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Erie's Four Functions: Reframing Choice of Law in Federal Courts

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ERIE'S FOUR FUNCTIONS: REFRAMING CHOICE OF LAW IN FEDERAL COURTS

*Allan Erbsen**

ABSTRACT

This Article seeks to mitigate decades of confusion about the Erie doctrine's purposes, justifications, and content. The Article shows that "Erie" is a misleading label encompassing four distinct components. Jumbling these components under a single heading obscures their individual nuances. Analyzing each component separately helps to clarify questions and values that should animate judicial analysis. The Article thus reconceptualizes the Erie doctrine, offers a more precise account of how Erie operates, and provides a framework for rethinking several foundational aspects of Erie jurisprudence.

2013 marks Erie's seventy-fifth anniversary. The years have not been kind to Erie and its progeny. Decades of jurisprudence have produced as much consternation as enlightenment. Successive generations of students and lawyers have struggled to understand an ever-expanding constellation of opaque precedents. Even mentioning the word "Erie" can invoke feelings of dread. That reaction is unfortunate because the issues that Erie confronts are vitally important and endlessly fascinating. Erie addresses the relationship between governments in a federal system, the division of powers within governments, and the essential elements of the rule of law. So how did a doctrine this central to the constitutional order become a morass of often inscrutable decisions?

Confusion arises in part because what courts and commentators label "the Erie doctrine" comprises four distinct sets of inquiries serving four dis-

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tinct functions. Erie governs: (1) the creation of federal law; (2) the interpretation of its scope; (3) the prioritization of federal law relative to state law; and (4) the adoption of non-federal law when federal law is inapplicable. These four inquiries collectively help courts make three kinds of decisions when analyzing choice of law. Courts must determine: (1) which government is an authoritative source of law for a particular dispute; (2) which institution within that government is authoritative; and (3) which rule that institution would endorse. Bundling these distinct functions and choices into a single expansive “Erie” doctrine shrouds decisionmaking in a haze of generalities. Fragmenting Erie into its components highlights how different concerns and criteria are relevant in different contexts, which in turn can help resolve a wide variety of theoretical and practical problems.

The Article provides new insights into several recurring doctrinal puzzles. For example, it considers how choice of law rules in federal court are a form of federal common law and whether Klaxon is an appropriate federal common law rule, which types of state institutions federal diversity courts should emulate and thus whether federal courts should attempt to predict the decisions of a state’s highest court, the extent to which federal courts can create common law that incorporates general law (including customary international law), what default rules should guide interpretation of federal laws that might conflict with state laws, and the distinction between statutory and common law under the Supremacy Clause and Hanna’s “twin aims” test.

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INTRODUCTION

The Supreme Court's decision in *Erie Railroad Co. v. Tompkins*¹ is far more famous and influential than it is clear and informative. Although more than 16,000 judicial decisions and 5,700 law review articles have cited *Erie*,² the opinion provides thin support for its reasoning and little guidance about its implications.

Weaknesses in the opinion have become more troubling as the word "*Erie*" has evolved from a case name into a doctrinal label. A widely accepted rule emerging from *Erie* is that "[t]here is no federal general common law."³ This emphatic and enigmatic departure from

1 304 U.S. 64 (1938).

2 These figures arose from a search for "*Erie* /5 *Tompkins*" in Westlaw's ALL-CASES and JLR databases on October 1, 2013. (The search for cases must be done for two sets of years to avoid the 10,000 opinion cap on search results.)

3 *Erie*, 304 U.S. at 78. Other familiar statements in *Erie* are less widely accepted, although modern readers must be sensitive to jurisprudential changes over the intervening decades. For example, Justice Brandeis obliquely suggested that even Congress might be powerless to regulate conduct along the defendant railroad's track. *See id.* "Although Congress [at the time] very likely did have power to make rules for right of ways near railroad tracks when the railroad traffic on those tracks crossed state lines (as was the case in *Erie*), Justice Brandeis's assumption that large areas of

precedent was sufficient to resolve the specific dispute before the Court.⁴ But subsequent cases have presented myriad permutations on *Erie's* facts that the holding did not address. These cases have appropriated *Erie* as a malleable label encompassing concepts that extend far beyond *Erie's* narrow context. As this “*Erie* doctrine” has evolved, it has become increasingly more complex and progressively less coherent. Courts and commentators agree that the *Erie* decision and the ensuing doctrine are often inscrutable,⁵ but disagree about why, when, and how.

Ambiguity has arisen in part because *Erie's* imprecision and importance have combined to transform the opinion into a mirror that reflects the varying interests of its readers. To readers concerned about federalism, *Erie* becomes a case about the allocation of power between the national and state governments. To readers concerned about separation of powers, *Erie* becomes a case about the proper role of courts in the process of making law. To readers concerned about the nature of legal authority, *Erie* becomes a case about the origins of legal rules and proper methods for ascertaining their content. There is enough grist in *Erie* to support each of these perspectives and enough mystery to preclude endorsing any one of them over the others.

The decision's amenability to multiple interpretations has led commentators to inflate *Erie* into an almost mystic emblem encompassing multiple aspects of lawmaking in a federal system.⁶ The “*Erie*” label tends to obscure more than it clarifies as courts and commentators try to delve through layers of gloss in an effort to resolve specific problems.

state tort law remained outside the regulatory province of the federal government was probably accurate in 1938.” G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 809 (2006).

4 See *infra* Section I.C (discussing *Erie's* facts).

5 See, e.g., Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 922 (2013) (“From the standpoint of technical, lawyerly craftsmanship, Justice Brandeis’s opinion has many vices.”); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2011) (elaborating on the article’s title); Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 878 (2011) (“[W]ith nearly every case, the Court seems to correct course or careen in a different direction.”).

6 Rhetoric about *Erie* occasionally veers toward religious imagery. See Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent: II*, 40 TEX. L. REV. 619, 635 (1962) (contending that *Erie* “has continued to gain stature until it is practically a religion” whose adherents squash “heresy”); Philip B. Kurland, Book Review, 67 HARV. L. REV. 906, 912 (1954) (referring to the “anti-*Erie* cult”).

A better approach is to puncture *Erie's* mystique by recognizing that the *Erie* label encompasses several doctrines that are best understood separately. Isolating each subsidiary doctrine eliminates distractions, highlights salient questions, and helps illuminate new ways of thinking about recurring puzzles that have befuddled courts for decades.

Erie's seventy-fifth anniversary is an opportune moment to reassess the ensuing doctrine's basic premises and framework. The key to understanding how the *Erie* doctrine should operate is to recognize why it exists; doctrinal form follows doctrinal function. This Article therefore approaches *Erie* from an atypical direction. Rather than starting with a specific dispute and looking backward to *Erie* for guidance, I start by considering the kind of guidance that is necessary in particular contexts. This approach identifies the role that the *Erie* doctrine is attempting to play, which in turn allows for a refined inquiry into how it can best fill that role in particular contexts.

Despite its imprecision, the *Erie* doctrine serves an essential function by governing the allocation of regulatory authority in a federal system. The Constitution divides power among the federal and state governments and between the federal legislative, executive, and judicial branches. States likewise allocate power among institutions with varying degrees of authority to create and interpret state law. The abundance of empowered lawmakers inevitably leads to conflicting claims of regulatory authority. Mechanisms are necessary to resolve these conflicts by determining which governments and which institutions are authorized to supply binding rules in particular circumstances. *Erie* is one such mechanism. If the *Erie* doctrine did not exist, the Supreme Court would have to invent something like it. If the doctrine is dysfunctional, the Court should improve it.

The Article proceeds in four steps. Part I concludes that what is commonly known as the "*Erie* doctrine" is really a composite of four doctrines governing four distinct phenomena: *creation* of federal law, *interpretation* of its scope, its *prioritization* relative to state law, and the *adoption* of non-federal law when federal law is inapplicable. These four doctrines collectively help courts make three kinds of choices, rather than a single amorphous choice of "law." Courts must choose an authoritative government, an authoritative institution within that government, and a rule that the institution would endorse. Part I also situates *Erie* in a broader context by analyzing how federalism and separation of powers complicate choice of law and by identifying basic "rule of law" values that animate choice of the law in the federal system.

Fragmenting *Erie* into its components and carefully parsing the choice of law inquiry demystifies current doctrine by allowing for a more precise account of the issues confronting courts in particular cases. Parts II and III illustrate the utility of this precision. Part II considers whether different values might animate *Erie*'s distinct components and guide courts confronting seemingly technical choice of law questions. Part III then analyzes seven doctrinal puzzles that a nuanced account of *Erie* helps to reveal and frame. For example, it addresses when federal courts can rely on general law, whether federal courts must follow the choice of law rules of the state in which they sit, and how federal courts should ascertain the content of state law. This Part suggests answers to some recurring puzzles and provides a new context for others, laying a foundation for future scholarship reconsidering several longstanding precedents.

The Article thus proposes a new framework for considering the functions that the *Erie* doctrine serves and the optimal methods for implementing those functions. Peeling back the "*Erie*" label to reveal the doctrine's distinct components highlights questions and concerns that cryptic precedents often obscure. The more precise account that emerges unsettles central pillars of modern *Erie* jurisprudence.

I. *ERIE*'S FUNCTIONS: CREATION, INTERPRETATION, PRIORITIZATION, AND ADOPTION

Courts and commentators agree that *Erie* is a perplexing enigma. But why? Conventional wisdom posits several reasons for *Erie*'s inscrutability. *Erie* promotes values that are either unclear or in conflict, makes false assumptions, forces courts to draw undrawable lines between substance and procedure, lacks a clear analytical structure, requires considering abstract jurisprudential theories about the nature of law, and is cited in myriad contexts that have no discernible connection to *Erie*'s actual facts. Indeed, the *Erie doctrine* has transcended the *Erie decision* to become an amorphous concept permeating distinct fields of constitutional law. *Erie* has evolved to resemble what it purported to reject: a "brooding omnipresence" hovering above federal jurisprudence, moored only to tenuous judicial rationalizations.⁷

7 Justice Holmes criticized loose pre-*Erie* conceptions of legal authority by observing that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Less than a decade after *Erie*, Charles Clark applied the "brooding omnipresence" metaphor to *Erie* itself. See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v.*

These accounts of why *Erie* is confusing have some explanatory value and influence my analysis in Part III. However, this Part explores a simpler and surprisingly overlooked explanation for why *Erie* seems inscrutable.

Confusion arises because what is commonly known as the *Erie* doctrine encompasses four inquiries that serve four distinct functions. Each inquiry should be understood as requiring its own doctrine (or set of doctrines) to guide judicial analysis. Disentangling these subsidiary doctrines can illuminate how *Erie* operates, highlight puzzles about its meaning, and provide insights for resolving those puzzles.

Erie's four functions are to govern the creation, interpretation, and prioritization of federal law, and the adoption of non-federal law. Each of these terms has multiple meanings, but I am using them in a specific sense.

When I discuss *Erie's* role in the *creation* of federal law, I refer to an inquiry about whether a particular institution is an authoritative source for the federal rule it purports to announce. This aspect of *Erie* applies most frequently when courts create federal common law, but is also relevant when considering limits on the authority of all institutions that create any kind of federal law.

I use *interpretation* to encompass an inquiry into a federal rule's scope. For example, what aspects of an issue does the rule address: Does it create rights or also remedies? Does it govern collateral questions such as limitations periods, access to juries, and the availability of class actions? And does it seek to supplement or instead displace state law? Resolving these interpretative questions can determine whether federal law potentially applies in a particular case and whether it conflicts with state law that might otherwise apply.

The term *prioritization* describes an inquiry into the choice among conflicting laws. For example, if the creation inquiry concludes that a federal law is valid, and the interpretation inquiry concludes that the federal law encompasses a disputed issue, the prioritization inquiry considers when (if at all) federal law would yield to a conflicting non-federal law.⁸

Tompkins, 55 YALE L.J. 267, 275 (1946) (“The question really at issue is not whether there is not anywhere the brooding omnipresence of the common law, but just where it shall be permitted to operate; and I think my subtitle fairly expresses the substitution we have made of one general abstraction for another.”).

8 The concept of “priority” incorporates traditional concerns that animate choice of law doctrine but that generally do not appear in discussions of *Erie*. A notable exception is 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, and then to

Finally, I use the word *adoption* to address cases where a federal court concludes either that federal law does not apply or that federal law requires considering rules drawn from outside federal law. In these cases the court must ascertain the content of law created by exogenous sources while taking care not to distort that law. Excessive distortion in the process of adopting a non-federal rule would in effect create a new rule with a federal judicial origin. Assessing the validity of that new rule would require a separate inquiry under *Erie's* creation component.

Adoption of non-federal law differs from the seemingly similar phenomenon of incorporating non-federal law. In my lexicon, a court or Congress “adopts” non-federal law when it concludes that non-federal law must apply.⁹ There is never a specific non-federal law that must apply of its own force. Instead, federal courts select particular non-federal laws using a federal choice of law rule.¹⁰ But the “choice” addresses only *which* non-federal law to adopt. There is no choice about *whether* to adopt a non-federal rule as governing law for a particular dispute. Because the governing law must be non-federal, federal courts lack discretion to alter it; otherwise they would convert the non-federal law into a new federal law of their own creation.¹¹

In contrast, a court or Congress “incorporates” non-federal law when it concludes that federal law governs a particular issue, but need not be nationally uniform.¹² A nonuniform federal law may incorporate aspects of state law, creating what is formally a federal rule but

assign priority to one or the other if conflicts exist.”). My “interpretation” and “prioritization” labels track Professor Roosevelt’s reliance on “rules of scope” and “rules of priority.” *Id.* at 18.

9 I therefore use the term differently than Henry Hart, who equated “adoption” and “absorption” of law, such that federal adoption of a state rule converted the rule into federal law that courts could interpret against a backdrop of federal interests. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 529 (1954). I refer to the scenario Hart addressed as “incorporation” of state law, which is a term he also used. *Id.* The Supreme Court has also used the terms interchangeably. *See West Virginia v. United States*, 479 U.S. 305, 309 (1987) (using “adopted” and “incorporation” in adjacent sentences considering whether a federal common law rule would mirror the content of state law). Different terminology can apply when the phenomenon occurs in reverse, as when state law incorporates federal standards. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005) (considering when federal courts have jurisdiction over federal questions “embedded” in state law).

10 *See infra* subsection III.D.1.

11 *See infra* subsection III.D.2.

12 *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979) (holding that federal courts should borrow state law when there is “little need” for or a risk of “disrupt[ion]” from a uniform national rule).

functionally a state rule. Lawmakers are often unclear about whether federal law adopts or incorporates state law.¹³ Whether the distinction matters depends on context. For example, if federal law incorporates state law rather than adopting it, then perhaps federal courts can skew their interpretations of state law to accommodate federal interests.¹⁴ The distinction might also influence whether suits invoking state law arise under federal law for jurisdictional purposes.¹⁵ Incorporate

13 See *infra* Section III.A (discussing whether federal law might adopt or incorporate general law, including customary international law). For example, the Federal Tort Claims Act (FTCA) requires federal courts to resolve cases using state law without specifying whether the statute adopts or incorporates state law. See 28 U.S.C. § 1346(b)(1) (2006) (requiring district courts to determine liability “in accordance with the law of the place where the act or omission occurred”). A related ambiguity is that the statute does not expressly indicate whether federal courts should apply state law even if a state court would choose to apply federal law in an analogous suit against a private defendant. See 31 FEDERAL PROCEDURE, LAWYERS EDITION § 73:445 (1998) (noting authority for both possibilities). In any event, the label describing the interaction between state and federal law is less important than the practical implications of adopting a particular rule. As the Supreme Court explained in the course of articulating federal common law governing a military contract:

We refer here to the displacement of state law, although it is possible to analyze it as the displacement of federal-law reference to state law for the rule of decision. Some of our cases appear to regard the area in which a uniquely federal interest exists as being entirely governed by federal law, with federal law deigning to “borro[w],” or “incorporat[e]” or “adopt”, state law except where a significant conflict with federal policy exists. We see nothing to be gained by expanding the theoretical scope of the federal preemption beyond its practical effect, and so adopt the more modest terminology. If the distinction between displacement of state law and displacement of federal law’s incorporation of state law ever makes a practical difference, it at least does not do so in the present case.

Boyle v. United Tech. Corp., 487 U.S. 500, 507 n.3 (1988) (citations omitted).

14 See Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 804 (1957) (noting that “a decision to apply state law as a matter of federal incorporation does not necessarily carry with it the obligation” to use the same “techniques” of interpretation as when “state law will apply because the court has no competence to do otherwise”). Incorporation (rather than adoption) of state law can create an interesting reverse-*Erie* issue. If a federal court incorporates state law into federal common law and then distorts its interpretation of state law to promote federal interests, then a state court—even in the state from which the law was drawn—presumably must respect the federal interpretation. See Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1281–83 (2011) (considering potential limits on the authority of federal courts to modify incorporated state law). For a broader discussion of how and why federal courts incorporate state law, see Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RES. L. REV. 823 (2011).

15 See Lumen N. Mulligan, *You Can’t Go Holmes Again*, 107 NW. U. L. REV. 237, 262–66 (2012) (analyzing the basis for federal jurisdiction over FTCA actions).

poration of non-federal law thus raises questions involving *Erie*'s creation and interpretation components that are distinct from questions that arise under the adoption inquiry.

This Part explains why *Erie* should be understood as a composite of the four subsidiary doctrines outlined above. Section A identifies principles that shape the choice of law inquiry in federal court, while Sections B, C, and D explain how the Supreme Court's jurisprudence has incorporated those principles into doctrine. Section E then synthesizes the principles and jurisprudence while explaining that some of the *Erie* doctrine's components partially overlap.

A. *Background Principles Shaping the Role that Erie Performs*

Erie's significance and challenging inscrutability have combined to make it the Mount Everest of Supreme Court jurisprudence. Most lawyers respect *Erie* from afar, but do not want to get too close. When they venture near, they often find the terrain inhospitable and the landscape shrouded in clouds. The Court's opaque opinion in *Erie* has for decades been an obstacle to understanding the doctrine that the opinion creates. So for a moment I will ignore the opinion and subsequent precedents that struggle to apply it.

Setting *Erie* and its baggage aside for the moment can help illuminate concepts that well-worn citations and jargon often conceal. Rather than starting with doctrine and working backward to underlying principles, I will start with principles and work forward to doctrine. This approach highlights why various features of the federal system required the Supreme Court to eventually confront the questions that the *Erie* doctrine addresses. The rest of the Article then considers how well *Erie* addresses those questions and how a more nuanced understanding of the questions might lead to more defensible answers.

My point here is not that the *Erie* decision was inevitable, but rather that reconsideration of pre-*Erie* precedent—in some form or another—was likely given evolving conceptions of the federal system and the nature of law.¹⁶ Discussions about “*Erie*” would therefore still occur even if the *Erie* decision did not exist. We would use different words and invoke different sources, but the debate would continue.

A precise account of the *Erie* doctrine requires recognizing a few basic principles about the nature of law in a federal system of divided

16 A thorough account of the developments undermining *Swift* and leading to *Erie* is available in EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000) and TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM (1981).

powers that purports to follow what is often called “the rule of law.” Theorists have for centuries disagreed about the nature of law and what it means to follow the rule of law. That is not a debate I will enter.¹⁷ Instead, subsection 1 identifies and synthesizes propositions that are widely considered unobjectionable in the context of United States law. Defending these basic propositions is a task for a different article, but they are sufficiently well established to justify using them as a foundation for reframing *Erie*. Indeed, I will show that *Erie* itself implicitly relies on these propositions.

1. Basic Elements of the Rule of Law in a System of Divided Power

Six concepts are relevant to building a foundation for *Erie* in background principles governing the rule of law: source, content, scope, choice, conflict, and authority. First, legal rules have a *source*. The source can vary. For example, rules might emerge from different sovereigns, different institutions within particular sovereigns, customary practices, or private agreements. Theorists might even contend that a rule emerges from the mind of the judge who writes an opinion invoking it. But the rule comes from somewhere.

Second, legal rules have *content*. This content may be inscrutable or indeterminate, but it is the essence of a rule and it is what judges are attempting to discern when they apply the rule. Content might vary as rules move through different institutions. Thus, the legislature that is a rule's initial source might understand the rule's content differently than the court interpreting the statute, such that the rule as applied is a blend of input from two sources: the legislature and the court.¹⁸ Likewise, a rule might have different content in different courts when different judges interpret it differently in similar cases. Nevertheless, the task of judges purporting to interpret rules from

17 For a discussion of recent and historical efforts to define the rule of law, see Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293 (2009). Many definitions of the rule of law include a normative standard to assess particular substantive laws. See, e.g., *id.* at 302 (proposing a definition that considers whether governments “protect[] the human rights and dignity of all members of society”). This Article focuses on the narrower question of how laws are made rather than what ends they promote. See, e.g., BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 122 (2004) (noting that a desire to avoid arbitrary decisionmaking is a recurring theme in discourse about the rule of law).

18 One might characterize this change in two ways: the rule's content remained the same and the court misinterpreted it, or the rule's content evolved based on institutional context. My argument does not depend on accepting either characterization. Both perspectives posit a deferential role for courts that differs by degree: judges should strive either not to misinterpret content created by others or to alter that content only in appropriate circumstances.

exogenous sources is to identify a rule's content to the best of their ability using the analytical tools of their profession.¹⁹

Third, a rule's content includes information about its *scope*, such as the context in which it is relevant, in which territories it applies, and which entities it regulates. Information about scope is often implicit or embedded in ambiguous terms, which complicates efforts to apply rules to novel circumstances. For example, consider the seemingly clear text of the Fifth Amendment, which protects "any person" "in any criminal case" from being "compelled . . . to be a witness against himself."²⁰ Among the interesting questions about the Fifth Amendment's scope is whether the privilege bars compelling defendants to testify in state court if the testimony could later be used against them in federal court. The Court initially said no, and then reversed course and said yes.²¹ Thus, even if we know what this aspect of the Fifth Amendment is generally trying to accomplish—preventing compulsory self-incrimination—the text's scope can be difficult to discern in light of the existence of multiple legal systems.

