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The Erie Doctrine: A Flowchart

Michael S. Green
William & Mary Law School, msgre2@wm.edu

THE *ERIE* DOCTRINE: A FLOWCHART

*Michael S. Green**

I. INTRODUCTION

A flowchart belongs in a commercial outline. Why would any self-respecting legal scholar write a symposium piece presenting one? Well, the *Erie* doctrine is different. First, it is very, very complicated. I have never seen an *Erie* flowchart in a commercial outline that did not have substantial errors or omissions. Academic treatment, for its part, tends to work in the weeds, without presenting the *Erie* doctrine in an organized and comprehensive way. What I offer below is, I think, the first correct and complete flowchart for *Erie* cases.

Second, a properly formulated and sufficiently detailed flowchart, with accompanying explanations, can go a long way toward quieting academic worries that the *Erie* doctrine is fundamentally flawed. I hope to show that *Erie* problems are standard choice-of-law problems, and the way that the Supreme Court has told federal courts to deal with them is in keeping with that fact. Even the disagreements one sees on the Court are

* Dudley W. Woodbridge Professor of Law, College of William and Mary. Many thanks to the participants in the University of Akron School of Law's Conference on *Erie* at Eighty for helpful comments.

just what one would expect given the nature of the choice-of-law problems at issue. The Supreme Court's *Erie* jurisprudence isn't perfect, but it largely makes sense.

The third reason an *Erie* flowchart is worthy of academic treatment is that it helps highlight unexplored problems. Despite countless articles on *Erie*, there is a surprisingly large number of issues that have not been discussed in much detail. Identifying them is part of what I will try to do here.

I begin by describing what I believe are the four considerations that come into play in an *Erie* problem. I then present the flowchart, followed by a lengthy explanation of each step.

II. THE FOUR CONSIDERATIONS IN AN *ERIE* PROBLEM

First, some fundamentals. An *Erie* problem arises when a federal court facing an issue must choose between using a standard drawn from another sovereign's law or using an independent federal standard. I believe there are four considerations that can come into play in the federal court's choice.

A. Sovereignty Considerations

The first two considerations consist of reasons the federal court might have to use another sovereign's standard. The first and most obvious of these is respect for the other sovereign's lawmaking authority. Let us call these *sovereignty* considerations.

Although the relevant sovereign is usually a state, it might be a foreign nation. Indeed, the place of foreign law in *Erie* problems is a big gap in the literature, which almost always speaks of *Erie* problems as if they exclusively involve the choice between federal and state legal standards.[1]

An example of sovereignty considerations in action is *Erie Railroad v. Tompkins* itself. In *Erie*, the Supreme Court held, in part, that a federal district court in New York had to use Pennsylvania's standard on the duty of care that a New York railroad has to a Pennsylvania trespasser in Pennsylvania, out of respect for Pennsylvania's lawmaking authority.[2]

Notice that if sovereignty considerations come into play, the other

1. An exception is Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531 (2011). For a response, see Michael Steven Green, Erie*'s International Effect*, 107 NW. U. L. REV. 1485 (2013). Also unexplored is the role of the law of federal territories such as the District of Columbia or Guam, which derive their lawmaking power from the federal government.

2. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

sovereign must *want* the federal court to use its standard to decide the issue (in the sense that the appropriate authorities of the other sovereign would, if asked, say they want that result). Thus, to understand *Erie* as being about respect for Pennsylvania's sovereignty, we must assume that the Pennsylvania Supreme Court would have said it wanted a federal court facing the facts in *Erie* to use Pennsylvania's standard. If it wouldn't have said that—if the standard was intended to bind only Pennsylvania state courts—there would have been no assertion of Pennsylvania regulatory authority the federal court in *Erie* could have failed to respect.

Although the terms "substantive" and "procedural" have many different meanings,[3] a law can be called substantive if the sovereign that created it intends it to be used in other court systems and procedural if the sovereign intends it to be used only in its own courts. Unless otherwise noted, that is how I will use the terms here. Thus, one can say that sovereignty considerations are not implicated unless the other sovereign's law is substantive in the relevant sense.

One reason *Erie* problems are challenging is that it is so difficult to determine whether another sovereign's law is substantive or procedural. Unless the question is certified to the Pennsylvania Supreme Court, no Pennsylvania state court will have occasion to answer the question. Pennsylvania state courts are concerned only about what *they* should do, not what courts in other jurisdictions should do.[4]

In addition to being almost always unanswered, substance/procedure questions are ubiquitous. Every time Pennsylvania law is made, the courts of other jurisdictions can ask whether the law is procedural only, freeing them to come up with their own standard for the matter. Since there will almost never be an answer, they will be forced to speculate or engage in the onerous process of certifying the question to the Pennsylvania Supreme Court.

Surprises concerning substance/procedure questions take two forms. First, a law can appear procedural, because it regulates court activity, but turn out to be substantive. An example of such a surprise would be if the Pennsylvania Supreme Court said that it wants the courts of other legal systems to use Pennsylvania's pleading rules when entertaining Pennsylvania actions or that it wants Pennsylvania's statute of limitations to be used in other court systems whenever a party is a Pennsylvanian, even when the cause of action is under sister-state, federal, or foreign law.

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3. For a classic expression of this point, see Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 341–43 (1933).

4. *See generally* Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845 (2013).

Second, a law can appear substantive, because it identifies the content of the cause of action upon which the plaintiff claims a right to relief,[5] but turn out to be procedural. I have argued that the conflicting approaches in *Erie*[6] and *Swift v. Tyson*[7] were not motivated by disagreement about federal courts' constitutional obligations or by jurisprudential disagreements about the nature of law but were the result of two different (and equally plausible) views about whether state court interpretations of the general common law prevailing in the state were substantive or procedural.[8] *Erie* assumed that they were substantive (state supreme courts wanted federal courts to follow their interpretations) while *Swift* assumed that they were procedural (state supreme courts took the general common law standard prevailing in their state to be a question of fact about which federal courts could come to their own conclusion).[9] If the question could have been certified to the relevant state supreme courts, the disagreement would have been quickly resolved, although the result would probably have been an *Erie* approach for some states and a *Swift* approach for others.

It is important to recognize that substance/procedure questions are unique in being *systematically* unanswered. It is common, of course, for questions about the applicability of a jurisdiction's law to certain facts to have not been answered by the jurisdiction's courts, requiring the courts of other legal systems facing those facts to speculate or certify. For example, Pennsylvania courts may not have said anything about whether Pennsylvania negligence law applies to police officers when acting in the course of their duties. But these questions of scope can be, and often are, answered by the jurisdiction's courts when they encounter the same facts. A Pennsylvania state court can get a negligence case brought against a police officer acting in the course of his duties. But there is a set of facts that a Pennsylvania state court will never be faced with—namely one where it is *not a Pennsylvania state court* but is instead a federal, or California, or German court. Since it never faces such facts, it never has a reason to speak about what should be done when they arise. Legislatures

5. Or it identifies defenses to the action that remove liability. In what follows I will speak of the content of a cause of action without adding this qualification.

6. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

7. 41 U.S. 1 (1842).

8. Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1120–27 (2011).

9. In Erie's *Suppressed Premise*, I offer an account of why the Supreme Court in *Erie* could require federal courts to follow state court decisions concerning the general common law prevailing in the state even if the state courts themselves did not take them to be binding. *Id.* at 1136–54. I ignore that argument here.

will also rarely speak of the substantive or procedural character of their laws, treating the question as just one of the many choice-of-law problems that they leave to the courts.

Notice that substance/procedure questions concerning federal law are not systematically unanswered, because appeals from state courts to the United States Supreme Court can occur. Through the mechanism of appeal, the Supreme Court has made it clear that its interpretations of federal law are binding on state courts.[10] And it has answered many questions about whether other federal laws are substantive or procedural when state courts entertain federal causes of action.[11]

Unanswered substance/procedure questions bedevil *Erie* problems. Much of the disagreement between Justices Stevens and Ginsburg in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[12] concerned a substance/procedure question about New York law: whether New York wants federal courts entertaining New York statutory damages actions to use section 901(b) of the New York Civil Practice Law, which prohibits statutory damages actions from being brought as a class.[13] No New York court had—or ever would have—occasion to answer the question and the Supreme Court (curiously) did not think to certify the question to the New York Court of Appeals.

This problem of determining whether another sovereign's law is substantive or procedural is not confined to *Erie* problems. It is also faced by state courts and the courts of foreign nations when they try to determine whether they should use another sovereign's law to decide an issue. Indeed, the very same problem of whether section 901(b) is substantive or procedural was faced by a Connecticut state court when it considered entertaining New York statutory damages actions as a class.[14] In involving substance/procedure questions, *Erie* problems are standard choice-of-law problems, just like those faced by state or foreign courts.

There are three general approaches to substance/procedure questions that courts tend to take, each with its advantages and disadvantages. The

10. *E.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

11. *E.g.*, Cent. Vt. Ry. Co. v. White, 238 U.S. 507 (1915) (burdens of proof); Atl. Coast Line R.R. Co. v. Burnette, 239 U.S. 199 (1915) (time bar). Foreign courts, by contrast, are still in the dark, for the Supreme Court has no occasion to say what they should do.

12. 559 U.S. 393 (2010).

13. *Compare id.* at 428–37 (Stevens, J., concurring) with *id.* at 451–57 (Ginsburg, J, dissenting). Another example is *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), in which Justices Scalia and Ginsburg came to different conclusions about whether New York's standard for reviewing a jury's award of damages as excessive was substantive or procedural. *Compare id.* at 429 (featuring Ginsburg arguing that it is substantive), with *id.* at 463–68 (featuring Scalia arguing that it is procedural).

14. Weber v. U.S. Sterling Sec., Inc., 924 A.2d 816, 826–27 (Conn. 2007).

first is to apply forum law whenever the issue faced can be characterized as concerning the means by which causes of action are to be litigated. Forum law applies to all these issues, even if one might understand another jurisdiction's law concerning the issue to be substantive. The main benefit of the forum-law approach is that it dramatically reduces the number of substance/procedure questions a court must face.

The forum-law approach was, by and large, the traditional one used by courts.[15] The only exceptions were a small set of issues that could be characterized as concerning the means of litigating causes of action—including statutes of limitations and burdens of proof—where another jurisdiction's law on the issue might be used if it was interpreted as bound up with the cause of action.[16] In this narrow set of cases, the forum had to speculate about whether the other jurisdiction's law was substantive or procedural. But most substance/procedure questions were avoided entirely, including all questions of whether a third jurisdiction, different from the forum and the one that created the cause of action, might want its law to extend to an issue. For example, a California court entertaining a Nevada action would apply California's attorney-client privilege law to communications between an Oregon attorney and her Oregon client in Oregon, even though Oregon could be understood as wanting its law to apply.

One possible justification for the forum-law approach is that even if another jurisdiction's law is substantive, the forum also likely has a legitimate interest in its procedural law being used, and any conflicts can be decided in the forum's favor. But the actual justification for the traditional approach was a rigidly territorial division of lawmaking authority, in which conflicts between forum law and the law of another jurisdiction were largely impossible. The forum state was understood as having the sole power to regulate the means by which causes of action were litigated in its courts, because the courts' activities were within its borders. To describe an issue faced by a court as concerning the means of litigating a cause of action meant that forum law was the only one that could apply.[17] By the same token, the sovereign where the cause of action arose had the sole power to determine its content.

Modern approaches in the conflict of laws reject this sharp division of lawmaking power. Lawmaking power is now thought to be concurrent

15. *See* Restatement (First) of Conflict of Laws §§ 586–600 (1934).

16. *E.g.*, *id.* §§ 599, 605.

17. *See, e.g.*, JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS 165 (1916); Michael S. Green, *Legal Monism: An American History*, in Christoph Bezemek, Michael Potacs and Alexander Somek (eds.), VIENNA LECTURES ON LEGAL PHILOSOPHY 23, 32–40 (2018).

rather than exclusive.[18] Even if a jurisdiction's law regulates court activity, rather than defining the right upon which a plaintiff sues, it is possible that it legitimately extends to other court systems. To find out whether another jurisdiction's law actually extends to an issue, a court must do its best to discern whether the relevant authorities of the other jurisdiction would say they want their law to apply. The benefit of this *scrupulous* approach is greater sensitivity to the sovereignty interests at play in choice-of-law cases. Its main disadvantage is difficulty of application, given that there will be no direct information from the other jurisdiction's courts on the matter.

