

***ERIE* DOCTRINE, STATE LAW, AND CIVIL RIGHTS LITIGATION**

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I. INTRODUCTION

Imagine what the *Erie* doctrine would look like if the seminal case¹ involved the relevance of the Rules of Decision Act in a suit brought against Erie County for federal civil rights violations with pendent state law claims instead of a common law tort action brought against the Erie Railroad Company. Perhaps the plaintiff claimed Erie County intentionally hid evidence related to the plaintiff's federal and related state law claims. Should federal or state common law spoliation doctrine govern the standard applied and available remedies? Or what if, after trial, the plaintiff prevailed on both state and federal claims? If federal judge-made law permitted a multiplier of the lodestar for attorneys' fees, but not state law (or vice versa), the Court might have had to choose whose law should apply when it was impossible to disentangle time spent on one set of claims or another. If these were the disputes that characterized the first *Erie* case, what would our choice of law framework look like when state law questions arise in federal court?

Both cases and commentary suggest that the doctrine would look the same. We know that *Erie* requires federal courts sitting in diversity jurisdiction to apply state substantive law to resolve state law claims.² But almost all scholars and jurists also maintain that *Erie* applies when federal

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

2. *Id.* at 79–80.

courts sit in federal question—or *arising under*—jurisdiction.³ *Erie* itself said that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”⁴ Yet, for the most part, neither scholars nor federal judges have taken the time to explain the precise role of *Erie* or the Rules of Decision Act (RDA) in federal question cases. In other scholarship, I have argued that *Erie* questions should be put in their jurisdictional context.⁵ I provided a framework for examining such questions that I referred to as “*Erie* Step Zero.” In this essay, I expand on that framework by illustrating how to consider the problem in cases involving civil rights litigation.

At the outset, it is worth noting that the issue is more than marginally significant. One would not know it if one only read the Supreme Court decisions—every *Erie* case decided by the U.S. Supreme Court has arisen through diversity jurisdiction.⁶ But lower courts have had to address the problem in multiple contexts. First, and certainly most common, are those cases in which state law claims are raised because they share a “common nucleus of operative fact”⁷ with a claim over which there is an independent basis for arising under jurisdiction.⁸ For the most part, courts have assumed that *Erie* applies without any modification to these pendent state law claims.⁹ At the same time, when state law issues have arisen in federal civil rights litigation—say application of privilege law—courts have resisted applying state law if it interferes with federal interests.¹⁰

In my prior work, I proposed that, contrary to the conventional wisdom, the *Erie* analysis should be placed in the jurisdictional context in which the choice of law arises. For instance, in diversity cases, we consider whether the choice between state and federal law is outcome

3. I review the literature in greater detail in other work. See Alexander A. Reinert, *Erie Step Zero*, 85 *FORDHAM L. REV.* 2341, 2346–52 (2017). One notable exception will be discussed below. See *infra* Part I.A. See generally Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 *MICH. L. REV.* 311 (1980) (arguing that the *Erie* doctrine should apply differently in federal question and supplemental jurisdiction claims).

4. *Erie*, 304 U.S. at 78 (emphasis added).

5. See Reinert, *supra* note 3, at 2372–76. Michael Green has argued along similar lines. See Michael Steven Green, *The Twin Aims of Erie*, 88 *NOTRE DAME L. REV.* 1865 (2013).

6. To be clear, by “*Erie* case” I mean every case in which the Court relied upon the *Erie* doctrine to resolve a choice-of-law question. In some federal question cases, the Court has explicitly declined to apply the *Erie* analysis. See Reinert, *supra* note 3, at 2356–58 & nn.

7. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

8. See 28 U.S.C. § 1367 (2012); *Gibbs*, 383 U.S. 715. These state law claims share a common nucleus with a parallel federal law claim asserted in the plaintiff’s complaint or may enter a federal question case as compulsory or permissive counterclaims raised by the defendant.

9. Reinert, *supra* note 3, at 2352–62.

10. *Infra* Part III.A.

determinative in light of “the twin aims of the *Erie* rule.”¹¹ These twin aims—avoiding forum shopping and inequitable administration of laws based on the citizenship of the parties¹²—have particular resonance in diversity of citizenship jurisdiction. But they do not necessarily translate to cases in which jurisdiction is founded on a federal question. And as I will discuss in detail later, they may be particularly inapt for claims seeking remedies for federal civil rights violations.¹³ On the other hand, *Hanna v. Plumer*’s¹⁴ insistence that we think of outcome determinativeness from an *ex ante* rather than *ex post* perspective¹⁵ is sensible regardless of the jurisdictional context.

Taking these two insights together, therefore, I have proposed that courts ask about forum shopping and inequity from an *ex ante* perspective while recognizing that arising under jurisdiction serves different purposes than diversity jurisdiction. Whereas diversity jurisdiction makes federal courts available to resolve state law claims in a forum free from bias based on state citizenship, arising under jurisdiction makes federal courts available to resolve federal law issues. This is because federal judges might be more experienced, solicitous, and knowledgeable about federal law, and because it serves the federal system’s interest in uniformity.¹⁶ When state law questions arise in federal question cases, they are almost always intimately connected to the federal issues; perhaps they arise through a state law claim that is part of the federal question claim’s “common nucleus of operative fact,”¹⁷ perhaps they arise through a state law claim that contains an embedded and significant federal issue,¹⁸ or perhaps it is necessary to resolve state law issues to resolve a federally created legal claim.¹⁹ In all of these cases, concerns about forum shopping should be focused on those instances in which the choice of a federal

11. See *Hanna v. Plumer*, 380 U.S. 460, 468–69 (1965).

12. *Id.*

13. See *infra* notes 40–42.

14. 380 U.S. 460 (1965).

