (*Herron*). Hence, it might be argued (though scarcely persuasively) that while the federal courts had no federal interest in departing from state law in *Byrd*, they did in *Herron*, because state law in *Herron* would have required them to give a federal jury a function for which it was unfit or which would have given vent to the jury's localistic bias against out-of-state litigants.

115. *See* Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 281-82 (1959) (Frankfurter, J., dissenting). The seventh amendment (civil jury) thus differs from the sixth amendment (criminal jury), because insofar as the criminal jury has undeniable authority to excuse defendants or mitigate their punishment by acquitting them against the evidence, it has authority to nullify legislative policy in individual cases. *See* Westen & Drubel, *Toward A General Theory of Double Jeopardy*, 1979 SUP. CT. REV. 81, 130-32 & nn. 234-36.

the seventh amendment cannot be taken to prohibit the legislature from delegating its policymaking role to judges rather than juries, or to prohibit judges from reserving to themselves certain issues to decide as matters of "law."

In conclusion, given the way *Byrd* is commonly described, the Court appears to have reached the wrong result for the wrong reasons. *Byrd* is commonly understood as a case in which the seventh amendment "applied" and, yet, in which the seventh amendment had to be balanced against the state interests underlying a state rule to the contrary.[116] That is wrong on both grounds. No valid and pertinent federal rule need ever be balanced against state rules to the contrary; federal rules, once found valid and pertinent, are always supreme.[117] Nor was the particular issue in *Byrd* one that the seventh amendment — or any other federal rule, for that matter[118] — required to be left to a jury. Since the issue involved the formulation of policy, and since the state legislature had already formulated the policy (or, more accurately, since the state's highest authority had

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116. *See* authorities cited in Redish & Phillips, *supra* note 13, at 364-66. *See also* Leathers, *supra* note 109, at 797 (describing the intent of the Rules of Decision Act as a directive to the judiciary to weigh federal interests against state interests).

117. *See* text at notes 30-34 *supra*. *See also* Ely, *supra* note 18, at 717 n.130; Redish & Phillips, *supra* note 13, at 386-87. To say that balancing is inappropriate *following* a finding of validity and pertinence, however, does not mean that balancing is inappropriate *in the course* of ascertaining validity and pertinence. On the contrary, legal rules almost always operate in areas of conflicting values and policies, and almost always reflect a preference for one or more values over others. (When only one value or policy is present, rules are unnecessary: We do not need rules against the selling of human flesh for human consumption.) Consequently, since every interesting rule reflects a preference or "balance" of one set of values over another, one must almost always engage in "balancing" to ascertain the validity and pertinence of rules. For illustrations of such balancing in ascertaining the validity of a federal common law of procedure in nondiversity cases, see text at notes 201-22 *infra*.

118. If *Byrd* is not based on the seventh amendment, it must be a rule of federal common law because it has no apparent source in any statute. As an alleged rule of federal common law, however, *Byrd* raises two problems. First, it is not clear why, if federal policies are indeed sufficient to support a rule of federal common law, they are insufficient to support a comparable constitutional rule. This, after all, is not an area in which the policy underlying the common law rule is different from, or less central to, or more extreme than, the policy that supposedly informs the constitutional guarantee. The policy in *Byrd* purports to derive from the same kinds of central notions regarding trial by jury that inform the seventh amendment. Nor is that an area of lawmaking in which the federal courts ordinarily defer to Congress and, hence, prefer to proceed by way of nonfinal federal common law rather than by final constitutional interpretation. The federal law governing the distribution of functions between judge and jury is the kind of area in which, if anything, Congress is likely to defer to the courts. Hence, *Byrd* cannot be explained as an effort by the Court to create nonfinal law in an area in which the Court believes it should defer to Congress's greater expertise.

Second, as a rule of federal common law, *Byrd* is no more valid than a comparable constitutional rule: the very factors suggesting that the federal government has no constitutional interest in regulating the way a state allocates policymaking between judge and jury also suggest that there is no such residual "federal policy" sufficient to support a common law rule. *See* Comment, *The Use of Government Judgment in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial,* 43 U. CHI. L. REV. 338, 373 (1976).

determined that the legislature had left it to the courts to interpret its policy), nothing remained for the seventh amendment to allocate to the jury. Hence, the Court should have held that the seventh amendment, though valid and otherwise supreme, was simply not pertinent to the issue, and that given the absence of a pertinent federal rule, state law be applied as the residual rule under the Rules of Decision Act.

Thus, *Byrd* was the simplest of all *Erie* cases, because the federal rule, if pertinent, would have had to govern. The real problem in *Byrd* was not to choose between federal law and state law, but to construe the federal rule itself. In that respect, *Byrd* was no different from an ordinary seventh amendment case, the only twist being that when a court finds the seventh amendment impertinent in a case like *Byrd*, it responds by applying state law to the issue at hand. Indeed in the last analysis, this is probably the most significant thing that can be said about *Byrd*, because the same is true of every *Erie* case: *Erie* cases are no different from (or more difficult than) any case that requires one to determine whether a federal rule is pertinent or valid; the only twist is that if one finds in an *Erie* case that the federal rule is impertinent or invalid, one responds by applying state law.

B. *Statutory Rules*

The analysis of federal statutes in diversity cases is more complex than the analysis of federal constitutional rules because federal statutes must be examined for validity as well as for pertinence. The issue of pertinence is similar for statutory provisions and constitutional provisions: In each case, one must ascertain whether the drafters of the provision intended that it govern the issue at hand. The issue of validity, however, is rather different. Constitutional rules are always valid because, by definition, no superior norms exist to invalidate them. Statutes, on the other hand, are inferior to constitutional norms and are valid if — and only if — they conform to constitutional norms. Thus, federal statutes are invalid unless enacted pursuant to constitutionally prescribed legislative standards.

Once the pertinence and validity of federal statutes are resolved, the analysis proceeds as before. If the federal court finds the statute both pertinent and valid, the statute must govern. On the other hand, if the court finds the statute either impertinent or invalid, the statute cannot govern. In that event, if the federal court is to decide the case, state law comes into play in one of two ways, depending upon whether the statute is impertinent or invalid. If the statute is invalid — that is, if the statute exceeds the enumerated powers of the

federal government — then state law must govern, because it is the only other law the federal courts can lawfully choose under the tenth amendment. If the statute is merely impertinent, state law is assumed to apply, because it is the law that Congress would presumably wish to choose in that event.

Prima Paint Corp. v. Flood & Conklin Manufacturing Co.[119] illustrates the foregoing approach. The plaintiff, Prima Paint, filed suit in a federal court in diversity seeking to rescind a commercial contract. The defendant, relying upon an explicit arbitration clause in the contract, asked the federal court to stay its proceedings pending submission of the underlying dispute to arbitration; the defendant based its motion on section 3 of the United States Arbitration Act of 1925, which requires a federal court to stay its proceedings regarding any issue that the parties have explicitly agreed to arbitrate.[120] The plaintiff opposed the motion, arguing, first, that the Arbitration Act did not cover the contractual dispute and, second, that even if it did, the Act could not be invoked in a diversity suit if a state rule rendered the dispute nonarbitrable. In the Court's words:

> The point is made [by the plaintiff] that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts are bound in diversity cases to follow state rules of decision in matters which are "substantive" rather than "procedural," or where the matter is "outcome determinative."[121]

The Court approached this *Erie* problem in precisely the correct manner. It did not talk about "choosing" between federal law and state law, or about deciding whether federal law ought to be "applied," or about "balancing" federal law against state law. Instead, the Court started and ended by asking whether the Arbitration Act was pertinent and valid federal law. Finding that Congress intended the Federal Arbitration Act to cover the contractual dispute at issue and that the Act, so construed, was valid, the Court correctly held that the Act must be applied. Given the existence of valid and pertinent federal law, the matter of state law was entirely irrelevant.[122]

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119. 388 U.S. 395 (1967).

120. 43 Stat. 883 (codified at 9 U.S.C. § 3 (1976)).

121. 388 U.S. at 404-05.

122. In determining whether a federal statute is pertinent, the court may wish to consider the existence and strength of the policies underlying a contrary state rule, and the effects of any disparity that would result from construing the federal statute to create a rule independent of state law. *See, e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 202-03 (1956) (holding that in light of a strong state rule to the contrary and the disadvantages of a disparity between the state rule and any federal rule, the Arbitration Act of 1925 ought to be construed as not per-

It is instructive to review the Court's reasoning in *Prima Paint*. The Court first analyzed the statute for pertinence, concluding that Congress intended (a) that contractual disputes of the kind at hand be referred to arbitration, (b) that federal courts stay the proceedings pending arbitration, and (c) that such stays issue in all cases within the jurisdiction of the federal courts, including cases based on diversity of citizenship. "In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the [federal] courts."[123]

Next, and perhaps more important, the Court held that the Arbitration Act, so construed, was valid because Congress enacted the Act pursuant to its constitutionally enumerated powers. Two such powers were mentioned — Congress's article III power to create and regulate the jurisdiction and procedures of the lower federal courts, and Congress's article I power to regulate commerce among the states. The Court found it unnecessary to decide whether Congress could have enacted the Arbitration Act pursuant to article III, because the Court concluded that Congress had in fact acted pursuant to its article I powers over interstate commerce:

> The question in this case . . . is not whether Congress [pursuant to article III] may fashion federal substantive rules to govern questions arising in simple diversity cases. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundation of "control over interstate commerce and over admiralty."[124]

In other words, the Arbitration Act was pertinent in *Prima Paint* because Congress intended that it apply, and the Act was valid because Congress had the constitutional power to enforce its intention.

It is unfortunate that the Court in *Prima Paint* refrained from deciding whether the Arbitration Act could have been enacted under article III. Some of the most interesting federal statutes in diversity — such as the Declaratory Judgment Act and the Interpleader Act — are manifestly based on article III and are valid only if authorized pursuant to Congress's article III power over the jurisdiction and

taining to diversity actions). Nonetheless, it remains true that once a valid statute *is* found to be pertinent, the axiom of supremacy renders state law irrelevant.

123. 388 U.S. at 404.

124. 388 U.S. at 405.

procedures of the federal courts.[125] One wishes, therefore, that the Court had said something about the scope of article III as a source of legislative power in diversity cases.

It is still more unfortunate that the Court in *Prima Paint* referred to the constitutional doubts expressed in dictum in *Bernhardt v. Polygraphic Co.*,[126] because *Bernhardt* misconceived the constitutional issue in *Erie* cases. The *Bernhardt* Court implied that an otherwise constitutional federal statute might nonetheless become unconstitutional if applied in a diversity case to "invade the field" of "local law."[127] As Professor John Hart Ely brilliantly demonstrates, it is a fundamental mistake to think that the constitutional authority of the federal government is limited or demarcated by rigid "enclaves" of "local" law.[128] The only significant constitutional question in any *Erie* case is whether the pertinent federal rule falls within one of Congress's enumerated powers.[129] Moreover, in construing Congress's article III powers, one should proceed in the same way Chief Justice Marshall approached Congress's enumerated powers to borrow money and regulate commerce in *McCulloch v. Maryland*[130]—in the same way the Court now approaches all questions of enumerated powers. One should construe Congress's power over the jurisdiction (and thus the procedures) of the federal courts generously, deferring

125. The enumerated power of Congress to regulate the jurisdiction and procedures of the federal courts is found in two places in the Constitution: in art. I, § 8, cl. 9 ("Congress shall have the power . . . [t]o constitute tribunals inferior to the Supreme Court"); and in art. III, § 1 ("The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish"). For purposes of convenience, we shall refer to this enumerated power as Congress's *article III* power. It should be remembered, however, that this article III power over the jurisdiction and procedures of the federal courts is also found in article I and, like Congress's other enumerated powers, it is supplemented by Congress's power "to make all laws which shall be necessary and proper for carrying [it] into execution," art. I, § 8, cl. 18. *See also* text at note 133 *infra*. On the validity of the Interpleader Act, 28 U.S.C. § 1335 (1976), see Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1713, at 435 n.93 (1972). On the validity of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), *compare* Farmers Alliance Mut. Ins. Co. v. Jones, 570 F.2d 1384, 1386 (10th Cir. 1978), *with* Allstate Ins. Co. v. Charneski, 286 F.2d 238, 240, 244 (7th Cir. 1960). If the foregoing statutes are invoked in actions involving commerce, they might be validated as exercises of Congress's article I power to regulate commerce among the several states; but theoretically, at least, some cases will always remain that do not involve interstate commerce and in which the statutes can be validated, if at all, only under Congress's article III power.

126. 350 U.S. 198 (1967).

127. 350 U.S. at 202. In addition, see 350 U.S. at 208 (Frankfurter, J., concurring).

128. Ely, *supra* note 18, at 701-02, 705. *But see* Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 67 CORNELL L.Q. 377, 381, 391 (1967); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 704 n.111 (1976).

129. *See* Ely, *supra* note 18, at 701-02.