The third approach is to adopt some easily-applied test to decide, in a rough-and-ready way, whether a law should be treated as substantive or procedural without detailed inquiry into the intent of the particular lawmakers at issue. Let us call this the *rule-of-thumb* approach. The rules of thumb used are varied, but they all seek to capture sovereignty interests more accurately than the forum-law approach but at less administrative cost than the scrupulous approach.[19]

Indeed, one can characterize both *Swift* and *Erie* as using a rule-of-thumb approach to a substance/procedure problem. *Swift* adopted the view that all states considered their interpretations of the general common law prevailing in their borders to be procedural, whereas *Erie* adopted the view that they all considered them to be substantive. Each was largely accurate for its time but missed nuances that a scrupulous jurisdiction-by-jurisdiction approach might have caught, for there were probably some *Erie* states when *Swift* was decided[20] and some *Swift* states when *Erie* was decided.[21]

Each of these three approaches—the forum-law approach, the scrupulous approach, and the rule-of-thumb approach—can be found in state courts facing substance/procedure questions. And because *Erie* problems sometimes involve substance/procedure questions too, one can find advocates for each on the Court.

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18. Green, *supra* note 17, at 40–48; *see also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

19. *See, e.g.*, Davis v. Mills, 194 U.S. 451 (1904) (adopting a rule of thumb in determining whether a statute of limitations is substantive or procedural).

20. Connecticut is a possibility. *See* Brush v. Scribner, 11 Conn. 388, 407 (1836); Green, *supra* note 8, at 1124.

21. Georgia is a possibility. *See* Slaton v. Hall, 148 S.E. 741, 743 (Ga. 1929); Green, *supra* note 8, at 1123.

B. Borrowing Considerations

The second reason a federal court might use a standard drawn from another sovereign's law is that it serves *federal* regulatory purposes. Because federal interests stand behind the use of the other sovereign's standard, one should describe the law that is applied as federal. A standard from another sovereign's law is *incorporated* into federal law. Let us therefore call these *borrowing* considerations.

For an example of borrowing considerations in action, consider *Woods v. Interstate Realty Co.*[22] A Mississippi statute required non-Mississippi corporations to register to do business in Mississippi before bringing a lawsuit "in any of the courts of this state."[23] The *Erie* problem was whether a federal court sitting in diversity in Mississippi should use the same standard. The Fifth Circuit, after reviewing Mississippi state court decisions, concluded that the phrase "courts of this state" referred only to Mississippi *state* courts.[24] But the Supreme Court concluded that the Mississippi standard should be used in federal court anyway. The reason could not be respect for Mississippi's lawmaking power—by hypothesis, Mississippi officials didn't care whether the standard was used in federal court. Their rule was procedural. Using the standard must instead have served some federal interest.[25]

Failure to distinguish between sovereignty and borrowing considerations is the main reason that the *Erie* doctrine appears so puzzling to academics and judges.[26] If one assumes that the only reasons to use state standards are sovereignty considerations, the Supreme Court's *Erie* jurisprudence looks deviant. Deference to state interests is much more than one would expect. But when borrowing considerations are added, the puzzle disappears.

Part of the problem is ambiguity concerning the word "law." On the one hand, "choosing Mississippi law" might mean giving a matter over to Mississippi's lawmaking authority. That did not happen in *Woods*. On the other hand, the phrase might be used more broadly to mean using a standard that is in Mississippi law, even when the reason one uses the standard has nothing to do with Mississippi's regulatory interests. That is what took place in *Woods*. To avoid confusion, I will generally speak of

22. 337 U.S. 535 (1949).

23. *Id.* at 536 n.1.

24. Interstate Realty Co. v. Woods, 168 F.2d 701, 704–05 (5th Cir. 1948).

25. The *Woods* court described this interest as avoiding "discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts." *Woods*, 337 U.S. at 538.

26. For an example, see Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161 (2016).

a federal court applying state or foreign *standards* (and thus say that Mississippi's standard was applied in *Woods*) and will say that state or foreign *law* is applied only when the reason is sovereignty considerations. But deference to linguistic convention will sometimes force me to use the word "law" when I mean standard, for example, when I speak of *Erie* problems as concerning "choice of law." Speaking of them as "choice of standard" problems, although sometimes more accurate, just sounds too odd.

Another source of confusion is the way that the terms "substantive" and "procedural" are used (or misused) in *Erie* cases. In *Erie* parlance, the Mississippi statute in *Woods* would be described as "substantive."[27] But that wrongly suggests that sovereignty considerations stood behind its use in federal court—that Mississippi officials wanted the federal court in *Woods* to use their standard. The Supreme Court didn't care what Mississippi officials wanted. The Mississippi standard was used for federal reasons.

That sovereignty and borrowing considerations are distinct is evident when they point to different jurisdictions. As implausible as it may seem, in 2017 the Georgia Supreme Court reaffirmed the state's commitment to a Swiftian view of the common law.[28] If a Georgia state court gets a common law case that arises in Alabama, it will come to its own conclusion about what the common law standard prevailing in Alabama is.[29] What should a federal court sitting in diversity in Georgia do when entertaining a common law case that arises in Alabama? Sovereignty considerations recommend that it follow the decisions of the Alabama Supreme Court.[30] According to the vertical borrowing considerations at play in *Erie* problems, by contrast, it should interpret Alabama law the way a Georgia state court would.[31]

Of course, there is a good argument that Georgia's approach is unconstitutional. A less extreme example of sovereignty and borrowing considerations pointing to different jurisdictions occurs when the forum

27. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc., 536 F.3d 663, 670 (7th Cir. 2008).

28. Coon v. The Medical Ctr., Inc., 797 S.E.2d 828 (Ga. 2017).

29. This apparently applies to all common law cases, not just cases that would be described as concerning the general common law during the *Swift* era.

30. Although the Alabama Supreme Court has never had occasion to say whether its interpretations of the common law prevailing in Alabama are substantive, we can safely assume that it thinks they are.

31. Federal courts in Georgia appear to have privileged borrowing considerations over sovereignty considerations. *E.g.*, Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 n.6 (11th Cir. 1987); In re Tri-State Crematory Litig., 215 F.R.D. 660, 677 (N.D. Ga. 2003); Briggs & Stratton Corp. v. Royal Globe Ins. Co., 64 F. Supp. 2d 1340, 1343–44 (M.D. Ga. 1999).

state makes the constitutionally permissible choice of its own law even though another jurisdiction is more interested in its law applying.[32] Vertical borrowing considerations recommend forum law, while the weight of sovereignty considerations recommend the other jurisdiction's law.

In *Klaxon*, the Supreme Court decided this conflict between vertical borrowing considerations and the weight of sovereignty considerations in favor of the former.[33] A federal court sitting in diversity should use the choice-of-law rules of the forum state. I will discuss whether *Klaxon* was rightly decided later.[34] But it is worth noting that with *Klaxon* in place, the sovereignty considerations that a federal court is permitted to consider in an *Erie* problem cannot point to a different jurisdiction's law than borrowing considerations do (provided that the forum state's approach is constitutional). If a New York state court would favor New York's interests over Pennsylvania's interests and so apply New York law, a federal court in New York facing an *Erie* problem can take into account only sovereignty considerations in favor of applying New York law. But even with *Klaxon* in place, the distinction between borrowing and sovereignty considerations remains essential. Borrowing considerations will recommend that a federal court in New York use a New York standard when sovereignty considerations are utterly absent—when New York officials do not care whether the standard is used in federal court.

Although borrowing considerations are particularly important in *Erie* problems, they have a recognized place in other choice-of-law contexts as well. Consider a California state court entertaining a Nevada cause of action. The plaintiff has waited two and a half years to sue. Which limitations period should the court use—the three-year period in California's statute of limitations or Nevada's two-year limitations period? Assuming that Nevada's limitations period is substantive, in the sense that Nevada officials want the California state court to use their period, the court might use it out of respect for Nevada's lawmaking power. This is an example of sovereignty considerations in action. But even if Nevada officials don't care whether the California court uses their limitations period, the court might use it anyway because that keeps plaintiffs from seeking out California state court solely to take advantage of California's longer limitations period. This is an example of borrowing considerations in action.

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32. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).
33. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
34. *See infra* Explanation of Question 10.

C. *Countervailing Considerations*

In contrast to these two reasons to use another sovereign's standard to decide an issue, there are federal interests in favor of using an independent federal standard. I will call these *countervailing* considerations,[35] because they can recommend a standard that is different from the competing state or foreign law—even though the federal standard might, by chance, be the same as the other sovereign's.

The following is an example of countervailing considerations' being decisive in an *Erie* problem. Assume that under the federal standard of *forum non conveniens* a federal court entertaining some foreign cause of action should dismiss it so it can be entertained by a foreign court. A forum state court would retain the action. Because the difference between the federal and forum state standards will motivate forum shopping, vertical borrowing considerations recommend using the forum state standard. But federal courts facing such *Erie* problems have uniformly concluded that the federal standard should be used.[36] Some countervailing considerations to which they have appealed to justify this conclusion are federal interests in foreign relations and the difficulty the federal court would face interpreting foreign law and getting access to foreign witnesses.

Notice that a federal court balancing borrowing considerations against countervailing considerations is balancing one type of federal interest against another. The law the court applies is federal and the issue is solely whether this federal law should borrow a standard from another sovereign's law or use an independent federal standard. On the other hand, a federal court balancing sovereignty considerations against countervailing considerations is trying to determine whether the law of another sovereign or federal law should be applied.[37]

Countervailing considerations obviously have their analogue in state court. Consider our California state court entertaining a Nevada cause of action. The plaintiff has waited two and a half years to sue. Sovereignty and borrowing considerations can recommend using Nevada's two-year limitations period. But countervailing considerations can argue in favor of

35. Here I am following the language in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958).

36. *See* 14D CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828.5 (2009).

37. Sometimes both sovereignty and borrowing considerations recommend another sovereign's standard, in which case the standard could be described as the law of the other sovereign *and* as federal law. There is no need to choose between descriptions, since federal law and the law of the other sovereign have the same content.

using California's three-year limitations period. The period is an expression of California's regulatory policies concerning when plaintiffs have waited too long to sue (such as when evidence is stale or plaintiffs have waived their rights) and the California court could favor these California policies over any California policies in favor of borrowing the Nevada period and over any Nevada policies in favor of applying Nevada law.

D. Separation-of-Powers Considerations

To repeat, the first three considerations in *Erie* problems consist of reasons for a federal court to use a standard drawn from another sovereign's law (sovereignty and borrowing considerations) and reasons for it to use an independent federal standard (countervailing considerations). So far we have assumed that federal courts are free to answer *Erie* problems as they see fit, without their decisions being constrained or influenced by the decisions of other federal actors. But that, of course, isn't the case. The fourth type of consideration concerns how federal courts' reasoning in an *Erie* problem is constrained or influenced by federal enacted law, whether it is a provision of the U.S. Constitution, a federal statute, or a Federal Rule of Civil Procedure (FRCP). Let us call these *separation-of-powers* considerations.

Of particular importance in *Erie* problems is determining whether federal enacted law has already answered the *Erie* problem in favor of a federal standard, forcing the federal court to give priority to countervailing considerations over sovereignty and borrowing considerations. One of the most difficult issues in *Erie* problems is deciding whether a federal court's hands have been tied in this fashion. It is also possible for federal enacted law to compel the federal court to apply state or foreign law, privileging sovereignty or borrowing considerations over countervailing considerations.[38]

If a federal court's hands are not tied, in the sense that it is not following the mandate of some federal enacted law in answering the *Erie* problem, then its decision can be described as a form of common law reasoning. Notice that even then its reasoning can be *influenced* by federal enacted law. In particular, federal enacted law can play a role in generating some of the countervailing or borrowing considerations that the federal court takes into account.

