

Erie and Preemption: Killing One Bird with Two Stones

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The Supreme Court has developed a standard account of the Erie doctrine. The Court has directed different analyses of Erie cases depending upon whether the federal law in question is in the form of a federal rule (or statute) or is instead a judge-made law. But the cases applying the doctrine are difficult to explain using the standard account. Although the Court and commentators have noted that Erie is a type of preemption, they provide little, if any, rigorous analysis of Erie in light of preemption doctrines. This Article attempts to fill that void, offering an extended analysis of Erie as a preemption doctrine. The analysis demonstrates how and why Erie constitutes a species of preemption. It then shows the appropriateness of preemption analysis to Erie problems whether one is dealing with a federal rule of civil procedure or with federal common law. Because preemption underlies both wings of the Erie doctrine, the standard account's bifurcated approach is wrong. Moreover, employing doctrines developed in other preemption contexts explains the results of the Supreme Court's Erie cases better than the Court's own standard account. By making explicit the linkage between Erie and preemption, one can clarify the analysis and better predict and explain the results of the Supreme Court's cases.

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INTRODUCTION

The old adage marks the act of killing two birds with one stone as pure cleverness. Rather than repeat one's effort, the same work achieves two ends simultaneously. When a single stone would do for killing two birds, only a fool would launch more than one. But an even greater foolishness exists in launching two stones at a single bird when only one would do. The law occasionally attempts to kill one bird with

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two stones because it does not realize that there is but a single bird. It sometimes aims two doctrines—the stones of law¹—at what is in fact only one bird—one legal issue.² Recognizing this fact would lead to less effort and increased cogency in the analysis of the single problem.

The instance of targeting one bird with two stones that this Article assesses is the dual doctrines of *Erie*³ and preemption.⁴ We have in our legal toolbox an *Erie* doctrine used to solve *Erie* problems and a preemption doctrine used to solve preemption problems. *Erie* and preemption have seldom been rigorously analyzed as different aspects of the same problem. Neither line of cases consults the other, and commentators do not usually subject them to a unitary analysis.

But one can easily view the two doctrines as answers to a single problem. To illustrate this point, suppose litigation in which federal law requires a party to do X but state law requires a party to do X and also Y. The issue in such a case is whether the less exacting standard of federal law voids the state law's additional requirement. Is this a preemption case or an *Erie* case? Well, it is both. The template above describes cases such as *Wyeth v. Levine*,⁵ which considered whether compliance with a federal regulation on warnings insulated a drug manufacturer from liability under a state tort law claim that would have required additional warnings. Similarly, *Williamson v. Mazda Motor of America, Inc.*,⁶ considered whether an automobile manufacturer could be held liable under state law for failing to install lap-and-shoulder-style restraints in an inner rear seat when federal law gave the manufacturer the option of using either that type of restraint or a simple lap belt. Both of these cases were decided under the preemption doctrine. But the template also

1. Cf. WILLIAM BLAKE, *THE MARRIAGE OF HEAVEN AND HELL* plate 8, at 67 (Michael Phillips ed., 2011) (1790) (“Prisons are built with stones of Law, Brothels with bricks of Religion.”).

2. Examples are not difficult to identify. In property law, two closely related defeasible estates existed at common law, the fee simple determinable and the fee simple subject to condition subsequent. Their differences, having to do with the language employed to create them and the manner in which they terminated, create more problems than any distinction is worth. Some states have therefore abolished one of the two. See D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 41 (2009).

Similarly duplicative are the largely parallel causes of action for personal injury from defective products in implied warranty and strict tort liability. See Sean M. Flower, Note, *Is Strict Product Liability in Tort Identical to Implied Warranty in Contract in the Context of Personal Injuries?* Denny v. Ford Motor Company, 62 MO. L. REV. 381, 387 (1997) (“While both claims are generally available, many scholars have argued that warranty and strict liability are substantively the same claim when brought for personal injury damages.”).

3. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* doctrine provides that federal courts exercising diversity jurisdiction must apply state substantive law. See *id.* at 78.

4. See *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265 (2012) (“Pre-emption of state law thus occurs through the ‘direct operation of the Supremacy Clause.’” (quoting *Brown v. Hotel Emps.*, 468 U.S. 491, 501 (1984))).

5. 555 U.S. 555, 560 (2009) (holding a drug manufacturer liable for failure to warn under state law even though it had complied with federal labeling requirements).

6. 131 S. Ct. 1131, 1133 (2011) (holding that a federal regulation allowing automobile manufacturers to install in rear center seats either a lap belt or a lap-and-shoulder belt did not preempt state tort law requiring a lap-and-shoulder belt).

describes cases such as *Cohen v. Beneficial Industrial Loan Corp.*,⁷ which considered whether under *Erie* plaintiffs had to comply with a state statute requiring a bond as security for costs in a derivative action when Federal Rule of Civil Procedure 23 imposed various procedural requirements for derivative actions but did not, however, require a bond.⁸

It is my thesis that both *Erie* and traditional preemption address the same problem, or at least subcategories of the same problem. If courts subjected them to an explicitly common analysis, judicial reasoning would become clearer, particularly on the *Erie* side of the newly conjoined structure. And the clearer analysis would enable courts to achieve better solutions to the *Erie* issues. It is of course possible that both doctrines are weak, confused, and poorly constructed and that this is an instance of two beggars meeting in the dark and tragically seeking from the other what they both lack. In fact, something of a consensus exists in the commentary that both doctrines are a mess.⁹ But at a minimum, if the thesis of similarity of the doctrines is correct, then uniting the two will inevitably shed some light, even if what is exposed are common failings rather than a success, that could be borrowed from one to the other.

My particular focus is on the *Erie* doctrine. I believe that recognizing *Erie* as inevitably a preemption doctrine will lead to a better mode of *Erie* analysis. My conclusions specifically are as follows: First, any *Erie* issue, whether the federal law in question is embodied in a federal rule of civil procedure (or federal statute) or is instead judicially created, is a preemption issue and should be analyzed in the same manner. This is a rejection of the Supreme Court's dichotomous approach to *Erie*, which uses different analyses depending upon whether the federal law is embodied in a federal rule or statute or is judge-made. Second, the unavoidable questions in any *Erie* case (whether or not a federal rule is involved) are the existence and intended scope of federal law. Consistent with preemption analysis, the nature of competing state law and the federal policy underlying the federal law should inform the scope of a federal rule. Third, because, like preemption, *Erie* measures federal law against state law to sort out conflicting policies and interests, *Erie* questions must be answered on a state-by-state basis rather than categorically finding a particular type of issue always to be governed by federal (or state) law.¹⁰

7. 337 U.S. 541 (1949).