15. See *id.* at 468–69.

16. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g. & Mfg.*, 545 U.S. 308, 312 (2005) (“The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”).

17. See, e.g., *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

18. See, e.g., *Grable*, 545 U.S. at 313.

19. See *State of Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) (making an independent determination of state law in a case founded on the Contract Clause, and not deferring wholesale to the decision of the state’s highest court, “in order that the constitutional mandate may not become a dead letter”).

forum is motivated by something other than the recognized and beneficial reasons for which we make federal courts available to resolve federal law. Similarly, concerns about inequity should not be focused on citizenship but on the differences in treatment between state law claimants who do or do not have access to federal courts. Finally, to the extent *Hanna* suggested that the balancing of interests introduced by *Byrd v. Blue Ridge Cooperative*²⁰ was unnecessary or unimportant, examining *Erie* in the context of federal question jurisdiction brings that balancing back to the fore.

I take this analysis further in this essay because the interests at stake in federal civil rights litigation sometimes call for skepticism towards state law and an embrace of federal court jurisdiction. Indeed, there has long been a link between substantive enforcement of federal civil rights and the provision of federal jurisdiction to resolve such claims. Therefore, the particular jurisdictional context of civil rights litigation may sometimes call for even greater solicitude for federal law.²¹

The value of this framework is not just that it helps to resolve conflicts where application of state law interferes with federal claims (to which courts have been sensitive). It also helps to frame how to address circumstances where state law might be more open to federal civil rights claims. Courts have neglected to view these circumstances through a coherent lens.

The first part of this essay briefly reviews my prior proposal and then explains its particular salience in civil rights litigation. I revisit my framework that contextualizes the *Erie* analysis with respect to the different goals of diversity and federal question jurisdiction. Critical to this framework is recognizing that the first question in resolving a choice-of-law dispute between federal and state law is what I have called “*Erie Step Zero*”—one must situate the dispute in its jurisdictional context before moving to the more familiar *Erie* choice of law analysis. In part II, I argue that the jurisdictional context of federal civil rights litigation presents unique concerns when considering how to apply state law. Part III then turns to specific examples of how conflicts between state and federal law might be raised and resolved in federal civil rights litigation.

II. THE RELEVANCE OF JURISDICTIONAL CONTEXT TO *ERIE* QUESTIONS

In my prior work, I have engaged in a detailed survey of the scholarly and judicial approach to *Erie*'s application outside of the diversity of

20. *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958).

21. *See infra* notes 40-42 and accompanying text.

citizenship context. In this essay, I will not belabor the point. In short, courts and commentators almost uniformly assert that *Erie* questions are the same whether they arise in diversity or arising under jurisdiction.²² The basis for this view is largely unexamined and, to the extent its proponents cite to case law or other authority, unsupported.²³

Instead, once one closely examines *Erie* and its progeny, a basis for a contrary account emerges: traditional *Erie* analysis, with its focus on forum shopping concerns and unfairness based on state citizenship status, is rooted in the diversity of citizenship context. This was not obvious from the start—for although the Court has only considered *Erie* choice of law questions in the context of diversity cases, when it began elaborating on the *Erie* doctrine in cases like *Guaranty Trust v. York*²⁴ and *Byrd v. Blue Ridge Cooperative*,²⁵ the Court did not explicitly tie its analysis of the distinction between substance and procedure to the jurisdictional context of diversity cases. But when the Supreme Court recalibrated the *Erie* analysis in *Hanna v. Plumer*,²⁶ it did so with diversity jurisdiction in mind.

Hanna's key insight, for the purpose of this essay, was that determining the line between substance and procedure required in part a determination of whether a rule was outcome-determinative in light of *Erie*'s twin aims: reducing both forum shopping and inequitable outcomes based on the citizenship of the parties.²⁷ The Court's reasoning was founded on the relationship between diversity jurisdiction and the *Erie* doctrine. First, the Court emphasized that the pre-*Erie* doctrine of *Swift v. Tyson*²⁸—in which federal courts were free to disregard state common-law decisions in diversity cases—had undermined the very purpose of diversity jurisdiction, which was to level the playing field between citizens and noncitizens of a state.²⁹ Because *Swift* made choice of law turn on whether the case was brought in federal or state court, it gave the out-of-state citizen-plaintiff the power to determine choice of law with the initial filing decision.³⁰ Thus, *Erie*'s concern, highlighted by *Hanna*,

22. Reinert, *supra* note 3, at 2346–62.

23. *Id.* at 2362–67.

24. *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99 (1945).

25. 356 U.S. 525 (1958).

26. 380 U.S. 460 (1965).

27. *Id.*

28. *Swift v. Tyson*, 41 U.S. 1 (1842).

29. *Hanna*, 380 U.S. at 467.