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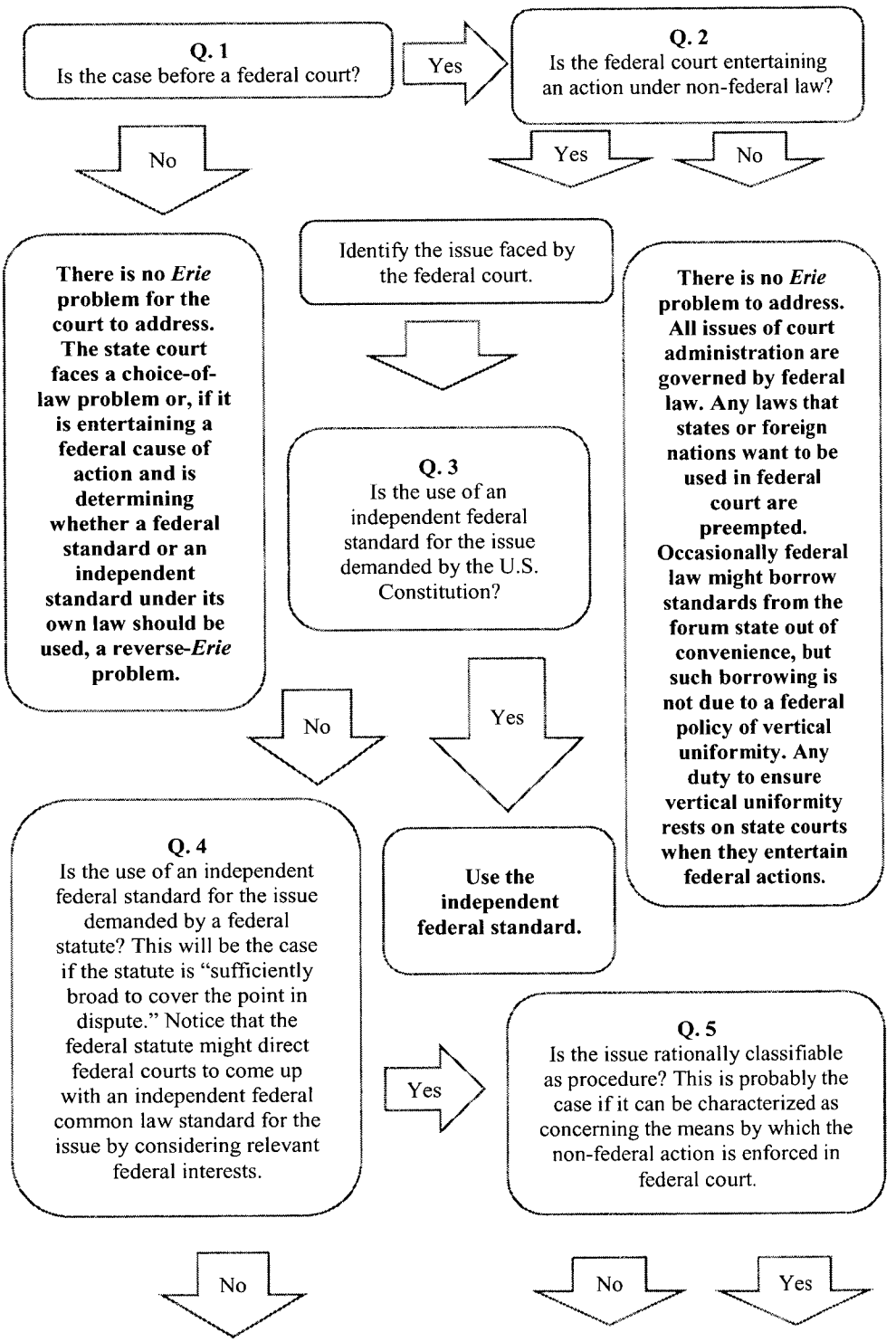
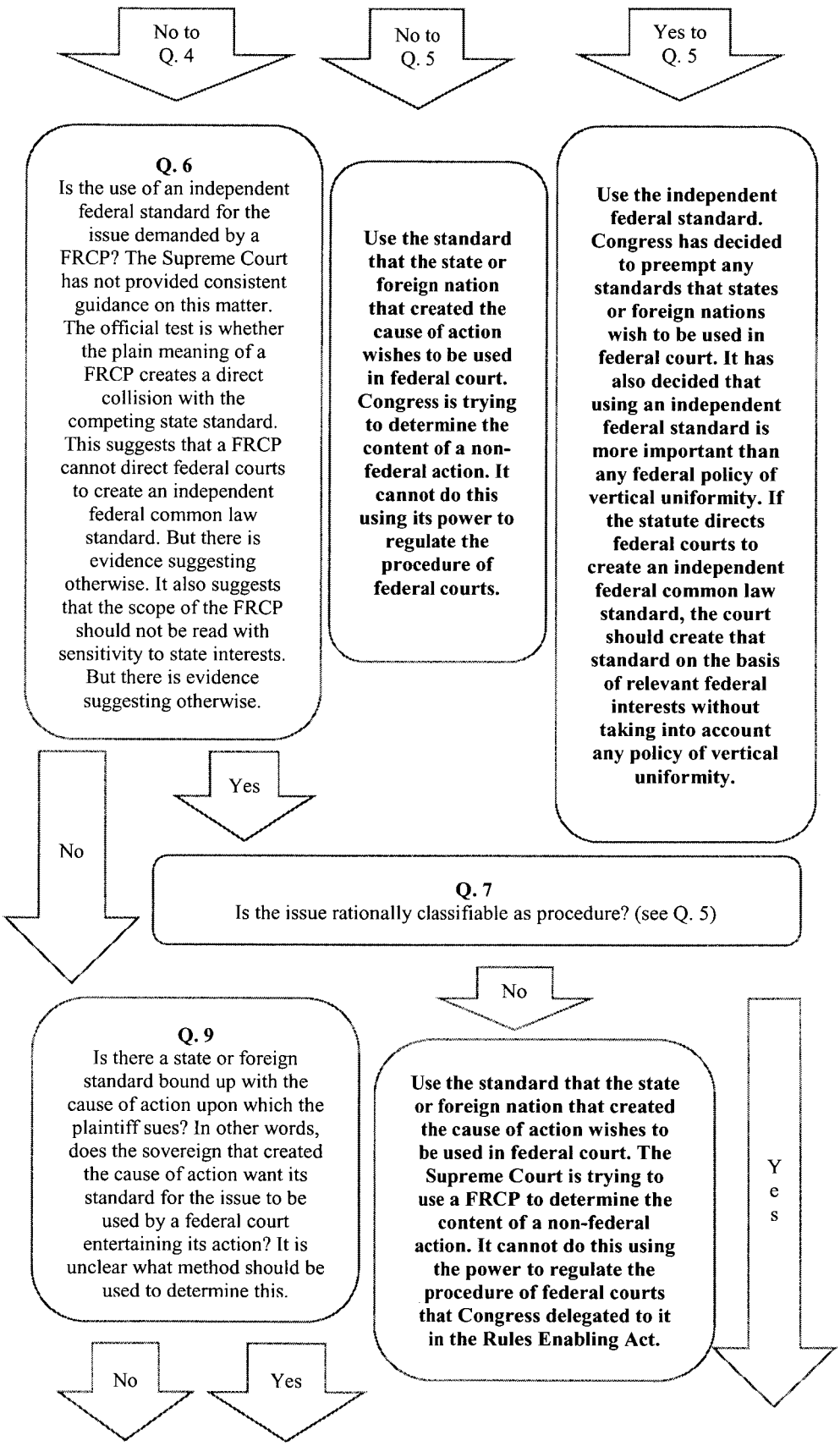
38. As we shall see, the Supreme Court has understood the U.S. Constitution as compelling federal courts to favor sovereignty considerations in certain circumstances. *See infra* Explanation of Question 9.

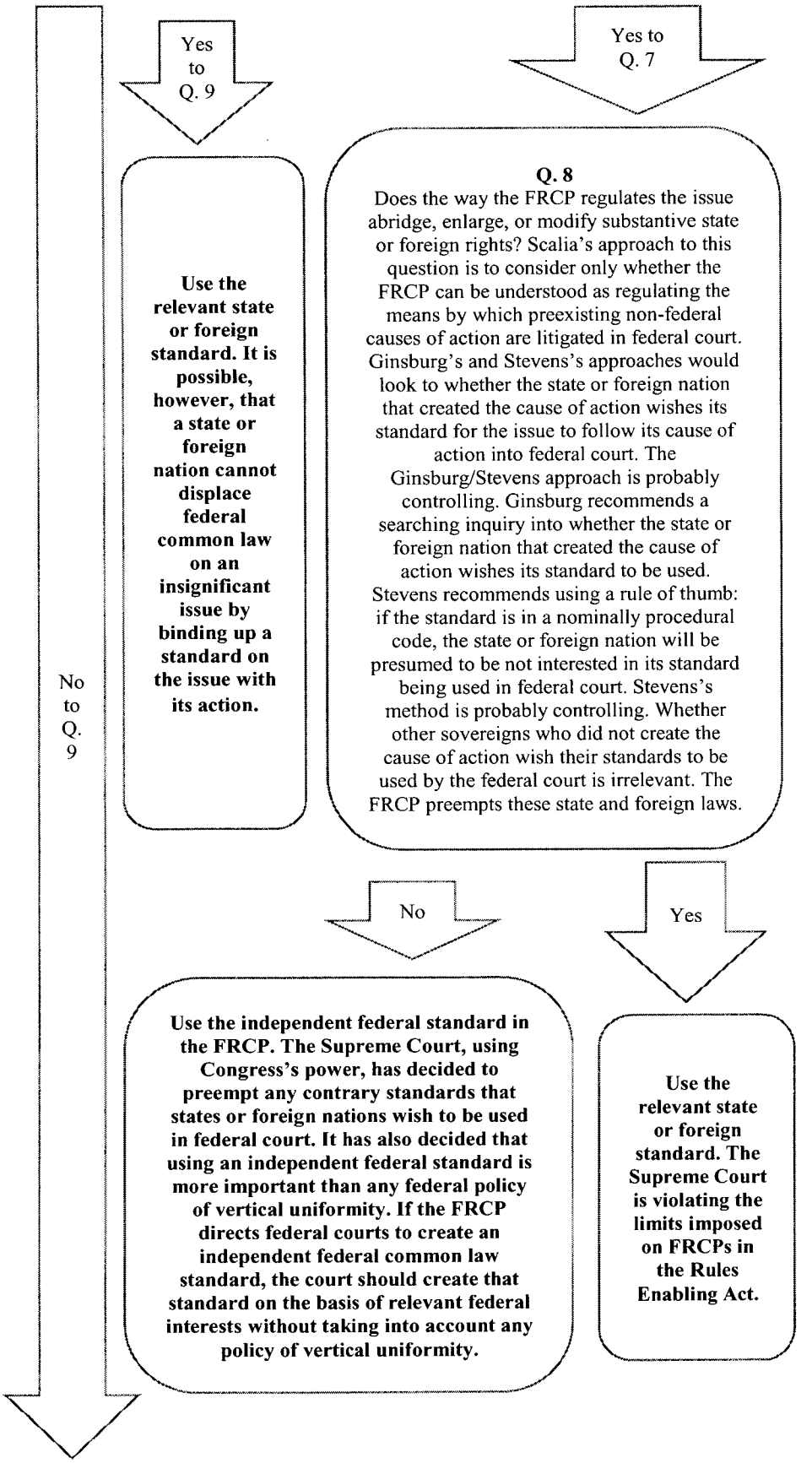
Separation-of-powers considerations also have their analogue in state court. Our California court deliberating about whether to apply Nevada's or California's limitations period might find that it is compelled to apply California's limitations period because the California state legislature has told it to do so. Or the legislature might have enacted a borrowing statute that compels the court to use Nevada's limitations period, thereby favoring borrowing considerations. The separation-of-powers considerations one sees in *Erie* problems are not unique to that context. To sum up, *Erie* problems arise when federal courts facing an issue must choose between an independent federal standard and a standard drawn from another sovereign's law. In making this choice, they can take into account sovereignty considerations (does the other sovereign wish its standard to be used?), borrowing considerations (are there federal reasons to use the other sovereign's standard?), and countervailing considerations (are there federal reasons to use an independent federal standard?). Furthermore, how the court takes these factors into account can be constrained and influenced by federal enacted law, that is, by separation-of-powers considerations. In considering sovereignty, borrowing, and countervailing considerations, subject to the restraints of separation-of-powers considerations, *Erie* problems look like normal choice-of-law problems faced by other courts.

