ARTICLES

Normalizing *Erie*

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This Article argues that the Erie *doctrine should be normalized by bringing it into line with ordinary doctrines of federalism. Under ordinary federalism doctrines—such as the dormant commerce clause, implied preemption, federal preclusion law, and certain special "enclaves" of federal common law—courts will displace state law to protect federal interests even when neither Congress nor the Constitution clearly articulates those interests. But under the* Erie *doctrine, the Supreme Court has mandated exactly the opposite approach: state law trumps federal interests unless those interests have been legislatively codified. This striking anomaly has not been noticed, in part because the voluminous literature on* Erie *has failed to recognize that the* Erie *doctrine is a response to the same problem addressed by ordinary federalism doctrines: In the absence of an explicit congressional or constitutional directive, how should courts sitting in diversity jurisdiction respond to clashes between state law and unarticulated (that is, uncodified) federal interests?*

This Article explains that Erie*'s unconventional answer to the problem of unarticulated federal interests is a fluke of history. Pivotal decisions about the* Erie *doctrine, unlike pivotal decisions about ordinary federalism doctrines, occurred at a time of heightened concern about judicial overreaching. Those concerns distorted the Court's decisionmaking, and* Erie*'s response to the common federalism question consequently diverged from ordinary federalism. Recognizing and putting aside the distorting influence clears a path to re-envisioning the doctrine and replacing the current* Erie *analysis with the familiar and established framework of ordinary federalism. Doing so simultaneously brings* Erie *back into line with ordinary federalism, increases judicial transparency, and resolves tensions within the existing* Erie *doctrine.*

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INTRODUCTION

One of the central problems of American federalism is how federal courts should treat state laws that conflict with federal interests. The hardest aspect of that problem involves *unarticulated* federal interests: situations in which neither Congress nor the Constitution speaks clearly about whether or how federal interests trump state laws. May courts nevertheless displace state laws in order

to safeguard federal interests? The usual answer is yes. Ordinary federalism doctrines establish a common framework to analyze the conflict between state law and unarticulated federal interests. State law is presumptively operative, but the presumption can be overcome by a sufficiently strong unarticulated federal interest. If the presumption is overcome, state law is displaced and federal law governs. Ordinary federalism operates in many familiar doctrines, including the dormant commerce clause, implied preemption, federal preclusion law, and certain special "enclaves" of federal common law.

Oddly, however, there is one situation in which the Court has reached the opposite conclusion, declaring that state law trumps federal interests unless those interests have been legislatively codified. This anomaly is commonly known as the *Erie* doctrine. Derived (some would say loosely) from the 1938 case of *Erie Railroad Co. v. Tompkins*,[1] the doctrine has generated more than two hundred Supreme Court cases and many thousands of scholarly articles. It has been called "the most studied principle in American law."[2] Almost forty years ago, two scholars noted that the *Erie* doctrine has "profoundly confused both courts and commentators" since its inception.[3] Matters have only gotten worse since they wrote.

But despite the voluminous literature on *Erie*, no one has recognized that the doctrine is actually a response to the same problem of ordinary federalism: In the absence of an explicit congressional or constitutional directive,[4] how should courts sitting in diversity jurisdiction respond to clashes between state law and unarticulated (that is, uncodified) federal interests? Rather than adopting a rebuttable presumption in favor of state law, as ordinary federalism does, black-letter *Erie* doctrine almost categorically prohibits judges from applying uncodified federal law. This puzzling discrepancy between the *Erie* doctrine and normal federalism has gone surprisingly unnoticed and unexplained.

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

2. Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980). The doctrine has also been labeled "a star of the first magnitude in the legal universe," BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977), and an "icon," Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 595 (2008), among other things. Ironically, given my argument in this Article that *Erie* is anomalous within the world of federalism decisions, one scholar has called it "the gatekeeper of state law autonomy." Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1091 (1989). For the seminal article on *Erie*, see John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

3. Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 357 (1977).

4. The Rules of Decision Act, 28 U.S.C. § 1652 (2012), is not a directive to apply state law, however much the Court may insist that it is. *See* text accompanying notes 36–40, *infra*.

In this Article, I argue that it is time to normalize *Erie*. *Erie*'s unconventional answer to the problem of unarticulated federal interests is a fluke of history. Pivotal decisions about the *Erie* doctrine, unlike pivotal decisions about ordinary federalism doctrines, occurred at a time when concerns about judicial overreaching—specifically concerns about judicial interference with legislative prerogatives—were front and center. Because of *Erie*'s unique timing, these worries distorted the Supreme Court's decisionmaking. The *Erie* Court's response to a common federalism question consequently diverged from ordinary federalism. Once we recognize and put aside the distorting influence, we can re-envision the doctrine, replacing the current *Erie* analysis with the familiar and established framework of ordinary federalism. Doing so simultaneously brings *Erie* back into line with ordinary federalism, increases judicial transparency, and resolves tensions within the existing *Erie* doctrine.

I begin by explaining, in Part I, how *Erie* is anomalous. Part I.A describes each of the ordinary federalism doctrines in turn, identifying the common problem and the common solution. In the cases under each of the four doctrines, the Court confronts a clash between state law and unarticulated federal interests. The dormant commerce clause cases pit state laws against the federal interest in the free flow of interstate commerce. The implied preemption cases implicate a federal interest in the full and effective implementation of federal statutes. Preclusion doctrines address the federal interest in the reach and scope of federal-court judgments. And the enclaves of federal common law encompass a motley assortment of Court-identified federal interests. In each of these situations, the Court solves the problem by using the same strategy of ordinary federalism. The Court presumes that state law operates normally. But if the state law interferes with articulated *or* unarticulated federal interests, the presumption can be overcome and federal law displaces state law.

Part I.B shows how the problem in *Erie* cases is analogous but the solution is not. The use of state law in suits between citizens of different states can sometimes clash with unarticulated federal interests, for example an interest in an integrated national market for consumer goods or an interest in the uniformity of federal litigation rules. But the *Erie* doctrine essentially prohibits federal courts from inquiring into those unarticulated interests. Instead of a rebuttable presumption in favor of the operation of state law, the *Erie* doctrine draws a sharp distinction between articulated and unarticulated federal interests. If the federal interest has been codified, federal law governs. Conversely, if the interest has not been codified, state law

governs.[5] This formalist approach—an apparent limit on judicial discretion—contrasts with the more pragmatic and functionalist strategy of ordinary federalism, which gives judges the discretion to evaluate the strength of unarticulated federal interests and the extent of the state interference.

Part II turns to history to suggest that the contrast between *Erie*'s formalism and ordinary federalism's functionalism is not coincidental. The doctrines of ordinary federalism were developed over many years, and during that time the Court's primary focus was indeed on federalism: the relationship between states and the federal government. Concerns about judicial discretion or judicial overreaching were very much in the background. The *Erie* doctrine, however, reached a pivotal point of development during a period when those concerns were in the foreground, and worries about judicial discretion were at their height. The Court, blinded by these concerns, failed to recognize the *Erie* problem as one of ordinary federalism.

Part II.A begins by tracing the history of concerns about judicial overreaching. Mostly dormant or nonexistent for the Constitution's first century or so, such concerns reached a crescendo during the first third of the twentieth century. And it was just at that point that *Erie* made its appearance.

I describe this *Erie* moment in Part II.B. For almost a hundred years following *Swift v. Tyson*,[6] the Court expanded the reach of federal common law. It is unsurprising that by 1938 the Court was ready to cut back and allow more leeway for state law to apply. But the jurisprudential forces that culminated in the momentous changes of 1937 and 1938—the end of the *Lochner* era of judicial resistance to

5. Although there are nuances that in theory could allow federal law to govern in the absence of codification and state law to govern even in its presence, both the basic *Erie* doctrine and its practical application yield the dichotomy I describe in the text. The dichotomy was formally adopted in *Hanna v. Plumer*, 380 U.S. 460 (1965). The Court held that if the federal interest has been codified, it governs unless "the [Rules] Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* at 471. The Court has recently reiterated the applicability of all Federal Rules of Civil Procedure that "regulate matters 'rationally capable of classification as procedure.' " Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010). On the other hand, in the absence of codification, state law will govern unless the difference between it and federal law is "nonsubstantial" or "trivial." *Hanna*, 380 U.S. at 467–68; *see also* Ely, *supra* note 2; Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1085–89 (2011); sources cited in note 110, *infra*.

6. 41 U.S. (16 Pet.) 1 (1842).

Progressive legislation, as well as the *Erie* decision—were not focused primarily on federalism.[7]

The crucial jurisprudential dispute of the first third of the twentieth century was instead about the power of the federal judiciary in particular, not the power of the federal government in general. Judicial overreaching was the culprit, regardless of whether that overreaching took the form of increasing or decreasing the power of the federal government (or, for that matter, of state governments) as a whole. When the Court moved away from *Swift*, then, its new doctrine rejected not only the perceived excesses of *Swift*, but also the perceived excesses of the *Lochner* era.[8] And Brandeis's Progressive politics further exaggerated the (over)reaction to those excesses. Finally, the original characterization of *Erie* as constitutionally mandated, combined with the rapid accumulation of precedent, enshrined *Erie*'s approach to such an extent that later Courts—even those less concerned with limiting judicial power—failed to notice it as anomalous.

Part II.C offers the contrasting history of ordinary federalism. Although each of the doctrines developed differently—and each continues to develop—none faced a crucial decision point at a time when the Court was worried about judicial discretion or judicial overreaching. Doctrines governing the dormant commerce clause, implied preemption (especially obstacle preemption), preclusion, and the handful of "enclaves" of federal common law all developed over relatively long periods of time. This lengthy gestation allowed the Court to focus on the changing nuances of the relationship between the federal and state governments in general, without being distracted by a time-specific concern with the role of the federal judiciary in particular.

Having described the existence and the origins of the disparity between *Erie* and normal federalism, I turn in Part III to the normative question. I argue that the *Erie* doctrine should be revised to align with ordinary federalism doctrines. Doing so would create a more sensible scheme for diversity cases and would close the gap between *Erie* and

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7. Indeed, the pre-1937 Court's insistence on the breadth of general federal common law under the extant *Swift* doctrine was, from a federalism perspective, in sharp contrast to its resistance to the federal New Deal. Thus the opponents of the old Court did not urge expanding or contracting federal power *vel non*. For a similar description of the New Deal's jurisprudential underpinnings (but made in service of a point opposite my own), see Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON & POL'Y 17, 113–14 (2013).

8. As Sam Issacharoff has put it, *Erie* represents the "triumph of the Progressive vision against the hated ghost of *Lochner*." Samuel Issacharoff, *Federalized America: Reflections on* Erie v. Tompkins *and State-Based Regulation*, 10 J.L. ECON. & POL'Y 199, 217 (2013). Issacharoff views this basis for *Erie* as an argument against implied preemption, *see id.* at 219–22. I argue that it instead reflects an undesirable distorting influence on the Court's decisionmaking in the federalism context.

kindred doctrines. More importantly, it would also force the Court to be more transparent than it currently is in its accommodation of state and federal interests. Under current doctrines, the Court can characterize as doctrinally predetermined some decisions that in reality require a discretionary choice between state and federal law. My proposed realignment of the *Erie* doctrine would foreclose that sort of masquerade. It would also align the Court's black-letter jurisprudence with its actual decisionmaking.

Part IV briefly sketches the practical implications of normalizing *Erie*. I outline what the *Erie* doctrine might look like without the distorting effect of concerns about judicial power. This Part also describes how a normalized *Erie* doctrine would resolve tensions within the current *Erie* doctrine, in particular the recurring problem of how to handle Federal Rules of Civil Procedure that conflict with substantive state policies. The Article ends with a short Conclusion.

I. UNARTICULATED FEDERAL INTERESTS AND JUDICIAL POWER

A. Ordinary Federalism

In a federal system, there will inevitably be situations in which state and federal interests are at odds. Various provisions of the federal Constitution—including, for example, the Supremacy Clause, the Privileges and Immunities Clause, and a few others—explicitly prohibit the states from acting in ways that interfere with certain federal interests. But a constitution written for the ages is unlikely to account for every clash between state law and federal interests. Indeed, even detailed federal statutes may not foresee every possible problem created by state actions.[9]

So the question will always arise: If neither the Constitution nor a federal statute speaks directly to whether a particular state action interferes with federal interests, what should happen?

A few of the drafters of the Constitution suggested one answer, but it was rejected. In the Federal Convention of 1787, James Madison and Charles Pinckney several times proposed that Congress be given a veto over all state laws "contravening" the Constitution,[10] or, more

9. For an excellent discussion of why Congress is unlikely to be able to foresee and account for such clashes in the text of statutes, see Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 8–31 (2013).

10. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 31 (May 29) (Adrienne Koch ed., 1966) (the "Randolph Resolutions" or "Virginia Plan," almost certainly drafted largely by Madison).

broadly, "interfering in the opinion of the Legislature with the general interests and harmony of the Union."[11] Had the latter proposal been adopted, the failure of Congress to veto a state law presented to it might be taken to indicate congressional approval. But the veto was rejected, and thus the question remained open whether congressional silence should dispose of the matter, or whether, instead, the courts were free to identify and protect federal interests left unarticulated by Congress.

The Supreme Court's definitive response across at least four different doctrines has been that courts should protect unarticulated federal interests. In each case, the decision to allow judicial protection of the asserted interest was neither obvious nor constitutionally mandated. But in each case the Court has decided—sensibly, in my view—that a congressional failure to articulate or protect a particular interest should not prevent the courts from identifying and protecting that interest. Only in the context of *Erie* has it reached a different conclusion. Examining each of the other doctrines in turn allows us to see how *Erie* is anomalous.

1. The Dormant Commerce Clause

The most straightforward presentation of the question of unarticulated federal interests arises in the context of the federal interest in the free flow of interstate commerce. The Commerce Clause gives Congress the power to regulate interstate commerce, but says nothing about whether that power is exclusive—that is, whether (or under what circumstances) the positive grant of power to Congress implicitly deprives the states of authority to enact laws that regulate, or that might impede, interstate commerce.

The dormant commerce clause doctrine represents the Court's resolution of the issue. Under that doctrine, the courts are authorized to strike down state laws that unduly burden the federal interest in interstate commerce, even when Congress has not spoken.[12] The most

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11. *Id.* at 518 (August 23); *see also id.* at 88 (June 8). This proposal, suggested both times by Pinckney and seconded by Madison, is broader because it is not limited to a veto over unconstitutional laws. Despite Madison's original, narrower proposal, he probably preferred the broader version. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 149–50 (2010).

12. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1971). In one sense, the dormant commerce clause doctrine is a double example of federal courts protecting unarticulated interests. Not only is explicit *congressional* authority for judicial action lacking, the *Constitution* itself gives no textual indication of limits on state regulation of interstate commerce. As Richard Epstein (a defender of the doctrine) puts it: "[A]s a matter of textual interpretation, [the] pedigree of the dormant Commerce Clause is shaky at best," and it is "a judicial invention that is not easily

important implication lies less in the imposition of implicit limits on state authority and more in the affirmation of federal *judicial* authority to step into the breach left by congressional inaction. Indeed, a handful of objectors have suggested dismantling the entire doctrine on the ground that it is a judicial usurpation of legislative authority.[13] The principal importance of the dormant commerce clause doctrine for my purposes, then, is that it establishes as a first principle that courts have the authority to protect federal interests even when those interests are unprotected or unarticulated by Congress.[14]

2. Implied Preemption

Somewhat less obviously analogous is the federal interest in the full and effective implementation of federal statutes. Congress, of course, has the power to explicitly preempt state laws when acting within its constitutionally prescribed authority.[15] Again, the Court could have chosen to take congressional silence—or lack of explicit preemption—as dispositive. But it did not do so: black-letter federal preemption doctrine reaches more broadly than invalidation of state laws expressly preempted by federal statute. Instead, state laws are preempted if Congress has completely occupied the field,[16] if it is

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defensible on narrow originalist grounds." RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 228–29 (2014).

13. *See, e.g.*, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 361 (2008) (Thomas, J., concurring in judgment) ("[T]he text of the Constitution makes clear that the Legislature—not the Judiciary—bears the responsibility of curbing what it perceives as state regulatory burdens on interstate commerce."); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 352 (2007) (Thomas, J., concurring in judgment) ("But the Constitution vests [the] fundamentally legislative choice [between economic protectionism and the free market] in Congress. To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce."); Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Nonintervention*, 69 OR. L. REV. 895 (1990). Justice Scalia recently called the whole doctrine "a judicial fraud." Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting).

14. Note that Congress still has the last word. If it authorizes a particular state law, that law does not violate the dormant commerce clause no matter how much it might impede interstate commerce—even if the Supreme Court has previously invalidated the state law under the dormant commerce clause. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423–25 (1946); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

15. Whether that power derives from the Supremacy Clause or from Congress's other powers is a subject of some debate. *See, e.g.,* Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Thomas W. Merrill, *Preemption and Institutional Choice,* 102 NW. U. L. REV. 727 (2008); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000). That debate is not relevant to my thesis.

16. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

physically impossible to comply with both state and federal law,[17] or if the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[18] All three doctrines follow roughly the same historical and jurisprudential pattern. Because the last one, often labeled "purposes-and-objectives" or "obstacle" preemption, provides the clearest parallel to both *Erie* and the other doctrines I discuss, I focus on it.

Obstacle preemption—like the dormant commerce clause—depends on the underlying principle that the judiciary has the power to determine whether state laws interfere with important federal interests even when Congress has not explicitly articulated those interests. In this context, Congress and the Court share the task of identifying the federal interest at stake: Congress enacts the statute, but the Court identifies the underlying objectives and insists on full implementation even when Congress has not made its wishes clear. And it is the judiciary that decides whether the state law in question is an impediment to full implementation.

Opponents of the doctrine of obstacle preemption rely on arguments that further demonstrate that the doctrine is a form of protecting unarticulated interests, rather than simply an aspect of ordinary statutory interpretation. Justice Thomas, for example, has written trenchantly against this form of preemption, arguing that under the doctrine, "the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law."[19] For Justice Thomas, "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution."[20] Similarly, some scholars suggest that the doctrine of obstacle preemption should be replaced with a doctrine based on "ordinary rules of statutory interpretation."[21] These scholars implicitly assume that the current doctrine of obstacle preemption is something other than ordinary statutory interpretation: replacement would not be necessary if obstacle preemption were in fact just an instance of statutory interpretation.

17. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

18. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

19. Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment).

20. *Id.*

21. Gardbaum, *supra* note 15, at 770. Other scholars have made similar suggestions. *See, e.g.*, Nelson, *supra* note 15, at 263–64, 276–90; Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption*, 5 N.Y.U. J.L. & LIBERTY 63 (2010); *accord* Issacharoff, *supra* note 8, at 220; Merrill, *supra* note 15, at 729.

3. Preclusion

Federal preclusion doctrines also raise an analogous question of judicial power to protect unarticulated federal interests. Although it seems obvious that there exists a federal interest in the preclusive effect of federal-court judgments, Congress has never specifically articulated either the interest or its contours. There is no federal statute governing the preclusive effect of federal-court judgments. It has therefore been up to the courts to create preclusion doctrines, and the Supreme Court has done so. For both federal-question cases and diversity cases, the Court has made clear that the preclusive effect of a federal judgment is a question of federal common law.[22] Once again, the federal judiciary has filled the gap left by congressional inaction, protecting federal interests that Congress could have, but has not, addressed.

As with the dormant commerce clause and implied preemption, the characterization of federal preclusion law as an instance of judicial protection of unarticulated federal interests is bolstered by the arguments of those who oppose the doctrine. One pair of commentators, for example, criticized the Court's most recent preclusion case for its failure to rely on any "specific act of Congress or . . . provision of the Constitution," as required by "*Erie*'s condemnation of 'federal general common law.' "[23]

4. Enclaves of Federal Common Law

Finally, the Supreme Court has identified a handful of diverse situations in which judicially created federal common law displaces state law. These "enclaves" demand the application of federal common law, according to the Court, because they implicate "uniquely federal interests."[24] Often viewed as exceptions to *Erie*, they are "well-

22. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001). Some scholars have included *Semtek* in the list of cases establishing "enclaves" of federal common law, discussed in the next subsection. *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 588 n.16 (2006). But in *Semtek*, the Court did not cite *any* of the other "enclave" cases. It relied directly only on preclusion cases. It also mentioned *Erie*—to which the "enclave" cases are sometimes considered an exception—only obliquely in two contexts: in rejecting an interpretation of Rule 41(b) as encompassing a rule of claim preclusion and in choosing to adopt state rules of preclusion as the default federal rules (in the absence of a countervailing federal interest). This citation pattern suggests that the Court did not think of *Semtek* as an "enclave" case.

23. Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 725–26 (2006).

24. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). Two scholars have recently traced the term

established and stable pockets of federal common law."[25] They include disputes between states,[26] cases affecting the rights and obligations of the United States,[27] admiralty cases,[28] cases affecting foreign relations,[29] and cases affecting government contractors.[30] Many scholars have noted the inconsistency between the *Erie* doctrine and the existence of these enclaves. Scholars have either urged the elimination of some (or all) of the enclaves or tried to justify them on historical, structural, or textual grounds.[31] But the lesson here should be that it is the *Erie* doctrine that is the outlier, not the existence of isolated instances of judicial power to protect unarticulated federal interests.

B. Erie*'s Exceptionalism*

By now, readers should see the pattern: when Congress has authority to act but has failed to do so, the courts have stepped in to identify and protect federal interests. What is less obvious is that the *Erie* doctrine raises the same question of judicial power, even though the Court treats it as something entirely different.[32]

"enclaves" to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), and have identified six enclaves. *See* Tidmarsh & Murray, *supra* note 22, at 588 n.16. For the classic argument reconciling *Erie* and these enclaves of common law, see Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 388–90 (1964).

25. Tidmarsh & Murray, *supra* note 22.

26. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

27. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943).

28. Kossick v. United Fruit Co., 365 U.S. 731 (1961).

29. *Banco Nacional de Cuba*, 376 U.S. 398.

30. Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

31. *See, e.g.*, Bradford R Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 78 NW. U. L. REV. 761 (1989); 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 (2008); Tidmarsh & Murray, *supra* note 22; Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008).

32. Scholars, too, have ignored the commonalities between, on the one hand, run-of-the-mill *Erie* cases, and, on the other, cases involving preemption, the dormant commerce clause, federal preclusion law, or the "enclaves" of federal common law. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2098–99 (2000). Dinh describes a spectrum of situations in which federal law "preempts" state law; the spectrum runs from clear congressional action, through less clear congressional action, to congressional inaction. He includes on this spectrum various forms of preemption, the dormant commerce clause, and federal common law enclaves as exemplified by *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). He does not discuss *Erie*. His discussion is broader than most, in the sense that it links preemption with both the dormant commerce clause and federal common law, but it is typical in its omission of the *Erie* doctrine. One commentator has recently noted in passing the similarity between what he labels "difficult" *Erie*

It is sometimes supposed that the *Erie* doctrine is the answer to a unique question that arises solely because of the existence of diversity jurisdiction. Justice Frankfurter helped foster that view early on, when he wrote that a federal court sitting in diversity jurisdiction "is . . . in effect, only another court of the State."[33] Justice Brandeis's opinion in *Erie* was considerably broader, identifying the limits on federal judicial power as simply one aspect of limits on federal power generally. The constitutional error of *Swift v. Tyson*,[34] which required its overruling, was that it conferred on federal courts "the power to declare rules of decision which Congress was confessedly without power to enact as statutes."[35]

But there is another way to look at the question answered (in different ways) by both *Swift* and *Erie*, one that is simultaneously broader than Frankfurter's and narrower than Brandeis's: What is the role of the judiciary in furthering national policies and national interests that have not been specifically addressed by federal statutes? Looking at the question in this way demonstrates that it is neither a general issue of federal power nor unique to *Erie*. It is, in fact, the same question raised and answered by the ordinary federalism cases just discussed. The Court, however, does not view it that way.

The *Erie* doctrine and its predecessor under *Swift* both concern the source of the governing substantive law in cases in which federal court jurisdiction is based on the diverse citizenship of the parties.[36] The

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cases and "difficult" preemption cases. Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1169 (2011). His analogy is limited to *Erie* cases in which a federal positive law exists but "is silent on the ultimate question of how that piece of federal law relates to potentially overlapping state law." *Id.* He thus focuses on interpretive questions about the scope of the federal interest articulated in the law's text, rather than on unarticulated federal interests. Another recent commentator makes essentially the same move, with somewhat greater detail, as a way to explain the Court's inconsistent precedent when a Federal Rule of Civil Procedure is at issue. Jeffrey L. Rensberger, Erie *and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591 (2015).

33. Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99, 108 (1945); *see also* Van Dusen v. Barrack, 376 U.S. 612, 642–43 (1964) (holding that transfer from a federal court in which a diversity case is properly filed to another federal court does not change the obligation to apply the choice-of-law doctrines of the state in which the case was originally filed, because transfer does not "effect a change of law but [is] essentially only . . . a change of courtrooms").

34. 41 U.S. (16 Pet.) 1 (1842).

35. Erie R.R. v. Tompkins, 304 U.S. 64, 72 (1938); *see also id.* at 78 ("Congress has no power to declare substantive rules of common law applicable in a state . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts.").

36. The doctrine also applies to state-law claims brought into federal court under supplemental jurisdiction based on 28 U.S.C. § 1367. Nothing in my argument turns on whether the source of jurisdiction is § 1332 or § 1367, so for simplicity's sake I refer to *Erie* as a rule for diversity cases.

crux of the problem in both *Swift* and *Erie* is that Congress has never clearly specified the law to be applied in diversity cases. The Rules of Decision Act[37] does not fit the bill. The Court adopted one meaning of that Act in *Swift* then the opposite meaning in *Erie*, and may well have been wrong both times (from the perspective of both the original legislative intent and the original public meaning of the language of the Act).[38] The first Congress, in 1789, enacted both the Rules of Decision Act and the first statute authorizing diversity jurisdiction. The grant of diversity jurisdiction was based primarily on fears that state courts would be insufficiently attentive to the federal interest in a national economy.[39] Thus the two acts taken together suggest an implicit congressional articulation of some federal interest;[40] at the very least, the Rules of Decision Act cannot be interpreted as an explicit denial of any federal interest in the substantive law to be applied in diversity cases.

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37. 28 U.S.C. § 1652 (2012). In its current form (which diverges only trivially from the original 1789 language), it reads: "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."

38. On the incorrectness of the statutory interpretation, see Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 903–04 (1986); Friendly, *supra*, note 24, at 388–90; Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 954–56 (2013) and sources cited therein; and Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133–37 (2011), and sources cited therein. For a recent defense of the Court's interpretation, see Young, *supra* note 7, at 25–45. For more classic arguments that the Rules of Decision Act places significant limitations on federal court lawmaking in diversity cases (and disputes about the underlying policy behind those limitations), see Ely, supra note 2 (avoiding forum-shopping and consequent unfairness); Redish & Phillips, *supra* note 3, at 357 (federalism); and Westen & Lehman, *supra* note 2 (avoiding unfairness).

39. *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1010–17 (2007); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 86–98 (1993); Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); *see also* David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1265–70 (2007) (collecting sources).

40. Scholars dispute whether the mere statutory grant of jurisdiction ought to be taken as a congressional authorization for judicial lawmaking in cases within that grant. *See, e.g.*, Green, *supra* note 2, at 609–10 (yes); Field, *supra* note 38, at 915–19 (yes, although *Erie* rejects this possibility); Borchers, *supra* note 39, at 98 (maybe); Steinman, *supra* note 31, at 316 (no). I do not take sides in this argument; rather, I suggest that no statutory authorization is necessary, as the courts should be able to protect unarticulated federal interests. The contemporaneous enactment of the Rules of Decision Act and the grant of diversity jurisdiction remove any argument that there is a codified *prohibition* on judicial protection of unarticulated federal interests in the context of diversity.

In the absence of an explicit federal statute, the question of the source of law in diversity cases thus raises exactly the same question as the other three doctrines discussed here: May the judiciary determine whether the particular case implicates federal interests unarticulated by Congress, and, if so, may it create and apply federal common-law doctrines[41] to protect those interests? The Court's answer in *Erie* is firmly negative. Federal courts must apply state law, not federal, unless the federal interest has been codified in either a statute or a Federal Rule of Civil Procedure.[42] That approach is flatly inconsistent with the approach taken under ordinary federalism doctrines, and the Court has never addressed either the analogy or the inconsistency.

Reconceiving the key question in *Erie* and its progeny in this way sheds light on the doctrine, but it also creates a previously unnoticed puzzle. Why has the Court so steadfastly eschewed judicial protection of unarticulated federal interests in only this one context? I suggest that history provides the answer. The *Erie* doctrine—and only that doctrine—developed against a background of concerns about judicial overreaching, which distorted the Court's focus. The next Section of this Article elaborates my claim.

II. THE ORIGINS OF *ERIE*'S EXCEPTIONALISM

A. The Rise and Fall of Concerns About Judicial Overreaching

Concerns about judicial authority are necessarily intertwined with jurisprudential views of what it is that judges do. In eras in which judges are thought to find, rather than make, law, there will be less concern that judges might trespass on legislative prerogatives. In eras in which judges are viewed as partisan or political lawmakers, there will be more such concern. The concern, in short, will rise and fall in concert with the amount of discretion judges are believed to exercise.

My thesis is that the *Erie* doctrine, unlike the other doctrines, was influenced by the Court's concerns about judicial overreaching. That thesis necessarily rests on jurisprudential history, but requires only a broad overview of the eras of American jurisprudence. In particular, I focus on the dominant jurisprudence of each age as an

41. By describing doctrines as "common law," I mean only that it is fashioned by judges without recourse to any particular written source. I do not intend to wade into the controversy about the many possible meanings of the term. *See* Nelson, *supra* note 31, at 10–18.

42. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Burlington N. R.R. v. Woods, 480 U.S. 1 (1987); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (statutes); *see also* sources cited in note 110, *infra*. There are a handful of exceptions, which makes the usual *Erie* rule all the more anomalous. *See* text accompanying notes 24–31, *supra*, and 191–216, *infra*.

indicator of judicial views. In this Section, I therefore paint with broad strokes, ignoring many nuances and attempting to provide a relatively uncontroversial description of each era.

Judicial power in the abstract was not especially controversial in the early republic. Particular rulings were ignored, challenged, criticized, or overruled, but the authority of the judiciary itself was not seriously questioned. For example, despite some contemporaneous criticism of the Supreme Court's substantive mandamus holding in *Marbury v. Madison*,[43] the decision itself was largely uncontroversial. *Marbury*'s affirmation of the power of judicial review, in particular, garnered little criticism.[44] During the first few decades after *Marbury*, the only major dispute about judicial review was a debate about federalism rather than separation of powers.[45]

Why such complacency about the judiciary? Serious concern about judicial overreaching is unlikely as long as judges (and citizens) believe—or at least claim to believe—that they have little or no discretion. And so it was when the Constitution was adopted and for more than a hundred years afterward, through two related jurisprudential eras.

Before and after 1789, and continuing through at least the first three decades of the nineteenth century, natural law jurisprudence dominated American judicial thought. Both state and federal courts invalidated statutes based on inconsistency with unwritten natural law, sometimes in addition to, but sometimes instead of, a narrow reliance on written constitutions.[46] Law was found, not made, by judges,

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43. 5 U.S. (1 Cranch) 137 (1803).

44. *See, e.g.*, WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 72 (2000); ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 102 (1989); HOWARD E. DEAN, JUDICIAL REVIEW AND DEMOCRACY 27 (1966); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 248 (1923); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001).

45. *See, e.g.*, Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 11, 12–13 (George Arishidze et al. eds., 2016):

> Few objected to federal judges reviewing the constitutionality of federal statutes or state judges reviewing the constitutionality of state statutes. But *federal* judges reviewing the federal constitutionality of *state* statutes? That was a problem. It was, however, merely one aspect of the larger issue of federal power in general; objections to federal judicial interference with state prerogatives were no louder than objections to federal legislative or executive interference with state prerogatives. From *Martin v. Hunter's Lessee* through John Calhoun's interposition and nullification theories to the Civil War, states periodically resisted *all* federal claims of supremacy.

See also Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415 (2003).

46. *See* Suzanna Sherry, *Natural Law in the States*, 61 CIN. L. REV. 171 (1992); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

even if they had a hand in shaping it. Law was, in Oliver Wendell Holmes's classic disparaging description a century later, a "brooding omnipresence in the sky."[47] Whether this natural law was thought to spring up from customs (or existing positive law) or descend from reason (or God), it placed serious enough constraints on judicial discretion to allay most concerns about judicial "lawmaking."[48] As Larry Kramer has described the difference between that view and the modern one: "Common law adjudication has an element of creativity in both worlds, but the earlier view sees this creative element as bound closely to the service of exogenously fixed principles."[49]

The Marshall Court encouraged the public belief in judges as law finders rather than lawmakers. The Court drew a distinction between law and politics, identifying the former as the domain of the judiciary and the latter as the domain of the other branches.[50] And even as the Court made new law, it denied doing so. As perhaps the foremost historian of the Marshall Court has put it:

> [T]he process of recasting doctrine often meant its modification to conform to new conditions, but the recast doctrines were treated as if they were enduring principles that had been extracted from the authorities of the past. Just as the Court did not treat its recasting of the Constitution as making new law, it did not treat its recasting of common law doctrines as lawmaking. In both areas modifications of language or doctrine were presented as the promulgation and clarification of settled principles.[51]

Thus, whether because of an actual belief in the existence of natural law or because of tactics that reduced public opposition to the exercise of judicial discretion, early nineteenth century judges remained relatively untroubled by concerns about judicial overreaching.

As the century progressed, the prevailing jurisprudence changed but the underlying principles that protected judges from doubts about their own authority did not. Natural law jurisprudence morphed into classical formalism, but jurists continued to believe that judges could remain aloof from politics. Classical formalism shared with natural law

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47. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

48. On the differences among these various sources of unwritten law, see, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 776–77 (2010); Nelson, *supra* note 38, at 931–37; and Stephen A. Siegel, *Historism in Late Nineteenth Century Constitutional Thought*, 1990 WISC. L. REV. 1431, 1540–43. The classic description of the development of the Anglo-American idea of a "higher" law is EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955) (reprinting two 1928 Harvard Law Review articles).

49. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 282 (1992).

50. *See, e.g.*, William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 935–36 (1978).

51. G. EDWARD WHITE, 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 9 (1988).

jurisprudence both a denial that judges made law[52] and techniques that claimed to cabin judicial discretion. Law was viewed as "built on a bedrock of scientifically deducible principles,"[53] and governed by "identifiable bright-line boundaries that judges could apply to a case without the exercise of will or discretion."[54] The law declared by judges, in other words "was not an arbitrary creation."[55]

During both eras, then, judges believed (or at least claimed to believe) that adjudication was apolitical and therefore that judicial authority should not be troubling. As Morton Horwitz has noted, "until very late in the nineteenth century, categorical modes of thought made it possible for jurists to believe that there could be a form of neutral legal reasoning that was fundamentally different from political reasoning."[56]

All that changed by 1938. The timing—and the abruptness of the transition—is somewhat disputed,[57] but there is no dispute about the jurisprudence that replaced formalism. Oliver Wendell Holmes spoke for the emerging (but not yet dominant) new view when he declared in 1917:

> Ours is not a closed system of existing precedent. The law is not such a formal system at all. . . . We legitimately made the law in question and we can unmake it. Courts must make law. Indeed, courts are major policy makers in our system of government.[58]

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52. *See, e.g.*, N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 34 (1997) (suggesting that "the very nature of the formalist argument" was that "law was discovered, not made").

53. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 23 (1995); *see also* HULL, *supra* note 52, at 3–15.

54. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 18 (1992); *see also* Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1592–93, 1637–38 (2002) (noting that during 1920s, the Court identified common law, more than the legislature, with "the people," and describing the Taft Court's "understanding of itself as the authoritative voice of a deep public morality that transcended mere transient democratic will"); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 24 (1991) (describing American jurisprudence from the Founding through the *Lochner* era as "conceptual constitutionalism": "Constitutional law's operative concepts . . . must be given to, not chosen by, the Courts. Judges were to discover and disclose these basic concepts . . . . Constitutional law's basic norms were not the product of judicial will and policymaking").