30. If the out-of-state plaintiff wished to take advantage of the state rule, she would file in state court, preventing the in-state defendant from removing. 28 U.S.C. § 1441(b)(2) (2012) (prohibiting removal on diversity grounds if the defendant is a citizen of the state in which suit was brought). If the out-of-state plaintiff sought the benefit of the federal rule, she would file in federal court, where the defendant could not shift the case to state court.

about the inequitable administration of the laws was directly tied to the mechanics of diversity jurisdiction. *Erie*'s concern about forum shopping, also highlighted by *Hanna*, was less directly tied to diversity jurisdiction. Nonetheless, *Erie*'s concern seemed to be that parties had manipulated their own citizenship to create diversity jurisdiction so as to take advantage of a particular rule that would be applied under the *Swift* doctrine.³¹ Nowhere did the Court in *Hanna* or *Erie* discuss concerns about forum shopping in the context of federal question cases.

The concerns that animated *Hanna* do not transfer seamlessly to the federal question context. The forum shopping that *Hannah* was concerned about in diversity cases, for example, may not always be of concern in federal question cases. After all, the purpose of Section 1331 jurisdiction is to encourage forum shopping when the parties wish to resort to the promise of experience, solicitude, and uniformity with respect to federal law that are thought to be provided by federal courts.³²

The *Hannah* Court was understandably concerned about the potential for the *Erie* doctrine to be used as a tool to foment inequality based on state citizenship. After all, the purpose of diversity jurisdiction is to reduce the potential for differential treatment based on state citizenship. It would be a perverse outcome if *Erie* analysis undermined that goal. In the context of federal question jurisdiction, however, that kind of bias is simply not at issue, nor could *Erie* analysis exacerbate inequality along the axis of state citizenship.³³

Placed in its jurisdictional context, therefore, *Erie* questions that arise in federal question cases should be analyzed with different concerns in mind. Rather than inequity based on citizenship, we should be focused on potential inequity based on the happenstance that a litigant is able to bring a state law claim into a federal forum simply because it overlaps with the factual and legal contours of a federal question claim or simply because it implicates the need to resolve a substantial federal issue.³⁴ We also would want to avoid adjudicating state law claims differently simply because a litigant has chosen to frame them as supplemental claims to a federal question anchor if the litigant also could have brought them independently as diversity claims.³⁵

31. *Erie R. v. Tompkins*, 304 U.S. 64, 73 (1938) (discussing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)); *see also Hanna*, 380 U.S. at 467 n.8 (citing *Black & White Taxicab*, 276 U.S. at 518).

32. Reinert, *supra* note 3, at 2372.

33. *Id.* at 2372–73.

34. *Id.* at 2373.

35. *Id.* at 2373–74.

As to forum shopping, we should be on the lookout for cases in which parties choose federal court for reasons other than those recognized as valid for the purposes of arising under and supplemental jurisdiction. The motivation for bringing pendent state law claims in federal court may have nothing to do with forum shopping but instead may relate to efficiency goals or rules of preclusion, which create an incentive to bring the claims together in the same jurisdiction.³⁶ Indeed, if the federal question claim is the moving force in the litigation, the litigant who invokes supplemental jurisdiction may fundamentally be motivated by the desire to “resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”³⁷ This choice is one to be supported, not one that should arouse suspicion. And to the extent that forum shopping might be present, it would likely be filtered out by a district court’s application of 28 U.S.C. § 1367(c)(2), which authorizes a district court to decline the exercise of supplemental jurisdiction when the pendent claim *substantially predominates* over the federal question claim.

After one has conducted this outcome-determinative test, modified for federal question jurisdiction, there still is the potential that *Byrd* balancing should play a role.³⁸ To be sure, if a court decides that the choice between federal and state law is not outcome determinative, then it will be free to apply the federal rule. If a court decides that the choice is outcome determinative, however, it should move to *Byrd* balancing to determine whether federal interests are sufficiently important to outweigh the state interest in applying its rule. For if one is concerned that *Hanna*’s analysis gives short shrift to federal interests in diversity cases,³⁹ one should presumably be at least as concerned when we move to the federal question context.

III. ERIE STEP ZERO AND CIVIL RIGHTS LITIGATION IN FEDERAL COURT

Applying this framework in the context of federal civil rights litigation has additional implications. First, if jurisdictional context matters for resolving *Erie* questions, then civil rights litigation is a special brand of arising under jurisdiction. When the Reconstruction-era Civil Rights laws were passed—creating substantive rights to enforce federal

36. *Id.* at 2374.

37. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005).

38. Reinert, *supra* note 3, at 2374–75.

39. Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 360 (1977) (criticizing *Hanna* precisely because it shifted focus from the balance between federal and state interests prioritized in *Byrd* to avoidance of forum shopping and litigant inequity).

constitutional norms against state actors—they included a specific jurisdictional provision (now 28 U.S.C. § 1343), that gave federal courts jurisdiction over such actions. At the time, the general federal question jurisdiction statute (the precursor to 28 U.S.C. § 1331), included an amount-in-controversy requirement, which stayed in place until 1980.⁴⁰ But the provision granting jurisdiction over civil rights actions never contained an amount-in-controversy requirement. Congress believed that the rights protected by the 1871 Civil Rights Act were important enough that federal jurisdiction over them should not depend on the valuation of particular constitutional rights.⁴¹ As the Supreme Court viewed it, the substantive rights created by the 1871 Act would have been meaningless without the jurisdictional grant.⁴² Thus, it is not just that federal arising under jurisdiction offers a venue in which federal law would be received without hostility—federal court jurisdiction was viewed as essential to full enforcement of civil rights.

