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ERIE'S STARTING POINTS: THE POTENTIAL ROLE OF DEFAULT RULES IN STRUCTURING CHOICE OF LAW ANALYSIS

Allan Erbsen[*]

Abstract

This contribution to a symposium marking the seventy-fifth anniversary of *Erie Railroad Company v. Tompkins* is part of a larger project in which I seek to demystify a decision that has enchanted, entangled, and enervated commentators for decades. In prior work I contended that the "*Erie* doctrine" is a misleading label encompassing four distinct inquiries that address the creation, interpretation, and prioritization of federal law and the adoption of state law when federal law is inapplicable. This article builds from that premise to argue that courts pursuing *Erie*'s four inquiries would benefit from default rules that establish initial assumptions and structure judicial analysis. Considering the potential utility of default rules leads to several conclusions that could help clarify and improve decisionmaking under *Erie*. First, courts deciding whether a state rule has priority over a conflicting judge-made federal rule in diversity cases should default to federal law despite the intuitive appeal of state law. Second, when courts are considering whether to create federal common law, the proponent of a federal solution should bear the burden of persuasion. Third, the Supreme Court should replace the rule from *Klaxon v. Stentor Electric*, which requires federal courts to identify applicable nonfederal law by using the forum state's choice of law standards, with a default rule that favors forum standards while authorizing federal choice of law standards in appropriate circumstances. Reconsidering how federal courts choose applicable nonfederal laws would also provide an opportunity to reconcile *Klaxon*'s irrebuttable preference for intrastate uniformity with the more flexible default rule in *United States v. Kimbell Foods*, which requires courts crafting federal common law to incorporate state standards unless there is a good reason to create nationally uniform standards. Finally, courts should develop a default rule—which one might label an "*Erie* canon"—to determine whether federal statutes and rules should be interpreted broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws.

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INTRODUCTION

The successive anniversaries of *Erie Railroad Co. v. Tompkins*[1] have an eerie similarity. At each major milestone, commentators extol the decision's importance while grappling with its inscrutability. Within a "few short years" of *Erie*'s birth, Judge Charles Clark observed that the decision "suggested at least as many questions as it has answered."[2] On its twenty-fifth anniversary, Judge Henry Friendly, speaking in the same endowed lecture series as had Judge Clark, felt a need to defend *Erie* from a "new spate of attacks" by scholars challenging its reasoning.[3] On its fiftieth anniversary, scholars again reconsidered doctrinal confusion that arose in the wake of *Erie*'s "vagaries."[4] Now, in this symposium marking *Erie*'s seventy-fifth anniversary, the next generation gathers to decipher both the decision and its progeny.

The academy's fascination with *Erie* is understandable because the opinion's reach is unavoidable. At a high of level of abstraction, *Erie* touches some of the most interesting questions of constitutional law. It implicates the allocation of power between the federal and state governments. It addresses the division of lawmaking authority among federal institutions. And it even contemplates the nature of law itself, raising questions about where legal rules originate and what makes them authoritative.

Yet despite being about so many things, *Erie* says almost nothing. Justice Brandeis's opinion is notorious for addressing weighty questions with minimal analysis and minimal support. The opinion cites "the Constitution," but not any specific clause.[5] The decision invokes principles of federalism and separation of powers, but does not elaborate on their role or significance. The holding repudiates decades of prior precedent, but does not mark a clear path for the decades to follow. Unsurprisingly, courts and commentators have struggled to apply the skeletal decision to the myriad circumstances that it potentially encompasses.

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[1] 304 U.S. 64 (1938).

[2] Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 269 (1946).

[3] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384 (1964). Both Friendly and Clark were delivering the annual Benjamin N. Cardozo Lecture to the Association of the Bar of the City of New York. *See id.* at 383.

[4] Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700 (1988); *see also* Mary Kay Kane, *The Golden Wedding Year:* Erie Railroad Company v. Tompkins *and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 692 (1988) ("[W]e should not be surprised if, in the next fifty years, [holdings building on *Erie*] do not come easily, but only after some confusion.").

[5] *Erie*, 304 U.S. at 80 ("We merely declare that in applying the doctrine [of *Swift v. Tyson*] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

This article will focus on one dimension of the ongoing struggle to implement *Erie*: the need to develop default rules that can provide a helpful starting point for judicial analysis. This discussion is part of a larger project in which I seek to demystify the *Erie* doctrine by exploring its assumptions and mechanics. In an earlier article, I explained that confusion surrounding *Erie* stems in large part from the fact that the name "*Erie*" is a label encompassing four distinct inquiries.[6] Fragmenting *Erie* into these four components helps clarify the unique role that each plays in regulating choice of law within a federal system.[7] A subsequent article will address how this more granular account of *Erie*'s four inquiries undermines a central pillar of current *Erie* jurisprudence: the "twin aims"[8] test that governs conflicts between state law and judge-made federal law.[9] The project's goal is to show that a seemingly opaque and ethereal doctrine is really an amalgam of relatively familiar and manageable concepts. Revealing these dimensions of *Erie* can help structure judicial analysis and highlight competing values that might guide judicial discretion.

Part I identifies *Erie*'s four components and discusses the potential utility of using default rules to guide courts considering each distinct inquiry. Part II discusses specific potential defaults. These defaults might help in determining when federal procedural common law preempts state law, when federal courts can create federal common law, how federal courts should interpret the scope of ambiguous federal statutes, and whether federal courts should revisit the *Klaxon* rule that governs choice of law in diversity cases.[10] Default rules can clarify implementation of *Erie* and suggest avenues for future scholarship developing *Erie*'s normative foundation and refining its analytical components.

I. THE POTENTIAL VALUE OF DEFAULT RULES IN STRUCTURING *ERIE* ANALYSIS

Understanding why default rules might improve decisionmaking under *Erie* requires understanding what decisionmaking under *Erie* actually entails. The jurisprudence that has come to be known as the *Erie* doctrine is better understood as a composite of four distinct inquiries addressing the *creation*, *interpretation*, and *prioritization* of federal law and the *adoption*

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6 *See* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. (forthcoming 2013) [hereinafter Erbsen, *Four Functions*].

7 *See infra* Part I (identifying *Erie*'s four components).

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

9 *See* Allan Erbsen, Erie *and the Problem of Pedigree: Rethinking the Second-Class Status of Federal Procedural Common Law* (unpublished work in progress on file with author) [hereinafter Erbsen, *Pedigree*].

10 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts adjudicating nonfederal questions in diversity cases must apply the forum state's choice of law rules).

of nonfederal law. These four inquiries partially overlap and have subtle dimensions that I have explored in detail elsewhere.[11] The following nutshell summary outlines the basic framework.

The creation inquiry considers whether a particular institution can be an authoritative source of binding federal law given the facts of a pending case. Common questions implicating *Erie*'s creation component include whether federal courts can rely on federal common law and whether Congress may preempt state law. Even if a federal actor can create a binding rule, the rule may apply in federal court only if an issue falls within the rule's scope. Identifying that scope implicates *Erie*'s interpretation inquiry. Relevant questions include whether the federal rule creates rights, remedies, or both; whether it addresses collateral issues such as pleading standards and limitation periods; and whether it seeks to displace state law or merely to supplement state law. If a federal rule is valid and encompasses a disputed issue, there is still a question about whether the federal rule should trump inconsistent state law. *Erie*'s prioritization inquiry determines when, if ever, federal law must yield to state law in a system where federal law is generally "supreme."[12] Finally, *Erie*'s adoption inquiry is relevant when federal law does not apply, such that the court must determine the source and content of binding nonfederal rules.

Each of these four inquiries serves distinct purposes by considering distinct factors in light of distinct values. But what purposes, what factors, and what values? These questions have befuddled courts and commentators for seventy-five years. This article suggests that recurring questions might become more manageable if courts can identify a useful starting point for each of *Erie*'s four inquiries. Default rules can potentially supply such starting points.