Fourth, given that laws emanate from multiple sources, the content of legal rules with an ostensibly similar scope will frequently *conflict* as different sources develop inconsistent approaches to similar problems. For example, Congress might enact a statute providing that the maximum speed on all highways built with federal funds is fifty-five miles per hour, while a state statute might provide that the minimum speed on certain federally funded highways within the state is sixty-five miles per hour. A single highway thus might fall within the regulatory ambit of two inconsistent rules that different sources have purported to apply.

Fifth, conflict between legal rules requires courts to make a *choice* when multiple sources of law appear relevant. Courts often make these choices explicitly. But even the absence of a formal choice is itself a choice. If a court adopts a particular rule that conflicts with an available alternative, the court has implicitly chosen not to apply the alternative.

Finally, the rule of law ideal posits that some sources of law have a stronger claim to *authority* than others. Treating a rule as binding in

19 If the rule is endogenous rather than exogenous—i.e., if the judge creates it—the rule still must have content. Observers might question the legitimacy or merits of that content, but the rule exists to the extent the court relies on it to justify a particular conclusion.

20 U.S. CONST. amend. V.

21 See Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1208–18 (1998) (discussing evolution of the "same-jurisdiction rule").

court is defensible not just because the rule has a source, but because the source is authorized to compel compliance based on some principle of political theory justifying government action. (Many such theories are available; this Section's argument does not hinge on picking one.) There may not always be a best source. For example, a transaction affecting two states might justify the application of either state's law. But there are often worse sources; in the prior example, either of the two affected states' laws might apply, but not the broadly worded laws of a third state with no connection to the dispute.²²

In sum, courts often must choose between conflicting rules with overlapping scopes emanating from distinct sources claiming authority to regulate a disputed issue. This goal should be uncontroversial.²³ But two salient features of the Constitution make this goal difficult to implement in practice.

2. Complications in the United States Federal System

The first problem stems from the separation of powers among three branches of the federal government. Although nominally only the legislative branch makes law, it is long-settled that both the executive and judicial branches possess authority to create binding rules, both formally and informally. Some of this authority is delegated from Congress, but some arguably arises from inherent power.²⁴ Courts in a federal system thus routinely confront a critical question: Which federal institutions are authoritative sources of law in particular contexts?

A second problem arises from federalism. The Constitution designates different levels of government—the United States and the

22 See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 815, 823 (1985) (holding that a Kansas court could not apply forum law to claims by class members with “no apparent connection to the State”).

23 Of course, the fact that a choice is necessary does not mean that judges will agree about what constitutes an adequate justification for making that choice. Colorful disputes therefore can exist even within a mature legal system. See, e.g., *Francis v. Henderson*, 425 U.S. 536, 552 (Brennan, J., dissenting) (criticizing the majority's “*ipse dixit*” as “baldly asserted . . . without the slightest veneer of reasoning to shield the obvious fiat by which it has reached its result” and “a sad disservice to the Court's obligation to elaborate on its rationales”).

24 See *infra* subsection III.D.2 (discussing inherent judicial power). For a discussion of inherent executive power, compare STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 20, 430 (2008) (endorsing inherent powers), with Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 U. PA. J. CONST. L. 569, 586 (2010) (arguing that Calabresi and Yoo conflate inherent and implied powers and that the idea of inherent powers lacks constitutional support).

states individually²⁵—as authoritative sources of law that often exercise overlapping authority. This arrangement inevitably leads to conflict among potentially applicable rules. Courts must then determine which rule has priority by assessing the extent of each government’s authority.

Choice of law analysis in the United States federal system thus involves two concurrent choices. The court must decide which government is an authoritative source of law and which institution within that government is authoritative. For example, when the federal government can create law, it does not necessarily follow that federal courts can create federal common law.²⁶ Likewise, when state governments are the appropriate source of law, there is a question about which state institutions—such as higher courts or lower courts—are authoritative expositors of that law.²⁷

3. The Distinction Between Choosing Governments, Institutions, and Rules

A final complexity arises from parsing the word “law” in the phrase “choice of law.” Subsection 2 concluded that choice of law analysis in a federal system requires choosing both an authoritative government and an authoritative lawmaking institution. But choosing an institution does not tell us what specific rules to apply in a case. Identifying an applicable rule requires a further inquiry: we need to know what rules the authoritative institution endorses. These may be rules that the institution created, but they may also be rules from another source to which the institution defers, or which the institution incorporates into its own law.²⁸ For example, federal law can require courts to apply rules enacted by state legislatures, a state’s law can require its courts to apply rules from other states, and both state and federal law might enforce a contract requiring courts to apply foreign rules.

This analysis suggests that a choice of law inquiry in the United States does not really involve choosing “law” so much as choosing paths that lead to law. Courts choose which governments are authoritative sources of law, which institutions within those governments may shape law, and which specific laws those institutions endorse.

25 States can in rare instances make law collectively, with congressional approval. See U.S. CONST. art. I, § 10 (authorizing interstate compacts).

26 See *infra* Section III.A.

27 See *infra* subsection III.D.2.

28 The distinction between “incorporating” and “deferring” to law can be fuzzy. See *supra* notes 9–15 and accompanying text.

An added wrinkle is that criteria for making each kind of choice might emanate from different sources. For example, federal law might provide criteria for choosing which state government is an authoritative source of rules addressing a particular issue. But state law might provide criteria for determining whether the chosen state would apply its own rules or defer to rules from another state.²⁹

B. Swift

The prior Section illustrates that even if the *Erie* opinion did not exist, the problems that the *Erie* doctrine confronts would still be salient given rule of law ideals embedded in a federal system. Courts would need some way to determine which governments are authoritative sources of law, which institutions in those governments are authoritative, and which rules those institutions endorse. An early effort to address these questions was *Erie's* predecessor, *Swift v. Tyson*.³⁰

Analyzing *Swift* suggests that the much-criticized pre-*Erie* choice of law regime was mostly consistent with the analytical framework discussed in Section A. *Swift* asked the right questions; the problem was with the answers.

In *Swift*, the parties disputed the enforceability of a negotiable instrument executed as part of a shady land transaction. The plaintiff contended that he had acquired a bill of exchange from a third party requiring the defendant to pay \$1540.30.³¹ The defendant tried to avoid paying by arguing that the third party had tricked him into providing the bill as payment for worthless land that the third party might not even have owned.³² The defendant's argument seemed weak because under what is known as the holder in due course rule, an indorsee can enforce a bill if he acquired it "without any notice of facts which impeach its validity."³³ In effect, the bill is like cash, and its origins are less important than its face value. However, some New York courts had created an exception to the holder in due course rule when the indorsee acquired an instrument as payment for a preexisting debt, as the plaintiff had done in *Swift*.³⁴

The Supreme Court expressed "serious doubt" about whether decisions creating an exception to the holder in due course rule

29 See *infra* subsection III.D.1.

30 41 U.S. (16 Pet.) 1 (1842).

31 *Id.* at 14.

32 See *id.* at 14–15.

33 *Id.* at 15.

34 See *id.* at 16–18.

reflected the current thinking of New York's highest court.³⁵ Nevertheless, the Court assumed for the sake of argument that New York's courts had "fully settled" the exception in the defendant's favor.³⁶ The issue for the Supreme Court was whether these state decisions were an authoritative source of law that bound federal courts.

Justice Story's opinion framed the choice of law inquiry by distinguishing between two kinds of law: "general" and "local."³⁷ The Court never developed a precise definition of "general law." But the term was understood to encompass rules that were not created by particular sovereigns and yet had by informal custom or express consensus become legitimate sources of authority on which courts could rely.³⁸ In contrast, local law encompassed "the positive statutes of the state, and the construction thereof adopted by the local tribunals, and . . . rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character."³⁹ The general/local distinction collapsed over time as the Court expanded the concept of general law to include subjects of intense local interest, such as tort law and the validity of municipal bonds.⁴⁰ But judges at the time of *Swift* would have understood the fuzzy distinction reasonably well.⁴¹

The general/local distinction mattered because the Court believed that state court decisions were binding on matters of local law,⁴² but merely persuasive on matters of general law.⁴³ On this view, state courts had no special claim to authority when applying general

35 *Id.* at 17.

36 *Id.* at 18.

37 *Id.* at 8.

38 See 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, 1517 (1984). "General" law was derived from "*jus gentium*, or the law of nations," and "operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary." Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279–80 (1996).

39 *Swift*, 41 U.S. (16 Pet.) at 18.

40 See FREYER, *supra* note 16, at 57–71; Anthony J. Bellia, Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 693–701 (2013).

41 See FREYER, *supra* note 16, at 52.

42 A subsequent opinion elaborated that "no principle" allowed the Court to ignore state court decisions addressing matters of local law "when the land disposed of was within their borders, and the parties in interest were citizens belonging to their community." *Beauregard v. City of New Orleans*, 59 U.S. (18 How.) 497, 503 (1856).

43 *Swift*, 41 U.S. (16 Pet.) at 19 ("[T]he decisions of the local tribunals upon such subjects [of general law] are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.").

law rooted in transjurisdictional customs and refined over generations by multiple tribunals. State decisions constituted only new data points in an already large set. The Supreme Court perceived itself as free to analyze the data for itself and reach its own conclusions about the meaning of general law.

The Court interpreted New York's decisions refining the holder in due course rule as relying on general law rather than creating local law.⁴⁴ This interpretation meant that the decisions were not binding. Freed from the obligation of respecting New York precedent, the Court announced its "own opinion of the true result of the commercial law" that required enforcing the plaintiff's bill.⁴⁵

Swift asked the right questions, albeit without phrasing those questions in a way that a modern reader would expect. First, *Swift* asked which government was the appropriate source of law. The Court concluded that the answer was none because the law emanated from customary practice rather than sovereign authority. It was "not the law of a single country only, but of the commercial world."⁴⁶ Next, *Swift* considered which institutions were the appropriate expositors of applicable law. The opinion concluded that the Court itself could deduce the relevant rules from the general law using "general reasoning and legal analogies."⁴⁷

Throughout its analysis the Court recognized that it was not free to ignore authoritative sources of law—it conceded that it must apply local law—but believed that it was in fact applying law from an authoritative source. The opinion thus pays at least some attention to choice of law methodology, which is not surprising given that Justice Story had previously written a 532-page treatise on the subject.⁴⁸

Swift could have asked more precise questions, but the real problem was with the answers. For example, it was debatable whether the

44 *See id.* at 18 ("[T]he Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law.").

45 *Id.* at 19.

46 *Id.* Justice Story may have overestimated commercial law's transnational uniformity. *See* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1160 (2012) (noting that "most of the areas of commerce long thought to compose a broadly shared law merchant evolved from contract or legislation rather than custom" and "gap-filling [customs] . . . were usually not uniform and universal but rather local and contested").

47 *Swift*, 41 U.S. (16 Pet.) at 19 (noting that state and federal courts applying general law were engaged in "like functions" using the same methods).

48 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed. 1834). For a discussion of how federal courts applied *Swift*'s choice of law approach in subsequent cases, *see* FREYER, *supra* note 16, at 45–100.

New York decisions really were examples of general rather than local law, whether a federal court could ignore state court interpretations even of general law, and whether the distinction between general and local law made any sense. Additional language in the opinion—such as the assertion that judicial opinions are “only evidence of what the laws are; and are not of themselves laws”⁴⁹—was also questionable.⁵⁰

The weaknesses underlying *Swift*'s reasoning gradually attracted normative and practical criticism.⁵¹ Doubts mounted as federal courts expanded the scope of general law to displace state regulation of traditionally local matters.⁵² This skepticism culminated in *Erie*'s broad repudiation of *Swift*.

C. Erie

The plaintiff in *Erie* sought to recover damages for injuries caused by a passing train while he was walking along the defendant railroad's right of way. The parties disputed two issues: (1) whether federal courts should determine the railroad's duty of care under “general law” or the “common law of Pennsylvania”; and (2) the content of Pennsylvania's common law.⁵³ The Court resolved the first issue by concluding that general law was not binding and avoided the second issue by remanding to the circuit court.⁵⁴ On remand, the Second Circuit held that Pennsylvania law did not require the railroad to protect the plaintiff because he was a “wayfarer” upon a “longitudinal” path rather than a “crossing” path.⁵⁵ In contrast, if general law had applied, the railroad would have owed a duty of care no matter which

49 *Swift*, 41 U.S. (16 Pet.) at 18.

50 See Harold M. Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 B.U. L. REV. 659, 662 n.9 (1938) (summarizing the origins of and early reactions to *Swift*'s distinction between law and evidence of law).

51 For a synthesis of critiques, see PURCELL, *supra* note 16, at 66–69. Some of the criticism was leveled at *Swift*'s author. Justice Frankfurter, while still a law professor at Harvard, relayed another Harvard professor's view that *Swift* stemmed from the “restless vanity” of Justice Story, who was allegedly “fond of glittering generalities” and had a “reputation for learning greater even than the learning itself.” Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 529–30 n.151 (1928) (quoting JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 253 (2d ed. 1921)). Ironically, Justice Frankfurter was later subject to similarly personal criticism of his own allegedly “egregious misinterpretation” of *Erie* stemming from “personal motives” and “resentment of Brandeis.” PURCELL, *supra* note 16, at 206, 212.

52 See *supra* note 40.

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

54 See *id.*

55 *Tompkins v. Erie R.R. Co.*, 98 F.2d 49, 52 (2d Cir. 1938).

direction the plaintiff was walking.⁵⁶ Identifying the source of law governing the plaintiff's claim was therefore not an academic exercise; it determined who won and who lost.

Erie reached its conclusion that general law did not apply by acknowledging the basic propositions discussed in Section A, albeit in a scattered fashion that has led to confusion. I have highlighted the parallels to Section A by reordering and summarizing three salient points in Justice Brandeis's majority opinion.

First, the opinion stated that "law . . . does not exist without some definite authority behind it."⁵⁷ This confirms the observation in Section A that the rule of law ideal requires not only identifying a source of law, but also determining whether that source is authoritative with respect to a disputed issue. *Swift* had deemed general law to be authoritative, while *Erie* did not.

Second, the opinion concluded that the "last word" on the content of a legal rule should come from institutions with authority to create or interpret that rule.⁵⁸ When considering state law, the relevant institutions were the state's "Legislature or its Supreme Court."⁵⁹ This conclusion confirms Section A's observation that selecting law from an authoritative government is insufficient. Instead, courts must further determine which government institutions are authorized to shape the content of binding rules. The Court applied a similar insight to the federal government when it concluded that "the federal courts" lack a general lawmaking power.⁶⁰ Thus, the fact that one institution of the federal government (such as Congress) could potentially enact a rule does not mean that the federal courts could promulgate the same rule.

Finally, the opinion held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied

56 See *Erie*, 304 U.S. at 70 (noting that the plaintiff had prevailed in the lower courts).

57 *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

58 *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting)). The Court also stated that efforts to identify a rule's source should not rely on drawing lines that are unsatisfactory. *Id.* at 74. However, this objection to *Swift* did not appear to challenge general law's legitimacy. The Court doubted whether the line between "general" and "local" law was a coherent basis for selecting a source of law, but this part of the opinion grounds that concern only in empirical observations that the line created frustrating "uncertainties" about which law regulated behavior. *Id.* at 74–75.

59 *Id.* at 79.

60 *Id.*

in any case is the law of the state.”⁶¹ This holding confirmed that in a federal system the federal government is not always an appropriate source of binding rules. Given *Erie’s* conclusion that federal and general law were both unavailable, the only remaining option on the facts of *Erie* was state law.⁶²

Isolating and rearranging *Erie’s* components reveals that both *Erie* and *Swift* asked similar questions; the revolutionary aspect of *Erie* came in the answers. The answer to the “which government” question in diversity cases involving common law and customary practices was no longer none, but rather the states. The answer to the “which institution” question when federal law is inapplicable was no longer the federal courts, but rather the state courts. Neither answer hinges on any distinction between “local” and “general” law.

Although *Erie* was interesting and important, it was too easy a case to establish parameters for the doctrine bearing its name. Analyzing choice of law in federal court is difficult only when there is a plausible conflict for the court to resolve. The potential existence of conflict requires considering the scope of competing rules and the relative authority of competing rulemakers. These vexing questions are at the heart of modern cases attempting to apply *Erie*.⁶³ But in *Erie* itself, the Court quickly rejected the idea that any law other than Pennsylvania common law could be relevant. That conclusion was correct once the Court abandoned *Swift’s* distinction between general and local law. The holding therefore provided little guidance for cases where federal law might be relevant or where multiple states purported to regulate the same conduct. What we now call the *Erie* doctrine required further elaboration.

D. *An Illustration of Erie in Operation: Standard Oil*

The Court has confronted dozens of cases in *Erie’s* wake that directly presented difficult questions about creation, interpretation, and prioritization of federal law, and adoption of non-federal law. *Erie* had skirted these questions by rejecting general law. The Court’s 1947 decision in *United States v. Standard Oil Co.*⁶⁴ is especially interesting because it implicates each of *Erie’s* four components. The opinion provides a concrete illustration of the abstract rule of law principles

61 *Id.* at 78.

62 The opinion also addressed other issues, such as risks of “discrimination” and forum shopping in a federal system, *id.* at 76, that might help flesh out how *Erie* applies in practice, as I discuss in Part III.

63 See *infra* Part III.

64 332 U.S. 301 (1947).

discussed in Section A and the need for precision in parsing choice of law problems.

Standard Oil involved a tort suit in federal court by the United States against the owner of a truck that had injured a United States soldier. The United States sought reimbursement for the soldier's medical care and salary while he could not perform his duties, as well as damages for loss of the soldier's services.⁶⁵

A threshold question was whether state or federal law governed liability in the absence of a controlling federal statute. The Court concluded that "federal common law"⁶⁶ applied because "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."⁶⁷ On the merits, the Court rejected the government's theory of liability, in part because it felt that Congress should play the leading role in creating new rights to sue.⁶⁸ Federal common law thus did not create a new tort theory; instead, it preempted potentially relevant state rules.

More importantly for my purposes here, the Court felt the need to distinguish *Erie* despite the fact that neither party relied on general law. The Court observed that *Erie*'s "object and effect were . . . to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control."⁶⁹ In contrast, *Erie* "had no effect" on the judiciary's authority to craft rules governing "essentially federal matters, even though Congress has not acted affirmatively."⁷⁰ The Court thus treated *Erie* as confirming the need for law to derive from authoritative sources, drawing a line between areas where federal law was authoritative and where it was not, and assuming that the federal courts were an institution that was authorized to create law in appropriate circumstances.⁷¹

Dicta in *Standard Oil* went on to consider *Erie*'s interpretation and prioritization prongs, albeit without framing the analysis in those terms. The Court observed that whether federal law preempts state

65 *Id.* at 302.

66 *Id.* at 308.

67 *Id.* at 305–06.

68 *Id.* at 316.

69 *Id.* at 307.

70 *Id.*

71 The Court muddled its analysis by opining that "[w]hether or not . . . state law is to control in such a case as this is not at all a matter to be decided by application of the *Erie* rule." *Id.* at 309. A more accurate statement would have been that *Erie*'s holding favoring state law was not dispositive, but the "*Erie* rule" and underlying principles were relevant.

law is a context-sensitive question that requires interpreting the federal law that ostensibly applies.⁷² Scrutiny might reveal that federal law is not as broad as it appears to be. For example, when Congress enacts a statute that “partially” addresses federal interests while “fail[ing] to make other provision[s]” addressing subjects on which state law “ordinarily” governs, then courts can assume that Congress “consented” to resolving those subjects under state law.⁷³ The Court did not explain whether state law would apply as an alternative to federal law or whether federal common law would incorporate state law to fill gaps in the statute. However, the two cases that the Court cited to support its analysis both suggest that state law would apply because federal law could not apply.⁷⁴ *Standard Oil* therefore confirmed that federal law displaces state law only on matters within the federal law’s scope and that interpretation is necessary to reveal that scope.

The Court also made a tentative effort to identify factors influencing whether a nationally uniform federal law would apply when its scope encompassed an issue but did not clearly require displacing state law. For example, state law might apply when it “affords a convenient and fair mode of disposition,” provides a predicate to federal action (such as voiding a title to land that the United States subsequently purchased), is consistent with a perceived need for national uniformity, or otherwise accords with “specific governmental interests.”⁷⁵ Here again, the Court was not clear about which component of *Erie* it was applying. The Court could have been discussing the priority of federal law or the incorporation of state law. The distinction determines whether state law would apply as federal common law or as an alternative to federal law.⁷⁶ Nevertheless, the Court recognized

72 An earlier decision made the point more directly, noting while discussing *Erie* that the extent to which a federal statute preempts state law “though left by the statute to judicial determination” is “nevertheless to be derived from it and the federal policy which it has adopted.” *Deitrick v. Greaney*, 309 U.S. 190, 200–01 (1940).

73 *Standard Oil*, 332 U.S. at 309.

74 See *id.* at 309 n.13; *Blair v. Comm’r*, 300 U.S. 5, 9–11 (1937) (deferring to state court’s “final” authority on “local law” as predicate to resolving “federal question”); *Reconstruction Fin. Corp. v. Beaver Cnty.*, 328 U.S. 204, 210 (1946) (holding that a federal statute did not displace “established local tax assessment and collection machinery”).

75 *Standard Oil*, 332 U.S. at 309–10.