There is a second aspect of federal civil rights litigation related to the jurisdictional grant that also gives a different timbre to *Erie* questions that may arise in civil rights litigation in federal courts. Civil rights litigation in federal court, particularly litigation embraced by Section 1343's jurisdictional grant, is often brought against state actors of some kind. The Reconstruction Congress was understandably skeptical of the willingness or ability of state courts to entertain such suits in an unbiased way. This is reflected in the jurisdictional statute discussed above and also in the substantive treatment of, for example, Section 1983 claims. As just one example, in *Monroe v. Pape* the Court made clear that federal civil rights claims are actionable without regard to whether remedies exist under state law—a person acts under color of state law whether or not her conduct is authorized or lawful under state law.⁴³ Holding to the contrary, the Court concluded, would leave the enforcement of substantive federal rights

40. See Pub. L. 96-486 (eliminating \$10,000 amount in controversy requirement for general federal question jurisdiction). The amount in controversy requirement had been eliminated in part in 1976, when it was removed for claims against the United States and federal officials sued in their official capacity. See Pub. L. 94-574.

41. The interrelationship of general federal question jurisdiction and Section 1343 was discussed at length in *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 529 (1939).

42. See *Hague*, 307 U.S. at 529 (“We can hardly suppose that Congress, having in the broad terms of the Civil Rights Act of 1871 vested in all persons within the jurisdiction of the United States a right of action in equity for the deprivation of constitutional immunities, cognizable only in the federal courts, intended by the Act of 1875 to destroy those rights of action by withholding from the courts of the United States jurisdiction to entertain them.”).

43. 365 U.S. 167, 183 (1961).

subject to the vagaries of state law, a result that was in tension with the overriding purpose of the 1871 Civil Rights Act and its brethren.⁴⁴

How does this translate to the application of *Erie* in civil rights litigation in federal court? Diversity jurisdiction is founded on the need to avoid bias of state courts based on citizenship. Federal civil rights jurisdiction is founded on the need to avoid state court bias in favor of state institutions and actors. When *Erie* questions arise in these distinct contexts, *Erie* analysis should be tailored to the goals to be achieved by the distinct jurisdictional grants. In diversity cases, *Erie* analysis should be concerned with bias based on citizenship—in particular bias against in-state residents in favor of out-of-state residents—while in federal civil rights litigation one should apply *Erie* conscious of avoiding bias in favor of state institutions.

Under this rubric, application of state law should be disfavored in federal civil rights litigation if it interferes with enforcement of substantive federal civil rights claims. In many respects, the law already takes account of this in situations in which federal claims are directly implicated—when federal courts borrow from state law to fill in gaps that laws like Section 1983 leave open.⁴⁵ But courts are less attuned to this when asked to apply state law to pendent state claims, even when the application of state law could have an impact on enforcement of the federal claim.

Moreover, in some areas of law, courts have neglected at all to consider what should happen when state institutions make themselves *more* amenable to suit than federal law provides. Courts have not seen this as a choice of law problem, but there are reasons to reconsider that assumption. I explore the ramifications here for the doctrine of qualified immunity.

I concede that as a bottom-line matter, this analysis may result in courts declaring that some rules are substantive for diversity purposes but not for federal question purposes, which will be troubling to some. Some scholars already recoil against the related idea of having dual readings of the Federal Rules of Civil Procedure depending on whether the basis for jurisdiction is diversity or federal question.⁴⁶ But the Supreme Court has acknowledged at times that the line between substance and procedure

44. *Id.* at 180.

45. Federal courts borrow state law under 42 U.S.C. (1988) to fill in gaps in federal law when adjudicating federal claims, but not if state law is hostile to federal interests.

46. See Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 125 (2011).

might differ depending on whether jurisdiction is based on diversity or the presence of a federal question.⁴⁷

Lower courts have implied the same at times,⁴⁸ but there is little consistency in how courts have addressed the question. Many courts, applying the intuition that *Erie* applies regardless of the basis for jurisdiction, have concluded that state law controls both the federal and supplemental state law claims even if they would have disregarded state law were the federal claim brought on its own.⁴⁹ And some, while acknowledging the force of the argument that there is a difference between the jurisdictional contexts, ask if providing a different approach for such questions is justifiable as a practical matter.⁵⁰ But the lower courts have

47. *Levinson v. Deupree*, 345 U.S. 648, 652 (1953). In *Levinson*, the Court held that federal practice regarding amendments to pleadings applied to an admiralty case but recognized that the issue might be analyzed differently were jurisdiction founded on diversity. (“Whether, if this were a diversity case, we would consider that we are here dealing with ‘forms and modes’ or with matters more seriously affecting the enforcement of the right, it is clear that we are not dealing with an integral part of the right created by Kentucky.”) *Id.*

48. For example, when lower courts heard Telephone Consumer Protection Act (TCPA) cases under diversity jurisdiction, as they had assumed that the TCPA did not create a federal cause of action, they applied *Erie* to choice of law disputes. *See, e.g.,* *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006); *Holster v. Gatco, Inc.*, 485 F.Supp.2d 179, 183–84 (E.D.N.Y. 2007), *aff’d*, 618 F.3d 214 (2d Cir. 2010), *overruled on other grounds*; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). After the Supreme Court clarified that the TCPA does create federal question jurisdiction, *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012), however, lower courts felt free to disregard *Erie*, *see, e.g.,* *Bailey v. Domino’s Pizza, LLC*, 867 F.Supp.2d 835, 839–40 (E.D. La. 2012). Even outside of the TCPA context, courts have recognized the possibility that a state law could be substantive for diversity but not federal question contexts. *See, e.g.,* *Doe v. City of Chicago*, 883 F.Supp. 1126, 1134 (N.D. Ill. 1994) (discussing the role of a state law affidavit of merit requirement).