130. 17 U.S. (4 Wheat.) 316 (1819).

to Congress's expressed judgment that it possesses such power.[131] In short, one should sustain the validity of federal statutes in diversity whenever they are "arguably procedural."[132] Since the Arbitration Act was designed to render the resolution of commercial disputes simpler, cheaper, faster, and more accurate — all "procedural" purposes — it clearly could have been sustained under the combination of Congress's article III power to regulate the procedures of the federal courts and its article I power to enact "necessary and proper" implementing legislation.[133]

One issue still remains to be considered. What would have happened in *Prima Paint* if the Court had found the Arbitration Act impertinent or invalid? In other words, what happens in a diversity case if no valid federal law is pertinent? The simple answer is that the district court then applies state law, because the Rules of Decision Act instructs the court to apply state law in the absence of federal law:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[134]

Despite some puzzling efforts to obfuscate its meaning, the Rules of Decision Act is disarmingly simple. It directs the federal courts to apply state law in all civil actions, except where federal law "otherwise requires or provides." And what should a court do if federal law does "otherwise provide"? Obviously, if a pertinent federal law exists, and the law is valid, the Rules of Decision Act implicitly directs the court to apply the federal law instead. To restate this as a simple instruction: *If valid and pertinent federal law exists, it shall be applied; if such federal law does not exist, state law shall be applied.*[135] Thus, the Rules of Decision Act is another reminder that the only significant *Erie* question in any civil action, including diversity suits, is whether valid and pertinent federal law exists.

Now, there is some difference of opinion regarding the basis on which state law applies under the Rules of Decision Act. Some

131. *Cf.* Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 748-49 (1963) (Congress's judgments as to its powers when it is clearly acting within its powers are entitled to greater judicial respect than are its judgments as to the limits of its powers).

132. Hanna v. Plumer, 380 U.S. 460, 476 (Harlan, J., concurring).

133. *See* Ely, *supra* note 18, at 705 & n.73. *See also* Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955), as modified in Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 351 (1960); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 447 (1958).

134. 28 U.S.C. § 1652 (1976).

135. For a discussion of *which* state law applies, see note 169 *infra*.

courts and commentators argue, for example, that in the absence of federal law, state law applies "of its own force."[136] That is not true. State law applies because Congress has chosen to apply it, the choice being explicitly reflected in the Rules of Decision Act itself. To be sure, if Congress does not wish to incorporate state law by reference, it might have to withhold jurisdiction altogether; sometimes state law is the only law that Congress can constitutionally choose. But that is very different from saying that Congress has no choice at all. Congress always has the choice between incorporating state law by reference and withholding subject matter jurisdiction altogether. To that extent, it is meaningful to say that state law applies because the federal government has decided it should apply. The federal government chooses to use state law because doing so furthers *federal* interests.

This observation — that state law applies under the Rules of Decision Act because federal law chooses to borrow it to achieve a federal purpose — can be graphically illustrated by *Woods v. Interstate Realty Co.*[137] Interstate Realty, a Tennessee corporation that had not qualified to do business in Mississippi, sued Woods in diversity in a federal district court in Mississippi. The *Erie* question was whether the district court should entertain the suit under a federal judge-made "open door" policy, or bar the suit under a Mississippi "door closing" statute that barred unqualified foreign corporations from bringing lawsuits "in any of the courts of this state."[138] Relying on federal policy concerns about fair treatment of litigants,[139] the court held that the federal open-door rule was invalid as applied. Hence, given the absence of valid federal law, the Court directed that the state statute be applied. The important point for the present, however, is the basis on which the state statute applied. Obviously, the door-closing statute could not have applied of its own force, because it did not even address the federal courts: the statute by its terms barred actions from being brought in the "courts of this state."[140]

136. *See* note 20 *supra*.

137. 337 U.S. 535 (1949).

138. MISS. CODE § 5319 (1942), *cited in* 337 U.S. at 536 n.1.

139. In brief, these policy concerns suggest that it is unfair for the character or result of litigation brought in federal court to differ from what it would be if the litigation had been brought in a state court, if the difference arises solely because of the citizenship of the parties. The source of these policy concerns is discussed in detail in text at notes 151-94 *infra*.

140. MISS. CODE § 5319 (1942), *cited in* 337 U.S. at 536 n.1. Perhaps one could construe the phrase, "courts of this state," to mean courts *in* this state, thus giving the door-closing statute a construction that would include the federal courts. But such a construction would be implausible. Why would the Mississippi legislature believe that it had the power to close the doors to federal court? It is more reasonable to assume that the legislature simply reserved judgment on the effect of the door-closing statute on federal courts, leaving it to the federal courts them-

The statute applied not because the *state* government desired it, but because the *federal* government desired it. The federal courts borrowed state law and used it as their own to further a distinctly federal policy.

To continue, others have argued that state law applies under the Rules of Decision Act because "there can be no other law."[141] Again, while that is not false, it is misleading. To see why, it is useful to distinguish between a case in which federal law is inapplicable because it is invalid, and a case in which federal law is inapplicable because it is impertinent. To say a federal statute is invalid — that is, unconstitutional — means that the federal government cannot enforce it as a rule of decision without intruding upon the powers reserved to the states. If the federal government lacks the power to enact a rule of decision, it must also lack the power to adopt a foreign rule — say an Italian rule — because by choosing to use the Italian rule as its own, it transforms the Italian rule into a federal rule. Yet it does not follow that the federal government also lacks the power to adopt state law by reference. After all, what restrains the federal government in the "Italian" case is the principle that the federal government shall not intrude upon the powers reserved to the states. That principle is not implicated if the federal government responds to its own lack of power by choosing to apply the laws of the states, because the states are the jurisdictions whose authority stands in reserve. Thus, where the federal government lacks constitutional power to choose any other law, it may still, constitutionally, choose state law as the rule of decision. By the same token, in choosing state law, it may be said to be doing so because there is no other law that it could constitutionally adopt.

The analysis is slightly different, however, with respect to valid federal law that is simply impertinent. If federal law is inapplicable solely because it is impertinent, then, as before, the Rules of Decision Act directs that state law be applied. But it would be misleading to say that state law applies because there is no other law; for Congress could redraft the federal statute to make it a pertinent law or even adopt some foreign law as its own. In other words, some law other than state law *could* supply the rule of decision. Nonetheless, given the constitutional distribution of power between the central

selves to construe the statute in light of prevailing federal policies. In that event, when the federal court in diversity adopted the door-closing statute as its own, the state statute could not be said to apply "of its own force," except in the circular sense that it had been construed to have whatever "force" the federal court wished to give it.

141. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

government and the states, it is fair to assume that the Constitution creates a *prima facie* rule in favor of state law (as opposed to the law of any foreign jurisdiction); that is, having refrained from creating a rule of decision, and having failed to make an explicit choice in favor of any foreign law, Congress can be constitutionally presumed to have intended to choose state law.[142]

To summarize, it is true that when federal law is inapplicable, state law applies under the Rules of Decision Act because "there is no other law." But it is important to identify the reason why federal law is inapplicable. If a federal statute is inapplicable because it is invalid, state law applies because Congress could not constitutionally choose any other law; if federal law is inapplicable solely because it is not pertinent, state law applies because Congress will not be assumed to have chosen any other law. In each case, however, state law applies only because Congress has made an anterior choice to vest jurisdiction in the lower federal courts. State law applies because Congress has weighed one federal interest against another and concluded that state law should be applied: Congress has weighed the policies in favor of vesting federal jurisdiction under state rules of decision against the policies in favor of either withholding federal jurisdiction or creating an independent federal rule, and it has concluded that the former predominates. In that sense, state law applies because — and only because — Congress has concluded that its application serves a predominant federal interest.

C. *Federal Rules of Civil Procedure*

Federal rules of civil procedure should be analyzed in the same way as federal statutes, except the rules must satisfy an additional standard of validity. The pertinence analysis is precisely the same for rules as it is for other laws. The court must determine whether the framers of a rule intended that it govern the issue at hand; if so (and if the rule is valid), the rule applies; if not, state law applies. In so construing a rule, a court applies the same canons of construction it would apply to a federal statute.[143]

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142. Naturally, this presumption that American courts are expected to apply a law that was drafted by some American legislature (state or federal) is very weak and may be overridden by any significant federal policy to the contrary. *See* note 207 *infra*.

143. Although the rules of civil procedure are generally assumed to apply to the same extent in diversity cases as in nondiversity cases, it would not be irrational to conclude that certain rules were not intended to apply in diversity cases; for example, if a certain rule is recognized to have an outcome-determinative effect whenever applied, a court might reasonably conclude that the framers of the rules did not intend it to apply in diversity cases. *See, e.g.*, FED. R. EVID. 501, which explicitly provides that federal rules of privilege not be applied in diversity cases.

The first step in analyzing a rule's validity is also the same. A rule of civil procedure, like a statute, is valid only if it is constitutional. To be constitutional, a rule must emanate from a constitutionally enumerated power of the federal government. The most obvious basis for the rules of civil procedure is Congress's article III authority to regulate the jurisdiction and procedures of the federal courts. Although other enumerated powers may be relevant, too, the article III power suffices to sustain the rules, because the rules are all "arguably procedural."[144]

In addition to the constitutional test, however, the rules of civil procedure must satisfy still another standard of validity. Since the rules draw their authority from the Rules Enabling Act,[145] they may be invalid if they contravene the norms established in that statute. In that respect, rules differ from federal statutes. A statute can be invalidated only by a constitutional provision (or by a superseding statute); as a legal norm, it is subordinate only to the Constitution. The rules of civil procedure, on the other hand, are legal norms that are subordinate to both the Constitution and their enabling legislation — the Rules Enabling Act.

The Rules Enabling Act[146] contains two statutory standards for rules adopted by its procedures: The rules must relate to the "practice and procedure" of the federal courts, and they must not abridge "substantive rights" as defined by applicable state law.[147] No one

144. *See* notes 132-33 *supra* and accompanying text. Although Justice Harlan coined the phrase "arguably procedural" as a somewhat sarcastic reference to what he understood to be the *Hanna* Court's test of statutory validity under the Rules Enabling Act, Professor Ely revives and embraces the term as a *constitutional* test of the validity of rules of civil procedure. *See* Ely, *supra* note 18, at 698.

145. 28 U.S.C. § 2072 (1976).

146. The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein . . . and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

28 U.S.C. § 2072 (1976).

147. In speaking of "substantive rights," the Rules Enabling Act must refer to rights grounded in state law, because the Act itself establishes no identifiable rights. Yet the Rules Enabling Act does not make explicit *which* of the many potentially relevant states supplies the law that defines these rights, or even *how* a court should go about identifying that state. To answer this choice-of-law question implicit in the Rules Enabling Act, one must determine, first, the *source* of the choice-of-law rule and, then, the *content* of that rule.

The *source* of the choice-of-law rule must be federal. If the court looked to a state for its choice-of-law standard, it would beg the very issue in dispute: *which* state supplies relevant legal standards? *Cf.* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("whether the water of an interstate stream must be apportioned between the two States is a question . . . upon which neither the statutes nor the decisions of either State can be

seriously questions the meaning of "practice and procedure"; it refers to the way legal disputes are resolved in court — to the speed, accuracy, economy, and fairness with which disputes are adjudicated. The real debate centers upon the statutory meaning of "substantive rights." At least four meanings are plausible: A rule of civil procedure could abridge some conception of substantive rights if (1) it intrudes upon the powers constitutionally reserved to the states; (2) it influences the "outcome" of a case by causing the case to come out differently in federal court than if it were tried in state court under

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conclusive"). *See also* note 169 *infra*, discussing an analogous problem in construing the Rules of Decision Act.

The *content* of this federal choice-of-law standard must depend on the Rules Enabling Act's purposes in looking to state law in the first place. Professor Ely assumes that the Act incorporates the choice-of-law rules of the state in which the federal district court sits, presumably because any other choice-of-law standard would produce a different outcome in federal court than would result in the state courts of the same forum. *See* Ely, *supra* note 18, at 733, 734 n.218, 736 n.222. Yet his argument assumes that the reference in the Rules Enabling Act to "substantive rights" is designed to further an interest in similar outcomes, an assumption whose weakness can be revealed if we consider an example from outside diversity jurisdiction, recognizing that the Rules Enabling Act speaks to *all* cases in federal court.

Assume that Joe, who resides in Maryland, brings a *patent* suit in a federal court in Maryland against Elliott, who lives in Pennsylvania. During the trial, Joe seeks to compel Elliott's wife to testify about conversations she had had with her husband in Pennsylvania. Assume, too, that while both states recognize a privilege for communications between husband and wife, Maryland recognizes such a privilege only if the communication is between residents of the state or if the communication itself took place within the state. Assume, further, that Maryland's choice-of-law rules direct its courts to apply Maryland rules of evidence and privilege to actions brought within Maryland courts. Professor Ely's rule would require the federal court in the patent suit to deny Elliott the benefit of the privilege — the court would have to use Maryland's choice-of-law rules, which direct the court to apply Maryland's own privilege law, which in turn denies Elliott the benefit of the privilege. Yet there is no reason to believe that any purpose of the Rules Enabling Act would be served by such a result. The only conceivable reason for looking to the whole law of Maryland, including its conflicts rule, would be to achieve an outcome similar to the outcome that a Maryland state court would have reached. Yet that is impossible in a patent suit, because such suits can never be brought in state court.

To decide which state law applies, one must first determine the reasons why the Rules Enabling Act looks to state law at all. *Cf.* Oil Workers v. Mobil Oil Corp., 426 U.S. 407 (1976) (federal statute, which permits union shop agreements except where such agreements are prohibited by state law, but does not specify *which* state law controls, requires federal court to look to the state of the situs of employment because doing so furthers the purposes for which Congress deferred to state law). If the reason is to further the purposes of state-created rules governing primary conduct outside the courtroom, the federal court in this example should look to the way Pennsylvania defines its residents' substantive rights. *See* Berger, *Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Laws Rule*, 42 BROOKLYN L. REV. 417, 432-34, 448-56 (1976); Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 539-43 (1956).