The need to develop default assumptions to guide *Erie*'s four inquiries becomes apparent when one distinguishes *Erie*'s relevance as a source of general principles about the structure of government from its relevance as a source of rules that judges apply in particular cases. As a source of principles, *Erie* permeates constitutional law addressing federalism and separation of powers. Almost any interesting constitutional question touches *Erie* at some level of abstraction. Yet as a source of rules for courts to follow, *Erie* applies much less frequently. Most choice of law questions are easy, obviating formal *Erie* analysis. One can say that *Erie* is still relevant in easy cases, but only in the sense that all Supreme Court decisions establishing the basic structure of judicial power—such as *Marbury*[13] and *Martin*[14]—

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11 *See* Erbsen, *Four Functions*, *supra* note 6.

12 U.S. CONST. art. VI, cl. 2.

13 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

14 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816) (establishing that the Supreme Court could review state court decisions applying federal law).

are always relevant to judicial decisionmaking. Caselaw supports the limited need for applying *Erie* to specific disputes: while courts seem to cite *Erie* often, these citations in fact occur in only a tiny fraction of all federal cases, and even of all diversity cases.[15]

Given that *Erie* helps courts resolve only a small number of cases each year, courts need guidelines for when to invoke it. Once *Erie* is deemed relevant, guidelines are again necessary to implement *Erie*'s various inquiries.

Default rules can be a helpful source of guidance.[16] Courts might assume that a particular *Erie* inquiry is never necessary absent some triggering concern or that the inquiry is always necessary in a particular context. When an inquiry is necessary, defaults might influence which questions courts ask and which factors shape the answers. As Part II illustrates, default assumptions will differ for each of *Erie*'s four components.

The concept of a "default rule" is laden with baggage because different areas of law reference defaults for different purposes. Common invocations of default rules envision decisionmaking by at least two actors: an actor who creates the default and an actor who reacts to it.[17] For example, in contract law, emphasis on default rules often arises from the parties' ability to establish or reallocate legal entitlements through bargaining. A legislature or court can create defaults to set a baseline that shapes negotiations and

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[15] For example, 678 opinions dated from October 2010 to September 2011 in Westlaw's DCT database cite *Erie* (based on a search on Aug. 24, 2013). Many of these citations involve little or no discussion. Only 158 opinions mention *Erie* at least twice and 64 mention *Erie* at least three times. Yet 289,252 civil cases were filed in the district courts in the same period, including 101,366 diversity cases. *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 125 (2012) (the report also tabulates the number of pending—as opposed to newly commenced—civil cases, but does not separately identify diversity cases). Even accounting for the fact that many cases do not yield opinions, that many opinions are not available on Westlaw, and that some courts cite *Erie*'s progeny without citing *Erie* itself, discussions of *Erie* appear in only a small fraction of opinions. In contrast, District Courts cite other decisions much more frequently. A Westlaw search for the same time period reveals, for example, more than 15,000 citations to the Court's revision of pleading standards in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

[16] Commentators typically do not address *Erie* from the perspective of default assumptions. The only article extensively considering default rules under *Erie* focuses on different issues than those I consider here. *See* Sergio J. Campos, Erie *as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573 (2012) (contending that state and federal procedural law supply competing "defaults" for enforcing entitlements, that *Erie* requires choosing between these enforcement mechanisms, and that the choice can involve setting a default rule that encourages state and federal lawmakers to clarify the relationship between procedural and substantive law). My approach here addresses different concerns because it neither relies on distinguishing substance from procedure nor attempts to identify specific types of state rules that should apply in federal court. Instead, my analysis of defaults focuses on assumptions that provide a starting point for each of *Erie*'s four inquiries.

[17] An actor can wear both the rule-maker and rule-receiver hats simultaneously. For example, two parties might negotiate an agreement that creates waivable defaults governing their relationship. Each party would thus be the source of and target for a particular default.

fills gaps in agreements.[18] This private law model of defaults has rough analogues in public law. For example, some constitutional doctrines—such as the *Miranda* rule requiring warnings to suspects before custodial interrogation as a condition for admitting subsequent testimony[19]—incentivize government actors to behave in particular ways without compelling them to do so.[20] The rule functions as a default with an unattractive but available opt-out mechanism.[21] Similarly, regulatory agencies can promulgate default rules that actors may modify if they are willing to accept other burdens, such as providing information to the agency or redirecting their pursuits along paths that the agency prefers.[22]

I am using the concept of default rules in a different sense than the conventional account above. Rather than encouraging courts to develop rules that induce a reaction from actors outside the judiciary,[23] I envision default rules as a starting point for judicial implementation of a potentially difficult inquiry. The equally familiar phrase "rebuttable presumption" could replace "default rule."[24] However, a reference to presumptions may be misleading because in some contexts defaults and presumptions are distinct. Defaults embody "substantive principle[s]" that animate analysis, while presumptions sometimes address the "evidentiary effect" of findings

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18 *See generally* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

19 Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

20 *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 459–65 (1998) (contending that *Miranda* established a "default" that could have but ultimately did not encourage "democratic experimentalism"); John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 851 (2006) (characterizing *Miranda* as a "model default" because it establishes a template for how actors should behave).

21 Legislatures can also opt-out of judicially created default rules if members can agree on a viable alternative. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792–93 (2006) (observing that "constitutional defaults" can inspire legislative action by creating a judicial baseline that at least some legislative factions will find unattractive, leading to a statutory compromise that displaces the default).

22 *See* Bradley C. Karkkainen, *Framing Rules: Breaking the Information Bottleneck*, 17 N.Y.U. ENVTL. L.J. 75, 80–84 (2008).

23 An example of a judicially created default rule designed to influence other actors is Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which created a framework for analyzing presidential authority that in turn helped frame negotiations between the executive and legislative branches. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2354 n.189 (2006) (analogizing *Youngstown* to a "'preference-eliciting' . . . default rule" of statutory interpretation) (quoting Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002)).

24 *See* Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 491 (2006) (stating that "a default rule is no more than a rebuttable presumption—the mere beginning of the inquiry").

based on those principles.[25] The terminology of defaults rather than presumptions thus seems more helpful when discussing choice of law, but the concept is more important than the label. The key point is that the sorts of default rules that I discuss would emanate from the judiciary as a form of self-discipline rather than as an effort to alter the behavior of entities affected by decisions, with one exception: in Part II.D, I discuss default rules of interpretation that might influence how lawmakers craft rules.

Thinking about defaults as starting points highlights how a court implementing *Erie* can use defaults to skew its analysis toward favored outcomes unless there is a good context-specific reason to believe that an alternative outcome is preferable. Such skewing would of course need a justification, so a default's legitimacy would hinge on its fidelity to *Erie*'s underlying values. To the extent that those values have a constitutional foundation, defaults would be a form of constitutional common law.[26] If portions of *Erie* lack a constitutional foundation, then the relevant defaults would be a federal common law gloss on what is essentially a federal common law doctrine.[27]

Relying on default rules as starting points for the implementation of public law doctrine can produce a wide variety of benefits. First, default rules can prioritize assumptions that are empirically likely to be valid. These defaults promote efficiency by avoiding wasteful analysis of unlikely scenarios absent a case-specific reason to believe that such analysis is necessary. For example, the "presumption of regularity" in administrative decisionmaking is in effect a default rule that obviates scrutiny of agency behavior absent an unlikely reason to think that the behavior is relevant.[28] Second, defaults can mitigate confusion by providing structure to complicated doctrinal inquiries. A court that knows where to begin its analysis and which factors are persuasive is on a clearer path to a justifiable result than a court engaged in a relatively free-form inquiry.[29] Third, focusing judicial attention on defaults can highlight conflict between values that might otherwise be resolved without reflection.[30] Finally, defaults allocate and define the burden of persuasion, which can facilitate resolving close cases consistently with normative commitments. Familiar examples in con-

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[25] Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 109 (2009).

[26] For discussion of how common law acquires constitutional undertones, see Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[27] For discussion of why *Erie* might be understood as having preconstitutional or extraconstitutional foundations, see Erbsen, *Four Functions*, *supra* note 6; Craig Green, *Can* Erie *Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813 (2013).