49. *Bradley v. City of Ferndale*, 148 F. App’x 499, 511 (6th Cir. 2005) (looking to state law to determine if denial of immunity is subject to interlocutory appeal where a state law claim is supplemental to a § 1983 claim); *Aliotta v. Nat’l R.R. Passenger Corp.*, 315 F.3d 756, 759 (7th Cir. 2003) (applying state law to a jury instructions issue involving a state law claim in which there was federal question jurisdiction); *In re Larry’s Apartment, L.L.C.*, 249 F.3d 832, 838 (9th Cir. 2001) (“[A] federal court sitting in diversity applies state law in deciding whether to allow attorney’s fees when those fees are connected to the substance of the case.”); *Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (applying state law to determine the fee award where a plaintiff in a civil rights case prevailed on federal and state causes of action); *Alvarado v. Fed. Express Corp.*, Nos. C 04-0098 SI, C 04-0099 SI, 2008 WL 2340211, at *4 (N.D. Cal. June 5, 2008) (“If the jury had based its verdicts solely on Title VII, federal law would govern the award of fees. Because the jury verdicts were based on both federal and state law claims, however, the *Erie* doctrine dictates that state law governs the issuance of attorney fees.”); *Chin v. DaimlerChrysler Corp.*, 461 F.Supp.2d 279, 283 (D.N.J. 2006) (applying state law regarding attorney’s fees in a case in which state law claims were supplemental to claims under the Magnuson-Moss Warranty Act).

50. *See, e.g.,* Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579 at 658 n.286 (2013) (acknowledging possible difference in interpretive approaches but inviting analysis of whether “such confusing differences are necessary in practice”).

been forced to address this question without sufficient guidance from the Supreme Court or commentators.

IV. EXAMPLES OF CONFLICTS BETWEEN STATE AND FEDERAL LAW IN CIVIL RIGHTS LITIGATION

A. *Erie Step Zero and Privilege Law*

One of the most common areas in which a conflict between state and federal law has arisen in federal question cases with supplemental state law claims is privilege law.⁵¹ Indeed, in the debate regarding the adoption of Federal Rule of Evidence 501, the Senate Judiciary Committee was concerned about how Rule 501 would be applied in federal question cases with pendent state law claims.⁵² But Rule 501 did not resolve the problem, stating unhelpfully that where state law “supplies the rules of decision,” privilege claims should be governed by state law.⁵³ The intent was to incorporate *Erie* analysis into Rule 501 because there were some questions about whether state law as to privileges would be considered substantive under *Hanna*.⁵⁴ This works fine in a diversity case but not in a federal question case with pendent state law claims because states recognize privileges from disclosure that could limit both the information disclosed during pretrial discovery and the evidence presented at trial.⁵⁵ If state law privileges were applied during pretrial discovery to bar access to information relevant to a federal question claim, it could substantially interfere with enforcement of a federal right. If it were enforced during trial, such that relevant statements were not admissible at all, even on federal law claims, or certain statements were admissible on certain

51. Martin I. Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923 at 948 (1975) (recognizing that the question of privileges becomes more difficult when there are supplemental state law claims in a federal question case).

52. *Id.* at 958–60 (detailing rulemakers’ concern that Federal Rule of Evidence 501 might apply differently depending on the jurisdictional basis of the claim).

53. FED. R. EVID. 501; *see also* In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at *1 (S.D. Ill. Apr. 12, 2011) (MDL action).

54. *See* H.R. REP. NO. 93-650, at 9 (1973) (stating that privilege rules should be considered substantive for *Erie* purposes); *see also* In re Grand Jury Investigation, 918 F.2d 374, 379 n.6 (3d Cir. 1990); Laxalt v. McClatchy, 116 F.R.D. 438, 446 (D. Nev. 1987); Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 500 (2002); Harold L. Korn, Professor, N.Y.U. Sch. of Law, *Remarks on the Continuing Effect of State Rules of Evidence in the Federal Courts* (June 21, 1969), in *A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference Second Judicial Circuit of the United States*, 48 F.R.D. 39, 75 (1969).

55. Rule 501 applies to all stages of a civil proceeding, not just at trial. *See* FED. R. EVID. 1101(c).

claims but not others, it would either directly or indirectly interfere with distinct federal interests.

Using the framework proposed here, however, would clarify how courts should resolve these issues. For example, if the state law privilege barred access to evidence or discovery that was relevant only to the state law claim, it could be enforced in full—in this circumstance, there would be no conflict between applying state and federal privilege law. To the extent that there is a conflict, however, one could rely on the modified *Erie* analysis to resolve it. Do we expect, *ex ante*, that a federal forum was chosen so as to take advantage of the federal privilege laws in the adjudication of the state law claim? Is there a concern about inequity in the application of state privilege law because of the happenstance that in this case the state law claims share common facts with a federal question claim? Is the state privilege law one that protects governmental institutions and state actors from accountability for unlawful conduct? Even if the answers to these questions suggest that the choice of law is outcome determinative, how should the federal interests be balanced against those of the state?