Our hypothetical case involves litigation within the exclusive jurisdiction of the federal courts, but there is no obvious reason for believing that the Rules Enabling Act — and its reference to "substantive rights" — means anything different in diversity cases from what it means in federal question cases. Otherwise, one would have to read at least two separate choice-of-law standards into the Rules Enabling Act: one for diversity cases, and one for all other cases. Indeed, the only reason Professor Ely gives for looking to the whole law of the forum in diversity cases is to achieve similar outcomes; yet he himself makes a persuasive case elsewhere for the proposition that the Rules Enabling Act is *not* designed to achieve similar outcomes. *See* Ely, *supra* note 18, at 721-27.

state rules;[148] (3) it intrudes upon state-created privileges that the state considers "fundamental"; or (4) it interferes with state-created rules designed to regulate conduct and personal relationships outside the courtroom.

The first three of these possible constructions all present difficulties. The first is superfluous, because a rule of civil procedure will not intrude upon the powers constitutionally reserved to the states unless it exceeds the enumerated powers of the central government; yet if a rule exceeds the powers of the central government, it is unconstitutional and, thus, already invalid for that reason alone. It need not be further prohibited by the Rules Enabling Act. The second construction is implausible, because it would render many of the existing rules of civil procedure invalid as applied in diversity cases,[149] and because it would mean that rules adopted pursuant to the Rules Enabling Act could be no more expansive in diversity cases than the judge-made rules that can now be adopted without reference to the Rules Enabling Act.[150] The third construction is at best incomplete, because the term "fundamental" is not self-defining. One cannot tell whether a state rule is fundamental unless one possesses an anterior standard for defining what "fundamental" means; yet the third alternative does not supply such a standard, and none come to mind beyond those already mentioned.[151]

Professor Ely makes a persuasive case for the fourth interpretation of "substantive rights."[152] His construction gives the Rules Enabling Act a meaning that is not superfluous and that does not confine the rules of civil procedure to the restrictive standards governing judge-made rules of procedure. It also appears to reflect the Supreme Court's reasoning in *Hanna v. Plumer*,[153] the Court's most recent and thorough inquiry into the meaning of the Rules Enabling Act. Thus, to adopt Professor Ely's construction, a rule of civil pro-

148. This is the test applied to measure the validity of judge-made rules of procedure in diversity cases. *See* text at notes 191-99 *infra*,

149. *See* Ely, *supra* note 18, at 721 & n.156.

150. *See* text at notes 191-99 *infra*.

151. The Supreme Court has indicated that the test of "substantive rights" does not turn on how *important* the right may seem to the court. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 11, 14 (1941). *Cf.* Herron v. Southern Pac. Co., 283 U.S. 91, 94 (1931) (the fact that a state rule is embodied in the state constitution is immaterial to the applicability of a contrary federal rule in a diversity suit).

152. Ely, *supra* note 18, at 725-27. In the last analysis, Professor Ely seems to conclude that his fourth test of "substance" includes everything that is not strictly "procedural." *See id.* at 726. For Professor Ely's definition of "procedure," see *id.* at 724-25. In short, while "procedure" has a fairly restricted and definite meaning, "substance" is residual and includes everything that is not otherwise identified as procedural.

153. 380 U.S. 460 (1965).

cedure is valid under the Rules Enabling Act if it relates to the way disputes are resolved in court and yet does not also regulate the conduct and relationships of persons outside the courtroom.[154] In short, a rule of civil procedure is valid only if it is *solely* a rule of "practice and procedure."

Consider rule 15(c). Rule 15(c) provides that, for purposes of statutes of limitation, amended pleadings that bring in new parties shall "relate back" in time to the date of the original pleading. To determine whether rule 15(c) applies in diversity cases in the face of state rules to the contrary, one must examine the rule for pertinence and validity. The inquiry into pertinence is relatively easy, because rule 15(c) was presumably intended to govern in diversity cases as well as in other federal cases.[155] The inquiry into validity is as easy in some ways, but more difficult in others. Rule 15(c) is easily valid by constitutional standards, because it is procedural — or arguably procedural — within the meaning of Congress's article III power over the jurisdiction and procedure of the federal courts. The more difficult question is whether it is also substantive and, therefore, invalid by the statutory standards of the Rules Enabling Act. On the one hand, rule 15(c) appears to abridge a substantive right because it interferes with a state statute designed "to permit potential defendants to breathe easy after the passage of the [limitations] period,"[156] a purpose unrelated to the way disputes are judicially adjudicated. On the other hand, the rule is carefully designed to safeguard the substantive interests of defendants: It applies only if the new parties actually receive notice during the limitations period, only if the new parties would not be prejudiced by having to defend on the merits, and only if the new parties knew that, but for a mistake concerning the identity of the proper party, they would have been served during

154. Professor Ely's construction of the Rules Enabling Act finds further support in the 1975 statute authorizing the Supreme Court to prescribe amendments to the Federal Rules of Evidence. Act of July 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1948, as amended by Act of Dec. 12, 1975, Pub. L. No. 94-149, § 2, 89 Stat. 806 (now codified at 28 U.S.C. § 2066 (1976)). The statute empowers the Supreme Court to amend the federal rules of evidence, but provides that amendments "creating, abolishing, or modifying a privilege," shall not take effect until approved by an act of Congress. Since rules of privilege are a classic example of rules that govern conduct and relationships of persons outside the courtroom, *see* Ely, *supra* note 18, at 738-40, the statute lends support to Professor Ely's argument that Congress does not wish the federal courts to use their power under rules enabling acts to enact rules that interfere with rights under state law governing conduct or relationships outside the courtroom. *See* H.R. REP. NO. 650, 93d Cong., 1st Sess. 28-29, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7097-98 (separate statement of Rep. Elizabeth Holtzman) ("[d]ecisions regarding privileges necessarily entail policy considerations because, unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom").

155. *See* note 143 *supra*.

156. *See* Ely, *supra* note 18, at 731.

the limitations period. For all these reasons, the effect of rule 15(c) on substantive rights is slight.

The validity of rule 15(c), therefore, turns upon the intensity of the statutory prohibition. Professor Ely suggests that the "substantive" prohibition is easily violated — that even the slightest intrusion upon substantive rights renders a rule invalid under the Act.[157] However, since almost any rule can be described as arguably furthering some substantive value,[158] Professor Ely's construction threatens to invalidate many, if not all, the rules of civil procedure. A more reasonable approach presumes that in enacting the Rules Enabling Act, Congress intended to delegate sufficient power to sustain comprehensive rules of general applicability. Thus, if a rule of civil procedure survives the multi-step process of being drafted by an Advisory Committee, approved by the Judicial Conference, approved by the Supreme Court, and not vetoed by Congress, it should be presumed not to violate substantive rights, particularly if the substantive effect of the rule is apparent on its face.[159] By that construction, rule 15(c) should be deemed valid because, while it intrudes to some extent upon substantive rights under the state law, the intrusion is too slight to violate the statutory presumption of validity.

D. *Common Law Rules*

The most intriguing *Erie* questions in diversity cases involve rules of federal common law — "judge-made" rules — because they implicate still another standard of validity. The pertinence analysis of common law rules is identical to that of statutes: A judge-made rule is pertinent if its purposes are served by applying it to the issue at hand. The question of validity, however, is more complicated, because the judge-made rules must satisfy not only constitutional and statutory standards, but also the separate standards governing the validity of federal common law. As we shall see, this means that, generally, federal courts in diversity should neither create nor apply judge-made rules that are "outcome-determinative."

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157. *See id.* at 724 n.171, 737-38.

158. *See* Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 751-52 (1974) (discovering a substantive interest in a rule that Professor Ely deems entirely procedural); Ely, *The Necklace*, 87 HARV. L. REV. 753-59 (1974) (finding a substantive policy in a rule that Professor Chayes deems entirely procedural).

159. For the deference owed the rules regarding whether they violate "substantive rights," see Hanna v. Plumer, 380 U.S. 460, 471-72 (1965); C. WRIGHT, FEDERAL COURTS 276 (3d ed. 1976). This deference is particularly strong if the extent to which the rule violates substance is apparent on the face of the rule and, thus, something the framers presumably took into account. *See, e.g.*, FED. R. CIV. P. 15(c), which is designed on its face to toll the statute of limitations.

To illustrate, consider *Guaranty Trust Co. v. York*,[160] which raised the question of whether a federal court in diversity ought to measure the timeliness of an equitable action by the federal rule of laches or by the relevant state statute of limitations. The answer turns on whether a judge-made rule of laches is valid and pertinent if applied to allow a diversity action that would be barred in state court by a state statute of limitations. The laches rule is pertinent, because its purposes would be served by applying it in diversity. The issue of validity is more difficult because even without reference to the distinct standards governing the formation of federal common law, the rule must be consistent with both the Constitution and existing federal statutes.

The constitutional question in *York* is easily resolved because the laches rule is indisputably "procedural."[161] The statutory question is more elaborate because statutes are more numerous and more detailed than constitutional provisions. To determine whether a common law rule is statutorily valid, one must scan the entire corpus of federal legislation to see whether the rule conflicts with any congressional enactment presently in force. The only statute arguably relevant to the rule of laches in *York* is the Rules Enabling Act. This may come as a surprise because the Rules Enabling Act purports to refer only to officially adopted rules of civil procedure, not to judge-made rules of procedure. Yet the statutory prohibition on rules that abridge "substantive rights" must be deemed to apply to judge-made rules, too; otherwise, judges could do through common law adjudication what they cannot do through the carefully circumscribed and safeguarded mechanism used to create rules of civil procedure.[162] Thus, to be valid, the laches rule of *York* must not abridge "substantive rights" within the meaning of the Rules Enabling Act. Assuming arguendo that the laches rule satisfies that test, it is statutorily valid. The only remaining question is whether the rule passes muster under the independent standards governing the validity of common law rules.

Before considering that final question, however, we should turn back for a moment to the Rules of Decision Act, because the Rules of Decision Act is sometimes mentioned as a statutory bar to the adoption of common law rules of procedure in diversity cases. This view is most forcefully expressed by Professor Ely. He argues that the principal — if not sole — statute governing the validity of judge-

160. 326 U.S. 99 (1945).

161. *See* Ely, *supra* note 18, at 726-27 & n.181.

162. *See id.* at 716 n.126.

made rules in diversity cases is the Rules of Decision Act, and that the statutory test under the Act is whether the judge-made rule is "outcome-determinative."[163] Thus, Professor Ely interprets the Rules of Decision Act as if it said the following:

> If a valid and pertinent federal law exists, it shall be applied in the courts of the United States; if no such federal law exists, state law shall be applied; *provided, however, that no federal common law rule of procedure shall be deemed valid in diversity cases if it would tend to cause the case to be decided differently in federal court than it would be decided in state court.*

This view of the Rules of Decision Act seems misconceived. It finds no support in either the language of the statute or the jurisprudence of *Erie*. Moreover, by distracting attention from the true source of the principle that diversity cases should come out no differently in federal court than they would in state courts,[164] it gives excessive weight to that principle.

To start with the obvious, Professor Ely's view finds no support in the words of the Rules of Decision Act. The Act is not confined by its terms to diversity cases, nor even to cases in which state law supplies the claim for relief.[165] It makes no special provision for di-

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163. *Id.* at 698, 717-18. The Act reads:

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

28 U.S.C. § 1652 (1976).

164. The quest for that "true source" is pursued in the text from here through note 190 *infra*.

165. Ironically, the precise meaning of the term "rule of decision" is still unclear. Although the term is used today to refer to any "rule" by which issues in a case are decided, *see, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949), the framers of the Judiciary Act of 1789 probably intended the term to refer only to cause-of-action-creating "rules" in contrast to procedural rules. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 24-26 (1825) (Marshall, C.J.). The framers of the Judiciary Act, having enacted § 34, immediately enacted a Process Act that was nearly identical to § 34, except that instead of directing the federal courts to look to state law for the "rule of decision," the Process Act directed them to look to state law for the rules governing "modes of process." An Act to regulate Processes in the Courts of the United States, 1 Stat. 93 (1789). For a description of the Process Act and its successors, including the famous Conformity Act of 1872, see HART & WECHSLER, *supra* note 2, at 663-76. Hence, if the framers of the Judiciary Act of 1789 had understood "rule of decision" to include matters of procedure, they never would have had to adopt the Process Act. *See* 2 W. CROSSKEY, *supra* note 38, at 820-21.