8. FED R. CIV. P. 23.

9. See Robert J. Condlin, "A Formstone of our Federalism": *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 532 (2005) ("Lower federal courts have been confused about *Erie/Hanna* case law for a long time, but now even the Supreme Court seems to be in on the confusion."); Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 189 (2013) ("[T]he Supreme Court has created an intricate patchwork of ephemeral distinctions and murky exceptions, revealing its own deeply rooted discomfort with such displacement of state policymaking.")

As for preemption, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) ("Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.")

10. Professor Thomas's excellent article, see Thomas, *supra* note 9, is one of the few works to examine *Erie* through a preemption lens. Although we share many of the same views, her analysis differs from mine in some important details. In common with my approach, she believes that the federalism policies employed in preemption cases, in particular the

The Article proceeds as follows. First, Part I lays out some basics of *Erie*, examining both the usual treatment of the doctrine in the cases and also some areas in which hard questions persist. Part II lays out a similar sketch of preemption. The basics having been established, Part III then makes the case for *Erie* being a preemption doctrine. This is most obviously the case when a federal statute or federal rule of civil procedure conflicts with state law. But, I will argue, *Erie* cases are also preemption cases when the conflict is between unwritten federal law and state law. I will then examine several ways in which looking at *Erie* cases as preemption cases will clarify the analysis. Finally, I will examine the Supreme Court's most recent case on *Erie*, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,¹¹ in light of the preemption principles I have identified.

I. SOME BASICS OF *ERIE*

This part of the Article sets out the basic contours of *Erie* as presently understood. I call this explication of *Erie* the “standard account;” to the extent there is “black letter” law of *Erie*, this is it. That being said, this description necessarily oversimplifies matters. After setting out the standard account, I will then explain some of the difficulties with it.

A. *The Standard Account*

Any case under the *Erie* doctrine involves a conflict between state and federal law in a case before a federal court under diversity jurisdiction.¹² The cases under *Erie*, according to the standard account, fall into two categories according to the nature of this state-federal conflict. The cases that were first chronologically to come before the Court involved a conflict between state law, on the one hand, and federal law not contained in a federal statute or written federal rule of civil procedure on the other.¹³ Absent a federal rule or statute, these cases perforce involved a conflict between state

presumption against preemption, do and should inform *Erie* analysis.

Her approach differs from mine in that it places the preemption analysis within the Rules Enabling Act. She argues that Congress did not delegate all of its authority to regulate procedure to the Court in the Enabling Act, but instead reserved the power to create rules that impinge on state substantive polices. *See id.* at 243 (“Applying the federalism canons to the REA leads to a conclusion that the Court’s rulemaking power is not broad enough to displace state procedural rules that are part of a state regulatory scheme addressed to areas Congress has left to the states.”). In my analysis, on the other hand, respect for state autonomy is utilized in the interpretation of the rule, not assessing its validity. *See infra* note 400–02 and accompanying text.

11. 559 U.S. 393 (2010).

12. *See* Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 4 (2012) (“*Erie* analysis is now concerned with whether federal or state law should be applied . . .”).

13. *See, e.g.,* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

law and federal common (i.e. judge-made) law.¹⁴ The *Erie* case itself is an example.¹⁵ So too is the early case of *Guaranty Trust Co. v. York*.¹⁶ The second category consists of cases in which the conflicting federal law exists in the form of a statute or federal rule of civil (or appellate) procedure.¹⁷

The Supreme Court established this dichotomy in *Hanna v. Plumer*.¹⁸ The dispute in *Hanna* was whether in a diversity action the federal court should apply Federal Rule of Civil Procedure 4,¹⁹ which allowed service by leaving process at the defendant's home with a person living there, or state law, which required in-hand personal service.²⁰ Earlier cases, most notably *Guaranty Trust Co. v. York*, had established an "outcome determinative" test.²¹ Under this test, in diversity cases "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."²² The argument for state law in *Hanna* was accordingly based on the *York* test: since the state law that required in-hand service also contained a time limit for that service and since that time had run, applying state law would lead to a dismissal, whereas under Federal Rule 4, the service was proper and the case could proceed.²³ This difference between state and federal law, it was argued in *Hanna*, was so determinative of the outcome that state law had to be applied.²⁴

The Court rejected this argument and established the dichotomy between cases in which federal law is embodied in a federal rule and those in which it is not.²⁵ The "*Erie* rule," the Court said, "has never been invoked to void a Federal Rule."²⁶ While prior cases had sometimes involved an arguably relevant rule, according to the Supreme Court in each such case the rationale was that the "Federal Rule was not as broad as

14. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 788 (1986) ("Byrd . . . [is] the best refuge for those who assert broad power in the federal courts to apply a federal common law of procedure . . .").

15. 304 U.S. 64 (1938). In *Erie*, state law provided that persons walking along a railroad right-of-way are trespassers to whom the railroad owes no tort duty. *Id.* at 70. There was no federal rule or statute to the contrary.

16. 326 U.S. 99 (1945). In *York*, the conflict was between a state statute of limitations and the federal common law of laches as a time limit for suit in equity cases. *Id.* at 101.

17. The Supreme Court first indicated the importance of the distinction in *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (holding that *Erie* "has never been invoked to void a Federal Rule").

18. *Id.*

19. FED. R. CIV. P. 4.

20. *Hanna*, 380 U.S. at 462.

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

22. *Id.*

23. See *Hanna*, 380 U.S. at 466 (1965) ("[A] determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner.").

24. See *id.* ("*Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case.").

25. See *id.* at 471 ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice . . .").

26. *Id.* at 470.

the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.²⁷ The Supreme Court thus set to one side the mode of analysis of the earlier cases, none of which, according to the Court, involved a conflict between state law and a federal rule.²⁸

According to the Court in *Hanna*, an attempt to apply cases such as *York* to the issue before it misconceived the problem.²⁹ In cases where there is a federal rule in conflict with state law, the federal rule controls, so long as it is in fact a valid federal rule; Rule 4 applied because it “neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and . . . the Rule is therefore the standard against which the District Court should have measured the adequacy of the service.”³⁰ As the Court clarified in a later case, a federal rule must “be applied if it represents a valid exercise of Congress’ rulemaking authority.”³¹ And to be valid under the Enabling Act, a rule need clear only a low hurdle: a federal rule is within the Act so long as it “really regulates procedure.”³²

Thus, under the standard account, the easy cases are ones involving federal rules or statutes. Here, the *Erie* question is a simple application of the Supremacy Clause.³³ The Rules Enabling Act provides that all “laws in conflict with” the federal rules “shall be of no further force or effect.”³⁴ This means, according to *Hanna*,³⁵ that the federal rules supersede the Rules of Decision Act, which

27. *Id.*

28. *See id.* But *see infra* notes 78–97 and accompanying text (arguing that some earlier cases did in fact present a conflict between state law and a federal rule).

29. *See Hanna*, 380 U.S. at 471 (“When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice . . .”).