[28] Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (listing grounds for rebutting the presumption).

[29] Canons of interpretation serve a similar function. *See infra* Part II.D.

[30] *See* Ferejohn & Friedman, *supra* note 20, at 838 (contending that "explicit attention" to selecting defaults "might improve the quality of constitutional decisionmaking").

stitutional law are tiers of scrutiny that raise the hurdles a challenged rule must overcome in proportion to the importance of burdened rights.[31]

Default rules thus can in theory help courts implement *Erie*'s four distinct inquiries. The next question is whether particular defaults might be sensible in practice.

II. POTENTIAL DEFAULTS FOR *ERIE*'S FOUR COMPONENTS

Among the benefits of fragmenting *Erie* into its four components is that courts and commentators can separately analyze the default assumptions that should guide each distinct inquiry rather than jumbling them into a confusing morass. This part briefly sketches potential defaults for each component in order to highlight overlooked dimensions of *Erie* and to raise questions for further study.

A. *Prioritization: A Counterintuitive Preference for Federal Law*

Suppose that a federal court sitting in diversity confronts a question for which federal and state law seem to provide conflicting answers. The court must determine which answer has priority. One might think that priority is obvious under the Supremacy Clause: federal law will apply because it is "supreme."[32] On this view, *Erie*'s prioritization inquiry is merely a rote formality because the creation and interpretation inquiries do all of *Erie*'s real work when state and federal law conflict. Once a problem falls within the scope of a valid federal law, the Supremacy Clause obviates inquiry into whether that federal law must yield to state law.

However, a quirk of modern *Erie* jurisprudence is that courts do not always treat the prioritization inquiry as a simple formality. Instead, resolving a conflict between state law and a "federal judge-made law"—in contrast to a federal "statute or Rule"—requires considering empirical and policy questions related to *Erie*'s "twin aims."[33] I critique this rule elsewhere, contending that the prioritization inquiry should always favor a valid federal law that actually addresses a disputed question, regardless of the federal

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[31] *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455–56 (2002) (Souter J., dissenting) (observing that "strict scrutiny leaves few survivors" because regulations must be "necess[ary]" to protect a "compelling governmental interest," while "intermediate scrutiny" imposes a "comparatively softer" requirement that regulations be "narrowly tailored" to promote a "significant" interest) (citation and internal quotation marks omitted).

[32] U.S. CONST. art. VI, cl. 2.

[33] Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988) (citation omitted); *see also* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (identifying the "the twin aims of the *Erie* rule" as "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

law's source.[34] But for present purposes I will assume that courts are correct in holding that *Erie* requires considering the relative priority of state law and judge-made federal law. The issue then becomes: could defaults help guide that inquiry?

One can imagine three potential starting points for a prioritization inquiry. Federal courts might: (1) by default apply federal law unless *Erie* requires applying state law; (2) by default apply state law unless *Erie* justifies applying federal law; or (3) avoid selecting a default, so that the choice between federal and state law would require an *Erie* analysis in every case.[35]

We can quickly dispense with the third option—no defaults—because it is inefficient. As discussed below, most prioritization questions are easy. This observation suggests that the no-defaults option is wasteful because tediously implementing a multifactor *Erie* test would not alter the outcome in most cases. Courts can simply assume that either federal or state law applies (depending on which default they adopt) and depart from that assumption with minimal effort when circumstances warrant. In these easy cases, either default should produce the same result.

The two remaining options—defaulting to federal or state law—should in theory reach the same result if the adversarial system functions as intended. If the parties are diligent, they will notice subtle prioritization problems, bring them to the court's attention, and raise all relevant arguments favoring both state and federal law. Wise judges will then carefully parse competing arguments and reach the optimal result. Either state or federal law should always have a stronger claim of authority over a particular issue on which they conflict, and that priority will become apparent through the application of *Erie*. Even if arguments for state and federal law seem

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[34] *See* Erbsen, *Pedigree*, *supra* note 9.

[35] The parties could attempt to modify the prioritization default by including a choice of law clause in a contract. But that clause would not obviate analysis of which law governed enforcement of the contract, which in turn requires a prioritization inquiry. For example, suppose that a federal court adjudicating a diversity case in Texas must decide whether state or federal law governs a particular procedural issue. The court initially concludes that federal law has priority. Now further suppose that the court learns of a contract between the parties specifying that California law will govern the procedural issue. The contract would seem to resolve the prioritization inquiry by selecting state law over federal law and then by selecting California law over Texas law. However, the contract's choice of law clause would be relevant only if it is enforceable. State law ordinarily would govern enforcement of the clause. *See* MidAmerica Constr. Mgmt. v. MasTec N. Am., Inc., 436 F.3d 1257, 1260 (10th Cir. 2006) ("[W]here subject matter jurisdiction is based on diversity of citizenship, federal courts must look to the forum state's choice-of-law rules to determine the effect of a contractual choice-of-law clause."). However, if the clause conflicts with an otherwise applicable federal rule, there would still be a question about whether the federal rule preempts private agreements. If the federal rule would be preemptive then the contract would not override the court's initial determination that federal law has priority. For a discussion of when and how parties can contract around otherwise applicable federal procedural rules, see Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

equally balanced, such that allocating the burden of persuasion might matter, a "tie" is impossible because the Supremacy Clause presumably tips the scale in favor of federal law.[36]

This faith (again, in theory) that judges can successfully parse difficult prioritization problems does not mean that the *Erie* inquiry is objective—it clearly is not.[37] Instead, the point is that in idealized conditions a judge should reach the same result regardless of the starting default because the default becomes irrelevant once all arguments are on the table and fully understood.

In practice, however, defaults are extremely important. First, one cannot assume that courts will notice latent prioritization issues. Choice of law inhabits a foreboding corner of the legal landscape that many judges and lawyers seem to dread and often overlook, leading them to miss subtle *Erie* problems.[38] In these tricky cases where courts overlook conflicts of law, the default law becomes the operative law without any scrutiny. Second, even when courts notice prioritization issues, the difficulty of applying *Erie* to close cases creates a risk of weak or misguided reasoning.[39] Difficult cases also create a risk that a default will be sticky—the default law will apply by inertia absent a compelling reason to apply a different law. To the extent that default rules might channel this reasoning in a specific direction, choosing the appropriate default is important. But which default is superior?

Choosing an appropriate prioritization default requires favoring one kind of troubling error over another. Competing default rules would skew the risk of error toward incorrectly applying federal law or incorrectly applying state law. Both types of error are troubling. Federal law should not exceed the limited bounds of its authority, but neither should state law in-

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[36] The Supremacy Clause arguably does more than resolve ties; it creates a definitive rule prioritizing federal law, further justifying a default favoring federal law. *See* Erbsen, *Pedigree*, *supra* note 9. In some cases, federal and state law might be identical. This lack of conflict obviates choosing between them absent a reason to care, such as a need to determine if a claim "arises under" federal law for jurisdictional purposes. 28 U.S.C. § 1331 (2012); *cf.* Graves v. BP Am., Inc., 568 F.3d 221, 223 (5th Cir. 2009) ("This [diversity] case does not require us to decide the choice-of-law issue because . . . federal and state law dovetail to provide the same outcome.").

[37] The choice of law inquiry under *Erie* is less subjective than under the prior regime, which permitted courts to search far and wide for suitable governing rules. *See* Swift v. Tyson, 41 U.S. 1, 19 (1842) ("The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord MANSFIELD . . . to be in a great measure, not the law of a single country only, but of the commercial world."). But modern doctrine still leaves room for judicial discretion due to its imprecise methods for interpreting and characterizing federal and state rules.

[38] *See, e.g.*, Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TULANE L. REV. 1087, 1108 (1989) (noting that "[r]emarkably," some district courts have "failed even to recognize" recurring *Erie* problems regarding enforcement of forum selection clauses). A similar phenomenon is evident on law school exams, where subtly disguised *Erie* issues have been the bane of countless students.