Nonetheless, whatever its original meaning, today we can reasonably construe "rule of decision" to include *any* rule by which an issue in a case is resolved. *See* Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 679-90 (1976); Comment, *Rules of Decision in Nondiversity Cases*, 69 YALE L.J. 1428, 1428 n.6 (1960). The reason for adopting a broad construction today is simple: The Process Acts and their successor, the Conformity Act of 1872, ch. 255, 17 Stat. 196, have now been repealed. *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992. *See also* Ely, *supra* note 17, at 736 n.223. Consequently, if the Rules of Decision Act does not instruct the federal courts to apply a state's law of procedure (in the absence of a pertinent and valid federal rule of procedure), then no statute does. In that event, just as the federal courts once had to act *as if* the Rules of

versity cases. Nor, indeed, is there any reason to believe that the framers drafted the Rules of Decision Act with diversity cases exclusively in mind.[166] Rather, the Act applies by its terms to all "civil actions,"[167] including, presumably, cases in admiralty, cases involv-

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Decision Act applied in equity as well as in "cases at common law," *see* Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945), so, too, they would have to act *as if* the Rules of Decision Act applied to procedural rules as well as substantive rules, because in the last analysis, the Rules of Decision Act is merely declaratory of the law that would exist in its absence. *See* note 186 *infra*. This does not mean that the courts would be falsifying the original intent underlying the Rules of Decision Act, or changing the meaning that the framers originally attributed to it; it merely means that they would construe the repealer of the Conformity Act of 1872 as an implicit amendment of the Rules of Decision Act, modifying "rules of decision" to encompass matters of procedure.

166. The Rules of Decision Act was part and parcel of the Judiciary Act of 1789, which vested the federal courts with jurisdiction not only in diversity suits, but also in criminal actions by the United States, admiralty and maritime suits, forfeiture suits by the United States, suits by aliens under treaties of the United States, suits at common law by the United States, suits against consuls and ambassadors, and suits between a state and citizens of another state. 1 Stat. 73, 76-81. Although Congress did not vest the federal courts with *general* federal question jurisdiction until 1875, it did include within the Judiciary Act of 1789 jurisdiction over certain specialized federal questions. *See* HART & WECHSLER, *supra* note 2, at 844-50. Insofar as any (or all) of the foregoing classes of cases are cases "at common law" within the meaning of § 34 of the Judiciary Act of 1789, the Rules of Decision Act governs their treatment. For nondiversity cases in which the Rules of Decision Act has been deemed applicable, see Campbell v. Haverhill, 155 U.S. 610, 614 (1895), and authorities cited in Hill, *supra* note 88, at 1034; Note, *Clearfield: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991, 994-95 & n.24 (1953); Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1431-33 (1960); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087 (1964).

167. The Rules of Decision Act, which was once limited to "trials at common law," 1 Stat. 92 (1789), was amended in 1948 to apply to all "civil actions." Act of June 25, 1948, ch. 646, 62 Stat. 944 (now codified at 28 U.S.C. § 1652 (1976)). This change obviously has nothing to do with whether the Rules of Decision Act applies in nondiversity cases. It merely means that while the Act formerly applied in all "common law" actions (diversity as well as nondiversity), it now applies in all "civil" actions (diversity as well as nondiversity).

Interestingly, the 1948 amendment to the Rules of Decision Act may have narrowed the Act in one respect, rather than broadened it: By specifying that the Act applies only in "civil" actions, the 1948 amendment prevents the Act from applying in criminal proceedings. This may not be so serious today, when explicit independent federal rules of decision govern both the substance and the procedure in federal criminal proceedings; but it is quite possible, historically, that the original Rules of Decision Act was intended to apply in all trials in courts of "common law," including criminal proceedings. The result would hardly be startling. The federal courts would apply federal law whenever valid and pertinent federal law existed (whether in the form of a constitutional rule, statute, treaty provision, or rule of federal common law); otherwise, they would apply state law. Some later authority supports the proposition that the Rules of Decision Act was not intended to apply in federal criminal proceedings. *See* United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851) (federal courts should be allowed to apply federal rules of procedure in federal criminal cases and, therefore, the Rules of Decision Act cannot be deemed to apply to criminal proceedings). But cases like *Reid* are based on the peculiar assumption that the Rules of Decision Act prohibits federal courts from fashioning federal common law in areas in which an independent federal rule of decision would be valid and appropriate. If the Rules of Decision Act is not given that construction, but rather is understood to direct the application of state law only when no valid and pertinent federal rule of *any* kind exists — including a rule of federal common law — then the Rules of Decision Act can plausibly apply in federal criminal proceedings while still permitting the federal courts to fashion independent federal rules of decision whenever they are appropriate. *See* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1097

ing ambassadors and consuls, suits between a state and a citizen of another state, suits by the United States, and certain suits arising under the treaties and laws of the United States.[168] It quite simply states that if federal law exists, federal law shall be applied; otherwise, the appropriate state law[169] shall be applied.

Nor does the Rules of Decision Act contain any words of limita-

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(1964). As to whether the Rules of Decision Act should be construed to include federal law in the form of "federal common law," see text at notes 171-80 *infra*.

168. *See* note 166 *supra*. Again, this is not to say that the Rules of Decision Act requires the federal courts to apply state law across the board in all such cases. It merely means that *unless* a valid and pertinent federal rule exists in such cases (whether in the form of a constitutional rule, a statute, a treaty provision, or a rule of federal common law), the federal court shall apply the appropriate state rule. While some authority (especially in admiralty cases) holds that the Rules of Decision Act does not apply in such cases (*see, e.g.*, Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 264 (1950); *but see In re* Taylor, 82 F. Supp. 268, 273 (E.D. Mo. 1949)), these authorities, like United States v. Reid, 53 U.S. (12 How.) 361 (1851), discussed in note 167 *supra*, assume that the Rules of Decision Act requires the federal courts to apply state law even where otherwise valid and pertinent federal common law exists. It is more reasonable to assume that the Rules of Decision Act is entirely consistent with the application of federal common law in admiralty cases, cases involving ambassadors, and in suits between a citizen and a state, etc., and that it only requires a federal court to apply state law when *no* such federal law exists. Based on the latter construction, the Rules of Decision Act presents no threat to the development of federal common law in nondiversity cases. *See* note 167 *supra*.

169. Once a federal court concludes that no valid and pertinent federal rule governs an issue, and that the Rules of Decision Act directs it to apply state law, it must then decide *which* state's law to apply. *See* Mishkin, *supra* note 9, at 806-08. This has led some commentators to conclude that the Rules of Decision Act itself contains the standards governing that choice-of-law question. *See* Ely, *supra* note 18, at 714-15 n.125. For the reasons we develop in this Section of the text, such a position cannot be coherently maintained. Rather, the Rules of Decision Act incorporates whatever standards otherwise exist for determining which law applies. *Cf.* note 147 *supra* (discussing which state's laws determine "substantive rights" under the Rules Enabling Act).

That, in turn, raises two questions: What is the *source* of those standards for choosing the appropriate state's laws, and what is the *content* of those standards? The source must be either state law or federal law, yet to place the source in state law, one would have to choose a particular state, thereby begging the choice-of-law question. Thus, the source must be federal law. *Cf.* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("whether the water of an interstate stream must be apportioned between the two States is a question . . . upon which neither the statutes nor the decisions of either State can be conclusive"); note 147 *supra* (analogous question for Rules Enabling Act).

The content of the standard must depend upon the federal court's purpose in looking to (or adopting) state law. As has been brilliantly argued elsewhere, the federal courts should choose "the law of whatever state is dictated by the conflicts rule that it deems best from the standpoint of the particular federal statute involved and the particular [federal] substantive issues of the case." Note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 HARV. L. REV. 1212, 1215 (1955). In diversity cases, it is now understood that a federal court choosing among the potentially applicable state laws must choose in accord with the choice-of-law rules of the forum. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). But that is not because the Rules of Decision Act itself directs the federal court to apply the forum's choice-of-law rules. *See* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 41 (1963). Rather, it is because the particular federal purpose in diversity cases for looking to state law in the first place — namely, the desire that outcomes be the same in federal courts as they would be in state courts across the street — dictates that the federal court look not only to the forum's municipal law, but also to its whole law. *See* Ely, *supra* note 18, at 714 n.125. If the federal court had a different purpose in looking to state law (as it almost always would in nondiversity cases), then the federal choice-of-law rule, too,

tion regarding the validity of federal law. One can reasonably assume, of course, that in referring to federal law, the Rules of Decision Act means *pertinent* federal law, because, otherwise, the Act would direct the federal courts to apply federal law that was never intended to govern. By the same token, one can assume that by federal law, the Rules of Decision Act means *valid* federal law, because otherwise the Act would direct the federal courts to apply unconstitutional federal treaties and statutes. Significantly, however, the Rules of Decision Act does not itself contain any standards for defining the validity of federal law in diversity cases (or in any other cases). Rather, it implicitly incorporates by reference whatever standards of validity may otherwise exist, and then proceeds to state the obvious: if the federal law is found to be valid under those standards it shall be applied; otherwise, state law shall be applied.

In enumerating the kinds of federal law that shall be applied, the Rules of Decision Act explicitly mentions the "Constitution," "treaties of the United States," and "Acts of Congress,"[170] but says nothing about federal "common law." This omission has caused some observers to conclude that the Rules of Decision Act implicitly prohibits the federal courts from applying federal common law in the face of state rules to the contrary.[171] Yet that is absurd, for we have already noted that the distinction between federal common law and federal statutory law is merely a difference in emphasis.[172] Such a conclusion is just as untenable as the suggestion that article III of the Constitution denies the federal courts jurisdiction over cases "arising under" federal common law. Article III (like the Rules of Decision Act) empowers the federal courts to hear cases that arise under the Constitution, treaties, and "Laws" of the United States, and makes no mention of federal "common law";[173] yet article III is now under-

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would be different, because one chooses whatever state law "serve[s] the ends which initially promp[t] federal incorporation [of state law]." Mishkin, *supra* note 9, at 808.

170. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652 (1976).

For whatever it may signify, as originally enacted the Rules of Decision Act referred to "statutes of the United States" rather than to "Acts of Congress." *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92:

> That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

171. *See, e.g.*, Leathers, *supra* note 109, at 807, 809, 811; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 680 n.6 (1976).

172. *See* text at notes 60-83 *supra*.

173. The judicial Power shall extend to all Cases, in Law and Equity, arising under this

stood to include cases arising under federal common law.[174]

The same is true of the Rules of Decision Act. If the Rules of Decision Act were construed as suggested above, it would preclude the development of independent federal common law, because the federal courts would be directed always to apply state law instead. It is simply too late to suggest that the federal courts have no valid authority to create federal common law; they obviously do, and they exercise it all the time.[175] Moreover, once valid federal common law is created, the axiom of supremacy requires that it be applied over state rules to the contrary.[176] Thus, the Supreme Court held in *Howard v. Lyons*[177] that a valid federal common law immunized federal officials from liability for libel,[178] and that such federal common law must apply in all civil actions in which it is pertinent, including diversity cases. Thus, in enumerating the various sorts of federal law that apply over state rules to the contrary, the Rules of Decision Act must be understood to include valid rules of federal common law.[179]

This does not mean that there are no standards governing the

Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U.S. CONST. art. III § 2, cl. 1.

174. *See also* Illinois v. City of Milwaukee, 406 U.S. 91, 98-101 (1972). Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1513 & n.13 (1969); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 332-33 (1964).

This is not to say (as William Crosskey said) that "Laws" under article III means *general* common law. Crosskey argued that by granting the federal courts authority to hear cases "arising under . . . the Laws of the United States," the framers of the Constitution intended to give the federal courts authority to fashion general common law without any specific or further connection to the enumerated powers of national government. 1 W. CROSSKEY, *supra* note 38, at 610-40. The argument here is not that "Laws" should be deemed to include *general* common law, but that it must be deemed to include *specific* federal common law.

175. *See* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

176. The supremacy clause, in providing for the supremacy of "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States," does not explicitly include federal "common law." Yet, like article III, § 2 (which also fails to include an explicit reference to federal "common law"), the supremacy clause is understood to include every valid manifestation of federal law, including federal common law. *See, e.g.*, Kossick v. United Fruit Co., 356 U.S. 731, 738-42 (1961) (federal common law of admiralty supersedes contrary state law). *See also* note 174 *supra*.

177. 360 U.S. 593 (1959). *See also* Miree v. DeKalb County, 433 U.S. 25, 29 & n.3 (1977) (federal common law governs in diversity cases even in the face of state law to the contrary, where a uniform national rule is necessary to promote federal governmental interests).

178. While the Court did not call this newly created federal rule of official immunity "federal common law," it candidly recognized that the rule did not derive from any "legislative" enactment "by Congress," but rather (like the federal rule in Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)), was "formulated by the court" from undefined "federal sources." 360 U.S. at 597. The Court has since recognized that the federal law of official immunity is "federal common law." *See* United States v. Gillock, 100 S. Ct. 1185, 1192 n.10 (1980).

179. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591-93 (1973) (federal " 'common law' " *is* federal law within the meaning of the Rules of Decision Act, which

validity of federal common law, or that the standards are the same in diversity cases as in other federal cases. Standards do exist, and some of them are specifically tailored to the values underlying diversity jurisdiction; indeed, as we shall soon see, the prevailing standard in diversity cases is closely akin to the "outcome-determinative" test that Professor Ely so forcefully expounds.[180] The important thing to recognize here is that these standards for determining the validity of federal common law are not found in the Rules of Decision Act. The Rules of Decision Act merely incorporates by reference whatever standards of validity otherwise exist.

Professor Ely's thesis suffers from a second major problem: it finds no support in the jurisprudence of *Erie Railroad*. To our knowledge, the Supreme Court has never held that the Rules of Decision Act itself prohibits the federal courts from adopting a federal common law of procedure in diversity cases.[181] Interestingly, the Court has made very few references at all to the Rules of Decision Act in post-*Erie* diversity cases.[182] The few references it has made

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directs the federal courts to apply state law unless federal law "otherwise requires or provides").