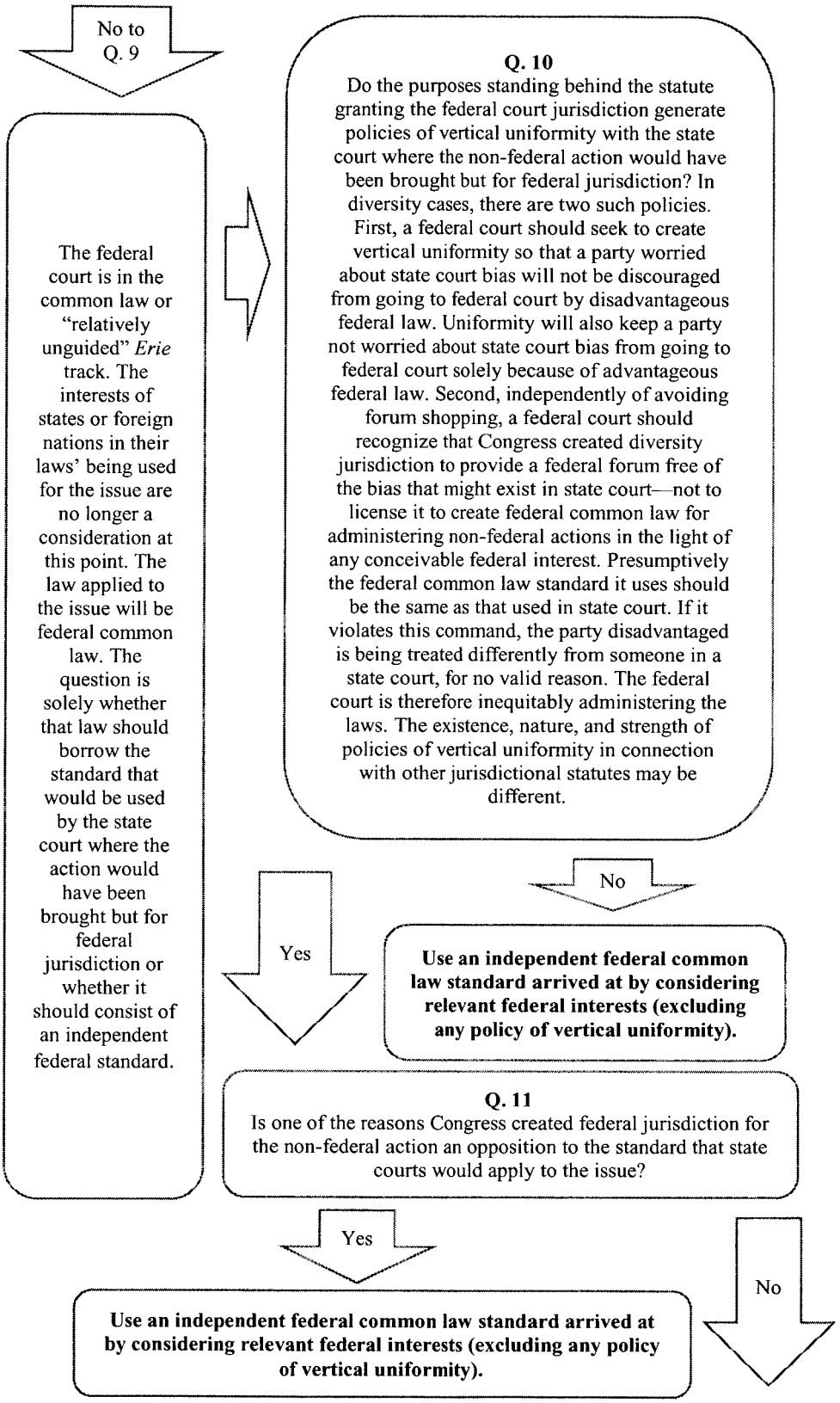
Now for the flowchart, followed by a lengthy discussion of each step.

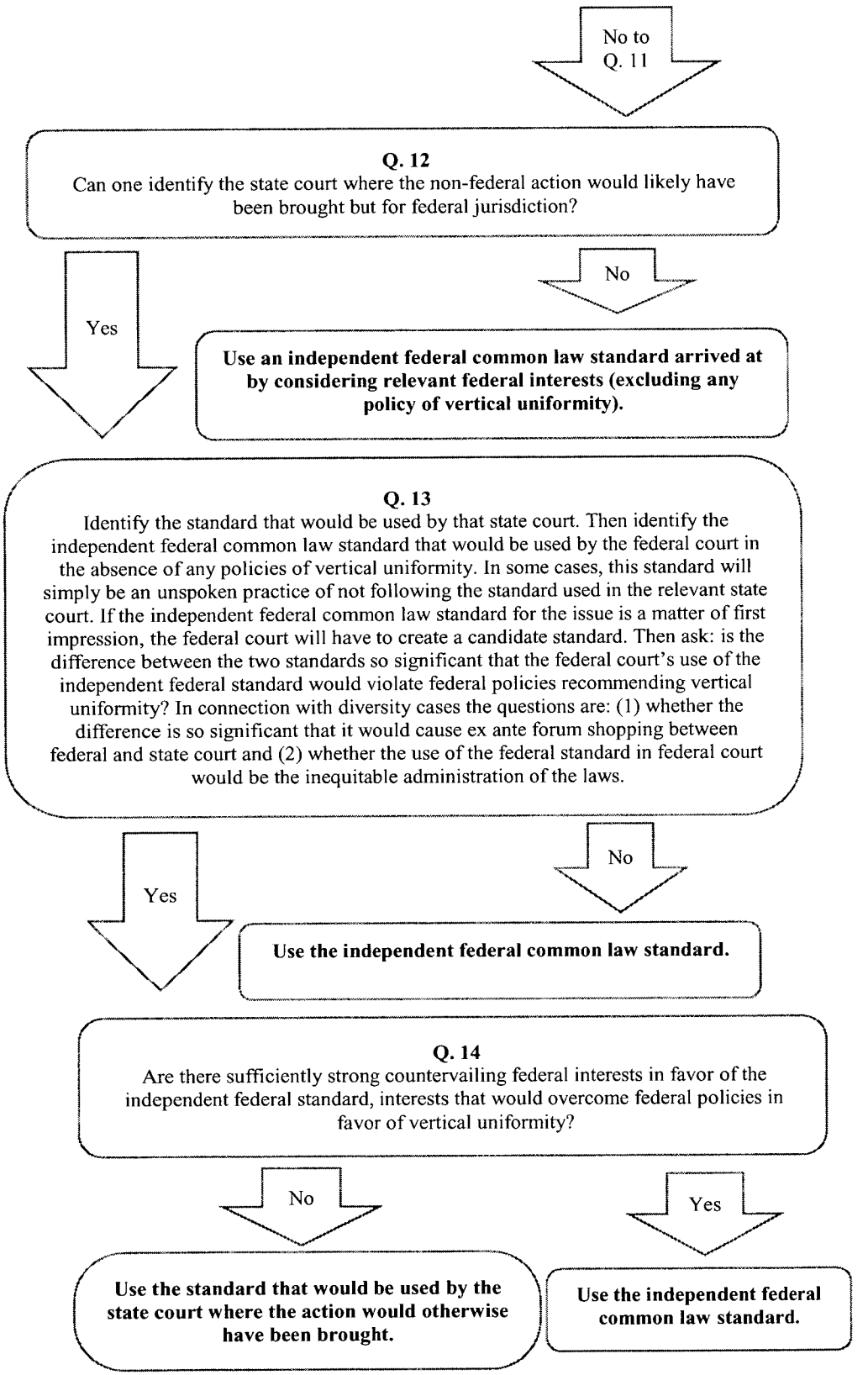
II: THE FLOWCHART




No to Q. 4
No to Q. 5
Yes to Q. 5
Q. 6
Is the use of an independent federal standard for the issue demanded by a FRCP? The Supreme Court has not provided consistent guidance on this matter. The official test is whether the plain meaning of a FRCP creates a direct collision with the competing state standard. This suggests that a FRCP cannot direct federal courts to create an independent federal common law standard. But there is evidence suggesting otherwise. It also suggests that the scope of the FRCP should not be read with sensitivity to state interests. But there is evidence suggesting otherwise.
Use the standard that the state or foreign nation that created the cause of action wishes to be used in federal court. Congress is trying to determine the content of a non-federal action. It cannot do this using its power to regulate the procedure of federal courts.
Use the independent federal standard. Congress has decided to preempt any standards that states or foreign nations wish to be used in federal court. It has also decided that using an independent federal standard is more important than any federal policy of vertical uniformity. If the statute directs federal courts to create an independent federal common law standard, the court should create that standard on the basis of relevant federal interests without taking into account any policy of vertical uniformity.
Yes
No
Q. 7
Is the issue rationally classifiable as procedure? (see Q. 5)
No
Q. 9
Is there a state or foreign standard bound up with the cause of action upon which the plaintiff sues? In other words, does the sovereign that created the cause of action want its standard for the issue to be used by a federal court entertaining its action? It is unclear what method should be used to determine this.
Use the standard that the state or foreign nation that created the cause of action wishes to be used in federal court. The Supreme Court is trying to use a FRCP to determine the content of a non-federal action. It cannot do this using the power to regulate the procedure of federal courts that Congress delegated to it in the Rules Enabling Act.
Yes
No
Yes


No to Q. 9
Yes to Q. 9
Use the relevant state or foreign standard. It is possible, however, that a state or foreign nation cannot displace federal common law on an insignificant issue by binding up a standard on the issue with its action.
Yes to Q. 7
Q. 8
Does the way the FRCP regulates the issue abridge, enlarge, or modify substantive state or foreign rights? Scalia's approach to this question is to consider only whether the FRCP can be understood as regulating the means by which preexisting non-federal causes of action are litigated in federal court. Ginsburg's and Stevens's approaches would look to whether the state or foreign nation that created the cause of action wishes its standard for the issue to follow its cause of action into federal court. The Ginsburg/Stevens approach is probably controlling. Ginsburg recommends a searching inquiry into whether the state or foreign nation that created the cause of action wishes its standard to be used. Stevens recommends using a rule of thumb: if the standard is in a nominally procedural code, the state or foreign nation will be presumed to be not interested in its standard being used in federal court. Stevens's method is probably controlling. Whether other sovereigns who did not create the cause of action wish their standards to be used by the federal court is irrelevant. The FRCP preempts these state and foreign laws.
No
Yes
Use the independent federal standard in the FRCP. The Supreme Court, using Congress's power, has decided to preempt any contrary standards that states or foreign nations wish to be used in federal court. It has also decided that using an independent federal standard is more important than any federal policy of vertical uniformity. If the FRCP directs federal courts to create an independent federal common law standard, the court should create that standard on the basis of relevant federal interests without taking into account any policy of vertical uniformity.
Use the relevant state or foreign standard. The Supreme Court is violating the limits imposed on FRCPs in the Rules Enabling Act.


No to Q. 9
The federal court is in the common law or "relatively unguided" *Erie* track. The interests of states or foreign nations in their laws' being used for the issue are no longer a consideration at this point. The law applied to the issue will be federal common law. The question is solely whether that law should borrow the standard that would be used by the state court where the action would have been brought but for federal jurisdiction or whether it should consist of an independent federal standard.
Q. 10
Do the purposes standing behind the statute granting the federal court jurisdiction generate policies of vertical uniformity with the state court where the non-federal action would have been brought but for federal jurisdiction? In diversity cases, there are two such policies. First, a federal court should seek to create vertical uniformity so that a party worried about state court bias will not be discouraged from going to federal court by disadvantageous federal law. Uniformity will also keep a party not worried about state court bias from going to federal court solely because of advantageous federal law. Second, independently of avoiding forum shopping, a federal court should recognize that Congress created diversity jurisdiction to provide a federal forum free of the bias that might exist in state court—not to license it to create federal common law for administering non-federal actions in the light of any conceivable federal interest. Presumptively the federal common law standard it uses should be the same as that used in state court. If it violates this command, the party disadvantaged is being treated differently from someone in a state court, for no valid reason. The federal court is therefore inequitably administering the laws. The existence, nature, and strength of policies of vertical uniformity in connection with other jurisdictional statutes may be different.
No
Yes
Use an independent federal common law standard arrived at by considering relevant federal interests (excluding any policy of vertical uniformity).
Q. 11
Is one of the reasons Congress created federal jurisdiction for the non-federal action an opposition to the standard that state courts would apply to the issue?
Yes
No
Use an independent federal common law standard arrived at by considering relevant federal interests (excluding any policy of vertical uniformity).