[39] *See, e.g.*, EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 3 (2000) (observing that *Erie* has been "widely misunderstood").

fringe that authority.[40] The key question is: which error is preferable in the context of *Erie*'s prioritization inquiry? Three factors suggest that a default favoring federal law is preferable.

First, federal courts in diversity cases spend the vast majority of their time applying federal law, especially as a case progresses.[41] The daily grind of motions and fact development primarily implicates federal rules governing practice, such as pleading, discovery, evidence, and case management.[42] Defaulting to state law in diversity cases would therefore be inefficient given the ubiquity of federal law in federal court.

Second, a default favoring federal law is unlikely to suppress important state interests because state laws that should apply in federal court under *Erie* are likely to stand out. These laws typically create and limit rights to sue, remedies, and defenses, so at least one of the parties will have an incentive to bring them to the court's attention. In most cases, the prioritization issue will be easy, as in *Erie* itself, where state law obviously determined a railroad's duty of care once the Court rejected the existence of "federal general common law."[43] In rare cases where the prioritization issue is difficult, a default to federal law still provides ample opportunity for the parties to convince a judge that state law should apply.[44]

Third, to the extent that a default favoring federal law tips the scales against state law, that result is normatively defensible. As the prior discussion indicates, the scale tipping occurs in only two scenarios: where the parties and court do not notice that state law should apply or when competing arguments favoring state law and federal law are difficult to resolve. In both scenarios, a rebuttable preference for federal law is defensible.

To see why a federal law default is normatively sound, recall the distinction between *Erie*'s creation, interpretation, and prioritization components. The creation component prevents federal courts from inventing federal rules absent a source of constitutional, legislative, or inherent authority.

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40 *Compare* U.S. CONST. amend. X (reserving power to states), *with* U.S. CONST. art. VI, cl. 2 (federal law is "supreme").

41 The calculus is different early in a case, when a motion to dismiss for failure to state a claim might rely primarily on questions of state law. *See* FED. R. CIV. P. 12(b)(6). However, the relevance of state law is likely to be obvious when adjudicating most motions to dismiss, such that a default favoring federal law will not skew a court's choice of law decision from the correct result. *See infra* text accompanying note 43.

42 *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (describing a "shift in the focus of federal litigation to the pretrial phase").

43 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). State law thus had priority in the sense that there was no potentially applicable federal law capable of displacing state law. In *Erie*, the only question on remand concerned the content of state law. *See id.* at 80.

44 Courts would need a standard for evaluating competing arguments about which law has priority. Determining the content of that standard is beyond the scope of this article, which focuses on whether the proponent of state or federal law should have the burden of persuasion under whatever standard controls the prioritization inquiry.

The interpretation component prevents federal courts from applying federal rules to issues beyond their scope. But the prioritization component assumes that a given issue is within the scope of a valid federal rule. So the only remaining inquiries are whether the issue is also within the scope of a valid state rule and, if so, which rule has priority. In effect, the question is whether the state rule displaces the otherwise applicable federal rule.[45]

Framing the prioritization problem in terms of displacing a valid and otherwise applicable federal rule raises a new question: if nobody would otherwise notice that state law might apply, or the arguments favoring state law are roughly equal to the arguments favoring federal law, why should federal courts default to state law? The state's interests presumably are not dispositive—otherwise the arguments for applying state law would be more apparent and stronger.[46] Federal interests favoring federal law presumably are strong because of federal judges' expertise in applying federal law and the general desire for uniform procedural rules in federal court (even if judicial discretion renders uniformity elusive in practice).[47] Comity concerns

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[45] Blurring *Erie*'s distinct components can lead to confusion. For example, Donald Doernberg has contended, contrary to my analysis below, that the default rule in *Erie* cases implicating "vertical choice-of-law" should be that "state law applies." Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611, 645 (2007) [hereinafter Doernberg, *Unseen Track*]; *see also* Donald L. Doernberg, *"The Tempest,"* 44 AKRON L. REV. 1147, 1151 n.26 (2011) ("viewing the applicability of state law as the default rule makes a good beginning point for accurate *Erie* analysis"). He supports that conclusion by citing the limited scope of federal power under Article I, which determines what subjects Congress may regulate but does not directly control interpretation of a valid statute's scope. *See* Doernberg, *Unseen Track*, *supra*, at 645. Doernberg therefore seems to be proposing a default rule addressing the *creation* of federal law rather than *prioritization* of an otherwise valid federal law. If so, then he and I may agree on the optimal content of default rules despite the apparent disagreement. *See infra* Part II.B (discussing my proposed default for *Erie*'s creation component).

[46] Even when *Erie* issues are not apparent, altering the default rule to favor state law might not make the application of state law more likely. For example, Adam Steinman has suggested that state law should supply the summary judgment standard for diversity cases. *See* 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, 301–02 (2008). If this argument is correct, then courts are routinely overlooking an important *Erie* issue. Yet courts presumably would overlook this issue even if the default rule favored state law because the prevailing view of *Erie* posits that the Federal Rules of Civil Procedure should apply in diversity cases. *See* Hanna v. Plumer, 380 U.S. 460, 470 (1965). The problem therefore is not that a default rule is obscuring a potential *Erie* issue, but rather that current accounts of *Erie* do not deem the issue to be difficult. A new approach to summary judgment in diversity cases would therefore require a new understanding of *Erie*'s requirements rather than a new default. *Cf.* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1413–14 (1997) (noting that *Erie* generates assumptions about federal and state power that persist until "contestation within a certain discourse undermines the authority of an earlier practice or claim").

[47] *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929 (1989) ("Proponents of the Enabling Act and of the original Federal Rules sold both on the promise that uniform federal procedure would be superior to federal procedure under the Conformity Act of 1872, which yielded a melange of state and federal law. . . . [However,] it would be hard to call federal procedure uniform today. The Federal Rules may appear

might in theory justify deferring to state law.[48] But those concerns seem misplaced in diversity cases because the mistrust of state courts partially underlying the constitutional grant of diversity jurisdiction is the antithesis of comity.[49] Indeed, this mistrust might justify favoring federal law in close cases if state law would undermine national interests.[50]

The three arguments above suggest that the optimal default rule for *Erie*'s prioritization component is that federal courts should apply federal law—assuming a valid and applicable federal law exists—unless analysis under *Erie* requires applying state law.[51] When there is a good reason to think that state law should displace federal law, the default can be overcome. In this way, courts devote time to *Erie*'s prioritization inquiry only when the court or a party identifies a choice of law problem that requires further scrutiny.[52]

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uniform, but many of them merely empower district judges to make ad hoc decisions."); *cf.* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (noting in the context of upholding jurisdiction over federal questions embedded in state claims the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues").

48 Comity is typically a rationale for federal judicial deference to state interests when the question is whether a federal court should defer to or abstain in favor of a state proceeding, rather than whether it should apply state law. *See* Michael L. Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981). However, before *Erie*, the Court sometimes invoked comity as a justification for deferring to decisions by state courts when important federal interests were not at stake. *See, e.g.*, Mut. Life Ins. Co. v. Johnson, 293 U.S. 335, 339 (1934) ("The summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance.").

49 *See* 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3601 (3d ed. 2009) ("It is unclear what prompted the concern about the inadequacy of or bias in the state courts and whether it was justified."). For a discussion of whether *Erie* issues should be treated differently depending on whether they arise through supplemental rather than diversity jurisdiction, see Erbsen, *Four Functions*, *supra* note 6.

50 *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1855 (2006) (criticizing *Klaxon*'s preference for forum rather than federal choice of law rules because it "weakens one of diversity jurisdiction's core purposes in protecting out-of-state litigants from in-state bias"); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 625 n.38 (1999) (noting possibility that the Diversity Clause may originally have been understood to provide not just "a neutral forum, but also neutral laws").

51 The Rules of Decision Act, 28 U.S.C. § 1652 (2012), does not create a contrary default. *See* Erbsen, *Four Functions*, *supra* note 6 (discussing the Act's opaque and apparently circular text).

