A Unified Approach to *Erie* Analysis for Federal Statutes, Rules, and Common Law

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INTRODUCTION

This Article proposes toppling one of the *Erie* doctrine's most prominent pillars.[1] The relevant line of *Erie* jurisprudence governs a frequently recurring question in federal litigation: When federal and state law appear to conflict, which law should a court apply?

An abstract example illustrates the question's significance and difficulty. Suppose that the parties in a federal diversity action dispute whether the court should apply federal law or state law to resolve a particular issue. The court's choice would end the case. One party would prevail under federal law, while the other would prevail under state law. The court's choice of law would also have ramifications beyond determining the case's outcome. Applying the wrong law would impair the spurned lawmaker's regulatory interests, raising federalism and separation of powers concerns. Yet both options may seem wrong. State law is often incongruous in federal court, while federal law can be gratuitous in a diversity action that does not involve a federal claim. So how should the court decide which law applies? And how does that choice of law implicate related issues, such as the boundary between interpretation and lawmaking and the legitimacy of federal common law?

Civil procedure students learn two answers to the choice-of-law puzzle. They start with a soothing formal rule and then drift into the turbulence of a balancing test. Students first learn that federal courts apply federal procedural law and state substantive law. This tidy bifurcation seems plausible until someone asks: "What's the difference?" Students then learn that courts do not really enforce a strict substance/procedure distinction. Instead, courts apply a two-pronged choice-of-law rule cobbled together from several Supreme Court decisions. The first prong gives automatic priority to most types of federal law, such as statutes and the Federal Rules of Civil Procedure. The second prong subjects the remaining type of federal law—judge-made common law—to a multi-factored "twin aims" test announced in *Hanna v. Plumer*.[2] Even the Supreme Court concedes that the twin aims test is "relatively unguided."[3]

The Court's unguided inquiry across slippery terrain produces disorientation. But the Court nevertheless believes that the current two-pronged method is an appropriate manifestation of policies animating *Erie* and its progeny.

The unguided approach to choice of law in federal court is misguided for several reasons that this Article explores in depth. Current jurisprudence governing

1. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
2. 380 U.S. 460, 468 (1965).
3. *Id.* at 471.

vertical choice of law suffers from at least four overlapping and fatal flaws.[4] The Court's approach: (1) relies on an arbitrary distinction between federal common law and statutory law; (2) elides the indeterminate boundary between lawmaking and interpretation; (3) ignores the judiciary's statutorily delegated authority to fill gaps in procedural codes; and (4) fails to recognize that preemption doctrine implementing the Supremacy Clause should fill the choice-of-law role that courts mistakenly assign to doctrine implementing *Hanna* and *Erie*.

Exposing current doctrine's flaws reveals a superior approach to deciding when federal courts should apply federal law. This new approach has implications for many cutting-edge fields of scholarship that are not usually analyzed concurrently or in connection to *Erie*. For example, the Article raises questions about how substantive canons should influence interpretation of federal law, the difference between delegated and inherent lawmaking powers, the legitimacy of federal common law, and the discretion of administrative agencies.

Part I develops a framework for fragmenting the multifaceted *Erie* doctrine into more precise components. This approach pierces the *Erie* doctrine's daunting mystique to reveal that *Erie* is merely a label encompassing four distinct inquiries. Looking past the distracting *Erie* label brings the discrete inquiries that the label obscures into sharper focus. These inquiries address:

(1) the *creation* of federal law (is an ostensibly applicable federal law valid?);

(2) the *interpretation* of federal law (what does an ostensibly applicable federal law mean in the context of a particular case?);

(3) the *prioritization* of federal law (if the ostensibly applicable federal law conflicts with state law, which controls?); and

(4) the *adoption* of non-federal law (what law does a federal court apply when federal law is not applicable?).

Discussion of *Erie*'s four inquiries provides context for considering how each inquiry influences the others. A more refined taxonomy can also illuminate doctrinal mistakes that invocations of an amorphous "*Erie* doctrine" obscure. Dividing *Erie* into its components reveals that the creation and interpretation inquiries should perform the analytical work that the Court currently ascribes to the prioritization inquiry. The current inquiry into whether federal law has priority distracts from the more salient questions of whether the federal law is valid and whether it encompasses the disputed issue.

Using my terminology, a court confronting a conflict between federal and state law must consider: (1) whether the federal lawmaker had authority to *create* the federal rule; and (2) how broadly to *interpret* the rule. These two inquiries often occur in tandem. For example, doubts about whether Congress can create a given rule

4. A choice between federal and state law is "vertical" in a hierarchical federal system, while the choice between the laws of coequal states is "horizontal." Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1236 (1999).

may warrant interpreting a statute narrowly to preserve its validity. Likewise, doubts about whether a federal court should create federal common law may warrant restraint both in creating a rule and interpreting its scope. Prioritization of federal law becomes relevant only after the creation and interpretation inquiries are complete. If a federal law was validly created and a proper interpretation renders it applicable, then federal law preempts state law under the Supremacy Clause. There is no need for a fuzzy prioritization inquiry. And if federal law was either improperly created or cannot apply based on a proper interpretation, then prioritization is moot.

Accordingly, emphasizing creation and interpretation rather than the current "twin aims" prioritization inquiry would more effectively address separation of powers and federalism concerns that should inform vertical choice of law. Federal courts should not apply a fuzzy test to decide whether a valid federal law has priority over state law. Instead, under the Supremacy Clause, valid federal law always preempts state law on matters within the federal law's scope. The hard questions are whether ostensibly applicable federal laws are valid exercises of federal lawmaking power that can or should be interpreted to conflict with state law.

Part II provides a new framework for organizing modern prioritization jurisprudence and isolating the Supreme Court's contestable assumptions. It challenges conventional wisdom by showing that *Hanna*'s "twin aims" test relies on an arbitrary distinction between federal common law and other forms of federal law, implements that distinction poorly, and cannot rely on the oft-cited but inapposite Rules of Decision Act (RDA).[5]

The twin aims test is essentially a substantive canon of interpretation masquerading as a choice-of-law rule. It fails at both tasks. Building a new "*Erie* canon" from scratch would produce a more sensible approach to interpretation. And replacing the twin aims test with an emphasis on preemption would produce a more sensible approach to prioritization.

Part III provides the first account of how the Federal Rules of Civil Procedure (FRCP) authorize federal courts to create preemptive common law through the "any manner" clause in FRCP 83(b).[6] This power has been hiding in plain sight for eighty years. Yet courts and commentators have not addressed its significance for *Erie*. The Article shows that the foundational premise of the Supreme Court's prioritization jurisprudence is wrong because the supposed line between formal rules and judge-made law either does not exist or is unworkably faint. This insight extends beyond the FRCP context to other forms of common law that apply in federal court.

Federal common law is often a Bermuda Triangle of constitutional jurisprudence. This locus of myth and mystery leads courts to either misperceive or

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5. 28 U.S.C. § 1652 (2018).

6. FED. R. CIV. P. 83(b) ("Procedure When there is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules.").

steer clear of federal common law's conceptual challenges. Closer scrutiny—using forum non conveniens doctrine as an example—reveals how current *Erie* jurisprudence provides a misguided account of federal common law's priority.

Part IV develops a new approach to prioritization and spotlights policy questions about the validity and scope of federal law. This Part contends that the Supremacy Clause, rather than *Erie*, resolves priority questions in federal court through ordinary preemption principles. The policy questions that courts currently consider when assessing priority are better suited to *Erie*'s creation and interpretation inquiries. These inquiries directly analyze: (1) whether the federal government has authority to create law covering particular issues; (2) which federal institutions—Congress or the judiciary—can create law; and (3) when federal courts should interpret federal law broadly or narrowly if it potentially conflicts with state law. Scholarship addressing the origins and optimal content of federal law is therefore relevant to *Erie* in ways that the current prioritization inquiry obscures.

In sum, the Article suggests reorienting *Erie* analysis in three ways. First, courts implementing the prioritization inquiry should not apply *Hanna*'s "twin aims" test, which is irredeemably flawed. Second, the arbitrary line that separates "choice of law" under *Hanna* from "preemption" under the Supremacy Clause should disappear, leaving a single preemption test for all conflicts between federal and state law. The prioritization inquiry should therefore consider only the Supremacy Clause, such that in virtually all cases a valid federal law will displace state law on matters within its scope. Third, deemphasizing prioritization will highlight the importance of the creation and interpretation inquiries. Courts must focus on when federal institutions may create federal law, how to interpret the scope of federal law, and whether to embrace or avoid conflicts with state law. These sensitive policy questions would benefit from direct attention and should not be blurred with distracting questions about federal law's priority. Accordingly, this Article's approach would make choice-of-law analysis less arbitrary and more directly engaged with the federalism and separation of powers concerns at *Erie*'s core.

I. SITUATING THE RELATIVE PRIORITY OF FEDERAL AND STATE LAW IN THE BROADER CONTEXT OF *ERIE* JURISPRUDENCE

Vertical choice-of-law jurisprudence is confusing because *Erie* has become fossilized in discordant layers of gloss. The opinion in *Erie Railroad Co. v. Tompkins* makes only a narrow point limiting the federal judiciary's authority to enforce "general law" that displaces state law.[7] Yet the broader "*Erie* doctrine" entangles several concepts that are not directly connected to the eponymous case. Courts routinely cite *Erie* as the foundation for sweeping propositions about the contours of federalism, limits of judicial power, and even the nature of law.[8] Because the case

7. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938).

8. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 698 (1974); Ernest A. Young, Erie *as a Way of Life*, 52 AKRON L. REV. 193, 213 (2018). *Erie*'s susceptibility to multiple

is simultaneously venerated and poorly understood, citations to *Erie* often are ornaments rather than arguments. Jurisprudence built on such a tenuous foundation is ripe for reexamination.

The *Erie* doctrine is best understood as an amalgam of four distinct components. Each component serves a different function using a discrete set of tools. Treating the components as separate inquiries enables clearer and more precise analysis. Even when the inquiries in practice overlap or occur in tandem, close attention to each inquiry's goals and methods can improve decisionmaking.

Section A briefly outlines my prior work defining *Erie*'s four components. This discussion provides context for the present Article, which explores the prioritization component in depth and explains how it relates to *Erie*'s other three components.[9] Section B then explains how prioritization and interpretation can blur and how to avoid that blurring.

Both sections focus on litigation in federal courts because the common law that the Article considers in Section III.A fills gaps in the FRCP, which do not apply in state courts.[10] In addition, the creation and interpretation inquiries are more complicated when state, rather than federal, institutions develop federal law.[11] My discussion of prioritization is relevant to cases in state courts, but further analysis would be necessary to address idiosyncratic aspects of state court litigation.

Priority is especially salient when federal courts exercise diversity or supplemental jurisdiction over a claim arising under state law.[12] Cases arising under federal law also raise priority questions when state law governs aspects of a claim or defense, such as in many tax and bankruptcy actions. In these federal question cases, "federal law rests on a substructure of state-created interests."[13]

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readings has led to evolving perceptions of its significance, such that "the iconic decision today is not what it used to be, and the case might not remain in the future what it is right now." Craig Green, Erie *and Constitutional Structure: An Intellectual History*, 52 AKRON L. REV. 259, 260 (2018).

9. *See* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579 (2013).

10. *See* FED. R. CIV. P. 1, 81 (stating that the FRCP apply only in federal courts).

11. *See* Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005); Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006).

12. *See* 28 U.S.C. §§ 1332, 1367 (2018); Erbsen, *supra* note 9, at 658 n.286 (discussing application of *Erie*'s interpretation inquiry in federal question and supplemental jurisdiction cases). An interesting question would arise if a case includes both federal and state claims and applying state law to the state claim would prejudice the federal claim. *Cf.* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 26 n.3 (1988) (noting but not resolving this issue in the context of venue transfer).

13. Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 101 (1955); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 535 (1954) ("Federal tax law, for example, can say what state-created interests are to be taxed . . . but it cannot create the interests."); Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1249 (2010) (noting that federal courts often "disregard the reality that they are being asked to interpret and apply criminal laws of other governments"); Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 639 (2004) ("[F]ederal courts in bankruptcy have not developed any consistent theory on when they may overrule state law.").

A. Overview of the Erie *Doctrine's Four Discrete Inquiries: Creation (Whether the Federal Law is Valid), Interpretation (What the Federal Law Means), Prioritization (How the Federal Law Interacts with State Law), and Adoption (Potential Sources of Non-Federal Law)*

A simple hypothetical fact pattern illustrates the *Erie* doctrine's four separate functions. Suppose that a federal district court in California exercises diversity jurisdiction over a civil action between citizens of California and Michigan. The defendant's lawyer repeatedly disrupts proceedings with inappropriate outbursts. Eventually, the Court invokes its inherent power to hold the obstreperous lawyer in civil contempt. The lawyer raises four objections to the contempt order:

(1) federal district judges cannot impose contempt sanctions without a grant of statutory or FRCP authority that is absent here;

(2) even if federal common law authorizes sanctions, the relevant rules do not encompass the facts of this case;

(3) even if federal common law rules encompass the lawyer's conduct, in a diversity action state law should apply and would compel a different result; and

(4) as between Michigan and California law, California law should apply.

Each of the lawyer's four objections implicates one of the *Erie* doctrine's four components. Assessing each objection requires invoking separate sets of ideas and precedents loosely connected to *Erie*.

The first objection addresses the *creation* of federal law. The question is whether the federal government may create binding rules to resolve the disputed issue, and if so which federal institutions have lawmaking authority. As applied to the hypothetical above, the issue is whether Congress and/or the judiciary can create rules governing civil contempt in a diversity case.

Erie's creation inquiry animates several distinct strands of jurisprudence. For example, the creation inquiry addresses Congress's authority to regulate particular fields,[14] the judiciary's authority to develop federal common law,[15] and the Supreme Court's authority to implement the Rules Enabling Act (REA).[16]

The second objection addresses the *interpretation* of federal law. The question is whether a potentially applicable federal law encompasses the disputed issue. For

14. *See Stewart Org.*, 487 U.S. at 31–32 (considering whether a statute was "a valid exercise of Congress's authority").

15. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("[W]here a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created."); *id.* at 729 ("[P]ost-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.").

16. *See* 28 U.S.C § 2072 (2018); Sibbach v. Wilson & Co., 312 U.S. 1, 9–11 (1941) (holding that Congress can delegate rulemaking power to the judiciary and that the Court complied with the delegation's conditions).

example, does a federal contempt rule forbid a given type of behavior in a given context?

Interpretation is necessary both when laws have a fixed text—such as the Constitution and statutes—and when laws develop through a common law process. Refining a common law rule's scope combines policymaking with traditional interpretive methods, although theorists disagree about the optimal mix of techniques.[17]

The third objection addresses the *prioritization* of federal law. If federal and state law conflict, the question is how to choose between them. In the hypothetical above, the court would ask whether federal common law that purports to govern contempt in diversity cases displaces inconsistent state law.

Depending on the circumstances, courts implementing *Erie*'s prioritization inquiry apply a bright-line preemption rule or a fuzzy multi-factored test. Parts II through IV explore the prioritization inquiry in greater depth and contend that the bright-line rule should expand and replace the irredeemably flawed fuzzy test.

The fourth objection addresses the *adoption* of non-federal law. If a federal court cannot apply a federal rule, then it must consider three questions about state law. First, which government's rule applies (in the hypothetical, California's or Michigan's)? Second, which institution is an authoritative source of an applicable rule's content—for example, the state legislature, the state's highest court, or a lower state court? Third, what rule would that institution apply? The most prominent adoption case is *Klaxon v. Stentor Electric*, which requires federal courts to implement the forum state's choice-of-law rules.[18] The adoption component also encompasses jurisprudence articulating methods for ascertaining the content of state law[19] and for addressing federal incorporation of state law.[20]

Accordingly, the *Erie* doctrine is best understood as the sum of four components governing the creation, interpretation, and prioritization of federal law, and the adoption of non-federal law. These components determine which

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17. *Compare* RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985) ("[L]egal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally."), *with* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 261 (1990) (contending that "interpretation" entails using a set of methods that are needlessly restrictive when applying common law rather than statutes).

18. 313 U.S. 487, 495–96 (1941).

19. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4507 (3d ed. 2016) ("[T]he federal court must determine issues of state law as it believes the highest court of the state would presently determine them, not necessarily (although usually this will be the case) as they previously have been decided by other state courts."). The FRCP provides a process for ascertaining the content of foreign law. *See* FED. R. CIV. P. 44.1; Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1872–73 (2018) (noting that Rule 44.1 replaced a "common-law" approach).

20. A non-federal rule enforced in federal court can have one of two distinct statuses. It might apply of its own force, or it might apply because federal law incorporates its content. This distinction has several practical implications for subject-matter jurisdiction and choice-of-law methodology. *See* Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243, 258–65 (2018).

governments, and which institutions within those governments, are authoritative sources of binding legal rules. My prior work defines and defends in greater depth this framework for thinking about *Erie* and its progeny.[21] The present Article identifies critical flaws in the Court's approach to prioritization. The Article then explains why the creation and interpretation inquiries can more appropriately address questions currently relegated to the prioritization inquiry.

B. Relationship Between the Interpretation Inquiry (What a Federal Law Means) and the Prioritization Inquiry (How the Federal Law Interacts with State Law)

The intersection between the prioritization and interpretation inquiries helps explain why *Erie* creates "confusion and more confusion."[22] In theory, courts can recharacterize any prioritization issue as an interpretation issue. The potential shell game leads to uncertainty about the proper boundary between the two inquiries. This Section explains why the two inquiries should remain distinct. Part II explores how modern doctrine overlooks the distinction.

The contempt hypothetical above illustrates the potential overlap between interpretation and prioritization. We can frame the scope of a federal common law contempt rule in two ways:

(1) a contempt sanction is appropriate when a lawyer does *X*; or

(2) a contempt sanction is appropriate when a lawyer does *X*, unless the case arises in diversity jurisdiction and state law compels a different result.

The more refined second formulation incorporates the federal rule's interaction with state law into the federal rule's definition. This refined approach to framing the federal contempt rule potentially blurs the interpretation and prioritization inquiries. It suggests that concerns about priority limit the federal contempt rule's scope. Courts implementing the refined federal rule therefore need not ask whether federal law has priority over a conflicting state rule because a narrow interpretation of the federal rule avoids the conflict. By definition, federal and state law cannot conflict because federal law is defined in a way that defers to otherwise inconsistent state law. The priority question becomes moot and the interpretation inquiry does all the work.

A skewed application of *Erie*'s interpretation inquiry—i.e., reading federal law narrowly to avoid conflict with state law—could potentially subsume the prioritization inquiry in all cases. The question of "when does federal law have priority over state law" would be avoided by reasoning that "there is no prioritization issue because federal law can be read as deferring to state law." This interpretive move can be sensible if federal deference to state law is express, as in

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21. *See* Erbsen, *supra* note 9.

22. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 270 (1946).

some statutes.[23] Likewise, using interpretation as a means of avoiding conflict with state law can be prudent when federal courts have discretion about the breadth of the common law rules they create.

The problem is that prudence can shade into unwarranted trepidation. A narrow interpretation of federal law seems like a gambit when deference is an arbitrary limit on an otherwise broad rule, as in the contempt scenario above. The outcome of this gambit would reflect a covert prioritization inquiry disguised as interpretation. The federal rule would receive a narrow reading not because conventional interpretive methods favor that narrow reading, but because the court thinks that *Erie*'s prioritization policies require deference to state law.

Analytical shortcuts blur the policies underlying interpretation and prioritization at the expense of each inquiry. The interpretation analysis is weak because it incorporates questionable assumptions about priority. The prioritization analysis is weak because it relies on an interpretive fig leaf.

Refining the prioritization and interpretation inquiries mitigates potential blurring. Clarifying what each inquiry should accomplish also helps courts confront the relevant policy questions more directly.

We can think of the interpretation inquiry as fragmenting into three questions:

(1) Setting aside choice-of-law concerns for the moment, does the relevant federal law encompass the disputed issue?

(2) If the relevant federal law encompasses the disputed issue, does it conflict with state law?

(3) If there is a conflict, do ordinary tools of interpretation—in contrast to assumptions about how prioritization should operate—indicate that the relevant federal law requires deferring to or rejecting inconsistent state law?

If question one reveals that the relevant federal law does not encompass the disputed issue, and there is no reason to create new federal law to fill the gap, then priority is irrelevant. As the Court noted in *Hanna*, "state law must govern because there can be no other law."[24] Federal law, including federal common law, is available only when it has been validly created and appropriately interpreted. When federal law is not available, state law is the default. Foreign and international law can of course apply, but only if state choice-of-law rules select them.[25]

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23. *See, e.g.*, 28 U.S.C. § 5001(b) (2018) ("In a civil action brought to recover on account of an injury sustained in a place [subject to exclusive federal jurisdiction], the rights of the parties shall be governed by the law of the State in which the place is located.").

24. Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

25. *See* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). For a critique of choice-of-law rules governing the application of foreign law in federal court, see Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531 (2011). The Court appears to assume that each state has a body of law that applies uniformly within its borders. That assumption does not account for the nuances of local law, including local common law. *See* Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO

The prior paragraph included an important caveat. Sometimes *existing* federal law does not encompass a disputed issue, and there is no reason for the court to fill the void with *new* federal common law. This caveat will not always apply. The interpretation inquiry sometimes will suggest that existing federal law does not encompass a disputed issue, yet the court will nevertheless want to apply a federal rule. This scenario implicates the creation inquiry.

When the interpretation inquiry concludes that existing federal law does not address an issue, yet applying federal law seems desirable, the court must decide whether it can and should create a federal common law rule.[26] This decision involves "choice of law" in the sense that the court chooses between creating a federal rule and allowing state law to fill a void.[27] But this choice in the creation context is logically antecedent to the more traditional "choice of law" that occurs in the prioritization context.[28] Both contexts involve a choice between federal and state law. However, the choice in the creation context implicates a complex constitutional calculus, while the choice in the prioritization context should be essentially automatic under the Supremacy Clause. Yet current prioritization doctrine enables *Hanna*'s "twin aims" test to infect the creation inquiry and distract from the relevant federalism and separation of powers concerns. Unjustified doubt about whether federal law has priority over state law leads to doubt about whether federal law can even exist in a particular context. This blurring of the creation and prioritization inquiries is a methodological error that my framework for parsing *Erie* seeks to prevent. Judicial decisions about whether to create federal common law, how broadly to interpret federal law, and when to prioritize federal law raise distinct kinds of problems. Courts should address these problems separately rather than by an unstructured invocation of "*Erie*."

Returning to the interpretation inquiry, if question one reveals that federal law encompasses the disputed issue, then question two requires interpreting state law to assess whether federal and state law conflict.[29] When state law is so undeveloped

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L. REV. 1939 (2014) (noting local common law's importance and obscurity). Federal courts applying state law must therefore carefully consider whether state law includes local variants that the federal court must respect.

26. *See infra* Section II.B.4.a (discussing the contexts in which federal common law is available).

27. Clermont, *supra* note 11, at 45 (noting that "preemption and judicial choice of law" have "adjacent places" in the process of implementing *Erie*); *see also* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691 (2006) (characterizing as "choice-of-law" the decision whether to fashion a federal common law rule that displaces state law).

28. *Hanna*, 380 U.S. at 474 (Harlan, J., concurring) (characterizing the Court's decision as addressing "choice of law in diversity actions").

29. If federal and state law are consistent, or the conflict is immaterial, then the prioritization inquiry does not merit discussion. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 374 (5th ed. 2006) (noting that prioritization is unnecessary when "all putatively applicable laws produce the same result."); *cf.* Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 113 n.1 (1938) (opinion by Justice Brandeis observing that *Erie* has no practical effect when state law and general law are identical).

that there is insufficient grist for interpretation, *Erie*'s adoption inquiry requires predicting how the state's highest court would rule.[30]

Courts determining whether federal and state law conflict must have a methodology for interpreting state law. This methodology creates a separate *Erie* problem if federal and state methodologies would produce different interpretations. Abbe Gluck has persuasively argued that federal courts often should defer to state methods when interpreting state statutes.[31] She frames her inquiry in terms of whether federal interpretive methods constitute preemptive law that displace inconsistent state methods.[32] In other words, do federal methods have priority over state methods? This Article's framework provides an alternative way of framing the question. Courts would ask: Can and should federal methods have a scope that is sufficiently broad to encompass state law questions? The applicability of federal methods would thus be a question for the creation and interpretation inquiries rather than the prioritization inquiry.