180. *See* text at notes 191-99 *infra*.

181. Professors John Hart Ely and Martin Redish both argue that the Court's decisions in *Hanna*, *Byrd*, and *York* — which all impose limits on the ability of the federal courts to fashion a federal common law of procedure in diversity cases — should be understood as statutory interpretations of the Rules of Decision Act. *See* Ely, *supra* note 18, at 708-10; Redish & Phillips, *supra* note 13, at 360-62. *See also* Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 1678 (1976). Yet the Rules of Decision Act was not even cited in *Hanna* or *Byrd*. And it was mentioned in *York* merely for purposes of analogy, because, by its terms (being limited to "trials at common law"), the Rules of Decision Act did not apply to the kind of equitable proceeding at issue in *York*. *See* 326 U.S. at 105-07 (but compare *id.* at 103-04). *See also* 2 W. CROSSKEY, *supra* note 38, at 871. Admittedly, the Court in Sibbach v. Wilson & Co., 312 U.S. 1, 10-12 (1941), spoke as if the Rules of Decision Act itself prohibited the federal courts from applying federal rules of civil procedure to matters of "substance," but *Sibbach* is now better understood as a construction not of the Rules of Decision Act but of the Rules Enabling Act. *See* Ely, *supra* note 18, at 733-38. *See also* note 185 *infra*.

This habit of viewing the Rules of Decision Act as itself the source of the limitations on the authority of the federal courts to fashion federal common law in diversity cases may derive from *Erie*, because the *Erie* Court *did* impose such limitations on the federal courts in diversity cases, 304 U.S. at 76-78, and it *did* say it was construing the Rules of Decision Act. *See* 304 U.S. at 77-78, 79-80. But it does not follow that the *Erie* Court regarded those limitations as having their source in the Rules of Decision Act, or that the *Erie* Court regarded the two parts of its opinion as being connected. On the contrary, the Court considered the Rules of Decision Act only for the purpose of deciding whether the Act was an affirmative *grant* of power to the federal courts to fashion common law. It construed the Act only to the extent of determining that since "state law" should be deemed to include state judge-made law, the Rules of Decision Act was not an affirmative grant of power to the federal courts to make law in the face of a contrary state judge-made law. *See* 304 U.S. at 71, 72-73, 79-80. The *Erie* Court did not address the Rules of Decision Act for the purpose of ascertaining the *limits* on federal lawmaking power. Nor did it attribute to the Rules of Decision Act the limits that it found to exist otherwise.

182. The Supreme Court has referred to the Rules of Decision Act in only nine post-*Erie*

are entirely consistent with the view that the Rules of Decision Act merely incorporates by reference the independent standards that otherwise exist for determining the validity of judge-made rules of procedure in diversity cases. Thus, in *Cohen v. Beneficial Industrial Loan Corp.*[183] the Court stated that because the pertinent federal judge-made rule was "substantive,"[184] the Rules of Decision Act required that state law be applied. The *Cohen* Court need not be understood as saying that the Rules of Decision Act itself invalidates federal judge-made rules that are "substantive." Rather, the Court may have been saying that once a federal judge-made rule is found to be invalid by whatever standard of validity otherwise prevails — in this case, by the prohibition against judge-made rules that are "substantive" — the Rules of Decision Act then comes into play and, given the absence of valid federal law, directs that state law be applied.[185]

Indeed, if anything, Professor Ely's view contradicts the traditional understanding of the Rules of Decision Act. The Court has always said that the Rules of Decision Act is merely *declaratory of the rule that would exist in its absence.*[186] In the Court's words, the Rules of Decision Act "has been uniformly held to be no more than a declaration of what the law would have been without it."[187] Yet if Professor Ely is correct in asserting that the outcome-determinative

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diversity cases. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 539 (1958); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949); King v. Order of United Commercial Travelers, 333 U.S. 153, 154, 157, 159 (1948); Guaranty Trust Co. v. York, 326 U.S. 99, 102, 103-04 (1945); Huddleston v. Dwyer, 332 U.S. 232, 236 (1944); Sibbach v. Wilson & Co., 312 U.S. 1, 10-12 (1941); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 540 (1941); West v. A.T. & T. Co., 311 U.S. 223, 231 (1940); Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177 n.3 (1940). In *King, Fidelity Union Trust Co.*, and *West*, all the parties conceded that state law governed under the Rules of Decision Act, and the only question was how to determine the content of state law in the absence of a decision from the highest state court. In *Huddleston* and *Vandenbark*, all parties again conceded that state law governed, and the only question was how a federal appellate court should react when the state changed its law between the diversity trial and the appeal.

183. 337 U.S. 541 (1949).

184. 337 U.S. at 555-56.

185. The same analysis can be applied to the Court's suggestion in Sibbach v. Wilson & Co., 312 U.S. 1 (1941), that if rule 35 of the federal rules of civil procedure were "substantive," the Rules of Decision Act would require a federal court in diversity to apply state law instead. The *Sibbach* Court should not be understood as saying that the Rules of Decision Act *itself* invalidates any federal rule of civil procedure that abridges "substantive rights." Rather, it should be understood as saying that once a rule of civil procedure is found to be invalid by whatever standards of validity may otherwise exist — in this case, by the prohibition in the Rules Enabling Act on the adoption of rules that abridge "substantive rights" — the Rules of Decision Act then comes into play, directing that state law be applied in the absence of valid federal law.

186. Guaranty Trust Co. v. York, 326 U.S. 99, 104 (1945); Erie R.R. v. Tompkins, 304 U.S. 64, 72 (1938); Mason v. United States, 260 U.S. 545, 559 (1923).

187. Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831).

limitation originates in the Rules of Decision Act and would not exist without it, then the Rules of Decision Act has independent content of its own and, hence, cannot be declaratory of what the law would have been without it. By the same token, if the Court is correct that the Rules of Decision Act is merely declaratory of what the law would have been without it, then the outcome-determinative limitation must originate elsewhere and, thus, must exist in the law independently of the Rules of Decision Act.

A third problem is that, by assuming that the outcome-determinative limitation was actually codified in the Judiciary Act of 1789, Professor Ely tends to place excessive weight on the federal policy in seeing that diversity cases come to the same result in federal courts as they would in the state courts. Thus, Professor Ely would prohibit the federal courts from ever resorting to common law methods to adopt outcome-determinative rules of procedure in diversity cases, regardless of how desirable the rules might be. Yet, as Redish and Phillips point out, some judge-made rules (such as rules for six-person juries in civil cases) are difficult to justify invalidating, even though they may be outcome-determinative.[188] The answer to this paradox is not to jettison the outcome-determinative test or, alternatively, to invalidate six-person juries in diversity cases, but to recognize that, rather than being rigidly codified in the Rules of Decision Act, the outcome-determinative test has its source elsewhere, and that its true source permits the federal courts to depart from it in compelling cases.

This brings us to the true source of the limitation on the authority of the federal courts to adopt a federal common law of procedure[189]

188. Redish & Phillips, *supra* note 13, at 392-97. *See also* HART & WECHSLER, *supra* note 2, at 747-48.

189. By a "federal common law of procedure," we mean a system of judge-made rules of procedure of the kind that Congress *could* enact pursuant to its article III power over the jurisdiction and procedure of the federal courts (and of the kind that Congress *has* enacted in the form of rules of civil procedure under 28 U.S.C. §§ 2072, 2076 (1976)), provided that such judge-made rules do not conflict with anything already contained in the rules of civil procedure. For an illustration of an outcome-determinative federal common law of procedure that is applicable even in diversity cases, see Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (federal common law rule that a plaintiff who has accepted a remittitur may not appeal to seek reinstatement of the original verdict). *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-33 (1979) (federal common law of collateral estoppel, applicable at least in federal question cases).

A federal common law of procedure of this kind is no different from any other variety of federal common law, except that, because the underlying source of federal power relates exclusively to the governance of the federal courts (*i.e.*, the congressional power over the jurisdiction and procedure of the federal courts), the resulting federal common law will ordinarily apply only in the federal courts. Obviously, this has nothing to do with the axiom of supremacy; it simply means that because the underlying federal policy will ordinarily be fully exhausted by applying the law of procedure only in federal court, no federal law will remain to

in diversity cases. The limitation is found, we believe, not in the Constitution or any specific act of Congress, but among the *federal policies* that underlie and shape federal common law. As the Court put it in *Hanna v. Plumer*, the true source of the limitation is in "the *policies* underlying the *Erie* Rule."[190]

The content of the policy is now well understood: The policy forbids "the character or result of a litigation materially to differ because the suit ha[s] been brought in a federal court." In diversity, the policy nurtures a fairness value: the widely shared perception that it would be "unfair"[191] to "subject a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen."[192] The source of this federal policy lies less in the enactments of Congress than in its silences, less in the wording of statutes than in their interstices. It draws its force less from anything Congress has said than from what Congress has found it unnecessary to say, less from what Congress has done in the past than from what it would do if the policy were disregarded. In short, it is a common law limitation — a limitation derived not from the Constitution[193] or from specific acts of Congress,[194] but from the

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be made binding in the state courts. In other words, the law is not *pertinent* to cases in state court. *Cf.* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (federal common law of interstate water apportionment is applicable in federal courts and state courts alike, because the underlying federal policies would be frustrated if they were allowed to be disregarded by state courts). Professor Cheatham has coined phrases to distinguish among varieties of federal common law depending upon whether they apply in *all* courts or only in *federal* courts, calling the former "true federal common law," and the latter "federal courts' law." Cheatham, *Comments by Elliott Cheatham on the True National Common Law*, 18 AM. U. L. REV. 372, 374 (1969). For a *statutory* analogy to these two varieties of federal common law, *compare* 22 U.S.C. § 2370(e) (2) (1976) (the Act-of-State doctrine is applicable in federal and state courts alike) *with* 9 U.S.C. § 3 (1976) (the provision for stays of judicial proceedings pending federal arbitration is applicable only in federal courts). Of course, if the federal policies underlying a federal common law rule of procedure would be served by its applying in state courts, too, and if the federal rule were thus pertinent to state judicial proceedings, the supremacy clause *would* make the rule binding on state court judges.

190. 380 U.S. at 467 (emphasis added).

191. 380 U.S. at 467. *See also* Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).

192. Ely, *supra* note 18, at 712.

193. The "outcome-determinative" test is not a *constitutional* limitation, because, if it were, it would prohibit Congress from ever adopting a statute applicable in diversity cases that affected outcomes. Congress obviously has such power. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). *See also* Ely, *supra* note 18, at 700-06; Friendly, *supra* note 87, at 402 n.90 (although the federal courts may lack the common law power under *York* to create an outcome-determinative rule of laches in diversity cases, Congress has a *constitutional* power to adopt statutes of limitations in diversity suits).

194. The Rules Enabling Act prohibits the federal courts from adopting rules of civil procedure or judge-made rules, *see* text at note 162 *supra*, that abridge "substantive rights," but that is not the same as prohibiting them from adopting outcome-determinative rules of procedure. *See* Hanna v. Plumer, 380 U.S. 460, 469-70 (1965); Ely, *supra* note 18, at 718-38. The closest Congress has come to codifying the outcome-determinative limitation on the adoption

sorts of widely shared and largely unstated values from which all common law derives. It derives from the same sources as federal common law because, being a nonconstitutional, nonstatutory limitation on the creation of a federal common law of procedure in diversity cases, the outcome-determinative policy is a part of federal common law. It is a limitation which, if disregarded, would lead to the creation of a judge-made law of procedure that one would aptly describe as "invalid."

Now it might be said that contrasting *common law* policy with *statutory* policy is artificial, and that since the outcome-determinative limitation draws its force from the assumption (or threat) that Congress will enforce it, it should be described as a statutory policy. This criticism has some force because, as we previously discussed, no real distinction exists between legislation and common law other than the distinction between points on a continuous spectrum.[195] In that sense, all federal common law can be seen as a form of statutory construction. So, too, the outcome-determinative limitation could be characterized as a statutory policy, a policy presumably having its source in the statutes governing the diversity jurisdiction.[196]

But this argument clashes with the way we ordinarily talk. Ordinarily we *do* find it useful to contrast common law with statutory construction; ordinarily we *do* speak of common law in describing areas governed by principles first articulated by courts rather than

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of a common law procedure in diversity cases is in rule 501 of the federal rules of evidence, which prohibits the federal courts from applying federal rules of privilege in diversity cases. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1933. Rule 501 cannot be based on a congressional desire to prevent the federal courts from adopting federal rules of privilege that would interfere with state-created "substantive rights," — that is, state-created standards of primary conduct and interpersonal relationships outside the courtroom — because rule 501 *permits* the federal courts to adopt such rules in everything but diversity cases and because the inevitable disruption of state-created "rights" that thus results is hardly lessened by not applying such rules in diversity cases. Hence, rule 501 must reflect a congressional desire that independent federal rules of privilege not be applied to cause diversity cases to come out differently in federal court than they would in state court across the street. *See* S. REP. NO. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7053; H.R. REP. NO. 650, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7082.

195. *See* text at notes 60-83 *supra*.