52 State courts take a similar approach when adjudicating interstate cases by assuming that local law applies absent a reason to consider rules from other jurisdictions. *See, e.g.*, Gleim v. Roberts, 919 N.E.2d 367, 370–71 (Ill. App. Ct. 2009) ("In the absence of a conflict in the relevant laws of the two states, the law of the forum state applies. . . . As the parties seeking a choice-of-law declaration, it was the defendants' burden to present evidence establishing that such a declaration was necessary."); Akro-Plastics v. Drake Indus., 685 N.E.2d 246, 248 (Ohio Ct. App. 1996) ("Local law applies if the party alleging that the law of a foreign jurisdiction applies fails to demonstrate a conflict between local law and the law of that jurisdiction.").

A default rule favoring federal law is counterintuitive because diversity cases by definition generally do not involve claims that arise under federal law and thus courts must usually apply some state law.[53] But the applicability of these state laws will often be obvious. The default affects outcomes only where prioritization issues are close or hidden. In those cases, defaulting to federal law is efficient and promotes federal interests without undermining substantial state interests.

Defaulting to federal law would be more efficient than current practice.[54] Current jurisprudence implementing *Erie* does not use the terminology of defaults. However, a common judicial mantra is that federal courts adjudicating diversity or supplemental claims "apply state substantive law and federal procedural law."[55] This way of thinking in effect creates two prioritization defaults: one for substantive law and one for procedural law (although in practice current doctrine also considers whether a law is made by judges or by Congress, independent of whether the law is substantive or procedural).[56] The problem is that drawing a line between substance and procedure is "notoriously shadowy."[57] Default rules are alluring in part because they provide an opportunity to avoid unnecessary complexity, so a default framed in terms of an indeterminate line is counterproductive.

Accordingly, as counterintuitive as it may seem, federal courts adjudicating claims arising under state law should apply a default rule favoring the prioritization of federal law. The default can be easily overcome when state law obviously applies and can be overcome with greater effort when the court or a party identifies a good reason to believe that state law should govern a particular issue. The next question for a court to consider would be: what constitutes a good reason for preferring state law in close cases? I consider that question in other work, where I contend that courts should focus on the scope of federal rules to determine whether they displace inconsistent state rules.[58]

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[53] Diversity claims can arise under federal law in rare instances when federal question jurisdiction is unavailable. *See, e.g.*, Gottlieb v. Carnival Corp., 436 F.3d 335, 336 (2d Cir. 2006) (Sotomayor, J.) (holding that a federal court could exercise diversity jurisdiction over a claim under the federal Telephone Consumer Protection Act, which divests federal question jurisdiction); *see generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–98 (1997) (discussing historical role of diversity jurisdiction as a mechanism for litigating federal questions in federal court).

[54] I discuss current prioritization rules more thoroughly in Erbsen, *Pedigree*, *supra* note 9.

[55] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Hanna v. Plumer, 380 U.S. 460, 465 (1965).

[56] *See* Erbsen, *Pedigree*, *supra* note 9.

[57] Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 461–62 (1997) ("many legitimate rules of court have substantive consequences, just as much substantive law has procedural implications") (footnotes omitted).

[58] *See* Erbsen, *Pedigree*, *supra* note 9.

B. *Creation: The Proponent of Federal Common Law Must Justify its Application*

Erie analysis requires a different default when a court addresses the creation of federal law rather than its prioritization. For the sake of brevity, I will focus here on the creation of federal common law by federal courts. Similar analysis also applies to the creation and judicial review of statutes and treaties, but with additional complexities.[59]

A federal court's inquiry into whether it can create federal common law has two potential starting points: (1) federal courts cannot create federal common law absent an affirmative justification; or (2) federal courts can create federal common law absent a challenge to their lawmaking authority.[60] As with the prioritization inquiry, the choice between competing creation defaults is likely to affect outcomes only in difficult cases where the scope of federal judicial authority might be either overlooked or closely contested.

In the context of thinking about defaults, the creation and prioritization inquiries differ in three material respects. First, the creation inquiry cannot rely on the prioritization inquiry's assumption that a potentially applicable federal rule exists because the creation inquiry is the source of that later assumption. *Erie*'s creation component requires lawmakers to consider whether they possess authority to create particular federal rules. Only if such authority is present can the prioritization inquiry later assume that a valid federal law is available to govern a disputed issue.

Second, because the creation inquiry requires courts to justify the existence rather than the priority of federal law, it raises more difficult questions about federalism and separation of powers. In the creation context, *Erie* considers the scope of federal authority in a system of divided sovereignty and the scope of judicial authority in a system of separated powers. These constraints make *Erie* an obstacle to federal and judicial action, such

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[59] *See* Erbsen, *Four Functions*, *supra* note 6. There is no judicial remedy for a violation of *Erie*'s limits on Congress's ability to create federal law until after a plaintiff raises a justiciable challenge, so in practice the application of *Erie* to legislation occurs in the context of judicial review rather than during the lawmaking process. Nevertheless, legislators take an oath that arguably requires considering constitutional limits on their authority—including any limits derived from *Erie* if those limits have a constitutional foundation—even without judicial intervention. *See* U.S. CONST. art. VI, cl. 3 ("Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution."); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1697, 1697 n.20 (2011) (noting debate between "departmentalists" and "judicial supremacists" regarding the Supreme Court's "power to bind the political braches").

[60] This section focuses on the creation of "federal common law" in the traditional sense of laws that are "supreme" and under which federal question suits may "arise." U.S. CONST. arts. III, § 2, VI; *see also* Erbsen, *Four Functions*, *supra* note 6 (discussing potential justifications for federal common law). This sort of lawmaking is distinct from pre-*Erie* efforts by federal courts to fashion binding rules of "general" law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–76 (1938).

that the creation of federal law and federal common law require an initial defense.[61] Although the Supreme Court has not framed this need for a defense in terms of defaults, it has counseled courts to consider the justification for judicial lawmaking before creating federal common law.[62] A similar sentiment applies to legislation, albeit with greater deference to the choices of a politically accountable branch of government.[63]

Third, a creation default cannot fully share a prioritization default's concern about efficiency. The prioritization inquiry focuses in part on resolving thousands of disputes in an adversarial system in which federal law is available and difficult conflicts with state law should stand out. A prioritization default can therefore aspire to efficiency even as it considers other values in close cases. Yet favoring the creation of federal law simply to promote efficient decisionmaking would be normatively unsound in light of the federalism and separation of powers concerns limiting the scope of federal law. The possibility that a federal common law or statutory rule may resolve a regulatory problem more efficiently than would a state rule might be a factor in determining whether a federal rule is available, but it cannot be the only factor.[64]

The foregoing distinctions suggest that when federal courts consider whether they may create common law to govern a particular problem, the default should be that judicial lawmaking is inappropriate absent considera-

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[61] *Erie* may also serve other goals, but at a minimum it requires thinking carefully about the allocation of power between different levels of government and different government institutions. *See generally* Erbsen, *Four Functions*, *supra* note 6.

[62] *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (noting that federal common law is an exception to *Erie*'s "general[]" limit on judicial lawmaking authority and emphasizing the need for restraint in crafting common law rules); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (stating that "the existence of Congressional authority under Art. I" does not "mean that federal courts are free to develop a common law to govern those areas until Congress acts"); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) (rejecting existence of a federal common law crime because "judicial power . . . is a constituent part" of "concessions from the several states—whatever is not expressly given to the [federal government], the latter expressly reserve").

[63] *See* Nat'l Fed'n of Ind. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.").