30. *Id.* at 463–64.

31. *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987).

32. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

33. *See* Donald L. Doernberg, “*The Tempest*”: Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1155 (2011) (“With respect to enacted federal law—the Constitution, statutes, administrative regulations and the Federal Rules—the Supremacy Clause operates as the dispositive weight in the balance, mandating the triumph of federal law (even a Federal Rule of Civil Procedure) over any contrary state rule.”); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 114 n.50 (2011) (arguing that even without the Rules of Decision Act directing application of federal law, “valid and applicable federal law would preempt state law by virtue of the Supremacy Clause”); Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 674 n.20 (1988) (explaining that if a valid federal Rule “conflicts with state law, the Federal Rule controls under the Supremacy Clause”); Thomas, *supra* note 9, at 205 (stating that *Hanna*’s holding is “a pure expression of the Supremacy Clause: where Congress has enacted legislation governing diversity actions, the Court must follow it”).

34. 28 U.S.C. § 2072(b) (2012).

35. This reading of the law by *Hanna* was endorsed by John Hart Ely in his immensely influential article, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718 (1974):

Hanna’s main point, however, was that when the application of a Federal Rule is at issue, the Rules Enabling Act—and not the Rules of Decision Act as construed by *Erie R.R. v. Tompkins* and other cases—should determine whether

otherwise provides for the application of state law in certain cases.³⁶ And contrary state law (in *Hanna*, the state law requiring in-hand service of process) is preempted by conflicting federal law (the federal rule with its origins in the Rules Enabling Act) as well.³⁷ As the Court said in *Hanna*, “When a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the 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.”³⁸

It is my contention that *Hanna* improperly disaggregated *Erie*, that the earlier cases cannot all be explained as holding that “the Federal Rule was not as broad as the losing party urged,”³⁹ and that *Erie* had been invoked to avoid the application of a federal rule. It is also my contention that the preemption analysis of *Hanna* should apply whether or not the matter is covered by a federal rule, but there will be more on this later. For now, I am continuing with the standard account, and under that version of *Erie*, the preemption analysis governs in situations involving conflict between state law and a federal rule or statute and is applicable only in such cases.

But what of the other category of cases, those in which there was no federal rule (or statute) in conflict with state law? The federal law in these cases could be characterized as “unwritten federal law” or, more simply, “federal common law.”⁴⁰ Here *Hanna* offered guidance that, despite being dicta,⁴¹ has been influential. It identified the “twin aims” of *Erie* as “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”⁴² In *Erie* cases with no federal rule or statute, therefore, one must ask whether applying federal rather than state law

federal or state law is to be applied. . . . [T]his point seems plainly correct. The Enabling Act provides that “[a]ll laws in conflict with” Rules promulgated under its authority “shall be of no further force or effect,” and the Rules of Decision Act is a law. But even if that language were not there, the Enabling Act is much more recent

36. The Act provides that the “laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C. § 1652 (2012).

37. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

38. *Id.*

39. *Id.* at 470; see *supra* note 27 and accompanying text.

40. Federal common law is, among other things, a pejorative term referring to the assumption of law-making power by the federal judiciary under the reign of *Swift v. Tyson*, 41 U.S. 1, 18 (1842). See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (overruling *Swift* in part because “[t]here is no federal general common law”). But federal common law also refers to enclaves of legitimate judge-made law in cases such as *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) and *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943), where the strength of federal interests justifies the federal courts in making their own law. See *generally infra* notes 181–200 and accompanying text.

41. The Court began the discussion by posing the question of what result would be obtained “even if there were no Federal Rule making it clear that in-hand service is not required in diversity actions.” *Hanna*, 380 U.S. at 466. Posing and answering a counterfactual question is classic dicta.

42. See *id.* at 468.

would be likely to encourage forum shopping or the inequitable administration of the laws.⁴³ On the facts before the Court in *Hanna*, the difference between service in hand, as required by state law, and process being left at the defendant's home was too trivial to actually cause people to forum shop.⁴⁴ Also, because of this triviality, having service under state law in some cases (those in state court) and under federal law in others (those in diversity) would not raise any equal protection ("inequitable administration of the laws," as the Court put it) concerns.⁴⁵ In the end, this test from *Hanna*'s dicta is the *York* outcome test with a clarification of how divergent the outcome under federal law must be in order to require the application of state law.

The *Hanna* dicta has frequently been cited and applied by the Court in subsequent cases.⁴⁶ Less frequently mentioned is the analysis used in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*⁴⁷ In *Byrd*, the *Erie* issue was the applicability of a state law that made a certain factual issue a matter to be decided by the judge rather than the jury.⁴⁸ As against this state law, there was no contrary federal rule or statute; rather, state law conflicted with an unwritten federal practice that disputed facts are ordinarily decided by the jury.⁴⁹ *Byrd* posed three questions for analysis: First, what is the nature of the state law? Is it "bound up with" state-created "rights and obligations"⁵⁰ or merely a rule of "form and mode?"⁵¹ If the state law is bound up with the definition of rights and obligations under state law, one should apply state law, as it is substantive in the *Erie* sense.⁵² Second, if on the other hand the state rule is one merely of form or mode, one should still apply it if it has a significant enough effect on the outcome of the litigation. Thus, *Byrd* incorporates the outcome test of *York*. Third, the analysis in *Byrd* adds an additional strand not found in *York*. Whatever degree of effect on the outcome exists, the policy of cases having the same outcome in federal diversity and in state courts must be balanced against "countervailing considerations"⁵³ of "federal policy."⁵⁴

43. See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99, 101 (1945) (holding at the lower court that a "federal district court . . . is not required to apply the State statute of limitations," despite the absence of any different federal statute of limitations).

44. See *Hanna*, 380 U.S. at 468.

45. See *id.*

46. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416, 428 (1996) (referring to the "twin aims" of *Erie* identified in *Hanna*); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) ("In deciding what is substantive and what is procedural for these purposes, we have adhered to a functional test based on the 'twin aims of the *Erie* rule' . . .").

47. 356 U.S. 525 (1958).

48. See *id.* at 533–34.

49. See *id.* at 537. *Byrd* was not a Seventh Amendment right-to-a-jury-trial case. The Court specifically disavowed direct reliance on the Seventh Amendment. See *id.* at 537 n.10. Of course if the Seventh Amendment did directly apply—that is, if it gave a right to a jury trial in the matter at hand—then any *Erie* analysis would be obviated. The Seventh Amendment itself would displace state law.

50. *Id.* at 534–35.

51. See *id.* at 536.

52. See *id.* at 535–36.

53. *Id.* at 537.

54. *Id.* at 538.