If the claim sounds in civil rights, there may be even stronger arguments for applying federal law where evidence or discovery is relevant to all claims. The jurisdictional grant in civil rights claims is deeply connected to substantive rights enforcement. And it would undermine federal interests if the presence of a supplemental state law claim made it harder to enforce federal civil rights. If enforcement of the state law privilege law will have an impact throughout the entire case, it is more likely that a court should choose to enforce federal common law.

As it turns out, most courts have come to a similar conclusion. Some courts have held that federal law applies across the board to both federal claims and pendent state law claims.⁵⁶ Others have held that the federal law of privilege governs where the evidence sought is relevant to both federal and state law claims, an outcome more consistent with my proposed framework.⁵⁷

56. See *Tucker v. United States*, 143 F.Supp.2d 619, 622–25 (S.D. W. Va. 2001) (applying federal privilege law to a Federal Tort Claims Act claim and to a pendent state law claim, based both on interpretation of Rule 501 and principles of uniformity); *In re Combustion, Inc.*, 161 F.R.D. 51, 53–54 (W.D. La.), *aff'd*, 161 F.R.D. 54 (W.D. La. 1995) (finding that federal law applied across the board in part because the relevant federal statutes both provided for exclusive jurisdiction).

57. See Reinert, *supra* note 3, at 2360 n.108.

B. *Erie Step Zero and Cost-Shifting*

Several courts have held, in the supplemental jurisdiction context, that the *Erie* doctrine requires that state law govern awards of attorney's fees in cases where a judgment is based on both federal and state claims.⁵⁸ The framework I propose here would raise questions about this approach. For it is well recognized that, in areas such as Title VII and Section 1983, for instance, fee- and cost-shifting provisions are part and parcel of effective enforcement of the statutory regime.⁵⁹ Thus, if applying state fee-shifting rules to federal law claims undermines those substantive goals, it may be inappropriate to do so. It may be that in cases that have common facts, costs and fees attributable to a state law claim are indistinguishable from those attributable to a federal law claim. But if that is the case, one still needs a valid reason to choose state law over federal law to govern cost shifting.

Some examples may be of assistance. In an age discrimination case, a jury awards damages based on both federal and state law. Federal law prohibits a multiplier for attorneys' fees under certain circumstances, but state law permits it. May the court apply a multiplier to the lodestar for all claims or only the state law claim?⁶⁰ One court that analyzed the question used traditional *Erie* analysis and applied state law to calculate attorneys' fees because applying state law in state court but not in federal court would lead to forum shopping and inequity.⁶¹ In other words, the state method for calculating attorneys' fees was substantive and due to be enforced through the RDA. The court did not address whether this holding applied only to state law claims.

But the matter is not so simple—if it is impossible to distinguish between time spent on a federal claim and a state claim (and often it will be), applying state law might have the impact of providing greater recovery for attorneys' fees than is permitted under federal law. The framework I propose would ask courts to consider whether doing so

58. *See id.* at 2376 n.211.

59. *See, e.g.,* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 4, 62 (2010); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 793–94 (2011); *cf. Chambers v. Nasco, Inc.*, 501 U.S. 32, 55–56 (1991) (concluding that the district court acted within its discretion in a diversity case by invoking its inherent power and assessing attorney's fees and expenses as a sanction for a party's bad faith litigation conduct, and rejecting an *Erie* challenge to the district court's action).

60. This hypothetical is based on *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (applying state law to determine the fee award where a plaintiff in a civil rights case prevailed on federal and state causes of action).

61. *Id.* at 1479.

would undermine federal interests. In this case, it is hard to construct an argument that applying state law would ultimately undermine federal law.

But if we take the basic holding and treat it as creating a rule that entitlement to attorneys' fees is substantive, how should one address a different problem? Under federal law, statutory attorneys' fees belong to the client. Under state law, statutory attorneys' fees belong to the attorney, and the attorney therefore has standing to seek fees even where the client disclaims any such intention. In a federal civil rights case with pendent state law claims, does the attorney have standing to seek statutory fees as a prevailing party?⁶² If the right to seek attorneys' fees is substantive, can it be argued that the question of who may assert that right is clearly procedural? And again, if time spent on state and federal claims is indistinguishable, may a lawyer use federal courts to obtain attorneys' fees' simply because she can append a state law claim to it that carries with it a substantive right for attorney enforcement?⁶³

C. *Erie Step Zero and Spoliation*

Federal and state law differ as to what standard to use for pre-litigation spoliation of evidence and what remedy may be obtained. In a case in which there are federal law claims and pendent state law claims, part of a common nucleus of operative fact, what standard may be applied to pre-litigation spoliation of evidence?⁶⁴ Under traditional *Erie* analysis, where the case arises in a diversity context, state substantive law on spoliation will be applied.⁶⁵

But in the context of federal civil rights litigation, should the same result obtain? If the spoliation has an impact on both the federal and state claims, does the federal court violate the RDA by imposing federal spoliation law? Does it undermine federal interests by applying state spoliation law?

In application, much likely depends on which spoliation law can be considered to impose stricter obligations. If state law is more onerous than federal law, it advances state substantive policy by applying state law and

62. This hypothetical is based on *Alvarado v. Fed. Express Corp.*, Nos. C 04-0098 SI, C 04-0099 SI, 2008 WL 2340211, at *4 (N.D. Cal. June 5, 2008) ("If the jury had based its verdicts solely on Title VII, federal law would govern the award of fees. Because the jury verdicts were based on both federal and state law claims, however, the *Erie* doctrine dictates that state law governs the issuance of attorney fees.")