Whatever interpretive method the federal court uses, it will ultimately come to a conclusion about an ostensibly applicable state law's meaning. The court will then compare this conclusion about the state law's meaning to its conclusion about the federal law's meaning, and will decide if there is a conflict.

If federal and state law seem to conflict, then question three requires using ordinary tools of interpretation to identify how federal law addresses its relationship with state law. This reliance on ordinary tools of interpretation distinguishes question three from the gambit described above in which courts skew interpretation of federal law based on dubious assumptions about its priority. Currently, concerns about implementing or avoiding *Hanna*'s fuzzy "twin aims" test can infect the interpretation inquiry and lead to flawed conclusions about the meaning of federal law. My framing of question three, coupled with my emphasis on preemption under the Supremacy Clause, is designed to shift judicial perspectives when interpreting federal law. Courts should not be concerned that prioritization will be difficult because preemption will be straightforward under the Supremacy Clause, in contrast to *Hanna*'s fuzzy test. The truly difficult issue involves ascertaining the meaning of federal law rather than determining its priority. That inquiry into meaning is an exercise that courts routinely conduct. There is no reason why conducting that inquiry in an "*Erie*" context requires departing from ordinary methods of interpretation. Instead, there is a subtler issue about whether the "*Erie*" context in

30. *See supra* note 19; Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1497 (1997) ("[C]ourts and commentators may disagree over the precise point at which interpretation ends and prediction begins.").

31. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as Law and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011). For a discussion of whether federal courts should defer to state methods for interpreting state common law, see Nina Varsava, *Beyond Substance and Procedure: Precedent, Interpretation, and the Limits of* Erie (Univ. of Wis. Legal Studies Research Paper No. 1495, 2020), https://ssrn.com/abstract=3238221 [https://perma.cc/U3SD-ZSXD].

32. *See* Gluck, *supra* note 31, at 1903.

which the interpretive question arises raises any unique questions for the court to address.

Examples of context-sensitive interpretive questions include: Did the federal law's creator perceive itself as supplying a definitive solution to a problem, or as providing a default rule to fill a void that state law could also fill in appropriate circumstances? And if state law sometimes displaces the federal default rule, does state law apply only in state court or also in federal court? These questions incorporate into *Erie* analysis concerns about a rule's "scope" that animate choice-of-law doctrine.[33]

If federal law defers to state law, then there is no conflict and no need for prioritization.[34] The prioritization inquiry is necessary only if the relevant federal law expressly or implicitly rejects deference to a conflicting state law.

As noted in Part IV, the existence of potentially conflicting state law may be a reason for interpreting federal law narrowly. For example, in some circumstances an *Erie* canon might warrant skewing interpretation of federal law toward deferential accommodation of state law.[35] But a preference for deference would implicate the interpretation inquiry, not the prioritization inquiry, which operates only after courts adopt a definitive interpretation of the relevant federal law. Moreover, developing a canon would require courts to directly confront the policy issues that arise when federal and state law potentially conflict. This direct engagement with policy is preferable to an ad hoc process that enables *Hanna*'s flawed prioritization test to taint interpretation.

In contrast to the three-step interpretation inquiry, the prioritization inquiry has only one step. When the interpretation inquiry concludes that a valid federal rule is broad enough to encompass the disputed issue and is inconsistent with state law, courts must decide whether federal or state law has priority. I argue in Parts II–IV that this inquiry should entail applying preemption principles and the Supremacy Clause rather than a multi-factored "twin aims" test.

If reliance on preemption principles seems surprising, recall that we are assuming that the creation inquiry deems the relevant federal law to be valid. Accordingly, the rulemaker was empowered to choose federal law as the basis for decision. If the rulemaker made an unacceptable choice between federal and state law, then the problem really implicates *Erie*'s creation component rather than its prioritization component. The problem would be that a rulemaker created a federal law with broader consequences than the rulemaker was allowed to impose. So the

33. Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 13 (2012) (explaining how choice-of-law concepts can help resolve some of the *Erie* doctrine's persistent puzzles).

34. In some cases, federal law incorporates state law, such that federal and state law have similar content, albeit with several potential complications. *See* Erbsen, *supra* note 9, at 586–88 (discussing the difference between adopting and incorporating state law).

35. *See infra* Section IV.B.2.

solution should be to invalidate or fix the federal law rather than to manipulate the prioritization inquiry.

We are also assuming that the court correctly interpreted the federal rule. Courts applying *Erie*'s prioritization component therefore must respect the rulemakers' choice and implement the supreme federal law.[36]

For convenience, the foregoing analysis treats the creation and interpretation inquiries as sequential. This approach has intuitive appeal because the decision to create a federal rule seems to precede efforts to interpret the rule. But in practice courts should apply the creation and interpretation inquiries iteratively. An iterative approach links questions about whether a rule is valid and what it means. Thus, the creation inquiry is not complete until the court has an interpretation to test. And the interpretation inquiry is not complete until the court knows the range of what the rulemaker can authorize. Accordingly, the interpretation and creation inquiries in practice are likely to occur in tandem, with one inquiry influencing the other.

To add further complexity, an avoidance canon straddles the creation and interpretation inquiries by discouraging interpretations that approach an uncertain limit on creative discretion.[37] For example, if a court doubts whether the judiciary can create common law contempt rules that govern diversity cases, it might be inclined to interpret contempt precedent from federal question cases as not extending to diversity cases. This form of avoidance implicates at least two constitutional values. First, separation of powers concerns may warrant eschewing interpretations that could extend a rulemaker's power beyond institutional limits. Second, federalism concerns may lead courts to reject interpretations of federal law that create avoidable conflicts with state law. Accordingly, doubt about whether a federal institution can or should create a federal rule that displaces state law may favor interpreting the federal rule narrowly.[38]

Both the sequential and iterative perspectives on creation and interpretation have the same practical effect on prioritization. If a case reaches the prioritization stage after the creation and interpretation inquiries are complete, then the court knows that a federal law is valid, encompasses the disputed issue, and does not defer to state law.

Accordingly, when courts reach the prioritization inquiry, the creation and interpretation inquiries have already done all the interesting work. The only remaining question is: Does a valid and nondeferential federal law that encompasses a disputed issue have priority over conflicting state law? The Supremacy Clause

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36. *See infra* Section IV.A.

37. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (considering whether a proposed interpretation "arguably" exceeds the rulemaker's authority). For critiques of avoidance, see Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (contending that jurisprudence couched in the language of restraint often "camouflages acts of judicial aggression"); Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. 1067 (2018).

38. *See infra* Section IV.B.2.a (discussing potential *Erie* canons).

should make short work of that question because federal priority is usually clear.[39] The Supreme Court's jurisprudence overlooks this critical distinction between creation and interpretation on the one hand, and prioritization on the other. Parts II–IV show that the Court's blurring of distinct inquiries generates a needlessly elaborate prioritization test that distracts from the constitutional and policy questions that should animate creation and interpretation.

II. FRAMEWORK FOR UNDERSTANDING THE *ERIE* DOCTRINE'S APPROACH TO THE RELATIVE PRIORITY OF FEDERAL AND STATE LAW

The current prioritization inquiry is an example of the mischief that arises when courts simultaneously overthink and undertheorize doctrine. Case law implements tests that are both intricate and indeterminate, producing answers to questions that are not worth asking. Section A suggests reasons for the current confusion and links the concepts of prioritization and preemption. Section B proposes a new framework that clarifies existing law and isolates its most troubling elements.

A. Sources of Confusion About Prioritization

Commentators have struggled to identify a foundation for the Supreme Court's prioritization decisions. Several candidates have emerged, including: limits on judicial authority arising from the Constitution's separation of powers, federalism norms embedded in the Constitution's structure, due process, equal protection, general choice-of-law principles, the RDA, and intrinsic distinctions between substantive and procedural law.[40]

At least three pathologies explain the confusion.

1. Blurring of Erie*'s Four Inquiries, Especially Regarding the Substance/Procedure Distinction*

Courts and commentators typically bundle all four components of the *Erie* doctrine into a single loosely structured inquiry. Discussions of prioritization therefore needlessly invoke concerns that are more relevant to creation, interpretation, or adoption.[41] Readers confronting these red herring concepts are left to struggle with locating where one inquiry ends and another begins. The prioritization inquiry's precise contours thus remain obscure, leading to disputes about what the inquiry entails.

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39. *See infra* Section IV.A.

40. *See generally* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595 (2008) (rejecting several justifications for a broad reading of *Erie*); Kermit Roosevelt III, *Valid Rule Due Process Challenges:* Bond v. United States *and* Erie*'s Constitutional Source*, 54 WM. & MARY L. REV. 987, 998–1000 (2013); *infra* Section II.B.4.c.

41. *See infra* Section II.B.4 and Part IV.

The conflation of four distinct inquiries into an amorphous "*Erie* doctrine" is especially pernicious because some concepts are potentially relevant to all four inquiries, but for different reasons. Overlaps between *Erie*'s components can implicate abstract values—such as federalism and separation of powers—or seemingly technical questions.

An example of how *Erie*'s inquiries can blur involves judicial efforts to distinguish substantive rules from procedural rules. The distinction is ethereal because "substance" and "procedure" are distracting labels obscuring complex concepts. Yet the labels have been inescapable: the Court expressly eschews them,[42] but also repeatedly invokes them.[43] Sometimes the same opinion both scorns and embraces the substance/procedure distinction. For example, *Hanna v. Plumer* stated that "*Erie*-type problems" are "not to be solved by reference to any traditional or common-sense substance-procedure distinction."[44] This retreat from the substance/procedure distinction lasted only a few paragraphs. *Hanna* eventually observed that *Erie* "say[s], roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law."[45] Similarly, *Guaranty Trust Co. v. York* stated that "the question is not whether a [state rule] is deemed a matter of 'procedure' in some sense."[46] But the following sentence considered whether the state rule was a "matter of substance."[47] Justice Rutledge's dissent in *Cohen v. Beneficial Industrial Loan Corp.* neatly illustrates the substance/procedure distinction's stubborn persistence. He acknowledged that "in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible."[48] But in the next sentence, he stated that "this fact cannot dispense with the necessity of making a distinction."[49]

The substance/procedure distinction's ubiquity is disorienting because the line between substance and procedure has different contours and significance in different contexts. In the creation inquiry, the substance/procedure distinction influences the validity of federal law, including federal statutes governing litigation,[50]

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42. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) (holding that characterizing a state rule as "procedural" does not fully capture the rule's "effect[s]" and therefore does not determine its applicability in federal court).

43. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."); Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) (characterizing forum non conveniens as a rule "of procedure rather than substance"); Chambers v. NASCO, Inc., 501 U.S. 32, 52 (1991) (stating that *Erie*'s "concerns" are "at issue" "[o]nly when there is conflict between state and federal substantive law").

44. *Hanna,* 380 U.S. at 465–66.

45. *Id.* at 471.

46. Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945).

47. *Id. York*'s author later referred to the substance/procedure distinction as "less than self-defining" and "delusive." Bernhardt v. Polygraphic Co., 350 U.S. 198, 207 (1956) (Frankfurter, J., concurring).

48. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting).

49. *Id.*

50. *See infra* text accompanying notes 83–87.

rules promulgated under the REA,[51] and perhaps some forms of federal common law arising from the judiciary's inherent powers under Article III.[52] In the interpretation inquiry, the substance/procedure distinction could influence how broadly or narrowly courts read rules.[53] In the prioritization inquiry, the substance/procedure distinction arguably animates the current "unguided" approach to vertical conflicts between state law and federal common law.[54] And in the adoption inquiry, the substance/procedure distinction influences state choice-of-law rules that apply under *Klaxon*.[55] Implementing the substance/procedure distinction sensibly—to the extent that doing so is possible or desirable—requires a precise understanding of why the distinction matters. Precision is elusive when all four *Erie* inquiries blur together.

The Supreme Court inadvertently illustrated its own confusion when it discussed the substance/procedure distinction in *Sun Oil Co. v. Wortman*.[56] Consider two adjacent sentences from the opinion. First:

> Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.[57]

Second:

> In the context of our *Erie* jurisprudence . . . that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.[58]

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51. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure . . . .").

52. *See* Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1184 (2006) ("Given that Congress [in the REA] reserved to itself the exclusive right to create procedural law that encroaches on substantive rights, it would be very odd indeed if the Court could evade this restriction simply by relying on its inherent power."). *But see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504, 508 (2001) (holding that preclusion is an appropriate subject for federal common law even though it might be substantive in the REA context). For a discussion of federal procedural common law's foundation and scope, see Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008). For a similar discussion in the context of federal equitable remedies, see Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in Federal Courts*, 60 DUKE L.J. 249 (2010); Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018); citations *infra* note 157.

53. *See infra* text accompanying notes 407–08.

54. *See infra* Section II.B.4.b.

55. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

56. 486 U.S. 717 (1988).

57. *Id.* at 726–27.

58. *Id.* at 727.

The first sentence cautions courts to think carefully about why they are drawing a line between substance and procedure. The second sentence fails to exercise that caution. The Court refers to "our *Erie* jurisprudence" as if "*Erie*" is a single monolithic inquiry. But *Erie* is an amalgam of four distinct inquiries that invoke the substance/procedure distinction for different reasons. The Court was thus unable to precisely articulate distinctions between *Erie*'s components in a decision that is about the importance of precisely articulating doctrine.

This Article's analysis does not depend on any particular view of whether the substance/procedure distinction is useful. Indeed, the distinction's utility varies by context and therefore resists general conclusions. For present purposes, the distinction is interesting only because it highlights the importance of carefully focusing on the unique purposes and constraints of each of *Erie*'s four components. An added virtue of the Article's framework is that it renders the often confusing substance/procedure distinction irrelevant to the prioritization inquiry.[59]

2. Fragmented Doctrinal Evolution Across Contexts and over Time

A second reason why the prioritization inquiry has become needlessly complicated is that it currently operates differently depending on the source and content of federal law.[60] Yet the case-by-case process of adjudication generally prevents courts from comprehensively articulating these differences. Courts address the specific problem that a case presents. This leads to decisions about individual trees that only briefly sketch the surrounding forest. Absent a comprehensive account, the prioritization inquiry can seem malleable and arbitrary.

A related complication is that the prioritization inquiry has evolved over time. Yet the Supreme Court's reluctance to overrule prior decisions means that old and new precedents coexist. Readers cannot be certain about whether a new decision displaces older decisions. As time passes, doctrine becomes an accretion of discordant layers.

For example, in 1958 the Court extensively discussed prioritization in *Byrd v. Blue Ridge Rural Electric Cooperative*.[61] The Court then essentially ignored *Byrd* for the next thirty-eight years, citing its prioritization inquiry only rarely and tangentially.[62] Some commentators believed that *Byrd*'s unique methodology had

59. *See infra* Section IV.A.

60. *See infra* Section II.B.

61. 356 U.S. 525 (1958).

62. *See* Donovan v. Penn Shipping, Inc., 429 U.S. 648, 650 (1977) (per curiam) (citing *Byrd* only for its holding); Hanna v. Plumer, 380 U.S. 460, 466–67 (1965) (considering problem that was conceptually similar to what *Byrd* considered, but citing *Byrd* only for its recharacterization of a prior precedent); Fay v. Noia, 372 U.S. 391, 406 (1963) ("cf." citation to *Byrd*); Magenau v. Aetna Freight Lines, 360 U.S. 273, 278 (1959) (addressing facts similar to *Byrd*'s).

faded into irrelevance.[63] Yet *Byrd* prominently reappeared in a 1996 decision[64] before mostly disappearing in a major 2010 decision.[65] *Byrd*'s current force is unclear. Like a dormant volcano, *Byrd* occasionally emits puffs of unsettling smoke. Arguably, *Byrd* should have more prominence than the Court currently accords it if one thinks carefully about how *Byrd* coexists with *Hanna*.[66]

3. Failure to Reconcile Erie *with Preemption Jurisprudence*

Finally, the prioritization inquiry should be—but currently is not—indistinguishable from preemption analysis. Asking whether a federal rule has priority over a conflicting state rule is equivalent to asking whether the federal rule preempts the state rule.

The analogy to preemption may seem jarring because federal law typically preempts state law in either all U.S. courts or no U.S. courts.[67] Yet I am arguing that sometimes federal law preempts state law in federal courts but not in state courts.[68] The incongruity fades when one recognizes the interplay between prioritization and interpretation. A federal court can interpret a federal law narrowly so that its scope encompasses cases in federal court but not in state court. For example, consider the contempt hypothetical from Part I. A federal court might decide that federal law governs lawyers' misconduct in federal courts adjudicating state claims but is silent about misconduct in state courts adjudicating federal claims.[69] Giving this interpretation a preemptive effect would displace state law only in federal court, leaving state courts free to develop their own rules.[70] Likewise, in some circumstances a federal rule might preempt state law in only a subset of cases in federal court; for example, in federal question cases but not diversity cases.[71] And

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63. *See* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1638 (1998) (noting "confusion" among commentators about *Byrd*'s status).

64. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–38 (1996); *cf.* Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 267–69 (2008) (noting uncertainty about how *Gaspirini* situated *Byrd* in the *Erie* pantheon).

65. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 417 (2010) (Stevens, J., concurring) (citing *Byrd* only briefly in a concurring opinion).

66. *See infra* text accompanying notes 189–92.

67. *See* U.S. CONST. art. VI (obligating "the judges in every state" to follow federal law that conflicts with otherwise applicable state law).

68. *See supra* text accompanying notes 11–13.

69. *See supra* Section I.A; *see also* Am. Dredging Co. v. Miller, 510 U.S. 443, 450 (1994) (holding that federal forum non conveniens doctrine applies in federal court but not in state court); Jeffrey L. Rensberger, Erie *and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591, 1615–16 (2015) (discussing "partial preemption").

70. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 464 (2018) (noting that state procedures provide an important alternative to federal procedures for enforcing protected rights).

71. *See* Henderson v. United States, 517 U.S. 654, 657 n.2 (1996) ("In a suit on a right created by federal law, filing a complaint suffices to satisfy the statute of limitations . . . . In a federal-court suit on a state-created right, however, a plaintiff must serve process before the statute of limitations has run, if state law so requires for a similar state-court suit.").

in unusual situations a federal rule that applies only in federal court may justify an ancillary federal rule that protects federal policy interests by preempting state law in state courts. An interesting example comes from FRCP 23, which governs class actions in federal courts but also generates federal common law that applies in state courts. A federal common law tolling rule protects the policies underlying Rule 23 by preventing state courts from dismissing claims as untimely based on delays caused by prior Rule 23 litigation.[72]

Accordingly, this Article's references to preemption assume that federal law displaces state law only on matters within a particular federal law's scope. Federal law therefore will sometimes apply only to certain kinds of claims (e.g., federal question claims rather than diversity claims) or only in certain kinds of courts (e.g., federal courts rather than state courts).

Despite preemption's relevance, the Supreme Court generally treats its *Erie* and preemption cases as distinct lines of authority. Opinions considering whether a federal statute displaces state law in a diversity case often invoke *Erie* without mentioning preemption,[73] or invoke preemption without mentioning *Erie*.[74] A handful of opinions mention both *Erie* and preemption without acknowledging that the two doctrines address the same issue from different directions.[75]

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72. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1 (2018) [hereinafter Burbank & Wolff, *Common Law*] (discussing this example in detail). More generally, Burbank and Wolff have contended that federal law's ability to displace state law is in part a function of the federal law's source, which influences the breadth of a court's interpretive discretion. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25–26 (2010) [hereinafter Burbank & Wolff, *Missed Opportunities*].

73. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (holding without reference to preemption or the Supremacy Clause that *Erie* permits federal courts "to apply rules enacted by Congress with respect to matters . . . over which it has legislative power"); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 (1988) (citing *Prima*); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (holding that *Erie* should not be "extended to legal problems affecting international relations").

74. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (discussing preemption in a diversity action without citing *Erie*); Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 229 (1995) (same); Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (same); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (same); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (same).

75. *See* Ferens v. John Deere Co., 494 U.S. 516, 526 (1990) (citing both *Erie* and preemption); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 414 n.13 (2010) (plurality opinion) (same); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198 (1988) (citing the Supremacy Clause and noting that *Erie* did not require applying state law); Lehman Bros. v. Schein, 416 U.S. 386, 389 (1974) (noting that "under the regime of *Erie*," federal courts must enforce state policy choices when there is "no overriding federal rule which pre-empts state law"); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 67 (1966) (holding that *Erie* does not override a "pre-empting federal interest" in a diversity case); Transcon. & W. Air v. Koppal, 345 U.S. 653, 656–57 (1953) (citing *Erie* while considering whether federal law preempted plaintiff's state law claim in a diversity action); Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948) (holding that "the Supremacy Clause" leaves "no room for the application of *Erie*"); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942) (citing the Supremacy Clause as supporting proposition that "the doctrine of [*Erie*] is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those

Scholarship about preemption generally does not discuss *Erie*, while scholarship about *Erie* tends not to discuss preemption.[76] This compartmentalization has led scholars to overlook the point that I address in Parts III and IV: because preemption analysis subsumes prioritization analysis, and because federal common law is often preemptive, *Erie*'s interpretation and creation components should do most of the work currently allocated to the prioritization component. The interesting question is not whether valid federal common law encompassing an issue has priority over state law. Priority usually is automatic. Instead, the interesting questions are whether federal common law can and does encompass a disputed issue.

B. Current Applications of Erie*'s Prioritization Inquiry*

This Section outlines a framework for understanding the Supreme Court's prioritization jurisprudence. The framework provides a rationale and organization that are consistent with the Court's decisions but not always evident in the decisions themselves.[77]

The Article's framework identifies four distinct rules that emerge from the Supreme Court's post-*Erie* decisions. The first three rules address the Constitution, statutes, regulations, formal rules (such as the FRCP), and treaties. These aspects of prioritization jurisprudence are not controversial. Indeed, treating them as distinct helps reveal why they are unobjectionable. The fourth prioritization rule addresses federal common law and is highly contestable. Isolating this approach to federal common law and unpacking its assumptions can help courts clarify their analysis and focus on where modern doctrine goes astray. Part III builds on this foundation to expose flaws in the Court's prioritization jurisprudence.

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statutes"); *cf.* Burks v. Lasker, 441 U.S. 471, 476–77 (1979) (holding that despite *Erie*, federal rather than state law supplied standards for implementing a federal statute); Urie v. Thompson, 337 U.S. 163, 174 (1949) (same); Deitrick v. Greaney, 309 U.S. 190, 200–01 (1940) (same); Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 349–50 (1939) (holding that *Erie* did not require applying state law to determine "remedial details" when a right stemmed from a treaty).

76. *See* Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1172 (2016). Suzanna Sherry has identified this and other discontinuities as an example of unwarranted "exceptionalism" about *Erie*. *Id.* My prior work likewise highlights how *Erie*'s mystique obscures its foundations and implications. *See* Erbsen, *supra* note 9, at 582–83. For examples of scholarship linking *Erie* and preemption for various purposes, see Burbank & Wolff, *Missed Opportunities*, *supra* note 72, at 39 (noting that concerns about preemption influence interpretation of the FRCP); Clermont, *supra* note 11, at 9 (stating that *Erie*'s "ballyhooed" prioritization component often overshadows preemption analysis); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 774 (1998) ("*Erie* cases are simply a small subset of preemption and federal common law cases, and they can be analyzed as such"); Rensberger, *supra* note 69, at 1620 (noting overlapping "areas of inquiry" between *Erie* cases and preemption cases); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 314 (1980) (recognizing that a "valid and pertinent" federal law should displace state law).