Since *Hanna* involved a conflict between state law and a written federal rule, between the two cases, *Byrd* should be more authoritative on conflicts with unwritten federal law because *Hanna* has but dicta on that issue.⁵⁵ And it is not just a matter of semantics: *Hanna*'s dicta simply asks about the degree of potential difference in the outcome. *Byrd* agrees that this is a factor but allows concern about differences in outcome to be offset by federal policy. There is no similar place for "countervailing considerations" under *Hanna*'s dicta.⁵⁶

Several post-*Hanna* cases deal with conflicts between state law and a federal rule or statute. For example, *Burlington Northern Railroad Co., v. Woods*⁵⁷ held that Federal Rule of Appellate Procedure 38⁵⁸ conflicted with an Alabama statute mandating a ten percent penalty upon the unsuccessful appeal of a money judgment.⁵⁹ And *Stewart Organization, Inc. v. Ricoh Corp.*⁶⁰ held that the federal statute on transfers between district courts, 28 U.S.C. § 1404,⁶¹ conflicted with state law.⁶² More recently, in *Shady Grove Orthopedic Associates. v. Allstate Insurance. Co.*,⁶³ the Court dealt with a conflict between state law and Federal Rule of Civil Procedure 23⁶⁴ on class actions. These cases thus appropriately employ the holding of *Hanna*.

But other post-*Hanna* cases involve, or at least the Court thought they involved, a clash between state law and unwritten federal law and yet follow *Hanna*'s dicta more than *Byrd*'s holding. For example, in *Walker v. Armco Steel Corp.*,⁶⁵ state law provided that a complaint had to be filed and process served within the time provided by the statute of limitations. Federal Rule of Civil Procedure 3 provides that a "civil action is commenced by filing a complaint with the court."⁶⁶ *Walker* held that Rule 3 was inapposite: "There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations."⁶⁷ Assuming that the Court is correct and that Rule 3 was inapplicable to the case,⁶⁸ one is left with state law conflicting with some federal law that, per the Court's analysis, is not embodied in a rule or statute. Despite *Byrd* having a holding on this and *Hanna* having only dicta, the Court in

55. See Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1001 (2011) (noting that this portion of *Hanna* is dicta).

56. See *id.* (rejecting the view that "*Byrd*'s balancing of state and federal interests did not survive *Hanna*").

57. 480 U.S. 1 (1987).

58. See FED. R. APP. P. 38.

59. See *Burlington N. R.R.*, 480 U.S. at 7.

60. 487 U.S. 22 (1998).

61. See 28 U.S.C. § 1404(a) (2012).

62. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. at 28–32.

63. 559 U.S. 393 (2010).

64. See FED. R. CIV. P. 23.

65. 446 U.S. 740 (1980).

66. See FED. R. CIV. P. 3.

67. *Walker*, 446 U.S. at 750–51.

68. I have argued elsewhere that the Court erred in construing Rule 3 to be inapplicable. See Jeffrey L. Rensberger, *Hanna's Unruly Family: An Opinion for Shady Grove Orthopedic Associates v. Allstate Insurance*, 44 CREIGHTON L. REV. 89 (2010).

Walker failed to even cite *Byrd* and instead used a *Hanna* (dicta) analysis focusing on the “twin aims” of *Erie*.⁶⁹

It was not until *Gasperini v. Center for Humanities, Inc.*⁷⁰ in 1996⁷¹ that the Court again delivered a holding on *Erie* not involving a federal rule or statute. Again, the dicta from *Hanna* held sway. The case involved a state law that expanded the grounds upon which a state court of appeals could reduce a jury verdict as excessive.⁷² Although, according to the Court, no federal rule addressed the standard to be employed,⁷³ it turned to *Hanna*’s dicta and not *Byrd*: the question was whether state law is “outcome affective in . . . ‘that failure to apply it [in federal court] would unfairly discriminate . . . or be likely to cause a plaintiff to choose the federal court.’”⁷⁴

Thus, the standard account of *Erie* provides as follows:

- If the conflict is between state law and a federal rule or a federal statute, apply the federal rule if it is valid.
- If the conflict involves unwritten federal law, either
 - apply the *Hanna* dicta test, which asks if differences in outcome under state versus federal law are significant enough to lead to forum-shopping or to inequitable outcomes of otherwise identical cases, the one in state court, the other in federal court; or
 - apply the *Byrd* test, which asks the same question about differences in outcome, but allows that concern to be outweighed by other federal policies.

B. Recurrent Problems Under the Standard Account

Black letter law provides useful capsule summaries but in some instances misleads by creating an appearance of orderliness when none in fact exists. Stating a rule is one thing, but seeing how courts *apply* the rule to facts before it is another, less tidy, enterprise. Such is the situation with the cases under the standard account of the *Erie* doctrine. While one might identify additional recurring problems, I will set out what I believe are the three most problematic. First, the case law gives no consistent guidance on how to interpret federal rules when determining whether they apply and thus perhaps conflict with state law. Second, the case law is inconsistent on how to determine whether an applicable federal rule really conflicts with state

69. See *Walker*, 446 U.S. at 753 (“It is sufficient to note that although in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an ‘inequitable administration’ of the law.” (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))).

70. 518 U.S. 415 (1996).

71. *Byrd* was a 1958 decision, *Hanna* was decided in 1964, and *Walker* dates from 1980. See *Walker*, 446 U.S. at 740; *Hanna*, 380 U.S. at 460; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

72. See *Gasperini*, 518 U.S. at 423.

73. Justice Scalia disagreed, finding the governing standard in Rule 59 of the Federal Rules of Civil Procedure. See *id.* at 467–68 (Scalia, J., dissenting).

74. *Id.* at 428 (alteration added) (quoting *Hanna*, 380 U.S. at 468).

law. Third, the Court has never successfully explained how to answer the primordial *Erie* question of how to define state laws that must be honored as “substantive.”

1. Does a Federal Rule Conflict with State Law? How Are We To Read the Rules?

The entire enterprise under the standard account turns upon whether the conflicting federal law is a federal rule or statute or is an unwritten federal law. One might imagine it a relatively simple thing to determine whether a federal rule applies to a given matter that is the subject of an *Erie* dispute, but it turns out to be otherwise. Sometimes the Court gives a narrow interpretation to federal rules that would seem, on their face, to be applicable.⁷⁵ As a result, the *Hanna* holding, with its near automatic indication of federal law applying over state law, is avoided. On the other hand, other cases seem to reach out to rope into the case a federal rule or statute that is less than obviously relevant.⁷⁶ This results in the avoidance of state law because once it is determined that a federal rule or statute is applicable, it is an all but forgone conclusion that the federal rule or statute will apply.⁷⁷ In short, the standard account’s emphasis on applying federal rules in *Erie* cases poorly explains the cases.