76 The Court subsequently cited *Standard Oil* in the course of holding that federal common law sometimes “adopt[s]” state law, but did not expressly indicate that *Standard Oil* had discussed this possibility (as opposed to discussing the application of state law as an alternative to federal law). *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). However, there is no indication in *Standard Oil* that the Court believed that state law could displace a valid federal statute on issues within the fed-

the importance of choosing between federal and state law and articulated factors influencing that choice.

The Court's imprecision in distinguishing creation, interpretation, prioritization, and adoption helps to explain why commentators have criticized the holding. The odd result of *Standard Oil* is that it preempts state remedies by federalizing tort law governing the relationship between the United States and its soldiers, but does not substitute a new rule to occupy the field it cleared. The Court simultaneously asserted that congressional authorization was not necessary to *displace* state law but was necessary to *replace* state law. Commentators question whether this concurrent denial of federal remedies and exclusion of state remedies is sensible given Congress's limited capacity to create new law reacting to the Court's decisions.⁷⁷ If Congress will not replant fields that the Court clears, then perhaps the Court should merely prune the field to preserve at least a basic level of regulation.

A more precise account of *Erie* might have altered *Standard Oil's* holding to mitigate this criticism. Separating the creation, interpretation, priority, and adoption issues forces courts to focus on the content of the rules they create. Here, the Court created a preemptive rule, yet acted as if it had not created any rule and had instead deferred to Congress. An explicit focus on the creation inquiry would have highlighted the Court's role as an institutional source of governing law (in the form of dormant preemption). Likewise, explicit focus on the interpretation inquiry might have highlighted the broad preemptive scope of the Court's rule. The Court also prioritized federal law over state law without considering the content of potentially conflicting state rules, which is an essential component of the prioritization and adoption inquiries and could have resulted in allowing at least some state rules to survive.⁷⁸ Of course, the Court might have

eral statute's scope. The opinion is thus best read as addressing *Erie's* adoption inquiry rather than its prioritization inquiry.

⁷⁷ See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 632 (6th ed. 2009).

⁷⁸ See *infra* subsection III.D.1 (discussing the adoption inquiry). For example, when a court conducting a prioritization inquiry carefully considers the content of both federal and state law, it might apply state law because either: (1) state law encompasses matters that are beyond the scope of federal law, and thus is not preempted; or (2) the conflict between state and federal law requires rethinking the scope of federal law, such that the interpretation inquiry becomes a safety valve to avoid a prioritization holding. See *infra* subsection III.B.1; see also Allan Erbsen, *Erie's Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis*, 10 J.L. ECON. & POL'Y (forthcoming 2013) (analyzing how default rules might skew the interpretation inquiry toward embracing or avoiding conflict with state law).

reached the same conclusions even if it had been more precise because it was uncomfortable allowing state law to have any role in regulating the relationship between the United States and its soldiers. But a more precise *Erie* analysis may have inspired a more limited holding that preserved a role for state law (at least when the United States was the plaintiff)⁷⁹ absent congressional preemption or a specific threat to federal interests.

E. *Synthesis of Erie's Central Functions*

Considering the principles discussed in Section A and the cases discussed in Sections B through D highlights how the *Erie* doctrine has four components that answer three questions.

First, *Erie* enforces limits on the authority of governments and institutions that create federal law. A judge crafting a rule of federal common law must consider *Erie's* admonition about the limited scope of judicial power.⁸⁰ Likewise, a member of Congress reviewing a bill must consider *Erie's* concerns about the limited scope of federal power.⁸¹

Second, *Erie* requires interpreting federal law to determine its scope. Some federal rules apply broadly to many people, places, and contexts, while others apply narrowly. A rule's scope will influence whether it conflicts with state law.

Third, *Erie* prioritizes conflicting federal and state laws. When parties to litigation in federal court seek a binding resolution of their dispute, multiple sources of law might provide potentially relevant rules. *Erie* and its progeny help judges choose which rules to apply.

79 If state law creates claims or rejects defenses in suits against the United States, then the United States would need to account for fifty sets of rules when trying to avoid liability and protect the federal treasury. When state law controls the rights of the United States as a plaintiff, there is less need for complex planning and no risk that the treasury will be further depleted (beyond the uncompensated loss that the United States seeks to recover). Nevertheless, relying on state law could still be troubling even when the United States is a plaintiff if states fail to respect federal interests by, for example, misconstruing the principal/agent relationship between the United States and its soldiers or recognizing spurious defenses to federal claims.

80 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (noting limited "power" of the "federal courts").

81 Although *Erie* is generally treated as a case governing judicial power, it also opines on legislative power. See *id.* ("Congress has no power to declare substantive rules of common law applicable in a State."). For a discussion of whether and how legislators must consider constitutional limits on their authority, see Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001).

Finally, *Erie* fills the void left by an absence of federal law in federal court by adopting non-federal rules.⁸² This inquiry requires determining which non-federal sources of law are authoritative, which institutions authoritatively determine the content of that law, and whether a particular government relies on rules that it did not create (such as by deferring to the laws of other states, or to general law).

These four components collectively help federal courts make three important choices: between governments, between institutions within governments, and about the content of rules that the selected institution created or endorsed.

Erie's four functions overlap, such that my taxonomy describes useful analytical categories rather than formally distinct concepts. When the categories collide, the ensuing doctrinal mess is easier to resolve if courts and commentators can track each strand of an intertwined inquiry. Two overlaps are especially salient—between creation and interpretation and between interpretation and prioritization—raising problems that I address in Part III.

The boundary between creation and interpretation of law is indeterminate. For example, a court interpreting a statute often adds and subtracts, stretching some terms and compressing others. The resulting rule is a hybrid of the legislature's text and the judiciary's gloss. When the text is silent, courts fill the gaps. At some point this gap-filling moves so far beyond what the statute encompasses that interstitial "interpretation" really creates a new common law rule.⁸³ Even a seemingly clear rule can transform in the process of judicial efforts to interpret its relevance to a specific case.

Erie itself repudiated distinctions between law and judicial opinions applying law, recognizing that the opinion helps to frame rules governing the outcome. As Justice Frankfurter subsequently explained, *Erie* "overruled a particular way of looking at law . . . as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations."⁸⁴ Some legal realists go further and reject any difference between creating and applying rules—the act of applying a rule creates a new case-spe-

82 For a discussion of the potentially nuanced distinction between adopting and incorporating law, see *supra* notes 9–15 and accompanying text.

83 See, e.g., FALLON ET AL., *supra* note 77, at 607 ("As specific evidence of legislative purpose with respect to the issue at hand attenuates, all interpretation shades into judicial lawmaking."); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' . . . is entirely one of degree.")

84 *Guar. Trust Co. v. York*, 326 U.S. 99, 101–02 (1945).

cific rule—but theorists generally acknowledge that rules have some content independent of their application in litigation.⁸⁵

Accordingly, there is a difference between a court making law in the sense of determining a dispute’s outcome by applying a rule and making law in the sense of creating the rule being applied. This distinction between adjudication and lawmaking can be helpful when contemplating *Erie’s* doctrinal nuances, especially when courts attempt to identify the content of federal and state rules.⁸⁶ The boundary between creation and interpretation is thus fuzzy to draw, but still useful to consider.

Interpretation and prioritization share a similarly imprecise boundary. The priority inquiry requires considering whether to apply a federal or state rule when the two conflict. Yet whether they conflict is a matter of interpretation; the federal rule could be read broadly or narrowly to create or avoid a conflict. For example, a canon of interpretation favoring a broad reading of federal rules governing litigation in federal courts would be a covert priority rule that incorporates the goal of displacing state law. Likewise, a canon limiting the scope of federal law to avoid conflicts with state law would be a covert priority rule respecting state interests. Rules governing interpretation and priority can therefore incorporate aspects of both inquiries.⁸⁷

The fact that *Erie* encompasses four distinct yet partially overlapping components addressing three distinct questions helps explain why *Erie* is confusing. In many contexts, either most of the doctrine is irrelevant or a particular component is especially salient. Yet decisions implementing *Erie* often do not carefully parse between its components. This imprecision gives *Erie* jurisprudence an ethereal aura. The “*Erie* doctrine” seems to permeate federal law even as its many manifestations appear dissimilar. Attempts to illuminate *Erie* create a fleeting sense of accomplishment as insights that seem profound in one context prove tangential in others.

Fragmenting *Erie* into its components can clarify doctrine and suggest avenues for reform. Analyzing each component in isolation

85 See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 96 (2010) (contending that legal realists sought to attack “the notion that judging merely entailed the logical application of legal rules and principles,” but did not go so far as to contend “that legal rules and principles do not have a significant role in judges’ decisions”)

86 See *infra* Part III.

87 See *infra* subsection III.B.1. Canons of interpretation routinely have substantive consequences or aspirations that can complicate efforts to distinguish the act of interpretation from broader policy preferences. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121–25, 168–77 (2010).

highlights how each applies in different contexts, implicates different values, and raises different challenges. Efforts to discuss *Erie* as an amorphous whole are thus likely to be more frustrating and less fruitful than a more focused discussion of creation, interpretation, prioritization, or adoption. The remainder of the Article builds on this observation.

II. *ERIE'S ASSUMPTIONS: A THRESHOLD INQUIRY INTO THE DOCTRINE'S UNDERLYING VALUES*

Recognizing that *Erie* has four components reveals the doctrine's functions, but does not reveal how the doctrine operates in practice. Analyzing how *Erie* operates requires asking a threshold question that courts and commentators often overlook when wrestling with doctrine: What values does *Erie* promote? If we do not know the premises that guide *Erie* analysis, we cannot know how the *Erie* doctrine should apply in a particular case.

This Part contains more questions than answers. The goal is not to identify a specific set of principles animating the *Erie* doctrine, but rather to consider their source and importance in implementing each of *Erie's* four functions. Further scholarship can then develop these principles, which in turn can help resolve the doctrinal puzzles that I analyze in Part III.

Even if courts know the functions that *Erie* serves, they need to identify values that inform the implementation of those functions in order to know how *Erie* applies in particular circumstances. For example, suppose that in a diversity case the plaintiff contends that the federal court should apply state common law rule *S* and the defendant responds that the court should apply federal statutory rule *F*. How should the court choose between *S* and *F* if the issue could plausibly fall within the scope of both rules? As with all legal decisions, the court needs criteria to structure its analysis. Those criteria will vary depending on which goals the choice should promote.

First, suppose that *Erie's* sole goal in the prioritization context is to enforce the Constitution's separation of powers. This goal would require courts to focus on whether an ostensibly applicable federal law emerged from an institution with authority to regulate the disputed issue. If authority is the only factor, then rule *F* will apply if Article I authorized Congress to enact it. *Erie's* prioritization inquiry would thus add essentially nothing to the creation and interpretation inquiries. Federal priority would follow automatically from a conclusion that an issue falls within the scope of a properly created federal law.

Second, suppose instead that *Erie*'s prioritization goal is solely to protect state interests in a federal system. In this regime, rule *S* might apply even if rule *F* is valid. The validity of the federal rule would not be dispositive if there is a plausible state interest, especially given that federal jurisdiction might exist solely due to a quirk of the parties' citizenship rather than the existence of a federal claim. Even if the Supremacy Clause creates a priority rule favoring the federal statute, federalism concerns might inspire an interpretative canon that cabins the statute's scope to avoid triggering the priority rule. Resting *Erie* on federalism grounds thus might shift judicial focus from *Erie*'s prioritization inquiry to its interpretation inquiry.

Finally, suppose that separation of powers and federalism are not the only relevant concerns. Choosing between *F* and *S* might then require asking additional questions. For example: Is rule *S* integral to the state's broader regulatory regime? Is rule *F* central to the federal court's administration of its docket? Is either rule better than the other (e.g., more just, more efficient, etc.)? Or would applying one of the rules lead to unfair surprise? The court cannot know what questions to ask until it knows what values inform its inquiry. The court must also know what its inquiry is supposed to accomplish. Is the court asking whether *F* is a valid exercise of the rulemaker's authority, whether *F* encompasses the disputed issue, or whether *F* has priority over inconsistent state rules? The choice between *F* and *S* thus requires analysis that is more granular than a general reference to "*Erie*" might suggest.

Specifying values that the *Erie* doctrine seeks to protect is also important in the creation context. For example, consider *Standard Oil*,⁸⁸ which created federal common law governing the relationship between the United States and its soldiers. If the concerns animating *Erie*'s limits on the creation of federal common law focus on federalism, then *Standard Oil*'s creation of federal common law makes sense. Strong federal interests justify federal law governing torts against soldiers on active duty. Yet if separation of powers concerns animate *Erie*'s limits on the creation of federal common law, then *Standard Oil* is harder to justify. The Constitution gives Congress power to "support Armies"⁸⁹ and the President power to command them,⁹⁰ but does not expressly grant the judiciary power to assist in these endeavors by inventing or displacing tort rules.

88 See *supra* Section I.D.

89 U.S. CONST. art. I, § 8, cl. 12.

90 *Id.* art. II, § 2, cl. 1.

There is a sensible response to the separation of powers objection to judicial lawmaking in *Standard Oil*, but that response does not avoid the need to identify values underlying *Erie*. The judiciary arguably is an appropriate source of law because Article I implicitly preempts state tort law governing soldiers, and thus the judiciary must create common law filling the regulatory void until Congress acts. However, this response merely shifts the *Erie* inquiry from the creation context to the interpretation context. The response indicates that federal courts may create common law to fill regulatory voids, but now courts need to know which constitutional provisions create such voids.

Identifying voids that might justify federal common law requires interpreting the Constitution to determine its preemptive scope, which varies from clause to clause. For example, the Raise and Support Clause animating *Standard Oil* apparently preempts more state law than the Inferior Courts Clause authorizing Congress to regulate lower federal courts. The Inferior Courts Clause enables Congress to regulate federal procedure, and courts can in turn fill regulatory voids with procedural common law.⁹¹ Yet current doctrine presumes that this federal common law is not automatically preemptive when it conflicts with state law.⁹² Current doctrine governing the Inferior Courts Clause thus tolerates less robust dormant preemption than *Standard Oil's* interpretation of the Raise and Support Clause. Accordingly, *Erie's* interpretative component determines whether the Constitution generates regulatory voids that authorize federal common law and influences the preemptive force of that void-filling law in the subsequent prioritization inquiry. *Erie's* interpretative preferences about common law creation are therefore critically important, yet courts cannot define these preferences without insight into *Erie's* underlying values.

If this discussion of federal common law seems to roam far afield from the actual *Erie* decision, recall that *Erie* was a diversity case. The *Erie* court therefore could have attempted to rehabilitate and modernize *Swift* by reasoning along the following lines: In diversity cases, the Diversity Clause authorizes federal courts to create federal common law that governs disputed issues; sometimes this federal common law mirrors state law, but sometimes it borrows from other sources, such as general law. *Erie* obviously did not venture in this direction. But rejecting this potential interpretation of the Diversity Clause while endorsing *Standard Oil's* interpretation of the Raise and Support Clause requires criteria for distinguishing the two contexts. Doctrine

91 See *infra* notes 157–58 and accompanying text.

92 See *infra* subsection III.C.2.

governing when federal courts can create federal common law and how federal courts should interpret the Constitution's preemptive scope is thus entangled with doctrine addressing how federal courts should decide when to adopt nonfederal law. Parsing the distinct inquiries and identifying values and criteria relevant to each can lead to a clearer understanding of how "*Erie*" applies in particular cases.

Framing *Erie* analysis as dependent on *Erie*'s core concerns highlights a problem that has confounded courts and commentators for seventy-five years. The problem becomes clear by distinguishing the role that *Erie* plays in a federal system from how *Erie* performs that role. The role is important for the reasons noted in Part I: courts in the United States federal system must ensure that the content of legal rules emanate from an authoritative source. Yet even *Swift* acknowledged that choice of law is not simply the exercise of naked preferences. The *Swift* approach to choice of law had its own set of priorities and techniques for selecting and interpreting rules that in hindsight were flawed, but at the time would have appeared rational.⁹³

Recognizing that *Erie* and *Swift* both played the same role of constraining judicial choices in a federal system underscores that the role can be performed in distinct ways. Some might be better than others, but that ranking is not self-evident. More importantly, a clear justification for ranking competing methods does not emerge from Justice Brandeis's notoriously opaque opinion in *Erie*, which overrules *Swift* without fully defining an alternative regime.

Erie's imprecision means that courts attempting to develop and apply the *Erie* doctrine confront an early obstacle. Courts know in the abstract what they are trying to accomplish (constrain their discretion when creating, interpreting, prioritizing, or adopting rules), and they know that articulating those constraints requires identifying a set of values to animate specific choice of law inquiries, but they do not know precisely what those values are. In particular, courts confront at least two vexing puzzles that I address below in Sections A and B. Courts must first determine the extent to which *Erie* has a foundation in positive law and then must identify the non-positive sources that fill gaps in the positive foundations.

A. *The Puzzle of Positive Constraint:
The Constitution and the Rules of Decision Act*

One way to demystify *Erie* is to contend that the abstract doctrine has a foundation in a specific authoritative text. Implementation of

93 See *supra* Section I.B.

Erie would then become an exercise in interpretation to tease out the relevant concerns. That exercise would still be difficult, but at least it would be grounded in a familiar context and performed using familiar analytical tools.

The problem is that several texts might be relevant and their meaning is disputed. So the twin puzzles are to first find and then interpret a relevant text (if any exists) in a way that can guide subsequent steps in the *Erie* framework.

An often mentioned possibility is that the Constitution may animate *Erie*. Indeed, Justice Brandeis expressly invoked the Constitution to defend *Erie's* holding. This reference might have been helpful if it had been developed. But the opinion cites only “the Constitution” as a whole without citing specific provisions.⁹⁴ *Erie's* citation to the Constitution was not only imprecise, but also gratuitous because, as the concurrence observed, “[n]o constitutional question was suggested or argued below or here.”⁹⁵

Erie's enigmatic references to “the Constitution” eerily replicate methods that the opinion elsewhere criticizes. *Swift's* allusion to an amorphous general law yields to an allusion to an amorphous constitutional law. The flexibility that courts enjoy when implementing the imprecise constitutional command invites a critique that *Erie* itself leveled against *Swift*: rules derived from indeterminate sources may rest on “little less than what the judge advancing the doctrine thinks at the time” is the right result.⁹⁶

Courts and commentators have reacted to Justice Brandeis's brevity by suggesting numerous constitutional hooks on which to hang

94 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938). None of *Erie's* four citations to the Constitution invoke a specific clause. See *id.* at 78 (“[N]o clause in the Constitution purports to confer . . . upon the federal courts” a “power to declare substantive rules of common law applicable in a State”); *id.* (“[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States.”); *id.* at 79 (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.”); *id.* 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.”).

95 *Id.* at 82 (Butler, J., concurring in the judgment); see also Edward A. Purcell, Jr., *The Story of Erie*, in *CIVIL PROCEDURE STORIES* 21, 48–49 (Kevin M. Clermont ed., 2d ed. 2008) (noting that the railroad sought to preserve *Swift's* central holding while tweaking the definition of general law to exclude well-settled common law governing access to rights of way).

96 *Erie*, 304 U.S. at 78 (quoting *Balt. & Oh. R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

Erie's hat. Options include the Tenth Amendment,⁹⁷ the Equal Protection Clause,⁹⁸ the Fifth Amendment's Due Process Clause,⁹⁹ the Supremacy Clause,¹⁰⁰ Article III's definition of "judicial Power,"¹⁰¹

97 U.S. CONST. amend. X; see, e.g., George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 620 (1984) ("The rule of *Swift* was unconstitutional because it thrust the national government into an area not assigned to it—the making of general law. . . . The tenth amendment confirms this understanding, and Brandeis reaffirmed it. . . ." (footnotes omitted)); cf. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701–06 (1974) ("The question, here as with respect to any other question of federal power, was whether anything in the Constitution provided a basis for the authority being exerted—and the answer was no. . . . That point having been made. . . the Constitution's utility as a point of reference was ended.").

98 U.S. CONST. amend. XIV, § 1. Compare Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 998–99 (1996) (noting that *Erie* may rely in part on "an equal protection consideration" barring Congress from allowing "the citizenship of the disputants" to alter the applicable law, which would produce "arbitrarily discriminatory results"), with Bradford R. Clark, *Erie's Constitutional Source*, 95 CAL. L. REV. 1289, 1299 (2007) ("This [equal protection] reading. . . is both inconsistent with the structure of the Court's opinion and anachronistic.").

99 U.S. CONST. amend. V. Compare Kermit Roosevelt III, *Valid Rule Due Process Challenges: Bond v. United States and Erie's Constitutional Source*, 54 WM. & MARY L. REV. 987, 999–1000 (2013) ("*Erie's* constitutional source. . . is the Due Process Clause," which prohibits "deprivation of property" based on "law without a lawmaker, which is to say no law at all."), with Craig Green, *Can Erie Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813, 833 (2013) ("Any due process 'problem' in [the *Swift*] context would require a form of constitutional rights that is absent from familiar precedents and that lacks roots in the historical traditions and notions of popular justice that dominate modern constitutional jurisprudence.").

100 U.S. CONST. art VI. Compare Clark, *supra* note 98, at 1290 ("[T]he constitutional structure strongly suggests that the Supremacy Clause establishes the exclusive basis for disregarding state law, and that more expansive judicial doctrines like *Swift* are unconstitutional."), with Craig Green, *Erie and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 665 (2008) ("[T]he Supremacy Clause has nothing to do with 'federal general common law' because the latter never claimed preemptive 'supremacy' and never bound state courts.").

101 U.S. CONST. art III, § 1. Compare 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, 320 n.412 (2008) (proposing Article III as a "textually plausible, structurally coherent constitutional basis" for *Erie* that might supplement the Tenth Amendment), with Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L.J. 3, 56–57 (1941) (canvassing Founding-era sources to conclude that Article III authorizes federal courts to resolve diversity cases without reference to state law), and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 91 (1938) (Reed, J., concurring in part) ("I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions."). For further discussion of whether Article III authorizes federal courts to develop common law governing diversity cases, see Erbsen, *supra* note 78, and *infra* note 252–53 and accompanying text.