196. Ultimately, it makes no difference whether one views the outcome-determinative test as a common law limitation or as a statutory limitation immanent in 28 U.S.C. § 1332 (1976). In each case, the result would be the same: The federal courts would be prohibited from adopting an outcome-determinative common law of procedure in diversity cases, except where authorized by Congress. *See, e.g.*, 28 U.S.C. § 2072 (1976) (congressional delegation of rulemaking authority, authorizing the federal courts to adopt rules of civil procedure applicable in diversity cases, provided that the rules do not abridge "substantive rights"). The difficulty with viewing the outcome-determinative test as a statutory limitation is not that the results would be any different, but that one would be indulging in a patent fiction. *See* Monaghan, *supra* note 35, at 16-17 (to describe the Supreme Court's jurisprudence on the commerce power as "statutory" construction, rather than as "federal common law," is to indulge in a "high fiction"). *See* note 198 *infra*.

legislatures.[197] Accordingly, describing the law of admiralty as federal common law is useful, and describing the outcome-determinative limitation in the same terms is useful, too. Both are bodies of law governed by principles that were articulated in the first instance by judges, rather than by the legislature.[198]

This emphasis on the common law origin of the outcome-determinative limitation has several advantages. For one thing, it reduces the likelihood that the outcome-determinative limitation will be rigidly applied in every case, regardless of how desirable the countervailing policy in favor of a judge-made rule of procedure.[199] Once the courts recognize that the limitation is itself judicially created, they may be more disposed toward evaluating it in light of competing federal policies. To be sure, since the policy in favor of identical outcomes is quite strong, few competing policies will be sufficient to override it. This is particularly so with respect to judge-made rules of procedure, because the Rules Enabling Act now equips the federal courts with a convenient, safeguarded mechanism for adopting outcome-determinative rules of procedure, thus suggesting that the courts should generally resort to the Act in lieu of creating outcome-determinative rules on their own. Nonetheless, there are surely some issues — and six-person juries may be a good example — on which the court may correctly conclude that the policy favoring identical outcomes is outweighed by competing federal policies. In that event, the courts should not be embarrassed by departing from the outcome-determinative limitation, because such departures are part and parcel of the same common law process that gave rise to the limitation in the first place.

Furthermore, emphasizing the common law origins of the outcome-determinative limitation reminds us that *Erie* problems are resolved not by weighing federal interests against state interests, but by

197. *See* text at notes 60-83 *supra*.

198. *See* Redish & Phillips, *supra* note 13, at 377 n.121 (asserting that the outcome-determinative test is "ultimately" based not on the "language" or "legislative history" of a statute, but on "the standard the Court deemed [to be] morally compelled"). *See also* Hill, *supra* note 166, at 1023-24 (arguing that it is "productive of confusion" to attribute to federal statutes what is essentially federal common law).

199. There is no logical reason why the outcome-determinative test would have to be more rigid as part of a statute than as a common law limitation. Even if it were part of a statute, such as rule 501 of the federal rules of evidence, *see* note 194 *supra*, the federal courts would still be obliged to *construe* the statute to determine how rigidly the outcome-determinative test ought to be applied. Hence, as a matter of logic, the content of the outcome-determinative limitation does not necessarily depend on whether it is viewed as a statutory limitation or a common law limitation. As a matter of everyday parlance, however, "common law" connotes a more appropriate judicial attitude for applying the outcome-determinative policy than does "statutory interpretation."

weighing federal policies against one another. The question in *York*, for example, was whether a judge-made rule of laches is valid if applied in a diversity case to produce an outcome different from what would occur in state court. The Court responded by weighing the federal policy favoring identical outcomes in diversity cases against the competing federal policy in favor of applying an equitable doctrine of laches in federal court, and it concluded that the former policy predominated. In other words, after assessing competing federal policies, the Court made a federal judgment that one federal policy outweighed the other. *York* thus reminds us that *Erie* cases turn exclusively on federal assessments of federal policies, and that these federal policies remain forever open to reassessment by Congress and (derivatively) by the federal courts, subject to rather scant constitutional limitations.

III. *ERIE* IN FEDERAL QUESTION CASES

The stage is now set for an analysis of *Erie* in nondiversity cases. Theoretically, one could proceed by studying any of the other eight grounds of federal jurisdiction, such as suits between a state and a citizen of another state, or suits involving ambassadors. Since the issue arises most commonly in federal question cases, however, we shall discuss it in that context.

Paradoxically, the *Erie* problem in federal question cases is the same as in diversity cases, yet it is also different. The problems are the same because in each case one must decide whether the alleged federal rule is both valid and pertinent. If it is, then it must be applied; if it is not, state law is to be applied. The problems are also the same with respect to much of the way one approaches the issues of pertinence and validity. The pertinence of a rule is a highly individualized matter, because it depends on whether the rule's purposes would be served by applying it to the issue at hand, something that varies from one rule to another and from one jurisdictional ground to another. Nonetheless, while it is impossible to generalize about questions of pertinence, the inquiry in all cases is essentially the same: to determine the rule's scope by ascertaining its intent.

The inquiry into a federal rule's validity in federal question cases also parallels the inquiry in diversity cases, at least where the federal rule takes the form of a constitutional provision, a statute, or a rule of civil procedure. As previously discussed, constitutional provisions are presumptively valid, statutes are valid if consistent with higher constitutional norms, and rules of civil procedure are valid if consistent with the Constitution and the further limitations set forth in the

Rules Enabling Act. These questions of validity are no more difficult in *Erie* cases than in the many other areas in which the validity of federal rules is questioned, and they are no different in federal question cases than in diversity cases.

The parallel between the validity inquiry in federal question cases and that in diversity cases ends, however, when we examine common law (or judge-made) rules. The standards governing the validity of federal common law under the two sources of federal jurisdiction differ significantly because the underlying federal policies differ. In diversity cases, the prevailing value of fairness demands that no person be treated any better or any worse than another solely because of his state of citizenship; hence the common law limitation that a federal court in diversity shall not adopt judge-made rules that differ materially from the rules that would govern the case in state court, unless a countervailing federal interest overrides the federal policy favoring identical outcomes. To whatever extent the values underlying this limitation in diversity are not relevant in federal question cases, the limitation should be modified. In the remainder of this Article, we seek to ascertain the common law limitations applicable in federal question cases by identifying the governing federal values in such cases and contrasting them with the values that are relevant in diversity.

Theoretically, one could proceed by selecting any judge-made rule at random. However, since we have thus far discussed judge-made rules of procedure, and since procedural issues arise in every federal question case, regardless of subject matter, we shall proceed by trying to identify the limitations that restrain the federal courts from adopting a federal common law of procedure in federal question cases. Because federal policies, and hence the controlling limitations, differ according to how the federal question arises, we shall further divide the discussion into three basic classes of federal question jurisdiction: exclusive, concurrent, and ancillary.

A. *Exclusive Jurisdiction*

Consider the following problem:

> Happy sues Lucky in a federal district court for patent infringement. The state law in the forum state requires the state courts to use twelve-person juries; the federal district court, in contrast, has adopted a local rule that requires six-person juries in all civil actions.[200] Should the federal rule apply in the face of the state rule to the contrary?

200. Such rules, adopted by district courts pursuant to rule 83 of the federal rules of civil procedure, are common. *See* Colgrove v. Battin, 413 U.S. 149, 150 n.1 (1973).

The answer turns upon whether the six-person federal rule is valid, and that, in turn, depends on whether the rule is consistent with the three prevailing standards of validity — constitutional, statutory, and common law. The six-person rule is clearly valid constitutionally: it comports with the seventh amendment[201] and, even without reference to the federal government's authority to regulate patents, the rule is within the federal government's article III authority to regulate the jurisdiction and procedure of the federal courts.[202] The rule is also statutorily valid, because it conforms to all arguably relevant statutes: The Rules of Decision Act has nothing to say on the issue, because the Act contains no independent standards for testing the validity of federal law; the patent statute[203] contains certain standards, but none deal explicitly with jury size; the Rules Enabling Act prohibits the federal courts from adopting procedural rules that abridge "substantive rights," but if "substantive" pertains to conduct outside the courtroom, rules of jury size have no apparent substantive effect.[204]

The real question, therefore, is whether any common law policies forbid six-person juries and, if so, whether they outweigh the evident federal policy in favor of speedier, cheaper, and simpler jury trials. One potential limitation is the common law policy against outcome-determinative rules that we saw first in diversity cases. Yet that policy appears irrelevant here. The policy seeks to eliminate certain kinds of unfair "discrimination"[205] that occur when a case can be tried in either federal court or state court, by requiring the federal court to borrow state rules whenever those rules would influence the outcome of the litigation. This policy is not relevant to a case within the exclusive jurisdiction of the federal courts, since such a case can

201. *See* Colgrove v. Battin, 413 U.S. 149, 151-60 (1973).

202. A federal rule for six-person juries without doubt is "arguably procedural," *see* text at note 132 *supra*, because it is designed to enhance the speed, economy, and convenience of trying civil cases. *See* Redish & Phillips, *supra* note 13, at 396-97.

203. 35 U.S.C. § 281 (1976).

204. The only difference between a "local rule" under rule 83 and ordinary rules of civil procedure is that because local rules are not proposed by the Judicial Conference, or approved by the Supreme Court, or submitted to Congress, they do not carry the same presumption of validity as ordinary rules of civil procedure. *See* note 159 *supra*. That is, one cannot so easily presume from the mere adoption of a local rule that it does not abridge "substantive rights" within the meaning of the Rules Enabling Act. As for the remaining questions of statutory validity, the Supreme Court has held that local rules prescribing six-person juries are consistent both with 28 U.S.C. § 2072 (1976) ("Such rules . . . shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution") and with rule 48 ("The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury"). *See* Colgrove v. Battin, 413 U.S. 149, 161-64 (1973).

205. Erie R.R. v. Tompkins, 304 U.S. 64, 75 (1938).

be brought only in federal court. The exclusiveness of the court's jurisdiction obviates the problem of discrimination.

Another potential limitation is the federal policy in favor of unitary rules within the territory of a state. This policy, once reflected in the Process and Conformity Acts,[206] requires federal courts to apply state procedural rules in all actions at common law. The policy is based not on a value judgment that maintaining dual systems of procedure would in any way be unfair to individual litigants, but rather on the systemic value in enabling all litigants and lawyers within a given territory to rely on a single system of rules. In favoring territorial uniformity, the policy is both more inclusive and yet less weighty than the policy favoring identical outcomes in diversity cases: more inclusive, because it counsels conformity to all state procedural rules (as opposed to merely state rules affecting outcome); less weighty, because the adoption of rules of civil procedure and the repeal of the Conformity Act have weakened the ideal of conformity by reducing the areas in which conformity is possible.

Having identified the pertinent federal policies, we can place them on the balance.[207] In one pan, the federal rule favoring six-person juries reflects a significant federal interest in speed, efficiency, and economy of litigation. In the other pan, the policy favoring territorial uniformity of procedure, though once significant, is now feeble. Given the imbalance, the former policy clearly prevails. It

206. For a description of the Process and Conformity Acts, see HART & WECHSLER, *supra* note 2, at 663-76. The difference between them was that the Process Acts were static and required conformity with state laws as they existed at the time of enactment (1789); consequently, with the passage of time, the federal courts were conforming not to what state law was then but to what state law had been in 1789. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21-26 (1825). The Conformity Act of 1872, in contrast, required continuing conformity.

207. It is sometimes said that in deciding whether to create a rule of independent federal common law or to adopt state law by reference, federal courts should proceed with a presumption in favor of state law. That is, they should adopt state law unless a strong federal interest favors creating an independent federal rule. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979) ("the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation"); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1517-19 (1969); *but cf.* Comment, *Adopting State Law As the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 846-48 (1976) (criticizing this approach). In reality, however, this "presumption" is nothing more than a recognition that one of the many federal policies militating against the creation of an independent federal rule is the ever-present federal policy in favor of reserving governance to the several states. For if a federal court takes the foregoing policy fully into account (as well as all other federal policies in favor of applying state law) and then concludes that countervailing federal policies in favor of an independent rule are nonetheless sufficient to override them *even by a slight amount*, nothing remains by which the court could ever justify applying the state law. Of course, logic does not prevent one from isolating the foregoing policy and treating it as the basis for an omnipresent "presumption" favoring state law; but by calling it a "presumption," the federal courts may fail to see that, in reality, it is simply one of many federal policies that in any particular case may militate against the creation of a rule of independent federal common law.

follows, therefore, that the federal rule in favor of six-person juries is valid and, as such, must be applied in the face of contrary state law.

B. *Concurrent Jurisdiction*

Now assume that instead of a patent action, a plaintiff files a section 1983 civil rights suit in federal court, a suit within the concurrent jurisdiction of federal and state courts. Does a shift from exclusive to concurrent jurisdiction alter the landscape of federal policies regarding six-person juries? Do any common law limitations on the adoption of judge-made rules of procedure come into play solely because a case is within the concurrent, rather than the exclusive, jurisdiction of the federal courts? If so, are these limitations sufficient to render a six-person-jury rule invalid as applied in a civil rights action?

It should be clear by now that some of the standards governing validity remain unchanged. Thus, the constitutional test under article III, the "substantive" limitation of the Rules Enabling Act, and the common law policy in favor of procedural conformity apply as well to concurrent cases as to exclusive cases. At the same time, however, concurrent jurisdiction implicates two additional policies — one derived from common law, the other from a statute. Although the common law limitation turns out to be insubstantial, the statutory limitation comes close to being sufficient to cast doubt on the six-person-jury rule.