The chief examples of cases reading federal rules narrowly are *Ragan v. Merchants Transfer & Warehouse Co.*⁷⁸ and *Walker v. Armco Steel Corp.*⁷⁹ When the Court in *Hanna* said (in 1965) that *Erie* had never been used to void a federal rule, but instead in some earlier cases the “Federal Rule was not as broad as the losing party urged,”⁸⁰ it was thinking of *Ragan*, a 1949 case.⁸¹ *Ragan* had held that state law, not Federal Rule of Civil Procedure 3, governs in diversity cases to determine what must be done (mere filing of the complaint or also service upon the defendant) before the expiration of the statute of limitations.⁸² Now, saying this of *Ragan*—that it decided that the rule was not as broad as contended—is one way to line up an earlier case with the new learning of *Hanna*, but it does not make it true. *Ragan* did not textually analyze Federal Rule 3 and find it inapplicable; instead, it analyzed the issue under the then-prevailing test of *York*, asking what effect on the outcome is created by the variance between state and federal law.⁸³ Since the change in outcome was great—dismissal for failure to meet the statute of limitations or continuation of the case—state law had to apply.⁸⁴ State law applied,

75. See *infra* notes 83–102 and accompanying text.

76. See *infra* notes 103–11 and accompanying text.

77. The only remaining question is whether the rule is valid as within the scope of the Rules Enabling Act. The standard of validity under the Act is exceedingly low. See *supra* note 32 and accompanying text.

78. 337 U.S. 530 (1949).

79. 446 U.S. 740 (1980).

80. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).

81. See *id.* at 470 & n.12.

82. See *Ragan*, 337 U.S. at 531 & n.1.

83. See *id.* at 532 (“*Erie* . . . was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court.”).

84. See *Rensberger*, *supra* note 68, at 91.

said the Court in *Ragan*, because “[i]f recovery could not be had in the state court, it should be denied in the federal court.”⁸⁵

We could simply regard *Ragan* as an elderly and atavistic relative who embarrasses us at family gatherings but who is largely ignored because he is seldom present. But well after *Hanna*’s creation of the standard account, the *Ragan* issue came up again in *Walker v. Armco Steel Corp.*⁸⁶ *Walker* gives *Ragan* a second, post-*Hanna*, birth. It posed exactly the same issue as *Ragan*.⁸⁷ The cases were so close on the facts that the chief argument for applying federal law was to overrule *Ragan* in light of *Hanna*.⁸⁸ The Court declined to do so, doubling down on *Hanna*’s statement that Federal Rule 3 did not cover the statute of limitations issue.⁸⁹ Instead, “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run.”⁹⁰ The problem with this characterization of Rule 3 is that *there are no timing requirements* that are triggered by Rule 3’s statement that “a civil action is commenced by filing a complaint with the court.”⁹¹ The time for pleadings, for example, runs from the date of service, not filing.⁹²

Another example of the narrow reading of a federal rule is *Gasperini v. Center for Humanities, Inc.*⁹³ The question there involved the applicability of a state law in a diversity case that allowed an appellate court to reduce damages found by a jury when the award “deviate[d] materially from what would be reasonable compensation.”⁹⁴ One could read Federal Rule of Civil Procedure 59,⁹⁵ which allowed the grant of new trials “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,”⁹⁶ as applicable and in conflict with state law. Justice Scalia so read Rule 59, but he wrote in dissent.⁹⁷ Thus, the Court ignored Rule 59 despite an at least plausible argument for its application.

On other occasions the Court has reached to find a rule that is not obviously relevant. In *Stewart Organization, Inc. v. Ricoh Corp.*,⁹⁸ the Court held that the federal statute that generally governs transfers between federal courts, 28 U.S.C.

85. *Ragan*, 337 U.S. at 532.

86. 446 U.S. 740, 743–53 (1980).

87. *See id.* at 748 (“The present case is indistinguishable from *Ragan*.”).

88. *See id.* at 749.

89. *See* *Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (“It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged”); *see also id.* at 470 n.12 (citing *Ragan*, 337 U.S. at 530, as one such case).

90. *Walker*, 446 U.S. at 751.

91. FED. R. CIV. P. 3.

92. *See* Rensberger, *supra* note 68, at 92.

93. 518 U.S. 415 (1996).

94. *Id.* at 418 (citing N.Y. CIV. PRAC. LAW AND RULES § 5501(c) (McKinney 1995)).

95. FED. R. CIV. P. 59.

96. The text of Rule 59 has insubstantially changed. The quote is from the version of Rule 59 in existence at the time. *See Gasperini*, 518 U.S. at 417.

97. *See id.* at 467–68 (Scalia, J., dissenting).

98. 487 U.S. 22 (1988).

§ 1404,⁹⁹ was applicable and controlled under *Hanna* as against a state law that generally voided contractual forum selection clauses.¹⁰⁰ The federal statute says nothing about forum selection clauses or their enforceability. The pertinent portion of the statute reads in whole, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”¹⁰¹ Similarly, in *Burlington Northern Railroad Co. v. Woods*,¹⁰² the Court read Federal Rule of Appellate Procedure 38 as conflicting with an Alabama statute that required a ten percent penalty upon a money judgment that was unsuccessfully appealed.¹⁰³ This conflict was not inevitable; Rule 38 deals with frivolous appeals, allowing a penalty for such appeals as a matter of discretion.¹⁰⁴ The Alabama statute governed all losing appeals, frivolous or not.¹⁰⁵ The Court could have allowed the Alabama statute to apply to all losing appeals and then have Rule 38 also provide for a discretionary additional penalty if the appeal was frivolous.¹⁰⁶

In short, one cannot simply say that a textually applicable and valid federal rule applies over state law. Some apparently applicable, or at least plausibly applicable, rules have not applied under *Erie*. Since those rules were no doubt valid—that is the rules are within the scope of power delegated under the Rules Enabling Act¹⁰⁷—if we are to keep *Hanna* the only possible conclusion is that the Court is employing some canon of construction¹⁰⁸ to decide not that a federal rule is invalid but instead that it was not intended to apply. Initially, the Court denied giving the rules anything other than their plain meaning even as it was engaging in this sleight of hand. In *Walker*, the Court denied that the rules “are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.”¹⁰⁹ But eventually, the Court admitted that “Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”¹¹⁰ Thus, the standard account has another layer, one that was at first covert and is now overt. A valid federal rule trumps conflicting state law *only if* it is applicable. A rule is applicable only if the drafters intended it to apply to the situation *and* that interpretation is to be made with an eye toward *Erie* policies.

99. 28 U.S.C. § 1404 (2012).

100. *See Stewart*, 487 U.S. at 30–32.

101. *Id.* at 29 (citing 28 U.S.C. § 1404(a)).

102. 480 U.S. 1 (1987).

103. *Id.* at 6–7.

104. FED. R. APP. P. 38 (“If a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee.”).

105. *See Burlington*, 480 U.S. at 3.