Article I's definition of "legislative Powers,"¹⁰² and the general structure of the Constitution's framework for federalism, separation of powers, or both.¹⁰³ Each of these potential constitutional sources serves different purposes that would shape choice of law and federal common law in different ways. Selecting one, some, all, or none is therefore an essential first step in identifying values animating the *Erie* doctrine. Judicial opinions that purport to apply *Erie* without identifying its constitutional—or extra-constitutional—foundation are destined to be unsatisfying.

Another potential positive constraint on choice of law in federal court is the Rules of Decision Act (RDA), which 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."¹⁰⁴ On this view, choice of law in federal court is a function of legislative command.

Unfortunately, the RDA's legislative command is neither clear nor comprehensive, for at least four reasons. First, nobody knows exactly what constitutes a "rule of decision." If some rules are rules "of decision," then presumably another category of rules exists that are "not of decision." Multiple interpreters have struggled to identify

102 U.S. CONST. art I, § 1. Although Article I does not directly address the judiciary's lawmaking authority, some theories of *Erie* link the scope of federal judicial power to the scope of federal legislative power. See, e.g., Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 395 (1964) (finding it "unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not"); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 208 (1956) (Frankfurter, J., concurring) ("[I]t would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because [of diversity jurisdiction] . . . in disregard of the law of the State in which a federal court is sitting").

103 See, e.g., Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 427–28 (1958) ("*Erie* does indeed have a constitutional basis—in the sense that our system of federalism is rooted in the Constitution, and that the failure of a federal court to give due regard to state law or to federal law, as the case may be, inevitably thwarts the constitutional scheme of things."); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683–88 (1974) (discussing the general concept of separation of powers as the constitutional underpinning of *Erie*); Hart, *supra* note 9, at 512 (describing the "constitutional problem of *Erie*" as "the need of recognizing the state courts as organs of coordinate authority with other branches of state government in the discharge of the constitutional functions of the states").

104 28 U.S.C. § 1652 (2006).

a sensible dividing line,¹⁰⁵ leading to tortured efforts to distinguish, for example, substantive rules from procedural rules.¹⁰⁶ The RDA is thus a choice of law rule that fails to identify a clear category of laws to which it applies.

Second, the RDA is circular. The potential value of the RDA as a positive constraint on choice of law is that it might identify cases where state law applies, yet it assumes a prior understanding of the phrase “in cases where they apply.”

A revisionist interpretation seeks to sidestep the circularity problem by positing that the phrase “where they apply” requires federal courts to determine *which* state’s law applies, rather than *whether* state law applies, when federal law does not control.¹⁰⁷ Yet this interpretation leaves no room for the application of anything other than state or federal law and therefore excludes foreign law in alienage cases. There is no reason to believe that Congress intended to exclude foreign law. Indeed, the statute that included the earliest version of the RDA also vested alienage jurisdiction in the circuit courts, raising the prospect that foreign law would be relevant.¹⁰⁸ This problem can be avoided by tweaking the revisionist interpretation to posit that federal diversity courts applying foreign law do so because state choice of law rules select the foreign law as a rule of decision. Federal courts invoking foreign law would therefore still comply with the RDA by “apply[ing]” the state choice of law rule. But that tweak begs the

105 See Jerome A. Hoffman, *Thinking Out Loud About the Myth of Erie: Plus a Good Word For Section 1652*, 70 *Miss. L.J.* 163, 183–87 (2000) (discussing competing interpretations of “rules of decision”).

106 *Cf.* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“The accepted dichotomy [in *Erie* jurisprudence] is the familiar ‘procedural-substantive’ one. This of course is a subject of endless discussion, which hardly needs to be repeated here. Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction.”).

107 See LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 423 (4th ed. 2009). Efforts to salvage the otherwise circular RDA try to avoid what proponents view as a “nonsensical” conclusion that the Act enables federal common law to prevent state law from “apply[ing]” despite never acknowledging the existence of federal common law. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 121 (2d ed. 1990). However, even if the RDA makes little sense, that may be less a reason to reinterpret it than a consequence of the RDA’s enactment in an era that did not anticipate the future prevalence of federal common law. See Louise Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 *Nw. U. L. Rev.* 860, 866 (1989) (“[T]he [RDA] comes down to us as a relic of a prepositivist, prerealist time.”).

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

question of whether federal common law can displace state choice of law rules in alienage cases.¹⁰⁹ If federal common law can govern choice of law in federal court, then the court's choice about whether to apply state law, federal law, foreign law, or general law is itself a federal question that analytically precedes the RDA's conclusion that state law should "apply." Viewing the RDA's "where they apply" language as governing *which* state's law applies therefore would not avoid the circular inquiry of *whether* state law applies.¹¹⁰

Third, the RDA's reference to "laws of the several states" could refer not to the laws of any particular state, but rather to the laws of the states in the aggregate. This interpretation—which is contested in a debate in which I take no side—could justify choosing general law even in cases governed by the RDA.¹¹¹ Another similarly delimiting possible reading of the phrase "laws of the several states" is that it implicitly distinguishes between "local" law, which is binding in federal court, and "general" law, which is not.¹¹² These fine distinctions, which were "indistinct" even at the time,¹¹³ seem alien today, but resonated with contemporary taxonomies of law.¹¹⁴

Finally, even if the RDA had a clear meaning, it did not fully cover the terrain that *Erie*'s broad language purported to encompass. The version of the RDA in effect when *Erie* was decided did not cover equity cases,¹¹⁵ even though the Court extended *Erie* to cover equita-

109 See *supra* Section I.A; *infra* subsection III.C.1.

110 Cf. Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 998–1000 n.45 (2011) (contending that "the RDA leaves the courts free" to apply a "judicially developed choice-of-law technique").

111 Compare Sherry, *supra* note 5, at 134–37 (endorsing this interpretation, but focusing on federal common law rather than general law as the alternative to individual state laws), with Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL'Y (forthcoming 2013) (rejecting this interpretation).

112 Fletcher, *supra* note 38, at 1516–17; cf. Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 663 (2002) (observing that the RDA might allow federal courts to apply the "unwritten law of nations" even if such law is not federal common law because it clearly is not state law).

113 Fletcher, *supra* note 38, at 1533.

114 See *id.* at 1517–38. Yet another possible interpretation partially supporting *Swift* is that even if the RDA expressly required federal courts to apply state common law, that would "not necessarily" mean that federal courts were obligated to respect state court opinions. Nelson, *supra* note 5, at 955 ("In 1789, people did not automatically treat the phrase 'unwritten or common law' as a synonym for 'judicial decisions.'").

115 Compare 1 Rev. Stat. § 721 (1875) (codified at 28 U.S.C. § 725) (limiting RDA's scope to "trials at common law"), with Act of June 25, 1948, ch. 646, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652) (amending RDA to encompass "civil actions").

ble rights.¹¹⁶ Relying on the RDA to animate *Erie* would require both interpreting the statute in a way that provides useful guidance while also articulating a foundation for *Erie* when the statute was silent. Yet if *Erie* has a foundation independent from the RDA, it is not clear that the RDA adds anything of value.

Unsurprisingly, courts have deemed the RDA superfluous since early in the nineteenth century, noting that it “has been uniformly held to be no more than a declaration of what the law would have been without it.”¹¹⁷ The analysis in this subsection supports the RDA’s historical marginalization, such that the RDA is not a plausible source of positive guidance for the *Erie* doctrine.

In sum, a central unresolved puzzle of *Erie* is whether it has any foundation in positive law, what that foundation might be for each of *Erie*’s four components, and how that foundation would influence the doctrine’s development.

*B. The Puzzle of Non-Positive Constraints:
Is Erie a Brooding Omnipresence?*

Whether or not *Erie* has a foundation in positive law, it may also have a foundation elsewhere. So a second puzzle is determining what these relatively amorphous foundations might be and how they can animate various stages of the *Erie* inquiry.

Framing the problem requires thinking about *Erie* outside the context of the United States legal system. Recall that the *Erie* doctrine serves a specific function: it limits the discretion of judges to choose which rules they will apply. In effect, *Erie* posits that laws emerge from different sources (such as different sovereigns, different institutions within sovereigns, or customary practices), and that laws from a particular source have a greater claim to authority in particular cases. *Erie*’s role is to help judges make what Justice Frankfurter termed a “sharper analysis” of law’s “true source.”¹¹⁸ Viewed at this level of abstraction, *Erie* performs a role that exists in every legal system purporting to follow the rule of law.

116 See *Guar. Trust Co. v. York*, 326 U.S. 99, 111 (1945) (“To make an exception to *Erie* . . . on the equity side of a federal court is to reject the considerations of policy which . . . led to that decision.”).

117 *Hawkins v. Barney’s Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831); see Fletcher, *supra* note 38, at 1527 (“[E]ven if [the RDA] had never been enacted, the federal courts would have followed the local law of the states in cases where it applied.”). Nevertheless, courts continue to cite the RDA. See, e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 417 (2010) (Stevens, J., concurring in part and in the judgment).

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

Choice of law has been fodder for treatise writers in well-developed legal systems for centuries.¹¹⁹ The “true source” of law has been understood differently over time, such that older choice of law rules do not always fit well in new eras (which was a fate that befell *Swift*).¹²⁰ But however law was understood, choice of law has long been deemed important.

Given that early courts in multiple jurisdictions following the conventional wisdom of their eras could muddle through choice of law without the positive law sources cited in *Erie*, one can wonder whether *Erie* itself can survive without those sources. For example, if the RDA did not exist, surely we would not conclude that federal courts confronting a conflict of laws may choose whatever rules they feel like applying based on whim.¹²¹ The Constitution itself might help make that choice—indeed, the grant of diversity jurisdiction implies the need for a choice of law rule¹²²—but the sheer variety of constitutional arguments used to justify *Erie* belies any clear textual mandate.¹²³

If the Constitution’s text does not clearly require a particular choice, perhaps there are arguments about which choice is better that have nothing to do with the text. These arguments either predated the Constitution (such as general theories about choice of law) or arose independently (such as innovations in jurisprudential theories about the nature of law). *Erie* would thus incorporate background principles that are extra-constitutional. Relying on extra-constitutional authority may seem odd, but courts often look beyond the Constitution in other contexts involving the allocation of power in a federal system.¹²⁴

119 The first choice of law treatise in English was written in 1834. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 26 (1963) (citing STORY, *supra* note 48). The preface to that treatise cited dozens of works in several languages dating to the fourteenth century. STORY, *supra* note 48, at xi–xiv.

120 See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 252–56 (1992) (summarizing historical evolution of choice of law doctrine).

121 See *supra* note 117 (noting that courts have viewed the RDA as superfluous).

122 TEPLY & WHITTEN, *supra* note 107, at 423.

123 See *supra* Section II.A.

124 See, e.g., *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850) (citing “well-established rules of international law” as aids to understanding the Constitution’s framework for interstate comity and enforcement of judgments); *Thompson v. The Catharina*, 23 F. Cas. 1028, 1030 (D. Pa. 1795) (No. 13,949) (observing in the context of maritime law that “the change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence, we inherited from our ancestors, and possessed at the period of our becoming an independent nation”). For a discus-

If this reasoning about *Erie*'s pre-constitutional or extra-constitutional foundation is sensible, two conclusions follow. First, citing the Constitution or RDA might be neither necessary nor sufficient to resolve particular *Erie* questions. If *Erie* serves a similar role as doctrine in other judicial systems that lack the U.S. Constitution and RDA, then perhaps it relies at least in part on principles that are extrinsic to the Constitution and RDA. Identifying those principles would then become essential to applying *Erie*. Having some sort of choice of law regime might be a constitutional requirement, but the specific content of the regime might be a matter of judicial discretion absent further statutory guidance or a specific constitutional command relevant to a specific case. As Caleb Nelson has observed, this discretion would lead to the "ironic conclusion" that *Erie* at least in part "might best be characterized as what modern lawyers call 'federal common law.'"¹²⁵ Even more ironically, it would be federal common law that incorporates general law.

Second, implementing *Erie* may require federal judges to borrow principles from choice of law jurisprudence. Resolving conflicts between seemingly authoritative sources of law requires a metric for determining how to choose between potentially applicable rules. This metric might also require reconsidering the scope of the federal rule to narrow its reach and avoid the conflict. These are the kinds of inquiries that choice of law jurisprudence has addressed for centuries, yet *Erie* does not overtly borrow from this jurisprudence.¹²⁶

Accordingly, the second puzzle that arises from fragmenting the *Erie* doctrine into four steps and focusing on its underlying concerns requires situating *Erie* amidst historical analysis of choice of law. *Erie* was born from citations to "the Constitution," but its spirit might have pre-constitutional and extra-constitutional origins.

* * *

The discussion in this Part establishes that even if we know what functions *Erie* serves, we still need to know what values animate those functions. This Article focuses primarily on identifying *Erie*'s func-

sion of whether and how preconstitutional norms survived the Founding, see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012). An interesting potential objection to Professor Sachs's argument—which he acknowledges and refutes—is that *Erie*'s hostility to general law precludes relying on atextual background norms. See *id.* at 1882–84. The irony of the objection is that preconstitutional general law may animate *Erie* itself.

¹²⁵ Nelson, *supra* note 5, at 985–86; see also Green, *supra* note 99, at 836 (framing *Swift* as resting on "federal common law rules concerning choice of law" that *Erie* could have modernized without relying on the Constitution).

¹²⁶ See *infra* subsection III.C.1.

tions and doctrinal quirks, but the discussion above provides a framework for thinking about the underlying values. Further scholarship could help illuminate the jurisprudential theories animating *Erie* and inform the content of rules implementing *Erie*.¹²⁷

III. *ERIE'S* IMPLEMENTATION: RETHINKING DOCTRINAL PUZZLES

Parts I and II focused on *Erie's* functions; this Part focuses on its form. The morass of cases constituting *Erie* jurisprudence address several recurring problems that pose enduring puzzles. This Part illustrates how a more nuanced account of *Erie's* components can provide a new perspective on puzzles that have confounded courts and commentators for decades. For each puzzle, courts need to know whether their task is to create federal law, interpret federal law, prioritize conflicting laws, or adopt non-federal law. Courts likewise must recognize the difference between choosing an authoritative government, an authoritative institution within that government, and a rule that the institution would endorse.

The following sections analyze seven puzzles implicating all four of *Erie's* components. The goal is not to provide definitive answers, although I do offer some. Instead, the discussion exposes common themes underlying ostensibly dissimilar puzzles and places each puzzle in a context that helps to identify solutions.

First, analyzing multiple puzzles in the same article highlights how confusion in each area arises for similar reasons. This similarity is often difficult to discern because judicial opinions and scholarship usually address individual puzzles in isolation. Each problem might therefore appear to be difficult for idiosyncratic reasons. The analysis in this Part reveals that many puzzles arise from or become more difficult because of a shared pathology: a failure to parse *Erie* into its components. Each puzzle may raise some unique issues, but a more precise account of *Erie's* distinct components would place those issues in a context that can lead to better solutions.

Second, the analysis in this Part situates each puzzle within one of *Erie's* components and shows how that context can lead to doctrinal reform. A more precise account of where each puzzle fits within the

127 For examples of such efforts focused on modern choice of law theories, see Roosevelt, *supra* note 8, at 15 (“[T]he choice-of-law perspective gives us a simpler understanding of what is at stake in *Erie* analysis.”); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 537–39 (2006) (using the concept of “policy bundles” to highlight the interplay between choice of law principles and rules governing how judges craft federal common law).

broad *Erie* landscape helps determine what questions courts should ask and how to formulate coherent answers.

A. *Creation and the Puzzle of General Law: When Can Federal Common Law Incorporate or Choose General Law Rules that Could Not Apply of Their Own Force?*

Erie's central holding that “[t]here is no federal general common law” walks a semantic tightrope between the concepts of “federal common law” and “general common law.”¹²⁸ Shaking the rope highlights how *Erie* failed to articulate a normative theory that could shape the role of general law in the federal system. The potential utility of such a theory is evident in debates about whether federal common law should apply in some diversity cases and about the status of customary international law in United States courts.

The Court in *Erie* could not reject “federal common law” because federal courts routinely apply such law in multiple contexts. Judges and scholars often do not agree on when to apply and how to craft federal common law. But there is a broad consensus that courts can create federal common law in at least some cases that need a federal solution, but for which the Constitution, legislative action, and executive action have not directly supplied an answer.¹²⁹ Examples include rules governing interstate and foreign relations, the federal government’s proprietary interests, and admiralty.¹³⁰

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

129 For a discussion of competing theories of when, why, and how federal common law operates, see Clark, *supra* note 38; Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

130 See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Recent scholarship explores how additional clusters of federal judicial opinions outside the canonical categories constitute an often overlooked form of federal common law. See, e.g., Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013) (“[F]ederal courts have spent the last century engaged in an under-the-radar enterprise of fashioning and applying what are arguably hundreds of federal common law doctrines to questions of federal statutory interpretation.”); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 815 (2008) (“While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.”).

Likewise, the Court could not deny the existence of “general common law” because the Court itself had been diligently consulting such law since the Founding. Justice Brandeis doubted whether general law was a stable and legitimate source of judicial authority.¹³¹ However, he could not deny general law’s historical and contemporary salience as a source of ideas and guidance.¹³² Indeed, on the same day the Court decided *Erie*, Justice Brandeis filed another majority opinion applying a “federal common law” rule of “equitable apportionment” for resolving interstate water disputes.¹³³ That judicially created rule apparently borrowed from general law, which did not seem to disturb the Court.¹³⁴

The continued vitality of general law is consistent with Brandeis’s endorsement of Justice Holmes’s argument that “law in the sense of which courts speak of it today does not exist without some definite authority behind it.”¹³⁵ A central premise of Holmes’s critique was that prior decisions had deemed general law “obligatory” rather than merely available.¹³⁶ *Erie* eliminated the obligatory component of general law, mooted further discussion of what role, if any, general law might play in a federal system. By this deft maneuver, *Erie* avoided saying that general law did not *exist* and held instead that general law was not *binding* in diversity cases.¹³⁷

Given that “federal common law” and “general common law” both survived *Erie*, the Court was careful to condemn only “federal general common law.” Yet that novel term apparently had never

131 See *Erie*, 304 U.S. at 74 (noting “the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law” and how that impossibility created “uncertainties”); *id.* at 79 (discussing the “fallacy underlying” *Swift’s* endorsement of “transcendental” law (internal quotation marks omitted)).

132 See *infra* notes 139–48 and accompanying text.

133 *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102, 110 (1938).

134 *Hinderlider* relied on a prior decision which in turn claimed to be “building up . . . interstate common law” from unspecified sources. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907); see also A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 394 (1985) (“[T]he Court has never been very precise about the source of the law of equitable apportionment.”).

135 *Erie*, 304 U.S. at 79 (internal quotation marks omitted).

136 *Id.*

137 *Id.* at 79–80. For a discussion of recurring theoretical debates about whether and how nonpositive law can “exist,” see Lea Brilmayer, *Untethered Norms After Erie Railroad Co. v. Tompkins: Positivism, International Law, and the Return of the “Brooding Omnipresence,”* 54 WM. & MARY L. REV. 725 (2013).

appeared in any published judicial opinion before *Erie*.¹³⁸ The ambiguous term raises a question: What exactly did *Erie* reject? If general law survives in some form, but not as “federal general common law,” what role can general law continue to play? The answer is not clear because *Erie* did not carefully distinguish between rules that incorporate general law and rules that adopt general law of its own force. Closer attention to the difference between *Erie*’s creation and adoption inquiries might have highlighted the need for a normative theory explaining when federal courts can create rules that incorporate general law.

One possible reading of *Erie* is that its rejection of “federal general common law” means that federal courts can never *incorporate* general law into federal law. Yet that conclusion is implausibly broad for three reasons.

First, the Supreme Court has often expressly relied upon general law after *Erie*, notably in maritime cases.¹³⁹ The wisdom of this reliance is debatable.¹⁴⁰ But there is little doubt that if a federal court may craft federal common law in a particular case, then it has discretion to shape the rule (within limits).¹⁴¹ This discretion includes authority to incorporate general law principles.¹⁴² At that point the

138 At least none that are in Westlaw. This statement is based on a search on September 6, 2013 of the ALLCASES database on Westlaw for the phrases “general federal common law” and “federal general common law” before *Erie* was decided on April 25, 1938.

139 See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) (“With admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies.” (citation omitted)). For examples of other fields in which general law is relevant, see Nelson, *supra* note 127, at 508–25.

140 See Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1247–52 (2011) [hereinafter Erbsen, *Constitutional Spaces*] (considering potential justifications for federalizing admiralty law); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 542 (2008) [hereinafter Erbsen, *Horizontal Federalism*] (same).

141 See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979) (holding that federal courts have discretion to incorporate state law into federal common law).

142 See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405–06 (1970) (“[O]ur decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law.”); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (stating that “general commercial law” is “a convenient source of reference for fashioning federal rules”); Bellia & Clark, *supra* note 40, at 713 (noting that federal common law rules “are often nothing more than general law rules that the Court has borrowed from customary bodies of law to implement some feature of the constitutional structure”).