77. *See supra* notes 73–75 (noting that the Court often treats its *Erie* and preemption decisions as separate lines of precedent).

1. The Constitution Has Priority over State Law

The prioritization inquiry is simple when the Constitution conflicts with state law. The Constitution always has priority.

The Constitution itself supplies the priority rule in Article VI, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[78]

The Supremacy Clause does not contain any caveats, so there is no need to categorize constitutional provisions as substantive or procedural. If a constitutional provision applies—i.e., if the interpretation inquiry reveals that the disputed issue is within the provision's scope—then it supersedes all other potentially applicable law. The Court has acknowledged that *Erie* did not alter the Supremacy Clause's sweeping approach to the Constitution's preemptive force.[79]

Of course, displacing state law implicates *Erie*'s concerns about respecting state "autonomy."[80] Courts in close cases might therefore seek to avoid displacement by concluding that the Constitution does not apply. These situations do not implicate the Constitution's supremacy. Instead, they implicate its scope. Judges who decline to apply an ostensibly relevant constitutional provision implement *Erie*'s interpretation component rather than its prioritization component.

2. Federal Statutes and Treaties Have Priority over State Law

The Supremacy Clause adopts the same priority rule for statutes and treaties as for the Constitution: all three are "supreme."[81] Accordingly, statutes and treaties have priority over state law regardless of whether they are substantive or procedural.

Confusion nevertheless arises because discussions of statutes and treaties often blur the creation, interpretation, and prioritization inquiries. Separating these inquiries clarifies the role of each.

The substance/procedure distinction is often relevant when applying the creation inquiry to statutes. In various circumstances, Congress has authority to

78. U.S. CONST. art. VI.

79. *See* Simler v. Conner, 372 U.S. 221, 222 (1963) (per curiam) (holding that *Erie* does not preclude invoking the Seventh Amendment rather than state law in a diversity case to determine whether an action is legal or equitable); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949) ("a federal court would not give effect, in either a diversity or nondiversity case, to a state statute that violates the Constitution"); *cf.* Rummel v. Estelle, 445 U.S. 263, 303 (1980) (Stewart, J., concurring) (noting that *Erie*'s preservation of state regulatory autonomy does not insulate states from federal constitutional constraints).

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

81. U.S. CONST. art. VI.

create only laws that are "rationally capable of classification" as procedural.[82] Article I allows Congress to enact "all laws which shall be necessary and proper to carry into Execution . . . Powers vested by this Constitution in the Government of the United States."[83] One of the "Powers" that Congress can support is the "judicial Power" in Article III.[84] Similarly, Articles I and III allow Congress to "constitute" and "establish" lower federal courts.[85] According to the Supreme Court, this power includes authority "to prescribe and regulate the modes of proceeding in such courts."[86] These clauses do not provide a back door to new substantive powers. For example, a statute regulating purely intrastate commerce could not circumvent the Interstate Commerce Clause merely because the statute also provides procedures for enforcing the new federal regulations in a federal court. Similar bootstrapping concerns could arise under the Treaty Clause if treaties implement nominally procedural goals using methods that undermine substantive state interests.[87]

In both the statute and treaty contexts, *Erie*'s creation inquiry polices compliance with limits on federal authority. The relevant question is whether quasi-substantive federal laws are valid. This question precedes consideration of their priority.

Efforts to characterize statutes as substantive or procedural may also affect interpretation. As discussed in Part IV, courts might use various canons to interpret

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82. Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987) ("Rules regulating matters indisputably procedural are a priori constitutional. Rules regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,' also satisfy this constitutional standard." (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965))). Congress can also regulate procedure in state courts as a necessary and proper incident to its substantive powers, although arguably cannot control state procedure in cases implicating only state law. *See* Jinks v. Richland Cty., 538 U.S. 456, 464–65 (2003) (acknowledging a party's concerns about federal interference with state court procedures, sustaining a challenged federal statute despite these concerns, but noting that "we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts"); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (contending that in state courts, state law provides procedures for adjudicating state law claims even though federal law can provide procedures for federal claims). Federal common law may also apply in state courts when nominally procedural decisions would implicate federal substantive interests. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 810–17 (1986) (considering when federal common law preclusion rules displace state preclusion rules in state courts). Federal courts also indirectly influence the development of state law when attempting to predict its content while implementing *Erie*'s adoption inquiry. *See* Laura E. Little, Erie*'s Unintended Consequence: Federal Courts Creating State Law*, 52 AKRON L. REV. 275 (2019).

83. U.S. CONST. art. I, § 8.

84. *Id.* art. III, § 1; *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825) (holding that the Necessary and Proper Clause's application to Article III "seems to be one of those plain propositions which reasoning cannot render plainer").

85. U.S. CONST. art. I, § 8; *id.* art. III, § 2.

86. Livingston v. Story, 34 U.S. (9 Pet.) 632, 656 (1835). *But see* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 104–19 (contending that the Tribunals Clause does not authorize Congress to regulate judicial procedures).

87. *See* U.S. CONST. art. II, § 2, cl. 2; *cf.* Bond v. United States, 572 U.S. 844, 855 (2014) (raising but avoiding question about how the Treaty Clause augments federal regulatory authority).

statutes broadly or narrowly depending on their subject matter, including their substantive or procedural character.

Although the creation and interpretation inquiries for statutes are complicated, the priority inquiry is simple. All valid federal statutes preempt inconsistent state law on matters within a federal statute's scope. Determining whether a statute is valid and what it means is difficult. When we know that the statute is valid and encompasses an issue, determining its priority is easy. The Court's occasional invocations of *Erie* in the preemption context acknowledge this basic principle of statutory priority.[88]

The reference to "inconsistent" state laws in my formulation of the preemption/prioritization inquiry is a term of art. The scope of federal preemption is not uniform across all statutes. Some statutes preempt only a narrow slice of state law that conflicts or interferes with federal law, some preempt a proscribed type of state rules, and some preempt an entire field of regulated activity.[89] Thus, when I say that *Erie*'s prioritization inquiry is easy because it reduces to a question of preemption, the preemption question might still be difficult. But that difficulty emerges during *Erie*'s interpretation inquiry rather than its prioritization inquiry. The hard question is determining which kinds of state laws are inconsistent with the federal statute and what effect the federal statute should have when disputes implicate these inconsistencies. Making these determinations requires using conventional tools of statutory interpretation,[90] including an interpretive canon disfavoring preemption in some circumstances.[91] When these interpretive tools reveal the federal statute's scope and rejection of deference to state law, the prioritization inquiry is straightforward because all inconsistent state law within the federal statute's scope is preempted.

The prioritization inquiry for statutes also applies to treaties because the Supremacy Clause treats them identically. However, treaties that are not self-executing require congressional implementation in order to have a preemptive effect.[92] Aside from this quirk, treaties and statutes have the same priority. If a

88. *See* citations *supra* note 75.

89. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018) (describing "three different types of preemption": "conflict," "express," and "field").

90. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 231–43 (2011) (applying traditional interpretive methods to determine scope of a statute's preemption provision); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994) (distinguishing the interpretive process of identifying preemption from the choice-of-law rule in the Supremacy Clause that allows preemptive federal law to displace state law).

91. *See* Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009). For discussion of the Court's presumption against preemption, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) ("courts should not automatically seek 'narrowing' constructions of federal statutes solely to avoid preemption"), and Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 7 (2013) ("there remain good reasons for a presumption against preemption").

92. *See* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 694 (2008) ("By declaring treaties to have the force of law, the Supremacy Clause makes them enforceable in the courts in the same circumstances as

statute or self-executing treaty is valid and encompasses the disputed issue, then it preempts inconsistent state law.

3. Federal Rules and Regulations Promulgated Through a Statutorily Approved Process Have Priority over State Law

This subsection considers how the prioritization inquiry applies to what I call "delegated rules," as distinct from "common law" rules. These labels have no intrinsic significance. I use them merely to clarify discussion and track the Supreme Court's decisions.

A delegated rule is a rule promulgated through a statutorily approved rulemaking process. Instead of enacting laws itself, Congress enacts a statute that authorizes another institution to regulate. Delegated rules rely on the same institutional authority as statutes: Congress's "legislative Powers" under Article I.[93]

In contrast, a common law rule is a rule that arises without a statutory delegation of rulemaking authority. These rules rely on Article III's grant of "judicial Power" rather than Article I's grant of "legislative Power."[94] For example, the rule allowing federal district courts to sanction lawyers for pleading frivolous legal arguments is a delegated rule because it is within the statutorily authorized Federal Rules of Civil Procedure (FRCP).[95] In contrast, the rule allowing federal district courts to sanction parties for bad faith conduct not covered by the FRCP is a common law rule that arises from the judiciary's "inherent power to police itself."[96]

A gray area exists between delegated rules and common law rules when courts develop rules in the shadow of statutes. For example, Congress occasionally enacts "common law statutes" that provide limited guidance and rely on the judiciary to develop the field through adjudication.[97] Prominent examples include statutes

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statutory and constitutional provisions of like content. . . . The single exception to the requirement of equivalent treatment concerns treaties that are non-self-executing . . . ."); *cf.* Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 349–50 (1939) (noting that *Erie* allowed federal common law rather than state law to determine "remedial details" of a "right" arising from a treaty).

93. U.S. CONST. art. I, § 1.

94. *Id.*; *id.* art. III, § 1.

95. *See* FED. R. CIV. P. 11(b)(2), 11(c)(1).

96. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991).

97. Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyamkrishna Balganesh ed., 2013) (contending that the "common law statutes" label implies more cohesiveness and uniqueness than may be warranted). Some common law statutes are also examples of what theorists call "super-statutes," which are "applied in accord with a pragmatic methodology that is a hybrid of standard precepts of statutory, common law, and constitutional interpretation." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

governing antitrust,[98] labor,[99] and intellectual property.[100] Less prominent but equally interesting is the All Writs Act, which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[101] The Court has characterized the All Writs Act as "a residual source of authority."[102] This characterization creates ambiguity about whether the open-ended statute delegates legislative power or acknowledges judicial power.

Case law applying common law statutes can be characterized in three different ways. First, the judiciary might be interpreting the text. Any ensuing law would have the status and preemptive force of a statute. Second, the judiciary might be exercising delegated power from Congress. Decisions would thus create delegated rules through a statutorily authorized adjudicative process. Third, the judiciary might be creating common law on its own authority. The ensuing doctrine would be analogous to other areas of federal common law with no legislative imprimatur.

The gray area between common law rules and delegated rules foreshadows a doctrinal problem. The Supreme Court prioritizes common law rules differently than delegated rules. This distinction is troubling when a rule is amenable to both characterizations. Parts III and IV discuss the implications of this gray area in more depth and identify other areas where the boundary between delegated and inherent power is indeterminate.

Although the boundary between delegated rules and common law rules can be indeterminate, some rules created by the judicial and executive branches clearly rely on delegated authority from Congress. Courts therefore must consider whether this legislative imprimatur enables delegated rules to have priority over inconsistent state law.

Commentators discussing *Erie* typically consider only one type of delegated rule: the FRCP. But several categories are relevant. First, myriad statutes permit federal agencies to promulgate rules using congressionally authorized methods.[103] These rules collectively constitute a body of federal administrative law that often conflicts with state law, raising the same kinds of *Erie* questions that statutes raise.[104] Second, the REA authorizes the Supreme Court to promulgate six current sets of

98. *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 732 (1988) (noting that the Sherman Act creates a "dynamic" rather than "static" liability standard that incorporates evolving "common law").

99. *See* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456 (1957) ("We conclude that the substantive law to apply in suits under [the Labor Management Relations Act] is federal law, which the courts must fashion from the policy of our national labor laws.").

100. *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 172 (2018).

101. 28 U.S.C. § 1651(a) (2018).

102. Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985).

103. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 500–59 (2018).

104. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 874 (2000) (holding that a federal regulation preempted state common law).

rules governing "practice and procedure" in lower courts: the FRCP, Federal Rules of Evidence (FRE), Federal Rules of Criminal Procedure (FRCrimP), Rules Governing Section 2254 and Section 2255 Proceedings (Habeas Rules), Federal Rules of Appellate Procedure (FRAP), and Federal Rules of Bankruptcy Procedure (FRBP).[105] These rules raise prioritization concerns when they conflict with otherwise applicable state laws. Even quintessentially federal fields—such as bankruptcy and federal criminal law—generate prioritization issues when courts employ federal rules while considering state laws entangled with federal questions.[106]

Delegated rules at first glance have an ambiguous status under the Supremacy Clause. The Clause identifies three categories of supreme federal law: "the Constitution," "Treaties," and all other "Laws of the United States" that are "made in pursuance" of the Constitution.[107] Delegated rules are not self-evidently "Laws." Congress did not enact them and present them to the President, which is how laws are usually made according to the Constitution.[108] Commentators have therefore questioned the propriety and wisdom of allowing delegated rules to preempt otherwise applicable state law.[109]

Nevertheless, the Supreme Court has sensibly held that the "phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization."[110] Whether the delegated rule is a "Law" is an interesting question that is irrelevant for prioritization purposes. What matters is that the statute authorizing the rule is a Law. The statutory pedigree enables the rule to ride the statute's coattails into a supreme position in the constitutional hierarchy. A similar coattails phenomenon occurs within the Executive Branch because the Constitution vests "executive Power" only in the President.[111] Yet the President can assign executive functions to subordinate officers whose actions then have a presidential imprimatur.[112] Thus,

105. 28 U.S.C. §§ 2072(a), 2075 (2018). The REA is not the sole source of authority for federal procedural rules. *See, e.g.*, 50 U.S.C. § 1803(g) (2018) (authorizing rulemaking by foreign intelligence courts).

106. *See* citations *supra* note 13.

107. U.S. CONST. art. VI.

108. *See id.* art. I, § 7.

109. *See* David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 334 (2015) ("[I]f agency action qualifies as 'supreme Law,' then it violates the Constitution's separation of powers. Meanwhile, if agency action does not qualify as 'Law' (thus saving it from separation of powers doom), then it falls beyond the Supremacy Clause's purview. In short, to qualify for preemption, agency action must simultaneously qualify as *Law* for federalism purposes and *not Law* for separation of powers."); citations *infra* note 153 (discussing application of the Supremacy Clause to federal common law).

110. City of New York v. FCC, 486 U.S. 57, 63 (1988). *But cf.* Lipschultz v. Charter Advanced Servs., 140 S. Ct. 6, 7 (2019) (Thomas, J., concurring in the denial of certiorari) ("It is doubtful whether a federal policy—let alone a policy of nonregulation—is 'Law' for purposes of the Supremacy Clause.").

111. U.S. CONST. art. II, § 1.

112. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and in the judgment) ("Surely the authority granted to members of the Cabinet and federal law

both the legislative power vested in Congress and the executive power vested in the President can be exercised by other institutions and officers through delegation. Rules promulgated through statutory delegation are manifestations of legislative power. Likewise, actions taken by properly deputized and supervised officers are manifestations of executive power.

Accordingly, as the Court has held, federal "regulations have no less pre-emptive effect than federal statutes."[113] Regulations can supersede state law even if the authorizing statute is silent about preemption, so long as the "federal agency has properly exercised its own delegated authority."[114]

As with regulations, the Court has held that valid delegated rules adopted under the REA displace inconsistent state law.[115] In both the agency and REA contexts, the rulemaker derives its preemptive authority from Congress.[116] Of course, regulations promulgated by agencies and rules promulgated by courts generally address different kinds of issues. But the Supremacy Clause is content-neutral. All valid "Laws of the United States" are supreme regardless of their subject matter,[117] including when they address government "operations" (such as judicial procedure).[118]

The REA includes a supersession clause that appears to make preemption express rather than implied,[119] although there is an argument that the clause is

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enforcement agents is properly characterized as 'Executive' even though not exercised by the President."). Interesting questions about the nature of executive power arise when Congress, rather than the President, vests discretion in officials who the President cannot control. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1880 (2015) (considering whether Presidential control over decisionmaking is a necessary element of Article II's framework for supervision of executive action).

113. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

114. *City of New York*, 486 U.S. at 64; *see also Fid. Fed.*, 458 U.S. at 154 ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . . Rather, the questions upon which resolution of this case rests are whether the [agency] meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the [agency's] delegated authority.").

115. *See* Hanna v. Plumer, 380 U.S. 460, 470 (1965) (holding that a rule's "validity" establishes its "applicability" in lieu of conflicting state law). The Court has also endorsed Congress's "power to delegate rulemaking authority to the Judicial Branch" through the REA. Mistretta v. United States, 488 U.S. 361, 388 (1989).

116. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941) (holding that a valid FRCP provision "has the force of a federal statute").

117. In contrast, horizontal choice-of-law inquiries are more complicated because the Full Faith and Credit and Due Process Clauses do not contain a bright line priority rule. *See* U.S. CONST. art. IV, § 1; *id.* amend. XIV, § 1.

118. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819) (holding that the Supremacy Clause applies to statutes addressing the "operations" of federal institutions).

119. 28 U.S.C. § 2072(b) (2018). A statute cannot supersede the Constitution, so the REA presumably excludes the Constitution from its definition of "laws" that rules supersede. *Id.* FRCP 82 disclaims authority to extend jurisdiction, which avoids the question of whether the supersession clause would allow a rule to supplant jurisdictional statutes. *See Sibbach*, 312 U.S. at 10 (raising this question). Congress repealed the supersession clause that applied to bankruptcy rules, which are promulgated

narrower than its text suggests. The supersession clause states that: "All laws in conflict with [national rules promulgated under the REA] shall be of no further force or effect after such rules have taken effect."[120] The plain meaning of "all laws" encompasses both federal and state laws. But if this plain reading is correct, then state laws that conflict with federal rules would have no "force or effect" even in state court, which Congress presumably did not intend.[121] The phrase "all laws" therefore might mean "all *federal* laws," such that the supersession clause preempts federal law but not state law. However, an alternative way to resolve the clause's ambiguity would be to interpret "no further force or effect" to mean "no further force or effect *in federal court*." This interpretation would treat the supersession clause as preempting "all laws"—including state laws—in federal court, but not in state court. Accordingly, the clause is amenable to two conflicting interpretations, both of which require adding an implied limit to the ostensibly plain text. Both interpretations are arguably consistent with aspects of the clause's two original purposes, which were to: (1) address separation of powers concerns by delineating judicial and legislative authority to make binding rules; and (2) "free the federal courts from the obligation to apply state law imposed by the Conformity Act of 1872."[122] This Article expresses no view about which interpretation of the supersession clause is correct. In practice, REA-derived rules preempt state law in federal court even without resort to the supersession clause.[123]

The fact that valid delegated rules preempt state law on matters within their scope does not mean that validity and scope are easy to determine. But as noted in prior sections, questions about validity and scope implicate *Erie*'s creation and interpretation inquiries rather than its prioritization inquiry.

A large literature addresses how the creation and interpretation inquiries apply to administrative regulations implicating federalism and separation of powers concerns. Relevant questions include whether Congress can and should delegate a particular power,[124] how much deference agencies should receive when interpreting a statutory delegation,[125] and if courts should put a thumb on the interpretive scale either for or against preemption.[126] The priority inquiry is simple when the answers to these questions reveal that a regulation implements a valid delegation and

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under § 2075 rather than § 2072. *See* Pub. L. No. 95-598, § 247, 92 Stat. 2549, 2672 (1978).

120. 28 U.S.C. § 2072(b).

121. *See* Roosevelt, *supra* note 33, at 39.

122. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1044 n.203 (1989).

123. *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

124. *See, e.g.*, John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541 (2008).

125. *See*, *e.g.*, Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004).

126. *See* citations *supra* note 92.

encompasses a disputed issue despite the existence of conflicting state law. The Supremacy Clause enforces preemption.

The creation and interpretation inquiries under the REA are also vexing and have caused confusion. The substance/procedure distinction emerges again because the REA precludes rules that "abridge, enlarge or modify any substantive right."[127] Assessing a rule's validity therefore requires considering whether it is excessively substantive.[128]

Even when rules are valid, the Court has suggested that federalism concerns warrant interpreting federal rules narrowly to avoid conflict with state law.[129] But the Court has also said the opposite by purporting to apply the FRCP's "plain meaning" despite the existence of inconsistent state law.[130] Under either interpretive approach, when a valid federal rule unavoidably conflicts with state law, the federal rule has priority.[131]

Unilateral executive actions present a complication when considering the priority of delegated rules. The Supreme Court has held that executive orders and agreements have preemptive force under the Supremacy Clause.[132] These executive decisions do not rely on legislative delegation. Preemption without legislative action

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127. 28 U.S.C. §§ 2072(b), 2075 (2018).

128. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987) ("Rules which incidentally affect litigants' substantive rights do not violate [the REA] if reasonably necessary to maintain the integrity of [the REA-authorized] system of rules.").

129. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) (characterizing precedent as interpreting the FRCP "with sensitivity to important state interests and regulatory policies"). For similar reasoning applied to federal statutes rather than the FRCP, see Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1956) (interpreting the Federal Arbitration Act "narrowly" to avoid deciding whether *Erie* authorized creation of a federal rule and preemption of state law); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) (characterizing precedent as "avoid[ing]" "broad" interpretations of federal law that would create "disuniformity between state and federal courts"). For a critique of the Court's avoidance decisions under the REA, see Genetin, *supra* note 37.

130. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980). For a discussion of how federalism concerns should influence interpretation of the FRCP, see Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 239–59 (2013) (recommending substantive canons to restrain the FRCP's scope); Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 310 (2014) (noting that concerns about federalism are often in tension with other normative commitments in civil procedure cases, including concerns about protecting party interests). Separation of powers concerns should also inform interpretation by conforming a rule's scope to the REA's admonition against modifying substantive rights. *See* Burbank & Wolff, *Missed Opportunities*, *supra* note 72, at 44 (criticizing the "federalism myth" underlying REA jurisprudence).

131. *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965).

132. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003) ("valid executive agreements are fit to preempt state law, just as treaties are"); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 273 (1974) (holding that an executive order can preempt state law). In contrast to the President acting without Congress, Congress acting without the President—absent a veto override—probably cannot enact preemptive law. *See* INS v. Chadha, 462 U.S. 919, 954 (1983) (holding that congressional decisions of "legislative character" require presentment to the President).

raises idiosyncratic federalism and separation of powers issues.[133] However, for prioritization purposes, these executive decisions currently have the same preemptive force as statutes and delegated rules. If they are valid and encompass a disputed issue, and if the Court is correct about their status under the Supremacy Clause, then they have priority over state law without need for any further inquiry.

In sum, the prioritization inquiry for delegated rules (and possibly unilateral executive actions) is straightforward. If the creation and interpretation inquiries warrant applying the federal delegated rule, then the federal delegated rule has priority under the Supremacy Clause.

4. The Priority of Federal Common Law Currently Depends on Several Loosely Related Standards

This Section addresses the prioritization inquiry's most muddled component. To frame the problem, recall how we arrived at this point. The question we are trying to answer is: How does the Supreme Court decide when a valid federal law that encompasses a disputed issue displaces inconsistent state law? The prioritization inquiry is simple for four types of federal law: the Constitution, statutes, self-executing treaties, and delegated rules, including agency regulations and rules promulgated under the REA. These all have priority under the Supremacy Clause even though the Court often does not invoke supremacy when discussing *Erie*.[134] The only remaining category of federal law to consider is federal common law (FCL).

a. Reasons Why the Prioritization Inquiry Is Difficult in Cases Involving Federal Common Law

Determining FCL's priority over conflicting state law is difficult for at least three reasons. FCL encompasses several distinct subfields that are not fully defined, has an uncertain status under the Supremacy Clause, and raises conceptual questions that its fragmentation into subfields obscures.

First, FCL is not a uniform body of law. Different categories of FCL serve different purposes, arise from different sources, and implicate different constitutional values. Dividing FCL into categories is useful when the relevant question is how a particular category should operate. For example, courts might want to know a particular category's source, role, contours, and limits. However, in the context of prioritization, the fact that FCL comes in many flavors obscures common features relevant to preemption.