55. Siegel, *supra* note 48, at 1437.

56. HORWITZ, *supra* note 54, at 27.

57. For somewhat different descriptions of the transition, see DUXBURY, *supra* note 53; HORWITZ, *supra* note 54; EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA (2000); and Siegel, *supra* note 54.

58. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In charting the move from natural law through formalism to Realism and positivism, I am not claiming that positivism drove *Erie* or that *Swift* was incompatible with positivism. My point is simply that with

The first three decades of the twentieth century—often called the *Lochner* era after the case that "crystallized" the attacks on formalism and "brought Progressive Legal Thought into being"[59]—ended the long-running fiction that judges were neutral finders of the law. Realism in its various forms became the prevailing American jurisprudence.[60]

Once some version of the Realist view of judges as lawmakers spread to judges themselves, the jig was up. With the advent of Realism, "the judge is moved decisively from the wings to the centre-stage of American jurisprudence."[61] Now judges had to worry about whether they were illegitimately trespassing on legislative or popular authority. And worry they did, helped along by the political furor over the Supreme Court's conservative rulings against Progressive and New Deal reforms. The decades-long battle between Progressives and conservatives on the political front, and between Realists and classical formalists on the jurisprudential front,[62] culminated in the momentous Supreme Court about-face in 1937. The Court for the first time upheld crucial parts of the New Deal and similar state legislation,[63] and a year later conspicuously announced its withdrawal from serious scrutiny of legislation, at least where economic regulation was at issue.[64] For the next few years, the Court remained sensitive to concerns about judicial overreaching.

But beginning in the early 1940s, "the judiciary receded from the center of national politics."[65] As one prominent commentator has put it,

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Realism and positivism came a new concern about judicial overreaching. For recent scholarship persuasively challenging the conventional connection between *Erie* and positivism, see Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998); Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845 (2013); and Stephen Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to* Erie, 2 WASH. U. JURIS. REV. 75 (2010).

59. HORWITZ, *supra* note 54, at 36, 33. The reference is to *Lochner v. New York*, 198 U.S. 45 (1905).

60. Another, intersecting, trend contributed to the historical pattern of complacency gradually giving way to concern: during the late nineteenth and early twentieth centuries, "[a]s the Supreme Court became increasingly active and its decisions increasingly far-reaching, larger numbers of Americans grew concerned about the nature of its decisions and the legitimacy of its expanding role." Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1500 (2014).

61. DUXBURY, *supra* note 53, at 51.

62. Note that neither pair of opposition groups completely overlapped: Not all Progressives were Realists, and vice versa; not all formalists were conservatives, and vice versa. *See generally* DUXBURY, *supra* note 53; HORWITZ, *supra* note 54.

63. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

64. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

65. PURCELL, *supra* note 57, at 38.

"[t]he age that gave rise to the *Erie* decision was ending as the decision was issued" in 1938.[66] A confluence of factors played a role in the decline of concerns about judicial overreaching. As a practical matter, concerns were lessened by the Court's acquiescence in the New Deal, the withering of Progressivism in the face of the Cold War, and political realignments that eliminated the Court as a "common enemy."[67] On a more theoretical front, various forms of process theory and consensus theory edged out Realism as the dominant jurisprudence. By the late 1950s, the Supreme Court once again felt confident enough to declare itself the ultimate arbiter of the Constitution.[68] Judicial assertions that concerns about intrusion on legislative or popular prerogatives warranted judicial modesty, while still occasionally heard, did not return in force until very late in the twentieth century.

What this brief romp through American jurisprudential history should demonstrate is that (until quite recently) concerns about judicial overreaching did not exert much influence on the Supreme Court except during the short period between 1937 and the early 1940s. As I show in the next two sections, only the *Erie* doctrine hit a pivotal point of development during that period, and thus only the *Erie* doctrine was influenced by those concerns. That historical fortuity distorted the Court's focus and caused the *Erie* doctrine to veer off in a direction opposite that of the other doctrines raising the same question.

B. The Erie *Moment*

As every first-year law student learns, in 1842 the Court in *Swift v. Tyson*[69] held that federal courts did not need to follow state common law in diversity cases unless the case involved a question of "local" rather than "general" law. The Court interpreted the Rules of Decision Act directive that "the laws of the several states . . . shall be regarded as rules of decision"[70] as limited to "the positive statutes of the state" or "local usages."[71] In all other cases, the federal courts were obligated to ascertain for themselves the "just rule" dictated by "general principles

66. Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 849 (2001).

67. *See* PURCELL, *supra* note 57, at 37–38, 197–99, 227.

68. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

69. 41 U.S. (16 Pet.) 1 (1842).

70. 28 U.S.C. § 1652 (2012).

71. *Swift*, 41 U.S. at 18–19.

and doctrines."[72] In other words, federal courts were to develop and apply a federal common law except where local interests predominated.

Swift was more exemplary than unusual. If anything, it represents a nineteenth-century low point for judicial protection of federal interests in diversity cases. As historical analyses have shown, the 1789 Rules of Decision Act was probably meant to give federal courts the power to establish and apply federal common law in *all* federal cases absent a federal statute, including cases in which states had enacted statutory law.[73] And federal courts began to create federal common law almost immediately.[74] When *Swift* interpreted the Act to distinguish between state statutory law (which federal courts were to apply) and state common law (which federal courts need not apply unless it implicated purely "local" interests), it was in one sense a limitation on federal judicial power.

If *Swift* was a low point, it was also a turning point. Beginning as early as 1847—a mere five years after *Swift*—the Court began to expand the reach of general federal common law. In that year the Court decided *Rowan v. Runnels*,[75] in which it refused to follow Mississippi Supreme Court decisions interpreting the Mississippi Constitution. Instead, the Court adhered to its own prior interpretation of the Mississippi Constitution, reached in a case decided before the Mississippi Supreme Court had spoken definitively.[76]

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72. *Id.* at 19.

73. *See* sources cited in note 38, *supra*.

74. *See generally* 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 (1984); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004); Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249 (2010). The exceptions were cases involving purely "local law"—in other words, cases in which there was little or no federal interest. *See* Fletcher, *supra*, at 1531–38.

75. 46 U.S. (5 How.) 134 (1847).

76. The timing is a bit unclear. In *Green v. Robinson*, 6 Miss. (5 Howard) 80 (1840), the Mississippi High Court of Errors and Appeals interpreted the Mississippi constitution to prohibit the sale of slaves. In *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), the Supreme Court interpreted the same clause of the Mississippi constitution as not prohibiting the sale of slaves. Counsel for Groves (seeking to void the contract for sale) referred to *Green*, 40 U.S. at 461–62, but counsel for Slaughter argued that "[t]he decisions of the courts of the state of Mississippi have been contradictory" and the construction of the relevant provisions "has not been conclusively settled." *Id.* at 480. The Court, in discussing "whether there has been such a fixed and settled construction given to the [Mississippi] constitution as to preclude this Court from considering it an open question," did not mention *Green* at all. *See id.* at 497–98. Given the difficulty of obtaining state court records at that time, it is possible that the Court overlooked *Green* despite counsel's reference. In *Rowan*, the Court, noting that *Groves* had been decided early in 1841, described *Groves* as resting on the fact that at the time "the construction of the clause in question had not been settled either way, by judicial decision, in the courts of the State." 46 U.S. at 139. But by the

During the second half of the nineteenth century, the Court chipped away at *Swift*'s limitations. It continued the pattern, set in *Rowan*, of ignoring state constitutional rulings. It first announced in 1864 that it was not bound by "every . . . oscillation" in state-court interpretations, leaving it free to pick and choose whether to follow the state court's most recent decision.[77] It then relied on such "oscillations" even when there were none, or when the latest state ruling had occurred long before the events giving rise to the lawsuit before the Court.[78] By 1874, it abandoned the fiction of "oscillations," refusing to follow consistent Michigan Supreme Court rulings on the ground that they were not sufficiently persuasive.[79] Nine years later, the Court held that it had a "duty" to apply its own "independent judgment" in state constitutional cases.[80]

The Court similarly imposed its own views of state statutory law. In 1894, for example, it refused to follow the Wisconsin Supreme Court's interpretation of a Wisconsin statute, declaring that "we think we are at liberty, and perhaps required . . . to interpret this statute for ourselves."[81] As legal historian Carl Swisher described it, the Court "began to challenge not merely state court interpretations of the common law, but also state statutes violating principles or practices in which the Court believed."[82] And although in theory the Court's authority to apply federal common law was limited, under *Swift*, to general rather than local law, by the turn of the twentieth century "general" law included vast swaths of the common law.[83] In 1910, a case

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time of *Rowan*, the Mississippi courts *had* definitively spoken. *See, e.g.*, Cotton v. Brien, 6 Rob. 115, 116 (La. 1843) (referring to the apparently unreported 1843 Mississippi case of *Brien v. Williamson* as one of "several" decisions holding the sale of slaves unconstitutional). The *Rowan* Court insisted on abiding by *Groves* anyway: "Acting under the opinion thus deliberately given by this court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State." 46 U.S. at 139.

77. Gelpcke v. Dubuque, 68 U.S. 175, 205–06 (1864).

78. *See, e.g.*, City v. Lamson, 76 U.S. 477 (1870), discussed in CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1028–31 (1971).

79. Pine Grove v. Talcott, 86 U.S. 666, 677 (1874).

80. Burgess v. Seligman, 107 U.S. 20, 35 (1883).

81. Metcalf v. Watertown, 153 U.S. 671, 678–79 (1894).

82. CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, at 333 (1974).

83. *See* Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 370–71 (1893) and cases cited therein; RANDALL BRIDWELL & RALPH WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 119–22 (1977); TONY FREYER, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM 71 (1981); PURCELL, *supra* note 57, at 51–63; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1413–14 (2001); Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1972 (1997).

involving the quintessentially local question of the sale of real estate was held to implicate general rather than local law.[84]

Summarizing and criticizing some of these developments, Justice Field wrote in 1893 (in a passage later prominently quoted in *Erie*):

> I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views.[85]

Field's doubts about the soundness of *Swift* were echoed by later Justices, including, most famously, Justice Holmes (joined by Justices White and McKenna in 1910, and Justices Brandeis and Stone in 1928).[86]

In 1938, the dissenters garnered enough votes to overrule *Swift* altogether. In *Erie Railroad Co. v. Tompkins*,[87] the Court by a 5-3 vote (Justice Cardozo not participating) reinterpreted the Rules of Decision Act to include both state statutes and state common law. The majority relied on both the "defects" of the *Swift* doctrine and a new historical theory of the Act.[88] In a part of Justice Brandeis's opinion joined by only three of the other seven Justices, he also concluded that the "course pursued" under *Swift* was unconstitutional as an invasion of "rights . . . reserved by the Constitution to the several States."[89] Thenceforth, federal courts would be out of the business of declaring general federal common law.

The *Erie* doctrine quickly became deeply entrenched in layers of precedent. Immediately after the decision, the Court began to apply *Erie* with a vengeance. Less than a month after *Erie*, the Court vacated and remanded a decision in an insurance-law case in which the lower court had actually concluded that state law applied; the Court reasoned that "a different case might have been presented, and the facts and

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84. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 361 (1910); *see also* Williamson v. Berry, 49 U.S. (8 How.) 495, 543 (1850) (refusing to follow a New York court's interpretation of a private statute on the disposition of an estate, because it was "no part of local law"). The Court eventually changed its mind on *Williamson*. *See* Suydam v. Williamson, 65 U.S. (24 How.) 427 (1861).

85. *Balt. & Ohio R.R. Co.*, 149 U.S. at 401 (Field, J., dissenting).

86. *See Kuhn*, 215 U.S. at 370–72 (Holmes, J., dissenting); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting).

87. 304 U.S. 64 (1938).

88. *Id.* at 72–73, 74–78.

89. *Id.* at 78, 80.

authorities developed in another fashion, if the parties had had in mind from the first" that state law necessarily applied.[90] Two more insurance cases were remanded for the application of state law two weeks later.[91] By the end of the term two more cases had been granted certiorari, reversed, and remanded with instructions to apply state law.[92]

Even more significant, within a little over a decade, the Court decided at least thirteen major cases—addressing fifteen different important questions—clarifying and elaborating *Erie*. (That the doctrine needed so much clarification suggests just how groundbreaking the decision was.[93])

One set of questions involved how far the doctrine reached. In late 1938, the Court extended the principles of *Erie* to law pronounced by territorial courts.[94] In 1945, it held that *Erie* applied to both law and equity.[95] In two other cases, by contrast, the Court limited the reach of the doctrine and confirmed that pre-*Erie* law still applied. In 1942, the Court ruled that *Erie* had not altered the basic principles of preemption law: state rules of estoppel do not apply if they would thwart federal antitrust law.[96] Four years later the Court held that federal bankruptcy courts were similarly not bound by *Erie* to apply state law in "determining what claims are allowable and how a debtor's assets shall be distributed."[97]

A second set of questions arose in the context of the post-*Erie* need to identify and apply state law. In 1940, the Court ruled that in the absence of a ruling by the state's highest court, a federal court

90. Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 208 (1938).

91. N.Y. Life Ins. Co. v. Jackson, 304 U.S. 261 (1938); Rosenthal v. N.Y. Life Ins. Co., 304 U.S. 263 (1938).

92. Hudson v. Moonier, 304 U.S. 397 (1938); Mut. Benefit, Health & Accident Ass'n v. Bowman, 304 U.S. 549 (1938).

93. *Cf.* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 272 (1941) (calling *Erie* "the most remarkable decision of the [1938–1940] period and in some respects one of the most remarkable in the Court's history"); *see also* Nelson, *supra* note 38, at 922 (quoting contemporaneous commentators describing *Erie* as "transcendently significant," a "thunderclap," and "dramatic"). By the end of the 1950 Term, the Court had cited *Erie* in seventy cases, only six of which were unadorned mentions.

94. Waialua Agric. Co. v. Christian, 305 U.S. 91 (1938). The Court acknowledged that the Rules of Decision Act did not technically apply, but reasoned that "the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories." *Id.* at 109. The Court did not quite make *Erie* fully applicable, suggesting that federal courts could override local law of territorial courts when there is "a clear departure from ordinary legal principles." *Id.*

95. Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99 (1945). The Court had indicated as much, in dicta, a few weeks after *Erie*. *See Ruhlin*, 304 U.S. at 205.

96. Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

97. Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 162 (1946).

should follow state intermediate court rulings "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."[98] Shortly afterward, the Court made clear that federal courts could not abdicate their responsibility to decide issues of state law even under conditions of uncertainty.[99] In 1941, the Court held that a federal court of appeals should reverse a district court decision that was a correct application of state law at the time it was issued, if, before the court of appeals' ruling, the state supreme court changed the law by overruling the cases on which the district court had relied.[100] Later that year, the Court specified *which* state's law should apply, directing the federal court to use the choice-of-law doctrines of the state in which it sits.[101] And in 1943, the Court first announced the rule—which it implicitly overruled in 1991—that it would ordinarily defer to district court determinations of the content of state law.[102]

Finally, in six cases between 1939 and 1949 the Court grappled with a problem that has continued to bedevil federal courts ever since. Although *Erie* directs federal courts to apply state *substantive* law, federal *procedural* law still governs in federal court proceedings.[103] These six cases each raised the question whether a particular disputed rule was substantive or procedural, and in each one a divided Court held it to be substantive and therefore applied state law.[104] For a decade

98. West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1945); *accord* Six Cos. of Cal. v. Joint Highway Dist., 311 U.S. 180, 188 (1945); Fidelity Union Tr. Co. v. Field, 311 U.S. 169, 177–78 (1945). The same obligation does not run to decisions of *all* state lower courts. *See* King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 159–61 (1948).

99. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); *accord* Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 553–54 (1946).

100. Vandenbark v. Owens-Ill. Glass Co., 311 U.S. 538 (1941).

101. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); *accord* Griffin v. McCoach, 313 U.S. 498 (1941).

102. Palmer v. Hoffman, 318 U.S. 109, 118 (1943). Courts of appeals generally also deferred to district courts, but in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the Supreme Court held that they should decide questions of state law *de novo*.

103. *See, e.g.*, Guaranty Tr. Co. of N.Y. v. York, 326 U.S. 99, 107–08 (1945).

104. The six cases involved (1) state rules on burden of proof, *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (unanimous); (2) state rules on accrual of the cause of action, *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) (unanimous on this holding); (3) state statutes of limitations, *Guaranty Trust Co. of N.Y.*, 326 U.S. 99 (majority opinion by Justice Frankfurter; Justices Rutledge and Murphy dissented); (4) state rules governing whether the statute of limitations was tolled by the filing of a complaint or only by its service, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (majority opinion by Justice Frankfurter; Justice Rutledge dissented); (5) a state rule that required certain plaintiffs to post a bond before bringing suit because under state law they would be liable for attorneys' fees if unsuccessful, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (majority opinion by Justice Jackson; Justices Douglas, Frankfurter and Rutledge dissented); and (6) a state rule that an unregistered

after *Erie*, then, the Court applied it aggressively. As Justice Rutledge put it in dissent in 1949:

> I think [these] decisions taken together demonstrate the extreme extent to which the Court is going in submitting the control of diversity litigation in the federal courts to the states . . . . What is being applied is a gloss on the *Erie* rule, not the rule itself. . . . [T]he *Erie* case made no ruling that in so deciding diversity cases a federal court is "merely another court of the state in which it sits," and hence that in every situation in which the doors of state courts are closed to a suitor, so must be also those of the federal courts.[105]

The Court continued to decide, and to be divided by, more *Erie* questions, but this first decade is enough for my purposes. By the time the Court confronted the next truly significant *Erie* question in 1965, the *Erie* doctrine was so entrenched as to be immune from serious examination.

Two additional factors furthered that entrenchment. First, that the *Erie* decision rested in part on constitutional grounds gave it a *gravitas* that counseled against backpedaling. Second, leading up to *Erie* and for at least several years afterward, judge-made state law was viewed by Progressives as more favorable to Progressive goals than was judge-made federal law.[106] The New Deal Court was therefore naturally led toward application of state rather than federal law in a variety of circumstances.

The entrenchment of *Erie* meant that even after the concerns that triggered it faded, it remained invulnerable. That invulnerability led the Court to elaborate the doctrine in ways that limited judicial authority.