An interesting question is whether courts that incorporate general law are freezing the general rule as it exists at that moment, or also incorporating the evolutionary character of general law. For example, suppose that in 2012 a federal court decides

incorporated general law becomes federal law that applies in state courts under the Supremacy Clause¹⁴³ and can be the basis for federal question jurisdiction.¹⁴⁴

Second, the Constitution itself incorporates (or at least references) the general law of nations in clauses governing foreign relations.¹⁴⁵ This general law is a source that federal courts consult to

that federal common law governs a particular problem and crafts a rule that incorporates the general law. After twenty years, the general law rule has evolved to materially differ from the version adopted earlier. If a federal court again confronts the same issue, one can imagine three distinct approaches: it could conclude that the federal rule: (1) now differs from the general rule yet still applies; (2) is now outdated and should be replaced with a new federal rule based on the new general law rule; or (3) has evolved concurrently with the general law that it incorporated. A similar problem arises when the Constitution's use of a term might either freeze its meaning or incorporate the possibility of an evolving usage in the community from which the term was borrowed. See Erbsen, *Constitutional Spaces*, *supra* note 140, at 1244 n.283 (noting that Article I's reference to the "high Seas" "could refer either to specific waters that in 1789 were encompassed in the international law definition of high seas, or generically to the international law category of high seas such that the domestic category evolves along with the international category"). For a discussion of this temporal aspect of incorporation in the context of a current statute enacted in the nineteenth century referencing international law's definition of piracy, see *United States v. Dire*, 680 F.3d 446, 467–69 (4th Cir. 2012) (applying the modern definition).

143 See U.S. CONST. art. VI. *But cf.* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1453–58 (2001) (contending that some federal common law might not fit within the Supremacy Clause's definition of federal law). Although the distinction between general and federal law may be clear to a modern reader, "post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 745 (2004) (Scalia, J., concurring in part and concurring in the judgment). A Founding-era lawyer might have perceived general law's origin in the law of nations as a reason to consider it the "law of the land" in a sense that a modern lawyer would attribute to federal common law, but not to the type of general law applied in *Swift*. Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889–90 (2005).

144 See 28 U.S.C. § 1331 (2006); *cf.* *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286 (1875) (holding that a claim arising under "general law" did not raise a "Federal question" conferring appellate jurisdiction).

145 See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 746 (2012) ("[T]he Constitution employs various terms drawn from the law of nations, such as 'War,' 'Letters of Marque and Reprisal,' 'Captures,' 'Treaties,' 'Ambassadors,' and 'admiralty.'" (footnotes omitted)); *id.* at 779 (noting that the "allocation" of foreign affairs powers among the "political branches" cannot be fully understood without considering the implications of specific powers under the law of nations).

explain both the Constitution's original public meaning and its modern application.¹⁴⁶

Third, many statutes incorporate general law as a means of filling gaps in coverage or implementing a vague governing standard. A rare explicit example is a statute criminalizing "piracy as defined by the law of nations."¹⁴⁷ Implicit reliance on general law is more common.¹⁴⁸

In sum, reading *Erie* to reject the incorporation of general law into federal law is implausible. General law principles permeated federal law before *Erie* and survived *Erie*'s repudiation of "federal general common law."

Another possible interpretation of *Erie* is that even if federal courts can *incorporate* general law into federal law, they cannot *adopt* general law of its own force. On this view, *Swift* was wrong because it admitted relying on general law, which it grandiosely claimed—citing Cicero and Lord Mansfield—was law throughout the "world."¹⁴⁹ Rejecting this aspect of *Swift* is appealing to a generation instilled with the positivists' attempt to ground law in sovereign authority and the legal realists' skepticism of law's pretensions to uniformity.¹⁵⁰

But this anti-adoption interpretation is less helpful than it may seem for two reasons. First, *Swift* may not have adopted general law and instead relied on general law because that was the law that New York courts would have relied upon. If so, *Erie*'s non-adoption rule would not address the holding in *Swift*. Second, even if *Swift* did adopt general law, adoption can easily be recharacterized as incorporation. Indeed, it is possible to imagine a hypothetical variation of

146 See *id.* at 746 ("Accurately decoding [the Founders'] choices requires interpreters to give careful consideration to background principles of the law of nations and how they interact with the Constitution's allocation of powers."). As I have explained elsewhere:

International law can intersect with constitutional law in three ways that have generated controversy. International law can have: (1) *persuasive* force if it informs judicial understanding of the Constitution's text, (2) *preemptive* force if the Supremacy Clause requires federal courts to apply it and states to obey it unless and until Congress displaces it, and (3) *preeminent* force if the Constitution incorporates international standards.

Erbesen, *Constitutional Spaces*, *supra* note 140, at 1244 n.284.

147 18 U.S.C. § 1651 (2006); see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 & n.a (1820) (defining piracy by reference to a long list of foreign sources, including several in Latin).

148 For examples, see Nelson, *supra* note 127, at 519–25.

149 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842). However, one can debate whether *Swift* in fact applied general law of its own force. See *infra* notes 151–56 and accompanying text.

150 See PURCELL, *supra* note 16, at 78–79.

Swift that would survive *Erie's* anti-adoption rule and would be unconstitutional only if there is a normative argument against incorporation. Yet, as the following discussion illustrates, *Erie* never advanced a normative argument against incorporating general law into federal common law for purposes of diversity litigation.

On one reading, *Swift* merely applied New York's local choice of law rule, which in turn selected general law.¹⁵¹ The propriety of *Swift* would then hinge on whether a federal court could interpret the general law differently than the courts of the state whose choice of law rule it was enforcing.¹⁵² That inquiry requires considering whether state courts were adopting general law or instead incorporating general law into their own law. Justice Story either overlooked or finessed this question, noting only that state courts would "deduce" the rule of decision from general law.¹⁵³ This phrasing is opaque in a legal environment where courts routinely borrow each other's ideas. The key question is what status the idea has after it is borrowed, rather than its status before it was borrowed. Justice Story focused only on where New York found rules, not on what those rules became when New York relied on them.

Moreover, Justice Story began his analysis with an assumption about New York law that distorted his conclusion about general law. His opinion observed that New York's highest court had never endorsed the outlier holder in due course exception that *Swift* rejected,¹⁵⁴ but then assumed that the exception would not apply in federal court even if the state's highest court had endorsed it.¹⁵⁵ The problem is that because the highest court had not in fact endorsed the exception, lower courts had no occasion to decide if a higher court decision would bind them. Yet Justice Story nevertheless opined that "the Courts of New York do not found their decisions" about the exception "upon any . . . fixed . . . local usage."¹⁵⁶ This statement is misleading because it blends the actual content of New York law with Justice Story's assumption about what the state's highest court could have done. Lower state courts had not relied on a fixed local usage,

151 See Young, *supra* note 111.

152 A related question is whether a federal court can justify its refusal to follow a state court's interpretation of general law on the state court's own belief that its interpretation was not binding in federal court. For a discussion of this question, see Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1121–27 (2011).

153 *Swift*, 41 U.S. (16 Pet.) at 18.

154 See *id.* at 16–17.

155 See *id.* at 18.

156 *Id.*

but the highest court had not yet addressed the issue; if the highest court had addressed the issue—as Justice Story assumed for the sake of argument—then perhaps that would have created a fixed local usage. *Swift* never explored this possibility, and thus never considered that New York’s highest court in *Swift*’s hypothetical scenario could have incorporated general law into New York law rather than merely applied general law.

Accordingly, *Swift* might have been wrong for a different reason than the Court assumed in *Erie*. It is possible that the *Swift* court thought that New York’s choice of law rules selected general law, but erred either because New York courts in fact incorporated general law into local law, or because federal courts must follow state court interpretations even of general law.

Alternatively, *Erie* may have correctly concluded that *Swift* adopted general law. Nevertheless, *Erie*’s anti-adoption rule would be ineffective if adoption can be recharacterized as incorporation.

When a federal court sitting in diversity relies upon the general commercial law and treats it as independent of state law, one can say either that the court is adopting general law or that the court is incorporating general law into the “federal common law of diversity litigation in federal court.” Such a hypothetical body of federal law that would apply only in a federal forum seems strange, but is not entirely fanciful. Federal courts already craft common law to govern the “administration of justice.”¹⁵⁷ These rules are no less “federal law” than the Federal Rules of Civil Procedure, even though both apply primarily in federal courts.¹⁵⁸ Similarly, federal courts could eventually create a uniquely federal choice of law rule to replace the current practice under *Klaxon v. Stentor Electric*¹⁵⁹ of using the forum state’s choice of law rule.¹⁶⁰ This federal common law might preempt state

157 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 501 (3d ed. 2000); see also Barrett, *supra* note 130, at 823 (discussing federal common law “primarily concerned with the regulation of court processes and in-courtroom conduct”).

158 In theory, federal procedural common law—and even FRCP provisions—could apply in state courts when entangled with substantive federal rights, although in practice this is unlikely. See *Johnson v. Fankell*, 520 U.S. 911, 923 (1997) (observing that federal courts should respect “a State’s consistent application of its neutral procedural rules”); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (holding that “procedural” federal forum non conveniens doctrine need not apply in state court admiralty action); cf. FED. R. CIV. P. 1 (limiting scope of rules to “proceedings in the United States district courts”).

159 313 U.S. 487, 496 (1941).

160 See *infra* subsection III.D.1.

law even in state court, but it also might apply only in federal courts as a means of mitigating interstate friction in diversity cases.¹⁶¹

Even if federal common law cannot *incorporate* general law in diversity cases, federal common law still might be able to *choose* general law. If a federal common law choice of law rule is possible in diversity litigation, it is only a small step to argue that the federal choice of law rule might favor applying something other than state law as a rule of decision—for example, the general commercial law.¹⁶² Justice Story thus could have tried to salvage his holding in *Swift* simply by writing something along the lines of: Article III's grant of diversity jurisdiction authorizes federal courts to create a choice of law rule, which we apply today to conclude that the general commercial law is the optimal source of rules governing disputes about the validity of commercial paper that moves between states. If that gambit would have preserved *Swift's* holding, then *Erie* is less revolutionary than it seems.

A modern critic might respond to this reimagining of *Swift* by contending that federal courts cannot create a choice of law rule for diversity cases that has the effect of displacing state law with general law. For that objection to succeed, there must be a normative theory about why the existence of diversity jurisdiction does not authorize federal courts to create a choice of law rule that displaces state law with general law. Yet *Erie* does not offer such a theory. *Erie* briefly identifies a rationale for diversity jurisdiction,¹⁶³ but does not attempt to develop a general theory of federal common law that could help distinguish between permissible and impermissible uses of general law in diversity cases. Subsequent opinions have reconsidered pre-*Erie* precedents that created federal common law with insufficient analysis.¹⁶⁴ But these case-by-case efforts do not create a broad theory that

161 See *infra* notes 230–31.

162 Indeed, “general commercial law” is already an option when federal courts apply federal choice of law rules in federal question cases. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). For a discussion of whether relying on general commercial law in diversity cases can be sensible as a matter of policy, see Nelson, *supra* note 5, at 946–49.

163 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (noting the risk of “discrimination” by the forum state against noncitizens).

164 See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 217–18 (1997) (“We recognize . . . that this Court did once articulate federal common-law corporate governance standards, applicable to federally chartered banks. But the Court found its rules of decision in federal common law long before [*Erie*] We conclude that . . . [these rules did not survive *Erie*] and that . . . state law, not federal common law, provides the applicable rules for decision.” (citations omitted)); cf. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (“As respects the creation by the federal courts of common-law rights,

could justify reading *Erie* to bar application of general law in federal court.

The current status of general law thus presents a lingering puzzle. After *Erie*, deeming a rule to be “general law” is insufficient to justify its adoption in federal court. But that limit is easily circumvented if federal courts may create federal common law that incorporates or chooses general law.

Another practical example of how the adoption/incorporation distinction can be important is the current debate over whether customary international law (CIL) applies in federal courts.¹⁶⁵ CIL is a form of general law and thus might apply in federal court for two reasons: if it is a rule of decision that federal law adopts, or if federal lawmakers can create federal law that incorporates CIL. The debate over CIL’s status tends to focus on what I characterize as the adoption issue; i.e., whether CIL simply is federal common law of its own force.¹⁶⁶ But the incorporation issue is equally interesting.

Even if CIL is not itself a form of federal common law, it is still a distinct body of general law that a federal choice of law rule might select to govern a particular dispute. The challenging questions after *Erie* would be whether a federal court may fashion a federal common law choice of law rule to justify applying CIL and whether this choice of law rule would also apply in state courts.¹⁶⁷ In this framework, not all CIL would be federal common law, but some federal common law would incorporate CIL.

Erie’s rejection of “federal general common law” would thus raise the question of whether some forms of “general common law” can still

it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie*.” (citation omitted)).

165 For further explanation of why I draw this distinction, see *supra* notes 9–15 and accompanying text.

166 For early salvos in the debate, compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (contending that customary international law should not be treated as federal common law), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (responding to Bradley and Goldsmith). For more recent discussions of competing views about CIL’s status, see Bellia & Clark, *supra* note 145, at 828–37; Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1617–33 (2011); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 391–404 (2002).

167 See Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L LAW 513, 536–54 (2002) (considering potential justifications for, and limits on, a federal common law choice of law rule governing cases implicating foreign relations).

find a home within “federal common law.” Moreover, the new choice of law rule incorporating CIL would be an example of what Section I.A described as a blurring of *Erie*’s creation and prioritization functions: the judicial power to create law would generate a rule governing the resolution of conflicts between law from different sources.

Accordingly, the fuzzy distinction between “federal common law,” “general common law,” and “federal general common law” that Justice Brandeis sought to finesse cannot be so easily evaded. A theory of what values *Erie* promotes requires a concurrent theory of what values determine the scope of federal common law.¹⁶⁸ Otherwise, the judiciary’s ability to create federal common law that incorporates or chooses general law would swallow the prohibition against adopting general law. Here again, a sensible account of *Erie* requires considering its distinct components. We cannot know what law a court may prioritize without knowing what law a court may create and how courts may shape and interpret the content of that law.

B. Interpretation

The prior Section illustrated how *Erie*’s creation component determines whether a particular institution is authorized to create a particular federal rule. This Section considers how *Erie*’s interpretation component determines whether the federal rule encompasses a disputed issue on which state law might otherwise apply. Interpreting a rule requires determining its scope. But how? Two interesting puzzles arise: Should federal courts have a default rule for interpreting the scope of ambiguous statutes or rules, and how should the content of state law influence the interpretation of federal law?

1. The Puzzle of Interpretative Canons: Avoiding or Embracing Conflict

Imagine a diversity case in which the court must decide whether to allow discovery of several entries in the defendant’s personal diary. A hypothetical federal procedural rule provides that “the court may allow parties to discover the content of personal diaries only on a showing of good cause.” Meanwhile, a statute in the defendant’s home state creates “a right to privacy that prevents any court from

168 The Supreme Court was therefore imprecise when it stated that “the principles recognized in *Erie* place no limit on a federal court’s power to fashion federal common law rules necessary to effectuate a [particular] remedy founded on federal law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 n.6 (1991). The *holding* in *Erie* is irrelevant when federal common law expatiates federal law, but the *principles* animating *Erie* help determine what constitutes federal common law.

ordering disclosure of the contents of a personal diary unless the information is essential to proving a claim or defense and unavailable from other sources.” The court must determine the appropriate standard governing access to the diary.

Before we can decide whether the federal or state rule has priority in a diversity case, we must decide whether they conflict. A broad reading of the federal rule suggests a conflict because the phrase “good cause” arguably permits discovery in more situations than does the state statute. For example, perhaps the diary is relevant but not essential, or the information within it is obtainable elsewhere, but not without substantial cost. A narrow reading of the federal rule would avoid a conflict because the term “good cause” could incorporate respect for state privacy rights, such that the diary is discoverable in federal court only if it would be discoverable in state court. If the phrase “good cause” is truly ambiguous (e.g., context and drafting history do not illuminate its scope), then neither the broad nor narrow interpretation is obviously preferable.

Yet perhaps the values underlying *Erie* place a thumb on one side of the scale, favoring a broad or narrow reading that would create or avoid friction between federal and state law. In other words, does *Erie*'s interpretative component include a default canon for ambiguous federal rules in circumstances where state law is arguably relevant?

Identifying a default rule governing interpretation requires resolving a normative question that might have different answers in different contexts. There are three possible defaults: when a federal rule does not have a clearly defined scope, the court can err in favor of a broad or narrow interpretation, or it can aim to avoid erring in either direction. Favoring a broad interpretation is akin to concluding that federal law should not eschew conflict with state law and may even embrace conflict. On this view, the fact that a federal rule extends federal power is a feature, not a bug. In contrast, favoring a narrow interpretation is akin to adopting an avoidance canon that privileges state law and assumes that federal lawmakers want to minimize infringement of state prerogatives. The middle approach tries to avoid an error in either direction, although in practice this would be difficult to achieve when the statute is amenable to multiple interpretations. Neither the broad nor narrow default is obviously superior because reasonable minds can disagree on the normative and practi-

cal implications of shading statutory interpretation in different directions.¹⁶⁹

The optimal default might also vary by context. For example, federal statutes or regulations might have a presumptively broad scope when they address traditional federal interests (such as the military or foreign relations) and a presumptively narrow scope when they address matters traditionally subject to state regulation (such as tort law). Likewise, interpreting federal law to be consistent with state law might be more important in some contexts (such as litigation procedure, where disuniformity creates a risk of forum shopping),¹⁷⁰ than in other contexts (such as when federal regulations ensure vertical and horizontal uniformity by preempting all state law in the field). These sorts of normative questions are beyond the scope of this Article, so I will not propose a particular default rule for *Erie's* interpretation component.¹⁷¹

However, if there is an interpretative default one way or another, courts should be precise about defining it so that they do not arbitrarily misinterpret federal law. That precision is absent from current jurisprudence.

For example, consider three cases addressing whether a particular question was within the scope of a Federal Rule of Civil Procedure (FRCP). In *Walker v. Armco Steel Corp.*, the Court interpreted Rule 3 not to govern the question of what conduct (such as filing or serving a complaint) commences litigation for purposes of compliance with a state statute of limitations.¹⁷² The Court acknowledged that its task was to determine “whether the scope of the Federal Rule in fact is sufficiently broad to control the issue.”¹⁷³ In undertaking that interpretative inquiry, the Court expressly selected a default rule, stating that the FRCP should be given “their plain meaning” and should not be “narrowly construed” to avoid a conflict with state law.¹⁷⁴ Yet sixteen years later, the Court seemed to deny having adopted this default rule. In *Gasperini v. Center for Humanities, Inc.*,¹⁷⁵ the Court cited

169 A similar debate influences application of the avoidance canon in constitutional interpretation. See generally William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001).

170 See *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 405 n.7 (2010).

171 For a broader discussion of how default assumptions can aid in implementing *Erie*, see Erbsen, *supra* note 78.

172 446 U.S. 740, 743–44 (1980).

173 *Id.* at 749.

174 *Id.* at 750 n.9.

175 518 U.S. 415 (1996).

Walker for the proposition that the FRCP should be “interpreted . . . with sensitivity to important state interests and regulatory policies.”¹⁷⁶ *Gasperini* thus suggested, contrary to *Walker*, that the FRCP should be narrowly construed to avoid conflicts with state interests. *Gasperini*’s meaning remains opaque because of the Court’s fragmented decision in *Shady Grove Orthopedic Assocs. v. Allstate Insurance Co.*, which required the Court to determine the scope of FRCP 23.¹⁷⁷ In *Shady Grove*, all three opinions purported to endorse *Gasperini*’s default rule, yet all three disagreed about how that default operated.¹⁷⁸

Accordingly, a fair reading of current *Erie* jurisprudence is that the Court acknowledges the utility of having a default rule for interpreting the scope of FRCP provisions, but lacks a stable and determinate account of what that default requires. Thinking about *Erie*’s interpretation component as being distinct from its prioritization component can help clarify the importance of this default and highlight the normative concerns that shape the default.¹⁷⁹

2. The Puzzle of Comparisons: Identifying Conflict with State Law

Determining the content of state law is obviously important after the prioritization inquiry concludes that a federal court must apply state law. If state law governs an issue, the court must know what the law requires. But the content of state law also influences the antecedent question of whether state law applies.

Deciding whether federal law applies to a dispute can require considering the alternatives that might apply instead. For example, interpreting the scope of federal common law can sometimes require determining the content of state law. Federal common law by default incorporates state law when a uniform national rule is unnecessary, but there is an exception when a particular state law “prejudice[s]

176 *Id.* at 427 n.7.

177 559 U.S. 393 (2010).

178 *See id.* at 405 n.7 (rejecting *Gasperini*’s emphasis on “important” state interests, but agreeing that the FRCP should be interpreted to avoid disuniformity in state and federal procedure); *id.* at 421–22 n.5 (Stevens, J., concurring in part and in the judgment) (“agree[ing]” with the dissent’s reliance on *Gasperini*’s reference to important state interests, but “disagree[ing]” about the “degree to which the meaning of federal rules may be contorted . . . to accommodate state policy goals”); *id.* at 442–43 (Ginsburg, J., dissenting) (“The Court veers away from [*Gasperini*] . . . in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.”).

179 *See Erbsen, supra* note 78 (discussing the need for an “*Erie* canon”).

federal interests.”¹⁸⁰ Whether federal common law incorporates state law thus depends in part on the content of potentially applicable state rules. Likewise, the practical consequences of applying state law can influence a court’s assessment of whether to treat an issue as falling within the scope of federal authority.¹⁸¹ This inquiry blends *Erie*’s interpretation and prioritization components by considering which issues federal law addresses and whether federal law’s treatment of those issues displaces inconsistent state rules. Whether one frames the problem as one of interpretation or prioritization, applying *Erie* requires information about the content of state law.

Erie’s interpretation component therefore can raise the same kinds of questions as its adoption component. Both require identifying the source and content of rules that would supplant federal law in federal court. Yet questions arise about how to conduct these inquiries. To avoid duplication, I address these questions below in Section III.D, which discusses the adoption inquiry.

C. Prioritization

If federal law exists and extends to an issue, the next question is whether federal law has priority over conflicting state law. Current doctrine implementing this inquiry suffers from at least two flaws. First, courts have a needlessly myopic focus that overlooks potential lessons from analogous choice of law contexts. Second, courts rely on a distinction between common law and other types of federal law that is both theoretically and practically unsound.