63. As one court saw it, much depended on whether the plaintiff prevailed on state law claims or "solely on federal claims." *Alvarado*, 2008 WL 2340211, at *4.

64. *ArcelorMittal Indiana Harbor LLC v. Amex Nooter, LLC*, No. 2:15-CV-195-PRC, 2018 WL 509890, at *4 (N.D. Ind. Jan. 23, 2018)

65. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991).

does not undermine any articulable federal interests. Nor is it in tension with any of the reasons that jurisdiction is exercised in federal court. Different state law might create disuniformity in federal court, but we can tolerate this result without undermining other important federal interests.

If federal law imposes stricter obligations, does it undermine state substantive law to apply federal law in the context of connected state and federal law claims? We might answer this question *yes* only if the state law claims are the driving force behind the litigation, itself an independent reason to decline to exercise supplemental jurisdiction. In the absence of that condition being present, failing to apply federal law would undermine important federal interests connected to vindicating federal civil rights. In a jurisdictional context, the *Erie* analysis is more complex than the straightforward diversity-based inquiry.

D. *Erie Step Zero and Anti-SLAPP Laws*

At least thirty-two states have passed so-called *Anti-SLAPP* legislation, purporting to target “Strategic Lawsuits Against Public Participation,” also known as *SLAPP suits*.⁶⁶ Anti-SLAPP measures as a general matter seek to protect individuals who exercise their right to petition the government to address pressing social problems, but in some states they have been enacted to provide even broader protections.⁶⁷ In the *Erie* context, anti-SLAPP statutes can be troublesome because they can affect only specific claims within a case as well as the trajectory of an entire case. Texas’s law, for example, permits (1) dismissal of an entire complaint if the Court finds that it has been filed in violation of the anti-SLAPP law, (2) fee shifting for successful motions to dismiss, (3) a stay of all discovery during the pendency of a motion to dismiss or any appeal, and (4) interlocutory appeals of denials of motions to dismiss.⁶⁸ Thus, even if only one claim of many is alleged to have violated the anti-SLAPP statute, the remedies provided under Texas’s law can affect an entire case.

In the traditional *Erie* diversity context, many courts would find that Texas’s anti-SLAPP statute is substantive and applicable in federal

66. *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection> (listing state anti-SLAPP laws) [<https://perma.cc/2DNS-DKFK>]

67. For a criticism of the reach of current anti-SLAPP laws, see Alexander A. Reinert, *SPEAK FREE Act Would Silence Civil Rights and Public Interest Litigants* (Editorial), THE HILL (July 7, 2016).

68. Tex. Civ. Prac & Rem § 27.003(c) (providing for stay of discovery on filing of motion to dismiss); *id.* § 27.008 (providing for interlocutory appeal); *Id.* § 27.009 (providing for award of attorneys’ fees).

court.⁶⁹ And some have applied anti-SLAPP laws to state law claims made in the context of a federal question lawsuit.⁷⁰ But courts have been hesitant to apply anti-SLAPP laws to federal question claims.⁷¹ In one intellectual property case, for example, a court explicitly held that anti-SLAPP laws applied to the defendant's state-law counterclaims, but not to the plaintiff's federally-created patent infringement action.⁷² The defendant had argued that the anti-SLAPP law should apply to all claims but the court rejected that contention without any analysis.⁷³

It should be obvious, however, that even if limited to state law claims in federal civil rights litigation, anti-SLAPP laws could undermine important federal interests. Staying all discovery and permitting interlocutory appeals, even if the ultimate remedy of dismissal and fee shifting is limited to state law claims, will interfere with the enforcement of federal rights in federal courts. It thus may make sense to disaggregate elements of an anti-SLAPP law before determining how it should apply in the context of a federal civil rights litigation.

69. *United States v. Lockheed Missiles & Space Co., Inc.*, 171 F.3d 1208 (9th Cir. 1999) (holding statute was applicable to state law counterclaims asserted in a federal diversity action); *Mitchell v. Hood*, 614 F. App'x 137, 140 (5th Cir. 2015) (recognizing disagreement among courts of appeals as to whether state anti-SLAPP laws apply in federal court); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009) ("Louisiana law, including the nominally-procedural Article 971 (Louisiana's anti-SLAPP provision), governs this diversity case."); *Williams v. Cordillera Commc'ns, Inc.*, 2014 WL 2611746, at *2 (S.D. Tex. June 11, 2014) (explaining that state anti-SLAPP statutes "are enforceable in federal courts sitting in diversity jurisdiction" by virtue of the *Erie* doctrine).

70. *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970 (9th Cir.1999), and *Dealertrack, Inc. v. Huber*, 460 F.Supp.2d 1177, 1181 (C.D. Cal. 2006), held the anti-SLAPP statute applicable to state-law counterclaims in federal courts.