Erie and its immediate progeny, in holding that in the absence of a federal directive to the contrary federal courts must always follow state substantive law, rested on an implied assumption that the judiciary lacked power to protect unarticulated federal interests.[107]

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corporation could not bring suit in state court, *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (majority opinion by Justice Douglas; Justices Jackson, Rutledge and Burton dissented).

105. *Cohen*, 337 U.S. at 558 (Rutledge, J., dissenting).

106. *See generally* PURCELL, *supra* note 57, at 141–64.

107. One case in 1958 suggested that federal interests might sometimes outweigh *Erie*'s command, although the Court also provided other grounds for its decision. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958). The suggestion in *Byrd* has borne no fruit: as John Hart Ely recognized early on, "[T]here is no place in the [Court's post-1965] analysis for the sort of balancing of federal and state interests contemplated by the *Byrd* opinion." Ely, *supra* note 2, at 717 n.130. More recently, one procedure casebook noted that "[t]he Court has rarely cited *Byrd* since it was decided, and never unequivocally for the proposition that a countervailing federal interest overcomes" an *Erie* determination that state law should apply. THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 611 (4th ed. 2016). Another scholar suggested that it has been "all but ignored in subsequent developments." Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1954 (1991). On the other hand, some scholars have argued that some form of *Byrd* balancing is actually the best explanation of the caselaw. *See, e.g.*, Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE

That assumption was not questioned during the period of precedent-building that immediately followed *Erie*.

In 1965, the Court made the assumption explicit. In *Hanna v. Plumer*,[108] the Court bifurcated the analysis of vertical choice-of-law questions; that bifurcation still governs today. If Congress—directly by statute or indirectly through the Federal Rules of Civil Procedure—has codified the federal interest, then *Erie* is irrelevant and federal courts should apply the (codified) federal rule. This part of *Hanna*'s holding is essentially similar to a form of express preemption, as commentators have recognized.[109] But if Congress has not codified the federal interest, then *Erie* applies with full force.

Thus, ironically, the *Erie* doctrine cleaves preemption into its two halves, requiring courts to apply doctrines of express preemption and prohibiting them from applying doctrines of implied preemption. Indeed, one prominent scholar views *Hanna* as an embodiment of the very distinction between codified and uncodified federal interests that the Court has rejected in other contexts.[110] The combination of *Erie* and *Hanna* thus crystallizes the Court's rejection, in this one context, of the more usual judicial authority to protect unarticulated federal interests.

As this Section has shown, then, the doctrine governing the law to be applied in diversity cases in federal courts took pivotal turns at two points. First, in the mid-nineteenth century, the Court began to expand the reach of general federal common law. Then, in 1938, with

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DAME L. REV. 1, 14–17 (2006); Donald L. Doernberg, *The Unseen Track of* Erie Railroad*: Why History and Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611 (2007); Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61 (2010). Even if that is true—and I am not persuaded that it is—the black-letter law is to the contrary. *See, e.g.*, Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 KAN. L. REV. 751, 756 (1998) ("[T]he Court appears to vacillate between the balancing test of *Byrd* and the modified outcome test of *Hanna* [and] [t]hese two tests are largely inconsistent."); Steinman, *supra* note 31, at 267–69 (suggesting that a recent case cannot be read as endorsing *Byrd*, despite the arguments of some commentators).

108. 380 U.S. 460 (1965).

109. *See, e.g.*, Clermont, *supra* note 107, at 43–44.

110. *See* Clark, *supra* note 83, at 1419–22; *see also* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 635–37 (2013) (identifying the Court's focus on the "pedigree" of the federal law as a puzzle); Nelson, *supra* note 31, at 4 ("[C]ourts can recognize federal common law only on topics that something in *written* federal law implicitly or explicitly puts beyond the reach of the states' lawmaking powers."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 35–36 (2012) (stating federal law gets "differential treatment . . . depending on its source"; "judge-made law gets treated differently"). Another way of looking at it is to suggest that unless Congress says otherwise, "it is assumed that there are no substantive federal policies being furthered in the adjudication of a diversity case." Martin H. Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 969 (1980).

Erie, the Court contracted that reach. The first development occurred as a gradual accretion, as one might expect when one views the question as purely one of federalism. But the contraction was different: it was a complete, full-throated denial of federal judicial power to protect unarticulated federal interests, rather than some attempt to better accommodate both federal and state interests. Why was the Court so adamant? Because the contraction took place in 1938, at the height of the Supreme Court majority's concern with judicial overreaching. The Court's worries about judicial authority distorted its view of the federalism question before it. And by the time those worries had time to fade, the Court had piled so much precedent on top of *Erie* that there was no turning back.

There is a final irony in the disconnect between *Erie* and ordinary federalism. Twelve years before *Erie*, Justice Brandeis himself struck a broad stroke in favor of protecting unarticulated federal interests in the context of preemption. In *Napier v. Atlantic Coast Line Railroad Co.*,[111] Brandeis's opinion for a unanimous Court created a little-known corner of field preemption. *Napier* established for the first time that Congress's mere delegation of broad authority to a federal agency can be construed as an intent to occupy the field—even if there is no other evidence of that intent, and even if the agency has issued no regulations relating to the subject of the challenged state law.[112] In a letter to Frankfurter, Brandeis defended *Napier* as a way to ensure that federal interests could not be superseded unless Congress "expressly provided" for the preservation of state interests.[113] Brandeis's endorsement of judicial protection of unarticulated federal interests could hardly be broader. But in *Erie*, Brandeis and the Court were distracted by a preoccupation with extraneous matters. The next Section examines how ordinary federalism developed in the absence of that distraction.

C. Ordinary Times Produce Ordinary Federalism

The timing of *Erie* contrasts with the development of the ordinary doctrines of federalism. In this Section, I canvass the history of the dormant commerce clause, implied preemption, federal preclusion law, and the enclaves of federal common law. Each of these doctrines developed over a long period of time, and none hit a pivotal

111. 272 U.S. 605 (1926).

112. *See id.* at 613.

113. "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 263 (Melvin I. Urofsky & David W. Levy eds., 1991). I thank my colleague Jim Rossi for alerting me to both *Napier* and Brandeis's letter.

point during the immediate post-1937 era. Thus the doctrines were shaped by considerations of federalism undistorted by worries about judicial discretion or judicial overreaching. It is the absence of those worries that makes them ordinary. Unsurprisingly, in the absence of a distorting influence the Court ended up solving these four similar problems in similar ways.

1. The Dormant Commerce Clause

The doctrinal development of the dormant commerce clause spans almost two centuries. Dormant commerce clause jurisprudence traces its roots to Chief Justice John Marshall's opinion in *Gibbons v. Ogden* in 1824, in which the Court first discussed whether congressional power under the Constitution's Commerce Clause should be regarded as exclusive or concurrent.[114] The facts of *Gibbons* are familiar: Ogden sought to enjoin Gibbons from navigating interstate waters pursuant to Ogden's exclusive right to do so under an act of the New York legislature.[115] Although the Court expressly reserved judgment on the question whether the states might regulate commerce in the absence of congressional action,[116] both Marshall's majority opinion and Justice Johnson's concurring opinion strongly suggested that congressional power over commerce was exclusive.[117]

In dicta, Marshall also suggested possible exceptions to the exclusivity of federal authority. Certain state laws with an effect on interstate commerce might nevertheless be constitutional if they were enacted pursuant to the traditional police powers vested in the states.[118] Thus, although the Court in *Gibbons* did not directly address the contours of the dormant commerce clause, it laid important

114. 22 U.S. (9 Wheat.) 1 (1824).

115. *Id.* at 7.

116. *Id.* at 197–98; 200 ("In discussing the question, whether this power is still in the States . . . we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power . . . because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation.").

117. *Id.* at 209 ("It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. . . . There is great force in this argument, and the Court is not satisfied that it has been refuted."); *id.* at 227 (Johnson, J., concurring) ("The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive.").

118. *Id.* at 203–04.

groundwork. As one scholar put it, *Gibbons* represents a "tentative but unconsummated embrace of the Dormant Commerce Clause."[119]

Four years later, the Court tackled the issue again and again endorsed both the exclusivity of Congress's commerce power and the constitutionality of state laws with incidental effects on interstate commerce so long as they were rooted in traditional state police powers. Applying these principles in *Willson v. Black Bird Creek Marsh Co.*,[120] the Court upheld the challenged state law on narrow grounds. Willson, a federally licensed sloop operator, intentionally broke through a dam built by Black Bird Creek Marsh Company across Black Bird Creek, a small but navigable creek in Delaware.[121] Construction of the dam in question was authorized by a provision of the Company's charter, which had been granted by the Delaware legislature.[122] Willson challenged the trial court's judgment finding him liable for trespass, arguing that the Delaware statute granting the Company permission to construct the dam on navigable waters was an unconstitutional regulation of interstate commerce.[123] After noting that the Delaware legislation had been promulgated pursuant to traditional police powers—to increase the value of property adjacent to the creek and to improve the public health—Marshall's opinion for a unanimous Court disposed of the issue in a single sentence: "We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."[124]

For the next two decades, the Court formally adhered to the principle that while Congress had exclusive power to regulate interstate *commerce*, the states could nevertheless use their *police* powers in ways that incidentally affected that commerce. The unanimity of *Gibbons* and *Black Bird Creek*, however, evaporated quickly. Justice Story dissented when the Court upheld state regulations (as it did in *Mayor of the City of New York v. Miln*[125]), arguing that the state could not exercise its police powers through means that affected interstate commerce.[126] Chief Justice Taney, on the other hand, dissented when

119. Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1399 (2004).
120. 27 U.S. (2 Pet.) 245, 252 (1829).
121. *Id.* at 246.
122. *Id.*
123. *Id.* at 250.
124. *Id.* at 252.
125. 36 U.S. (11 Pet.) 102 (1837).
126. *Id.* at 156–57 (Story, J., dissenting).

the Court invalidated state regulations (as it did in *The Passenger Cases*[127]), because he believed state laws constitutional unless they conflicted with a positive act of Congress.[128]

In 1851, the Court laid the foundation for the modern dormant commerce clause doctrine. *Cooley v. Board of Wardens of the Port of Philadelphia*[129] upheld the constitutionality of a Pennsylvania statute that required ships arriving at or departing from the Port of Philadelphia to hire a local pilot to assist with navigation. In *Cooley*, the Court adopted both a new view of the allocation of authority over interstate commerce and a new test for determining whether state statutes violated the dormant commerce clause.

The Court first reversed its earlier holdings that congressional power was exclusive, ruling instead that power over interstate commerce was shared with the states.[130] To define the contours of this shared power, the Court suggested that the appropriate inquiry was no longer the origin of the power used to enact the statute, but rather the nature of the subject of regulation: If the subject of regulation was national in nature and required uniformity of treatment, state regulations could not stand. But if the subject of regulation was local in nature and would be well suited to a patchwork of regulation on the basis of "local peculiarities," then state regulation would be constitutional.[131]

Applying that standard, the Court concluded that the Pennsylvania local pilotage requirement did not violate the dormant commerce clause:

> [T]he nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.[132]

Thus, after *Cooley*, the Court's analysis of state-based regulations of interstate commerce in the absence of congressional action turned on

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127. Smith v. Turner and Norris v. City of Boston, 48 U.S. (7 How.) 283 (1849).

128. *Id.* at 470 (Taney, C.J., dissenting); *see also* Thurlow v. Massachusetts, Fletcher v. Rhode Island, and Peirce v. New Hampshire (The License Cases), 46 U.S. (5 How.) 504, 579 (Opinion of Taney, C.J.) (stating that state regulations are valid "unless they come in conflict with a law of Congress").

129. 53 U.S. 299 (1851).

130. *Id.* at 318 ("The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter.").

131. *Id.* at 318–19.

132. *Id.* at 319.

an analysis of the subject of, rather than the source of power for, the regulation.

The *Cooley* test did not fare well. Over the next hundred and twenty years, the Court adhered to the idea that congressional power over commerce was shared with the states, but struggled to develop a workable test for the constitutionality of state regulation in the absence of congressional action. One modern treatise summarizes the attempts: "Successive Courts invoked various verbal touchstones in an attempt to formulate a predictable dichotomy between permitted and invalid state exercise of regulatory power, but they were unable to find a test that was not merely conclusory."[133] The details of the failed tests need not detain us; they did not contribute, except in a negative sense, to the development of the doctrine.

Finally, in 1970, the Court in *Pike v. Bruce Church, Inc.*[134] formally adopted the flexible standard that still applies today:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[135]

There are, of course, still scholarly disputes about exactly how this test should be applied.[136] The Court itself has increasingly moved toward an approach that is heavily deferential to state statutes, upholding most nondiscriminatory state regulations.[137] But however strong the underlying presumption in favor of the validity of state laws, it is

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133. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.6 (2012). One might suspect that for at least part of that time, the efforts were plagued by the problem that eventually brought down the formalists: bright-line categorical formulations cannot successfully answer complex constitutional questions. For a general refutation of formalism in constitutional law, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUESTION FOR CONSTITUTIONAL FOUNDATIONS (2002).

134. 397 U.S. 137 (1970).

135. *Id.* (citations omitted). Prior to 1970, as noted in *Pike*, the Court "[o]ccasionally . . . candidly under[took] a balancing approach in resolving these issues." *Id.* at 142. The balancing test did not become black-letter law until *Pike*, however.

136. *See, e.g.*, John M. Baker & Mehmet K. Konar-Steenberg, *"Drawn from Local Knowledge . . . and Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 LOY. U. CHI. L.J. 1 (2006); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395 (1986).

137. *See, e.g.*, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 353 (2008) (suggesting that *Pike* imposes a high burden on those challenging state regulations); *see also* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.05 (2d ed. 2013) (concluding that courts rarely invalidate non-discriminatory statutes).

nevertheless only a presumption. The Court retains for itself the power to determine whether any given state law interferes with the unarticulated federal interest in the free flow of commerce. As one scholar puts it, "The judicially enforced dormant Commerce Clause . . . mows down state-imposed obstacles to interstate commerce."[138]

State power ebbed and flowed under the various iterations of the dormant commerce clause. At each turn, however, the Court was free to focus solely on the federalism question before it: exactly how to determine whether a state statute interfered with the unarticulated interest in the free flow of commerce. The Court invented the dormant commerce clause early in the nineteenth century and laid down the basic principles in 1851, both well before doubts about judicial power began to undermine the complacency of the natural law and formalist eras. By the time the Court adopted the modern formulation in 1970, Realist fears of judicial overreaching had long since receded—indeed, the Court was perhaps at the height of its authority.

During the three or four decades leading up to the late 1930s' heightened awareness of concerns about judicial authority, the Court struggled unsuccessfully to define the exact boundaries of the dormant commerce clause, but the basic principles were too well settled—and functioning too well—to question.[139] Thus, critics of the doctrine at that time urged the Court not to abandon it but rather to adopt the favorite approach of Progressives, a balancing test.[140] Justice Stone, dissenting in 1928, articulated a test very similar to the one ultimately adopted in *Pike*:

> [T]hose interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion

138. MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 93 (2012).

139. The general functioning of the dormant commerce clause (despite some discomfort with drawing particular lines) is what distinguishes *Erie* from the 1938 case of *South Carolina State Highway Department v. Barnwell*, 303 U.S. 177 (1938). The Court was able to reach its preferred result, upholding the state regulation against a dormant commerce clause challenge, by citing established principles going back to *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); it did not need to overturn any precedent. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), by contrast, had become unworkable—and once the Court determined that *something* had to be done about *Swift*, the influence of separation of powers concerns distorted its solution to the problem.

140. *See* HORWITZ, *supra* note 54, at 18 ("The emergence of balancing tests in numerous areas of the law is a prominent measure of the success of Progressive legal thinkers in undermining categorical thought.").

> that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.[141]

Dormant commerce clause doctrine, then, developed naturally, uninfluenced by concerns about judicial overreaching.[142] And this natural development produced a doctrine that ordinarily allows unhindered operation of state law, but reserves to the courts the power to displace that law in favor of federal interests even when those interests have not been articulated by Congress. This ordinary scheme is in sharp contrast to the *Erie* doctrine.

2. Implied Preemption

Chief Justice Marshall also laid the theoretical framework for implied preemption in general, and obstacle preemption in particular, in the early nineteenth century. In *M'Culloch v. Maryland*,[143] the Court held in part that a Maryland statute, which purported to tax any bank not chartered by the Maryland legislature, was preempted because it interfered with the National Bank established by Congress.[144] In reaching that conclusion, the Court reasoned that "[s]tates have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress."[145] Indeed, *M'Culloch* constitutes the Court's first express recognition of the notion that state laws must give way to the extent that they interfere with the "full and complete effects" of congressional statutes.[146]

In *Gibbons v. Ogden*,[147] the Court provided additional support for the notion that congressional purposes could force displacement of state law in certain instances. As noted earlier, Marshall skirted the question whether states had any authority to regulate interstate commerce. He was able to do so because the New York statute conferring on a private individual exclusive navigation rights on interstate waters "interfere[d] with," "came into collision with," and was

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141. Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1928) (Stone, J., dissenting). In one 1945 case, the Court seemed to adopt a balancing test, *see* S. Pac. Co. v. Arizona, 325 U.S. 761 (1945), but later characterized that case as one of an "occasional" suggestion of a balancing test. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

142. Michael Greve has suggested that some modern scholars—especially originalists—are making separation of powers arguments against the dormant commerce clause doctrine: "The only constitutional doctrine that is in any danger of being strangled by *Lochner*'s ghost is the dormant Commerce Clause." GREVE, *supra* note 138, at 393.

143. 17 U.S. (4 Wheat.) 316 (1819).

144. *Id.* at 436–37.

145. *Id.* at 436.

146. *Id.* at 330.

147. 22 U.S. (9 Wheat.) 1 (1824).

"contrary to" a federal licensing statute and was thus unconstitutional regardless of residual state authority.[148] The Court's recognition of *interference*—in addition to direct collision—with a federal statute as sufficient grounds for invalidating an otherwise valid state statute lends substantial support to the modern doctrine of obstacle preemption.