1. The Puzzle of *Erie*’s Scope: Choice of Law Along Multiple Dimensions of Federalism

Thinking about *Erie* in the context of prioritization raises a question about whether *Erie*’s choice of law inquiry is uniquely different from the inquiries that arise in other choice of law scenarios that are at least partially analogous. If *Erie* addresses a unique problem, then thinking about why the problem is unique might help pinpoint what values the *Erie* doctrine promotes and how it should operate. If the

180 United States v. Kimbell Foods, Inc., 440 U.S. 715, 736 n.37 (1979); see also United States v. Little Lake Misere Land Co., 412 U.S. 580, 595 (1973) (“[E]ven if . . . state property law should generally govern federal land acquisitions . . . the particular [Louisiana] rule of law before us today . . . may not.”).

181 See, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 539 (1958) (holding that state law generally should not apply when it would “disrupt or alter the essential character or function of a federal court”).

Erie context is not unique, then lessons from analogous areas of jurisprudence might inform understanding of *Erie*.

Choice of law problems within a federal system arise in three scenarios for which we can attach distinct labels: a federal court might apply state law (vertical top-down review), a state court might apply federal law (vertical bottom-up review), and a state court might apply the law of another state (horizontal choice of law).¹⁸² *Erie*'s traditional scope encompasses only the vertical top-down scenario.¹⁸³ The vertical bottom-up scenario is sometimes called "reverse-*Erie*,"¹⁸⁴ although it also partially overlaps with jurisprudence governing preemption.¹⁸⁵ The horizontal choice of law scenario is typically not understood as raising any kind of *Erie* issue.¹⁸⁶ Instead, a distinct body of constitutional law governed by the Full Faith and Credit and Due Process Clauses overlays a set of choice of law rules that vary from state to state.¹⁸⁷

Despite sitting in three distinct doctrinal silos, the three choice of law scenarios are similar. In each, a judge must consider that: (1) in a federal system multiple sovereigns create conflicting rules; (2) criteria are necessary to resolve conflicts in a way that respects relevant constitutional, statutory, and prudential concerns; and (3) those criteria address questions such as the scope of each sovereign's lawmaking power, the relation of the sovereigns to each other, and the policies underlying the conflicting rules. Viewed in this light, it is striking that very little scholarship about *Erie* addresses reverse-*Erie*, and that almost none addresses horizontal choice of law.¹⁸⁸ A comprehensive

182 More complicated issues arise when either type of court might apply foreign, international, or tribal law, but for present purposes I want to address only the kinds of traditional federalism problems on which most discussions of *Erie* focus.

183 See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (choosing between New York law and federal law); *Hanna v. Plumer*, 380 U.S. 460 (1965) (choosing between Massachusetts law and federal law).

184 *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986) (noting that "reverse-*Erie*" requires "substantive remedies afforded by the States" in state courts to "conform to governing federal maritime standards").

185 See Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 7 (2006).

186 For examples of scholarship situating *Erie* within a broader choice of law framework, see Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011); Green, *supra* note 14; Roosevelt, *supra* note 8; Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523 (2004); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999).

187 See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 620–86 (5th ed. 2006).

188 But see sources cited *supra* notes 185–86. An observation that might partially explain the fragmentation of scholarship about choice of law in a federal system is

account of choice of law in a federal system might well conclude that each context raises different concerns that require different criteria. But that conclusion is not self-evident and some conceptual overlap is inevitable.¹⁸⁹

Courts currently take distinct approaches to the three inquiries, raising questions about why an approach that is sensible in one context is inapplicable in the others. For example, the horizontal choice of law inquiry often assigns priority based in part on whether application of a particular rule would create “unfair[] surprise[],”¹⁹⁰ which is not a factor that appears in the Court’s vertical top-down jurisprudence.¹⁹¹ Likewise, the vertical bottom-up inquiry emphasizes whether state procedures are “outcome-determinative,”¹⁹² while the

that the topic is often split between different courses: Civil Procedure (*Erie*), Federal Courts (reverse-*Erie*), and Conflicts (horizontal choice of law). In prior work, I noted an analogous phenomenon in the context of personal jurisdiction doctrine. Although constitutional law governing personal jurisdiction shares common features and concerns with constitutional law governing other aspects of horizontal federalism, courts and commentators rarely situate personal jurisdiction doctrine within a broader constitutional context. I speculated that one reason for this doctrinal divide might be that scholars who teach and write about constitutional law often teach different courses and are part of different academic communities than scholars who teach and write about personal jurisdiction. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 72–74 (2010).

189 See Clermont, *supra* note 185, at 4; Roosevelt, *supra* note 8, at 24. For a rare modern example of a Supreme Court opinion noting the intersection of *Erie* and reverse-*Erie*, see *Danforth v. Minnesota*, 552 U.S. 264, 307 n.3 (Roberts, C.J., dissenting) (“A federal court applying state law . . . is not free to follow its own federal rule simply because the issue arises in federal court. By the same token, a state court considering a federal constitutional claim . . . is not free to follow its own state-law view on the question simply because the issue arises in state court.”).

190 See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) (holding that a state court’s application of forum law did not violate due process because the defendant was not “unfairly surprised”).

191 Another potential inconsistency between the horizontal and top-down inquiries is that the Full Faith and Credit Clause permits states to apply their own procedural statutes because “the procedural rules of its courts are surely matters on which a State is competent to legislate.” *Id.* at 722. If the same preference for forum rules extends to procedural common law, it would differ from the top-down inquiry’s assumption that federal procedural common law does not automatically apply in federal court even to cases within its scope. See *infra* subsection III.C.2. The Court has not addressed whether *Wortman* extends to procedural common law, but the Restatement apparently assumes that it does. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) (indicating that a forum “usually applies” its own “rules prescribing how litigation shall be conducted” and not suggesting an exclusion for common law rules).

192 *Felder v. Casey*, 487 U.S. 131, 151 (1988).

top-down inquiry does not.¹⁹³ In contrast, the top-down inquiry emphasizes the difference between federal statutes and common law,¹⁹⁴ while the bottom-up inquiry does not.¹⁹⁵ The two vertical inquiries also differ in their approach to *Erie's* adoption component. The top-down inquiry seeks to avoid forum shopping by requiring federal courts to apply the same rules that would apply in local state courts.¹⁹⁶ Yet the bottom-up inquiry encourages forum shopping because state courts, unlike federal district courts, are not required to follow precedent from the federal circuit for their region.¹⁹⁷ As a result, the content of federal law can differ between state and federal courts in the same state.¹⁹⁸

Accordingly, thinking about the concerns animating *Erie* requires reconsidering whether *Erie* should fit within a broader jurisprudence governing choice of law in a federal system. If *Erie* is less unique than commonly assumed, then it might draw guidance from analogous doc-

193 Compare *id.* (reverse-*Erie* case relying on precedent focusing on outcomes), with *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965) (*Erie* case stating that the same precedent's focus on outcomes "was never intended to serve as a talisman"); see also FALLON ET AL., *supra* note 77, at 425 n.5 (noting inconsistency between *Felder* and *Hanna*).

194 See *infra* subsection III.C.2.

195 See *Clermont*, *supra* note 185 (exhaustively reviewing reverse-*Erie* jurisprudence and not identifying the statute/common law distinction as a relevant factor); *id.* at 44 (lumping together federal "constitutional, statutory, or common law" when discussing reverse-*Erie*).

196 See *infra* subsection III.D.2.

197 See *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) ("[T]he Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment."); *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." (citation omitted)); cf. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."). In practice, courts in different states use several distinct methods for interpreting federal law that give varying weight to circuit and district court decisions. See Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151–68 (1999) (surveying cases).

198 A state court may choose to avoid forum shopping by following circuit precedent as a matter of comity. See *Szewczyk v. Dep't of Soc. Servs.*, 881 A.2d 259, 266 n.11 (Conn. 2005) ("Departure from Second Circuit precedent on issues of federal law . . . should be constrained in order to prevent the plaintiff's decision to file an action in federal District Court rather than a state court located a few blocks away from having the bizarre consequence of being outcome determinative." (internal quotation marks omitted)).

trines. Fragmenting *Erie* into its components would thus reveal doctrinal connections that a less nuanced account of *Erie* obscures.

Another possibility is that vertical choice of law analysis really is unique, such that *Erie*'s prioritization inquiry should depart from prioritization inquiries in other contexts. But if so, a second puzzle arises.

2. The Puzzle of Pedigree: Why After *Erie* Do Courts Still Distinguish Between Statutes and Common Law?

The second puzzle arises from a literal reading of the Supremacy Clause. If we posit that federal law is always supreme relative to state law, then *Erie*'s creation and interpretation components completely supplant its prioritization component. The conclusion that federal law exists and encompasses a disputed issue inexorably leads to the further conclusion that federal law preempts inconsistent state law. In effect, there is no prioritization inquiry because federal law always has priority. The same conclusion would extend to bottom-up cases: if an issue in state court is within the scope of a valid federal rule, the federal rule would preempt state law. Accordingly, prioritization in the vertical context would be much simpler than in the horizontal context, so courts would be justified in not having one doctrine borrow from the other.

The problem is that *Erie*'s prioritization inquiry does not in fact rely on a literal reading of the Supremacy Clause. *Erie* does not simply accord automatic priority to valid federal rules that encompass a disputed issue. Instead, the inquiry is more subtle.

Under current *Erie* jurisprudence, priority depends on a federal rule's pedigree. A federal rule that arises directly from the Constitution or a statute applies automatically under the Supremacy Clause.¹⁹⁹ Automatic priority also extends to rules that the Supreme Court promulgates under the Rules Enabling Act.²⁰⁰ In contrast, when federal courts create federal common law without congressional authorization, priority is no longer automatic. Substantive federal common law applies automatically in the rare instances when it is relevant in

199 See *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) ("[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers.").

200 See *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (equating the "validity" of an FRCP provision with its "applicability" in diversity cases).

diversity actions.²⁰¹ But procedural federal common law's priority depends on a fuzzy balancing test. In this "relatively unguided *Erie* choice" the Court must consider *Erie*'s "twin aims," which are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."²⁰² A "federal judge-made law" that would "disserve" these twin aims yields to conflicting state law.²⁰³

The emphasis on pedigree survives the Court's recent fragmented decision in *Shady Grove*.²⁰⁴ Justice Scalia's majority opinion concluded that rules authorized under the REA "automatically" displace state law unless they are "invalid" under the REA or "inapplicable" because the issue is outside the rule's scope.²⁰⁵ The majority did not consider how *Erie* treated procedural common law given its conclusion that the REA applied, but a plurality obliquely endorsed the twin aims test by noting that "judge-made rules" that cause "forum shopping" cannot displace state law.²⁰⁶ Justice Stevens's concurrence acknowledged that "the way that [*Erie*] is administered varies depending upon whether there is a federal rule addressed to the matter."²⁰⁷ He agreed that judge-made federal rules trigger the twin aims test and that valid rules promulgated under the REA apply to cases within their scope, although he disagreed with how the majority analyzed validity

201 Diversity actions by definition do not "aris[e] under" federal law or else they would be federal question actions under 28 U.S.C. § 1331 (2006). However, substantive federal law can control defenses, counterclaims, crossclaims, and third-party claims in diversity actions. See *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (stating that jurisdiction under § 1331 is appropriate only when federal law is part of a "well-pleaded complaint"). Courts give valid substantive federal law automatic priority in diversity actions where the issue is within the federal rule's scope. See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 80 (2008) (noting that a federal statute raised defensively in a diversity action would preempt state law under the Supremacy Clause if the statute's text covered the disputed issue); *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988) (holding that a federal common law defense preempted state law in a diversity action).

202 *Hanna*, 380 U.S. at 468, 471; see also *Stewart*, 487 U.S. at 27 n.6 (stating that the "twin aims" test applies to "federal judge-made law" when "no federal statute or Rule covers the point in dispute").

203 *Stewart*, 487 U.S. at 27 n.6.

204 See *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

205 *Id.* at 398.

206 *Id.* at 416 (Scalia, J., plurality opinion). Additional dicta implied a skeptical view of federal common law's validity, but did not deny that federal common law could displace state law in appropriate circumstances. See *id.* ("[W]here neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, state law must govern because there can be no other law." (internal quotation marks omitted)).

207 *Id.* at 417 (Stevens, J., concurring in part and in the judgment).

and scope.²⁰⁸ Justice Ginsburg's dissent also emphasized pedigree, noting that

[i]f a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits. If, however, no Federal Rule or statute governs the issue . . . federal courts, in diversity cases, [must] apply state law when failure to do so would invite forum-shopping and yield markedly disparate litigation outcomes.²⁰⁹

The current test for implementing *Erie's* prioritization component thus relies on a potentially applicable federal law's pedigree. If the Constitution, a valid federal statute, or a valid federal rule promulgated under the REA encompass an issue, then federal law applies automatically regardless of whether and why there is a conflict with state law. The same priority extends to substantive federal common law. But if federal procedural common law conflicts with state law, then priority hinges on the twin aims inquiry.

The puzzle is why this emphasis on pedigree makes any sense. It seems to ignore the Supremacy Clause and it draws a line between statutes and common law for little apparent reason, replicating one of the formalities that plagued *Swift*.²¹⁰

A complete account of why the pedigree rule is flawed—as well as potential defenses of the rule and alternative readings of the Supremacy Clause—is beyond the scope of this Article. I address the problem in more depth in a work in progress devoted entirely to the pedigree issue.²¹¹

For present purposes it suffices to observe that fragmenting *Erie* into its components highlights interlocking puzzles about the prioritization inquiry. Either prioritization is essentially automatic, and thus the pedigree rule is flawed, or prioritization requires a nuanced analysis, and thus *Erie* should consider doctrine from analogous choice of law contexts.

D. Adoption

The adoption inquiry raises the tricky problem of how federal courts should determine the content of laws that they did not create, but are required to apply faithfully. This final component of *Erie* is

208 *Id.* at 417–18.

209 *Id.* at 438–39 (Ginsburg, J., dissenting) (citation omitted).

210 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (distinguishing “enactments promulgated by the legislative authority” and “decisions of the local tribunals”).

211 See Allan Erbsen, *Erie and Procedural Common Law* (unpublished work in progress) (on file with author).

relevant when the other three components indicate that federal law does not govern a particular question. If a federal court cannot apply federal law and yet still has jurisdiction over a justiciable dispute, it must adopt rules from other sources to fill the void.²¹²

The context in which *Erie* analysis occurs complicates the intrinsically difficult process of adopting legal rules. A court applying *Erie* is considering more than just how to identify and articulate the applicable law, which are questions that theorists have debated for centuries. The court is also considering how an institution empowered by one government (the federal government) should identify and articulate law created and developed by the institutions of a different government (a state).

The *Erie* opinion provides minimal guidance about the adoption inquiry, stating only that when federal law does not exist or lacks priority “the law to be applied in any case is the law of the State” as provided by “statute” or the state’s “highest court.”²¹³ This thinly reasoned assertion overlooks several questions that have spawned enduring puzzles. Among the interesting questions are which state’s law applies and what rules govern federal inquiries into the content of that state’s law. Analyzing these questions in light of the distinction between creation, interpretation, prioritization, and adoption can help resolve confusion arising from *Erie*’s imprecision.

1. The Puzzle of Which State’s Law Applies: *Klaxon* and the Adoption of Non-Federal Law

Erie is enervating, but *Klaxon* is exasperating. In a nutshell, *Klaxon*²¹⁴ holds that federal courts in diversity cases apply the choice of law rules of the states in which they sit.²¹⁵ The many flaws and potential defenses of *Klaxon*’s holding have been thoroughly discussed elsewhere.²¹⁶ Rather than repeat the debate, I will highlight

212 Federal courts may dismiss a case when there is no “judicially manageable standard” for resolving the dispute, and thus in a sense no governing law. *Vieth v. Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion); *id.* at 278 (“[J]udicial action must be governed by *standard*, by *rule*.”). However, concluding that a case is nonjusticiable for lack of an applicable rule requires interpreting the Constitution’s provisions governing the judiciary’s role within a system of separated powers, such that federal law still governs the outcome of adjudication. *See id.*

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

214 *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

215 *See infra* notes 237–39 and accompanying text.

216 *See, e.g.*, FALLON ET AL., *supra* note 77, at 566–69; Baxter, *supra* note 119, at 32–42; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1851–57 (2006). *Klaxon*

how a nuanced fragmentation of *Erie* into its components highlights errors in *Klaxon's* assumptions and reasoning.

Understanding *Klaxon* requires revisiting *Erie*. The relevant analytical move in *Erie* was its observation that federal courts have only two *initial* places to look for governing law: all law is state law unless federal law applies.²¹⁷ This binary arrangement does not bar federal courts from *subsequently* considering foreign or international law, or even private agreements. Instead, *Erie* limits their application to circumstances where state or federal law includes choice of law principles that select rules from an extrinsic source.²¹⁸ Using my terminology from Part I, *Erie* first selects an authoritative government (a state), then selects an authoritative institution within that government (such as the highest court), and then identifies rules—from whatever source—that the authoritative institution would choose to apply. This methodology also explains why the laws of multiple states can be relevant in a particular case. If the initially selected state government would apply rules from other states, then *Erie* generally requires federal courts to do the same.²¹⁹

may also exacerbate critiques of *Erie* by preventing federal courts from avoiding the application of parochial laws that undermine national interests. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 242 (2012) (contending that *Erie* facilitates “state exploitation of interstate commerce”).

217 *Erie*, 304 U.S. at 78 (“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”); see *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965) (observing that after *Erie*, “neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law”).

218 See, e.g., *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam) (*Klaxon* prevented a federal court from ignoring the forum state’s choice of law rules even though they might require applying the law of a seemingly disinterested foreign nation); *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1184–85 (7th Cir. 1996) (applying *Klaxon* to determine enforceability of a contractual choice of law clause).

219 A complication arises if the two interested states would defer to each other. Suppose that a federal court in state *X* adjudicates a diversity action between citizens of states *X* and *Y*. *Klaxon* requires applying *X*’s choice of law rule, which favors applying *Y*’s law. But *Y*’s law includes a choice of law rule that would favor applying *X*’s law. Neither state seems interested in providing an answer to the disputed question, yet the federal court must apply law from one of them. For a discussion of this scenario and a proposed solution, see Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1861–64 (2005). Additional puzzles arise when courts must determine the “extrajurisdictional effect” of state choice of law rules. Michael Steven Green, *Law’s Dark Matter*, 54 WM. & MARY L. REV. 845, 869 (2013).

Parsing *Erie's* choice of “law” inquiry into three choices—choice of government, institution, and rule—highlights the key question: When potentially applicable rules conflict, and none of those rules constitute federal law, which government has an authoritative claim to supply criteria controlling the choice: the United States or a state? To reach this question, a court must have already concluded that federal law does not provide a rule regulating a disputed issue, based on analysis of *Erie's* creation, interpretation, and prioritization components.²²⁰ Resolving the disputed issue therefore requires adopting a non-federal rule. But the court needs to know where to look for that non-federal rule, which requires identifying the government responsible for providing choice of law criteria.

Sometimes the answer to the “which government provides the choice of law rule?” question is obvious. For example, the Constitution creates a federal choice of law rule in the Full Faith and Credit Clause.²²¹ Courts adjudicating interstate disputes can thus look to federal law to help choose an applicable state law, although in practice the federal rule as currently interpreted imposes only minimal constraints on otherwise applicable state choice of law principles.²²² A federal choice of law rule would also apply when Congress requires a particular choice by statute.²²³

The “which government?” question is more subtle when the Constitution is silent and Congress has not acted. Nevertheless, federal common law rules can still govern choice of law even if federal law cannot supply the ultimate rule of decision. The relevance of federal law may seem counterintuitive. After all, if federal interests are sufficient to justify creating federal common law to govern choice of law, then they will often be sufficient to justify a federal substantive rule.

220 If federal law does control an issue, state law could still apply if either federal common law or a federal statute incorporates state rules. The greater power to preempt state law includes the lesser power to incorporate it. For examples of statutes incorporating state law, see 28 U.S.C. § 2674 (2006) (state liability rules govern tortious conduct by federal actors); 43 U.S.C. § 1333(a)(2)(A) (2006) (state law governs portions of the “outer Continental Shelf”); 16 U.S.C. § 457 (2006) (state wrongful death and personal injury laws apply “within a national park or other place subject to the exclusive jurisdiction of the United States”); 40 U.S.C. § 3172(a) (2006) (state workers’ compensation laws apply on federal “land and premises”); 42 U.S.C. § 2014(hh) (2006) (state law governs “public liability actions” arising from a “nuclear incident” within the state); 18 U.S.C. §§ 7, 13(a) (2006) (state criminal law applies in federal “special maritime and territorial jurisdiction”).

221 U.S. CONST. art. IV, § 1.

222 See *supra* subsection III.B.1.

223 For examples of federal statutes governing choice of law, see *supra* note 220.

However, several types of cases might warrant federal choice of law standards without authorizing broader lawmaking authority. First, in some bankruptcy cases, federal courts must choose between conflicting state laws affecting the estate's assets and the validity of claims. This choice implicates federal interests in the estate's disposition that could justify federal choice of law criteria.²²⁴ Second, when federal jurisdiction exists only because a party is a federally chartered corporation, federal interests might favor a neutral choice of law rule to accompany the neutral forum even if state law otherwise applies.²²⁵ Third, in rare cases when federal courts must choose between state law and tribal law, federal interests in protecting tribal autonomy may warrant using federal rather than state choice of law criteria.²²⁶ Finally, in cases implicating foreign relations, federal interests arguably justify displacing state choice of law rules with a federal rule.²²⁷

The question then becomes, do diversity cases fall into the category where federal common law supplies a choice of law rule even when federal law cannot govern the merits? The answer is yes, although it does not necessarily follow that federal courts should create a uniquely federal choice of law rule rather than adopting choice of law rules from state governments.