[64] *See* INS v. Chadha, 462 U.S. 919, 944 (1983) ("the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution"); *id.* at 959 ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made . . ."); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954) ("[T]he mere complexity of the legal system for purposes of comprehensive summary is seen to be irrelevant. For legal and governmental systems are not designed for simple ease of nutshell description any more than for ease of central command. The systems are to be judged from the point of view neither of officials nor of expositors but from that of the people whose activities they are supposed to facilitate.").

tion of the principles (whatever they may be)[65] underlying *Erie*'s limits on federal judicial power. This assumption that federal courts should not create federal law without an affirmative justification enforces a normative constraint on federal judicial power by allocating the burden of persuasion to the proponent of federal law. In practice, this burden will be easy to carry when judicial power rests on settled precedent governing established enclaves of federal common law. But closer analysis will be necessary when addressing assertions of judicial authority in novel contexts or considering extensions of settled authority past established boundaries. Federal common law may still be appropriate in these new contexts,[66] but its propriety cannot be assumed.[67]

The proposed default is consistent with current jurisprudence counseling courts to be cautious when creating or extending federal common law.[68] Introducing the terminology of defaults ties the creation problem into *Erie*'s other components and highlights how courts must consider who has the burden of persuasion, what counts as a persuasive argument, and the weight of each argument.

C. *Adoption: Replacing* Klaxon*'s Irrebuttable Requirement for State Choice of Law Rules with a Rebuttable Default that Permits Federal Choice of Law Rules in Appropriate Circumstances*

Erie's adoption component currently relies on an essentially irrebuttable rule that might benefit from conversion into a rebuttable default. The adoption inquiry proceeds from two related premises. First, a court with jurisdiction needs to find law from an appropriate source. Second, all law comes from either a federal source or a nonfederal source.[69] When *Erie*'s three other components conclude that federal law either does not exist or cannot apply, the adoption component considers which nonfederal source fills the void. Historically, federal courts often relied on "gen-

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65 *See infra* note 101 (discussing how uncertainty about *Erie*'s foundations complicates its implementation).

66 *See, e.g.*, Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 555–60 (2008) (discussing the role of federal common law in regulating interstate relationships).

67 This section considered how courts should decide whether they can create federal common law. If federal common law is available, courts would then need to determine the optimal content of federal common law rules. A default rule might be helpful in this second creation context. *See infra* text accompanying notes 81–84 (discussing how courts decide whether to create uniform federal common law rules in lieu of incorporating state law); *cf.* Hart, *supra* note 64, at 529 (addressing the related problem of whether courts should fill gaps in federal statutes by "adopt[ing]" state law).

68 *See supra* note 62.

69 For a more detailed account of the adoption inquiry's assumptions, see Erbsen, *Four Functions*, *supra* note 6.

eral law" when federal law was unavailable.[70] *Erie* foreclosed that option and therefore required developing a mechanism for choosing an authoritative nonfederal law.[71]

The *Klaxon* rule embodies the modern alternative to reflexively invoking general law by instead requiring federal courts to invoke the choice of law doctrine of the state in which the federal action is pending.[72] Local choice of law rules in turn might select law from a particular state, foreign law, international law, or even general law.[73] The fact that applying the forum state's law would make little sense—either because the forum state has a tenuous connection to the dispute or would select law from a seemingly disinterested extrinsic source—is not a basis for circumventing *Klaxon*.[74]

I have criticized *Klaxon* elsewhere,[75] as have many other scholars.[76] There is no need to rehash these critiques here. It suffices to observe that the *Klaxon* rule rests on a rickety foundation for at least two reasons: it may be imprudent as a matter of policy and unjustified as a matter of theory.

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70 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938); *see also* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842) (distinguishing questions "dependent upon local statutes or local usages of a fixed and permanent operation" from "questions of a more general nature," such as "questions of general commercial law").

71 *See Erie*, 304 U.S. at 75–79. For a discussion of general law's modern relevance, see Erbsen, *Four Functions*, *supra* note 6; Anthony J. Bellia, Jr. & Bradford Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013).

72 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941). The rule has only narrow exceptions and otherwise "appears completely immune from attack." 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4506 (2d ed. 2010).

73 An interesting question is whether *Klaxon* would require respecting a state choice of law rule that selected religious law as a rule of decision. *Cf.* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 131 (1952) (Jackson, J., dissenting) (suggesting that *Erie* and *Klaxon* might require a federal court to respect a state's choice "allowing ecclesiastical law to govern" a particular dispute). For a discussion of how law that does not originate from state actors challenges conventional choice of law methodologies, see Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005).

74 *See* Ferens v. John Deere Co., 494 U.S. 516 (1990) (applying Mississippi's statute of limitations to a claim by a Pennsylvania resident against a Delaware corporation based on an injury in Pennsylvania; the plaintiff had sued in Mississippi to avoid Pennsylvania's statute of limitations and then obtained a transfer to Pennsylvania); Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4 (1975) ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.").

75 *See* Erbsen, *Four Functions*, *supra* note 6.

76 *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 690, 693 (1984) ("We recognize that *Klaxon* has been widely criticized and that learned scholars have suggested on the basis of policy and possible constitutional grounds that a federal conflicts of law rule should be applied in diversity cases . . . .").

Any new insight into *Klaxon*'s potential weaknesses can therefore be helpful in an ongoing debate about its viability.

For present purposes, *Klaxon* is interesting because it avoids considering default rules despite their potential utility. The adoption inquiry at first glance appears unable to rely on a default because privileging a single lawmaker would be impossible. One cannot plausibly contend, for example, that North Dakota law presumptively governs every diversity dispute for which federal law is not available. But even if courts cannot default to a particular lawmaker, they can default to a methodology for selecting the appropriate source of law. Selecting an appropriate default (and the circumstances under which it can be rebutted) is important because competing methodologies implicate different values and produce different outcomes.

If the Court were writing on a clean slate, the adoption inquiry could take one of three basic forms: it could promote horizontal uniformity, vertical uniformity, or a hybrid of both. First, federal courts could rely on nationally uniform criteria to select nonfederal governing law. For example, courts might develop a uniquely federal choice of law standard or borrow an existing standard, such as the Second Restatement's multifactored test.[77] Either way, the answer to the question "which nonfederal law applies?" would be identical in every federal district for any given set of facts. The rule would thus be horizontally uniform—i.e., uniform across states, setting aside variations in how individual judges exercise discretion. Second, federal courts could apply a vertically uniform rule, meaning that the choice of law inquiry in federal court would mirror the inquiry in a local state court and thus be uniform within the state. That is the approach in *Klaxon*.[78] Third, a hybrid approach would generally seek vertical uniformity, but would contain criteria for switching to a nationally uniform standard in appropriate circumstances. For example, the forum state's choice of law rules might yield to federal rules in cases implicating strong federal interests in regulating disputes involving foreign parties or foreign conduct.[79]

The hybrid approach is a textbook example of a default rule. It posits that a particular outcome is generally preferable (vertical uniformity), recognizes that an alternative outcome (horizontal uniformity) might be appropriate in some cases, and thus defaults to the preferred outcome while providing criteria for identifying outlier cases that overcome the default.

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[77] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

[78] Vertical uniformity can be elusive in practice because state and federal courts may not reach the same conclusions when there is no controlling precedent governing a difficult legal question. *Cf.* Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (stating that a diversity court must "determine what the New York courts would think the California courts would think on an issue about which neither has thought").

[79] *See, e.g.*, Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. L. REV. 1531, 1574 (2012) (contending that in diversity cases with an international component "the role of the federal court should be to critically evaluate whether the application of a state's conflict-of-laws rule supports federal objectives").

One can quibble over whether the default should be sticky or relatively easy to overcome. But the alluring benefits of both vertical and horizontal uniformity suggest that a rule entirely abandoning one in favor of the other might be less desirable than a nuanced hybrid relying on a rebuttable default.

A striking feature of *Klaxon* is that it endorses vertical uniformity rather than horizontal uniformity or a hybrid/default approach with virtually no analysis. The *Klaxon* Court seemed to think that its holding followed inexorably from *Erie* when in fact *Erie* granted more discretion than *Klaxon* acknowledged.[80] *Klaxon* therefore implicitly rejected the hybrid/default approach without carefully considering any of the questions one might expect a court to ask before selecting one of three competing approaches to choice of law. Examples of potentially fruitful inquiries that *Klaxon* skirted include: whether states have a legitimate interest in having federal courts mimic their choice of law standards; whether there are countervailing federal interests; whether litigants (especially repeat players who participate in a national market) have relevant interests that should shape the choice of law inquiry; whether judicially administrable criteria are available for implementing a hybrid rule; and whether a materially significant difference in outcomes would occur with sufficient frequency to justify the effort of creating a hybrid rule rather than adopting a bright-line preference for state law.