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133. For a critique of giving preemptive force to Presidential decisions without approval from Congress, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007).

134. *See supra* text accompanying notes 73–75.

Commentators do not agree on the basic definition of FCL and have constructed several competing taxonomies for its branches.[135] For present purposes, the outline of an ideal taxonomy is less important than the taxonomy's complexity. What matters is that FCL encompasses many diverse species, including law:

- governing enclaves in which the Constitution expressly or implicitly preempts state law, such as admiralty,[136] foreign relations,[137] interstate relations,[138] and tribal relations;[139]
- implementing terms in the Constitution that incorporate common law concepts;[140]
- protecting the federal government's "proprietary" interests in commercial transactions and government operations,[141] including judicial operations;[142]
- regulating procedures in federal court pursuant to "inherent power"[143] or other sources of authority;[144]

135. *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590–94 (2006) (canvassing multiple definitions of "federal common law" and noting the difficulty of finding a satisfactory definition in light of the topic's breadth and complexity); *cf.* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (identifying "essentially two categories" of FCL: exercising delegated power from Congress and protecting federal interests).

136. *See* Norfolk S. Ry. v. Kirby, 543 U.S. 14, 23 (2004).

137. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

138. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011).

139. *See* Oneida Cty. v. Oneida Indian Nation, 470 U.S. 226, 234 (1985).

140. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471 n.9 (1942) (Jackson, J., concurring) ("[T]he Constitution uses words and phrases borrowed from the common law, meaningless without that background, and obviously meant to carry their common law implications."). For discussion of whether the Constitution's incorporation of common law is dynamic or static, see Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1243–44 n.283 (2011) (analyzing definition of the "high Seas").

141. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973).

142. *See* Burbank & Wolff, *Common Law*, *supra* note 72 (discussing an FCL tolling rule that applies in state courts in order to protect federal policy interests underlying FRCP 23); *cf.* 28 U.S.C. § 1651 (2018) (authorizing federal courts to issue injunctions "in aid of their respective jurisdictions").

143. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991).

144. For example, federal abstention doctrines are a form of procedural common law that arguably implement either inherent power, constitutional federalism and separation of powers principles, or discretion implicit in jurisdictional statutes. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84 (1984) (contending that the Supreme Court has not afforded abstention doctrines the "cautious scrutiny" that "federal common law" typically entails); *see also infra* Section III.A (discussing FCL arising from the Any Manner clauses).

- creating and refining remedies, such as the *Bivens* action,[145] class actions,[146] and doctrines borrowed from equity;[147]
- arising from international customs (maybe);[148]
- implementing statutory delegations of lawmaking authority to the judiciary;[149]
- filling gaps in statutes;[150] and
- filling gaps in the Constitution, including by defining how government institutions operate,[151] which animates aspects of the *Erie* doctrine itself.[152]

Accordingly, the *Erie* doctrine's application to FCL creates a perfect storm of confusion. FCL's structure is amorphous, its legitimacy is contested, and doctrine that attempts to provide structure and legitimacy is itself a form of unstructured and contested FCL.

Second, FCL presents idiosyncratic prioritization problems when it does not fit neatly into the Supremacy Clause's hierarchy. Most types of FCL listed above trace their lineage to supreme federal law. They either: (1) apply when constitutional or statutory displacement of state law leaves a void that only FCL can fill; (2) implement constitutional, statutory, or treaty provisions; or (3) arise to some degree from a constitutional or statutory delegation of rulemaking power to the judiciary.

Although many forms of FCL have a solid constitutional or statutory foundation, some types of FCL have relatively opaque origins. These FCL rules arguably have detailed content that is remote from any plausibly enabling text or

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145. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (developing federal civil remedy for violations of the Fourth Amendment). *But see* Carlson v. Green, 446 U.S. 14, 39 (1980) (Rehnquist, J., dissenting) (contending that *Erie* precludes FCL damages remedies for constitutional violations).

146. *See* J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625, 1637 (2017) (noting that the Court's class action jurisprudence includes consideration of remedial policies underlying the affected substantive fields).

147. Guar. Tr. Co. v. York, 326 U.S. 99, 106 (1945) (holding that federal courts may enforce state law using the "traditional body of equitable remedies"). For potential limits on this aspect of FCL, see *infra* text accompanying notes 154–57.

148. The domestic status of customary international law is contested. For a recent analysis of the debate, see Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L. REV. 1707 (2018).

149. *See* Wheeldin v. Wheeler, 373 U.S. 647, 651–52 (1963).

150. *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160 n.13 (1983) (holding that *Erie* does not require "apply[ing] state law in federal interstices"). Canons of interpretation may also be a form of FCL. *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 5 WM. & MARY L. REV. 753 (2013).

151. *See* sources cited *infra* note 397. Judicially enforced norms animating the federal government's operations are a related form of federal common law. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) ("doctrines and requirements are constitutionally informed but rarely constitutionally mandated").

152. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 986 (2013) ("[T]he *Erie* doctrine might best be characterized as what modern lawyers call 'federal common law.'").

source of gap-filling authority. Commentators have therefore debated whether various FCL rules are "Laws of the United States" entitled to Supremacy.[153] For example, the Supreme Court recently held that federal courts can enjoin preempted state conduct based on "a long history of judicial review of illegal executive action, tracing back to England."[154] The Court did not identify the constitutional source of this equitable power.[155] This uncertainty, coupled with the Court's broad assertion of federal remedial authority even in diversity cases,[156] raises questions about when federal equitable remedies are available to displace state law.[157] Similarly, the federal status of customary international law is hotly contested in part due to ambiguity about its foundation in constitutional or statutory text.[158]

Ironically, *Erie* itself concluded that *state* common law rules are binding "laws" as defined in the RDA.[159] But this interpretation of the RDA does not mean that

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153. *Compare* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) (contending that judge-made rules circumvent Article I's formal lawmaking procedures and therefore cannot be "Laws" under the Supremacy Clause), *and* Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 568 (2013) (noting that some forms of FCL might not be preemptive, although they could potentially be reframed to rely on constitutional or statutory authority), *with* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 742 (2010) ("the word 'Laws' in the Supremacy Clause must now be taken to include more than Acts of Congress; it must encompass the commands of any authorized national lawmaker," including courts), *and* Green, *supra* note 40, at 615–55 (critiquing recent efforts to frame *Erie* as delegitimizing federal common law). The Supreme Court routinely treats FCL as preemptive, although Justice Thomas has embraced academic critiques of FCL's preemptive force. *See* Collins v. Virginia, 138 S. Ct. 1663, 1678 (2018) (Thomas, J., concurring) ("When the Supremacy Clause refers to '[t]he Laws of the United States made in Pursuance [of the Constitution],' it means federal statutes, not federal common law.").

154. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015).

155. *See id.* (holding that the Supremacy Clause is not the source of remedial authority).

156. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 106 (1945); Guffey v. Smith, 237 U.S. 101, 114 (1915).

157. *See* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1321 (2000) (criticizing the "equitable remedial rights doctrine," which enables federal courts to apply federal equitable remedies to claims arising under state law); Morley, *supra* note 52, at 220–21 (contending that state law should govern remedies related to state claims, while federal equitable remedies can enforce federal rights). Several theories justify enforcing federal rights with judge-made federal equitable remedies. *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1051–52 (2015) (discussing justifications for modern federal equity jurisprudence); John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1015 n.103 (2008) ("[T]he Court very likely would regard an equitable remedy that protected a legal advantage derived from federal law as itself federal law."); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 577 (2016) (discussing how federal courts incorporated equity into federal law as part of a broader practice of assimilating pre-constitutional law into the constitutional order); *cf.* James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. (forthcoming 2020) (discussing relationship between federal equitable remedies and common law writs) (available at https://ssrn.com/abstract=3484165 [https://perma.cc/V84T-A7UV]).

158. *See supra* note 148.

159. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (citing what is now 28 U.S.C. § 1652). FCL rules are also "laws" under which federal question jurisdiction can arise. *See* Nat'l Farmers Union

federal common law is a form of binding "Laws" under the Supremacy Clause. The same word—laws, capitalized or not—can have distinct meanings in different instruments. Indeed, some theories of preemption imply that the word "Laws" has distinct meanings in one sentence of the same instrument. The Supremacy Clause uses the word "Laws" twice: "the Laws of the United States which shall be made in pursuance [of the Constitution] . . . shall be . . . supreme . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding."[160] The phrase "Laws of any State" presumably *includes* common law. Yet arguments doubting FCL's preemptive force posit that "Laws of the United States" *excludes* common law. Such inconsistent usage of a term is unlikely,[161] but is not impossible because inconsistent context-sensitive uses of language exist elsewhere in the Constitution.[162]

The word "Laws" may also have different meanings over time. As Henry Monaghan has noted, the modern "conception of federal common law—judge-made law that would bind both federal and state courts—was simply not a part of the Founders' intellectual landscape."[163] The founding generation instead accepted the legitimacy of the general law that *Erie* repudiated.[164]

Accordingly, preemption analysis for federal common law under the Supremacy Clause is an exercise in translating pre-*Erie* text to a post-*Erie* world. This exercise leads to frustration: the pre-*Erie* text is imprecise, the post-*Erie* world is complex, and *Erie* itself is not a model of clarity.

Third, case law compounds confusion by not acknowledging that all FCL presents the same prioritization question, even if the answer varies by context. Recall that the prioritization inquiry asks whether valid federal law has priority over state law on matters within the federal law's scope. That inquiry is potentially difficult because various kinds of FCL may or may not trigger the Supremacy Clause. So one would expect the Supreme Court to approach prioritization by saying, essentially: (1) in this case valid FCL conflicts with state law; so (2) we must apply *Erie*'s prioritization component; which (3) entails determining whether the FCL rule is a "Law of the United States" entitled to supremacy; and (4) here is the test for making that determination. But this is not the Court's approach.[165] Some

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Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985) ("Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in [28 U.S.C.] § 1331.").

160. U.S. CONST. art. VI.

161. *See* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1568–69 (2008) (contending that FCL is a form of supreme federal law).

162. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799 (1999) ("[T]he same words sometimes sensibly mean different things in different contexts.").

163. Monaghan, *supra* note 153, at 768. Although the founding generation did not anticipate the post-*Erie* conception of federal common law, the modern distinction between federal common law and general law has roots that predate *Erie*. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917) (stating that "national" common law "incorporated" principles drawn from "general" maritime law and that state law was not "valid" if it caused "material prejudice" to these national common law rules).

164. *See* Monaghan, *supra* note 153, at 769–77.

165. Bradford Clark has suggested that the Court's bifurcated approach to the priority of FCL and federal statutes implicitly implements the Supremacy Clause. *See* Clark, *supra* note 153, at 1420–22.

decisions addressing FCL's priority expressly frame the problem in terms of *Erie* or preemption.[166] But many decisions never mention preemption, *Erie*, or its progeny, even in diversity cases.[167] Treating conceptually similar problems inconsistently is a path to an incoherent result.

b. Reconstructing the Hanna *Line of Case Law to Explain How Prioritization Currently Addresses Federal Common Law*

A unique prioritization inquiry currently applies to FCL. *Hanna* established that cases "where no Federal Rule applies"—meaning no delegated federal rule, such as an FRCP provision—implicate a "relatively unguided *Erie* choice."[168] Subsequent decisions confirmed that federal courts will "wade into *Erie*'s murky waters"[169] only when "no federal statute or Rule covers the point in dispute."[170] In these cases, the court describes its role as determining whether "federal common law" displaces state law.[171]

The prioritization inquiry for FCL is difficult to decipher because it has developed sporadically. Unlike Congress, the Supreme Court does not draft comprehensive codes governing entire fields. Law instead evolves on a case-by-case basis to address problems as they arise. Doctrine becomes a pastiche of insights from several authors across multiple eras addressing varying contexts.

A canonical account of prioritization for FCL highlights the Court's 1965 decision in *Hanna v. Plumer* as a transformative moment.[172] This account is correct

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However, the Court has not expressly endorsed this theory, which relies on contestable skepticism about FCL's preemptive force. *See supra* note 153 (noting competing interpretations of the Supremacy Clause).

166. *See* Empire Healthchoice Assurance, Inc., v. McVeigh, 547 U.S. 677, 691 (2006) (framing FCL's priority as a "vertical choice-of-law issue" implicating *Erie*); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 100 n.6 (1991) ("the principles recognized in *Erie* place no limit on a federal court's power to fashion federal common law rules necessary" to enforce "federal law"); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (contrasting modern restrained approach to federal common law with the "free-wheeling days antedating *Erie*"); Comm'r v. Stern, 357 U.S. 39, 45 (1958) (citing *Erie* to reject proposed federal common law rule displacing state law in civil action implicating the U.S. government's rights as a creditor); Clearfield Tr. Co. v. United States, 318 U.S. 363, 366 (1943) (holding that *Erie* does not bar creation of federal common law rule governing "rights and duties of the United States on commercial paper which it issues").

167. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23 (2004) (applying FCL in a diversity action about a maritime contract); First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (applying FCL in a diversity action involving international commerce); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (opinion by *Erie*'s author on the day *Erie* was decided that does not cite *Erie* while addressing "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *cf.* Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (citing preemption, but not *Erie*, to justify applying FCL in a diversity case).

168. Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

169. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

170. Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988).

171. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001).

172. *See* Ely, *supra* note 8, at 699.

only with respect to delegated rules rather than FCL. *Hanna* protected the REA's aspirations of uniformity by holding that valid delegated rules preempt state law.[173] *Hanna* thus halted a disturbing trend of decisions that allowed state law to apply in circumstances where the FRCP seemed to require a different result.[174] The Court in *Hanna* characterized these prior decisions as implicating *Erie*'s interpretation and creation components rather than its priority component because:

> [T]he scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.[175]

When a valid FRCP provision encompassed a disputed issue, *Hanna* confirmed that federal law had priority over inconsistent state law.[176]

In contrast to its importance regarding delegated rules, *Hanna*'s transcendence with respect to FCL is a myth. *Hanna* announced a prioritization approach that healed prior infirmities without itself being healthy. Prior and subsequent cases fill gaps in *Hanna*'s basic test, but the enterprise remains unguided.

I conform to tradition by using *Hanna* as a label for the lines of precedent that it synthesized and the subsequent opinions that it influenced. Like *Erie*'s role in the *Erie* doctrine, *Hanna*'s role in the *Hanna* doctrine is merely one part within a larger ensemble. My approach treats *Hanna* as an inflection point without deifying its reasoning.

This Section does not consider whether particular cases were correctly decided or properly reasoned. Instead, I think that the entire journey on which *Hanna*'s twin aims inquiry embarks is misguided and misleading. To be clear, I have no quarrel with *Hanna*'s holding that delegated rules displace inconsistent state law. My criticism focuses only on *Hanna*'s treatment of common law rules. Parts III and IV explain my argument. This Section strives only to explain what the *Hanna* line of cases actually does by identifying three propositions that weave their way through case law. I do not necessarily agree with these propositions as a normative matter, although some could be repurposed as part of the creation and interpretation inquires.[177] Instead, I present these propositions as a way to describe and

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173. *See Hanna*, 380 U.S. at 470–73.

174. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (holding that state pre-suit indemnification requirement rather than FRCP 23 governed conditions for maintaining an action in federal court); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949) (holding that state law rather than FRCP 3 governed tolling of the statute of limitations in federal diversity case).

175. *Hanna*, 380 U.S. at 470.

176. *See id. Hanna*'s holding implemented broader themes animating the Warren Court by protecting federal "independence from the states." *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 288 (2000).

177. *See* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 993 (2011) (noting that the federal judiciary's "choice-of-law power" and "lawmaking power" implicate overlapping issues); Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865 (2013) (defending aspects of *Hanna*'s test on policy grounds); Westen & Lehman, *supra*

reconfigure precedent assessing FCL's priority. This Section also does not try to explain how the different propositions fit together because the Court itself has been unable to do so. Each proposition is only a waypoint in the "unguided" inquiry.

Proposition 1: Assessing FCL's priority requires analyzing *Erie*'s "twin aims," which are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[178] This policy-oriented framework displaced prior emphasis on "uniformity of outcome" between state and federal courts.[179] The fact that applying federal law may "significantly affect the result" of litigation still matters,[180] but only to the extent that parties might forum shop to exploit differences in law.[181] Moreover, forum shopping is not intrinsically disturbing. Diversity jurisdiction exists to provide an alternative forum, so by definition it promotes forum shopping between state and federal courts.[182] Because forum shopping is a feature rather than a bug of the federal system, it is troubling only when it results in inequity.[183]

The fact that only inequitable forum shopping implicates prioritization means that *Hanna*'s "twin" factors reduce to a single concern: illegitimate exploitation of federal jurisdiction. The "fortuity"[184] of federal jurisdiction should not create a "double system of conflicting laws in the same State"[185] that enables a party to "gain advantages"[186] by gaming the system.

Prominent accounts of *Erie* incorrectly assume that the "twin aims" inquiry—whether understood as having two prongs or collapsing into one—is alone sufficient to resolve most priority questions.[187] However, the twin aims test merely highlights the importance of inequity. The test identifies a goal, not criteria for assessing whether the goal has been achieved. If inequity is the touchstone, then courts must be able to distinguish equitable from inequitable gamesmanship.

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note 76, at 374 (contending that *Erie* influences the content of FCL rules that potentially conflict with state law).

178. *Hanna*, 380 U.S. at 468.

179. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 540 (1958).

180. Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945).

181. *See Hanna*, 380 U.S. at 469; Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 (1996).

182. *See* Ely, *supra* note 8, at 710; Hart, *supra* note 13, at 513 ("Why is it an offense to the ideals of federalism for federal courts to administer, between citizens of different states, a juster justice than state courts, so long as they accept the same premises of underlying, primary obligation and so avoid creating uncertainty in the basic rules which govern the great mass of affairs in the ordinary process of daily living?").

183. Modern concerns about forum shopping may be rooted in received wisdom about historical abuses. For a discussion of forum shopping in the era leading to *Erie*, see EDWARD A. PURCELL, LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 177–99 (1992).

184. Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980).

185. *York*, 326 U.S. at 112.

186. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532 (1949).

187. *See, e.g.*, Ely, *supra* note 9, at 717–18; Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 518 (2005).

Accordingly, extolling *Erie*'s twin aims cannot alone produce a result without considering additional aspects of federal and state law bearing on equity. The two propositions below identify potentially relevant factors.[188]

Proposition 2: *Hanna* did not provide a complete account of *Erie*'s aims. *Erie* also governs the "proper distribution of judicial power between State and federal courts."[189] Just as federal courts cannot undermine state interests, state courts cannot undermine federal interests. *Erie* does not require enforcement of state laws that "alter the essential character or function of a federal court"[190] or "disrupt[] the federal system."[191] Courts must therefore assess *Erie*'s "twin aims" in light of federal policy interests, which *Byrd* characterized as "affirmative countervailing considerations."[192] Accordingly, *Hanna* obscured *Byrd* but did not eclipse it.

Proposition 3: Although the substance/procedure distinction is hollow and not dispositive, characterizations of state and federal law still matter under current law. Decisions considering conflicts between FCL and state law routinely lapse into euphemisms for substance and procedure. Federal law is more likely to apply if the relevant federal rule seems procedural. For example, federal courts apply federal rules addressing "details related to" their "conduct of business,"[193] "manner and means" of enforcing rights,[194] and the "scheme for the trial and decision of civil cases."[195] In contrast, state law is more likely to apply if it has a "substantive thrust."[196] Examples of a substantive thrust include rules that "create[] a new

188. An additional deficiency of the twin aims test is that often it is unhelpful for addressing priority issues that arise in federal question cases where inequitable forum shopping is not a concern (or is less of a concern than in diversity cases). *See supra* notes 13–14 (noting that priority issues can arise in federal question cases); Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341, 2372–83 (2017) (analyzing how prioritization should apply outside the diversity context); *cf.* Levinson v. Deupree, 345 U.S. 648, 651 (1953) (noting that *Erie* was "irrelevant" to prioritization in an admiralty case because "uniformity in the administration of justice within th[e] State" was not a concern).

189. *York*, 326 U.S. at 109.

190. Herron v. S. Pac. Co., 283 U.S. 91, 94 (1931). *Herron* predates *Erie*, but post-*Erie* cases endorsed *Herron*'s reasoning. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 539 (1958) (citing *Herron*).

191. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 (1996); *see also* Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 580 (1958) ("some frustration of state interests" is "inevitabl[e]" as a "necessary consequence" of "the constitutional power of the federal government to regulate the procedure of its own courts").

192. *Byrd*, 356 U.S. at 537. Identifying and weighing relevant federal interests is a complex exercise. *See* Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 384–400 (1977) (discussing potential factors).

193. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949).

194. *York*, 326 U.S. at 109.

195. *Gasperini*, 518 U.S. at 426.

196. *Id.*; *see also* Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 446 (1959) (noting that "presumptions" and the "burden of proof" are "substantive"); *cf.* Chevron Oil Co. v. Huson, 404 U.S. 97, 103 n.6 (1971) (suggesting that state "housekeeping rules" are unlikely to apply in federal court).

liability,"[197] make a "right to recover" "unavailable,"[198] or are an "integral part" of an otherwise applicable state regulation.[199]

In sum, FCL's priority currently depends on balancing a mix of policy considerations and characterizations without any guide for calibrating the scale. None of these policies and characterizations affect the priority of valid and otherwise applicable federal statutes, self-executing treaties, and delegated rules. The remainder of this Article explains why the Court's aberrant treatment of FCL is misguided and misleading.

c. Hanna*'s Approach to Priority Cannot Rely on the Rules of Decision Act*

Conventional wisdom about FCL's priority assumes that the RDA justifies *Hanna*'s framework.[200] This conventional account misinterprets the RDA's text. The RDA complements the Supremacy Clause by partially explaining what happens when federal law is not available to govern a particular issue. And the RDA may have something to say about when federal law is available.[201] However, the RDA does not create a choice-of-law rule in cases where valid federal common law encompassing a disputed issue conflicts with otherwise applicable state law.

The RDA provides that:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[202]

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197. *Cohen*, 337 U.S. at 555.

198. *York*, 326 U.S. at 109; *see also* Angel v. Bullington, 330 U.S. 183, 192 (1947) (holding that a federal court "cannot give that which [the state] has withheld"); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) ("a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court").

199. Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980); *see also* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535–36 (1958) (holding that *Erie* "required" "respect[ing] the definition of state-created rights and obligations by the state courts" by enforcing state laws "bound up with the definition of the rights and obligations of the parties"); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (holding that state law supplies the "measure" of the rights it creates).

200. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 10–11 (1941) (characterizing the RDA as a choice-of-law rule that applies to "substantive law" rather than "rules of procedure"); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 417 (2010) (Stevens, J., concurring) ("If no federal rule applies, a federal court must follow the Rules of Decision Act . . . to determine whether the state law is the 'rule of decision.'"); *id.* at 439 (Ginsburg, J., dissenting) (stating that the RDA "directs" the test in *Hanna*); Ely, *supra* note 8, at 717; Freer, *supra* note 63, at 1637 (describing "the RDA prong of the *Erie* Doctrine"); Mary Kay Kane, *The Golden Wedding Years:* Erie Railroad Company v. Tompkins *and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 675 n.32 (1988) (discussing the "substantive preserve guaranteed the states under the Rules of Decision Act").

201. *See* Burbank, *supra* note 82, at 789 (noting that the RDA "impos[es] discipline" on FCL by suggesting that FCL is available only when the Constitution, treaties, or statutes require or provide for FCL, such that federal courts cannot simply "conjure up" federal "interests"); *id.* at 761 n.121 (expressing skepticism about "techniques to avoid confronting the Rules of Decision Act").

202. 28 U.S.C. § 1652 (2018).

The RDA's opaque text at first glance seems to justify *Hanna*. The strongest form of the argument has four steps:

(1) A cognizable category of state law fits within the label "rules of decision" and is distinct from state laws that are not rules of decision.

(2) The line between "rules of decision" and "not rules of decision" roughly parallels the line between substance and procedure.