Identifying the institutional source of choice of law rules in diversity cases must be a federal question. Any other approach would be circular given *Erie's* premise that all initially authoritative law derives from federal or state sources. If federal sources do not determine

224 See *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946) (noting that “the question of which particular state’s law should measure the obligation [to pay creditors] seldom lends itself to simple solution” and suggesting in dicta, without citing the law of any state, that general choice of law principles might apply).

225 Compare *Berger v. AXA Network LLC*, 459 F.3d 804, 809–10 (7th Cir. 2006) (suggesting that federal common law displaces state choice of law rules in federal question cases when jurisdiction is based on party status), with *A.I. Trade Fin., Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454, 1463 (D.C. Cir. 1995) (applying forum state’s choice of law rule in action against a federally chartered corporation under 12 U.S.C. § 632).

226 Cf. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (holding that plaintiffs in diversity cases arising from conduct on a reservation must exhaust tribal court remedies).

227 See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1537 (2011) (advocating development of “specialized federal common law in international conflict-of-laws cases”); Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 169–70 (1988) (proposing a federal choice of law standard); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 286–87 (advocating greater “scrutiny” and possible displacement of state choice of law rules in international cases).

which state's law initially applies then state law must supply the answer. Yet one would have to consult the law of a particular state to find that answer. There is no way to know which state to consult without already having an answer to the question being asked. Treating the initial choice of law determination as a federal question is therefore a logical necessity.

If choice of law in diversity cases must be a federal question, then the next issue is which federal institution creates federal choice of law rules. Congress could do so as a necessary and proper means of implementing its power to vest diversity and supplemental jurisdiction in "inferior" federal courts that it "constitute[s]," "ordain[s]," and "establish[es]."²²⁸ But Congress has not acted.²²⁹ Absent legislation, federal common law controls to fill the void.

One could even go further and argue that federal common law directly implements the Diversity Clause. As I have explained elsewhere, diversity jurisdiction may exist in part to mitigate interstate friction that would arise if state courts adjudicated cases affecting sister states. Treating the initial choice of state law as a federal question can mitigate friction by having a neutral decisionmaker determine how to prioritize the competing states' regulatory interests.²³⁰ Whether this analysis means that a particular federal rule is constitutionally

228 U.S. CONST. art I, § 8; art. III, § 1. "Scholars are virtually unanimous in their view that Congress has the power to enact federal choice of law statutes." Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 23 (1991).

229 The RDA does not provide a viable choice of law rule for diversity cases. See *supra* Section II.A. Before authorizing the Federal Rules of Civil Procedure, Congress had promulgated narrow choice of law rules governing procedure in federal actions at law, including diversity cases. See, e.g., Conformity Act of June 1, 1872, Pub. L. No. 42-196, ch. 255, § 5, 17 Stat. 196 (requiring federal courts to "conform, as near as may be" to the forum state's laws governing "practice, pleadings, and forms and modes of proceeding").

230 See Erbsen, *Horizontal Federalism*, *supra* note 140, at 539-42; see also Hart, *supra* note 9, at 515 ("The Rules of Decision Act says that 'the laws of the several states' are to be followed only 'in cases where they apply.' The federal courts are in a peculiarly disinterested position to make a just determination as to which state's laws ought to apply where this is disputed."); Laycock, *supra* note 120, at 282 ("Unwillingness to displace state authority even over choice-of-law rules largely defeats the policy of the diversity jurisdiction."); Roosevelt, *supra* note 8, at 23 ("The relative priority of two states' laws is a question on which no single state can be authoritative."); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715 (1992) (discussing the possible origin, content, and scope of federal choice of law rules). Creating a federal choice of law rule would raise difficult questions about what choices the rule should make. For examples of specific proposals, see Baxter, *supra* note 119, and Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759.

required is debatable.²³¹ But the virtues of a federal rule may assuage any unease about the logical necessity of relying on federal law.

Even though federal law must govern choice of law in diversity cases, *Erie* and *Klaxon* never directly engage the federal common law nature of the inquiry. In *Erie*, the Court overlooked the problem entirely. Its binary distinction between federal law and state law is misleading because there is no such thing as “state law.” Instead there are fifty different bodies of law associated with fifty specific states. Courts need to know not just that a state’s law applies, but *which* state’s law applies. Justice Brandeis finessed this distinction by writing that federal courts must apply the law of “the State” without explaining how to identify that state.²³² The Court presumed that Pennsylvania law applied without purporting to rely on any particular source of choice of law principles. That presumption was reasonable because the accident had occurred in Pennsylvania and injured a Pennsylvania resident. But the *Erie* case had been filed in the Southern District of New York rather than in Pennsylvania, so it was unclear whether the Court applied Pennsylvania law due to a federal preference or deference to New York’s choice of law rules.²³³

Interestingly, Justice Story made the opposite omission in *Swift*. While *Erie* never mentioned forum law, *Swift* focused only on forum law. The forum (New York) was where the defendant was a citizen and the bill of exchange was “accepted.”²³⁴ But the plaintiff was a citizen of Maine, where the bill of exchange had been “dated” and the land was located.²³⁵ The *Swift* opinion never explains why Maine’s law did not apply. Like Justice Brandeis, Justice Story apparently believed that the correct choice of law was so obvious that identifying the source and content of rules governing the inquiry was unnecessary. *Swift*’s focus on New York law is consistent with an earlier decision by Justice Story applying the law of the place of contracting to cases involving negotiable instruments. In that case, Justice Story relied on a “well settled” choice of law rule within the “code of national law in

231 A related and difficult question is whether a federal choice of law rule should apply only in federal court or also in state court. A preemptive rule would better promote national uniformity but would further intrude on state prerogatives and require rethinking the Full Faith and Credit Clause’s currently minimal constraints on horizontal choice of law.

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

233 New York’s choice of law rules in 1938 would probably have required applying Pennsylvania law. See Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167, 181 n.66 (1985).

234 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 1, 14–15 (1842).

235 *Id.* at 1, 14.

all civilized countries.”²³⁶ It is difficult to imagine Justice Brandeis endorsing a choice of law framework with this sort of freewheeling pedigree, yet his opinion in *Erie* does not indicate what he had in mind to replace *Swift*-era choice of law methodology.

In the wake of *Erie*'s imprecise reference to laws of “the” state, the Court needed to fashion a rule for identifying a specific state. It did so in *Klaxon*.

With two paragraphs of analysis, the Court held in *Klaxon* that federal district courts must apply the forum state's choice of law rules.²³⁷ The Court reasoned that any other rule “would do violence to the principle of uniformity within a state, upon which [*Erie*] is based.”²³⁸ If “the accident of diversity of citizenship” allowed federal and state courts “sitting side by side” to apply different laws, plaintiffs (by filing) and defendants (by removing) would forum shop for favorable rules, undermining the “equal administration of justice” within the state.²³⁹ The Court's concerns are plausible, but its analysis is incomplete.

Several flaws mitigate the *Klaxon* rule's potential advantages. For example, the decision avoids intrastate forum shopping at the cost of encouraging interstate forum shopping,²⁴⁰ undermines predictability in national markets by denying repeat players in interstate disputes access to uniform choice of law rules, and ignores the federal interest in resolving competing state claims of regulatory authority.²⁴¹ Whatever the merit of these policy driven critiques,²⁴² which commen-

236 *Van Reimsdyk v. Kane*, 28 F. Cas. 1062, 1063 (C.C.D.R.I. 1812) (No. 16,871).

237 *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

238 *Id.* at 496.

239 *Id.*

240 The broad scope of adjudicative jurisdiction facilitates this forum shopping while weak restraints on horizontal choice of law encourage it. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring only “minimum contacts” between the defendant and the forum to justify jurisdiction); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion) (permitting Minnesota's tangential contacts with a case to allow Minnesota law to govern an insurance policy issued in Wisconsin to a Wisconsin resident injured in Wisconsin by Wisconsin residents).

241 Federal interests are also relevant in alienage cases where courts must choose between domestic and foreign law. A federal common law rule designed for interstate cases might not be appropriate for international cases implicating foreign relations. *See supra* note 227.

242 Other flaws are more technical. For example, after *Klaxon* choice of law rules from an initial forum follow a transferred case to a new forum even if the original forum had no connection to the dispute. A creative plaintiff can shop for favorable law by filing in an inconvenient district and then seeking a transfer to a preferred district. This occurred in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), where the Court held that Mississippi law governed a claim against a Delaware Corporation by a

tators have discussed elsewhere,²⁴³ I want to focus on a different flaw related to the source of authority animating *Klaxon*.

A strange feature of *Klaxon* is that the Court did not seem to realize that it was creating federal common law. Despite *Erie's* admonition for courts to be conscious of the sources of authority on which they rely, *Klaxon* does not expressly ground its holding in any source. *Klaxon* merely purports to “extend[]” *Erie*.²⁴⁴ Worse, *Klaxon* stated that the alternative to relying on the forum’s choice of law rules would be “enforcing an independent ‘general law’ of conflict of laws.”²⁴⁵ This framing of the problem is wrong. As Section III.A explained, when federal courts incorporate general principles of law into federal common law, those general principles cease to be “independent” sources of authority of the type applied in *Swift*. The actual alternative to state law in *Klaxon* was not general law, but federal law. And it was not really an alternative because the *Klaxon* rule is itself federal common law. *Klaxon* is thus thoroughly muddled: it creates federal law under the guise of adopting state law based on an irrelevant fear of applying general law.

Closer attention to *Erie's* distinct components might have provided clearer reasoning and a sounder rule. If the Court expressly focused on the source of choice of law rules in federal court, it should have realized that it was creating federal law and exercised the caution that *Erie's* creation component required. A cautious approach might have inspired more extensive consideration of federal interests relevant to the adoption of non-federal law. For example, *Klaxon* might

Pennsylvania resident injured in Pennsylvania. The plaintiff had initially filed the action in Mississippi to avoid Pennsylvania’s statute of limitations and then successfully sought a transfer to Pennsylvania. Likewise, *Klaxon's* focus on the forum state’s law is unstable when one realizes that the Constitution’s broad grant of power to create and regulate inferior federal courts does not require Congress to establish single-state districts, see U.S. CONST. art I, § 8, and Congress has in fact created multistate districts, see 28 U.S.C. § 131 (2006) (providing that the District of Wyoming includes “portions of Yellowstone National Park situated in Montana and Idaho”); Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96 (creating the short-lived “district of Potomac,” which included parts of Maryland and Virginia, as well as what is now the District of Columbia). Identifying the forum state for a diversity action in a multistate district would require applying the district’s internal rules assigning cases to various divisions. These housekeeping rules are not a plausible foundation on which to rest a choice of law inquiry. See Hill, *supra* note 103, at 558 (contending that the *Klaxon* rule would be “intolerable” in a multistate district). *Klaxon* is thus more an artifact of the federal judiciary’s current structure than a normative account of how choice of law should operate in diversity cases.

243 See *supra* note 216.

244 *Klaxon*, 313 U.S. at 496.

245 *Id.*

have given greater thought to the possibility that if a neutral decisionmaker is desirable in diversity cases, then a neutral choice of law rule might also be desirable. Federal courts therefore could apply a uniform national choice of law rule that promotes federal interests rather than relying on state choice of law rules that might privilege parochial interests.²⁴⁶ But instead *Klaxon* simply incorporated the forum state's law, in effect prioritizing forum law over the laws of other interested states without considering the availability of alternative rules.²⁴⁷ *Klaxon's* imprecision and inattentiveness to alternatives does not necessarily mean that adopting the forum state's choice of law rules is imprudent, but does suggest the need for careful reconsideration in light of *Erie's* four components.²⁴⁸

2. The Puzzle of State Institutional Authority: Federal Common Law and the Focus on States' Highest Courts

A second puzzle related to the adoption of state law is that *Erie* is internally inconsistent about the source of law determining the content of state rules. On one hand, *Erie* suggests that the optimal method for interpreting state law is itself a question of state law. On the other hand, *Erie* creates a federal common law rule requiring federal courts to interpret state law by predicting how the state's highest court would resolve an issue. This federal prediction rule is not necessarily consistent with state law governing the interpretative process. Distinguishing *Erie's* four components helps to highlight and resolve

246 See *supra* note 230. Applying a federal choice of law rule would still require considering state choice of law rules. The federal rule would identify which state's law to apply, but a state's choice of law rules are a component of its law that determines how far state law extends. See Roosevelt, *supra* note 8, at 23 ("States have the power to set the scope of their laws; federal courts do not.").

247 Empirical analysis shows that the forum's choice of law rules tend to favor forum law, although often not by large margins. See Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291, 313–14 (2000); cf. Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 764–75 (2009) (suggesting that federal courts might not be biased in favor of domestic law in transnational cases). In another article, I illustrate how *Klaxon's* preference for a bright line rule favoring forum law is inconsistent with the more flexible approach that federal courts use when crafting common law in other contexts. See Erbsen, *supra* note 78 (contrasting *Klaxon* and *Kimbell Foods*).

248 Questions arise under each component: (1) Can federal courts create a common law choice of law rule that operates either only in federal courts or also in state courts, and does Congress have more flexibility in crafting choice of law rules than does the judiciary? (2) What is the rule's scope and content? (3) When does it take priority over state choice of law rules? (4) If federal choice of law rules do not apply, which state's choice of law rules should a federal court adopt?

the tension between *Erie's* deference to state law and imposition of a federal interpretative standard. Instead of emulating the analytical methods of a state's highest court, federal district courts should emulate a state's trial courts, while federal appellate courts should emulate a state's highest court. This change in focus better respects state choices about the relative authority of different state institutions.

After a federal court decides which state's law to apply it must identify the content of that law. This process of interpretation should be faithful to *Erie's* principles. To see why, recall from Part I that *Erie* presumes that binding law has an authoritative source. When state law is binding, the source of that law is a state institution, such as the legislature or judiciary. Federal courts are not the kind of institution that states empower to create state law.²⁴⁹ Any attempt by federal courts to impose their own preferences about the content of state law would violate *Erie* by replacing an authoritative source of law with an unauthoritative source.²⁵⁰ Of course, some inconsistency between

249 State courts routinely observe that federal judicial decisions applying state law are not binding precedent. *See, e.g.*, 21st Century Ins. Co. v. Superior Court, 213 P.3d 972, 980–81 (Cal. 2009) (concluding that a federal court's prediction about what "this court would likely hold" was "unpersuasive"); *Aull v. Houston*, 345 S.W.3d 232, 236 (Ky. Ct. App. 2010) ("We are not bound . . . by the federal court's prediction.").

A state statute could in theory attempt to authorize federal courts to create state common law, which would raise at least two constitutional concerns. First, federal courts exercise the "judicial Power of the United States," not of the individual states. U.S. CONST. art. III, § 1. If that judicial power does not include authority to create state law that binds the states, then state acquiescence is likely to be irrelevant. *Cf.* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986) (stating that "consent and waiver" cannot evade the "structural principle" underlying "limitations imposed by Article III"); *infra* notes 252–53 and accompanying text (noting that the judicial power permits federal courts in diversity cases to exercise the lawmaking authority of state courts that federal jurisdiction displaces, but limiting its analysis to lawmaking that governs only the pending case). Second, delegating the power to create state law to non-state institutions would raise difficult due process questions. *Cf.* *United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (upholding the federal Assimilative Crimes Act, which criminalizes violations of state criminal law in federal enclaves, and characterizing the statute as a "deliberate continuing adoption" of state law rather than as a "delegation" of federal lawmaking power to states); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 672–94 (1986) (considering due process objections under state constitutions to state laws delegating government power to private actors); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1485 n.160 (2000) (contending that federal dynamic incorporation of state law is permissible but that federal delegation of lawmaking power to a state would be unconstitutional).

250 The opposite scenario—where state courts create federal law that is contrary to a decision of a district or circuit court—is less troubling if one interprets the Constitution (which does not itself establish any lower federal courts) to allow a role for state

federal and state applications of state law is inevitable for the same reasons that federal courts are inconsistent even when applying federal law: the process of interpretation can be subjective. But *Erie* still sets a goal of faithfully applying state law rather than altering or disregarding it.

A complication arises when state institutions have never considered a question that *Erie* deems to fall within the ambit of state law. In this scenario, one could posit either that state law exists but is not clear, or that state law does not yet exist. If state law is merely unclear, then the *Erie* problem differs only in degree from cases where there is greater evidence—such as roughly analogous precedent—of how state courts would resolve particular questions. The federal court would not be creating state law so much as compiling it from wisps of prior authority. But if state law does not exist because an authoritative institution has not yet created it or extended it to a new context, then there arguably is no law for a federal court to apply unless the federal court creates a rule. Categorizing that rule seems to require choosing between two troubling possibilities. If the rule is federal common law, it is inconsistent with the premise that state law applies. If the rule is state law, then the federal court becomes a source of another sovereign's laws. Yet state courts would not be obligated to follow this new law,²⁵¹ which then starts to resemble *Swifftian* general law: it lacks an authoritative state source, is binding only in federal court, but is not federal law.

This ethereal puzzle about when and how state law comes into being is interesting, but there is a simple solution in the *Erie* context: either state law governing burdens of persuasion explains how federal courts should proceed or federal law allows federal courts to create new rules. For example, suppose that in a run-of-the-mill tort action in state court a party relies on a novel claim or defense that the state's courts have never addressed. A conclusion that state law does not exist is akin to concluding that the party with the burden of persuasion has failed to provide a reason for ruling in their favor. The same analysis would apply in federal court under *Erie*, parties making unsupported arguments lose in federal court just as they do in state court.

courts in the federal lawmaking process with the possibility of error correction in the Supreme Court. *Cf.* Bellia, *supra* note 143 (discussing the role of state courts in creating federal common law). However, allowing state courts to depart from circuit and district precedent creates a risk of forum shopping in federal question cases, suggesting a potential need for further constraints on state discretion. *See supra* note 197 and accompanying text.

251 *See supra* note 249.

One might respond that state courts have a power that federal courts lack: they can create new law if the novel argument is sensible. Yet so too can federal courts. Article III provides that federal courts can exercise “judicial Power” over cases and controversies within their jurisdiction, which includes diversity actions.²⁵² This authority to resolve disputes is presumably at least coextensive with the authority of the state courts that diversity jurisdiction supplants.²⁵³ There is no reason to think that the Framers intended to prejudice parties compelled to litigate within federal diversity courts—such as defendants in original actions and plaintiffs in removed actions—by denying them access to new rules that state courts could create.

Article III thus allows federal courts to mirror the lawmaking flexibility of state courts. The label we use for the ensuing rules—“state law,” “predicted state law,” or even “diversity law”—is irrelevant so long as federal courts are clear about what they are doing and why they are doing it. This law would not replicate *Swiftian* general law because it would be tailored to the particular jurisdiction with authority to govern the dispute. The federal court would be trying to respect existing and potential state law rather than trying to displace state law.

The interesting question then becomes *how* should a federal court mirror state law. *Erie*'s prioritization inquiry considers the types of state rules that federal courts should follow, while *Erie*'s adoption inquiry considers which state institutions are authoritative sources of those rules.

The *Erie* doctrine seems to create a sensible rule for considering which institutions federal courts should emulate, but closer scrutiny reveals that the current approach is inconsistent with *Erie*'s principles. As currently applied, the *Erie* doctrine requires federal courts to ascertain the content of state law by predicting how the state's highest court would answer a question.²⁵⁴ Federal courts can therefore ignore state intermediate appellate court and trial court decisions,²⁵⁵

252 U.S. CONST. art. III, § 1.

253 In practice, federal authority might not precisely match state authority if the two judicial systems use different procedures to resolve disputes. Whether *Erie* tolerates procedural variation between federal and state courts depends on its creation component (testing whether federal procedures are valid), interpretation component (testing whether federal procedures are applicable), and its prioritization component (determining whether federal procedures displace inconsistent state procedures).

254 See 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4507 (2d ed. 2010) (collecting cases).

255 See *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (“[U]nder some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.”). Some circuits have relied on *stare decisis* to justify ignoring state intermediate appellate decisions that reject the circuit's own prior efforts to predict

although in practice these will often be helpful evidence of what the highest court would do.²⁵⁶ Federal judges apparently like this rule, which prevents them from becoming a “ventriloquist’s dummy” bound to repeat the holdings of lower state courts.²⁵⁷ The rule also has intuitive appeal because a “State’s highest court is unquestionably the ultimate expositor” on the content of existing law (although the legislature can react to judicial decisions by altering the law).²⁵⁸ If the highest state court will be the definitive authority *after* it decides a question, then predicting how the highest court will rule *before* it decides a question may provide the best chance of accurately foreshadowing the definitive content of unsettled state law. Nevertheless, focusing on a state’s highest court is inappropriate under either of two plausible justifications for the prediction rule.

The first potential justification for *Erie*’s prediction rule is that it is consistent with how state law structures interpretative and lawmaking processes in state courts. On this view, when *Erie* instructs federal judges to predict how the state’s highest court would rule, it is in effect requiring the same inquiry that lower state courts would per-

the content of state law. *Compare* FDIC v. Abraham, 137 F.3d 264, 269 (5th Cir. 1998) (“[W]e should not disregard our own prior precedent on the basis of subsequent intermediate state appellate court precedent unless such precedent comprises unanimous or near-unanimous holdings from several—preferably a majority—of the intermediate appellate courts of the state in question.”), *and* Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) (stating that “[i]nstead of guessing over and over [in response to intermediate state court decisions], it is best to stick with one assessment” until the state’s highest court addresses the issue), *with* *In re* Watts, 298 F.3d 1077, 1082–83 (9th Cir. 2002) (following intermediate state court decisions that rejected a prior Ninth Circuit precedent predicting state law).