No to Q. 11
Q. 12
Can one identify the state court where the non-federal action would likely have been brought but for federal jurisdiction?
No
Yes
Use an independent federal common law standard arrived at by considering relevant federal interests (excluding any policy of vertical uniformity).
Q. 13
Identify the standard that would be used by that state court. Then identify the independent federal common law standard that would be used by the federal court in the absence of any policies of vertical uniformity. In some cases, this standard will simply be an unspoken practice of not following the standard used in the relevant state court. If the independent federal common law standard for the issue is a matter of first impression, the federal court will have to create a candidate standard. Then ask: is the difference between the two standards so significant that the federal court's use of the independent federal standard would violate federal policies recommending vertical uniformity? In connection with diversity cases the questions are: (1) whether the difference is so significant that it would cause ex ante forum shopping between federal and state court and (2) whether the use of the federal standard in federal court would be the inequitable administration of the laws.
No
Yes
Use the independent federal common law standard.
Q. 14
Are there sufficiently strong countervailing federal interests in favor of the independent federal standard, interests that would overcome federal policies in favor of vertical uniformity?
No
Yes
Use the standard that would be used by the state court where the action would otherwise have been brought.
Use the independent federal common law standard.

III. EXPLANATIONS

With the flowchart presented, let us now consider each step in greater detail.

Question 1: Is the case before a federal court?

If the case is not before a federal court, then there is no *Erie* problem to answer. In a sense, this is true only by stipulation. *Erie* problems are simply *defined* as concerning whether a federal court should use a standard drawn from another sovereign's law or an independent federal standard.[39] If the question is whether a *state* court should use a standard drawn from another sovereign's law or an independent standard from its own law, then the problem the court faces is not called an *Erie* problem, even if it is similar to an *Erie* problem in other respects.

As we have seen, all the considerations faced by federal courts in *Erie* problems—sovereignty, borrowing, countervailing, and separation-of-powers—have their analogues in state court. It is true that *vertical* borrowing considerations are unique to *Erie* cases and are generally more significant than the horizontal borrowing considerations faced by state courts. A federal court in California has more reasons to borrow standards used by California state courts than a California state court has to borrow standards from sister-state or foreign courts. The fact remains that borrowing considerations can arise in state court too. *Erie* problems are, in their essentials, like any other choice-of-law case.

But even though state courts face problems similar to *Erie* problems, they are not called "*Erie*" problems. They are called "choice-of-law" problems or (if the state court is entertaining a federal cause of action and is trying to determine whether it should use a federal standard or a standard from its own law) "reverse-*Erie*" problems.

Question 2: Is the federal court entertaining an action under non-federal law?

If the only action a federal court is entertaining is under federal law, then it is usually said that there is no *Erie* problem for the court to answer. This is puzzling, for such a court can still legitimately ask whether an issue should be decided using a standard from another sovereign's law. In doing

39. Felder v. Casey, 487 U.S. 131, 161 (1988) (O'Connor, J., dissenting); Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010).

so, sovereignty, borrowing, countervailing, and separation-of-powers considerations can come into play.

Let us start with sovereignty considerations. It is true that if the plaintiff is suing under federal law, the question of whether there should be deference to another sovereign's lawmaking power concerning the content of the cause of action has already been answered in the negative. It is federal law—rather than state law or foreign law—that is being applied. But another sovereign might be legitimately interested in regulating an issue related to how the federal cause of action is litigated in federal court. Assume that an Oregon lawyer and her Oregon client have a conversation in Oregon. The conversation is relevant to a case brought under federal law in federal court. Oregon can have an interest in its attorney-client privilege law being used, forcing the federal court to weigh these sovereignty considerations against countervailing considerations in favor of federal attorney-client privilege law, unless (as is in fact the case[40]) separation-of-powers considerations force the federal court's hands. Another example is a foreign nation that wants its statute of limitations to be used by a federal court entertaining a federal cause of action, because a party to the action is a domiciliary.

That said, federal courts appear to assume that federal law trumps the law of any state or foreign nation that is interested in regulating how a federal cause of action is litigated in federal court.[41] Thus, it appears that federal courts have adopted the forum-law approach to substance/procedure questions that arise concerning questions of court administration in federal question cases.

Not only are sovereignty considerations ignored in federal question cases, so are the vertical borrowing considerations that are so important when federal courts sitting in diversity entertain actions under non-federal law. Although federal courts entertaining federal causes of action will sometimes borrow standards from the forum state for issues of court administration,[42] this is for reasons of convenience, not because there is a federal policy of vertical uniformity. One might wonder why no federal policy of vertical uniformity exists in federal question cases. If the federal cause of action can be entertained by both federal and state courts, there

40. Under FED. R. EVID. 501, federal privilege law should be used in federal question cases.

41. For example, in Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1966), the Court treated the question of the limitations period to use when a federal statute lacks one to be a matter of federal law, even when a state statute of limitations is borrowed.

42. The most obvious example is federal courts' borrowing limitations periods from forum state law for federal statutes. *See, e.g., id.* at 703–04.

is arguably a federal interest in avoiding forum shopping—in ensuring that the choice of a federal forum is for the right reasons, not simply to take advantage of some difference in standards of court administration between federal and state court. That would be a reason for a federal court in New York entertaining a federal cause of action to borrow standards from New York law concerning matters of court administration, even though New York officials do not want their law to be used.

Nevertheless, such vertical borrowing considerations are ignored in federal question cases. The reason, I think, is that the duty to ensure uniformity between federal and state courts when entertaining federal causes of action is thought to fall upon *state* courts. The matter therefore falls under the "reverse-*Erie*" rubric rather than being an *Erie* problem.[43]

Question 3: Is the use of an independent federal standard for the issue demanded by the U.S. Constitution?

At this stage one should identify the issue faced by the federal court entertaining the non-federal cause of action. Given *Erie*'s rejection of a Swiftian approach to the general common law, the issue is usually not going to concern the content of the plaintiff's non-federal cause of action. It will concern court administration, such as how long the plaintiff can wait before bringing suit without being dismissed as time-barred or how specific the plaintiff should be in his complaint. There is an *Erie* problem when the court is choosing between an independent federal standard and a standard drawn from some other sovereign's law to decide the issue.

As we have seen, separation-of-powers considerations can compel a federal court to use an independent federal standard, whatever the court's own judgment about the relative weight of sovereignty, borrowing, and countervailing considerations. This is obviously the case when a federal constitutional provision tells the federal court to use a federal standard. The court is bound to comply, even if sovereignty and borrowing considerations would recommend using another sovereign's standard.

Assume a federal court in California is entertaining a Nevada common law action in which the amount in controversy is $100,000. The Seventh Amendment tells it that the parties have a right to a jury trial. Because this right has not been incorporated into the Fourteenth Amendment, it does not apply in state court.[44] If the Nevada action were

43. *See* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1909–17 (2013).

44. Walker v. Sauvinet, 92 U.S. 90, 92 (1875); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996).

before a California or Nevada state court, the judge would be constitutionally permitted to act as the finder of fact.

It follows that the federal court must provide a right to a jury trial even if sovereignty and borrowing considerations recommend otherwise. It may be that Nevada officials want the Nevada action to be adjudicated in federal court by a judge. That does not matter—the federal court is forbidden to take this sovereignty consideration into account. It may also be that the difference between the way the Nevada action would be litigated in federal and state court in California will cause forum shopping. That also does not matter—the federal court is forbidden to take this borrowing consideration into account.

There remains the question of whether a federal constitutional provision does indeed direct a federal court to decide an issue according to a federal standard. If it doesn't (and no other federal enacted law directs the federal court to use the federal standard), then the decision to use the federal standard is the product of common law reasoning.[45] The Supreme Court has discussed when a federal statute and FRCP direct a federal court to decide an issue according to a federal standard—placing the federal court in the statutory or FRCP *Erie* "track." But, to my knowledge, it has not given us guidance in determining whether an *Erie* problem falls in the constitutional track.

To repeat, if a provision of the United States Constitution directs the federal court to decide the issue using an independent federal standard, then the court must use the federal standard. If the answer is no, then one moves on to consider whether any other federal enacted law ties the federal court's hands.

Question 4: Is the use of an independent federal standard for the issue demanded by a federal statute?

If a federal statute directs a federal court to use an independent federal standard to decide the issue and the statute is constitutional, the court is again bound to comply, even if sovereignty and borrowing considerations would recommend using another sovereign's standard. By enacting the statute, Congress has chosen to favor countervailing considerations recommending the federal standard over sovereignty or borrowing considerations and the federal court must defer to its judgment.

45. *E.g.*, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 n.10 (1958) (treating the question of whether an issue should be decided by a judge or a jury as falling in the common law *Erie* track).

Notice that how one describes the effect of the statute depends upon whether sovereignty or borrowing considerations are defeated. If sovereignty considerations are defeated, the statute *preempts* state or foreign law.[46] If borrowing considerations are defeated, there is no preemption, for state or foreign law did not purport to apply in the first place. Instead the federal statute *repeals* any past federal law on the matter—in particular, any federal common law that borrowed standards from another sovereign's law—and prohibits federal courts from engaging in future federal common lawmaking that engages in such borrowing.

The fact that putting an *Erie* problem in the statutory track may not mean that any state or foreign law is preempted can help explain why the Supreme Court jurisprudence on preemption—which arguably includes the demand that federal statutes be read narrowly to avoid having a preemptive effect on state[47] (and perhaps foreign[48]) law—is not generally referred to in an *Erie* context. The Court has instead said that an *Erie* problem falls within the statutory track just so long as the statute is "sufficiently broad to cover the point in dispute."[49]

Notice that a federal statute might direct a federal court to use an independent federal standard not by identifying the standard to be used, but by directing the federal court to consider federal interests and come up with the standard itself through common law reasoning.[50] When the effect of the statute is to override *sovereignty* considerations, this amounts to "field" preemption.[51] State or foreign law is displaced and the federal court is directed to fill the void with federal common law. When the statute's effect is only to override *borrowing* considerations, there is no field preemption. Federal common law applies even before the statute is enacted. What the statute does is remove borrowing considerations from

46. For an article that looks at *Erie* problems in the statutory and FRCP track from the perspective of preemption, see Jeffrey L. Rensberger, Erie *and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591 (2015).

47. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001).

48. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (discussing a presumption against extraterritoriality). *See also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (discussing a presumption against preemption of international law).

49. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 n.4 (1988). Another reason Supreme Court jurisprudence on preemption is largely ignored in *Erie* problems is that even when there is preemption, its effect is limited. In the usual preemption context, state or foreign law is preempted in state as well as federal court. But in an *Erie* context the federal statute preempts state or foreign law only in federal court.

50. *See, e.g.*, *id. See also* Rensberger, *supra* note 46, at 1602–03.

51. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480–81 (2018); Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 109 (1992).

the federal policies that federal courts should take into account when creating federal common law rules for the issue.

Question 5: Is the issue rationally classifiable as procedure?

If a federal statute demands that the federal court use an independent federal standard for the issue, the only remaining question is whether the statute is constitutional. Here the Supreme Court has attributed broad powers to Congress to regulate the activities of federal district courts. The only thing that matters, as the Court in *Hanna* has told us, is that the issue regulated is "rationally capable of classification" as procedure.[52]

The source of this broad authority is the power to establish the lower federal courts, combined with the Necessary and Proper Clause.[53] A neglected issue is the role of other constitutional provisions empowering Congress, such as the Commerce Clause. It is true that if the Commerce Clause is used to create the federal cause of action upon which the plaintiff sues, then we are no longer facing an *Erie* problem (see Question 2). But the Commerce Clause might be the source of power to regulate the activities of federal courts when entertaining non-federal causes of action.[54] There has been little discussion of this matter.

There has also been little discussion of what the *Hanna* test actually means. The word "procedure" is not being used with the meaning I identified above.[55] If it were, the *Hanna* test would be satisfied if the statute were meant to apply only in federal court. That would allow a federal statute to replace the entire content of the non-federal cause of action, so long as the replacement did not purport to extend to state or foreign courts. Instead it is an *issue*, rather than a law, that is being characterized as procedure. It appears that characterizing an issue as procedure means treating it as concerning the means by which a preexisting cause of action is litigated, rather than the content of the cause of action itself.

One benefit of the *Hanna* test is that it frees a federal court from being constitutionally compelled to speculate about the substantive nature of state or foreign law. It can adopt the forum-law approach to substance/procedure questions in statutory track *Erie* problems. Still, one wonders whether the Supreme Court would stick to the *Hanna* test when

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

53. *Id.* at 472–74.

54. *Cf.* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (using Commerce Clause to justify constitutionality of Federal Arbitration Act).

55. *See supra* text accompanying note 3.

a federal statute overrides an *explicitly* substantive standard that is bound up with a state or foreign cause of action. Imagine that Pennsylvania's wrongful death statute says that the two-year time limit for the action is meant to follow it into federal, sister-state, and foreign courts. Could Congress really pass a three-year statute of limitations for wrongful death actions that would allow the Pennsylvania action to be brought in federal court after two years had passed? How can one understand the statute as concerning the means by which the Pennsylvania action is litigated in federal court when the statute displaces part of the cause of action itself?