(3) *Hanna*'s "twin aims" line between FCL that has priority over state law and FCL that yields to state law also roughly parallels the line between substance and procedure.

(4) *Hanna* therefore implements the RDA, which functions as a statutory choice-of-law rule waiving the otherwise applicable Supremacy Clause when FCL procedures conflict with substantive state rules.

This argument is alluring because it provides a statutory foundation for doctrine that otherwise seems arbitrary. But the foundation collapses upon closer scrutiny.

First, *Hanna* never cited the RDA.[203] Neither did the circuit court decision that *Hanna* reversed.[204] A theory positing that *Hanna* was trying to define "rules of decision" is therefore strained from the outset.

John Hart Ely's contrary argument that *Hanna* relied on the RDA is one of the many curiosities orbiting the *Erie* doctrine. Ely was a law clerk for Chief Justice Warren in the year that Warren authored *Hanna*.[205] He was also a brilliant scholar who wrote an influential article about "The Irrepressible Myth of *Erie*" that repeatedly characterizes *Hanna* as relying on the RDA.[206] Ely must have realized that *Hanna* never mentions the RDA. Yet he did not address this hole in his narrative. Ely's article nevertheless was widely cited for the proposition that *Hanna* is an RDA case,[207] thus propagating the type of "myth" that it was trying to repress.

Second, the RDA does not provide guidance for determining when state law applies. The text's reference to "cases where they apply" assumes that state laws sometimes apply in federal court. Yet the statute does not include language suggesting how courts should draw a line between "cases where they apply" and

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203. *Hanna* uses the phrase "rules of decision" once, but in the context of the creation inquiry and without invoking the RDA. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (holding that federal "rules of decision" must be "supported by a grant of federal authority contained in Article I or some other section of the Constitution"). The phrase also appears in an excerpt from another case that *Hanna* quoted, but that case also did not cite the RDA. *See id.* at 465 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

204. *See* Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964), *rev'd*, 380 U.S. 460 (1965).

205. *See* Ely, *supra* note 8, at 693 n.*.

206. *See, e.g.*, *id.* at 699 ("the major point" of *Hanna* "was its separation for purposes of analysis" of the RDA, REA, and Constitution); *id.* at 716 n.126 ("One of *Hanna*'s main points was that the Rules of Decision Act is more protective of state prerogatives than the Enabling Act.").

207. *See* Condlin, *supra* note 187, at 476–77 (2005) (noting Ely's influence on courts and commentators).

cases where they do not apply. *Hanna* had the practical effect of drawing that line. Given that the RDA does not indicate how the line should be drawn, the RDA cannot be a foundation for *Hanna*.

One can respond by arguing that the RDA might still justify *Hanna* under ordinary principles of statutory interpretation. The phrase "cases where they apply" is ambiguous. Courts routinely interpret ambiguous statutory language. Potentially, *Hanna* can be understood as a case drawing a line that the Court thought the RDA required—if one looks past the lack of any citation to the RDA. This justification for *Hanna* can be viable only if the "cases where they apply" clause actually provides an enforceable standard. However, as explained in the next point, the RDA does not create a federal choice-of-law rule.[208]

Third, long before *Hanna*, the Supreme Court concluded that the RDA did not create new choice-of-law requirements. Instead, Chief Justice Marshall observed that the RDA was "no more than a declaration of what the law would have been without it."[209] Marshall's view as a Justice aligned with his prior statement at the Virginia ratifying convention that state law obviously would apply in diversity cases.[210]

Erie cited the RDA but did not hold that the RDA is relevant to prioritization. *Erie* observed that federal judges improperly disregarded the RDA by allowing "general law" to displace state law.[211] But *Erie* framed the federal judiciary's cavalier reliance on general law as a problem of creation rather than prioritization. According to a literal reading of *Erie*, general law was not a type of law that the judiciary could enforce.[212]

Erie's treatment of general law was misleading because federal courts routinely enforce general law by incorporating it into FCL.[213] A more accurate analysis would have acknowledged that federal courts sometimes consult general law, but general law is not self-executing. General law does not apply of its own force and is not a source of lawmaking power. Instead, general law is dispositive only when another source of enforceable law—such as a constitutional provision, statute, treaty, or FCL rule—makes general law dispositive.

Thus, if the Court in *Erie* had been authorized to create FCL, it could have relied on general law to flesh out the FCL rule's content. But the facts in *Erie* did not authorize the creation of FCL. *Erie* was a diversity action in which the only potential source of judicial lawmaking authority were the constitutional and

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208. Some scholars, notably Wilfred Ritz, interpret the phrase "laws of the several states" in the RDA to mean that federal courts must apply the aggregate common law of the United States rather than the law of an individual state. For a thorough critique of this argument, see Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 38–44 (2013).

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

210. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 104 n.2. (1945).

211. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938).

212. *See id.* at 78.

213. *See* Erbsen, *supra* note 9, at 619–22.

statutory grants of diversity jurisdiction.[214] Congress could have enacted a statute governing the case, which involved an accident in a channel of interstate commerce,[215] but no such statute existed. Nevertheless, pre-*Erie* cases held that despite the absence of a federal claim or defense, the grant of diversity jurisdiction empowered federal courts to displace state law by "exercis[ing] an independent judgment."[216] *Erie* rejected these cases.[217] Once the grant of diversity jurisdiction became irrelevant, there was no remaining constitutional, statutory, or treaty provision authorizing judicial creation of FCL. The Court's inability to create FCL meant that it could not rely on general law. State law was the only available option for resolving the suit.[218]

Accordingly, state law applied in *Erie* not because state law had priority over federal law, but because relevant federal laws did not exist. Congress had not acted, the grant of diversity jurisdiction did not authorize judicial creation of common law, and there was no other basis for the creation of common law on *Erie*'s facts.[219]

Given that *Erie* was a case about the existence of federal law rather than federal law's priority, the Court's citation to the RDA did not imply a statutory priority rule. The RDA citation added nothing to *Erie*'s conclusion that general law was not self-executing and therefore was not directly available in a diversity case. The RDA merely confirmed that state law filled the void left by the absence of federal law.[220]

In light of its declarative nature, the RDA does not create a choice-of-law rule. By definition, choice-of-law rules make choices. The RDA does not make choices. Instead, the RDA assumes the existence of choices made elsewhere.

One might wonder why Congress would go through the effort of writing a statute that resembles a choice-of-law rule yet does not make choices. The answer seems to be that the RDA was added to the Judiciary Act early in the nation's history and late in the drafting process. This origin creates "some doubt whether all [the relevant] issues had been completely thought through."[221]

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214. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (2018).

215. *See* U.S. CONST. art. I, § 8.

216. *See* Burgess v. Seligman, 107 U.S. 20, 34 (1883).

217. *See Erie*, 304 U.S. at 78.

218. *See id.* (noting that state law applies by default when federal law is not available). *But see id.* at 91 (Reed, J., concurring) ("I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions.").

219. *See infra* Section II.B.4.a (noting various predicates for the creation of federal common law).

220. According to Judge Friendly, this aspect of *Erie*'s reasoning may explain why the Court invoked the "Constitution" as a basis for the holding. *Erie*, 304 U.S. at 80. On this view, if Congress has not regulated a particular subject, and if the federal judiciary lacks power to create federal common law, then there is no available source of law capable of displacing state law consistently with the Constitution's allocation of power between the national and state governments. *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 385, 394–95 (1964).

221. *Id.* at 396–97 n.65; *see also* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1527 (1984) ("[The RDA] was apparently added to the Judiciary Act as an after-thought.").

Accordingly, another source of law exogenous to the RDA draws the line between "cases where [state laws] apply" and cases where they don't. The RDA then declares what should happen after that line is drawn. *Hanna*'s effort to assess FCL's priority therefore cannot rely on the RDA because the RDA does not purport to create a priority standard.

This conclusion about the RDA's inability to sustain *Hanna* is consistent with Judge (then-Professor) William Fletcher's analysis of the RDA in a landmark article.[222] Fletcher's primary point was that the founding generation interpreted the RDA's reference to "state" law as encompassing only "local" law rather than "general" law.[223] Federal courts could therefore disregard state court decisions regarding matters within the ambit of general law, such as the enforcement of marine insurance contracts.[224] Fletcher went on to observe that the RDA was enacted at a time when choice-of-law jurisprudence was "undeveloped," and that the RDA did not expressly make choices about when non-state law or state law would apply.[225] The absence of an express choice was not controversial because federal courts applied the same *lex loci* approach in civil cases (to which the RDA applied) as they applied in equity and admiralty cases (to which the RDA did not apply).[226] *Erie* eventually repudiated the local/general distinction that Fletcher identified as the RDA's pre-*Erie* core.[227] After *Erie* stripped this founding-era gloss, the RDA persisted as a statute that presumed the existence of an exogenous choice-of-law rule without itself articulating choice-of-law criteria.

Fourth, the source of law that makes choices about when federal law applies in federal court is the Supremacy Clause. It is an explicit choice-of-law provision that elevates "Laws of the United States" above "Laws of any State."[228] The Supremacy Clause also presciently anticipates that state courts would try to circumvent federal supremacy, so it compels "Judges in every State" to follow federal law.[229]

The RDA fills a gap in the Supremacy Clause. The Clause explains what happens when valid federal law encompasses a disputed issue. But it is silent about what happens when federal law is not available. State law was the obvious gap filler, at least when general law could not apply. Congress presciently anticipated that federal courts would try to avoid applying state law, as they in fact did until *Erie*. The RDA therefore pushes back on nationalist impulses that undermine state interests by instructing federal courts to respect state law—at a minimum on local matters, and perhaps also more broadly—when federal law does not apply.

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222. *See* Fletcher, *supra* note 221.
223. *Id.* at 1516–17.
224. *See id.* at 1553.
225. *Id.* at 1516, 1531.
226. *See id.* at 1527–49.
227. *See supra* text accompanying notes 216–23.
228. U.S. CONST. art. VI.
229. *Id.*

Fifth, the omission of foreign law and territorial law from the RDA further suggests that Congress believed that a choice-of-law rule exogenous to the RDA established priority between federal law and competing sources of authority. The statute that contained the RDA also authorized federal alienage jurisdiction.[230] Many alienage cases would have implicated either foreign law or general law.[231] Either way, state law would not apply. The RDA cannot resolve the priority inquiry when federal law conflicts with foreign or general law because the RDA never mentions foreign or general law. Principles exogenous to the RDA must have governed prioritization.

The Court's treatment of federal territorial law, such as Hawaiian law before statehood, also supports the RDA's assumption of an exogenous choice-of-law rule. The Court held that the RDA did not require deference to Hawaiian law, but deferred to it anyway as a matter of policy.[232] The RDA is similarly silent about priority in cases implicating the law of Native American tribes. However, federal cases requiring a choice between federal and tribal law are rare because of doctrine limiting both federal and tribal jurisdiction.[233] In any event, choice of law in territorial and tribal cases emerges from a source exogenous to the RDA.[234]

A counter-argument to the relevance of foreign law and territorial law is that Congress in 1789 may have anticipated the Court's 1941 decision in *Klaxon* that required federal courts to apply state choice-of-law rules.[235] If this

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230. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

231. THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (assuming that alienage cases could implicate "the general law of nations" or "*lex loci*"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1692, at 570 (1833) ("[T]he law to be administered in cases of foreigners is often very distinct from the mere municipal code of a state, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties, in the case of conflict of the foreign and domestic laws."); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 10–16 (1996) (noting founding-era hope that alienage jurisdiction would give foreign creditors confidence that federal courts would enforce debts).

232. *See* Waialua Agric. Co. v. Christian, 305 U.S. 91, 109 (1938). The RDA also does not apply to the District of Columbia, but the D.C. Circuit nevertheless applies *Hanna* to local diversity cases. *See* Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979).

233. Tribes have limited legislative jurisdiction. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."). When tribal law may apply, plaintiffs must "exhaust available tribal remedies before" filing a federal question or diversity suit in federal court. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987). After exhausting tribal remedies, parties in federal court cannot relitigate tribal law issues (although they can challenge the tribal court's jurisdiction). *See id.* Accordingly, federal courts will rarely have occasion to consider a conflict between federal and tribal law.

234. This Article expresses no view about where the exogenous choice-of-law rule addressing foreign and territorial law comes from and what it requires. In contrast, the Article contends that the Supremacy Clause is the choice-of-law rule exogenous to the RDA that addresses conflicts between federal and state law. Another "choice of law" regime governs the decision about whether courts should create federal common law. *See supra* text accompanying notes 26–28.

235. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941).

counter-argument is valid, then the RDA could govern the choice between federal law and whatever non-federal law a state would choose, including foreign and territorial law. However, the counter-argument is flawed because the 1789 Congress understood choice of law as a form of general law rather than state law.[236] The RDA's reference to state law is therefore not a reference to state choice-of-law rules. Accordingly, *Klaxon* does not implement the RDA's text. Instead, *Klaxon* attempts to enforce *Erie*'s policy preferences about federalism and forum shopping.[237] (And, as I have argued elsewhere, *Klaxon* does so in a misguided and counterproductive manner.)[238] The RDA's reference to state law thus would have been irrelevant in cases involving foreign law and territorial law. This omission further confirms that federal choice-of-law rules arise from a source exogenous to the RDA.

Finally, the Court deferred to state law in equity cases even though the RDA at the time did not cover equity.[239] Here again, the preference for state law must have had a source exogenous to the RDA.[240]

In sum, the Supremacy Clause rather than the RDA determines FCL's priority. The RDA is relevant only when supreme federal law is unavailable. Whether federal law is available depends on *Erie*'s creation and interpretation inquiries.[241] This framework does not leave space for *Hanna*'s multi-factored approach to FCL's priority.

III. CURRENT PRIORITIZATION JURISPRUDENCE RELIES ON AN UNSUSTAINABLE DISTINCTION BETWEEN FEDERAL COMMON LAW AND OTHER CATEGORIES OF FEDERAL LAW

Part II established that the prioritization inquiry has two distinct strands. One strand is straightforward and mechanical, while the other is convoluted and fuzzy. Under the mechanical strand, four categories of valid federal law automatically displace inconsistent state law: the Constitution, statutes, self-executing treaties, and

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236. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 594 (2003) (noting in the context of the Full Faith and Credit Clause that "members of the founding generation expected the necessary choice-of-law rules to come from the general law of nations"); Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1030–31 (2015) ("American courts in the pre-*Erie* era conceptualized domestic choice-of-law as part of the general law, and more specifically, as an extension of private international law.").

237. *See* Michael Steven Green, Erie*'s International Effect*, 107 NW. U. L. REV. 1485, 1494 (2013) ("*Klaxon* has its source in the twin aims [of *Erie*] and not in the Rules of Decision Act.")

238. *See* Erbsen, *supra* note 9, at 638–46 (criticizing *Klaxon*).

239. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 103—04 (1945). Although *York* deferred to state law in equity cases after *Erie*, pre-*Erie* federal equity cases often applied judge-made federal law rather than state law. *See* Collins, *supra* note 52, at 338–39.

240. For an example of why equity's potential status as preemptive common law matters, see Jeffrey Steven Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIAMI L. REV. 176, 254–65 (2017) (discussing whether federal or state law governs the standards for a preliminary injunction in diversity cases).

241. *Cf.* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160 n.13 (1983) (holding that when a valid federal statute that is silent about limitations periods is interpreted to authorize an FCL limitations period, the RDA does not require applying state law).

delegated rules. Under the fuzzy strand, a multi-factor test determines FCL's priority.

This Part considers whether the line between FCL and other forms of federal law is a sensible basis for segmenting *Erie*'s prioritization inquiry. The line turns out to be arbitrary for at least two reasons. First, rules promulgated under the REA authorize federal courts to create common law that preempts state law. This fluid continuity between the statute, delegated rules, and common law eviscerates *Hanna*'s premise that procedural common law warrants a unique prioritization inquiry. Second, many forms of FCL beyond the REA context likewise have a foundation in positive law. Labeling an FCL rule as "judge made" is a misguided way to address subtle questions about the rule's practical effect. The creation and interpretation inquiries address these questions more directly than *Hanna*'s haphazard balancing approach.

A. In the Rules Enabling Act Context, There Is No Bright Line Between Common Law and Statutorily Authorized Rules

A critical problem with *Hanna*'s bifurcation is that delegated rules expressly authorize federal courts to create common law. Moreover, many delegated rules provide minimal guidance to courts. Implementation of these rules produces outcomes that are only nominally tethered to text. The boundary between text, interpretation of text, and common law is therefore elusive. Accordingly, *Hanna*'s fixation on the difference between delegated rules and common law fails to provide a coherent basis for implementing the prioritization inquiry.

Section 1 illustrates how delegated rules authorize creation of common law through what I call the "Any Manner" clauses. Section 2 shows that the Any Manner clauses preempt state law. Section 3 then explains why the Any Manner clauses undermine current prioritization jurisprudence.

The FRCP's historical origins help frame the discussion. Prior to the FRCP, the Conformity Act required federal courts to apply state procedures (with some exceptions).[242] The content of procedural rules applied in federal court therefore varied from district to district. A widely understood virtue of the REA was that it permitted the Supreme Court to promulgate roughly uniform nationwide rules supplemented by local districtwide rules.[243] When these formal rules were silent about a disputed issue, a question arose about whether federal or state law would fill gaps. In the same year that courts started to fill gaps in the new FRCP, the Supreme Court decided *Erie*. This Section considers how *Erie* applies to gap-filling procedural rules.

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242. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. For a history of federal procedure before the REA, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035–42 (1982).

243. Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064. The REA also authorized the Supreme Court to merge law and equity procedures. *See id.* § 2.

1. The "Any Manner" Clauses: Justification for a Broad Interpretation of Judicial Authority to Create Procedural Common Law

Four sets of rules promulgated under the REA include "Any Manner" Clauses authorizing the creation of common law. For example, FRCP 83(b) states:

> PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[244]

Materially identical Any Manner clauses appear in the FRCrimP, FRAP, and FRBP.[245] The Habeas Rules incorporate the FRCP and FRCrimP Any Manner clauses.[246] The FRE do not include an analogous clause. A potential explanation for this omission is that the FRE already offer sufficient discretion to choose between the binary alternatives of admitting and excluding evidence, so there is no need for a gap-filling clause.[247]

All four Any Manner clauses presumably have a similar purpose and meaning. As shown in the following table, the latter three were modeled on FRCP 83(b), and all four were then rewritten together in 1995:

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244. FED. R. CIV. P. 83(b). FRCP's 83(b)'s text evolved from Rule 44 of the Supreme Court's Admiralty Rules, which provided:

> RIGHT OF TRIAL COURTS TO MAKE RULE OF PRACTICE. In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

ADMIRALTY RULE 44, 254 U.S. 671, 698 (1920); *see also* FED. R. CIV. P. 83 advisory committee notes to 1937 enactment (citing Rule 44). Pre-REA admiralty practice relied on a mix of national rules, local rules, and rules developed "according to the discretion of the presiding judge." 1 ERASTUS C. BENEDICT & GEORGE V. A. MCCLOSKEY, THE AMERICAN ADMIRALTY § 679 (5th ed. 1925).

245. *See* FED. R. CRIM. P. 57(b); FED. R. APP. P. 47(b); FED. R. BANKR. P. 9029(b). The relevant text of these rules appears in the table on the following page. *See also* FED. R. BANKR. P. 8026(b) ("A district court or BAP may regulate practice in any manner consistent with federal law, applicable federal rules, the Official Forms, and local rules."). The rationale for the addition to the appellate rule of the phrase "in a particular case"—which is absent from the civil, criminal, and bankruptcy rules—is not clear. This unique language cannot prevent appellate courts from applying the same common law rules to many different cases. It therefore does not serve any apparent limiting function.

246. *See* HABEAS RULE 12 (incorporating the entire FRCP and FRCrimP).

247. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 439 (1989) (discussing "open-textured" standards and catch-all provisions).

Year	FED. R. CIV. P. 83	FED. R. CRIM. P. 57	FED. R. APP. P. 47	FED. R. BANKR. P. 9029
1938	In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.			
1944		(B) PROCEDURE NOT OTHERWISE SPECIFIED. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.		
1967			In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.	
1985/86	In all cases not provided for by rule, the district judge and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act. [1985]			In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with these rules or those of the district in which the court acts. [1986, slightly amending 1982 version.]
1995	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.
Current After Restyling Amends.	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement. [2007]	(B) PROCEDURES WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance. [2002]	See above.	See above.

Table 1. Evolution of Any Manner Clauses (Principal Amendments)

Of course, identical phrases within a set of rules can have different meanings in different contexts.[248] But assuming a shared meaning is a useful starting point absent evidence of any material variation in purpose. I therefore focus on the language of FRCP 83(b) as a proxy for its siblings.[249]

The plain meaning of the Any Manner clause suggests a broad authorization of federal common law. Precedent and comments by rulemakers support this interpretation.

First, the clause applies to all aspects of "practice" without limitation. "Practice" is coextensive with "procedure" in the paragraph heading. There is no reason to believe that the clause governs only a subset of the procedures encompassed in the heading. Nor is there any plausible definition of "practice" that would constitute such a subset.[250] "Procedure" and "practice" may once have had distinct meanings,[251] but the distinction has not survived in the modern rulemaking context.[252]

Second, the original 1938 text of Rule 83 stated that the Any Manner clause applied "in all cases not provided for by rule."[253] The reference to "cases" suggests that the clause enabled common law to fill gaps in written rules that did not anticipate novel circumstances. There is no indication that subsequent amendments sought to alter this meaning.

Statements from the original rulemakers confirm that the Any Manner clause intended to authorize gap-filling common law.[254] For example, Edgar Tolman stressed the importance of using federal common law rather than state law to fill gaps in the FRCP. Tolman observed that:

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248. *See* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 771–72 (2012) (analyzing the FRCP's distinct uses of "transaction and occurrence" and "common question of law or fact").

249. FRCP 83(b) contained the first Any Manner Clause promulgated under the REA. It therefore may carry historical baggage (such as pressure to circumvent the Conformity Act) that did not affect subsequent Any Manner Clauses. However, by borrowing Rule 83(b)'s language, the subsequent clauses apparently incorporated Rule 83(b)'s practical implications.

250. The REA also uses the phrase "practice and procedure," 28 U.S.C. § 2072(a) (2018), but the Court has not found the distinction meaningful.

251. *See* Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (distinguishing "practice, pleadings, and forms and modes of proceeding").

252. *See* Thomas F. Green, Jr., *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 205 (1941) (noting in context of FRCP 83 that "practice and procedure" are often used "synonymously"); Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 634 (1957) ("Considering the accepted definitions of the terms 'practice' and 'procedure,' and recognizing the types of matters which have been held to be within the term 'practice' as used in the rule-making grant of authority [in state statutes], it seems clear that the words are generally used synonymously.").

253. FED. R. CIV. P. 83 (1938 version).

254. The Supreme Court has given "weight" to the original rulemakers' "construction" expressed in the materials discussed in this paragraph. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444 (1946) (analyzing FRCP 4(f)).

> [The sentence containing the Any Manner clause] is, in my opinion, one of the most important and salutary in the entire set of rules. It closes all gaps in the rules. It puts an end to the whole of the Conformity Act, and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in the light of the circumstances that surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule.[255]

Similarly, Rules Committee Chairman William Mitchell rejected mandatory interstitial conformity with state law. Mitchell asked: "Suppose a point arises that is not covered by the Supreme Court rules or by the local district rules, what practice prevails?"[256] He then contended that federal courts could fill gaps without relying on state law:

> That brings you flat up against the question whether the gap should be filled by the application of the conformity statute, requiring the court to follow local state practice to fill the gap. The last sentence in [Rule 83] is full of meat. 'In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.' That doesn't say they must follow the state practice under the Conformity Act. They may follow the state practice, if they think that is an adequate one, and probably will in most cases, but the Conformity Act does not fill the gap. The district judges fill it. We hope there are not going to be many gaps, but you never can tell, and we had to provide for that situation.[257]

Likewise, James Wm. Moore, who helped draft the FRCP, thought that Rule 83's Any Manner clause was "an omnibus provision" allowing case-by-case resolution of procedural disputes.[258] This flexibility "eliminates all necessity to fall back on the Conformity Act."[259] A Justice Department official who worked with the rulemakers likewise interpreted the Any Manner clause as a gap-filler. He concluded that the clause signified that "the entire field of civil procedure is covered by the judicial rule making power. Consequently, the Conformity Act must be deemed to have been repealed."[260] The modern Advisory Committee notes are consistent with contemporary accounts, reflecting a desire to retain judicial "flexibility."[261]

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255. ABA, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 129 (Edward H. Hammond ed., 1938) [hereinafter WASHINGTON PROCEEDINGS] (statement of Edgar Tolman).

256. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES CLEVELAND, OHIO JULY 21, 22, 23, 1938, at 189 (William W. Dawson ed., 1938) (statement of William Mitchell).

257. *Id.*

258. 3 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE 3443 (1938 & Supp 1954).

259. *Id.* at 3444.

260. ALEXANDER HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 163 (1940).

261. FED. R. CIV. P. 83(b) advisory committee notes to 1995 amendment; *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*,

The drafting history of Rule 83 further confirms the broad interpretation allowing gap-filling common law. In 1935, a precursor to the Any Manner clause was draft rule A38, which stated:

> All matters not provided for by a valid statute, or by these rules, or by the rules of the various district courts made pursuant to the authority hereinafter given shall be governed by the common law as developed and applied in the federal courts.[262]

A drafting note by Charles Clark—the committee's reporter—justified this rule as "better" than "attempting to absorb the particular state practice."[263] The note then opined: "Now that we are rid of the Conformity Act, let us stay rid of it."[264]

The precise meaning of "common law" in draft rule A38 is opaque because the draft predates *Erie*. The draft could therefore refer to federal common law as we use the term today, or general law as it existed before *Erie*.[265] A related ambiguity is that federal courts prior to the FRCP implemented the Conformity Act.[266] Federal decisions therefore relied on rules with disparate origins in federal, general, and state law. This mélange of sources complicated efforts "to determine what the common-law administration by the Federal courts is."[267] Nevertheless, despite the nebulous contours of "common law," Clark's express repudiation of the Conformity Act confirms that rulemakers wanted to fill gaps on a case-by-case basis with something other than state law. The reworking of Rule A38 into Rule 83 changed the textual basis for federalization but did not retreat from the basic goal.

Third, the reference to "any manner consistent with federal law"[268] suggests that federal courts can create, literally, "any" procedural common law that other sources of federal law do not prohibit. Accordingly, the four Any Manner clauses authorize a wide range of federal procedural common law governing civil, criminal, appellate, and bankruptcy proceedings.

Courts have endorsed this broad interpretation of judicial authority to create common law. For example, the Supreme Court cited FRCP 83(b)'s Any Manner clause to justify "measures to regulate the actions of the parties to a multiparty

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137 U. PA. L. REV. 1999, 2014 n.74 (1989) (suggesting that the Any Manner clauses authorize "case-by-case" adjudication and "standing orders" to fill gaps in the FRCP); Hill, *supra* note 14, at 105 (observing that Rule 83 empowers "procedural improvisation").

262. *See* ADVISORY COMM. ON RULES FOR CIV. PROC., TENTATIVE DRAFT II, Rule A38 (Dec. 26, 1935) (available in binder of Advisory Committee materials in the collection of the Northwestern University Pritzker School of Law Legal Research Center).

263. *Id.*

264. *Id.*; *see also* Subrin, *supra* note 261, at 2013–14 (stating that Clark wrote the note).

265. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842).

266. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

267. PROCEEDINGS OF THE MEETING OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES., Feb. 25, 1936, at 1509 [hereinafter ADVISORY COMM. PROCEEDINGS] (comment by Edson Sunderland).

268. FED. R. CIV. P. 83(b).

suit,"[269] as "general authorization" for the kinds of orders that Rule 23 specifically authorizes in class actions,[270] and as allowing sua sponte dismissal of a complaint after plaintiffs' counsel failed to attend a pretrial conference.[271] Dicta in criminal cases suggests that the Court reads criminal Rule 57(b) similarly to civil Rule 83(b).[272] Lower federal courts have also interpreted Any Manner clauses to authorize a wide range of rules.[273]

The broad delegation of power in the Any Manner clauses is not unlimited. The clauses cannot exceed the REA delegation that authorized them. So the Any Manner clauses cannot authorize courts to "abridge, enlarge or modify any substantive right."[274] Other sources of federal common lawmaking power can authorize substantive rules,[275] but not the Any Manner Clauses. The clauses are also self-limiting, as they forbid inconsistency with other sources of federal law, including REA-derived rules.[276] Common law must also govern "practice" and "procedure," as defined in both the REA and the clauses themselves.[277] Finally,

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269. Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165, 172 (1989) (discussing judicial role in "facilitat[ing] notice" in class actions).

270. Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 n.10 (1981).

271. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 633 n.8 (1962).

272. In *Black v. United States*, the Court cited Criminal Rule 57(b) as support for the proposition that "the absence of a Criminal Rule authorizing special verdicts" was not "dispositive" of whether such verdicts were allowed. 561 U.S. 465, 472 n.10 (2010). Similarly, in *United States v. New York Telephone Co.*, the Court stated that Rule 57(b)'s Any Manner clause "reinforced" a conclusion that district courts could issue search warrants authorizing pen registers. 434 U.S. 159, 170 (1977) (not reaching the question of whether rule 57(b) could apply "by itself").

273. *See, e.g.*, Carlson v. United States, 837 F.3d 753, 763 (7th Cir. 2016) (holding that FRCrimP 57(b) "informs us what a court may do" with grand jury records when other "[r]ules are silent"); *In re* Atl. Pipe Corp., 304 F.3d 135, 143 (1st Cir. 2002) (citing FRCP 83(b) as confirming judges' "inherent power" to manage individual cases); Snider v. Melindez, 199 F.3d 108, 112 (2d Cir. 1999) (citing FRCP 83(b) to justify sua sponte dismissal order that was not "explicitly authorized . . . by statute or rule"); United States v. Webster, 162 F.3d 308, 339 (5th Cir. 1998) (citing FRCrimP 57(b) as consistent with the district court's "inherent powers" to order psychiatric exams); *In re* Requested Extradition of Kirby, 106 F.3d 855, 857 n.1 (9th Cir. 1996) (citing FRAP 47 as authority to determine the timeliness of an appeal when other rules were inapplicable); *In re* Cannonsburg Envtl. Assocs., Ltd., 72 F.3d 1260, 1269 (6th Cir. 1996) (citing FRBP 8018 to justify consolidating two appeals); Davis v. IRS, 905 F. Supp. 2d 1253, 1254 (D.N.M. 2012) (citing FRCP 83(b) to justify striking a filing); Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 15, 17 (S.D.N.Y. 2005) (citing FRCP 83(b) to justify ordering a party to seek information from a nonparty); *In re* Murray, 199 B.R. 165, 172 (Bankr. M.D. Tenn. 1996) (stating that FRBP 9029(b) tracks FRCP 83(b) in allowing case-by-case "gap-filling" by incorporating into bankruptcy procedure a provision of the FRCP governing capacity to sue).

274. 28 U.S.C. § 2072(b) (2018). The Supreme Court treats written rules promulgated through the rigorous Enabling Act process as "presumptive[ly]" procedural. Burlington N. R.R. v. Woods, 480 U.S. 1, 6 (1987). That presumption should not extend to common law that receives much less vetting.

275. *See supra* Section II.B.4.a.

276. *See* FED. R. CIV. P. 83(b); Carlisle v. United States, 517 U.S. 416, 425 (1996) (declining to apply FRCrimP 57 when doing so would be "inconsistent" with FRCrimP 29).

277. There is some uncertainty about whether practice and procedure encompass evidentiary rules. However, that concern is moot given that the REA separately authorizes "rules of evidence." 28 U.S.C. § 2072(a); *see also* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 663–65 (2019) (considering how the history of the FRE informs the definition of "procedural" in the REA).

Article III limits the Any Manner clauses because Congress presumably cannot authorize courts to do more than the "judicial Power" permits. However, an actual conflict with Article III is difficult to imagine because the clauses are already limited to non-substantive laws that are consistent with federal statutes and REA-derived rules.

2. The Any Manner Clauses Authorize Preemption of State Law

Denying preemption to rules derived from the Any Manner clauses would needlessly thwart the REA's goal of uniform federal procedures. Under a hypothetical regime without preemption, federal law would govern only some aspects of procedure and state law would fill the gaps. The statements from rulemakers quoted above anticipated and rejected this possibility of hybrid regulation.[278] Gap-filling content arising from the Any Manner clauses was therefore intended to be just as preemptive as content found elsewhere in REA-derived rules.

The REA's supersession clause may further support preemption, depending on whether its reference to "all laws" encompasses only federal law or also state law.[279] The Any Manner clauses disclaim some aspects of supersession—common law must be consistent with other "federal" law[280]—but do not disclaim the preemption of state law. Rule 83's authors could have added state law to the list of laws that federal courts must respect, but chose to limit the list to federal sources.

One can try to resist this conclusion about FRCP 83(b)'s broad preemptive scope by positing that the Rule's reference to respecting "federal law" includes federal prioritization rules. Courts developing gap-filling federal common law would therefore exercise restraint in order to respect the federal prioritization rule that *Hanna* embodies.[281] However, neither the text of Rule 83(b) nor the drafting history mention or support this theory. The more plausible reading is that Rule 83 does not silently incorporate a prioritization rule that did not exist when Rule 83 was adopted. Moreover, prioritization is relevant only when there is a conflict of laws, and a conflict can exist only after courts ascertain the content of federal law. Rule 83(b) is a mechanism for creating federal law, so its implementation precedes the question of how to prioritize gap-filling federal common law that conflicts with state law. Accordingly, Rule 83(b)'s reference to respecting exogenous "federal law" is not a reason to treat gap-filling federal common law as non-preemptive.

Of course, the fact that federal courts can create preemptive gap-filling common law does not mean that they should. Rule 83(b) grants discretion rather than mandating a particular outcome. Concerns that courts will abuse their

278. *See supra* text accompanying notes 254–64.

279. *See supra* text accompanying notes 119–22.

280. FED. R. CIV. P. 83(b).

281. *See* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME. L. REV. 1131, 1153 n.127 (2011) (developing and then rejecting this line of argument).

discretion implicate either *Erie*'s creation inquiry (there will be too much federal law) or its interpretation inquiry (federal law will be interpreted too expansively). Courts implementing Any Manner clauses must therefore carefully consider the federalism and separation of powers principles that animate *Erie*.[282] Confronting those principles directly would produce clearer reasoning than confronting them indirectly by linking Rule 83(b)'s scope to *Hanna*'s fuzzy "twin aims" test.

A narrower interpretation of the Any Manner Clause's preemptive scope is possible but implausible. The REA arguably may authorize preemption only when the content of rules arises from formal notice-and-comment procedures rather than informal common law adjudication. This interpretation would recognize concerns raised in related contexts by scholars who stress the importance of compliance with the REA's transparency and deliberation requirements.[283]

Even if the distinction between formal and informal rulemaking rests on an attractive preference for notice and comment, deeming the distinction relevant to preemption has no foundation in the REA's text. The text's reference to "general rules of practice and procedure" extends preemption to all rules promulgated using the REA's rulemaking procedures, which includes rules containing Any Manner clauses.[284]

The formal/informal distinction also relies on a flawed premise that judicial opinions interpreting a text are distinguishable from opinions exercising rulemaking discretion granted by the text. The distinction presumes that when a judge implements most FRCP provisions, the judge is merely interpreting text promulgated through notice-and-comment rulemaking. The legitimacy conferred by notice and comment thus flows through the text and into the opinion. In contrast, the distinction posits that when a judge invokes an Any Manner clause, the judge is exercising discretion to impose an outcome that the rulemakers never directly authorized. This discretion creates a break between the outcome and the notice-and-comment process legitimizing the text.

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282. *See supra* text accompanying notes 26–29 (explaining that the decision about whether to create federal common law is a form of "choice of law," but that this is a different kind of choice than what occurs during the prioritization inquiry).

283. *See* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 656 (2010) (criticizing the Court's efforts to alter procedural rules through interpretation rather than exercising "the self-discipline required to show appropriate respect for the procedural lawmaking system Congress established in 1934"); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012) (analogizing procedural rulemaking to substantive rulemaking by administrative agencies); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1152–69 (2002) (emphasizing the guiding role of advisory committee notes). *But see* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 687 (2014) ("For certain types of procedural rules, rulemakers should abandon the task of trying to regulate procedure by promulgating rules or standards . . . . Instead, they should turn their attention to regulating the *process* by which judges make procedural decisions . . . .").

284. 28 U.S.C. § 2072(a) (2018); *see also infra* text accompanying notes 319–22 (discussing meaning of "general" rules).

Trying to marginalize Rule 83 based on a distinction between interpretation and rulemaking overlooks the fact that numerous FRCP provisions grant broad discretion to augment the text. For example, FRCP 42(a)(3) specifies options for judges but allows them to "issue any other orders to avoid unnecessary cost or delay."[285] Similar "any other" clauses abound.[286] These open-ended rules blur the line between interpretation and rulemaking. A judge issuing "any other" order and a judge regulating procedure in "any manner" are equivalently grounded in text. They are either both creating law, both interpreting law, or both engaging in a hybrid of creation and interpretation.

Kevin Clermont provided a helpful metaphor by distinguishing between "the text of the Rules" and the "gloss that adheres to them."[287] In the *Erie* context, courts are often unsure about whether gloss is an independent layer (judicially created common law) or an integral part of the text it envelops (an interpretation). *Hanna* tries to drive a wedge between interpretive gloss and common law gloss even when the space between them is imperceptibly thin.

FRCP 16 provides an especially stark example of why the distinction between rulemaking and interpretation cannot justify marginalizing Rule 83 from the rest of the FRCP. Rule 16(c)(2) enumerates fourteen distinct judicial powers. Some of these—such as a provision allowing "special procedures for managing potentially difficult or protracted actions"[288]—mirror Rule 83(b) by authorizing improvisation. Yet even these fourteen broad powers were insufficient to achieve Rule 16's aspirations. Rule 16(c)(2) therefore includes a catch-all clause allowing courts to "facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action."[289] Rule 1 provides similar policy guidance by mandating that the entire FRCP "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[290] Thus, the same guidance ("just, speedy, and inexpensive") constrains judicial flexibility under both Rule 16(c)(2)(P)'s "other ways" clause and Rule 83(b)'s "any manner" clause. Moreover, every opinion implementing the "other ways" clause could also cite the "any manner" clause because both clauses have the same purpose: to address unpredictable circumstances beyond the scope of precise textual provisions. The choice of citation should not influence the scope

285. FED. R. CIV. P. 42(a)(3).

286. *See, e.g.*, FED. R. CIV. P. 12(e) (court may issue "any other appropriate order" when a party disobeys an order seeking a more definite statement); *id.* at 16(f) (court may issue "any just orders" imposing sanctions); *id.* at 49(a)(1)(C) (court may use "any other method" for obtaining special verdicts); *id.* at 56(d)(3) (court may "issue any other appropriate order" when nonmovant cannot present facts essential to opposing summary judgment); *id.* at 60(b)(6) (court may reopen final judgment for "any other reason that justifies relief").

287. Clermont, *supra* note 177, at 1022.

288. FED. R. CIV. P. 16(c)(2)(L); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH (2004) (noting myriad suggestions for implementing this rule).

289. FED. R. CIV. P. 16(c)(2)(P).

290. FED. R. CIV. P. 1.

of preemption. Judges implementing the "other ways" and "any manner" clauses engage in functionally identical processes of creating common law within the FRCP's constraints. If law arising from Rule 16(c)(2)(P) preempts state law in federal court, so does law arising from Rule 83(b).

Of course, one might respond that neither the "any manner" nor "other ways" clause can preempt state law because both involve rulemaking rather than interpretation. But then federal orders implementing the FRCP would have different preemptive force based on how much express guidance the text provided for the outcome. Precise texts would generate preemptive interpretations while imprecise texts would generate non-preemptive rulemaking. There is no evidence that rulemakers wanted or expected this convoluted approach to preemption. Nor is there any practical way of distinguishing judicial orders interpreting open-ended texts from judicial orders exercising authority to make rules. Accordingly, the distinction between formal and informal rulemaking does not provide a basis for limiting the preemptive force of common law implementing an Any Manner clause.

Moreover, if common law decisionmaking produces inappropriate results, rulemakers can intervene. Charles Clark, the reporter for the 1938 FRCP, cited this judicial supervision as a reason to maintain flexibility under the Any Manner clauses.[291] He probably overestimated the likelihood of intervention by rulemakers given modern obstacles to shepherding amendments through the rulemaking process.[292] But the point remains that formal rules are not a categorically superior alternative to common law, and the two approaches to rulemaking can work in tandem.

An alternative justification for narrowly construing Any Manner clauses is that they might not authorize common law that does not already arise from other sources, such as inherent judicial power under Article III.[293] On this view, the clauses would serve two purposes. First, the clauses would prevent litigants from contending that the enumeration of federal rules always forecloses the existence of unenumerated rules.[294] Second, the clauses would "insulate district judges against the argument that they were required by the Conformity Act to follow state practice on matters not governed by the civil rules." [295] Rule 83 does serve these purposes (among others), but a narrow interpretation does not follow from this conclusion.

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291. *"Open Forum" Discussion of Proposed Rules of Civil Procedure*, 23 A.B.A. J. 965, 965 (1937) (reporting statement by Charles Clark that the standing committee could propose changes to common law that was "out of line").

292. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 120 (2017) (discussing the "stickiness of the rulemaking status quo").

293. *See* Barrett, *supra* note 52, at 837 ("[It] is not at all clear that . . . [Rule 83(b)] authorizes procedural common law in the sense of generally applicable rules worked out by judges on a case-by-case basis.").

294. *See id.* (contending that Rule 83(b) confirms the continuing legitimacy of authority that "the judiciary otherwise possesses").

295. 12 WRIGHT ET AL., *supra* note 19, at § 3155.

The clauses are phrased as a grant of power rather than a preservation of power. The Any Manner clauses tell courts what they can do—they "may regulate." Other rules similarly use this "may" construction as a grant of authority.[296] This affirmative grant of common lawmaking power in 1938 was necessary to circumvent the Conformity Act, which Congress did not repeal until 1948,[297] and which would have displaced at least some federal common law.[298] Moreover, if the Any Manner clauses merely preserved exogenous authority, one would expect them to say something like "nothing in these rules prevents district courts from relying on consistent federal law from other sources." Several rules do in fact defer to extrinsic federal[299] or state[300] sources, but the Any Manner clauses do not. The Any Manner clauses' text therefore indicates that they are a grant of rulemaking power rather than an acknowledgment of inherent power. Moreover, the drafting history discussed above eliminates any doubt about the clause's broad delegation of rulemaking power.[301] Delegated authority under the Any Manner clauses overlaps with authority that other sources—such as inherent power under Article III—already provide, especially after the Conformity Act was repealed. This redundancy is not troubling because institutional power often stems from overlapping sources.[302]

Another potential justification for narrowly construing the Any Manner clauses is that the judiciary cannot augment its own power. It therefore cannot promulgate a rule under the REA that authorizes creating common law,[303] especially when common law preempts state law.[304]

Concerns about judicial overreaching do not undermine the Any Manner clauses. Congress's delegation of power to create national rules included authority to address gaps in those rules. Congress could not have expected the judiciary to enumerate a comprehensive code. Gaps were inevitable. One rulemaker succinctly framed the problem: "some case is going to come up where there is no rule. What is the judge to do?"[305] Accordingly, inherent in the REA's delegation of rulemaking power to the judiciary was an acknowledgment that federal courts would need to apply gap-filling common law. The rulemakers therefore plausibly interpreted the

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296. *See, e.g.*, FED. R. CIV. P. 15(d) ("may" allow supplemental pleadings); *id.* at 16(a) ("may" order a pretrial conference); *id.* at 37(b)(2)(A) ("may" issue sanctions).

297. Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992.

298. *See* 12 WRIGHT ET AL., *supra* note 19, at § 3155.

299. *See* FED. R. CIV. P. 22(b) ("The remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided [in various statutes governing interpleader].").

300. *See* FED. R. CIV. P. 64(a) (attachment); *id.* at 69(a) (execution).

301. *See supra* text accompanying notes 254–64.

302. *See* Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051 (2010).

303. *See* Barrett, *supra* note 52, at 837 ("Congress can confer common lawmaking power on federal judges, but federal judges cannot confer such power on themselves.").

304. *See* Burbank, *supra* note 242, at 1193 n.763 (suggesting that allowing common law derived from Rule 83 to "displace[]" state law raises concerns about Rule 83's validity under the REA).

305. ADVISORY COMM. PROCEEDINGS, *supra* note 267, at 1515 (comment by Monte Lemann).

REA to authorize the creation of a rule governing how gap-filling would occur.[306] Rule 83 serves this function by specifying how courts should fill gaps.

The FRCP's drafters also had to consider what sources would supply gap-filling rules. Judges have only two options: state law or non-state law. State law was not a viable option because the REA sought to liberate federal courts from the Conformity Act.[307] Once preemptive non-state law was selected as a gap-filler, the only options were general law and federal common law. *Erie* took general law off the table. Federal common law thus became the most compelling answer to an inevitable question about the source of interstitial rules. Accordingly, the Any Manner clauses are not a self-aggrandizing assertion of judicial power. Rather, the clauses are a reasonable interpretation of the REA's mandate to create a comprehensive system of federal procedure.

Congress's delegation of authority to create open-ended rules does not impermissibly undermine the separation of powers. The Constitution precludes Congress from delegating excessive discretion to agencies or courts.[308] However, the Supreme Court has only rarely invoked constitutional limits on delegation.[309] Valid delegations to the executive branch can authorize agencies to fill gaps through "case-by-case evolution of statutory standards" rather than "general rules."[310] The Court has likewise used its delegated power under the REA to promulgate catch-all provisions providing only marginally more guidance for adjudicative implementation than the Any Manner clauses.[311] Facilitating this adaptation to unforeseen or changed circumstances is a widely recognized virtue of delegation.[312] Congress has broad discretion to deploy these adaptive mechanisms and to decide whether the executive or judicial branches are best suited to regulate particular areas.[313]

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306. *See supra* Section III.A.1.

307. *See supra* Section III.A.1.

308. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 436–37 (2008) (noting that the "operative question has to do with what Congress has given away," rather than which institution has received delegated authority).

309. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (citation omitted).

310. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). *But cf.* Morton v. Ruiz, 415 U.S. 199, 231–32 (1974) (holding that gap-filling cannot occur in an "ad hoc" manner). Agencies may also issue informal guidance that has the practical effect of filling gaps in regulations, although informal guidance may be inappropriate when it resembles a new rule but circumvents formal notice-and-comment procedures. *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 502–09 (2013) (considering how administrative law principles should apply to guidance documents).

311. *See supra* text accompanying notes 286–91 (discussing FRCP 16 and 42).

312. *See, e.g.*, Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1585–86 (2016); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

313. *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006) (analyzing how Congress chooses where to delegate authority).

Given that Congress imposed guiding conditions on its delegation—such as the requirement that rules must not "modify any substantive right"[314]—the gap-filling Any Manner clauses should survive scrutiny under the nondelegation doctrine.[315] The REA offers at least as much guidance as its vague predecessors dating back to 1789.[316] In contrast, legislative delegation of authority to courts implementing common law statutes may raise more significant nondelegation concerns than delegation of gap-filling power under the Any Manner clauses. Both kinds of delegations rely on the judiciary's capacity to adapt to changing circumstances. Stare decisis may limit this flexibility—and thus remove a rationale for delegation—when the Court implements substantive statutes,[317] while procedural common law is relatively malleable.