More than a century after *Gibbons*, the Court conclusively established the obstacle preemption doctrine in *Hines v. Davidowitz*, decided in 1941.[149] In *Hines*, the Court reviewed a challenge to a Pennsylvania statute requiring most aliens over the age of eighteen to register with the state yearly and to provide the government with certain personal information and pay a nominal registration fee at each annual registration.[150] The act also required aliens to carry an alien identification card at all times and to show it upon demand by any police officer.[151] The Supreme Court reviewed the statute in light of a federal act that required all aliens fourteen or older to register once with the federal government, and to provide their fingerprints as well as certain personal information.[152]

The Court held that the Pennsylvania statute was impliedly preempted by the federal statute, but not under traditional notions of impossibility or field preemption.[153] Instead, the Court declared that state statutes must "yield to" the federal statutes when they constitute an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[154] The Court relied on legislative history evincing a congressional intent—not clearly evident in the text of the federal statute—that federal alien registration standards should be uniform across the states.[155] Because the Pennsylvania statute imposed additional requirements, the Court found that it constituted an obstacle to Congress's purposes and held it to be preempted as a result.[156] The Court refused to establish any categorical test for when an otherwise valid state statute would be constitutionally compelled to yield to

148. *Id.* at 211.
149. 312 U.S. 52 (1941).
150. *Id.* at 59–60.
151. *Id.*
152. *Id.* at 60–61.
153. *Id.* at 74.
154. *Id.* at 67.
155. *Id.* at 72–73.
156. *Id.* at 73–74.

unarticulated federal interests. Instead, the Court opted for case-by-case factual and legal analysis.[157]

The initial adoption of the obstacle preemption doctrine in *Hines* was qualified in two ways. First, the Court suggested that preemption in that case was compelled, at least in part, because regulation of foreign relations—and, by extension, regulation of immigration and alien registration—was an area of clear federal supremacy.[158] That aspect of *Hines* ripened into a suggestion that Congress has "occupied the field of alien registration."[159] To the extent that *Hines* thus fell at the intersection of obstacle and field preemption, the immediate implications of *Hines* were limited.

Second, in *Reitz v. Mealey*[160] ten months later, the Court upheld (against a preemption challenge) a state law that effectively made automobile-accident judgments non-dischargeable under federal bankruptcy laws. Although the Court's reasoning was brief and opaque, it seemed to rest largely on an argument that the state statute was enacted not to regulate debtor-creditor relations but rather as an exercise of the state's police power to enforce highway safety.

The significance of the state police power was confirmed six years later in *Rice v. Santa Fe Elevator Co.*,[161] in which the Court adopted a presumption against preemption when a state law was enacted pursuant to the "historic police powers of the States."[162] The Court would presume that Congress intended not to preempt a state statute enacted pursuant to the historic police powers of the states absent "clear and manifest" evidence of an intent to preempt.[163] The Court in *Rice* nevertheless invalidated the state statute at issue—which involved grain warehousing—on the ground that it conflicted with policies evinced by a federal statute. It is telling that even in the case in which the Court formally announced a limit on obstacle preemption, it found the state law preempted; the vitality of the limit therefore seems questionable.[164]

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157. *Id.* at 74. That case-by-case analysis led to several findings of preemption within a few years of *Hines*, although the type of preemption was not always clear. *See* Hill v. Florida, 325 U.S. 538 (1945); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

158. *Hines,* 312 U.S. at 70.

159. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

160. 314 U.S. 33, 37 (1941).

161. 331 U.S. 218 (1947).

162. *Id.* at 230.

163. *Id.*

164. One commentator, surveying modern preemption cases generally, has concluded that the presumption "was little more than a platitude for the Court to mention before moving with

Unsurprisingly, given the equivocal nature of *Rice*, the police-power limitation on obstacle preemption did not generate much progeny. In only two cases in the next two decades—one of them involving a statute almost identical to the highway-safety statute upheld in *Reitz*—did the Court rely on the presumption against preemption to uphold state statutes enacted under state police powers.[165] In a third case, the Court invalidated a state statute over the dissent of three Justices who argued that the presumption should save it.[166]

In 1971, the Court confronted for a third time the question whether federal bankruptcy laws preempted a state statute exempting from discharge in federal bankruptcy a state judgment obtained as a result of an automobile accident. With only five cases mentioning the police powers presumption—and only three of them actually relying on it—the Court did not feel constrained by precedent. In *Perez v. Campbell*,[167] it overruled both *Reitz* and the other case directly on point (*Kesler*), and implicitly abandoned the presumption itself. The purpose of the state statute—presumably including purposes related to traditional police powers—could not be relevant: "We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration."[168] The Court summarized its new approach as reiterating "the controlling principle that *any* state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."[169]

Technically, *Perez*'s "controlling principle" is still in effect. The Court has recently moved in the direction of a more general presumption against preemption, although it applies the presumption rather inconsistently (and often with great disagreement among the Justices).[170] Scholars also disagree about the soundness of a

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dispatch to find preemption." Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1222 (2010).

165. *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Kesler v. Dep't of Pub. Safety, 369 U.S. 153 (1962).

166. Campbell v. Hussey, 368 U.S. 297 (1961); *see also id.* at 313 (Black, J., dissenting).

167. 402 U.S. 637 (1971).

168. *Id.* at 651–52.

169. *Id.* at 652 (emphasis added).

170. *Compare, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012) (preempted), AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (preempted), Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (preempted), Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (preempted), *and* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) (preempted), *with*

presumption against preemption.[171] As with the dormant commerce clause, however, the existence of a presumption does not deprive the Court of authority to displace state laws as necessary.

Obstacle preemption thus does not have quite the pedigree that the dormant commerce clause doctrine does. Although both can trace their roots to the Marshall Court, explicit recognition of the preemption doctrine occurred almost a century later than explicit recognition of the dormant commerce clause.[172] That lag, however, turned out not to be significant.

In one sense, *Hines* is a surprising development for 1941. Only four years past 1937, the Court might be expected to still be concerned about judicial overreaching. But not only were those concerns fading quickly, *Hines* itself allowed the Court quite limited authority. The case involved foreign relations, and the contemporaneous case of *Reitz* seemed to carve out a large exception for state statutes enacted under the police power. So we might view the early obstacle preemption doctrine as a transitional phenomenon. A Court somewhat less distracted by judicial-authority concerns than it had been a few years earlier adopts a somewhat limited approach to judicial power to protect unarticulated federal interests.

Had the Court faced numerous similar cases during the 1940s and early 1950s, perhaps it would have applied the presumption against preemption consistently and built up a body of precedent that might be difficult to overrule. But there were only a handful of cases even potentially implicating state police powers—and only two, *Reitz* and *Rice*, were decided before 1960—and thus concerns about separation of powers had time to fade before the limitations of *Hines* really took hold. By 1971, those concerns had essentially evaporated, and the Court was free, in *Perez*, to jettison both the precedents and the limitations on its own authority.[173] Thus, as with the dormant

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CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) (not preempted), *and* Wyeth v. Levine, 555 U.S. 555 (2009) (not preempted). *See also* Merrill, *supra* note 15, at 741 ("[T]he presumption against preemption is honored as much in the breach as in the observance.").

171. *Compare, e.g.*, Clark, *supra* note 83, at 1427–30 (defending presumption), Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007) (same), Meltzer, *supra* note 9 (same), *and* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (same), *with* Dinh, *supra* note 32 (attacking presumption), *and* Nelson, *supra* note 15 (same).

172. Stephen Gardbaum suggests that preemption as a general doctrine was not well established until the early twentieth century. Gardbaum, *supra* note 15, at 785–805. Whether or not that is correct, it is clear that obstacle preemption is of relatively recent vintage.

173. Only recently have such concerns resurfaced, and, unsurprisingly, application of the *Perez* doctrine is now unpredictable. Nevertheless, the Court has not repudiated its own authority

commerce clause, the doctrine ultimately developed free of the distorting effect of concerns about judicial overreaching[174]—once again, unlike the *Erie* doctrine.

3. Preclusion

Preclusion doctrines are complex enough when they involve only one jurisdiction. Intersystem preclusion—that is, the preclusive effect a court in one jurisdiction should give to a judgment from another jurisdiction—raises additional questions. The Full Faith and Credit Act,[175] originally enacted in 1790 and essentially unchanged since then,[176] requires federal courts (as well as courts in sister states) to give the same preclusive effect to a prior state-court judgment that would be given to it by the courts in that state. There is no federal statute, however, that specifies the preclusive effect to be given federal-court judgments in subsequent suits in either state or federal courts.

The doctrines governing the preclusive effect of federal-court judgments were therefore developed by the Supreme Court in common-law fashion. The first question to arise was whether the Supreme Court even had jurisdiction to review a state court's refusal to accord a prior federal-court judgment preclusive effect. In 1874, in *Dupasseur v. Rochereau*,[177] the Court held that it did. "Where a State court refuses to give effect to the judgment of a court of the United States," the case arises under federal law and is thus within federal jurisdiction.[178]

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to protect unarticulated federal interests; it has merely been less likely (but, importantly, not completely unwilling) to find such interests in the absence of a textual basis in the statute.

174. As with *Erie*, however, some scholars have tried to inject separation of powers concerns into contemporary preemption debates. *See, e.g.*, Bradford R. Clark, *Process-Based Preemption*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 192, 213 (William W. Buzbee ed., 2009) (presumption against preemption "ensure[s] that Congress and the president—rather than judges—make the crucial decision to override state law"); Young, *supra* note 171, at 321–22 (suggesting that modern preemption doctrine represents a "shift [away] from relatively vigorous judicial enforcement of constitutional boundaries").

175. 28 U.S.C. § 1738 (2012).

176. *See* Allen v. McCurry, 449 U.S. 90, 96 n.8 (1980).

177. 88 U.S. (21 Wall.) 130 (1874).

178. *Id.* at 134; *accord* Stoll v. Gottlieb, 305 U.S. 165, 167 (1938); Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Long Island Loan & Tr. Co., 172 U.S. 493, 507–10 (1899); Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 146 (1887). *Dupasseur* also held that the case was within the Supreme Court's statutory jurisdiction as one in which the state court ruled against a right claimed "under an authority exercised under the United States." 88 U.S. at 134.

Dupasseur also held that, at least in diversity cases, "no higher sanctity or effect can be claimed for the judgment [of a federal court] . . . than is due to the judgments of the State courts in a like case and under similar circumstances." *Id.* at 135. This seemingly broad statement, however, should not be read to as a limit on the power of federal courts to protect unarticulated

Especially in federal-question cases, the Court has repeatedly held that the preclusive effect of judgments issued by federal courts is governed by doctrines established by federal judges rather than borrowed from state law.[179] Indeed, it reiterated that principle less than six months after *Erie* was decided.[180] Under this longstanding principle, the Court has continued to develop federal preclusion law independent of state law, for example by abandoning the traditional common-law requirement of mutuality.[181]

Thus when the Court reconsidered the *Dupasseur* issue in 2001, for the first time in almost a century, it was not writing on a clean slate. The Court had already recognized the existence of the federal interest in preclusion doctrines for federal-court judgments. It had experience both developing common-law preclusion doctrines and applying them. Moreover, *Dupasseur* itself could be viewed as archaic: it was decided under a different procedural regime, had produced little progeny, and had not been reexamined in the modern procedural landscape.[182]

So matters stood when the Court decided *Semtek International, Inc. v. Lockheed Martin Corp*. in 2001.[183] *Semtek* involved a diversity

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federal interests, for two reasons. First, the Court in *Dupasseur* and other cases examined whether the state court had in fact reached the correct decision under state law, concluding in at least one case that the state court had not done so. *See id.*; *see also Crescent City Live Stock Co.*, 120 U.S. at 160. Both the exercise of federal jurisdiction and the Court's review of the state court's state-law decision are inconsistent with interpreting *Dupasseur* broadly as a limit on federal judicial lawmaking power. How can the case arise under federal law if federal law does not govern the dispute? And ordinarily, the Supreme Court will not second-guess a state court's application of state law. *See, e.g.*, Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874). Both problems are solved if we interpret *Dupasseur* to hold that while federal law governs the preclusive effect of federal-court judgments, the *content* of federal law should be borrowed from state law, at least in diversity cases. Such an interpretation puts *Dupasseur* squarely in line with the dormant commerce clause and preemption cases, insofar as the federal courts presumptively defer to state law but retain ultimate control over the vindication of unarticulated federal interests. The other reason not to read *Dupasseur* broadly is that it was decided under a very different procedural regime. For diversity cases, a series of federal statutes culminating in the Conformity Act of 1872, 171 Stat. § 196 (1872) (repealed 1934), directed federal courts to follow state procedural rules. *Dupasseur* thus arguably rested on an assumption that preclusion doctrines should be considered procedural. Until 2001, in fact, all of the Court's cases regarding the preclusive effect of federal-court diversity judgments had been decided before 1938—when the Federal Rules of Civil Procedure replaced the Conformity Act—and therefore under the Conformity Act.

179. *See, e.g.*, Gunter v. Atl. Coast Line R.R. Co., 200 U.S. 273, 290–91 (1906); Deposit Bank v. Frankfort, 191 U.S. 499, 516–17 (1903).

180. *Stoll*, 305 U.S. at 170–71.

181. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971).

182. *See supra* note 178.

183. 531 U.S. 497 (2001). Some scholars include *Semtek* as a case involving an enclave of federal common law (discussed in the next Section). I disagree, for reasons I outline in note 22, *supra*.

suit for breach of contract, which was first filed in state court in California, then removed to federal court and dismissed on state statute of limitations grounds. The plaintiff then filed another breach of contract suit against the same defendant—based on the same allegations of fact—in state court in Maryland, which had a longer statute of limitations. The Maryland courts dismissed the suit on grounds of res judicata. Regardless of whether California state law would bar the subsequent suit, the Maryland court held, it was barred under federal preclusion law because the California federal court's dismissal was "on the merits."[184]

The Supreme Court granted the plaintiff's petition for certiorari, and held, first, that *Dupasseur* was not dispositive because it was decided under the Conformity Act, and, second, that Federal Rule of Civil Procedure 41(b) did not control whether every "on the merits" dismissal should be accorded preclusive effect.[185]

Having thus cleared away the brush, the Court was left to decide the preclusion question. After noting that "no . . . federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action,"[186] Justice Scalia's opinion for a unanimous Court claimed for the federal judiciary the authority to decide *all* questions of the preclusive effect of federal-court judgments, whether those judgments were issued in diversity cases or federal-question cases: "[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."[187] The Court characterized *Dupasseur* as resting on the principle that "the State was allowed (indeed, required) to give a federal diversity judgment no more effect than it would accord one of its own judgments only because reference to state law was *the federal rule that this Court deemed appropriate*."[188]

And what is the federal common-law preclusion rule that should apply in diversity cases? The Court held that because there was no need for a uniform federal preclusion rule in diversity cases, the federal courts should adopt the preclusion law of the state in which the judgment-issuing court sat.[189] Thus, federal common law governs the preclusive effect of all federal-court judgments, but in diversity cases, the content of that common law should mirror state law. Reinforcing

184. *Semtek*, 531 U.S. at 499–500.
185. *Id.* at 500–06.
186. *Id.* at 507.
187. *Id.* at 508.
188. *Id.*
189. *Id.*

the principle that federal preclusion law is nevertheless *federal* common law, and that the federal judiciary has the power to protect federal interests even if doing so displaces state law, the Court added that the "reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests."[190]

The *Semtek* doctrine, then, is analogous to both the dormant commerce clause and obstacle preemption. In the absence of a clear congressional command, the federal judiciary is authorized to make federal common law in order to protect unarticulated federal interests. Although there is—in diversity cases as in dormant commerce clause and preemption cases—a presumption that state law will govern, the courts retain authority to override the presumption and apply federal rather than state law.

As this history shows, federal preclusion law developed over a century and a half, and did so unencumbered by concerns about judicial overreaching. The Court's background presumption, giving federal diversity judgments the same preclusive effect that they would have in state court, was an allocation of authority based solely on federalism principles—as illustrated by the fact that the Court made the same choice unanimously in two very different eras. The only question decided during the crucial era of the late 1930s (indeed, for most of the twentieth century) was the preclusive effect of federal-question judgments. Unsurprisingly, even in 1938 at the height of the rejection of judicial power, the Court did not view that question as novel or pivotal from either a federalism or separation of powers perspective, and thus continued to follow the line of precedent from earlier eras. When the Court once again returned to the diversity question, both the timing and the history of the Court's preclusion cases allowed it to make a decision unclouded by whatever concerns about judicial overreaching were otherwise floating back into judicial consciousness.

4. Enclaves of Federal Common Law

During the eighteenth and nineteenth centuries, federal common law developed freely. Before *Erie*, there was no need to distinguish any particular area of law as especially appropriate for the application of federal, rather than state, law. As long as no state statute existed and the subject was not peculiarly local, federal common law applied. But in some areas, application of federal common law rested on

190. *Id.* For an excellent discussion of possible situations in which state preclusion law might be incompatible with federal interests, see Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 532–34, 564–75 (2003).

additional independent grounds. Two of the most important involved disputes between states and maritime—or admiralty—law.

Admiralty law was one of the earliest and most robust areas in which the federal courts created law in common-law fashion. As then-Professor (now Judge) William Fletcher has demonstrated, admiralty law was a well-known instance of the "general law merchant," which depended on the law of no individual state or nation.[191] The most significant questions arising under admiralty law involved the *boundaries* between state and federal law, similar to the questions that arose under the dormant commerce clause.[192]

Disputes between states also necessarily implicate federal law. As the Court has frequently noted, no state "can legislate for, or impose its own policy upon" another state.[193] If no congressional act settles a dispute between states, the courts must instead draw upon "what may not improperly be called interstate common law."[194] Prior to *Erie*, the Court therefore developed a body of common-law precedent governing interstate disputes, especially disputes over riparian rights.[195]

Erie deprived the federal courts of their *general* power to make common law. Did it also prohibit federal courts from continuing to create federal common law in specialized cases justified by additional circumstances, like admiralty and interstate riparian disputes? The Court answered that question quickly. On the same day that *Erie* was decided, Justice Brandeis authored a unanimous opinion in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[196] In a diversity case

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191. *See* Fletcher, *supra* note 74.

192. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205 (1917). *Jensen* recognized the analogy. In noting that "it would be difficult, if not impossible, to define with exactness" the boundary between valid and invalid state legislation touching on admiralty matters, the Court cited *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (among others). *Jensen*, 244 U.S. at 216. The Court also noted the similarity between the rules governing the extent of state authority over admiralty and the rules governing the extent of state authority over interstate commerce. *Id.* at 216–17.

193. Kansas v. Colorado, 206 U.S. 46, 95 (1907).

194. *Id.* at 98.

195. *See, e.g.*, *id.*; Washington v. Oregon, 297 U.S. 517 (1936); New Jersey v. New York, 283 U.S. 336 (1931); Connecticut v. Massachusetts, 282 U.S. 660 (1931); Wyoming v. Colorado, 259 U.S. 419 (1922), *vacated on other grounds*, 353 U.S. 953 (1957).

196. 304 U.S. 92 (1938). Of course, one could also characterize the rule of *Erie* itself as federal common law. *See* Craig Green, *Can* Erie *Survive as Federal Common Law?*, 54 WM. & MARY L. REV. 813 (2013); Nelson, *supra* note 38, at 985–86. That leads to the paradox that "judge-made federal law tells us that judges cannot make federal law." Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 806 (1989). Judge Henry Friendly famously suggested that *Erie* itself made possible the development of these enclaves of federal common law: "[H]aving rid itself of subconscious feelings of guilt for federal poaching on state preserves, the Supreme Court became freer to insist on deference to federal decisions by the states where deference was due." Friendly, *supra* note 24, at 407.

between two private parties arguing about water rights, the Court applied its own precedent rather than the law of any state, because "whether the water of an interstate stream must be apportioned . . . is a question of 'federal common law' . . . ."[197] The Court neither mentioned *Erie* nor recognized any tension between it and *Hinderlider*.

Over the years, the Court has identified a handful of other narrow " 'enclaves' in which [it] acknowledged its exercise of federal lawmaking power."[198] Those enclaves—which the Court has described as "few and restricted"[199]—are justified, according to the Court, because they involve situations "in which a federal rule of decision is 'necessary to protect uniquely federal interests.' " [200] After *Hinderlider* in 1938, the other enclaves were established gradually, one at a time over the next fifty years.

In 1943, the Court held, in *Clearfield Trust Co. v. United States*,[201] that cases affecting the rights and obligations of the United States in commercial transactions were governed by federal common law. A federal rule was necessary because of the need for uniformity: identical transactions by the United States should not be "subject to the vagaries of the laws of the several states."[202] Moreover, because the government's authority to enter into such transactions was of constitutional and federal statutory origin, the governing law was necessarily also federal.[203]

Illustrating its post-*Erie* reluctance to expand the reach of federal common law, the Court did not confirm another area of federal common law until almost two decades later. It held in 1961 that *Erie* had not diminished the longstanding judicial power to create federal admiralty law.[204] Tellingly, when it did so it once again failed to cite or distinguish *Erie*. Instead, it described the process of finding the boundaries of admiralty law as "one of accommodation, entirely familiar

197. *Hinderlider*, 304 U.S. at 110.

198. Tidmarsh & Murray, *supra* note 22, at 588.

199. Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

200. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)). For an excellent overview and defense of these enclaves, see Tidmarsh & Murray, *supra* note 22.

201. Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943); *accord* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

202. *Clearfield Trust*, 318 U.S. at 367.

203. *Id.* at 365.

204. Kossick v. United Fruit Co., 365 U.S. 731 (1961).

in many areas of overlapping state and federal concern,"[205] and drew an analogy to the dormant commerce clause by citing *Cooley*.[206]

In 1964, the Court added foreign relations to the list of areas governed by federal common law.[207] Explicitly distinguishing *Erie*, the Court held that rules governing foreign affairs "should not be left to divergent and perhaps parochial state interpretations."[208] Another two decades passed without any changes to the common-law landscape. Then, in 1988, the Court created a federal common-law "government contractor defense" to state-law tort suits.[209] Drawing a parallel to both preemption cases and the few existing areas of federal common law,[210] the Court held that the "civil liabilities arising out of the performance of federal procurement contracts" implicated a "uniquely federal interest" that demanded the application of federal common law.[211] No new enclaves of federal common law have been added since 1988.[212]

Thus the cases involving federal common law are few and far between. Even more important, the Court has viewed them as unique and individual rather than as part of a general pattern of accommodating state and federal interests. As one commentator notes, "The Court seems to consider *Erie* and the Rules of Decision Act irrelevant to these cases."[213] Another points to their "gingerly and apologetic tone."[214] A third characterizes them as concerning "topics that lie beyond the reach of state law."[215]

Both the existence of these enclaves of federal common law and their narrowness are consistent with my distinction between ordinary federalism and the anomaly of *Erie*. It is unsurprising that even at the height of concerns about judicial discretion the Court in *Hinderlider* felt compelled to follow precedent and apply existing federal common-law doctrines to interstate riparian rights. The only alternatives were to apply the law of one of the quarreling states, or to abdicate responsibility altogether and refuse to decide the dispute. As the Court pointed out early on, neither alternative can be right. No state may

205. *Id.* at 739.

206. *Id.* at 740.

207. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

208. *Id.* at 425.

209. Boyle v. United Techs. Corp., 487 U.S. 500, 503 (1988).

210. *Id.* at 504.

211. *Id.* at 505–06.

212. Some scholars would argue that *Semtek* added preclusion law in 2001. I disagree, for reasons I explain in note 22, *supra*.

213. Perdue, *supra* note 107, at 753.

214. Weinberg, *supra* note 196, at 829.

215. Nelson, *supra* note 31, at 2.

unilaterally impose its law on another. As for abdication, "disputes between [states] must be settled either by force or else by appeal to tribunals . . . [and] [f]orce, under our system of government, is eliminated."[216]

By the time the next enclave was created, in 1943, concerns about judicial overreaching were fading. *Hinderlider* had already opened the door for the Court to distinguish *Erie*, so the substantive *Erie* precedent exerted less influence. Moreover, *Clearfield* was an exceedingly narrow decision, resting as it did partly on the ground that the source of authority for the transaction underlying the suit was itself federal. Thus *Clearfield* set the pattern for the remaining cases: situations in which federal common law applied would be few and extraordinary. The remaining cases confirm that the enclaves of federal common law are more like ordinary federalism than they are like *Erie*. The cases are few and far between, and most arose long after the Court ceased to worry about its own authority. The Court sees no tension between these cases and *Erie*, and draws analogies to ordinary federalism instead.

Indeed, *Erie*'s greatest relevance for these cases lies in the contrast between the two. The pull of *Erie* ensures that the Court will rarely find the application of federal common law appropriate—the stars (and the precedents and the politics) must align in exactly the right way. Ironically, however, it is these cases rather than *Erie* that represent federalism in its ordinary form. Once again, *Erie* is the anomaly.

III. THE CASE FOR NORMALIZING *ERIE*

Even if I am right that *Erie* is anomalous and that the anomaly is the result of historical fortuity, we are still left with the question whether *Erie* should be normalized. Recognizing *Erie* as anomalous leaves three possible paths forward. We might leave things as they are, simply accepting the divergence between *Erie* and the ordinary federalism cases. We might revise the doctrines of ordinary federalism to align them with *Erie*. Or we might revise *Erie* to align it with ordinary federalism. In this Part, I begin by rejecting the first possibility, instead defending the need to align *Erie* and ordinary federalism. I conclude by rejecting the second possibility, arguing instead that it is *Erie*, and not ordinary federalism, that needs revision.

216. Kansas v. Colorado, 206 U.S. 46, 97 (1907).

A. Erie*'s Exceptionalism and Judicial Transparency*

We might rely on generic arguments to support a preference for the elimination of legal anomalies. Any dissimilar treatment of similar cases is problematic. Anomalies undermine the predictability of law, exert distorting influences on other doctrines, and create inequities. To paraphrase the *Erie* doctrine itself, neither the analysis nor the result in a case should turn on exactly how the Court phrases the question before it.

In the case of the divergence between *Erie* and ordinary federalism, however, the problem is even worse. The anomalousness of *Erie* allows the Court to exercise unfettered discretion while pretending that the result is mandated by doctrinal precedent. Essentially, the problem is this: If the Court characterizes the question before it as one of ordinary federalism, then it is free to supplant state law to protect unarticulated federal interests. But if it instead characterizes the question as an *Erie* issue, then it cannot supplant state law unless it finds the clash between state and federal law to be trivial. Placement of a case on one side or the other of the line between *Erie* and ordinary federalism drives the outcome.

The problem is most acute in the context of choosing whether to analyze a particular dispute under the *Erie* doctrine or under the doctrine of implied preemption. The structure of the problem lies in the pressures that each doctrine places on statutory interpretation. Obstacle preemption encourages the Court to read a federal statute for all it's worth.[217] *Erie* requires it to adopt the "plain meaning," which in practice sometimes turns out to be as narrowly as possible . . . and maybe even more so.[218] The consequence is that the (unacknowledged and therefore undefended) decision about how to characterize the dispute can often make the difference between displacing or not displacing state law.

Two real-world examples prove the point. First, the Court changed the characterization of conflicts between state law and the Federal Arbitration Act ("FAA"), first considering them under *Erie* and

217. *See supra* Part II.C.2; *see also* sources cited in notes 19–21.

218. The "plain meaning" directive comes from *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980). For an example of how the Court tortures the meaning of a Federal Rule of Civil Procedure to avoid a conflict with state law, compare *West v. Conrail*, 481 U.S. 35 (1987) (in federal-question case, Federal Rule of Civil Procedure 3 means that filing tolls the statute of limitations), with *Walker* (in diversity case, Federal Rule of Civil Procedure 3 does not mean that filing tolls the statute of limitations). *See also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (Scalia, J., dissenting) (accusing the majority of adopting an unduly narrow interpretation of Rule 59).

then under obstacle preemption—and that recharacterization changed results. Second, the Court was able to reserve the authority to disregard state preclusion law in *Semtek* only because it did not treat the issue as an *Erie* question.

The effect of exercising unacknowledged discretion to characterize the question as either *Erie* or implied preemption plays out most apparently in the Court's jurisprudence under the Federal Arbitration Act.[219] Section 2 of the FAA applies to "contract[s] evidencing a transaction involving commerce" and makes most arbitration clauses in such contracts "valid, irrevocable, and enforceable."[220] The FAA was enacted in 1925, before *Erie*. After *Erie* the question naturally arose whether the FAA should be applied in diversity cases that were governed by the substantive law of states that made arbitration clauses revocable or unenforceable.[221]

In *Bernhardt v. Polygraphic Co. of America*,[222] the Court ducked the question by interpreting the FAA narrowly to exclude the contract at issue. To do otherwise, the Court held, would raise a serious constitutional question under *Erie*.[223] After holding the FAA inapplicable, moreover, the Court went on to hold that the distinction between arbitration and litigation "substantially affects the cause of action created by the State," and that "[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action."[224] Thus, under *Erie*, an uncodified federal preference for the enforceability of arbitration clauses could not displace a state preference against them.

Bernhardt posed a serious practical problem, insofar as it suggested that the FAA could be constitutionally applied only in federal-question cases and not in diversity cases. A decade later the Court found a way around the constitutional barrier, over a vigorous dissent by Justices Black, Douglas, and Stewart. The Court held in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[225] that the FAA was based on Congress's power to "prescribe how federal courts

219. 9 U.S.C. §§ 1–16 (2012).

220. 9 U.S.C. § 2 (2012).

221. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1313–18 (1985), contains a good summary of the problem.

222. 350 U.S. 198 (1956).

223. *Id.* at 202.

224. *Id.* at 203. Justice Frankfurter, concurring, went even further. He opined that "it 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. *Id.* at 208 (Frankfurter, J., concurring).

225. 388 U.S. 395 (1967).

are to conduct themselves,"[226] in other words, that it was procedural and therefore outside of *Erie*'s strictures.

Prima Paint created its own problem: if the FAA was procedural, then it couldn't apply in *state* courts. In 1984 the Court solved that problem. In *Southland Corp. v. Keating*,[227] the Court held that the FAA was a substantive enactment resting on Congress's constitutional authority under the Commerce Clause. As such, it was mandatory on both state and federal courts in all cases within its scope. Justice O'Connor, joined by Justice Rehnquist, dissented, arguing that as a matter of legislative history, "Congress believed that the FAA established nothing more than a rule of procedure."[228] In an ironic tour-de-force of bootstrapping, the majority rejected Justice O'Connor's arguments on the ground that because the FAA was applicable in federal-court diversity cases (under *Prima Paint*), holding it inapplicable in state courts would cause forum-shopping.

This sequence of cases is admittedly dizzying; the Court kept changing its mind about the basis for, and interpretation of, the FAA. For my purposes, however, the real problem lies in the Court's choices *after* the move from *Bernhardt* to *Southland*. Once the Court determined in *Southland* that the FAA was a substantive enactment codifying the federal interest in the enforceability of arbitration clauses, *Erie* became irrelevant with regard to its explicit provisions. But what about questions on which the FAA is less than explicit?

Bernhardt had considered that very issue, under the *Erie* doctrine. Because of its holding that the FAA did not apply to the case before it, the Court had to consider whether an *unarticulated* interest in the general enforceability of arbitration clauses (perhaps evidenced by the passage of the FAA) should displace state law. Under *Erie*, the clear answer is negative: unarticulated federal interests can never supplant state law. And so the *Bernhardt* Court held.

After *Southland*, however, the Court began to consider the question as one of implied preemption. And, in keeping with ordinary federalism's broad judicial authority to protect unarticulated federal interests, the Court frequently displaced state law in situations in

226. *Id.* at 405; *see also id.* at 411 (Black, J., dissenting) (describing the FAA as "designed to provide merely a procedural remedy which would not interfere with state substantive law").

227. 465 U.S. 1 (1984).

228. *Id.* at 26 (O'Connor, J., dissenting). For further support for Justice O'Connor's view, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNALIZATION (1992); and Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014). For a contrary view, see Christopher R. Drahozal, *In Defense of* Southland: *Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

which the FAA's language did not clearly require it, in order to protect the unarticulated federal interest in the full enforceability of arbitration clauses.[229] As one scholar has put it, "[F]ederal courts may decide issues not expressly covered by the FAA by crafting a federal common law rule."[230]

The move from an *Erie* analysis to an implied preemption analysis thus changed results. One commentator has criticized *Prima Paint* and its progeny on the ground that they violate *Erie* by creating a federal common law of arbitration.[231] The problem is actually much worse than that: *Erie*'s uniqueness allows the Court to "violate" it at will by recharacterizing the issue as one of ordinary federalism. Or, as one commentator has provocatively put it, implied preemption "reflects the can't-live-with-*Erie* side" of federalism jurisprudence.[232]

Semtek offers a second example, beyond the implied preemption context, of how characterizing an issue as either an *Erie* question or a question of ordinary federalism makes a substantial practical difference. Because the Court analyzed the question of the preclusive effect of federal-court judgments in diversity under the framework of ordinary federalism, it could conclude that federal interests might potentially demand the displacement of state preclusion law. But imagine that instead the Court had viewed the question as implicating *Erie*.[233] With no dispositive federal statute or rule, the Court would have inquired whether the difference between applying state preclusion laws and federal preclusion laws (derived from the doctrines governing the preclusive effect of federal-question judgments) could create inequities or encourage vertical forum-shopping. The procedural posture of *Semtek* does not allow us to be certain, but it is likely that in some cases, if not in *Semtek* itself, state and federal preclusion rules differ enough

229. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

230. Hirshman, *supra* note 221, at 1347; *see also* Ronald Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 135 (2012) (explaining that the Court has "expand[ed] the breadth of FAA preemption . . . based as much or more on the Court's view of the federal pro-arbitration policy than the language of the FAA itself").

231. Richard L. Barnes, Prima Paint *Pushed Compulsory Arbitration Under the* Erie *Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1 (2007).

232. Michael Greve, *Atlas Croaks. Supreme Court Shrugs.*, 6 CHARLESTON L. REV. 15, 32 (2011).

233. At least one commentator had urged that it do so. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law*, 71 CORNELL L. REV. 733 (1986). Others have criticized the Court for its failure to consider *Semtek* under the *Erie* doctrine. *See* Dudley & Rutherglen, *supra* note 23.

to encourage forum-shopping.[234] So if the Court had characterized *Semtek* as raising an *Erie* question, it would have held—as it did—that state preclusion law governed, but it would have been unable to reserve the authority to disregard state law "in situations in which the state law is incompatible with federal interests."[235]

Of course, with any given statute the move could go in either direction. If the Court prefers to protect unarticulated federal interests, it can characterize the question before it as one of implied preemption. If the Court prefers not to, it can characterize it as an *Erie* question. The important point is that the divergence between *Erie* and ordinary federalism doctrines pushes that decision underground, allowing the Court to pretend that it is not really exercising discretion. In the absence of the anomaly, the decision would be more transparent. The Court would always have to explain why the presumption in favor of state law was or was not overcome in each particular case. That salutary result should be enough—together with a general preference for treating like cases alike—to support a conclusion that we should not leave *Erie* as an anomaly.

B. A Defense of Ordinary Federalism

Even if we conclude that the divergence between *Erie* and ordinary federalism should be eliminated, however, that conclusion does not tell us in which direction the reconciliation should proceed. As noted earlier, many scholars criticize some or all of the doctrines of ordinary federalism on separation of powers grounds. If their proposals were adopted, then those doctrines would end up looking much more like the current *Erie* doctrine. Similarly, some scholars have recast *Erie* itself as a separation of powers case, defending it as an embodiment of judicial self-restraint.[236] That argument, too, implies that we would be

234. Ironically, the question arose only because of the plaintiff's *horizontal* forum-shopping: Having been kicked out of a California federal court on statute of limitations grounds, Semtek refiled in Maryland because of its longer statute of limitations. Presumably, it also chose to file in Maryland *state* court because it expected a more favorable ruling from a state court than from a federal court on the question of the preclusive effect of the prior federal court ruling. The fact that the prediction turned out to be wrong does not undermine the point.

235. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001).

236. *See, e.g.*, 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); Clark, *supra* note 83, at 1412–22; Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459 (2001); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974); Young, *supra* note 7, at 64–82. One commentator labels this the "new myth" of *Erie*. Green, *supra* note 2, at 596. To the

better off revising the ordinary federalism doctrines to look more like *Erie* than vice versa.