256 See *West v. AT&T Co.*, 311 U.S. 223, 237 (1940) (noting that courts should not “disregard[]” intermediate appellate decisions absent “persuasive data that the highest court of the state would decide otherwise”). In theory, a federal court could take the prediction approach to its logical extreme by declining to follow even high court precedents that it believes would be overruled. In practice, federal judges are unlikely to make such bold predictions absent compelling evidence. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 205 (1956) (declining to ignore a forty-six-year-old state high court opinion because “there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, [and] no legislative development that promises to undermine the judicial rule”).

257 WRIGHT & MILLER, *supra* note 254, § 4507.

258 *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (internal quotation marks omitted). Despite the Court’s use of “unquestionably,” one can question the origins of this rule because the Court has not explained whether it emanates from federal common law or state law. See *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940) (citing *Erie*, without any explanation, as supporting the proposition that “[t]he highest state court is the final authority on state law”).

form. If so, then the prediction rule is consistent with *Erie's* goal of not distorting state law.

As Abbe Gluck recently explained, the “method” by which state courts interpret law is often as much a part of state law as the laws being interpreted.²⁵⁹ Law is not merely a set of words arranged in a particular way, but also a set of techniques for animating and applying those words. Professor Gluck was focusing on the interpretation of statutes, but the same principle applies to the creation and refinement of common law. When state courts make common law they do so because state law allows them to do so within certain limits. Just as the Constitution’s separation of powers affects the allocation and scope of federal lawmaking authority, the division of lawmaking power within a state determines which state institutions (including different types of courts) are authoritative sources of particular rules. The allocation and scope of that authority must itself be a question of state law because state law creates and structures state institutions. The Constitution imposes some limits on how state institutions operate—for example, the Due Process Clause precludes arbitrary lawmaking—but otherwise states generally have autonomy in deciding how to internally allocate lawmaking authority.²⁶⁰

Accordingly, the basic legal process question of “who decides” the content of state law is itself a question of state law when *Erie* deems state law to be authoritative and there is no federal constraint on state discretion (such as a due process limit).²⁶¹ This reasoning suggests that federal courts should determine the content of state common law using the same method as state courts.²⁶²

259 Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1930 (2011).

260 Federal law occasionally requires states to *exercise* their authority in particular ways, but generally does not dictate how states *allocate* authority between the legislative and judicial branches. See *Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997) (“We have made it quite clear that it is a matter for each State to decide how to structure its judicial system.”); *Reich v. Collins*, 513 U.S. 106, 111 (1994) (holding that the Due Process Clause required a state to provide a remedy to plaintiffs challenging a tax, but noting that “choices” about how to configure a “remedial scheme” are “generally a matter only of state law”).

261 The “who decides” question has a different answer when federal courts incorporate state law into federal law, at which point state law need not have the same meaning as it would have in state court, although uniform interpretation would still be prudent. See *supra* notes 9, 13–15 and accompanying text.

262 Other kinds of methods and institutional arrangements that are incidental to the lawmaking process may receive less deference. For example, the federal government has an interest in defining which federal institutions make factual determinations in diversity cases. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (citing “practical reasons” and the “Seventh Amendment” as justifications for

The problem with justifying the prediction rule as a reflection of actual state practice is that the Court has never tried to confirm if this account of state practice is correct, and the account appears wrong in some states. Soon after *Erie*, the Court examined South Carolina law to determine whether federal courts should follow the decisions of the state's Court of Common Pleas. The Supreme Court concluded that state law did not deem these trial court decisions binding on other state courts, but expressed caution about creating "a general rule" governing federal emulation of state trial courts because of variations in how "other states" structure their judicial systems.²⁶³ Yet subsequent cases ignored this warning, creating a prediction rule without tying that rule to the actual practices of state courts under state law.²⁶⁴ This omission is troubling because trial courts in some states do not always attempt to predict how the state's highest court would rule and are instead bound by other sources of authority, such as intermediate appellate decisions.²⁶⁵ In these states the federal prediction rule

allowing trial courts to find facts rather than following a state rule requiring appellate fact finding); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537–38 (1958) (holding that state law cannot "disrupt[] the federal system of allocating functions between judge and jury").

263 *King v. Order of United Commercial Travelers*, 333 U.S. 153, 162 (1948). A prior decision had noted the importance of "applicable principles for determining state law" without identifying what these were or where they came from. *Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943).

264 *See supra* notes 255–56.

265 *See, e.g.*, *Grand Cnty. v. Rogers*, 44 P.3d 734, 738 (Utah 2002) ("When the [intermediate appellate court] renders a decision on an issue, that decision is automatically part of the law of this state, unless and until contravened by this court, the legislature, or the people through the processes authorized for the making of new law."); *State v. Washington*, 114 So. 3d 182, 185 (Fla. Dist. Ct. App. 2012) ("While a lower court is free to disagree and to express its disagreement with an [intermediate] appellate court ruling, it is duty-bound to follow it."); *People v. Cummings*, 873 N.E.2d 996, 1003 (Ill. App. Ct. 2007) ("[D]ecisions of intermediate appellate courts are the law of the state or jurisdiction until such decisions are reversed or overruled by the court of last resort."); *Cuccia v. Superior Court*, 62 Cal. Rptr. 3d 796, 801 (Cal. Ct. App. 2007) (noting that the trial court "has no choice" about following intermediate appellate authority, but can encourage the appellate court to overrule precedent); *Am. Disc. Corp. v. Shepherd*, 120 P.3d 96, 102 (Wash. Ct. App. 2005) ("Where the Supreme Court has not addressed an issue, an existing Court of Appeals decision is the law that must be followed on the issue."); *Tebo v. Havlik*, 343 N.W.2d 181, 185 n.2 (Mich. 1984) ("[A]n uncontradicted decision of the [intermediate appellate court] must be followed by the circuit courts.").

Even intermediate appellate courts in some states have a limited lawmaking capacity. *See Young v. Beck*, 231 P.3d 940, 946 (Ariz. Ct. App. 2010) (holding that only the state's highest court can abrogate a common law doctrine); *Simmons Airlines v. Lagrotte*, 50 S.W.3d 748, 752 (Tex. App. 2001) ("It is not for an intermediate

replaces state law governing lawmaking in trial courts with an alternative federal common law rule.²⁶⁶ This federal rule would be justified only if it advances a federal interest, which leads to the second potential justification for the prediction rule.

The prediction rule might be appropriate because a federal court's choice of which state institution to emulate is a federal question requiring a federal common law rule (absent congressional action). The Diversity Clause puts federal courts in a position where they often must apply state law.²⁶⁷ Yet neither the Diversity Clause nor anything else in the Constitution explicitly tells federal courts where to look for answers about the content of state law, especially when state courts have not definitively resolved a contested question. This "where to look" inquiry must then be a question of federal common law. Treating the inquiry as controlled by state law would be circular: relying on state law as a source of rules about how to find the content of state law is impossible if one does not already know where in state law to look for such rules.²⁶⁸ Just as *Klaxon* avoids circularity by creating a federal common law rule regarding choice of an authoritative government, the *Erie* doctrine's prediction approach is a federal common law rule governing choice of an authoritative institution within the selected government.

appellate court to undertake to enlarge or extend the grounds for wrongful discharge under the employment-at-will doctrine."); *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 81 (Minn. Ct. App. 1989) ("It is not . . . the function of this court to establish new causes of action."); *Stanfill v. City of Richmond Heights*, 605 S.W.2d 501, 505 (Mo. Ct. App. 1979) ("court of error" cannot implement "change in the fundamental theory of the law").

266 At least one state trial court has observed, perhaps wistfully, that it lacked the flexibility of its federal counterparts. See *Chase Manhattan Bank v. N.H. Ins. Co.*, 749 N.Y.S.2d 632, 641 n.11 (N.Y. Sup. Ct. 2002) ("Unlike a lower New York court, a Federal court is not bound by the decisions of the Appellate Division, but is charged, instead, with predicting how the New York Court of Appeals would rule on an issue.").

267 Abstention is generally not an option even if state law issues are difficult. See *Meredith*, 320 U.S. at 234 (stating that other than in "exceptional cases," "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision").

268 Federal common law also governs the related question of how to allocate discretion among federal trial and appellate courts interpreting state law. Appellate review is de novo. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). The extent to which an appellate prediction of state law binds federal trial courts varies across circuits and by context (for example, a clear intervening change in state law motivates some district courts to depart from circuit precedent). See Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 992–95 (1996) (reviewing cases).

However, even though federal courts can create a common law rule governing which state institution to emulate, the current rule requiring federal courts to emulate the state's highest court is unsound. First, there is no compelling reason that federal common law governing the interpretation of state law should be nationally uniform.²⁶⁹ If federal diversity courts can apply fifty sets of tort and contract laws, then they can manage to apply fifty sets of laws governing the allocation of authority between different levels of the state judiciary. A uniform interpretative method would not enhance the ability of potential diversity litigants to anticipate outcomes and plan their behavior because the underlying law would still differ in each state due to *Klaxon*. Indeed, the current prediction rule might actually complicate parties' planning to the extent that it introduces a speculative variable into federal decisionmaking that is absent from decisionmaking in some state trial courts.

Second, although the prediction rule is a plausible method for determining the content of state law, other methods are also plausible, such as consulting legal scholarship, expert witnesses, trial court decisions, intermediate appellate court decisions, or a combination of sources.²⁷⁰ Indeed, horizontal choice of law inquiries can resort to multiple methods of ascertaining state law.²⁷¹ Even when the Constitution's Full Faith and Credit and Due Process Clauses compel a state court to apply the law of another state, there is no requirement that the state court use *Erie's* predictive approach.²⁷² Nothing in the Diversity Clause or any other part of the Constitution suggests that the methodology for ascertaining the content of law should differ in the

269 See *supra* note 12 (noting presumption favoring incorporation of state law into federal common law).

270 For a general discussion of whether predicting a superior court's decisions is a sensible way of making law in light of alternative possibilities, compare Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision-making*, 73 TEX. L. REV. 1 (1994) (defending a predictive approach), with Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 700–01 (1995) (criticizing prediction approaches).

271 Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136(2) cmt. d (1971) (describing “methods of providing information as to content of foreign law”).

272 Some states voluntarily borrow the federal prediction rule. See, e.g., *Fantis Foods, Inc. v. N. River Ins. Co.*, 753 A.2d 176, 183 (N.J. Super. Ct. App. Div. 2000) (“We see no reason why a different rule ought to govern state court judges in determining the law of a sister state than governs federal judges in identifying the law of any state”); *Lucero v. Valdez*, 884 P.2d 199, 204 (Ariz. Ct. App. 1994) (adopting prediction rule by “analogiz[ing]” vertical and horizontal choice of law).

vertical context from what is commonplace in the horizontal context.²⁷³

Recent scholarship has challenged current practices in horizontal choice of law by showing that state courts often ignore or misinterpret laws from other states.²⁷⁴ The sensible solution is to extend into the horizontal context *Erie's* insight in the vertical context that courts are obligated to apply foreign law with “fidelity” to how that law operates in foreign courts.²⁷⁵ Yet the need for greater rigor in the horizontal context does not mean that flaws in how *Erie* implements the fidelity requirement should propagate from the vertical context.²⁷⁶ Federal courts therefore should not be as lax in interpreting foreign law as are some state courts, while state courts should not be as wedded to the prediction approach as are federal courts. Instead, state and federal courts should both treat foreign rules of interpretation as an aspect of the foreign law being applied. *Erie's* approach to ascertaining the content of foreign law would thus have its roots in forum law without being needlessly parochial.

Third, the prediction rule is not necessary to prevent federal courts from becoming ventriloquists' dummies for state trial courts. State trial court decisions would bind federal courts only if they are binding in other state trial courts, which is unlikely because generally “[t]rial or inferior court decisions are not precedents binding other courts, including . . . other judges of the same trial court.”²⁷⁷

273 In both contexts, the question is the same: having concluded that legal rules from another government determine the answer to a disputed question, the court must ascertain the content of those rules. If the relevant government is, say, California, there is no reason why a federal district court and state trial court located in adjacent buildings in Texas must use different methods for identifying the applicable California rule. The methods *can* differ, but the Constitution does not *require* any difference.

274 See Green, *supra* note 14, at 1266–74.

275 *Id.* at 1262; see also *id.* at 1239 (“The obligations of a state court when interpreting sister-state law go to the heart of what it means to have fifty states cohabiting a federal union.”).

276 See *id.* at 1248 n.59, 1251 (suggesting that the prediction rule is important, but acknowledging that it is not an essential element of vertical *Erie* that state courts must apply in lieu of viable alternative means of respecting sister-state law).

277 *Ford v. Beaufort Cnty. Assessor*, 730 S.E.2d 335, 339 n.3 (S.C. Ct. App. 2012) (quoting 21 C.J.S. *Courts* § 212 (2006)); see also *King v. Order of United Commercial Travelers*, 333 U.S. 153, 161 (1948) (“[I]t would be incongruous . . . to hold the federal court bound by a decision [of a state trial court] which would not be binding on any state court.”). A similar model operates in the federal judiciary, where “federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.” *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011).

Finally, *Erie*'s emphasis on forum shopping illustrates why the current prediction rule fails to advance federal interests. In *Erie* the Court focused extensively on the risk of forum shopping by litigants hoping that federal courts would answer contested questions differently than state courts. Subsequent decisions confirm that preventing forum shopping is one of *Erie*'s "twin aims"²⁷⁸ and that a federal court sitting in diversity is "in effect . . . another court of the State."²⁷⁹ If preventing forum shopping is important, then the initial institution that federal courts should emulate is the state trial court where the action would have been filed if federal jurisdiction did not exist.²⁸⁰ By instead emulating the state's highest court, *Erie* creates an incentive to forum shop. State trial courts at the bottom of the judicial hierarchy typically have less discretion to depart from precedent or adopt novel rules than courts at the top of the hierarchy. Parties might prefer to file in or remove to a federal trial court masquerading as a state supreme court rather than litigate in a state trial court behaving the way that trial courts normally behave.

Of course, litigants in state court have one advantage that litigants in federal court do not: they can seek review in higher state courts that have more flexibility than trial courts. *Erie*'s prediction rule thus might make sense as a way of incorporating the powers of state appellate courts into federal decisionmaking.

However, two alternative ways to incorporate the state appellate process are superior to the current prediction rule. First, rather than guessing what a state's highest court might do, the federal court can certify a question to the state's highest court and receive a definitive answer.²⁸¹ Diversity cases raising difficult questions of unsettled state

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

279 *Guar. Trust Co. v. York*, 326 U.S. 99, 108 (1945).

280 In theory, a complication would arise if states create multiple types of trial courts with jurisdiction over cases where the amount in controversy exceeds the federal minimum. The federal court would then need to determine which type to emulate. This question of federal common law is not likely to arise because even if states have several types of trial courts with jurisdiction that overlaps the district court, those state courts presumably would employ similar methods for interpreting state law, obviating any choice between them.

281 See *Dorf*, *supra* note 270, at 700 (suggesting certification as an alternative to the prediction rule); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (noting that certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism"); Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1544–63 (1997) (discussing the costs and benefits of certification in diversity cases). But see Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1741–48 (2003) (contending that certification is inappropriate in diversity cases

law in which the district court's emulation of a trial court would disadvantage federal litigants are presumably rare and diffused across fifty states. If so, no one state would bear a burdensome load of certification requests.²⁸²

Second, if a federal court is going to act like a state appellate court, the acting should be done by a federal appellate court rather than a federal trial court. In state judicial systems, appellate courts can affirm or overrule decisions even if the trial court faithfully applied existing state law because the appellate court typically has more flexibility to create new law. If federal adjudication in diversity cases should replicate the lawmaking process of state adjudication, then federal appellate courts should emulate state appellate courts.²⁸³ Most states have two layers of appellate courts: intermediate and highest. A literal mapping of this structure onto the federal judiciary would analogize the federal circuit courts to state intermediate courts and the Supreme Court to a state's highest court. However, the Supreme Court almost never reviews questions of state law.²⁸⁴ This means that if circuit courts emulate state intermediate courts, federal courts will rarely have an opportunity to exercise the interpretative flexibility of a state's highest court. Federal common law should

due to the risk that state courts will bias their answers against out-of-state litigants). Federal judges have varying attitudes toward certification, even within the same circuit. *Compare* *Tinelli v. Redl*, 199 F.3d 603, 606 n.5 (2d Cir. 1999) ("When there is uncertainty in state law in a diversity case, it is often appropriate to certify the unresolved question to the highest court of that state."), *with* *Dibella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (noting that certification is appropriate only in "exceptional circumstances"). The disagreement appears to stem from competing perceptions about when state law is sufficiently uncertain to justify burdening a state court with a certification request. Apparently, uncertainty is in the eye of beholder.

282 Even courts in large states welcome certification requests. *See* *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 n.9 (Tex. 1992) ("By answering certified questions for those federal appellate courts that are *Erie*-bound to apply Texas law, we avoid the potential that the federal courts will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law. We find such cooperative effort to be in the best interests of an orderly development of our own unique jurisprudence, and to the bar, as well as in the best interests of the litigants we concurrently serve.")

283 For discussion of an analogous question about the relative lawmaking powers of federal trial and appellate courts in cases involving federal law, see Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203 (2011).

284 WRIGHT & MILLER, *supra* note 254, § 4036 ("Federal court determinations of state law are not binding on the Supreme Court. Nonetheless, the Court practices severe restraint in reviewing questions of state law.")

therefore allow circuit courts to emulate a state's highest court given that both are essentially courts of last resort.²⁸⁵

In sum, the rule requiring federal courts in diversity cases to predict how the state's highest court would resolve a disputed question is not an appropriate exercise of the judiciary's power to create federal common law. By using an inappropriate method to ascertain the content of state law, *Erie's* prediction rule undermines *Erie's* commitment to state authority. Instead, federal common law should require federal district courts in diversity cases to emulate state trial courts,²⁸⁶ which often but not always will involve predicting how the state's high-

285 This rule may seem inefficient because it encourages litigants to appeal federal district court decisions in the hope of obtaining review that is less constrained by state precedent. However, the efficiency concern does not warrant a different rule. First, my proposal replicates whatever inefficiency exists in state courts. If that inefficiency is a byproduct of a state's choice about how to allocate lawmaking authority among different institutions, then *Erie's* respect for this allocation and desire to avoid forum shopping should borrow the bitter with the sweet. Second, the current approach to *Erie's* adoption component is already inefficient because federal appellate courts review district court applications of state law de novo, which encourages appeals seeking a new audience. See *supra* note 268. The marginal increase in appeals under my proposal is unlikely to be burdensome, especially given the prevalence of prejudgment settlement.

286 Requiring federal district courts to emulate state trial courts in diversity cases raises a fascinating question that merits further scholarship: should the same emulation rule apply when federal courts consider state law outside the diversity context, such as when considering supplemental state claims in federal question cases? See 28 U.S.C. § 1367 (2006); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (federal courts are "bound" by *Erie* in federal question cases). The two contexts at first seem indistinguishable because both involve interpreting state law. However, forum shopping for favorable interpretations of state law is less likely when the parties have independent reasons to prefer a federal forum for a federal claim. Once in federal court, preclusion and estoppel rules in effect require plaintiffs to join transactionally related state claims and defendants to join compulsory state counterclaims. See FED. R. CIV. P. 13(a); RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e (1982). Moreover, supplemental jurisdiction cases might warrant special treatment because federal courts may approach state law differently when it is "woven into" a federal question case rather than when it is part of a "head of federal jurisdiction which entails a responsibility to adjudicate the claim on the basis of state law," such as the Diversity Clause. *McNeese v. Bd. of Educ.*, 373 U.S. 668, 673 & n.5 (1963) (discussing abstention); see also *Hagans v. Lavine*, 415 U.S. 528, 546 (1974) (noting that "[t]he Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims" as a means of avoiding difficult federal questions). Potential methodological inefficiencies discussed above at note 285 might therefore be more troubling in a federal question case than in a diversity case. Accordingly, the difference between federal interests in the supplemental jurisdiction and diversity contexts could in theory justify different interpretative methods, although further scholarship would be needed before concluding that such confusing differences are necessary in practice.

est court would rule.²⁸⁷ Federal judges might prefer the current prediction approach. But the desire of federal trial judges to have more flexibility than their state counterparts is not the sort of interest that survives *Erie's* limits on federal judicial authority.

The Court might have been able to avoid the flawed prediction rule if it had focused more precisely on distinct components of *Erie* analysis. Greater attention to the creation component would have highlighted the need for caution when creating a uniform federal common law rule governing methods of interpreting state law. More attention to the adoption component would have highlighted the need to rely on state law as a guide in selecting state institutions to emulate. Likewise, thinking about *Erie* as involving three kinds of choices—governments, institutions, and rules—rather than a single choice of “law” would have revealed how a state’s allocation of authority among its judicial institutions might inform federal judicial efforts to identify applicable rules.

CONCLUSION

This Article’s framework for thinking about the *Erie* doctrine provides a foundation for reconceptualizing choice of law in federal courts. Fragmenting *Erie* into its components demystifies a doctrine that otherwise seems to be an inscrutable monolith. The confusing whole is the jumbled sum of its more easily understood parts.

Deflating *Erie's* mystique does not diminish its importance. The *Erie* doctrine’s four functions place it at the center of debates about how to allocate regulatory power in a federal system and how to think about the legitimacy of legal rules. Making progress in these debates requires a more nuanced account of *Erie* than current jurisprudence provides. Focusing on *Erie's* four components can help resolve recurring doctrinal problems in vitally important areas of law that have confounded courts and scholars for seventy-five years.

²⁸⁷ Given that little is known about the varying limits on trial court discretion in the fifty states, further research would be helpful in guiding the development of state law in federal courts.