The common law limitation is superficially similar to the outcome-determinative limitation in diversity cases. The outcome-determinative limitation in diversity minimizes a certain kind of discrimination that occurs because diversity suits can be brought in federal courts and state courts alike. This antidiscrimination value (and the outcome-determinative rule it supports) is not relevant to patent cases, because the exclusiveness of federal jurisdiction precludes any possibility of discrimination; but it is at least arguably relevant to civil rights cases because they, too, can be brought in federal and state courts alike. Thus, one could argue that just as the federal courts should not fashion judge-made rules that cause diversity suits to come out differently in federal courts than in state courts, they should not lightly fashion judge-made rules that cause suits in their concurrent jurisdiction to come out differently.[208]

208. *Cf.* Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439, 1447 (1972) (cases between a state and citizens of another state); Note, *Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases*, 68 HARV. L. REV. 1212, 1228-29 (1955) (arguing that concurrent jurisdiction by state courts militates in favor of applying

This analogy, however, is unpersuasive because the basis for discrimination in diversity cases is far more invidious and, hence, the policy against disparate outcomes is far stronger than in concurrent jurisdiction cases. The basis for discrimination in diversity suits is citizenship. The complaining party argues that the outcome of the suit is different from what it would have been if he were a citizen of the same state as his opponent. This form of discrimination is offensive because it violates a fundamental principle of federalism: that persons shall presumptively be treated the same without regard to the state of their citizenship.[209] The basis for discrimination in suits within the concurrent jurisdiction, in contrast, is far less objectionable: The complaining party argues that he is being treated differently than he would have been if he and his opponent had both agreed to try the case in state court. Yet since he and his opponent each had an equal and unconditional right to bring the suit in federal court in the first place,[210] or to remove it to federal court from state court,[211] the opportunities for discrimination are "equalize[d]."[212] More importantly, since the basis for the supposed discrimination is entirely innocuous, the result is indistinguishable from the commonplace effect of any differential choice of forum.[213]

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state conflicts rules in federal courts). The alternative mechanism for achieving vertical uniformity, of course, is to fashion independent federal rules that are then also binding in state courts of the forum. *See id.* at 1221.

209. This principle is reflected in the privileges and immunities clause, the extradition clause, and the full faith and credit clause of the Constitution. *See* U.S. CONST. art. IV, §§ 1-2; Hicklin v. Orbeck, 437 U.S. 518 (1978). To recognize the existence of a policy against discrimination on the basis of citizenship, however, is not to say the policy is absolute or can never be overridden by countervailing policies. Obviously, there are circumstances in which the policy against such discrimination, though substantial, is outweighed by other considerations. *See* notes 149 & 193 *supra*. The very existence of diversity jurisdiction is proof that some considerations override the policy in favor of treating parties alike regardless of their place of citizenship. But in considering the propriety of an outcome-determinative federal rule of procedure in diversity cases, *one* of the policies that must be taken into account is the policy against causing a person to lose a case in federal court that he might have won in state court, simply because of his state of citizenship. In that respect, Redish and Phillips appear to beg the question when they argue against recognizing an antidiscrimination policy based on citizenship. The most they persuasively show is that the policy is not absolute. *See* Redish & Phillips, *supra* note 13, at 374-76.

210. The defendant could initiate litigation in the federal court under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1976).

211. A defendant who is sued in state court on a federal civil rights claim that could have been brought in federal court has a statutory right to remove the action to federal court. *See* 28 U.S.C. § 1441(a) (1976).

212. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954).

213. The innocuousness of the classification distinguishes the present hypothetical case from the standard diversity case. Some commentators have suggested that whatever unfairness results when a federal court in diversity applies outcome-determinative rules of its own could be eliminated by amending the federal removal statute to give the in-state defendant in a diversity suit the same authority an out-of-state defendant now enjoys to remove a diversity

The statutory limitation on judge-made rules of procedure in civil rights actions is more substantial, and derives from the statute[214] that implicitly vests state courts with concurrent jurisdiction to hear federal civil rights actions.[215] The statute's purposes are presumably several: to reduce the caseload of the federal courts by shifting a portion of civil rights litigation to an alternative forum; to give state court judges responsibility for enforcing federal civil rights; and to give litigants a choice of proceeding in a more familiar forum. Yet none of these purposes would be effectively served if the federal courts applied federal procedures that give noticeable tactical advantages to one party or the other, because such rules would inevitably cause cases to be either brought in, or removed to, federal court. It follows, therefore, that the statute vesting concurrent jurisdiction in state courts contains an implicit policy against the adoption of judge-made rules of procedure that are so outcome-determinative that they would effectively prevent civil rights suits from being heard in state court.

Although this policy is similar to the outcome-determinative limitation in diversity cases, it is also significantly different. For one thing, the diversity limitation is based on the notion that it would be *unfair* to individual litigants if the results of litigation depended upon their citizenship; the concurrent-jurisdiction limitation is based on the *systemic* explanation that it would be administratively incon-

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suit from state court to federal court. *See id.* at 513. However, as Professor Ely demonstrates, such an amendment to the removal statute would eliminate only one kind of unfairness — the unfairness that now exists as between an out-of-state plaintiff and an in-state defendant in a diversity suit: the plaintiff has an indefeasible option to bring the case *either* in state court *or* in federal court (whichever he prefers), while the defendant has an indefeasible option only to bring the case (in the form of a declaratory judgment action) in federal court, since if he brings it in state court his adversary can always remove to federal court. Amending the removal statute has no effect, however, on the other and more serious kind of unfairness — the unfairness existing between a person involved in litigation with a diverse party and a person involved in litigation with a nondiverse party. The former has indefeasible access to a federal court, while the latter has no access to a federal court. *See* Ely, *supra* note 18, at 712 nn.111-12. The latter unfairness is more serious than the former because it is based solely on the invidious classification of citizenship, while the former is based on the locus of the litigation (or, more accurately, on the relationship between the particular locus of the litigation and the plaintiff's particular place of citizenship). For a description of these two kinds of unfairness and the innocuousness of the former, see Redish & Phillips, *supra* note 13, at 374-77.

The latter kind of unfairness is entirely absent from our civil rights hypothetical, because while a party to a federal civil rights action may enjoy access to federal court that a party to a state civil rights action (or a state tort suit) lacks, the classification that distinguishes them and thus justifies the difference in treatment is not based on the invidious consideration of citizenship. This is simply a reminder that one cannot evaluate the fairness or unfairness of a differential choice of forums without evaluating the basis for the differential treatment. While a federal civil rights litigant has a choice of forums that a state civil rights litigant lacks, the difference in treatment is not unfair because the basis for the discrimination is not invidious.

214. 28 U.S.C §§ 1331, 1343 (1976).

215. *See* Martinez v. California, 100 S. Ct. 553, 558 n.7 (1980).

venient if all civil rights actions were brought in federal court. Similarly, the fairness value in diversity is abridged if even a single lawsuit comes out differently because of judge-made rules of procedure, while the systemic value in concurrent jurisdiction cases is abridged only if enough cases come out differently to encourage plaintiffs to sue in federal court or to encourage defendants to remove to that forum. Finally, the very definition of "outcome-determinative" varies with the type of jurisdiction: A rule breaches diversity's outcome-determinative test if, after trial, litigants can realistically argue that the outcome would have been different in state court;[216] a rule is so outcome-determinative as to undermine the policies behind concurrent jurisdiction only if — in anticipation of litigation — the litigant can realistically contend that the outcome depends upon the choice of forum.

Now, back to the original question: May a federal court in a civil rights suit validly enforce a judge-made rule for six-person juries in the face of a state rule to the contrary? The answer depends on an

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216. The outcome-determinative policy in diversity cases is sometimes said to consist of two separate components: (1) a policy against the creation of a federal common law of procedure that could plausibly lead a prospective litigant to conclude, beforehand, that choosing the federal forum over the state forum would materially enhance his chances of prevailing; and (2) a policy against the creation of a federal common law of procedure that could plausibly lead a losing litigant in federal court to say, afterwards, that a federal rule produced a different outcome than would have occurred under state rules in state court. *See* Hanna v. Plumer, 380 U.S. 460, 467-68 (1965) (discussing "the *twin* aims of the *Erie* rule: discouragement of forum-shopping and the avoidance of inequitable administration of the laws") (emphasis added). In reality, however, the first "aim" appears to collapse entirely into the second "aim" and to have no integrity of its own. That is, the policy against creating rules that would lead to forum-shopping exists only because — and insofar as — forum-shopping is *evidence* of a federal rule that would produce "inequitable administration of the laws." *See* McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 889 (1965).

The irrelevance of forum-shopping as a separate evil is easily illustrated. Assume, for example, that a federal court in diversity holds itself out as using an outcome-determinative rule of procedure, thus causing a party to a diversity suit to choose the federal forum over a state forum. But suppose the court then changes its mind and proceeds to apply the state rule instead. Although forum-shopping has occurred, no injury has resulted, because in the last analysis the federal court behaved just as the state court would have behaved. Now assume that a federal court does *not* hold itself out as using an outcome-determinative rule of its own, and, thus, does not induce forum-shopping, but then changes its mind and proceeds to apply an outcome-determinative rule. In that event, although *no* forum-shopping has occurred, the federal court has caused precisely the same kind of injury that it would have caused if it had advertised itself as using the outcome-determinative rule from the outset. In short, if a federal court looks to whether a federal rule of procedure induces a party to choose a federal forum, it does so only because the party's decision is *evidence* that the federal rule, once actually applied, would lead to an "inequitable administration of the laws." *Cf.* Ely, *supra* note 18, at 717 ("And more to the point — though it now appears that the likelihood of forum shopping does furnish *a useful touchstone* — a discrepancy that will not alter outcome for, or otherwise materially affect, litigants who comply with the forum's rules is hard to condemn as unfair") (emphasis added) (footnote omitted). *See also id.* at 714 (persuasively demonstrating that, when asking whether a losing litigant could protest that the federal rule had produced a different outcome, one should understand the federal rule's influence to be the burden imposed by compliance, not the penalty exacted for noncompliance).

assessment of competing federal policies. On the one hand, a strong federal interest in speed, efficiency, and economy supports using six-person juries. On the other hand, in addition to a residual policy favoring procedural conformity, an implicit federal statutory policy favors using state rules of procedure whenever the use of independent federal rules would have the wholesale effect of discouraging civil rights suits from being brought in state court. But, on closer scrutiny, the latter policy turns out to be inapplicable here because, while a litigant may be able to say at the conclusion of litigation that he was prejudiced by the use of a six-person jury, he will rarely be able to say so in advance and, thus, will rarely choose a forum on that basis. Accordingly, since no applicable federal policy sufficiently outweighs the federal interest in using a six-person jury, the rule on six-person juries is valid and must be applied.

One may be tempted to conclude at this point that judge-made rules of procedure always apply in federal question cases.[217] But that would confuse policy with power. Congress, of course, has the power to create a federal law of procedure for federal question cases, just as it also has the power to create outcome-determinative rules of procedure in diversity suits. The real question, however, is whether the federal courts may proceed on their own to create an independent common law of procedure, a question invariably hinging on a judicial assessment of competing federal policies. That such assessments often sustain judge-made rules of procedure in federal question cases (and invalidate them in diversity cases) does not relieve one of the task of making the assessment.

C. *Ancillary Jurisdiction*

The doctrine of ancillary jurisdiction permits a federal court to hear a claim over which it otherwise lacks jurisdiction when the relationship between the claim and another over which the court does have jurisdiction would render separate trials unfair and judicially inefficient. Because of the considerable factual overlap between the two claims and the awkwardness of trying them separately, the nonfederal claim is deemed to be part and parcel of the entire "case and controversy" for constitutional and legislative purposes. Ancillary jurisdiction can take a variety of forms. An exclusive federal question may be ancillary to a federal claim over which the state

217. *See* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 90-92, 116 (1955); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 324 n.12 (1971) ("[i]n federal question cases, the [procedural] law applied is federal law").

courts have concurrent jurisdiction, or vice versa. Or a state claim may be ancillary to either an exclusive or concurrent federal claim. Similarly, the ancillary claim may involve only the existing parties to federal litigation, or require the addition of a new party. Each variety of ancillary jurisdiction implicates distinctive federal policies and thus each must be separately analyzed to determine whether judge-made rules of procedure may be validly applied to the ancillary claim in the face of state rules to the contrary.

Rather than analyze each of the many permutations, however, we shall consider only one: a state claim, involving a new party, that is ancillary to a federal question over which the state courts have concurrent jurisdiction. Consider the following case:

> Diane, a resident of Michigan, works for Abstract Railway Company of Michigan. Diane is injured on the job and sues Abstract in a federal court under the Federal Employer's Liability Act. Abstract impleads its insurer, the Defiant Insurance Company of Michigan, as a third-party defendant. The third-party claim is ancillary to the FELA action, because the issue of insurance is not governed by FELA or otherwise within the jurisdiction of the federal courts. Defiant alleges, as part of its defense, that its insurance contract is invalid because of fraudulent representations by Abstract. The Michigan courts require the plaintiff to prove the absence of fraud as part of the case-in-chief; in similar sorts of federal questions, on the other hand, the federal courts generally require the defendant to prove the affirmative defense of fraud. Can the federal judge-made rule, which imposes on the defendant the burden of proving fraud, validly be applied to the ancillary claim for insurance?[218]

The answer depends on whether the federal policies governing

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218. The previous six-person jury example is not very useful here, because the purpose of the present inquiry is to decide when a federal court, which is presumably justified in applying a federal rule to the main federal claim, is nonetheless obliged to apply state procedural rules to the ancillary claim. That issue cannot easily be illustrated in the context of a federal six-person jury rule, because the very purposes of the impleader would be frustrated if a second jury were allowed to reach a different result on the impleaded claim than the result on the main claim. Since for all practical purposes the same jury must decide both claims, the very strength of the federal interest in using a six-person jury on the main federal claim will affect what would otherwise be an independent decision on whether to use a state rule of procedure on the ancillary claim. Consequently, to isolate the independent considerations that bear on whether state law should be used to decide ancillary claims, we have altered the hypothetical in favor of a state procedural rule that affects only ancillary claims and not the main claim.