71. *Best v. Hendrickson Appraisal Co., Inc.*, No. 06-CV-1358 W (JMA), 2007 WL 1110632, at *2-3 (S.D. Cal. Mar. 28, 2007) ("*Erie* applies in federal court, even on some federal claims (*contra Best*), but the court must analyze more than the "twin aims of *Erie* " before it chooses to apply state law (*contra Hendrickson*)."); *See NCDR LLC v. Mauze & Bagby, PLLC*, 2012 WL 12871954, at *2 (S.D. Tex. October 5, 2012), *aff'd on other grounds*, 745 F.3d 742 (5th Cir. 2014) (holding that the TCPA does not apply to plaintiff's federal Lanham Act claims because it would create an obstacle to the federal rights in violation of the Supremacy Clause); *See also Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (refusing to apply anti-SLAPP statute to a Section 43(a) Lanham Act claim on the ground that "the anti-SLAPP statute does not apply to federal law causes of action"); *Tobinick v. Novella*, 108 F.Supp.3d 1299, 1302 n.1 (S.D. Fla. 2015) (holding state anti-SLAPP statute does not apply to Lanham Act claim); *Doctor's Data, Inc. v. Barrett*, 2011 WL 5903508, at *2 (N.D. Ill. Nov. 22, 2011) (refusing to apply Illinois anti-SLAPP rules to Lanham Act claim); *Misko v. Backes*, No. 3:16-CV-3080-M (BT), 2018 WL 2335466, at *2 (N.D. Tex. May 4, 2018), report and recommendation adopted, No. 3:16-CV-3080-M (BT), 2018 WL 2329306 (N.D. Tex. May 23, 2018) (refusing to apply anti-SLAPP statute to federal question claim).

72. *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.*, 63 F.Supp.2d 1127, 1129-30 (N.D. Cal. 1999)

73. *Id.*

E. State Immunity Doctrine in Federal Civil Rights Litigation

Finally, although courts have rarely seen this issue as a choice of law problem, the role of state immunity law in federal civil rights litigation merits further inquiry. It would appear to be obvious that whether an individual is immune from damages liability is substantive in the traditional procedural/substantive distinction. And under traditional *Erie* analysis, one would expect state immunity law to apply to state law claims raised in diversity cases.

But how should the matter be analyzed in federal civil rights litigation? There are three different contexts in which to consider the question. First, although the immunity defense itself may be substantive, it might be more difficult to characterize common-law doctrines that operate at the margins of immunity doctrine. Take, for example, the issue of whether immunity determinations are reviewable interlocutorily. Federal law says that they are in certain situations, but state law sometimes diverges.⁷⁴ In *Bradley*, the Court applied state law regarding interlocutory appeals to adjudicate a state law claim that was brought as a supplemental claim in a Section 1983 action.⁷⁵ If state law granted broader rights of interlocutory appeal than federal law, however,⁷⁶ this may be a circumstance where application of state law meant to favor state institutions would be inappropriate where the jurisdictional grant is based on a federal civil rights statute.

Difficult questions could also arise where the substance of immunity law differs at state and federal law. If state law, for example, provides broader immunity to state officers than does federal law, it would be inconsistent with the principles I have elaborated upon here to apply state immunity law to the federal civil rights claim. And even as to which immunity law governs the state law claim, difficult questions could arise.⁷⁷ In *Kohlrautz*, the Court conducted a nuanced *Erie* analysis, taking into account jurisdictional context to determine that state (rather than federal) immunity law should apply to state law claims brought via supplemental jurisdiction in a federal question case.

Finally, the framework I have outlined here may also have implications for the rare case in which state immunity law exposes state officers to greater liability under state law than would federal immunity

74. See, e.g., *Bradley v. City of Ferndale*, 148 F. App'x 499, 511 (6th Cir. 2005).

75. *Id.*

76. Say, for example, that state law permitted appeal of denials of immunity at summary judgment when the issue turned on questions of fact, even though such appeals would not be cognizable under federal common law. *Johnson v. Jones*, 515 U.S. 304, 313-17(1995).

77. *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 830-33 (9th Cir. 2006).

principles. Courts have not generally seen this as a choice of law problem raised by the RDA, but courts should. Maryland, for example, does not permit state officials to assert any immunity from liability for violations of the state constitution.⁷⁸ If the defendant is shown to have acted intentionally, as opposed to negligently, she also will not be entitled to immunity from common law torts.⁷⁹ In Maryland, therefore, one could argue that federal courts should respect these substantive judgments in application of the Section 1983 doctrine. It would not interfere with any federal interests to do so, and it would advance state substantive judgments. Additionally, to the extent that federal courts are available in civil rights actions in order to avoid the risk of bias in favor of state institutions and state actors, applying state privilege law that is more rights-protective than federal law would not trigger any concerns of bias in favor of states and the state's entities or actors.

V. CONCLUSION

Erie's takeaway is that much turns on whether a state law is deemed substantive or procedural. But this assessment cannot be undertaken without being conscious of the jurisdictional context in which any conflict arises. As I have argued elsewhere, diversity cases present a different context than federal questions cases. As I argue here, civil rights cases present a different context as well. In some circumstances, as in diversity cases, it will make sense to apply state law through and through to state law claims presented in federal question or federal civil rights cases. In other contexts, federal law should govern the entire matter. Finally, there may be some contexts in which state law should apply to federal civil rights cases because it is more rights-protective than federal judge-made common law.

78. *DiPino v. Davis*, 729 A.2d 354, 371 (Md. 1999) (“Unlike in a § 1983 action and unlike in an action for some common law torts, neither the local government official nor a local governmental entity has available any governmental immunity in an action based on rights protected by the State Constitution.”).

79. *Cox v. Prince George's County*, 460 A.2d 1038 (Md. 1983).