106. *See* Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1101 (2011) (“The *Burlington Northern* Court reached out to find a conflict where none was necessary . . .”).

107. On the test for validity under the Rules Enabling Act, see *supra* note 32 and accompanying text.

108. *See* Genetin, *supra* note 106, at 1093–103; Thomas, *supra* note 9.

109. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980).

110. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996).

As the Court now puts it, under *Erie*, the “first question” is “whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court.”¹¹¹ Basic *Erie* policies, such as avoidance of forum-shopping, uniformity of result, and respect for state lawmaking, seem to influence the process of interpretation.¹¹² As Justice Ginsburg said, “[W]e have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest.”¹¹³ This makes every *Erie* case a hard one. One cannot carve out cases involving a federal rule as easy ones because the predicate question of whether there is a pertinent federal rule—one intended to apply—cannot be answered without wading into “*Erie*’s murky waters.”¹¹⁴

2. How To Differentiate State Laws That Conflict with a Federal Rule from State Laws That Supplement Federal Rules

The first step under the standard account is to determine if a federal rule or statute is in conflict with state law. The preceding Part addressed the problem of how to determine if a federal rule is applicable at all to the matter at hand. A related problem is how to determine whether an applicable federal rule conflicts with state law. In many situations, the difference between state and federal law does not present an either-or choice; rather, one could apply both.¹¹⁵ One could view state law as applying supplemental requirements in addition to those required by the federal rule. Or, instead, if state law requires something be done and the relevant federal rule does not require it, should we read the silence in the federal rule as an affirmative statement that no additional requirements are to be imposed?

The Court has given various descriptions of the nature of the conflict that is required for supersession of state law by a federal rule: a valid federal rule will apply if the federal rule and state law are in “direct collision.”¹¹⁶ The federal rule will apply if “the clash is unavoidable.”¹¹⁷ The federal rule will apply if it is “sufficiently broad to control the issue.”¹¹⁸ This “control” may be “implicit[.]”¹¹⁹ Whatever the precision the Court has implied, application of these concepts to actual cases and facts reveals the room for uncertainty.

111. *Walker*, 446 U.S. at 749–50.

112. See Thomas, *supra* note 9, at 207 (“Thus, even after *Hanna*, the Court continued to account for federalism concerns by examining the state policy purpose underlying the law being displaced, and by using creative interpretive approaches to avoid applying particular Rules.”).

113. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 439 (2010) (Ginsburg, J., dissenting).

114. *Id.* at 398 (majority opinion).

115. See, e.g., *Burlington N. R.R. v. Woods*, 480 U.S. 1, 7 (1987) (rejecting an argument that “a federal court sitting in diversity could impose the mandatory penalty [under state law] and likewise remain free to exercise its discretionary authority under Federal Rule 38”); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (holding that a Federal Rule of Civil Procedure did not “conflict with the statute in question and all may be observed by a federal court” along with the Federal Rule).

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

117. *Id.* at 470.

118. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

119. *Burlington*, 480 U.S. at 5.

Suppose that a federal rule speaks to a matter and contains procedural requirements A, B, and C while state law requires those plus an additional procedural step D. Does the federal rule conflict with state law? If the federal rule said in so many words that A, B, and C, and only A, B, and C are required, the matter would be clear: the rule was meant to be exhaustive. But, it is more likely that the rule is not so specific. In *Cohen v. Beneficial Industrial Loan Corp.*, state law required plaintiffs in derivative actions to file a bond to secure liability for costs.¹²⁰ The rule covering derivative actions (at that time Federal Rule of Civil Procedure 23) had no requirement of a bond.¹²¹ The Court found that Rule 23 was not in “conflict with the statute in question.”¹²² One could apply both the requirements of Rule 23 and of that state law, with state law imposing supplemental burdens on the plaintiff.¹²³

By itself, this decision is neither inevitable nor implausible. But why did that reasoning not apply in *Burlington Northern Railroad Co., v. Woods*?¹²⁴ In *Burlington*, a state statute required a penalty upon all unsuccessful appeals of money judgments; federal law allowed but did not require penalties if the appeal was frivolous.¹²⁵ The Court in *Burlington* found a conflict on the reasoning that Federal Rule of Appellate Procedure 38, by specifying discretionary penalties in frivolous cases, also meant to prohibit any other kind of award.¹²⁶ Silence in the federal rule was here read as a rejection of any additional procedural requirements on the same topic. Or why was the *Cohen* approach of allowing state law to supplement a federal rule not taken in *Stewart Organization, Inc. v. Ricoh Corp.*?¹²⁷ There the Court held that the federal statute on transfers between district courts, 28 U.S.C. § 1404, which treats a contractual forum selection clause as a factor to be considered in the district court’s discretionary decision to transfer, conflicted with state law that categorically rejected forum selection clauses.¹²⁸ One could harmonize the two holdings by saying that *if* there is a forum selection clause, the court may consider it a factor under § 1404. But whether there is, in fact, a valid forum selection clause is a matter of the state law of contracts (because the state law sets aside a written forum selection clause on the grounds of unequal bargaining power or a contract of adhesion). One could also make the argument for state law supplementing federal law in *Shady Grove Orthopedic Associates. v. Allstate Insurance Co.*, where the Court found a conflict between state law and Federal Rule of Civil Procedure 23’s treatment of

120. *Cohen*, 337 U.S. at 541.

121. FED. R. CIV. P. 23. Derivative actions are now governed by FED. R. CIV. P. 23.1.

122. *Cohen*, 337 U.S. at 556.

123. *See id.* at 556 (no provisions of the Federal Rules “conflict with the statute in question and all may be observed by a federal court”).

124. *Burlington*, 480 U.S. at 1; *see supra* notes 104–08 and accompanying text.

125. *See supra* notes 57–59 and accompanying text.

126. *See Burlington*, 480 U.S. at 7 (“[T]he Rule’s discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama’s affirmance penalty statute.”).

127. 487 U.S. 22 (1988).

128. *Id.* at 29–30. The Court was rather vague on the exact content of the state law. At one point it said that the state law “looks unfavorably upon contractual forum-selection clauses,” *id.* at 24, implying that they might be enforced in some cases. But elsewhere it characterized state law as having a “categorical policy disfavoring forum-selection clauses,” *id.* at 30, implying that forum-selection clauses were never entitled to any weight under state law.

class actions.¹²⁹ State law forbade a class action if the claim was for a statutory penalty.¹³⁰ The Court found this to be in conflict with Rule 23, the procedural requirements of which did not contain a prohibition on statutory penalty claims.¹³¹ But the Court could have read the two as complementary: state law supplied an additional requirement—no penalty could be recovered—that would apply in addition to the remainder of Rule 23.