Because the Supreme Court has not addressed such cases, we don't really know that much about when Congress's goal of regulating the activities of federal courts can override substantive state and foreign law. In this respect, however, the situation is similar to state court, for the Supreme Court has also failed to answer when a state's interest in regulating the activities of its courts can override substantive sister-state or foreign law.[56]

If we take the Supreme Court at its word in *Hanna*, however, the fact that the issue regulated by the federal statute is rationally classifiable as procedure means the federal standard in the statute must be used. If the issue cannot be so characterized, the statute is unconstitutional.[57] The failure of the statute to pass the *Hanna* test suggests that it improperly sought to regulate the content of the non-federal cause of action.[58] If so, then the court should apply the relevant non-federal law.

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56. For example, the Supreme Court has not told us whether a forum state may prefer its longer statute of limitations over a substantive sister state limitations period. The closest it has come is *Sun Oil v. Wortman*, 486 U.S. 717 (1988), which told us only that the court had the power to apply its statute of limitations in the *absence* of competing substantive sister state law. *Id.* at 729 n.3.

57. Unless some other source of congressional power, such as the Commerce Clause, is relied upon.

58. Actually, it is not clear that Congress's purpose would be improper if the state did not consider its view about the standard to be substantive. Consider Georgia, which remains committed to a Swiftian view of the common law. It apparently thinks that the common law standard prevailing in Georgia is a matter of fact concerning which federal courts may come to their own judgment. What if Congress decided to take the matter away from federal courts and answer by statute what the federal view of the common law standard in Georgia is? (Notice that the statute would only tell federal courts what to do with such cases—it would not purport to bind state courts.) Since Georgia does not consider its standard to be substantive, it is hard to see how it could complain. And yet *Hanna* would be violated, for the issue the statute regulates is the content of the non-federal cause of action, not mere questions of court administration.

Question 6: Is the use of an independent federal standard for the issue demanded by a FRCP?

If no federal constitutional provision or federal statute demands an independent federal standard for the issue, one moves on to ask whether a FRCP makes that demand. If a FRCP directs the federal court to use an independent federal standard, and the FRCP is valid—in the sense that it is within Congress's power and within the power that Congress has delegated to the Supreme Court under the Rules Enabling Act (REA)—the court is again bound to comply, even if sovereignty and borrowing considerations would recommend using another sovereign's standard. By enacting the FRCP, the Supreme Court has chosen to favor countervailing considerations over sovereignty and borrowing considerations, and the federal court must defer to its judgment. If it is sovereignty considerations that are overridden, the FRCP preempts state or foreign law. If it is borrowing considerations that are overridden, the FRCP repeals any past federal common law that borrows standards from another sovereign's law and prohibits any future creation of federal common law that engages in such borrowing.

One would think that the test here would be similar to what it is in the statutory context. At times the Court has suggested as much. The question is solely "whether the scope of the [FRCP] in fact is sufficiently broad to control the issue."[59] There is no need to read FRCPs narrowly to avoid conflict with state (or presumably foreign) regulatory interests. But the Court has also suggested that the scope of FRCPs should be read with "sensitivity to important state interests and regulatory policies."[60] Part of the problem, as we shall see, is that the scope of the substantive right limitation in the REA is itself a matter of some dispute. The idea that FRCPs should be read in keeping with limitations imposed by the REA is hardly surprising. The problem is that it is not clear what those limitations are.

The Court also seems conflicted about the possibility of a FRCP's removing state or foreign standards from consideration in an area and directing federal courts to fill the area in with independent federal common law standards arrived at by considering relevant federal interests. Officially the Court demands a "direct collision" between the FRCP and the competing state or foreign standards to put the *Erie* problem in the

59. Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980).

60. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 437 n.22 (1996).

FRCP track.[61] So understood, a FRCP cannot direct a federal court to create an independent federal common law rule. But it seems clear that, at times, something like that is indeed taking place.[62]

Question 7: Is the issue rationally classifiable as procedure?

If a FRCP in fact directs a federal court to use an independent federal standard, the next question is whether the FRCP is valid. Congress cannot delegate power to the Supreme Court that Congress does not itself possess. Therefore, the matter regulated by the FRCP must be rationally classifiable as procedure. (See Question 5.) If it is not, the FRCP must have sought to regulate the content of the non-federal cause of action being sued upon. The federal court should apply the relevant non-federal law.

Question 8: Does the way that the FRCP regulates the issue abridge, enlarge, or modify substantive state or foreign rights?

Even if the FRCP is within Congress's power, it will still be invalid if it violates the substantive rights limitation in the REA. The REA gives over Congress's power to regulate lower federal courts to the Supreme Court, subject to the requirement that any FRCP the Supreme Court creates does not "abridge, enlarge, or modify any substantive right."[63] Notice that a FRCP apparently can be invalid because it abridges, enlarges, or modifies *foreign* or even *federal* substantive rights as much as state substantive rights. We can ignore federal substantive rights, for that would take us outside the scope of an *Erie* problem.[64] But there appears to be no reason that an FRCP cannot be invalid because of its effect on foreign substantive rights. The role of foreign rights in connection with FRCPs is another gap in the *Erie* literature.

The substantive rights limitation protects *sovereignty* considerations, not *borrowing* considerations. If the *Erie* problem is in the FRCP track, federal policies in favor of borrowing standards used by a forum state court are already overridden. The only concern is whether the FRCP

61. Walker, 446 U.S. at 749, 750 n.9.

62. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25–52 (2010).

63. 28 U.S.C. § 2072(b) (2012).

64. There would be no *Erie* problem, because the choice the federal court would be facing would be between the federal standard in the FRCP and the federal standard in the federal substantive right.

overrides a state's or foreign nation's desire that its standard be used in federal court. So understood, the limitation appears to force federal courts to attend to the substantive nature of state or foreign law. But very early on, the Supreme Court restricted the scope of the limitation in a manner that freed federal courts from having to answer many substance/procedure questions. In *Sibbach v. Wilson & Co.*,[65] the Court made it clear that a right can be substantive for the purposes of the limitation only if it is tied to the cause of action upon which the plaintiff sues. The right cannot be based on state or foreign law unrelated to the cause of action, even if the relevant state or foreign sovereign legitimately wishes its law to apply in federal court.

Sibbach concerned the validity of FRCP 35, which permits a federal court to order a party to submit to a physical or mental examination. The plaintiff was suing under Indiana negligence law in federal court in Illinois. Illinois law would not allow such an examination, whereas Indiana law would. It is not implausible that Illinois officials would legitimately want the privacy protections of Illinois law to extend to federal courts in Illinois, provided that the invasion of privacy would occur within that state.[66] But the Court held such concerns to be irrelevant to the validity of Rule 35 because they were not tied to the Indiana cause of action upon which the plaintiff sued. This reading appears to still be accepted by the Court.[67] Thus, we can consider the Court to have adopted the forum-law solution to substance/procedure questions when the state or foreign standards at issue are not bound up with the cause of action. Even if these standards are substantive—in the sense that the relevant officials of the state or foreign nation would want them to be used in federal court—forum law (that is, the FRCP) is assumed to preempt them.

What *is* contested on the Court is whether a state or foreign standard can be a substantive right for the purposes of the limitation in the REA if the relevant state or foreign officials want the standard to follow their cause of action into other court systems. Here the *Sibbach* Court also adopted the forum-law approach.[68] As long as the FRCP, by its terms, regulates the means of litigating a cause of action in federal court, rather than purporting to determine the content of the cause of action, the FRCP

65. 312 U.S. 1 (1941).

66. I have argued that a state cannot have a legitimate sovereignty interest in its laws extending solely to federal court. The scope of its interest must be on the basis of a criterion that could, in principle, extend to a sister state court as well. *See generally* Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73 (2014). The fact that the invasion of privacy occurred in Illinois would be such a criterion.

67. *See, e.g.*, Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

68. *Sibbach*, 312 U.S. at 13–14.

is valid even if the interests of the state or foreign nation that created the action are seriously compromised. Thus, one need not consider whether state or foreign standards are substantive. All one needs to consider is the purpose of the FRCP. It would follow that a FRCP could include a three-year time limit for wrongful death actions, even when it overrode an explicitly substantive two-year limit in the state or foreign statute creating the action.

Justice Scalia adopted *Sibbach*'s forum-law approach in his plurality opinion in *Shady Grove*. Justice Ginsburg, in her dissent, adopted a scrupulous approach, in which the federal court undertakes a searching inquiry into whether the state or foreign nation that created the cause of action would want its standard to follow the action into federal court.[69] This has the benefit of showing respect for state and foreign regulatory interests, but it greatly increases the administrative burden on federal courts. Justice Stevens, in his concurrence in *Shady Grove*, adopted a rule-of-thumb approach, according to which a statute that falls within a nominally procedural code (as the New York law at issue did) is presumptively procedural in the absence of persuasive evidence that it is substantive.[70] Stevens's approach is generally taken to be controlling, but the main point for our purposes is that the disagreement on the Court is precisely what one would expect given the substance/procedure question it faced.

Notice that when one considers whether a FRCP abridges, enlarges, or modifies state or foreign substantive rights in a diversity case, the only substantive rights one considers are those that are tied to the cause of action identified by the forum's choice-of-law rules, as required by *Klaxon*. (Whether *Klaxon* applies in jurisdictional contexts other than diversity, however, is a matter that needs to be addressed independently.) Thus, it is entirely possible for a FRCP to be valid in a diversity case even though it abridges, enlarges, or modifies a substantive right, so long as the cause of action to which the substantive right belongs would not be chosen by a forum state court.

To sum up, if the FRCP abridges, enlarges, or modifies a substantive right tied to the cause of action, then the FRCP is invalid (or should be reread more narrowly to avoid the conflict with the state or foreign substantive law).[71] The issue must be decided according to the relevant state or foreign substantive law. But if the FRCP does not abridge, enlarge,

69. *Shady Grove*, 559 U.S. at 444–51 (Ginsburg, J., dissenting).

70. *Id.* at 431–36.

71. *See, e.g.*, *id.* at 437.

or modify substantive rights, the federal standard in the FRCP must be used, even if sovereignty or borrowing considerations recommend using a standard from another jurisdiction's law.

Question 9: Is there a state or foreign standard bound up with the cause action upon which the plaintiff sues?

If the use of the federal standard is not demanded by federal enacted law, we are not yet in the federal common law track, for federal enacted law might tie the federal court's hands in the opposite direction, that is, by demanding that it use the competing state or foreign standard. The language of Question 9 is drawn from *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[72], which suggests that in the absence of federal enacted law to the contrary, a federal court is constitutionally required to use a state (and presumably foreign) legal standard for an issue if the standard is bound up with the cause of action upon which the plaintiff sues. The reasons for applying the state or foreign standard are clearly sovereignty considerations, for the focus is on whether state or foreign officials want the standard to follow their cause of action into other court systems. Notice that in a diversity case one is concerned only about the substantive nature of a standard that is bound up with what a forum state court would choose as the cause of action, due to *Klaxon*. It is apparently possible, therefore, for a federal court sitting in diversity to apply federal common law that preempts a standard bound up with an applicable state or foreign cause of action, provided that a forum state court would have chosen a different cause of action.

Federal courts' inability to preempt state or foreign law with federal common law stands in contrast to Congress, which, as we have seen, can preempt such law, as long as the issue can rationally be characterized as procedure. It is not strange that a federal court's power to preempt state or foreign law would be more limited than Congress's (although it would appear to be more accurate to describe this restriction not as constitutional in its source, but as a congressional demand).[73] But it is strange that federal courts should *always* be obligated to use these bound-up state or foreign standards, no matter what the countervailing federal interests in favor of the independent federal common law rule happen to be. What if a state bound up its *service rules* with its cause of action? Would a federal

72. 356 U.S. 525 (1958).

73. After all, Congress could surely give federal courts the freedom to create federal common law in any circumstance where Congress itself could regulate the matter.

court entertaining the action be constitutionally prohibited from coming up with an independent federal common law rule concerning service?

Finally, there is no guidance about how federal courts are to identify whether the *Byrd* bound-up test is met. It clearly requires a federal court to speculate about the substantive nature of state and foreign law. The forum-law approach to substance/procedure questions is rejected. If the scrupulous approach is used, the burden on federal courts will be significant. The fact that Stevens's rule-of-thumb approach is probably controlling in connection with the substantive rights limitation in the REA is a reason to think that it would be used here too.