Reasonable minds can differ about whether the answers to these questions support or undermine the *Klaxon* rule. But thinking about *Erie*'s adoption inquiry in the context of default rules highlights how *Klaxon* overlooks the possibility of using a rebuttable default rule rather than a fixed rule for the adoption inquiry. That omission is troubling given the utility of defaults in the prioritization, creation, and interpretation components of *Erie* analysis.

Klaxon's blindness to the potential hybrid/default approach contrasts starkly with the Court's approach to a related problem in the creation context involving the uniformity of federal common law rules. Suppose that a court concludes that it may create a federal common law rule to govern a particular problem. The rule can take either of two forms. It can be nationally uniform, such that it has the same content in every state. Or the rule can borrow from state law, such that the content of the rule is a function of a dispute's geographic features (for example, where an accident occurred, where the litigants reside, where the suit was filed, etc.). The recurring need to choose between uniformity and localization raises the possibility of adopting a default to guide judicial discretion. That is exactly what the Court did in *United States v. Kimbell Foods*.[81] The Court's default assump-

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[80] *Klaxon* claims to "extend[]" *Erie* without explaining why *Erie* compels the holding. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941); *see also* Erbsen, *Four Functions*, *supra* note 6.

[81] 440 U.S. 715 (1979).

tion is that incorporating state law into federal common law is generally appropriate, but this default can yield to strong reasons for preferring a uniform national rule.[82]

Klaxon and *Kimbell Foods* seem to address an identical problem inconsistently. In both cases, the Court was creating a federal common law methodology governing choice of law.[83] The two contexts both require considering whether federal common law should be horizontally or vertically uniform. Yet *Kimbell Foods* adopted a hybrid/defaults approach, while *Klaxon* categorically favored incorporating state law. There may be sound reasons for the difference in approaches,[84] but they are not self-evident. The Court has never explained why *Kimbell Foods* used a different approach than *Klaxon*; indeed, the Court has never even cited the two cases in

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82 *See id.* at 728–29 (considering the need for "uniformity," whether state law would "frustrate specific [federal] objectives," and "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law"); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 628 (6th ed. 2009) (characterizing *Kimbell Foods* as creating a "presumption" favoring incorporation of state law); Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 111 (2008) ("in exercising its power to fashion federal common law in discrete areas of federal concern, the courts presumptively define the content of federal law as state law").

83 *See* Erbsen, *Four Functions*, *supra* note 6 (explaining why *Klaxon* is a form of federal common law).

84 For example, perhaps the *Kimbell Foods* context requires greater flexibility because courts must create a wide variety of federal common law rules, while a bright-line approach is more appropriate for the *Klaxon* context to address a single frequently recurring problem (albeit one that arises in many distinct factual circumstances). From this perspective, *Klaxon* would be an issue-specific implementation of *Kimbell Foods* rather than a departure from *Kimbell Foods*. Nevertheless, the fact that *Klaxon*'s preference for national uniformity is irrebuttable in all of the myriad circumstances where federal courts must adopt nonfederal law still seems inconsistent with the more context-sensitive methodology in *Kimbell Foods*.

the same opinion.[85] Commentators likewise have not attempted to reconcile the decisions.[86]

Klaxon's failure to consider the hybrid/defaults option is another crack in its threadbare armor. Further scholarship about *Klaxon* might profitably explore whether a flexible defaults-based approach would be superior to mandatory reliance on forum choice of law rules.[87]

D. *Interpretation: The Need for an "*Erie *Canon" to Determine Whether the Scope of Federal Law Should be Read Broadly or Narrowly to Minimize Conflicts with State Law*

Erie's interpretation component is another vexing source of confusion that would benefit from a default rule. The scope of a federal rule is often the central disputed issue in *Erie* cases,[88] yet the Court has tied itself in

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[85] One case cites to *Klaxon* and *Kimbell Foods* in different opinions without any effort to compare or contrast them. *See* Danforth v. Minnesota, 552 U.S. 264, 290 n.24 (2008) (citing *Kimbell Foods*, 440 U.S. 715); *id.* at 307 n.3 (Roberts, C.J., dissenting) (citing *Klaxon*, 313 U.S. 487). An issue in *Danforth* was whether state courts could rely on state law to give retroactive effect to newly created federal constitutional rights when federal law would not apply the rights retroactively. The Court held that federal courts should not impose a federal common law rule preempting state remedies. *See Danforth*, 552 U.S. at 289–90. In contrast, the dissent argued that federal law governing retroactivity in effect created a choice of law rule barring state courts from applying new law to old cases. *See id.* at 307–10 (Roberts, C.J., dissenting). The majority thus implicitly framed the problem as relating to *Erie*'s creation component—i.e., whether federal law should create an exclusive remedy or leave room for additional state remedies. But the dissent implicitly framed the problem as relating to *Erie*'s interpretation component—i.e., whether the issue of remedies was within the scope of existing federal law governing retroactivity. Closer attention to distinctions between *Erie*'s components would have highlighted how the competing positions differed, which in turn could have suggested additional perspectives for evaluating their merit.

[86] One scholar has noted the relevance of *Kimbell Foods* to the problem of designing a federal common law choice of law rule for "cases raising international issues." Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 508–09 (2002) (observing that the federal rule should conform to *Kimbell Foods* by borrowing state rules absent a "significant conflict with specific federal interests").

[87] For discussion of potential alternatives to *Klaxon* in particular contexts, see Childress, *supra* note 79 at 1573–79 (disputes with international components); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027–34 (2008) (nationwide class actions after the Class Action Fairness Act of 2005).

[88] *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437–39 (2010) (interpreting FED. R. CIV. P. 23); Kermit Roosevelt III, *Choice of Law in Federal Courts, From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 12 (2012) ("The court's task . . . is first to determine the scope of the different sovereigns' laws . . . .").

knots trying to explain how to determine that scope.[89] A default rule could streamline doctrine while advancing *Erie*'s normative goals.

The interpretation inquiry is relevant when federal law purports to address a disputed issue. For example, assume that *Erie*'s creation component validates a particular federal rule. Further assume that *Erie*'s prioritization component deems that federal rule to trump an otherwise applicable state law in the context of a pending case. Those two assumptions do not alone mean that the federal rule will apply in lieu of the state rule. A question remains about whether the federal rule's scope encompasses the disputed issue. If not, then the federal rule is irrelevant; there is no conflict with the otherwise applicable state law. Accordingly, knowing whether a federal rule applies under *Erie* requires interpreting the rule. Regardless of the federal rule's origin—whether from the Constitution, treaty, statute, regulation, procedural code, or federal common law—courts must know what the federal rule means.

Defaults are common when interpreting the scope of legal rules.[90] These defaults—often called canons—help courts determine the meaning of ambiguous texts.[91] Commentators disagree about whether particular defaults are sensible, but there is little doubt that defaults can be a useful analytical tool when carefully crafted and prudently applied.[92]

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[89] *See* Erbsen, *Four Functions*, *supra* note 6 (discussing inconsistent modern precedents interpreting the FRCP).

[90] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY app. B (4th ed. 2007) (categorizing dozens of canons).

[91] I am treating canons as a species of default rules that apply when courts interpret statutes and similar texts. One can imagine a different nomenclature in which default rules are an especially sticky species of canon. *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166, 169 (Richard A. Epstein & Michael S. Greve eds., 2007) ("A default rule . . . is stronger than a canon of interpretation. . . . [It] function[s] like a clear statement rule—a principle that dictates a result unless Congress overrides the outcome with a specified degree of clarity.").