In this Section, I argue against that approach, and suggest that ordinary federalism should be emulated because it is correct. It is *Erie*, and not the doctrines of ordinary federalism, that should be revised.

At bottom, the debate between those who prefer ordinary federalism and those who prefer *Erie* is part of the larger debate, central to contemporary public law scholarship, about "which institution should determine the content of the law."[237] The traditional answer—that the responsibility is shared by the legislature and the judiciary—is under broad attack from scholars across the political spectrum.[238] The choice between *Erie* as anomaly and *Erie* as model is a choice between the traditional view and the currently popular view. I cannot expect to resolve that debate here, so I offer only a basic outline of the most important arguments in favor of the traditional view.

Those who would limit judicial authority, in the federalism context as in other contexts, labor under two misconceptions. First, they believe that it is possible to constrain judicial discretion by the adoption of either specific doctrines or specific methodologies. Second, they believe that in the absence of such constraints, what judges do is no different from what legislatures do: it is all politics, which ought to be off-limits to judges. Both assumptions are false.

As to the first, Dan Meltzer perhaps put it most succinctly: "[J]udicial decisionmaking that involves some policymaking discretion is inevitable."[239] Illustrations abound that neither methodologies nor doctrines are truly constraining. Purported textualists ignore the plain

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extent that these scholars rely on *Erie* as establishing a *precedent* against judicial authority, they fail because the decision itself contains not even a hint that it is based on separation of powers. *Erie* was explicitly and conspicuously a federalism decision. *See* Sherry, *supra* note 38, at 145–47; Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1568, 1571–73 (2008). A defense of judicial restraint has to be used to support *Erie*, rather than misusing *Erie* to support a doctrine of judicial restraint. My argument here is different: I suggest that the Justices in the majority erred in their consideration of the federalism question because they were distracted by separation of powers concerns.

237. Merrill, *supra* note 15, at 727.

238. *See, e.g.*, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014); MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2006); JOHN O. MCGINNIS, ORIGINALISM AND THE GOOD CONSTITUTION (2013); CASS R. SUNSTEIN, RADICALS IN ROBES (2005). I have defended the traditional answer on various grounds. *See, e.g.*, Suzanna Sherry, *Liberty's Safety Net*, 16 GREEN BAG 2D 467 (2013); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973 (2005); Sherry, *supra* note 45.

239. Meltzer, *supra* note 9, at 43.

language of the Eleventh Amendment.[240] Purported originalists always find historical support for their own positions—dueling Supreme Court opinions relying on historical analysis are far from rare.[241] At the level of doctrine, if the Court were to explicitly reject the doctrine of implied preemption, the vagaries of statutory interpretation would allow it to reach most of the same results under a doctrine of express preemption. Preemption is not unique in this regard; as the discussion of FAA in the previous Section suggests, courts often have so many alternative doctrinal approaches available that they can wiggle out of any constraints. And the *Erie* doctrine itself is notorious for the fuzziness of its distinctions between substance and procedure and its pronouncements on the "plain meaning" of the Federal Rules of Civil Procedure.

Many scholars and judges have made similar or related points,[242] but the bottom line is the same. Scholars who criticize ordinary federalism doctrines for conferring too much discretion on judges are mistaken if they think that adoption of their proposals will curb judicial discretion. They are essentially trying to resurrect classical formalism. But formalism did not constrain judges, and neither will these scholars' proposals.[243] And formalist attempts to draw bright lines are doomed to failure. It is not an accident that ordinary federalism doctrines ultimately settled on some type of functionalist balancing test, or that even within the current *Erie* doctrine there is a tension between the formalist black-letter law and the functionalist strains that emerge in cases such as *Byrd* and *Gasperini*.[244]

The second problem with the critique of ordinary federalism doctrines is related to the first. Those who urge abandonment of the doctrines have a view of judging as dichotomous: "[I]f not the heavens, then the abyss."[245] In their eyes, if judges are not umpires calling balls and strikes, then they must be legislators in black robes. The demand

240. *See generally* John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (criticizing textualist Justices for their failure to adhere to the text).

241. Consider, for example, the majority and dissenting opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), or *Alden v. Maine*, 527 U.S. 706 (1999).

242. Prominent examples include AHARON BARAK, JUDICIAL DISCRETION (1989); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); and FARBER & SHERRY, *supra* note 133.

243. *See generally* FARBER & SHERRY, *supra* note 133 (critiquing modern formalist theories).

244. For a discussion of these tensions, see Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can't Fix the* Erie *Doctrine*, 10 J.L. ECON. & POL'Y 173 (2013).

245. Martha Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 730 (1994).

for discretion-curbing doctrines is an attempt to ascend into the heavens. The fear of unconstrained judicial discretion reflects the fear of the abyss. The bad news is that the attempt to curb judicial discretion is impossible. The good news is that it isn't necessary: political judging is not the only alternative to externally constrained judging. The abyss is a myth—at least in our modern American judicial system. Many scholars have canvassed the ways in which discretionary judging—in both constitutional and nonconstitutional cases—is internally constrained by various institutional and other factors.[246] Judging is not wholly divorced from politics, but neither is it politics as practiced in legislative arenas.

What I have said so far applies to any theory that attempts to limit judicial discretion based on an argument from separation of powers. But in the context of unarticulated federal interests, there are additional, more specific, reasons to prefer ordinary federalism to the current *Erie* doctrine. Adjusting the balance between state and federal power, especially in a regime in which there is overlap between the two, requires judgment. As Tom Merrill has noted, preemption decisions (both express and implied) "entail[ ] a discretionary judgment about the permissible degree of tension between federal and state law, a question that typically cannot be answered using the tools of statutory interpretation."[247]

In other words, federalism decisions cannot be made mechanical. It is one thing to argue, for example, that courts should not go beyond the individual rights listed in the Constitution. It might at least be possible to do so, although such a rule would nevertheless require discretionary interpretation of listed rights and in any case would not be a Constitution that many of us would want to live under. But in the federalism context, unless we return to a regime in which the powers of Congress and the states are mutually exclusive, the Court cannot avoid discretionary line drawing in every case in which state and federal interests potentially conflict. Whether those interests are articulated or unarticulated is a matter of degree—as illustrated by the difficulties the Court has had in the *Erie* context determining the scope of arguably preemptive Federal Rules of Civil Procedure.[248]

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246. *See, e.g.*, AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006); BREYER, *supra* note 242; DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2009); RICHARD POSNER, HOW JUDGES THINK (2008); RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Paul Freund, *An Analysis of Judicial Reasoning*, *in* LAW AND PHILOSOPHY 282 (Sidney Hook ed., 1964); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

247. Merrill, *supra* note 15, at 729.

248. *See supra* note 218; *infra* text accompanying notes 283–287.

What, then, would a doctrine governing the law to be applied in diversity cases look like if it had developed free of distorting concerns about judicial overreaching, that is, if the Court were to normalize the *Erie* doctrine? In other words, once we uncouple *Erie* from its historical context, we are free to develop a doctrine that applies ordinary federalism in the *Erie* context. In the next Section, I offer a brief sketch of that potential jurisprudential landscape.

IV. ORDINARY *ERIE*

A. The Four Principles of Ordinary Erie

The ordinary federalism doctrines exhibit a common structure. In each case, state law is ordinarily presumed to operate normally. But when the law is challenged on the ground that it exceeds state power by interfering with unarticulated federal interests, the courts evaluate that claim on its merits. A sufficiently substantial interference with a sufficiently significant federal interest results in the displacement of state law.

Under all four doctrines, the displacement of state law is universal: neither federal nor state courts are permitted to rely on the state law. A successful dormant commerce clause challenge means that the state law is invalid and cannot be enforced. A successful preemption challenge means the same. If unarticulated federal interests counsel against the use of state preclusion doctrines to govern the effect of a prior federal judgment, neither federal nor state courts can rely on those state doctrines. And if the Court decides that unique federal interests mandate the creation of an enclave of federal common law, the law thus created is binding on state courts as well.

For the dormant commerce clause and obstacle preemption, the matter ends there. Once the state law has been invalidated, there is simply no law to apply. Criminal and civil penalties prescribed by state law cannot be imposed. Private lawsuits authorized under state law cannot be brought in any court.

But in the context of preclusion, *some* law has to govern. It is not possible to say that because state preclusion law will not dictate the preclusive effect of an existing federal-court judgment, no law will do so. Thus in the case of preclusion law, if the courts rely on unarticulated federal interests to displace state law, they also fashion new federal common law to take its place. The same is true with regard to the rare enclaves of federal common law: the Court not only determines that the matter should not be governed by state law, but also establishes the law that *will* govern. This second step is necessitated by the fact that there

is, as Kevin Clermont reminds us, a "distinction between choosing the applicable law and specifying its content."[249]

Thus there are four important aspects to consider in normalizing *Erie*. First, a congruent doctrine governing the substantive law to be applied in diversity cases should adopt the background presumption of the applicability of state law. Second, and most crucially, a normalized *Erie* doctrine should recognize the courts' authority to overcome the presumption and displace state law in order to protect unarticulated federal interests. Third, because diversity cases—like preclusion and enclave cases and unlike dormant commerce clause or preemption cases—require the application of *some* law, courts would have to fashion federal common law to protect unarticulated federal interests when necessary. Finally, however, the universal quality of the ordinary federalism doctrines might not be appropriate: because the *Erie* question arises only when parties are in federal court, it might be that federal common law developed in the limited context of *Erie*[250] should apply only in federal court.

In this Section, I elaborate how each of these principles of ordinary federalism would translate into a revised and normalized *Erie* doctrine. In other words, I remove the distortion and describe what the *Erie* doctrine might look like if the Court had focused (or now focused) solely on the federalism question, as it did in the other contexts.

1. The Presumption that State Law Applies

Courts should begin by presuming that, in diversity cases, state substantive law applies.[251] They should do so for at least two reasons.

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249. Clermont, *supra* note 107, at 11; *see also* Nelson, *supra* note 31, at 39 (opining that once the Court decides that federal contracts are governed by federal law, the fact that no written federal law dictates how to interpret federal contracts "surely" does not mean "that federal contracts are unintelligible and unenforceable"; courts should supply the necessary federal law).

250. By focusing on the limited context of *Erie*, I mean specifically to exclude the current enclaves of federal common law (and any enclaves added in the future), which are, and should remain, binding on state courts.

251. The question of *which* state's law should apply is beyond the scope of this Article. Many scholars argue in favor of overruling *Klaxon* even in the current *Erie* regime. *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33–35 (1963); Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514–15, 541–42 (1954); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1865–66 (2006); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 282 (1992); Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 678–83 (2006); Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1020–21 (2015); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2002 (2008). The sort of

First, the ordinary federalism doctrines accommodate state and federal interests by adopting such a presumption. Because my argument rests primarily on the incongruity between *Erie* and ordinary federalism, my solution is to make *Erie* look more like the other doctrines. The same presumption should therefore apply.[252] Requiring congruity is not mere formalism, however. The adoption of a presumption in favor of the operation of state law makes sense for *all* the doctrines that address the question of unarticulated federal interests. A presumption one way or the other is efficient (the stronger the presumption, the more efficient). And because we are talking about *un*articulated interests, we should presume that if Congress has not chosen to explicitly protect the interest, it is more likely than not that the interest is unworthy of judicial protection.

Second, for run-of-the-mill cases, the current *Erie* doctrine works. Courts are familiar with the doctrine and apply it routinely and often with little difficulty. We do not need a federal common law to govern automobile accidents, property disputes, and the like. It would be more burdensome for federal courts to have to develop parallel federal common-law doctrines. Diversity jurisdiction is burdensome enough: as Justice Frankfurter noted, "An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."[253] Most federal courts told to construct a federal common law of, say, negligence, would probably choose to adopt state law anyway. I am already suggesting a radical change in the doctrine—from a near-universal mandate to a rebuttable presumption—and there is no need to throw the baby out with the bathwater.

2. Overcoming the Presumption: Identifying Unarticulated Federal Interests

Where the current *Erie* doctrine goes wrong—and where it diverges from ordinary federalism—is in its insistence that state

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balancing that I advocate for substantive law might yield a conclusion that there is a strong federal interest in uniform choice-of-law rules, as many of these scholars have urged.

252. There is some dispute in the literature about how courts use state law under current doctrines: whether state law is *applied*, *adopted*, or *incorporated*. *See, e.g.*, Erbsen, *supra* note 110, at 586–87; Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1869–71, 1886 (2013); Roosevelt, *supra* note 110, at 14–15. That debate is irrelevant to my thesis; I use the term "presumption" to encompass all three possibilities.

253. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949)*; see also* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97 (1990) (urging abolition of diversity jurisdiction); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reform*, 92 HARV. L. REV. 963 (1979) (same); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) (same).

substantive law must apply unless *Congress* has explicitly dictated otherwise. Under the doctrines of ordinary federalism, the presumption that state law applies can be overcome if the Court finds that application of state law would interfere with federal interests that are unarticulated by Congress. The judiciary, in other words, engages in an open-ended balancing process to determine whether state law should apply.

I suggest that in *Erie* cases, courts should similarly be able to overcome the presumption by reference to unarticulated, as well as articulated, federal interests. And it should not require the extraordinary circumstances that currently underlie the enclaves of federal common law.

Suggesting that the Court has power to identify and protect federal interests unarticulated by Congress raises two related questions, both of which can be answered by reference to existing doctrines. First, how should courts identify unarticulated federal interests triggering the application of federal common law? Second, how strong is the presumption in favor of state law?

On the first question, the Court has had little trouble identifying such interests in the context of the enclaves of federal common law. It could do so as well in *Erie* cases. It has not done so, however, because it views the line of cases from *Hinderlider* to *Boyle* as isolated and disfavored exceptions to the *Erie* doctrine: *Erie* demands slavish adherence to state law, and the Court creates narrow exceptions to it by adding categories of federal interests piecemeal by analogy to existing categories. I am suggesting instead that the Court adopt an overarching standard applicable in both the enclave cases and more run-of-the-mill *Erie* cases, allowing judges in all *Erie* cases to evaluate the effect of state law on federal interests.[254] Identifying unarticulated federal interests would work the same way in both contexts.

Additionally, there is precedent for judicial recognition of unarticulated federal interests even within the current *Erie* doctrine. In *Byrd v. Blue Ridge Rural Electric Cooperative*,[255] the Court relied on—and then immediately abandoned—a standard analogous to the

254. Wendy Perdue has also advocated aligning *Erie* and the federal common-law cases. *See* Perdue, *supra* note 107. But her suggestion differs from mine in two important and related ways. First, her argument is internal to *Erie* and the common-law cases and thus does not view it as part of the general question of judicial authority to protect unarticulated federal interests. Second, she suggests extending the two-step analysis of the common-law cases to *Erie* questions; my argument in this Article is that the cognate doctrines *already* provide the answer to the first step—there *is* power in the federal courts to create common law whenever unarticulated federal interests are at stake.

255. 356 U.S. 525 (1958), discussed *supra*, note 107.

approach I am suggesting. In *Byrd*, the Court struggled with whether to apply, in a diversity case, a state law that gave a particular disputed factual question to a judge rather than a jury. The Court first determined that the Seventh Amendment did not mandate a jury trial, and that the allocation to a judge rather than a jury might change the outcome of the case (and thus that under existing precedent, state law should apply). But the Court went on to suggest that "the federal policy favoring jury decisions of disputed fact" was an "affirmative countervailing consideration" that might dictate application of federal law.[256] The Court has never again referred to "countervailing considerations" that trump an otherwise applicable state law, and *Byrd* stands as an enigmatic and inexplicable case. Translating "countervailing considerations" as "unarticulated federal interests," however, makes sense out of *Byrd*.

Having explained *Byrd*, I would expand it to all legal issues in diversity cases rather than limiting it to cases in which the state law straddles the line between substance and procedure. And rather than characterizing it, as *Byrd* also did, as a test unique to *Erie* situations, I would simply identify it as an aspect of ordinary federalism.

Balancing tests reign throughout the legal landscape, and there is no reason to doubt the courts' ability to apply a balancing test in this area as they do in so many others. In particular, balancing tests are often used in horizontal choice-of-law decisions; it makes some sense to apply them as well in the context of the *Erie* doctrine's vertical choice-of-law context.[257]

As for the strength of the presumption in favor of state law, it probably does not make much difference. The Court has over time adopted varying levels of presumption in the dormant commerce clause and obstacle preemption contexts, and it has neither made the results predictable nor prevented the Justices from disagreeing with one another. Nor has attempting to answer what is essentially a difficult question of balancing individual and government interests by setting an artificial level of scrutiny produced much certainty in the Equal Protection context.[258]

Courts are experienced at identifying competing interests and balancing them to determine which should prevail. Doing so in the context of deciding whether unarticulated federal interests should

256. *Id.* at 537–38.

257. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1262–81 (1999).

258. *See* Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products, 14 GEO. J.L. & PUB. POL'Y ___ (forthcoming 2016).

displace the presumption that state law governs in diversity cases does not present any special difficulties.

3. Fashioning Federal Common Law

If a federal court determines that the application of state law would interfere with unarticulated federal interests, then federal law will apply. By definition, of course, in an *Erie* case there is no applicable (substantive) federal statutory law, so the courts will have to create federal common law. In one sense, this should make my suggested revision of the *Erie* doctrine less controversial than existing doctrines of preemption. As one commentator has noted, a serious negative consequence of a holding of preemption—at least in the context of tort claims—is that tort victims "may be left without recourse to a damages remedy" because federal law does not provide one.[259] My revised *Erie* doctrine offers an alternative to simple preemption: courts can instead view it as a situation in which the need to protect unarticulated federal interests requires the judicial substitution of federal remedies for state remedies.