Question 10: Do the purposes standing behind the statute granting the federal court jurisdiction generate policies of vertical uniformity with the state court where the non-federal action would have been brought but for federal jurisdiction?

It appears that after one has passed the *Byrd* bound-up test, all sovereignty considerations are left behind. The issue will be regulated by federal common law and the question is solely what the content of that law will be—whether it will use an independent federal standard or borrow the standard that would be used by the state court where the action would have been brought had there been no federal jurisdiction. As we have seen, however, a state or foreign nation can have legitimate regulatory interests in the activity of federal courts that are unrelated to the cause of action. One would think that such sovereignty considerations should have *some* capacity to weigh against a federal court's decision to apply an independent federal standard. And yet, as the Court's *Erie* jurisprudence now stands, there is no place for them to be taken into account.[74] We must assume they have been preempted by federal common law.

Setting aside sovereignty considerations, we now turn to the borrowing considerations that are so important in the common law (or "relatively-unguided") *Erie* track. In diversity cases these have been described as the "twin aims of *Erie*." According to the twin aims, a federal court sitting in diversity should use the standard that would be used by a forum state court if the difference between it and an independent federal standard would lead to forum shopping and the inequitable administration

74. Assume, for example, that a New York state court would apply Oregon's attorney-client privilege law to Oregon communications. Borrowing considerations will recommend that a federal court in New York use Oregon's standards too. But isn't Oregon's interest in its law applying in federal court also relevant?

of the laws.[75] The truth is that a federal court should use the standard that would be used, not necessarily by a forum state court, but by the state court where the action would have been brought but for diversity jurisdiction. It takes further argument to conclude that this is a forum state court (see Question 12). For the moment, however, I will assume that the relevant state court is that of the forum state.

It is crucial to understand that the twin aims are borrowing considerations, not sovereignty considerations. They cannot possibly be sovereignty considerations, for state law is used even on the assumption that the relevant state's officials don't care whether their law is used in federal court. *Woods* is a particularly clear example of this phenomenon, but countless others can be found. For example, in *Guaranty Trust Co. v. York*,[76] the Supreme Court told a federal court sitting in diversity in New York that it had to use New York's statute of limitations without making *any* attempt to determine what New York officials thought about the matter.

One important benefit of treating the twin aims as borrowing rather than sovereignty considerations is that it eases the pressure on federal courts facing common law track *Erie* problems. Unless sovereignty considerations come into play, the law that is applied is federal and the question is solely what standard best serves the balance of federal interests. To make a mistake means that the federal court has created a badly designed federal common law rule, with its costs felt only by the federal government. It has not infringed upon state or foreign sovereignty. It is also less worrisome if, as is sometimes the case, the federal court creates a curious chimera standard, in which state and federal standards are blended together.[77] Understood as an exercise in respect for state sovereignty, it is hard to see how such a result could be correct. But it makes much more sense if we understand the standard as the product of balancing competing federal interests.

Although looking at the twin aims as borrowing considerations goes a long way toward making sense of them, a host of questions still remain. The first is where they come from. The usual answer is the Rules of

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

76. 326 U.S. 99 (1945).

77. This is a common criticism of *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *See* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Earl C. Dudley, Jr., & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong With the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 708 (2006); C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 269–70 (1997).

Decision Act (RDA),[78] which states that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[79] But no one who gives the matter any serious thought can be satisfied with this response.

Setting aside the substantial historical evidence against such a position,[80] it is incompatible with the language of the RDA. First of all, the RDA extends to *all* civil actions in the courts of the United States, including actions brought under federal law. If the twin aims somehow came from the RDA, a federal court entertaining a federal cause of action would be bound by the twin aims too: if an issue of court administration was not covered by federal enacted law, it would have to use the standards that would be used by a forum state court. But that isn't so. Second, under the twin aims a federal court can be required to use *foreign* standards if they would be used by a forum state court. But the RDA says nothing about foreign law. Third, the RDA's language is categorical, but the twin aims are not. The RDA says that state law "shall be regarded as rules of decision," not that it shall be if the difference between state and federal standards leads to forum shopping and the inequitable administration of the laws. Fourth, the RDA says only that state law shall be used in cases where it *applies*. State law applies when the state's authorities would say it does. But the twin aims are about state law standards being used when state law does *not* apply, that is, when state authorities would not say their law should be used in federal court. Fifth, the RDA says vaguely that the "the laws of the several states" shall be used. But which state? There is no suggestion that the answer is the law that would be used by a forum state court.

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78. *E.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 722–23 (1974); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 39–41 (1988) (Scalia, J., dissenting).

79. 28 U.S.C. § 1652 (2012). This is the Act in its current form, which is not different from the original form in any respect relevant here.

80. The RDA was probably not intended to be a restriction on federal courts' power to create common law. As Wilfred Ritz has put it, the Act—by referring generally to "the laws of the several states"—is simply a "direction to the national courts to apply American law, as distinguished from English law." WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES AND USING NEW EVIDENCE 148 (Wythe Holt & L.H. LaRue eds., 1990). *See also* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 106–08 (1993); Suzanna Sherry, *Overruling* Erie: *Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2137–38 (2008). The Act makes it clear that American rather than English law should be used in federal courts. But it says nothing about the division of common lawmaking power between federal and state courts.

Let us therefore set aside the RDA as a possible source of the twin aims. To which statute should one look then? In fact, it is not absolutely necessary to ground the twin aims in any enacted law. The policies upon which courts rely when making common law rules (including policies recommending borrowing standards from other sovereigns' laws) often lack such a source. Nevertheless, I think that borrowing considerations in *Erie* problems can profitably be understood as grounded in the statute giving the federal court jurisdiction over the non-federal cause of action.[81] In diversity cases, that is, of course, the diversity statute.[82] It follows that the twin aims might not be relevant for other forms of federal jurisdiction. The argument for vertical uniformity depends upon the form of federal jurisdiction at issue.

The diversity statute can be understood as recommending vertical uniformity according to the following plausible argument: The purpose of diversity, it is usually said, is to provide an out-of-state party with a forum free from the bias in favor of locals that might exist in state court.[83] If that is the case, there are good reasons for federal courts sitting in diversity to borrow standards for court administration from a forum state court. Assume federal courts used a federal common law limitations period that is shorter than that used by a forum state court. An out-of-state plaintiff who was genuinely worried about bias in state court, but who had waited longer than the federal limitations period, would be forced to remain in state court, thereby frustrating the purposes of diversity. In addition, a defendant who was not worried about bias in state court might remove to federal court solely to get the plaintiff's action dismissed as time-barred, thereby wasting the federal forum on matters unrelated to the purpose of diversity. In short, vertical uniformity of court administration serves the purpose of diversity jurisdiction.

Although the purposes of federal jurisdiction for non-federal actions can generate borrowing considerations, which must be taken into account when federal courts create federal common law rules of court administering for such actions, it is important to recognize that these considerations can be overridden by federal enacted law. It is true that federal statutes and FRCPs that have standards different from those used in a forum state court will frustrate the purposes of diversity, for example,

81. *See* Green, *supra* note 43, at 1888–90. Other scholars have come to the same conclusion. *See* Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341 (2017).

82. 28 U.S.C § 1332(a)-(c) (2012).

83. *E.g.*, Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010); Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting); Borchers, *supra* note 80, at 79–80; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22–28 (1948).

by discouraging those who are legitimately worried about state court bias from seeking out a federal forum. But it is a lawmaker's prerogative to create laws that frustrate the purposes of earlier laws.

Another puzzling question is what the term "inequitable administration of the laws" means. Assume that a federal court sitting in diversity in New York is entertaining a New York cause of action. If it comes up with its own limitations period for the action rather than using New York's limitations period, that is apparently the inequitable administration of the laws. But when a state court in Pennsylvania uses Pennsylvania's limitations period for that same New York action, law is not inequitably administered. Why not? The reason cannot be that New York wants the limitations period to follow its cause of action into federal court in New York but not into state court in Pennsylvania, for the federal court must use New York's limitations period even if New York officials don't care whether it is used. Sovereignty considerations are not in play. Furthermore, why is it the inequitable administration of the laws if a federal court comes up with its own common law limitations period for the New York action, but not if Congress creates a statute of limitations for the action?

Again, I think the answer can be found in the purposes of diversity. Congress created diversity jurisdiction to provide a forum free from the bias that might exist in state court. Its purpose was not to license federal courts to create independent federal common law standards for court administration in the light of any conceivable federal interest.[84] Presumptively the federal common law standard they use should be the same as that of the forum state. If they ignore this policy of vertical uniformity and create a limitations period different from the one used in state court, a wrong has been done to the party disadvantaged by the federal period. She is being treated differently from someone who could remain in state court, without a valid reason. That is the inequitable administration of the laws. But since the wrong she suffers exists because the federal court ignored a congressional policy of vertical uniformity, no wrong is done to her if Congress abandons that policy by enacting a statute of limitations.

Tying the inequity to the purposes of diversity also explains why there is no inequity when a Pennsylvania state court uses its own limitations period for the New York action. Diversity exists to solve a

84. Notice that this policy exists even if there is no possibility of forum shopping (because Congress has given federal courts exclusive jurisdiction over the non-federal cause of action). Thus, Chief Justice Warren had good reason in *Hanna* to identify the inequitable administration of the laws as a separate consideration.

problem with jurisdiction in state court, and federal courts making common law rules concerning court administration in diversity cases need to take that fact into account. But the Pennsylvania legislature did not give Pennsylvania state courts jurisdiction over New York causes of action solely as a means of avoiding some problem with jurisdiction in New York state court. Its purposes in allowing New York actions into Pennsylvania state court are much broader. As a result, Pennsylvania state courts have few, if any, reasons to borrow standards from New York state courts.

What about supplemental jurisdiction? Do its purposes—in combination with the purposes of the statute that provided the federal court with original jurisdiction—generate policies of vertical uniformity, as has been widely assumed?[85] Supplemental jurisdiction exists to avoid the inefficiency that would otherwise occur if non-federal actions without their own source of federal jurisdiction had to be brought in state court. Furthermore, supplemental jurisdiction in diversity cases helps foster the purposes of diversity. If there were no supplemental jurisdiction, the cost of duplicative litigation might discourage a party who is worried about bias in state court from seeking out the protection of a federal forum for her diversity actions.[86]

What is more, since the actions with diversity jurisdiction and those with supplemental jurisdiction can be litigated together in federal court, vertical uniformity is needed or the purposes of diversity will be frustrated. Assume that the federal court applied an independent federal common law limitations period to an action with supplemental jurisdiction that is shorter than that used in a forum state court. The plaintiff might not seek out a federal forum—despite being worried about state court bias—because of this disadvantageous federal law. And the defendant might seek out a federal forum even though she had no worry about state court bias.[87] Similar frustration of the purposes of diversity would occur if the federal court used an independent federal common law limitations period for an action with supplemental jurisdiction that was

85. *E.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 40 (1988) (Scalia, J., dissenting); Godin v. Schencks 629 F.3d 79 (1st Cir. 2010).

86. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1422 (1999); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966); Miller Aviation v. Milwaukee Cty. Bd. of Supervisors, 273 F.3d 722, 731–32 (7th Cir. 2001); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 449 (1991).

87. *See* Peter Westen & Jeffrey S. Lehman, *Is there Life for* Erie *After the Death of Diversity?* 78 MICH. L. REV. 311, 385–87 (1980).

longer than that used by a forum state court. To ensure that choices of a federal forum are made for the right reason, procedural uniformity between federal and forum state court concerning actions with supplemental jurisdiction is needed.

Furthermore, even if concerns about forum shopping are set aside, a federal court's application of a different limitations period would be the inequitable administration of the laws. Congress created supplemental jurisdiction in diversity cases to overcome the inefficiency of separate litigation in state court and to foster the purposes of diversity. There is no reason to think that this was a license to federal courts to create independent federal common law standards of court administration in the light of any conceivable federal interest. To the extent that a federal court ignores this policy of vertical uniformity, it is inequitably administering the laws.[88]

To repeat, at this stage the federal court should consider the source of federal jurisdiction and determine whether there are federal policies of vertical uniformity. In diversity cases there are such policies, known as the twin aims of *Erie*, which extend to actions with supplemental jurisdiction. Whether there are such policies in connection with other forms of federal jurisdiction needs to be assessed independently. The fact that a non-federal cause of action is being entertained by the federal court is not on its own a reason to conclude that such policies are implicated. Only a confusion between sovereignty and borrowing considerations would lead one to conclude otherwise. When a plaintiff sues on a non-federal action in federal court, that is indeed a reason to worry about sovereignty considerations—the state or foreign nation that created the action may want a standard to follow it into federal court. But we have left sovereignty considerations aside. The question now is solely whether there are federal policies in favor of borrowing standards that would be used by a forum state court. That depends upon why Congress gave the federal court jurisdiction over the non-federal action.