The point is not that any of these cases are wrong. I happen to agree with most of the results.¹³² Instead, the point is that the cases have not identified a way in which to define when a “conflict” exists. It obviously exists in cases such as *Hanna*, where state law expressly forbade what federal law expressly allowed. A conflict could also exist, however, when dual compliance is possible, as in *Cohen* or *Burlington*. One of these two cases found a conflict, the other did not. In short, the standard account gives us no protocol for making this classification. It gives us a taxonomy without a test to differentiate between categories.

3. Determining What Laws Are “Substantive”

Under the standard account, if no federal rule or statute is in play, one must apply state “substantive” law.¹³³ The Court has failed to develop consistent and useful tests for classifying state law as either substantive or procedural.

The *Erie* case itself gives no guidance on how to make this determination. This is not surprising since *Erie* “dealt with a question which was ‘substantive’ in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee).”¹³⁴ At times, as in *York*,¹³⁵ the Court has appeared to define “substantive” as that which is not procedural: any rule that significantly affects the outcome defines what the *result* of the litigation is and is thus substantive; on the other hand, if the rule does not significantly affect the outcome but merely tells a court *how* to arrive at that outcome, it is procedural.¹³⁶ At other times, as in *Hanna*, the Court has used the outcome test not as a means to protect the efficacy of state substantive law as an end in itself but instead as a means to achieve harmonious state-federal relations—applying state substantive (i.e. outcome-effecting) law will avoid forum shopping and inequitable administration of the law.¹³⁷ On the other hand, the Court in *Byrd* was in fact concerned with protecting state autonomy, in particular the ability of states to create and define “rights and obligations” between

129. 559 U.S. 393 (2010).

130. *Id.* at 397.

131. *Id.* at 398–99.

132. My exception would be *Shady Grove*. See Rensberger, *supra* note 68.

133. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958) (“It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the [state law in question] to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.”).

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

135. See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

136. See *id.*

137. See *Hanna*, 380 U.S. at 468.

private parties.¹³⁸ Federal courts in diversity cases “must respect” state laws that are “bound up with these rights and obligations.”¹³⁹ Some cases give heed to state interests or policies, some do not.¹⁴⁰ Some cases direct courts to also consider federal interests,¹⁴¹ some do not.¹⁴²

Putting *Erie* in its proper preemption context will enable courts to understand better these recurring hard *Erie* questions and deal with them more consistently. The following Part gives an outline of the preemption doctrine.

II. SOME BASICS OF PREEMPTION

This Part sets out some of the basics of preemption. The law of preemption is a deep well whose waters are dark and turbulent. For our purposes, however, it is only necessary to draw from near the surface. In brief, preemption is a matter of determining the intent of Congress to override state law.¹⁴³ This intent may be directly expressed in legislation or it may be implied.¹⁴⁴

A. The Preemption Taxonomy: The Categories of Preemption

Preemption is one doctrine with three subtypes. All categories of the preemption doctrine derive from the Supremacy Clause¹⁴⁵: “The underlying rationale of the pre-emption doctrine . . . is that the Supremacy Clause invalidates state laws that ‘interfere with or are contrary to, the laws of congress.’”¹⁴⁶ Preemption thus gives teeth

138. *See Byrd*, 356 U.S. at 535.

139. *Id.*

140. *Erie* itself stressed the importance of “preserv[ing] the autonomy and independence of the States.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In later cases, one finds this concern voiced outside the majority opinion. *See Hanna*, 380 U.S. at 474–75 (Harlan, J., concurring) (“*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens And it recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.”).

141. *Byrd* made relevant to the calculus the presence of “countervailing [federal] considerations.” *See Byrd*, 356 U.S. at 537; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).

142. *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988) (The Court decided the applicability in diversity of a federal venue provision without relying on federal interest in venue. In fact, the Court stated its disagreement with the Court of Appeals’ reliance on “a significant federal interest in questions of venue.”).

143. *See infra* note 150 and accompanying text.

144. *See infra* notes 152–57 and accompanying text.

145. *See* U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

146. *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)); *see also Fidelity Fed. Sav. & Loan*

to the power of Congress to declare law unfettered by state pronouncements. “The Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land . . .’ Under this principle, Congress has the power to preempt state law.”¹⁴⁷

The ability of Congress to override state laws, so long as Congress constrains itself to an area of federal legislative competence,¹⁴⁸ is uncontroversial, having been established in 1824 in *Gibbons v. Ogden*.¹⁴⁹ Since congressional power is undoubted, the only question in any preemption case is whether Congress has exercised that power. Thus, preemption in any form is a question of congressional intent.¹⁵⁰ Within this common rationale, however, are several discrete types of preemption.¹⁵¹

On occasion, Congress speaks expressly to the intended effect of its legislation, saying in so many words that state laws in conflict are preempted: this is known as “express preemption.”¹⁵² Even with an express preemption provision, however, it is necessary to construe Congress’ express provision. Did Congress intend to preempt this particular state law? The question becomes one of the “scope” of the preemption provision.¹⁵³ Commentators disagree whether in making this determination of scope there is or ought to be a presumption against preemption or a deference to state lawmaking in areas traditionally dominated by state law.¹⁵⁴

Even when Congress has not explicitly declared conflicting state laws preempted, the Court may find implied preemption, which, in turn, has two subtypes. First, “state law must yield to a congressional Act . . . [w]hen Congress intends federal law to ‘occupy the field.’”¹⁵⁵ In such cases, “[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁵⁶ Relevant to field preemption is the existence of a “dominant federal interest in [the] field.”¹⁵⁷

Second, even absent broad federal regulation that encompasses the entire field, “state law is naturally preempted to the extent of any conflict with a federal

Ass’n v. de la Cuesta, 458 U.S. 141, 152 (1982) (“The pre-emption doctrine . . . has its roots in the Supremacy Clause . . .”); Nelson, *supra* note 9, at 305 & nn.31–32.

147. See *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (quoting U.S. CONST. art. VI, cl. 2).

148. Of course preemption, while powerful, is naturally limited by the limitations on Congress’ powers under Article I, Section 8. See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2091 (2000) (“The power to preempt, therefore, is necessarily pendant on some enumerated power to regulate under Article I, Section 8.”).

149. 22 U.S. (9 Wheat.) 1.

150. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[T]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.” (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

151. Having said that, it should be noted that the Court has several times stated that “the categories of preemption are not ‘rigidly distinct.’” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

152. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011).

153. See *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 443 (2005) (emphasis omitted).

154. See, e.g., Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217 (2010); Dinh, *supra* note 148, at 2091.

155. See *Crosby*, 530 U.S. at 372.

156. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

157. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985).

statute.”¹⁵⁸ Conflict preemption has two additional subcategories. It exists if it is “impossible for a private party to comply with both state and federal law.”¹⁵⁹ Conflict preemption will also be found when dual compliance is possible but “under the circumstances” state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁰

These preemption doctrines provide useful tools for an *Erie* analysis. I shall explain how certain of their strands are in fact woven into the *Erie* cases and how a more explicit reliance on them could aid in *Erie* analysis. But before arriving at that destination, we need to first cement the relationship between *Erie* and preemption.