That federal courts will, under my theory, have to develop federal common-law doctrines to govern areas in which federal law should apply, then, is a benefit rather than a disadvantage. And, again, it is not a novel task for federal courts. They already fashion common-law doctrines to govern the preclusive effect of federal-court judgments in both diversity and federal-question cases. They develop and apply common law in the context of the existing enclaves identified by the Supreme Court as implicating unique federal interests. They use common-law methods to fill gaps when the positive law runs out, for example in the Rules of Evidence and federal antitrust statutes. Even within diversity jurisdiction, federal common law sometimes governs: lower courts have held, for example, that federal common law governs

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259. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 562 (1997); *see also* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015 (2010) (suggesting that preemption of state law without substituting federal law ought to be rare); David C. Vladeck, *Preemption and Regulatory Failure Risks*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, *supra* note 174, at 54–56 (discussing the need for tort remedies to supplement a regulatory regime). As one commentator on the AALS Federal Courts Section listserv described current law, "when the US Supreme Court doesn't like state law, they federalize it. Examples: defamation, punitive damages, land use conditions, products liability (preemption)." Posting of Jack M. Beermann, beermann@bu.edu, to SECTFD.aals@lists.aals.org (June 11, 2015) (on file with author); *see also* Jack M. Beermann, *The Supreme Common Law Court of the United States*, 18 B.U. PUB. INT. L.J. 119, 152–54 (2008) (making a similar point). Using preemption to "federalize" some torts just eliminates the liability; my approach would instead retain liability but keep it uniform.

the determination of domicile for purposes of invoking diversity jurisdiction in the first place.[260]

As for the content of that common law, it would be almost oxymoronic to say much. As I am recommending a common-law approach to the *Erie* question, it behooves me to allow common-law development of the idea. I therefore leave to the federal judiciary to develop—and future scholars to evaluate—common-law doctrines adequate to the task of protecting unarticulated federal interests.[261]

Finally, a normalized *Erie* doctrine should also mirror ordinary federalism with regard to the relationship between the law developed by courts and the law enacted by Congress. In ordinary federalism cases, Congress can always override a judicial determination that unarticulated federal interests are at stake. Congress can enact laws specifying that particular state laws do not interfere with interstate commerce, or are not preempted. It can pass legislation providing that state, rather than federal, law applies in preclusion cases or in the enclaves of federal common law. It can also enact new federal statutory law to apply (in any situation of ordinary federalism) if it agrees that federal law should govern but disagrees with the particular common-law doctrines established by the courts. And so it should be in diversity cases. Even if the courts determine that an interest in, say, an integrated national market for consumer goods requires the development of federal common law, Congress can override that determination by passing a law specifying that state law applies in such cases.[262] Or Congress could choose to confer the authority to establish federal law on a federal agency rather than the federal (or state) courts.

The current *Erie* doctrine requires Congress to move first: if a state law interferes with federal interests, Congress has to notice, decide to act, choose that problem above all the others that it grapples with, and then overcome political barriers to craft and pass a responsive statute. Under a normalized *Erie* doctrine, the courts would tee up the issue for Congress. As Jonathan Siegel has noted in a slightly different context, courts have several advantages over Congress that allow them

260. *See, e.g.*, Bower v. Egyptair Airlines Co., 731 F.3d 85, 91 (1st Cir. 2013); Horton v. Bank One, N.A., 387 F.3d 426, 435 (5th Cir. 2004); Union Pac. R.R. Co. v. 174 Acres of Land, 193 F.3d 944, 946 (8th Cir. 1999); Pacho v. Enter. Rent-a-Car, 510 F. Supp. 2d 331, 334 (S.D.N.Y. 2007). For other examples, see Tidmarsh & Murray, *supra* note 22, at 590–92.

261. One question that will need an answer is the basis on which the courts should make (or the sources from which they should draw in making) federal common law. How free-wheeling should they be? *See, e.g.*, Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005); Nelson, *supra* note 31.

262. In other words, Congress could enact a clearer (and, if it so desired, more specific) substitute for the Rules of Decision Act.

to be more focused, transparent, and responsive.[263] Allowing the judiciary and the legislature to work together in the way that my revised *Erie* doctrine does is therefore efficient.

4. A Bifurcated Approach

The question of the governing law in diversity cases raises one additional question, not present in the context of most ordinary federalism cases. For cases arising under the dormant commerce clause, obstacle preemption, and the preclusive effect of federal-court judgments, the substantive claim or defense is itself federal. (The enclave cases are different; I address them separately.) Often, a party who would otherwise be subject to state law brings a declaratory or injunctive action in federal court, asking the court to invalidate the state law as preempted or unconstitutional.[264] Sometimes a party who is sued in state court raises preemption or unconstitutionality as a defense, asking the court to dismiss the complaint or indictment.[265] Either way, the party's substantive claim or defense is federal. Similarly, as the Court has recognized since *Dupasseur*, the claim that a prior federal-court judgment precludes suit is itself a substantive federal defense whether raised in federal or state court.

When the question is the law that governs in diversity cases (and the enclaves of federal common law), however, the situation is different. There is no substantive federal claim; even if the court decides that unarticulated federal interests warrant the development of, say, a federal law of products liability, no plaintiff could file a federal tort claim based on a defective product.[266] The claim would still arise under state law, and would be brought in federal court only on the basis of diversity of citizenship. Nor could a potential defendant bring an anticipatory suit in federal court demanding that in all products liability cases the state courts apply federal common law, the way a potential defendant brings an anticipatory suit seeking an injunction against enforcement of a state law. The sole substantive claim is under

263. Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1191–94 (2012).

264. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Perez v. Campbell, 402 U.S. 637 (1971); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

265. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Wyeth v. Levine, 555 U.S. 555 (2009); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

266. One might perhaps make an argument that once a common law of federal products liability (or whatever) has been developed, the courts ought to create a cause of action under that body of law as well. That possibility is beyond the scope of this Article.

state law, and it is only the diversity of citizenship that gives the federal court jurisdiction in the first place.

Nor is there a federal "defense" of the sort that the doctrines of preclusion, preemption, and unconstitutionality offer. The argument under my revised *Erie* doctrine is not that federal law eliminates the claim—that is, that it should be dismissed—but that the court's adjudication of the claim should follow a different path. That is more akin to a defendant arguing that plaintiff has mistaken the meaning of the governing law: under a true interpretation of the law, the defendant is arguing, the court's legal or factual inquiry will be different from the one plaintiff suggests.

Because the claim itself arises under state law, the question is not whether to allow the claim but how to decide it. This choice-of-law decision is, as one scholar has noted, similar to other "internal rules of the federal government": it is "intra-judicial law, designed by federal judges to address peculiar problems that arise in their statutorily ordained, constitutionally authorized job."[267] There is thus no *a priori* reason to assume that state and federal courts must decide the claim the same way; it is only the *Erie* doctrine itself that forces us to that conclusion. And it is because of *Erie* that the enclave cases—which grew out of the *Erie* doctrine's closing off of the ordinary pattern of creating federal common law to govern only in federal court—hold that the limited common law that remains after *Erie* must apply in both state and federal court.

Indeed, both before and after *Erie* different courts could decide exactly the same claim differently. Under *Swift*, state courts were not bound to follow Supreme Court decisions (much less lower federal court decisions) on general federal common law.[268] A few years after *Swift*, a New York court declined to follow its substantive holding.[269] Even under *Erie*, large gaps exist. State courts are not bound to follow federal courts' "*Erie* guesses" as to the content of state law. Nor is there a horizontal equivalent of the *Erie* doctrine: state courts are not obliged to apply the law of a sister state even to suits arising from events in that sister state.[270] Conversely, a court in state *A* can use the law of

267. Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 667–68 (2008).

268. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 77 (2009); Fletcher, *supra* note 74, at 1561; Strauss, *supra* note 236, at 1582–88; Weinstein, *supra* note 74, at 294 n.448.

269. Stalker v. McDonald, 6 Hill 93 (N.Y. Sup. Ct. 1843).

270. *See* Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237 (2011).

state *B* even in a situation in which state *B* would not use its own law.[271] There is also a split in the circuits about whether *Erie* requires federal courts, in attempting to divine how a state court would interpret a state statute, to follow state rules of statutory interpretation.[272] Once we remove the blinders imposed by *Erie*, and see the variety of legal circumstances in which different courts apply different law to the same claim, we can see that state courts should not necessarily be bound to apply federal common law (outside the established enclaves) to state claims.

Thus, had the *Erie* doctrine developed naturally, uninfluenced by separation of powers concerns, the Court might not have baldly declared that "[t]here is no federal general common law."[273] Instead, it might have accommodated state and federal interests by limiting both the circumstances calling for, and the reach of, federal common law. Even the enclave cases might have developed much as they did: in most circumstances, there is no particular need for universal federal common law, but in a few exceptional cases there is. An undistorted *Erie* doctrine, in other words, might allow federal courts to create federal common law in order to protect unarticulated federal interests, but also hold that absent extraordinary circumstances such federal common law binds only federal courts.

In the *Swift* era, such a bifurcation caused undesirable forum-shopping, but that is not a serious objection, for two reasons.[274] First, I

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271. *See* Green, *supra* note 58, at 873. Green discusses *Rhee v. Combined Enterprises, Inc.*, 536 A.2d 1197 (Md. Ct. Spec. App. 1988), which applied New Jersey law on interspousal suits to a suit between a Maryland husband and wife involved in an accident in New Jersey. The Maryland court applied New Jersey law even though New Jersey had previously held that its interspousal law should *not* be applied to nondomiciliaries involved in New Jersey accidents. Veazey v. Doremus, 510 A.2d 1187 (N.J. 1986); *see also* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1163, n.205 (2011) (describing a similar result in a Georgia court); *cf.* Green, *supra* note 252, at 1866–67, 1882, 1887–88 (noting that the Court in *Guaranty Trust* applied the state statute of limitations without examining whether *state* courts would rule that the state statute of limitations applied in non-state courts).

272. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1901 (2011) ("Neither the federal nor the state courts have any consistent or well-articulated approach to the question of whether they are required to apply one another's interpretive methodologies to one another's statutes.").

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

274. Assuming that it is even a problem: one scholar suggests that forum-shopping is not inherently evil. Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3272–77 (2014). Another argues that giving plaintiffs an ability to forum shop can be a good thing. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988). For an interesting and novel defense of *Erie* as a way to prevent forum-shopping in order to prevent federal courts from "increas[ing] their share of the market in dispute resolution through what

am not advocating the application of federal law across the board, as occurred in the years after *Swift*; I expect there are a fairly limited number of areas in which unarticulated federal interests counsel the application of federal common law, especially given the presumption against displacement of state law. Opportunities for forum-shopping would be concomitantly limited. Second, *Erie* did not eliminate—or even significantly reduce—forum-shopping. *Erie* merely traded vertical forum-shopping for horizontal forum-shopping. Parties are now arguably indifferent as between state and federal courts,[275] but they care about *which* state the court sits in regardless of whether that court is state or federal.

While freeing state courts from the obligation to follow federal common law may seem counterintuitive, it is neither novel nor necessarily detrimental to our litigation regime. And it means that my suggested normalization of the *Erie* doctrine is less intrusive on state prerogatives than are the other doctrines of ordinary federalism. Under the other doctrines, courts will presume that state laws are valid and operational, and will displace those laws only where necessary to protect unarticulated federal interests. In those contexts, that displacement is final and universal: states cannot salvage whatever policy they hoped to achieve by their laws. But under my proposed new *Erie* doctrine, states are still free to apply their own law in their own courts. It is only when state law negatively affects both unarticulated federal interests *and* citizens of other states[276] that federal common law will govern.

B. The Benefits of Normalizing Erie

In addition to closing the gap between *Erie* and the ordinary federalism doctrines, normalizing the *Erie* doctrine closes four other gaps. First, it makes federal legislative and judicial power

might be called judicial product differentiation," see Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 107, 110 (2012).

275. The choice of state or federal court still matters in some cases. For example, after *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), a case seeking statutory damages can be certified as a class action in a New York federal court but not in a New York state court. As one might expect, the *Shady Grove* decision led to "large shifts in the patterns of original filings and removals in federal courts in New York." William H.J. Hubbard, *An Empirical Study of the Effect of* Shady Grove v. Allstate *on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 151 (2013).

276. Or, in the case of supplemental jurisdiction, when state law overlaps with federal causes of action.

coextensive.[277] Second, it allows state and federal courts to exercise the same authority to create and apply common law.[278] Ironically, *Erie* itself simultaneously expanded the reach of state judge-made law and contracted the scope of federal judge-made law. Third, my revised *Erie* doctrine makes the vertical choice-of-law decision look much more like typical horizontal choice-of-law decisions that rely on some form of balancing test.[279] Finally, using a functionalist rather than formalist approach for *Erie* questions is more consistent with the approach adopted by the Federal Rules of Civil Procedure in 1938. Those Rules famously substituted the freewheeling functionalism of suits at equity for the arcane procedural formalism that had come to dominate suits at law.[280] If nothing else, Rule 1, calling for the Rules to be used to "secure the just, speedy, and inexpensive determination" of every case, makes the point.

Normalizing *Erie* also resolves two tensions within the current *Erie* doctrine. First, as noted earlier, there is a great deal of dispute about the place of *Byrd v. Blue Ridge Electric Rural Electrical Cooperative*[281] in modern *Erie* jurisprudence. Viewing *Erie* as an ordinary federalism question resolves that dispute. *Byrd* becomes an ordinary case in which unarticulated federal interests trump state law.[282] And recognizing the conduct of jury trials as an unarticulated federal interest also resolves any ancillary questions, such as how to conduct voir dire or whether to dismiss a juror for cause, that might otherwise be difficult to resolve under the current scheme that requires the judge to determine whether there is a codified federal rule on point, and, if not, whether applying federal common law (or customary practice) is likely to encourage forum-shopping or cause inequities.

Second, my revised *Erie* doctrine could resolve what has become the most difficult question under the current doctrine: what to do about a Federal Rule of Civil Procedure that seems to conflict with substantive state policies in a diversity case. In case after case, the

277. *See* Field, *supra* note 38, at 923–27; Mishkin, *supra* note 236; Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 8–9 n.42 (1975); Weinberg, *supra* note 196, at 806.

278. *See* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

279. *See* LEA BRILMAYER, CONFLICT OF LAWS 47–84 (2d ed. 1995); *see also* Roosevelt, *supra* note 110 (suggesting that *Erie* questions should be approached from a particular choice-of-law perspective).

280. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

281. 356 U.S. 525 (1958).

282. *See supra* text accompanying notes 255–257.

Court has wavered between interpreting a federal Rule narrowly to allow room for the operation of state policy, and interpreting the Rule more broadly and thus displacing state policy.[283] In neither situation does the Court make explicit that what it is doing is balancing some unarticulated federal interest in the Rule—or in the uniformity of federal litigation—against the state interference with that interest.

The problem becomes even worse when we examine the cases in which the federal Rule gives way. In those cases, some Rules apply differently depending on whether the case is brought under diversity or federal question jurisdiction and, in diversity cases, on which state's law applies.

For example, Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court." The Court has interpreted Rule 3 to mean, as a general matter, that the statute of limitations is tolled upon filing.[284] But the law in some states is that the statute of limitations is not tolled until the complaint is actually *served* on the defendant. In diversity actions in which the law of one of those states applies, the Court has said that state law governs: the statute of limitations is not tolled by mere filing.[285] Thus the plain language of Rule 3 means different things in different lawsuits. A similar problem has divided lower courts interpreting Rule 8's requirement that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Some states add additional requirements for particular lawsuits: for example, some states require in malpractice cases a "certificate of merit" from a licensed professional. Some lower federal courts require the certificate in malpractice cases governed by the law of one of those states, and others do not.[286] And even if the lower courts uniformly required such a certificate, Rule 8 would still be interpreted differently depending on *which* state's law applied.

As it stands, courts analyze these sorts of questions by asking whether the state rule "is in direct conflict with the Federal Rule."[287] But that question is nonsensical once the meaning of the Federal Rule has been determined. If a court interprets the Federal Rule in a federal-question case (or in a diversity case without a contrary state law) to say

283. For a description of the cases, see Sherry, *supra* note 244, at 180–89.

284. West v. Conrail, 481 U.S. 35 (1987).

285. Walker v. Armco Steel Corp., 446 U.S 740 (1980); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949).

286. *Compare, e.g.*, Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011) (certificate required), *with, e.g.*, Braddock v. Orlando Reg'l Health Care Sys., Inc., 881 F. Supp. 580 (M.D. Fla. 1995) (no certificate required).

287. *Walker*, 446 U.S. at 749.

one thing, how can that Rule *not* be in "direct conflict" with a state law that says the opposite?

It would make much more sense to ask whether, in the case of the particular Rule at issue, there is a sufficiently strong unarticulated federal interest in the Rule itself or in applying it uniformly. If so, then the state rule is displaced in diversity suits in federal court. If not, then the court reverts to the background presumption that state law applies. Thus my revised *Erie* doctrine solves a practical problem that arises frequently in federal courts.

CONCLUSION

Some scholars have argued that the *Erie* doctrine is flawed and needs repair. A few would even abolish it. Others defend it vigorously. The critics have mostly focused their attention on inconsistencies within the *Erie* doctrine or on practical problems in its application. Both critics and defenders have sometimes couched their discussion in terms of general theories of separation of powers or federalism.

But neither critics nor defenders of *Erie* have recognized that the doctrine is fundamentally at odds with the rest of the Supreme Court's federalism jurisprudence. In at least four other contexts, the Supreme Court accommodates state and federal interests by presuming that state law applies while nevertheless reserving to the federal judiciary the authority to protect federal interests. And in those ordinary federalism contexts—unlike under the *Erie* doctrine—the Court does not insist on congressional codification as a prerequisite for judicial action. Under the dormant commerce clause, implied preemption doctrines, doctrines of preclusion, and the enclaves of federal common law, federal courts are free to protect federal interests that Congress has not protected or articulated. It is only the *Erie* doctrine that draws a sharp and unjustified distinction between codified and uncodified—or articulated and unarticulated—federal interests.

In this Article, I identify and describe this anomaly, and attribute it to the historical circumstances in which the *Erie* doctrine developed. I contend that those historical circumstances distracted the Court's attention, preventing it from recognizing that the issue in *Erie* is the same as that in ordinary federalism cases. This lack of focus distorted the Court's response in *Erie*. Finally, I provide a brief sketch of what an undistorted *Erie* doctrine—*Erie* normalized, as it were—might look like.

Although the law truly is a seamless web, sometimes that web develops large and ugly holes. History, context, and precedent can blind

us to those holes. But when we see them, we should patch them. Normalizing the *Erie* doctrine is a long overdue repair.