Of course, if the ancillary claim were an independent claim in diversity, the outcome-determinative limitation on the creation of a federal common law of procedure in diversity cases would prevent the federal court from applying the federal rule in place of the state rule on burden of proof. *See* Palmer v. Hoffman, 318 U.S. 109 (1943). Some commentators believe that the diversity limitation also applies ipso facto to ancillary claims based on state law. *See* HART & WECHSLER, *supra* note 2, at 766; Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087 (1964). Yet, as we shall see, the policies underlying the outcome-determinative limitation in diversity cases are different from the policies present in ancillary jurisdiction cases, and hence, the resulting limitations should be different, too.

the formation of a federal common law of procedure authorize the federal courts to apply a judge-made burden-of-proof rule to an ancillary claim of this sort. Interestingly, the considerations of fairness that motivate federal policies toward ancillary cases bear similarities to both the fairness considerations we noted in diversity cases and those previously noted in concurrent jurisdiction cases. Yet at the same time, the fairness considerations in ancillary cases are also significantly different. In ancillary cases, as in diversity cases, one feels that it is unfair for a state-law claim to come out differently in federal court than it would in the state courts "a block away."[219] The policy in ancillary cases also resembles the policy in concurrent federal question cases; each reflects the view that a litigant should not lose in federal court a suit he would win in state court, simply because his opponents see a tactical advantage in choosing the federal forum.

Nonetheless, the ancillary policy in our hypothetical case also differs significantly from the policies in the other two cases. The basis for the discrimination in ancillary cases is less invidious than in diversity: The policy favoring identical outcomes is particularly strong in diversity cases since any other rule would lead to discrimination based on citizenship; the policy favoring identical outcomes weakens in the ancillary case, where none of the classifications leading to the difference in treatment is considered as unfair as a classification based on citizenship.[220] At the same time, however, the outcome policy is stronger in the ancillary case than in the concurrent jurisdiction case, because the tactical options of the litigants are not bilateral in the ancillary case. Each of the two parties to a federal question can succeed in directing the case to federal court, either by filing it there originally or by removing it from state courts. In the ancillary case, in contrast, the primary defendant has a unilateral choice of forums; if he chooses *not* to implead the third-party defendant (in favor of suing subsequently in state court), the third-party defendant has no right to intervene in the federal dispute. Tactical advantages that result from a choice of forums are more disquieting when only one party possesses the choice than when both

219. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

220. The classification that explains why the impleaded defendant in our hypothetical case is treated differently than it would be in state court is that the impleaded claim happens to be attached to the kind of cause of action that Congress believes ought to be brought in federal court under federal standards, rather than being attached (as it might be) to a cause of action arising entirely under state law. For a discussion of the special unfairness of classifications based on citizenship, see notes 209 & 213 *supra*.

parties do.[221]

To decide whether the federal courts can validly apply a federal rule on burden of proof to the claim between Abstract and Defiant, one must weigh the federal interest in such a rule against the countervailing federal policies it would abridge. The federal interest in the rule is weak: aside from the convenience of being able to apply a uniform burden-of-proof rule in all fraud cases,[222] the federal government should be indifferent regarding the standards by which risk of error is allocated between plaintiff and defendant in insurance claims under state law. On the other hand, we have noted a distinct federal policy against causing a claim to come out differently in federal court than it ordinarily would in state court, especially when one party has unilateral control over whether the case ends up in federal court. Given the weak federal interest in applying an independent federal rule on burden of proof, and the substantial policy favoring identical outcomes, one can reasonably conclude that the latter predominates, and that any judge-made rule on burden of proof that would produce a different outcome is invalid. Since the federal judge-made rule is invalid, and since no other federal law is pertinent, federal courts should apply state rules regarding burden of proof.

CONCLUSION

Anyone who writes about *Erie Railroad* nowadays should append an explanation, if not an apology. In our case, we wish to fill two gaps in the existing literature. Our specific purpose is to describe the extent to which the jurisprudence of *Erie* can be expected to survive the abolition of the diversity jurisdiction of the federal courts. Our broader purpose is to propose a new and comprehensive way of approaching the generality of *Erie* problems, including the sorts of problems arising only in diversity cases.

The most glaring omission in the existing literature, and the most disturbing one, is the failure to recognize the connection between *Erie* problems in diversity cases and analogous problems arising from other sources of federal jurisdiction. This oversight creates endless confusion. For one thing, it leads some people to believe

221. *See* note 213 *supra*.

222. While there is a discernible federal interest in the administrative convenience that flows from being able to apply a uniform rule nationwide, *see* Hanna v. Plumer, 380 U.S. 460, 472 (1965); Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1438 (1960), the importance of such "uniformity" should not be exaggerated. *See* Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1530 (1969); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1092 (1964).

that *Erie* is exclusively a problem of diversity jurisdiction, and that the insights gained there have no bearing on the relation between federal and state law in cases based on other jurisdictional grounds. This belief creates an artificial wall between the learning gained in diversity cases and the problems arising elsewhere.[223]

Conversely, and more serious still, this oversight blinds people in diversity cases to the insights that can be gleaned from federal question cases. It is commonly understood, for example, that when state law applies in a federal question case, it is because federal law chooses to "borrow"[224] it. As the Supreme Court recently explained, when state law applies in a federal question case, it is because the federal government "elect[s] to adopt state law as the federal rule of decision."[225] Yet when it comes to state law in diversity cases, commentators revert to a mind-set that assumes, somehow, that state law applies "of its own force."[226] Thus, by failing to transfer to diversity

223. This tendency can be found in even the most eminent students of federal jurisdiction. *See, e.g.*, HART & WECHSLER, *supra* note 2, at xvii, 691-755, 756-832 (placing the relationship between federal law and state law in diversity suits in a separate subchapter from "federal common law," and allocating responsibility for the two topics to separate authors).

224. Wilson v. Omaha Indian Tribe, 99 S. Ct. 2529, 2540 (1979).

225. Wilson v. Omaha Indian Tribe, 99 S. Ct. 2529, 2541 (1979).

226. *See* note 20 *supra*. Interestingly, while many are fond of the phrase, no one specifies precisely what it is supposed to mean or why it makes any difference. Sometimes it refers to a discretionary decision by the federal government to adopt state law in precisely the same form as the state would authoritatively declare its law to be, despite the federal government's constitutional authority either to fashion an independent federal rule of its own or to modify the state law for federal purposes. *See* Mishkin, *supra* note 9, at 802 n.20 (describing *Erie* as a case in which the state law of trespass on the railroad's right of way governed "of its own force," though recognizing that the federal government was competent to prescribe an independent federal rule for the railroad under the commerce clause). (For an illustration of an area in which the federal government refrained from exercising its competence to prescribe an independent federal rule by making a discretionary choice in favor of state law instead, but then modified state law to further federal purposes, see Indianapolis & St. L. R.R. v. Horst, 93 U.S. 291, 301 (1876).) The obvious trouble with describing these as cases in which state law applies "of its own force" is that they are wholly indistinguishable from any ordinary case in which the federal government adopts state law as its own. It may be true that the particular adoption entails following state law precisely as the state itself would declare it, but that is only because the federal government has chosen to adopt state law in that form, not because it is constitutionally compelled to do so. Perhaps this is why courts and commentators alike have difficulty identifying when state law applies "of its own force," or why it makes any difference. *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-94 & especially nn.8, 11-12 (1973).

In contrast, the concept "of its own force" is sometimes used to describe a situation in which the federal government adopts state law as its own *without* any constitutional competence to prescribe a contrary rule. *See* Mishkin, *supra* note 9, at 798-803. Again, this use of the concept is not without difficulty. For one thing, there are today very few areas of regulation in which the federal government would be deemed to be constitutionally incapable of acting. *See* Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557-60, 1621 (1977). In diversity cases, for example, where the federal courts generally follow outcome-determinative state rules of procedure, they do so not because Congress lacks the power to enact independent outcome-determinative federal rules of procedure, but because Congress has chosen not to exercise its power. Further-

cases the insights gained in federal question cases, they fail to recognize that state law applies in diversity cases, too, only because federal law chooses to adopt it.

This strange and persistent mind-set about the *ground* on which state law applies in diversity cases is the most perplexing of all the *Erie* puzzles. One is reminded of what Justice Holmes said of an earlier frame of mind, when he chided the author of *Swift v. Tyson* for believing there exists "a transcendental body of law outside of any particular state but obligatory within it."[227] Justice Holmes was referring, of course, to the belief that there exists a body of law called the common law which is binding on all English-speaking jurisdictions until explicitly derogated by statute. Regardless of whether the author of *Swift* actually shared that belief,[228] Justice Holmes was certainly correct that no one nowadays accepts it. Yet when facing a "conflict" between federal law and state law in diversity cases, many today appear to accept the comparable notion that some transcendental body of law stands outside of the two laws and controls the "choice" between them.

It would be interesting to explore the origins of this view of the law. Perhaps it originates with persons schooled in private international law, who are accustomed to resolving choice-of-law problems between sovereign nations on the basis of "transcendental" principles of international law.[229] Perhaps it comes from students of

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more, even in the very few areas where the federal government adopts state law because of its incompetence to do otherwise, the adoption is still discretionary because the federal government always retains the option of not vesting such jurisdiction in the first place. Certainly, if it *does* vest such jurisdiction, and if it *is* incompetent to prescribe an independent federal rule, the federal government must then apply state law as the state declares it, and the federal court's interpretation of state law is not binding on the state under the supremacy clause. *See* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1099 (1964). But, significantly, the same thing is true, too, when the federal government voluntarily chooses to adopt state law precisely as the state itself would declare its law. In each case, the federal government declares itself to be bound by, and subservient to, what the state courts declare their law to be — in the former because it *must*, and the latter because it *desires* to.

227. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

228. *See* note 88 *supra*.

229. Ironically, even Justice Holmes, who was so suspicious of "transcendental" law in the context of *Swift*, tended to regard conflict of laws as "transcendental" law. *See* Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 352 n.51 (1960); Currie, *The Constitution and Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 69 (1958). This tendency to view private international law as transcendental law may derive from a time when all international law was so viewed. *See, e.g.*, United States v. La Jeune Eugenie, 26 F. Cas. 832, 845-47 (C.C.D. Mass. 1822) (No. 15,551) (Story, Cir. J.) (describing international law as the law of nature). *But see* The Antelope, 23 U.S. (10 Wheat.) 66, 115, 120-23 (1825) (Marshall, C.J.) (describing international law as what nations determine it to be). Needless to say, a nation's rules relating to conflict of laws are as much a part of its *domestic* law as any other, and it cannot legally be bound to adhere to any "interna-

American conflict of laws, who are disposed to resolve choice-of-law problems between sister states on the basis of "transcendental" norms in the Constitution.[230] In any event, whatever validity this notion may have in other contexts, it is obviously irrelevant to the choice between federal law and state law in diversity cases, because in those cases there can be no law any higher than valid federal law. Consequently, unless one is ready to assume that the choice between federal and state law is not itself governed by "law," one must conclude that the source of the law is ultimately federal, and that its content is based upon a federal assessment of federal policies. In that sense, it can be truly said that the choice between federal and state law in diversity cases is itself a federal question, and, subject to minimal constitutional restraints, the law that is chosen is the one that the federal government wants to be applied.

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tional" rules unless it so chooses. Surely, it may voluntarily choose to adhere to generally accepted international norms, or it may join an international organization like, say, the European Economic Community, having authority to prescribe choice-of-law norms for its member nations. But unless and until a nation chooses to, it cannot be compelled to adhere to such norms, other than through extra-legal force.

230. William Crosskey believed that the full faith and credit clause supplied a basis for constitutionalizing interstate choice-of-law rules, *see* 1 W. CROSSKEY, *supra* note 38, at 541-57, but like so many of his other theories, this one has failed to take hold. *See* A. EHRENZWEIG, CONFLICT OF LAWS 28-33 (1962) (the effect of the Constitution on interstate choice of law is slight). *But see* Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976). Obviously, insofar as the Constitution *does* restrain states in fashioning their interstate choice-of-law rules, the Constitution *becomes* "transcendental" law regulating the choice-of-law rules of the several states. Otherwise, however, absent directions from the Constitution or other sources of federal law, *see* Horowitz, *Toward a Federal Common Law*, 14 UCLA L. REV. 1191 (1967), choice-of-law rules are as much a part of a state's domestic law as any other set of rules, and no choice-of-law rule and no particular law thus chosen can be legally binding upon the state unless it chooses to make them so.