[92] Among the benefits of interpretative defaults (if used wisely) are promoting efficiency by avoiding the need to repeatedly reconsider how to handle recurring sources of ambiguity, minimizing arbitrary decisionmaking by structuring judicial discretion, maximizing the probability that the interpreter reaches a justifiable result, signaling to rulemakers how their work will be understood and thus how it should to be written to convey an intended meaning, articulating norms that might shape the content of rules by encouraging drafters to consider the consequences of textual choices, and linking the interpretative enterprise to broader jurisprudential commitments. A large and rich literature discusses the potential virtues and vices of interpretative defaults. For an introduction to the debate, see EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008) (developing a theory of how defaults might produce optimal outcomes); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (illustrating how the availability of canons and countercanons governing the same issue can invite subjectivity into the interpretative enterprise); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (considering whether Congress rather than the judiciary should create rules governing statutory interpretation);

Although defaults often focus on ambiguities arising from grammar and word choice, they can also be used to enforce normative constraints on the scope of a rulemaker's power within a system that fragments regulatory authority.[93] Examples of such defaults include the constitutional avoidance canon (which reads statutes narrowly to avoid potential constitutional infirmities),[94] the canon favoring a narrow interpretation of judge-made federal rules that might exceed the rulemaking authority delegated in the Rules Enabling Act,[95] and clear statement requirements that skew toward narrow interpretations of federal statutes that might undermine state interests.[96] Defaults even exist to manage conflicts of law in a federal system. For example, courts might interpret a federal rule broadly or narrowly to invite or avoid preemption of potentially inconsistent state rules,[97] and courts might adopt default choice of law rules that Congress can modify in appropriate circumstances.[98] These and similar defaults all function as thumbs on

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Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203 (2011) (assessing interpretative defaults in the context of tension between competing normative preferences animating judicial and legislative actors); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (reviewing distinct interpretative methods); Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1373 (2010) (considering how "structural values" animating the Constitution inform statutory interpretation).

93 *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924 (2013) (distinguishing between "textual" and "substantive" canons).

94 *See, e.g.*, Solid Waste Agency v. U.S. Army Corp. of Eng'rs, 531 U.S. 159, 174 (2001) (interpreting a statute "as written to avoid the significant constitutional and federalism questions raised by" a competing interpretation).

95 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 629 (1997) (holding that Federal Rule of Civil Procedure (FRCP) 23 "must be interpreted with fidelity to the Rules Enabling Act"). For a discussion of whether substantive canons can aid in resolving disputes about the scope of FRCP provisions, see Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. 1067 (2011); 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 (2013).

96 *See, e.g.*, Sossamon v. Texas, 131 S. Ct. 1651, 1661 (2011) (abrogation of state sovereign immunity requires a "clear statement from Congress"); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (discussing rationale for clear statement rules that protect state interests). For a discussion of whether clear statement rules are consistent with specific constitutional clauses and values, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

97 *See* Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 654–55 (2013) (categorizing competing presumptions). Judicial abstention can serve a related coordination function by allocating interpretative authority between state and federal courts when issues implicate both state and federal law. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (holding that a federal court may abstain from deciding a federal constitutional question that a state court's resolution of a state law question would avoid).

98 *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1531 (2007) (contending that Article IV creates "default" constraints on interstate choice of law that Congress can alter); Young, *supra* note 86, at 503 ("The debate about customary international law [in the choice of law context] is generally about default rules. Whatever the usual status of customary

the scale favoring normatively preferred outcomes when other interpretative factors are roughly indeterminate.[99]

Erie's interpretation inquiry may benefit from a default similarly imbued with normative preferences about the optimal interaction between state and federal law. Implementing *Erie*'s interpretation component requires asking whether a federal rule should be read broadly or narrowly to encompass or avoid a disputed issue.[100] In close cases where the rule is susceptible to both interpretations, the norms animating *Erie* might skew the interpretative conclusion. If one believes that *Erie* primarily exists to promote federalism values by limiting federal interference with state law, then one might default to a narrow interpretation. If instead one views *Erie* as primarily concerned with the proper allocation of lawmaking authority between federal institutions, then there is less need to cabin federal laws that have already survived scrutiny under *Erie*'s creation component. Other theories of *Erie*'s normative purposes might further favor skewing interpretation toward a broad or narrow reading.[101]

Identifying an appropriate default—or an "*Erie* canon"—requires considering several questions that are ripe for further scholarship. First, a de-

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norms in the hierarchy of American law, Congress retains the power under Article I to federalize them or, in the exercise of its other powers, to relieve the states of any obligation of compliance.").

[99] Evolution of the Court's normative commitments alters the range of permissible defaults. For example, before *Erie*, federal courts interpreting unsettled state law often adopted a "default" assumption that state law was consistent with "general law" principles. Michael G. Collins, *Before* Lochner – *Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1283 (2000). This default enabled federal judges to create "a uniform but nonfederal body of public law and constitutional law" to constrain state regulatory authority. *Id.* at 1321. *Erie*'s emphasis on the distinction between state, federal, and general law required a new interpretative approach.

[100] A similar need to choose between broad and narrow interpretations arises when federal courts assess the scope of state law. The difference is that the appropriate method for interpreting federal law is clearly a question of federal law, while the appropriate method for interpreting state law might itself be a question of state law. Federal judges applying *Erie* may therefore have more flexibility to skew the interpretation of federal law based on principles drawn from *Erie* than they do when interpreting state law. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as Law and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1906–07 (2011) (advocating a "default rule" requiring that "federal courts should apply state rules of statutory interpretation to state law questions" absent a reason to believe that federal law displaces state interpretative preferences). *But cf.* Campos, *supra* note 16, at 1628–30 (suggesting that federal courts could interpret state law using default rules that encourage states to distinguish substantive and procedural rules; these defaults appear to be federal common law rules for interpreting state statutes).

[101] There is no consensus about what purposes *Erie* serves and which provisions of the Constitution animate the decision. *See, e.g.*, Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1289 (2007) (observing that *Erie*'s "constitutional rationale . . . has remained elusive for almost seventy years"). The optimal default might hinge on which values are relevant in particular contexts. For example, if a strong tradition supports federal uniformity with respect to a particular regulatory field (such as foreign relations) then a default might favor broadly interpreting federal rules in that field. Similarly, in regulatory fields where federal lawmakers were unlikely to have intended to displace state law in diversity cases, defaulting to a narrower interpretation might be appropriate.

fault is sensible only if it furthers an appropriate norm, so courts would need a more precise account of *Erie*'s norms than current jurisprudence provides. Identifying a guiding norm will determine whether courts should err in favor of construing federal statutes broadly or narrowly to embrace or avoid conflict with otherwise applicable state laws. The answer might differ depending on the subject being regulated (e.g., primary conduct or behavior during litigation) and the source of federal law (e.g., treaty, statute, rule or common law). Developing an *Erie* canon would thus entail a more systematic treatment of the interpretative questions that the Supreme Court already considers in its preemption jurisprudence.[102] Second, to the extent that defaults operate as a thumb on the scale favoring a particular outcome, courts must decide how heavy a thumb to wield. Finally, defaults are tools for resolving ambiguity, which raises a question about how courts can determine when a rule's scope is sufficiently ambiguous to justify skewing interpretation toward a broad or narrow reading.[103]

CONCLUSION

Erie will never be easy to understand and implement, but it need not remain the befuddling muddle that it has become. Fragmenting *Erie* into its components and identifying defaults to guide each distinct inquiry can help to refine choice of law analysis and highlight relevant norms. The initial sketch of default rules in this article provides a foundation and blueprint for further scholarship exploring when federal courts may apply federal law and how they select alternatives.

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[102] *See* Gluck & Bressman, *supra* note 93, at 942 (discussing "federalism-enforcing canons," including "clear statement rules" and the "presumption against preemption"). For recent efforts to consider how *Erie* might influence interpretative canons in particular contexts, see Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013) (treating canons as a form of federal common law and considering how *Erie* limits their creation and application); Thomas, *supra* note 95 (proposing rules for interpreting FRCP provisions that might conflict with state law).

[103] *See* Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (quipping that "ambiguity is apparently in the eye of the beholder").