Although nondelegation concerns do not affect the prioritization inquiry, they may affect the interpretation inquiry. The fact that delegating common law powers to courts is constitutional does not mean that common law rules are wise for every occasion. Accordingly, Part IV notes the need for an "*Erie* canon" governing the scope of federal procedural common law. Courts must be wary of broadly interpreting federal common law rules to displace state law. In some circumstances, a federal common law rule might appropriately apply in federal question cases but not in diversity cases, or in federal courts but not state courts.[318]

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314. 28 U.S.C. § 2072(b) (2018).

315. *See* Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 475 (2001) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.") (citation omitted); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (suggesting that the nondelegation doctrine should acknowledge "the well-recognized distinction between legislating and gap-filling"). Nondelegation might also be less of a concern in the context of procedural rulemaking because of the nexus between the Any Manner clauses and the judiciary's "inherent power" to manage litigation. *See* Alexander Volokh, *Judicial Non-Delegation, the Inherent Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1420 (2017). The Any Manner clauses also do not constitute a "redelegation" of legislative power from the Supreme Court to lower courts because the Court retains a supervisory role in the common law's development. F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 168 (2013) (contending that "when Congress unambiguously delegates policy-making power to a particular agent, only that agent may exercise the delegated power").

316. *See* Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (authorizing the Court to "regulate the whole practice" of lower courts in admiralty, equity, and common law cases "to prevent delays . . . promote brevity and succinctness . . . and abolish all unnecessary costs"); Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335 (authorizing federal courts to promulgate rules governing certain specified topics "as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings"); Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (specifying rules "subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe"); Act of Sept. 24, 1789, ch. 20, § 17(b), 1 Stat. 73, 83 (authorizing federal courts to "establish all necessary rules for the orderly conducting business [sic]").

317. *See* Lemos, *supra* note 308, at 454.

318. *See supra* text accompanying notes 70–71. Some scholars have criticized this asymmetrical approach, *see* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 125 (2011), but it is a necessary consequence of the interpretation inquiry when rulemakers carefully circumscribe federal law's scope.

Another argument for narrowly interpreting Rule 83 posits that the REA's authorization of "general" rules imposes a transsubstantivity requirement.[319] Common law rulemaking might result in different rules for different kinds of claims and therefore would exceed the statutory delegation.[320]

Concerns about transsubstantivity do not require narrowly interpreting the Any Manner clauses. First, the clauses on their face are transsubstantive. They authorize common law rules but say nothing about tailoring these rules to the substance of particular claims. Second, to the extent that the Any Manner clauses facilitate case-by-case tailoring of process to substance, the departure from transsubstantivity should be welcome (within limits). Procedure implements substantive law. A transsubstantive procedural code prevents arbitrary decisionmaking but can also stifle the flexibility that is necessary to enforce the wide range of substantive laws that courts encounter. Building case-by-case discretion into formal rules is a sensible way to capture the benefits of both transsubstantivity and substantive tailoring,[321] assuming that a healthy equilibrium is possible.[322] Third, the REA may not require enforcing transsubstantivity at the level of gap-filling common law. As noted in Section III.A.2, the REA's drafters must have known that gap-filling would be necessary. The FRCP's drafters in turn expressly embraced adjudication's ability to adapt rules to case-specific circumstances. The REA's preference for "general" transsubstantive rules therefore might apply only to formal written rules, and not to the inevitable gap-filling common law that by definition addresses idiosyncratic issues. Finally, even if common law must be "general," the REA would at most prevent judges from using their delegated Any Manner authority to craft subject-specific rules. Judges could still exercise their delegated authority to craft generally applicable rules.

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319. 28 U.S.C. § 2072(a).

320. *See Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 27 (1985) (letter from Stephen B. Burbank to Committee on Rules of Practice and Procedure (Feb. 27, 1984)) ("the last sentence" of Rule 83, before the 1995 amendments, "is not a 'general rule'").

321. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) ("There are, indeed, trans-substantive values which may be expressed, and to some extent served, by a code of procedure. But there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law."); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 786 (2017) (noting need for an occasional "ad hoc procedural fix"). *But cf.* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 930 (1999) ("[A] rulemaking system designed to achieve efficiency should place limited reliance on case-specific discretion . . . . Broad discretion generates high administrative and litigation costs with questionable efficiency benefits, impedes the solution of collective action problems, and frustrates the use of credible threats to achieve regulatory objectives.").

322. For a discussion of when substantive exceptions to transsubstantive norms may be appropriate, see David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1236–50.

Another argument for narrowly interpreting the Any Manner clauses is that they are severely constrained by a bar against disadvantaging parties without prior notice. The sentence following the Any Manner Clause in FRCP 83(b) states that:

> No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.[323]

Similar language exists in other rules containing Any Manner Clauses.[324] One could therefore argue that although the clauses authorize the creation of gap-filling common law, that law is unenforceable if it creates a material "disadvantage." However, this argument is not plausible given the drafting history of the "no sanction or other disadvantage" clauses. The clauses were added in 1995 to address problems associated with "internal operating procedures, standing orders, and other internal directives" that were often inaccessible to lawyers.[325] The amendment's clear target was generally applicable written codes, not gap-filling common law. And the amendment's clear purpose was to prevent courts from punishing lawyers or parties from deviating from the court's preestablished yet unknown expectations. The rulemakers' primary concern seemed to have focused on "standing orders."[326] There is also no indication that the word "disadvantage" was intended to do anything more than backstop the word "sanction" if a penalty that resembled a sanction was not technically a sanction. The reference in 1995 to a "disadvantage" arising from an inaccessible written code therefore did not alter judicial power to create gap-filling common law, which had existed for sixty years and which the FRCP's original drafters thought was essential.

A final challenge suggests that broad interpretations of Rule 83(b) conflict with Rule 83(a)'s authorization of formal local rules for individual federal districts.[327] Unlike Any Manner rules, local rules require public notice and comment.[328] If the Any Manner clauses are read broadly, then they provide an opportunity for judges to circumvent notice-and-comment rulemaking. That result seems troubling given the REA's emphasis on transparency and public deliberation.[329]

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323. FED. R. CIV. P. 83(b).

324. *See* FED. R. CRIM. P. 57(b); FED. R. APP. P. 47(b); FED. R. BANKR. P. 8026(b), 9029(b).

325. FED. R. CIV. P. 83(b) advisory committee notes to 1995 amendment.

326. Letter from Sam C. Pointer, Jr., Chairman, Advisory Comm. on Civil Rules, to Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice and Procedure, Attachment 1 at 3 (May 17, 1993), https://www.uscourts.gov/sites/default/files/fr_import/CV5-1993.pdf [https://perma.cc/8592-YKM7] (noting that the committee's "concerns" were "similar" to those underlying a related amendment to ensure that "negligent failure to comply with a local rule imposing a requirement of form should not be enforced in a manner to cause a party to lose any of its rights"); *see also* Minutes of the Advisory Comm. on Civil Rules 9 (Apr. 28–29, 1994), https://www.uscourts.gov/sites/default/files/fr_import/CV04-1994-min.pdf [https://perma.cc/3M9E-JH72] ("The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders.").

327. FED. R. CIV. P. 83(a).

328. *See id.*; FED. R. CRIM. P. 57(a); FED. R. APP. P. 47(a); FED. R. BANKR. P. 9029(a).

329. *See* 28 U.S.C. § 2071(b)–(f) (2018). *But cf.* 28 U.S.C. § 332(d)(4) (2018) (authorizing judicial

Conflict between the Any Manner clauses and local rulemaking procedures is not a reason to interpret the clauses narrowly.

First, rulemakers anticipated this conflict and preferred case-by-case adjudication over local rulemaking. For example, Edward Tolman thought that formal local rules "may impair the useful power" that the Any Manner clauses provide.[330] He observed that:

> Now, how much better it is to omit the drafting of rules for some unknown and unknowable thing that may or may not occur and to give the trial court, aided by counsel on both sides, the right to work out the unforeseen procedural problems as they arise and handle them then and there, in accordance with the circumstances that accompany and surround them.[331]

Similarly, William Mitchell was concerned that "meticulous" local rules would undermine the "flexibility" that common law would otherwise afford.[332] Subsequent developments have confirmed Mitchell's doubts because local rules often create unnecessary confusion and inefficiency.[333]

Even the committee charged with planning implementation of local rules was skeptical about their value. Its report observed that Rule 83's Any Manner clause was "very significant" and emphasized "the discretion of the trial judge," leaving a limited role for local rules.[334]

Second, as noted above, the Any Manner clauses recognize the inevitability of gaps that notice-and-comment rulemaking cannot fill. Accordingly, neither national nor local formal rules are viable alternatives to the Any Manner clauses.

In sum, FCL should not be viewed as circumventing the local rules process. Instead, FCL provides a favorable alternative to local rules that is consistent with text, policy, and historical expectations.

3. The Any Manner Clauses Erase the Line Between Formal Rules and Common Law Animating the Current Prioritization Inquiry

The Any Manner clauses should obliterate *Hanna*. Judicial decisions implementing the Any Manner clauses through federal common law have the same preemptive force as decisions implementing other federal rules. This equal preemptive force leaves no bifurcation for *Hanna* to exploit. The "unguided" prong ceases to exist for all cases enforcing the Any Manner Clauses. More generally, as

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councils in each circuit to "modify or abrogate" local rules promulgated under § 2071 that are inconsistent with national rules promulgated under § 2072).

330. WASHINGTON PROCEEDINGS, *supra* note 255, at 129 (statement of Edgar Tolman).

331. *Id.*

332. *Id.* at 232 (statement of William Mitchell).

333. *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 1006 (1996) ("Unrestrained localism in the federal courts is mischief serving no purpose that Congress can honorably embrace.").

334. ADMIN. OFFICE OF THE U.S. COURTS, REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES 9–10 (1940).

noted in the next section, the unguided prong also ceases to exist for all other forms of preemptive federal common law.

Accordingly, the current two-pronged approach to prioritization, featuring a fuzzy test for federal common law and automatic priority for all other types of federal law, collapses. What should rise in its place is an exercise in preemption. Valid interpretations of valid federal rules—whether or not labeled "judge-made"—preempt state law on matters within their scope. If there is doubt about whether some types of federal common law—such as federal equitable remedies[335]—can preempt state law, those doubts do not require considering the "twin aims" test. Instead, the relevant questions are whether federal courts can create these suspect forms of federal common law and if so how the Supremacy Clause treats them.

Jettisoning *Hanna* at first seems to raise disturbing federalism and separation of powers concerns. Allowing procedural common law to preempt state law in federal court would permit unelected federal judges to undermine interests that may be very important to states.[336]

However, eliminating *Hanna* does not remove federalism and separation of powers issues from the *Erie* calculus. Instead, this Article's framework shifts the policy battleground from the priority inquiry to the interpretation inquiry. Judges would still have power to interpret the scope of FCL narrowly so that it yields to conflicting state law in appropriate circumstances. In contrast, the "twin aims" inquiry does not focus on identifying circumstances warranting interpretive deference. Instead, the twin aims test relies on arbitrary distinctions and categorizations.

A virtue of spotlighting the interpretation inquiry while simplifying the prioritization inquiry is that the policy choices confronting judges become clearer. This is not simply a shell game in which a question that previously arose under one doctrinal label reappears under another. Instead, the question emerges in sharper focus through the use of a more refined lens. Embracing this lens would help judges to better understand their role, the tools at their disposal, and the relevant constitutional values. Part IV explores options confronting judges.

A complication arises from potential differences between the judiciary's inherent authority under Article III and its authority under the Any Manner Clauses.

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335. *See supra* notes 52, 157 (discussing competing characterizations of federal judicial authority to create and apply equitable remedies).

336. *See* Steinman, *supra* note 281, at 1152–53 (noting policy arguments against giving procedural FCL preemptive force). Steinman frames his concern about excessive preemption as relevant to *Erie*'s prioritization inquiry. *See id.* I share his concern, but think it implicates *Erie*'s interpretation inquiry, which governs whether an otherwise applicable federal rule is "deep enough" to preempt state law. *Id.* at 1148. Analogous concerns about the FRCP's preemptive force could also implicate the creation inquiry if there is a compelling argument that some federal rules violate the REA's prohibition against modifying substantive rights. *See* Steinman, *supra* note 64, at 296–97 (questioning application of federal pleading, summary judgment, and class certification standards to state law claims).

This complication does not salvage *Hanna*, but might inform efforts to apply the prioritization inquiry.

First, a gap may exist between the federal judiciary's inherent power and its power under the Any Manner clauses. The Any Manner clauses include statutorily and self-imposed constraints that might not limit the "judicial Power" under Article III. For example, Article III may grant some quasi-substantive authority that the REA withholds (including in cases involving equitable remedies),[337] and it may authorize common law venue rules that are beyond the FRCP's scope.[338] If so, federal courts could invoke Article III to achieve results beyond what the Any Manner clauses authorize. Analyzing the extent of inherent judicial power to manage federal litigation is beyond the scope of this Article.[339] For present purposes, what matters is simply the possibility that inherent power is broader than rulemaking authority under the Any Manner clauses.

Second, common law implementing the Any Manner clauses may have greater preemptive force than common law arising from inherent judicial power. The Any Manner clauses may benefit from a statutory supersession clause that preempts state law.[340] Exercises of inherent power to police federal litigation do not have a similar congressional imprimatur. Whether the absence of legislative approval limits the judiciary's authority to create preemptive procedural common law is another question beyond the scope of this Article. But again, the possibility may create complications.

The foregoing two points suggest that courts addressing conflicts between federal and state law may need to know whether a common law rule arises under an Any Manner clause or inherent power. This question is irrelevant under *Hanna*. It would become relevant if some FCL is valid only under Article III and if it therefore has less preemptive force (which is an issue on which I take no position). The prioritization inquiry should therefore pay close attention to the source of FCL rules. This emphasis on sources is consistent with *Erie*, which focused on identifying the origins of governing law.

Part IV addresses additional factors that should shape a new priority rule.

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337. *See* discussion *supra* notes 52, 157.

338. *See infra* Section III.B (discussing the enigmatic origins of forum non conveniens doctrine).

339. For analysis of the federal judiciary's inherent power, see Barrett, *supra* note 52; Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681–88 (2004); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

340. *See supra* text accompanying notes 120–24.

B. Outside the Enabling Act Context, Relying on a Distinction Between Federal Common Law and Other Sources of Federal Law Marginalizes Salient Policy Questions About Federal Common Law's Validity, Scope, and Effect

The problem discussed in Section A is not unique to the REA context. Whenever federal courts apply rules that resemble common law, questions arise about how to characterize what the court is doing. Is it interpreting law or creating law? Is it exercising inherent authority or delegated authority? What is the source of that authority? What policies animate that authority, and do they favor broad or narrow assertions of federal power? The current prioritization inquiry overlooks these questions, leading to an arbitrary test.

1. Example: Forum Non Conveniens Doctrine

Forum non conveniens doctrine (FNC) permits federal district courts to dismiss cases when venue would be more appropriate in another country.[341] The FNC doctrine is controversial.[342] A nuanced account of *Erie*'s distinct inquiries helps to frame the debate and suggest pathways to resolving contested questions.

Neither the Constitution nor any federal statute expressly authorizes FNC dismissals. Statutes provide standards for determining when venue is proper and allow transfers between federal districts.[343] But federal statutes are silent about the propriety of dismissing cases when a foreign forum is preferable. The FRCP are also silent. Rule 82 states that "[t]hese rules do not extend or limit . . . venue."[344] Rule 83(b) must in turn respect Rule 82's venue exclusion. Judicial authority to enforce FNC therefore cannot rely on the Any Manner clause.

Given that FNC does not stem from express language in the Constitution, a statute, or a delegated rule, questions arise about its source and nature. Doctrine might be either a form of constitutional interpretation, an example of general law that predates and survived the Constitution, or a species of federal common law. An added complication is that Congress implicitly acquiesced to FNC when it enacted 28 U.S.C. § 1404(a), which authorizes transfer among federal districts. Section 1404(a) "revis[ed]" and "codif[ied]" FNC for cases within the statute's scope,[345] but did not expressly abrogate the remaining portions of FNC doctrine despite the opportunity to do so.[346]

The Supreme Court has not committed to a particular characterization of FNC. It has variously treated FNC as a "residual doctrine" predating and filling

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341. *See* 14D WRIGHT ET AL., *supra* note 19, at § 3828.

342. *See* Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 821 (2008) ("Many scholars condemn the forum non conveniens doctrine as 'arbitrary,' 'incoherent,' abused, and even 'unconstitutional.'") (footnotes omitted).

343. *See* 28 U.S.C. §§ 1391–1413 (2018).

344. FED. R. CIV. P. 82.

345. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).

346. *Cf.* Burlington N. R.R. v. Woods, 480 U.S. 1, 6 (1987) (noting that congressional acquiescence to the FRCP adds to the Court's confidence in their validity).

gaps in the venue statutes,[347] a form of abstention invoking judicial power "to decline jurisdiction,"[348] an implementation of public policies governing the allocation of judicial business,[349] a "doctrine based on fairness,"[350] an example of "inherent power,"[351] a "common-law doctrine,"[352] and a "federal common-law venue rule (so to speak)."[353] The Court also called FNC a "supervening venue provision,"[354] raising the unanswered question: Provision of what?

Justice Frankfurter referred to FNC more majestically as a "manifestation[] of a civilized judicial system" that is "firmly imbedded in our law."[355] The mechanism by which FNC became imbedded remains a mystery. Indeed, the Court has identified only where FNC does *not* come from. It held that FNC "neither originated in admiralty nor has exclusive application there. To the contrary, it is and has long been a doctrine of general application."[356] The opinion did not state why this long application was justified. A subsequent opinion reaffirmed FNC's "traditional" reliance on a "broad[] range of considerations" without explaining the doctrine's historical origin or modern foundation.[357]

Apparently, FNC is a doctrinal analog to celebrities who are famous for being famous. It coasts on its reputation even though the Court cannot explain its ascension or persistence.

The Court has repeatedly avoided questions about FNC's priority under *Erie*. Four decisions expressly noted the prioritization problem when FNC issues arose in diversity cases. The Court declined to address prioritization because federal and state law were consistent.[358] These assertions of consistency are dubious. The Court elsewhere admitted that the "discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make [national] uniformity and predictability of outcome almost impossible."[359] Given this

347. Atl. Marine Constr. Co. v. U.S. Dist. Court, 571 U.S. 49, 61 (2013).

348. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947); *see also* Zivotofsky v. Clinton, 566 U.S. 189, 207 (2012) (including FNC in a list of abstention doctrines based on "comity").

349. *See Gilbert*, 330 U.S. at 508.

350. Lee-Hy Paving Corp. v. O'Connor, 439 U.S. 1034, 1037 (1978).

351. Carlisle v. United States, 517 U.S. 416, 438 n.1 (1996).

352. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 n.20 (1985).

353. Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

354. *Id.*

355. Balt. & Ohio R.R. Co. v. Kepner, 314 U.S. 44, 55–56 (1941) (Frankfurter, J., dissenting).

356. *Am. Dredging*, 510 U.S. at 450.

357. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722–23 (1996).

358. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981) (holding that state and federal law were "virtually identical" so "we need not resolve the *Erie* question"); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) (stating that addressing prioritization "would not be profitable" given similarity between federal and state law); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 530 (1947) (observing that federal FNC doctrine was consistent with state law, "if applicable"); Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 559 (1946) (stating that Court would "reserve decision" on the *Erie* question because federal and state law were consistent). *But cf.* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988) (holding that FNC dismissal in federal court did not preclude state court from subsequently applying its own FNC doctrine in the same case).

359. *Am. Dredging*, 510 U.S. at 455.

extensive discretion and complexity, even small differences between state and federal precedent could produce different outcomes.

Optimistic assumptions that state and federal courts would consistently reach the same FNC result may reflect a desire to avoid the implications of inconsistency. If state and federal FNC rules differ in a diversity case, then prioritization is necessary. Prioritization would be tricky under current law. The Court in another context labeled FNC as a doctrine "of procedure rather than substance."[360] But that label elides several practical implications of venue that affect priority.[361] Relevant questions under current *Hanna* jurisprudence include whether FNC promotes forum shopping, whether it is integrated with a state's remedial scheme, and the nature and significance of policies that animate it.[362] Lower courts have answered these questions in a way that favors federal priority, but scholars are divided.[363] I take a different approach, as I think these questions about priority are not worth asking.

The three questions about FNC that should be most important implicate three distinct components of *Erie*. First, why do federal courts have authority to enforce FNC? This is the question under *Erie*'s creation inquiry. Second, what is the scope of FNC in diversity cases; i.e., do federal courts have a reason for enforcing a version of FNC that conflicts with state law? This is the question under *Erie*'s interpretation inquiry. Third, what is the status of FNC under the Supremacy Clause? This is the question that I contend should constitute *Erie*'s prioritization inquiry.

Answering these questions would produce valuable insights. If the Court takes *Erie*'s creation inquiry seriously, it would need to explain what sources of law justify FNC dismissals. The Court could not simply call FNC a "provision" of "general applicability." This loose language treats FNC as the sort of "brooding omnipresence" that *Erie* condemned.[364] Likewise, a rigorous interpretation inquiry would directly confront contested policy questions animating FNC by asking why it should have a broad scope. Perhaps it should apply only to a narrow category of cases. Or perhaps FNC should not exist at all.[365] Finally, if FNC is valid and encompasses a disputed issue, invoking the Supremacy Clause asks the question that the Constitution itself says is important: Is FNC preemptive?

Once we have answers to the three foregoing questions, the *Hanna* inquiry becomes pointless. Some of the *Hanna* questions will have already been addressed. For example, if FNC promotes vertical forum shopping, then courts might have a reason to narrow its scope. Other *Hanna* questions would be irrelevant. For

360. *Id.* at 453.

361. *See* Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1938 (1991) (noting that venue changes can have "enormous impact on the litigants even though they may not necessarily affect the underlying claim").

362. *See supra* Section II.B.4.b.

363. *See* Lear, *supra* note 52, at 1198–1202 (surveying decisions and scholarship).

364. Guar. Tr. Co. v. York, 326 U.S. 99, 102 (1945).

365. *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017) (advocating elimination of federal FNC).

example, whether FNC is substantive or procedural tells us little about its origins, breadth, and status under the content-neutral Supremacy Clause.

2. Extrapolating Beyond Forum Non Conveniens

The FNC example is a good proxy for thinking about all federal common law. All federal doctrines that resemble common law raise similar kinds of creation and interpretation questions as FNC: When Congress is silent about the role of state law in a regulatory regime, under what circumstances can federal courts create gap-filling rules, procedures, and remedies?[366] When is interstitial common law a form of interpretation and when is it judge-made law?[367] Which common law doctrines are "general" law and which are "federal" law?[368] Do various nominally procedural FCL rules have a broad scope that encompasses claims arising under state law or a narrow scope that excludes them?[369] These and other questions directly address the separation of powers and federalism issues at *Erie*'s core. In contrast, *Hanna*'s questions require a distracting and ultimately pointless detour.

IV. RECOGNIZING THE FLAWED ASSUMPTIONS UNDERLYING CURRENT PRIORITIZATION DOCTRINE CAN LEAD TO A MORE REFINED APPLICATION OF *ERIE* THAT HIGHLIGHTS SALIENT CONCERNS ABOUT FEDERALISM AND SEPARATION OF POWERS

Synthesizing the points developed in Parts I through III permits a more refined implementation of the *Erie* doctrine. It also suggests several avenues for further scholarship. Indeed, this Article shows that several ostensibly distinct literatures actually address loosely connected threads of *Erie*. Highlighting these hidden connections can add new dimensions to the understanding of each area.

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366. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) ("silence [about choice of law] in federal legislation is no reason for limiting the reach of federal law" because "interstitial federal lawmaking is a basic responsibility of the federal courts").

367. *Compare* Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948) (holding that a longstanding common law rule "has become part of the warp and woof of the legislation"), *with id.* at 465 (Black, J., dissenting) (characterizing the majority's rule as relying on common law rather than a statute).

368. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) ("It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie* . . . .").

369. *Compare* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (holding that filing a complaint in a manner proscribed by federal law does not toll the statute of limitations in a diversity case), *with* West v. Conrail, 481 U.S. 35, 39 (1987) (reaching the opposite conclusion in a federal question case). The Court's answers to these questions about the content of federal law are not always convincing, perhaps due to confusion about how to implement the *Erie* doctrine's four distinct inquiries. *Cf.* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 702 (1988) (stating that *West*'s departure from *Walker* relies on "sleight of hand that still leaves me blinking").

A. The Prioritization Inquiry Should Implement the Supremacy Clause Rather than the "Twin Aims" Test and Therefore Will Be Relatively Simple in Most Cases

As Part I explained, prioritization issues arise only after the Court has applied the creation and interpretation inquiries. Moreover, the interpretation inquiry considers whether the relevant federal rule incorporates deference to conflicting sources of law.[370] Thus, by the time the prioritization inquiry arises, judges know that: (1) a federal institution with regulatory authority has created a valid rule; (2) this rule encompasses the relevant facts; (3) there is no policy or textual reason to read the rule narrowly; (4) there is no express or implied basis for deference to another regulator; and (5) state law conflicts with the federal rule. The federal court must therefore decide how to resolve the conflict.

Part II explained that the Constitution itself answers the question about how to resolve conflicts between federal and state law. Valid federal law is supreme on matters within its scope without qualification or exception. The Supremacy Clause does not have "twin aims" that limit its preemptive force. There are no fuzzy "equitable federalism" values to balance.[371] Federal law displaces all inconsistent state law. The only open question is: What kinds of rules fit within the Clause's definition of supreme law? That question has settled answers for the Constitution, statutes, self-executing treaties, and delegated rules. Current prioritization doctrine recognizes the preemptive effect of these sources, although it often does not frame the inquiry in terms of preemption and supremacy.[372] But FCL presents a more difficult problem.

The interesting *Erie* question about FCL's priority should be whether the Supremacy Clause makes FCL supreme. Supremacy is clear when the Constitution, a statute, or a treaty federalizes an issue without providing a rule. In that scenario, federal and state law cannot conflict because state law cannot apply. FCL is all that remains to fill the gap. In contrast, when a supreme source of federal law does not clearly preempt state law, conflicts between FCL and state law may raise more difficult prioritization questions.[373]

Instead of asking relevant questions about FCL's status, *Hanna* asks tangential questions. As Part III showed, *Hanna*'s approach relies on a flawed understanding of FCL in the REA context as well as in other contexts. Moreover, there is no basis in the *Erie* decision for thinking that the Supremacy Clause suddenly ceases to be relevant when FCL conflicts with state law. *Erie* did not consider FCL's priority because the case did not involve FCL. Instead, *Erie* considered whether a federal court could invoke "general law" untethered to either state or federal lawmaking

370. *See supra* Section I.B.

371. Felder v. Casey, 487 U.S. 131, 150 (1988) (holding that weighing competing state interests "has no place under our Supremacy Clause analysis").

372. *See supra* notes 73–75 (noting that the Supreme Court's vertical choice-of-law jurisprudence sometimes cites *Erie*, sometimes cites preemption doctrine, and sometimes cites both).

373. *See supra* note 153 (noting competing interpretations of the Supremacy Clause); *supra* notes 157–58 (discussing federal equitable remedies and customary international law).

authority.[374] *Erie*'s rejection of general law under the creation inquiry says nothing about the preemptive effect of valid FCL under the prioritization inquiry. Moreover, the Court confirmed soon after *Erie* that "federal supremacy" dictated the application of FCL and that "this is not at all a matter to be decided by application of the *Erie* rule."[375]

In sum, *Erie*'s prioritization inquiry entails considering whether federal law preempts state law. Determining FCL's priority requires analyzing its foundation and its status under the Supremacy Clause. In contrast, *Hanna*'s misguided inquiry considers questions that the Supremacy Clause does not ask.

B. Deemphasizing the Prioritization Inquiry Would Highlight Important Questions Under the Creation and Interpretation Inquiries About the Validity and Scope of Federal Law

FCL raises difficult *Erie* issues under both this Article's framework and current law. The difference is that this Article's framework requires courts to address difficult questions directly by grounding these questions in the most relevant constitutional inquiries. The forum non conveniens discussion in Section III.B used a concrete example to illustrate the benefits of shifting emphasis from prioritization to creation and interpretation. This Section places those benefits in a more abstract context by considering values that preemption implicates. It then explains how revitalized creation and interpretation inquiries would intersect with several ostensibly distinct lines of scholarship.

1. Hanna *Obscures Policy Questions About Preemption that the Creation and Interpretation Inquiries Directly Address*

The prospect of federal preemption typically raises four concerns. The first two implicate the Constitution's structure and the second two involve related questions of policy. First, a federalism concern arises from the federal government's limited powers. Preemption is troubling when the federal government injects itself into a domain where it does not belong and excludes a state from exercising its "reserved" authority.[376] Second, a separation of powers concern arises because each federal institution has only limited power. Preemption is troubling when one of these institutions exercises authority that belongs to a different institution.[377] Third, even when the federal government has authority to preempt state law, deference may be an appropriate policy.[378] Fourth, even if a particular federal institution has authority to create preemptive rules, policy arguments may favor action by a different federal institution. For example, scholars have debated the extent to which

374. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

375. United States v. Standard Oil Co., 332 U.S. 301, 309–10 (1947).

376. U.S. CONST. amend. X.

377. *See supra* note 153 (noting disagreement about when judge-made law, in contrast to statutes, can preempt state law).

378. *See* Hart, *supra* note 13, at 526 ("In wide areas . . . state law continues to operate not by virtue of the Tenth Amendment but by virtue only of the non-exercise of latent federal powers").

Congress and the judiciary may have solicitude for and the capacity to protect state interests.[379] These four concerns posit that over-preemption is undesirable. Under-preemption raises countervailing concerns, as federal institutions must vigorously protect federal authority in appropriate cases.[380] Accordingly, both over- and under-preemption are controversial for reasons of constitutional structure and public policy.

Erie's creation and interpretation inquiries directly address the reasons that preemption is controversial. The creation inquiry enforces structural limits on the power of federal institutions. The interpretation inquiry incorporates policy preferences about the proper scope of federal law when multiple governments regulate the same field.[381] Courts formulating FCL use the same adjudicative process both to create rules and determine their scope in particular cases. This flexibility leaves courts free to incorporate concerns about preemption into both the rulemaking and rule-application calculus.[382]

The interpretation inquiry subsumes factors in *Hanna* and places them in a more appropriate context. For example, a court applying *Hanna* asks whether an FCL rule would lead to inequitable administration of state law. If the answer is yes, the court balances that concern against competing factors.[383] This approach takes for granted that the FCL rule leads to inequity. Yet the federal courts created the putatively inequitable rule and have authority to adjust its scope. If the rule as currently constructed is inequitable, then the interpretation inquiry may have gone awry. Considering inequity at the interpretation stage rather than the prioritization stage highlights that there is still time to improve the rule. Similarly, if an FCL rule does not promote the kind of important federal values that influence the "twin aims" inquiry, then perhaps the rule should be construed narrowly to avoid a conflict with state law. Conversely, if a particular interpretation of an FCL rule serves important federal interests, characterizing the rule as inequitable under *Hanna* seems myopic.

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379. *Compare* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000), *with* Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327 (2001).

380. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[T]he government of the Union, though limited in its powers, is supreme within its sphere of action . . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all . . . . The nation, on those subjects on which it can act, must necessarily bind its component parts.").

381. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 120 (2018) (discussing "federalism canons").

382. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 n.69 (1974) (noting importance of concurrently considering FCL's validity and preemptive scope). For an example of an interpretation inquiry informed by preemption concerns, see William James Seidleck, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. PA. L. REV. 547 (2018).

383. *See supra* Section II.B.4.b.

In sum, an FCL rule's undesirable consequences might provide a reason for the judiciary to reconsider its choices regarding creation and interpretation, rather than a reason to question the rule's priority.

2. Spotlighting the Creation and Interpretation Inquiries Illuminates Problems Underlying Several Ostensibly Distinct Literatures

Simplifying the prioritization inquiry and amplifying the creation and interpretation inquiries would have several implications for future scholarship. The diverse range of affected literatures highlights the often hidden reach of *Erie*'s tendrils. This Section briefly highlights fruitful questions to pursue regarding the role of substantive canons, the distinction between lawmaking and interpretation, the legitimacy of FCL, and the distinction between substance and procedure.

a. Substantive Canons

A growing literature addresses "substantive canons" in statutory interpretation.[384] These canons are default rules that allow judges to skew interpretation toward a default policy preference when a statute's text is not clear.

An implication of this Article is that *Hanna* invented a substantive canon masquerading as a prioritization rule. The "twin aims" test essentially is a tool for deeming federal law not to apply in certain circumstances. But the test is destined to be unsatisfying because although it functions as a canon, it was not designed to be a canon.[385] Reframing the prioritization inquiry in terms of preemption would allow courts and commentators to develop *Erie* canons on a clean slate.[386]

Erie canons could address questions animating *Erie*'s four inquiries. Each question raises unique issues. Nevertheless, analyzing related questions as a bundle may reveal common themes about separation of powers and federalism that could shape how canons operate. Examples of questions that *Erie* canons could consider include whether courts should: interpret federal law to avoid or embrace conflicts with state law,[387] interpret federal rules to avoid potential invalidity under the

384. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 832 (2017) (summarizing and empirically testing views about the canons' role in interpretation).

385. Kim Roosevelt has persuasively argued that judges considering whether FCL preempts state law must make a "policy decision" drawing on values animating the federal system. Roosevelt, *supra* note 33, at 36. He frames this policy decision as implicating FCL's priority rather than its scope. *See id.* I agree that policy matters but think that *Hanna*'s untethered analysis illustrates why policy decisions should fall within *Erie*'s creation and interpretation inquiries rather than its prioritization inquiry.

386. *See* Allan Erbsen, Erie*'s Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis*, 10 J.L. ECON. & POL'Y 125, 146–50 (2013) (discussing rationale for a potential *Erie* canon).

387. *See* Atherton v. FDIC, 519 U.S. 213, 219 (1997) ("[W]e must decide whether the application of state law . . . would conflict with, and thereby significantly threaten, a federal policy or interest."); Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1153 (2011) (suggesting that *Erie* creates a policy discouraging application of federal procedural law that would conflict with otherwise applicable state law); Sherry, *supra* note 76, at 1228 (advocating consideration of an

REA,[388] interpret federal statutes to obviate federal common law addressing the same subject,[389] and incorporate or reject state law when determining the content of federal common law.[390]

A canon is likely to be more rigorous and legitimate if courts directly confront its animating policies. Developing *Erie* canons—and refining canons that already exist—in tandem would facilitate a reflective approach to lawmaking that is missing from modern doctrine's haphazard evolution.[391]

An *Erie* canon addressing whether federal courts should avoid or embrace conflicts with state law would overlap with existing canons addressing preemption.[392] This overlap confirms my point that "*Erie*" and "preemption" are labels obscuring similarities among a constellation of problems. Dispensing with labels reveals a single core question: If federal and state law potentially conflict, when should courts interpret federal law broadly to protect federal interests from state interference, and when should courts interpret federal law narrowly to defend state interests from federal interference? Interpretive methods in the preemption and prioritization contexts should converge rather than remain in separate silos.

b. Lawmaking versus Interpretation

Erie predated modern theories of interpretation analyzing the gray area between a text's express dictates and the outer limits of what the text authorizes. FCL often exists within this zone of statutory or constitutional uncertainty. From

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"unarticulated federal interest in the [federal] Rule itself or in applying it uniformly" against a "background presumption that state law applies" in diversity cases); Joshua P. Zoffer, *An Avoidance Canon for* Erie*: Using Federalism to Resolve* Shady Grove*'s Conflicts Analysis Problem*, 128 YALE L.J. 482 (2018) (noting the importance of developing an *Erie* canon and proposing a canon to avoid conflicts between federal and state law); citations *supra* note 130.

388. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999) (adopting "limiting construction" of an FRCP provision in part to "minimize[] potential conflict with the Rules Enabling Act").

389. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423–24 (2011) (distinguishing interpretive inquiries governing when a federal statute preempts state law and when it displaces FCL); O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) (stating presumption that FCL should not fill gaps in a "comprehensive" statute); Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (noting reluctance to interpret statutes as limiting the judiciary's "inherent power" to police litigation); City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (majority and dissent disagreed about whether a statute displaced preexisting FCL).

390. *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (noting "presumption that state law should be incorporated into federal common law"); *cf.* United States v. Gillock, 445 U.S. 360, 374 (1980) (noting that *Erie*'s "spirit" favors respecting state law while implementing federal law).

391. Of course, reflection does not necessarily produce incontestable results, especially in difficult cases. For recent discussions of how legal norms and methods constrain interpretation while preserving discretion, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523 (2018). Canons can also devolve into an implementation of "freestanding federalism" that divorces constitutional analysis from the "bargains and tradeoffs that made their way into" the Constitution's text. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009).

392. *See* citations *supra* note 91.

competing perspectives, some forms of FCL—especially gap-filling rules and remedies—can resemble either an effort to interpret a text or to create rules that are independent from the text.[393]

The distinction between interpretation and lawmaking matters whether one agrees or disagrees with scholars who doubt FCL's preemptive force under the Supremacy Clause.[394] For critics of FCL, a sensible application of the prioritization inquiry must distinguish between interpretations of a preemptive text and judicial creation of non-preemptive rules. In contrast, prioritization is not difficult for supporters of FCL's preemptive force. But the distinction between interpretation and lawmaking remains important even if FCL is preemptive. If judges have a precise understanding of what role they are playing—interpreting or creating—they are more likely to recognize applicable constraints on their authority. Both supporters and skeptics of FCL should agree that focused deliberation is superior to muddling through an ill-defined "*Erie*" analysis.

Questions about the boundary between interpretation and lawmaking arise in multiple contexts. For example, distinct literatures address whether decisionmakers are interpreting a text or creating law when:

- courts enforce "common law statutes";[395]
- courts fill gaps in an otherwise detailed statutory regime, including by finding implied preemption of state law;[396]

393. *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 366 (2002) (noting that "the boundary between" "statutory interpretation" and "federal common lawmaking" is "anything but distinct"). Theorists often assume that FCL derives its legitimacy from its relationship to a text that authorizes its creation. However, a text might not be necessary to legitimate common law drawn from traditional atextual sources. *See* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 9 (2015) (noting a "potential distinction between rules that courts would be creating out of whole cloth and rules that are firmly grounded in . . . widespread customs, traditional principles of common law, or the collective thrust of precedents from across the fifty states").

394. *See* citations *supra* note 153.

395. *Compare* Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 623 (2005) (contending that "the statutory texts have considerably more specific meaning than the conventional wisdom suggests"), *with* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws . . . that effectively authorize courts to create new lines of common law.").

396. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 450 (2016) ("*Geier*'s particular application of implied preemption doctrine is barely distinguishable from a claim to have authority to fashion general law."); Monaghan, *supra* note 153, at 763–65 (critiquing efforts to recharacterize some forms of FCL as interpretation rather than lawmaking); *cf.* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 580 (2019) (considering alternatives to the modern "swashbuckling" conception of common law judging).

- courts develop remedies and prophylactic rules to enforce the Constitution;[397]
- courts consider whether Congress can overrule a judicial decision that created FCL that may or may not have relied on an interpretation of the Constitution;[398]
- courts use adjudication to embellish rules that should instead be amended using notice-and-comment procedures,[399] or agencies use informal procedures to articulate rules that could be construed as "legislative" rather than "interpretive";[400]
- courts or agencies apply texts that include flexible standards that vest case-by-case discretion;[401] and

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397. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3 (2004) (distinguishing between "constitutional interpretation" and "constitutional doctrine"); Monaghan, *supra* note 382, at 2–3 ("a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 208 (1988) ("Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases.").

398. *Compare* United States v. Lara, 541 U.S. 193, 207 (2004) (characterizing prior decisions as creating FCL that Congress could abrogate), *with id.* at 228–31 (Souter, J., dissenting) (characterizing the same decisions as constitutional interpretation that Congress could not displace).

399. For example, judicial interpretation of the FRCP vacillates between traditional text-based and more "managerial" policy-based approaches. Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 125–26 (2015). At the extremes, policy-based interpretations of an REA-rule can seem more like an amendment that circumvents the notice-and-comment rulemaking process. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84–89 (2010) (criticizing the Court's reinterpretation of FRCP pleading standards as an end-run around more deliberative and effective rulemaking procedures); *cf.* BURBANK & FARHANG, *supra* note 292, at 180 (noting that the Supreme Court has used interpretation of the FRCP rather than rulemaking to significantly limit private enforcement of rights). The Court might have reached a different conclusion in its cases interpreting the FRCP's pleading standards if it had applied a "rulemaker primacy canon" foreclosing adventurous reinterpretations of settled authority. David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 984–85.

400. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96–97 (2015); *see also* Jacob E. Gerson, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1721–22 (2007) ("A main premise of the administrative state is that Congress enacts broad general statutes and agencies fill in the details by interpreting statutes. This process of gap-filling is interpretation, but in the post-realist post-*Chevron* world it is also policymaking."); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472 (2013) (discussing the "gray zone" between policymaking and policy guidance).

401. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 154 (1991) (noting that "adjudication" can authorize "lawmaking by interpretation"); Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2208–11 (2017) (discussing interpretive methods for addressing discretionary rules); Porter, *supra* note 399, at 165 ("When the Rule's drafters tied the poetry of equity practice to the prose of the law, they invited the case-specific, innately discretionary spirit of equity into the interpretation of many of the Rules."); *cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("[I]f there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would

- agencies seek to revise a prior position even though the underlying statute has not changed.[402]

Each of these contexts raises idiosyncratic issues. But collectively they implicate policy questions that *Hanna* obscures: When are courts creating rather than interpreting law, when is creation appropriate, and what is the status of various kinds of judge-created law under the Supremacy Clause?

c. The Legitimacy of Federal Common Law

A large literature addresses the legitimacy and content of FCL.[403] Questions include whether and when Congress can delegate lawmaking authority to courts, the extent to which various constitutional provisions authorize FCL, the scope of the judiciary's inherent power, and the optimal relationship between FCL and state law. The creation and interpretation inquiries unify these discrete strands of scholarship. Each strand addresses the core questions animating the *Erie* doctrine: Which governments, and which institutions within those governments, are authoritative sources of binding law? *Hanna* obscures these questions by asking whether valid federal law displaces inconsistent state law. Yet by that point, courts should have already completed the most important work because the validity and consistency determinations are the most difficult and consequential. Abandoning *Hanna*'s prioritization inquiry in favor of a preemption approach would allow courts and commentators to more directly consider FCL's proper role in the federal system.[404]

d. Substance versus Procedure

Scholars often consider the boundary between substance and procedure in various contexts.[405] The labels themselves are imprecise. However, the distinction may help isolate salient aspects of a problem. For example, perhaps an FCL rule that has substantive characteristics might apply in different circumstances than a rule with procedural characteristics. This is essentially what the Supreme Court held when it concluded that federal forum non conveniens doctrine was procedural and

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make more sense. Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.'") (citation omitted).

402. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (characterizing an agency's revised position as both an "interpretation" and "a reversal of policy").

403. *See* Tidmarsh & Murray, *supra* note 135, at 589–94 (discussing competing theories); Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1860–78 (2017) (discussing the parallel development of jurisprudence addressing FCL and *Erie*).

404. *See* Perdue, *supra* note 76, at 754 ("One way to reconcile *Erie* with federal supremacy is to treat the Erie doctrine not as a rule for picking between state and federal law, but instead as a rule for determining whether there *is* a valid federal common law rule applicable in the area.").

405. For the classic treatment, see Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 343 (1933) ("[A] person asking where the line *ought* to be drawn might well conclude that this ought to be at one place for one purpose and at a somewhat different place for another purpose."). Some scholars add a third vector to the substance/procedure distinction: remedies. *See* Hart, *supra* note 13, at 498.

therefore applied in federal admiralty cases, but not in analogous state court proceedings.[406]

Hanna provides a needlessly roundabout way of addressing the practical implications of the substance/procedure distinction. By the time a federal court considers prioritization, it assumes that a federal rule conflicts with state law. The substance/procedure distinction then becomes an arbitrary way of determining priority despite the Supremacy Clause's content-neutrality. The more interesting and important question is whether the conflict actually exists. The substance/procedure distinction's tenacious grasp on judicial imaginations suggests that it might communicate some useful information about the existence of conflicts between federal and state law. If a federal law seems primarily procedural, maybe courts should pause before interpreting it in a way that conflicts with a state law that seems substantive. And if a federal law seems primarily substantive, maybe courts should not hesitate to find preemption when conflicting state laws seem procedural.[407] I am not suggesting that the substance/procedure distinction actually is meaningful. But if the distinction is unavoidable, courts should address it in a context where it can be fruitful rather than distracting. Moving the substance/procedure inquiry from the prioritization stage to the interpretation stage would allow courts to confront its implications more directly with an eye toward relevant policies.[408]

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This Section showed that the *Erie* doctrine, preemption jurisprudence, and FCL are connected in an Escheresque loop implicating several fields of scholarship. "*Erie*" generates creation and interpretation inquiries that address the source and scope of federal law and its role in the federal system. "Preemption" jurisprudence is a subset of *Erie* that governs federal law's interaction with state law. "Federal common law" fills the gap when federal law preempts state law without expressly providing an alternative, or when federal courts perceive a need for a federal rule. *Erie*'s creation and interpretation components then reemerge to provide tools for assessing federal common law's validity and meaning. As problems move through this loop, questions arise about which institutions can create law, the scope of the laws that particular institutions can create, and how federal and state law should

406. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

407. In some circumstances, a substantive law may contemplate enforcement through specific procedures. Blending state and federal rules in a single case—for example by applying federal procedures to a state claim in federal court, or state procedures to a federal claim in state court—may therefore frustrate effective implementation of a substantive regulatory scheme. *See* Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529 (2018) (noting that Congress often relies on civil litigation as a mechanism for enforcing statutory rights); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) ("Because substantive law is calibrated to achieve some outcome, fidelity to that law may require that it remain hinged to the corresponding procedural law that was presumed its adjunct.").

408. *Cf.* Charles E. Clark, *The* Tompkins *Case and the Federal Rules*, 1 F.R.D. 417, 421 (1940) (noting in the context of justifying the FRCP's broad scope that "we must decide the question of substance versus procedure, not as one based on any supposed verities of definition, but as one of ascertaining and enforcing the policy to be subserved by the distinction").

interact. Doctrinal labels often obscure shared purposes and common themes underlying these related inquiries.

CONCLUSION

This Article straddles several fields that often inspire trepidation. Federal common law seems puzzling, choice of law seems mysterious, and *Erie* seems baffling. Stirring the REA, RDA, and substance/procedure distinction into the mix generates further confusion.

Fragmenting the *Erie* doctrine into its four components would demystify vertical choice of law, eliminate distracting tangents, and facilitate rigorous analysis of the questions that actually matter. A granular approach to *Erie* reveals that the prioritization inquiry should enforce the Supremacy Clause, while the creation and interpretation inquiries should assess the validity and scope of federal law. Replacing the Court's prioritization jurisprudence with this Article's framework would facilitate nuanced analysis of federal common law's legitimacy and effects.[409] The Any Manner clauses and forum non conveniens doctrine illustrate the practical importance of carefully considering federal common law's foundations. More generally, the Article's approach to federal common law reveals connections between diverse areas of scholarship in fields such as constitutional law, administrative law, and statutory interpretation.

409. Reasonable minds can still differ about the propriety of specific FCL rules because "[a]nalytic frameworks do not by themselves generate unequivocal answers to hard questions." John Hart Ely, *The Necklace*, 87 HARV. L. REV. 753, 753 (1974).