A proper understanding of the twin aims allows us to make sense of the Supreme Court's decision in *Klaxon*.[89] I think it is clear that borrowing considerations, not sovereignty considerations, are what motivated *Klaxon*. Choice-of-law rules are about identifying and choosing between sovereignty considerations. They allow a court to determine when a sovereign wants its law to be used and to decide which sovereign wins

88. For the argument that policies of vertical uniformity exist concerning actions with supplemental jurisdiction in federal question cases, see Green, *supra* note 43, at 1920–21.

89. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941).

when more than one has such a desire. To be sure, the forum state might be one of those sovereigns that wants its law to be used. But the reason a federal court uses the forum state's choice-of-law rules cannot be because the forum state wants the federal court to do so.[90] Even if it were true that New York wanted a federal court in New York to use a New York rule that picks New York law over Pennsylvania law, that would simply be a more emphatic way of saying that New York wants its law to be used.[91] Pennsylvania might have a similar desire that the federal court use a Pennsylvania rule that picks Pennsylvania law over New York law. How the federal court chooses between these sovereignty considerations remains, and the principles for choosing cannot be found in the law of the sovereigns the federal court is choosing between. The forum state's choice-of-law rules are used by federal courts for *federal* reasons—in particular because of federal policies of vertical uniformity.

We can also see why *Klaxon* is such a controversial case. With *Klaxon* in place, borrowing considerations can lead a federal court to choose against the weight of sovereignty considerations. One's view about *Klaxon* essentially depends upon how important one thinks getting sovereignty considerations right is compared to the policies of vertical uniformity derived from the purposes of federal jurisdiction. For my part, I think these policies are sufficiently weighty to make *Klaxon* justified, at least in diversity cases and for actions with supplemental jurisdiction in such cases.

If the statute giving the federal court jurisdiction generates no policies of vertical uniformity, then the federal court is free to apply an independent federal common law standard for the issue. If the statute giving the federal court jurisdiction does generate policies of vertical uniformity, however, the federal court needs to keep these in mind when creating a federal common law rule for the issue.

90. For a reading of *Klaxon* as concerning sovereignty considerations, see Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 16–23 (2012).

91. In fact, I very much doubt that state supreme courts, if asked, would say they want their choice-of-law rules to be used in other court systems. For a discussion, see Green, *supra* note 4, at 869–84.

Question 11: Is one of the reasons Congress created federal jurisdiction for the non-federal action an opposition to the standard that state courts would apply to the issue?

Even if the purposes of federal jurisdiction generate general policies of vertical uniformity, a federal court will not have a reason to borrow standards from forum state courts if one of the problems federal jurisdiction is meant to solve is the standards that state courts would apply to the issue. For example, assume that Congress gave federal courts diversity jurisdiction, in part, to avoid state court bias against those from out of the state, as this bias expresses itself in the choice-of-law rules used in state court. If that is so, then *Klaxon* is wrongly decided, and federal courts should use independent federal common law standards concerning choice of law. Although I do not think such a conclusion is justified in connection with diversity jurisdiction, it is entirely possible that Congress's purpose in enacting the Class Action Fairness Act was, in part, to provide a federal forum free from improper choice of law in state court.[92] If so, federal courts with jurisdiction under the Act would be free to come up with independent federal common law rules for choice of law.

Question 12: Can one identify the state court where the non-federal action would likely have been brought but for federal jurisdiction?

I have occasionally spoken about policies of vertical uniformity as recommending borrowing those standards that would be used by a forum state court. This is not entirely accurate. They recommend borrowing standards from the state court where the action would have been brought but for federal jurisdiction. For this reason, one will not be able to borrow those standards if one cannot identify what that state court is. The (unspoken) assumption in diversity cases is that had there been no diversity jurisdiction the action would have proceeded in the court of the state where the federal court is located. When the defendants remove to federal court, this assumption is clearly correct, since that is where the case began.[93] When the plaintiffs have chosen to sue in federal court, however, where the action would have been brought in the absence of federal jurisdiction is a matter of some speculation. The plaintiffs' choice could have been between a federal court in one state (say, New York) and

92. *See* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847 (2017).

93. This is true even if there is subsequent transfer to another federal district court. *E.g.*, Van Dusen v. Barrack, 376 U.S. 612 (1964).

a state court in another state (Pennsylvania). In such a case, the twin aims' goal of avoiding forum shopping would be served if a federal court in New York borrowed standards that would be used by a Pennsylvania state court rather than a New York state court. In diversity cases, however, the Supreme Court has apparently assumed—probably justifiably—that plaintiffs making a choice between state and federal court usually choose between a federal and state court within the same state.

But in some jurisdictional contexts, such as bankruptcy, the matter is more complicated. As an initial matter, let us assume that the purposes of bankruptcy jurisdiction generate policies of uniformity with the state court where the action would otherwise have been brought.[94] Notice that such borrowing considerations are independent of sovereignty considerations, that is, the reasons that a federal court sitting in bankruptcy has to respect state standards that the state wants to be used in federal court.[95] Borrowing considerations give a federal court reasons to use state standards even if the state's officials don't care whether they are used.

How can one determine the consequences of these policies of vertical uniformity? A federal court sitting in bankruptcy will usually be in the district where the debtor resides.[96] But it can take jurisdiction of actions against the debtor even if a state court where the federal court is located would not have personal jurisdiction.[97] When the action had previously been filed in a state court, there is no problem. The federal court borrows standards from that court (which, it should be noted, is not necessarily in the forum state).[98] Even if the action had not been previously filed in state court, the matter is not that difficult if all the parties are residents of the same state and the transaction at issue took place there. A court of that state (which will usually be the forum state) will very likely have been where the action would have been brought but for bankruptcy jurisdiction.[99] In some cases, however, one cannot identify where the

94. For such an argument, see Green, *supra* note 43, at 1922–25. In my discussion I speak of a federal court sitting in bankruptcy, but my reasoning applies to a bankruptcy court too.

95. *See* Butner v. U.S., 440 U.S. 48, 55 (1979); Green, *supra* note 43, at 1922–23.

96. *See* 28 U.S.C. § 1408 (2012).

97. 28 U.S.C. § 1334(e)(1) (2012); FED. R. BANKR. P. 7004(d).

98. *In re* Coudert Bros., 673 F.3d 180, 185, 191 (2d Cir. 2012) (holding that Connecticut limitations period rather than New York's period should be used for an action against the debtor, under either Connecticut or United Kingdom law, originally filed in state court in Connecticut, but ultimately entertained by bankruptcy court in New York).

99. Green, *supra* note 43, at 1927–28; *See In re* Johnson, 453 B.R. 433 (Bankr. M.D. Fla. 2011) (holding that a Florida statute forbidding a plaintiff to plead punitive damages until he offers evidence showing a reasonable basis for that relief should be used by a bankruptcy court in Florida entertaining an action under Florida law by bankruptcy trustee on behalf of Florida debtor against Florida defendant).

action would have been brought had there been no bankruptcy. If so, a federal court has no choice but to employ a federal common law standard for the issue. Keep in mind, however, that this is only a reason for the federal court not to borrow standards from a state court. It is not a reason for the federal court to ignore sovereignty considerations that recommend using state law.

Question 13: Is the difference between the independent federal common law standard and the standard that would be used by the state court where the action would have been brought but for federal jurisdiction so significant that the federal court's use of the independent federal standard would violate federal policies recommending vertical uniformity?

At this point the court needs to identify the standard that would be used by the state court where the action would have been brought absent federal jurisdiction and a candidate independent federal common law standard, which is the one that would be used in the absence of any federal policies of vertical uniformity. The federal standard might have already been created in federal question cases, where federal courts are not bound by policies of vertical uniformity. Or federal courts might have created the standard in the context of *Erie* problems, without recognizing them as such and so ignoring the possibility that a state or foreign standard should have been used.

It is also common for the federal standard to have never been articulated before, because federal courts simply have, as an unthinking matter, not done something that is demanded in a forum state court. In *Woods v. Interstate Realty Co.*,[100] one could say that there was a federal common law standard under which out-of-state corporations did not have to register to do business before bringing suit, because federal courts simply did not make such a demand. But they never recognized that they had this standard until the defendant in *Woods* argued that Mississippi's registration requirement should be used.

Sometimes the content of the federal standard is a matter of first impression. There is no federal standard at all, not even as a judicial practice. It does not follow that the other sovereign's standard should be used (as some flowcharts on *Erie* suggest). Rather, the federal court needs to come up with a candidate federal common law standard by looking to relevant federal interests, excluding policies of vertical uniformity.

100. 337 U.S. 535 (1949).

The court then determines whether the difference between the standards violates policies of vertical uniformity. In diversity cases, the court asks the following two questions. First, would the difference lead to forum shopping, by discouraging a party worried about state court bias from going to federal court or by encouraging a party not worried about state court bias to seek out federal court? Second, would the difference result in the inequitable administration of the laws, because parties would be treated differently in a federal and a forum state court for no valid reason? If the federal policies of vertical uniformity are not violated or any violation is *de minimis*, the independent federal common law standard can be used. The example offered in *Hanna* is differences between a federal common law service rule and the forum state's rule.[101] If the federal policies of vertical uniformity are violated, that is a strong reason to borrow the standard from the relevant state court.

Question 14: Are there sufficiently strong countervailing federal interests in favor of the independent federal standard, interests that would overcome federal policies in favor of vertical uniformity?

The twin aims of *Erie* and other policies of vertical uniformity recommended by the statute giving the federal court jurisdiction are important. But they are not dispositive. They can be defeated by countervailing considerations, that is, sufficiently strong federal reasons in favor of an independent federal common law standard.[102] The idea is that Congress did not *command* federal courts to borrow state standards. Rather, by creating federal jurisdiction it brought into being strong policies in favor of vertical uniformity, policies that can be overridden by other federal interests.

Although identifying countervailing federal interests is not easy, they must be sufficiently strong to overcome the weight of policies of vertical uniformity. The simple convenience of uniform rules for court administration across the federal court system is not enough. An example of countervailing federal interests that were sufficiently strong are those

101. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965).

102. Although the possibility of the twin aims' being defeated by countervailing federal interests was not mentioned in *Hanna*; in *Gasperini*, the Court mentioned such interests as relevant in deciding common law *Erie* problems. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 431–32 (1996). Furthermore, the Court also mentioned countervailing federal interests (although not *Byrd* by name) in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001). They have also been relied upon by lower federal courts. *E.g.*, Esfeld v. Costa Crociere, 289 F.3d 1300, 1307 (11th Cir. 2002); Moling v. O'Reilly Auto., Inc., 763 F. Supp. 2d 956, 975–76 (W.D. Tenn. 2011).

justifying federal courts' choice of federal over forum state standards for *forum non conveniens*, discussed above.[103]

IV. CONCLUSION

As the flowchart and explanations offered above have shown, solving *Erie* problems is a complicated matter. But in their essentials, *Erie* problems are like the choice-of-law problems faced by state courts. The only major difference is that borrowing considerations play a much larger role in *Erie* problems. This is because the purposes standing behind a congressional grant of federal jurisdiction over a non-federal action commonly recommend uniformity of procedure with the state court where the action would otherwise have been brought. No comparable borrowing considerations are generated when state law gives a state court jurisdiction over an action under sister-state or foreign law. Borrowing considerations are therefore rarer in the choice-of-law problems faced by state courts.

When these borrowing considerations do exist in an *Erie* problem—and, to repeat, they do so only when they can be justified by the purposes of the congressional grant of jurisdiction—they play an important role in determining the content of the federal common law procedural rules the federal court uses when entertaining the non-federal action. There is a reason for these rules to borrow content from the procedure of the state court where the non-federal action would otherwise have been brought. But the role of these federal borrowing considerations, although important, is not dispositive. They can be overridden by sufficiently strong countervailing federal interests in favor of an independent federal common law standard.

103. *See supra* text accompanying note 36.