III. RECASTING THE *ERIE* DOCTRINE AS A PREEMPTION PROBLEM

The previous discussion of the standard account of the *Erie* doctrine and preemption is, I hope, at least suggestive of a link between the two. The clearest connection to preemption lies in the *Hanna* line of *Erie* problems. In *Erie* cases of this type, courts displace state law with a federal rule or statute, doing so on the ground that they have been “instructed” to follow federal law by Congress (through its delegation to the Advisory Committee).¹⁶¹ Perhaps less clear is the connection between preemption and *Erie* cases in which there is no written federal rule or statute (the “non-*Hanna*” line of cases). But, as will be shown below, these cases too should be understood as involving preemption.

This Part of the Article will first cement what it previously suggested—the correspondence of the *Hanna* type of *Erie* cases to preemption as a matter of theory. It will then turn to preemption and non-*Hanna* *Erie* cases (those not involving written federal law) demonstrating that a similar linkage between the doctrines exists there as well. Indeed, as we examine the details of the *Erie* doctrine in the latter type of case, we will find several counterparts to existing preemption doctrine. Thus, the linkage to preemption is not just as a matter of theory but of practice as well.

A. Conflicts Between State Law and Federal Rules or Federal Statutes as Preemption Cases

Under the standard account of *Erie*, when a conflict exists between state law and a federal rule or a federal statute, one is categorically to apply the federal law, assuming the rule or statute to be otherwise valid and also that the issue is within the intended scope of the federal rule or federal statute.¹⁶² The Supreme Court itself has made clear that this type of *Erie* issue—the *Hanna* strand of *Erie*—is a matter of preemption: “When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule”¹⁶³ As Justice Scalia put it in his

158. *Crosby*, 530 U.S. at 372.

159. *Id.*

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

161. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

162. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010) (because state law and the Federal Rule “attempt[] to answer the same question . . . [state law] cannot apply in diversity suits unless Rule 23 is ultra vires”).

163. *See Hanna*, 380 U.S. at 471.

opinion in the *Shady Grove* case, any valid federal rule, that is, one that “‘really regulates procedure,’ . . . will pre-empt a conflicting state rule.”¹⁶⁴ Commentators agree that this strand of *Hanna* is a matter of preemption: under *Hanna*, “a direct collision of federal and state law effectively results in preemption of the state law.”¹⁶⁵

This conclusion follows from the nature of the *Erie* issue, the nature of preemption, and the structure of federalism. As the Court said in *Erie*, “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.”¹⁶⁶ This understanding of the sources of American law places state law as the default. Federal law, in contrast, comes into play as an exception. Reordering the elements referenced in the quote clarifies this point: “in any case, the law to be applied is the law of the state” unless the matter is “governed by the Federal Constitution or by acts of Congress.” Of course there is a technical error in the Court’s arrangement of state and federal law. Alongside the reference to law provided by the “Federal Constitution or by acts of Congress” should be a reference to legitimate federal common law. There is a federal common law, albeit not a “general” one, and it has the power to displace state law.¹⁶⁷ But subject to this minor emendation, the principle expressed in *Erie* remains true. State law is the default, the baseline, and federal law is the exception.¹⁶⁸ As Donald Doernberg has explained, the default arrangement of state law has its origins in our constitutional history:

The post-colonial nation began with only the law that the states used. As federal law developed, some of it displaced state law. One may view the Constitution, particularly [the specifications of Congress’ powers in] Article I, Section 8, as a statement to the newly formed federal government to the effect of “these are the areas in which you may displace state law.” Thus, one should begin analyzing any vertical choice-of-law problem by presuming that state law applies. The presumption is rebuttable, to be sure, but state law is the starting point.¹⁶⁹

164. *Shady Grove*, 559 U.S. at 414 n.13.

165. See, e.g., Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 44 (2006); see also *supra* note 33 and accompanying text.

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

167. See 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (2d ed. 1996) (“Because it is clear that there is a ‘federal common law,’ even if not a ‘general federal common law,’ it is not accurate to say that the law of the state is to be applied in all cases except on matters governed by the Constitution or by an Act of Congress. Neither the Constitution nor any federal statute provides the answer to controversies between states about interstate streams; nor do these sources indicate where the governing law is to be found. Yet, as Justice Brandeis stated, these controversies are to be decided on the basis of federal common law.”)

168. In the *Erie* case, there “was no constitutional predicate for a federal law of torts or property, so state law applied by default.” Doernberg, *supra* note 33, at 1151.

169. Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 645 (2007).

In an *Erie* case, then, one starts with state law, which applies unless and until displaced by federal law. If there is a pertinent federal rule or statute (or, as we shall see, common law), the displacement occurs. This displacement of state law by federal is in fact the same phenomenon as preemption. *Erie* thus rests in part on a doctrine of “residual sovereignty” of the states.¹⁷⁰

To be sure, cases applying the *Hanna* line of the *Erie* doctrine often do more than mechanically consider whether a federal rule or statute exists and then woodenly apply one if found; as noted above,¹⁷¹ there is considerable play in the joints. Over time, the Court has come to explicitly acknowledge that one must construe potentially applicable federal rules and statutes before concluding that they displace state law.¹⁷² But this additional analysis is not inconsistent with characterizing *Erie* analysis as preemption. As will be shown below, the Court’s actual mode of analysis is in fact consistent with preemption precisely because it engages in an interpretive exercise before deciding to apply federal law.

To these matters we shall return. But first, it is useful to examine preemption and the other branch of the *Erie* doctrine, the “relatively unguided”¹⁷³ choice between state law and federal unwritten (i.e. common) law.

B. Conflicts Between State Law and Unwritten Federal Law as Preemption Cases

Cases under *Erie* in which the federal law is not embodied in a statute or federal rule are less commonly thought of as involving preemption, but they inevitably do. If there exists no federal statute or rule (or constitutional provision) pertaining to the issue at hand but there is in fact some federal law, then perforce the federal law must be federal common law. And federal common law has the same preemptive power as federal statutory or rule-based law.¹⁷⁴ Thus, if a federal court applies an unwritten federal standard as against state law under *Erie*, it is using the federal (judge-made or common law) standard to preempt the state law.

170. See Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1254 (1990) (quoting Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 74 (1989)). Massey detects a broader principle of reserved state power that is reflected in a number of doctrines beyond *Erie* itself:

The principles employed by the Court to check federal judicial power—abstention, independent and adequate state grounds, the *Erie* doctrine, exhaustion of state administrative remedies, to name just a few—are better thought of as “tenth amendment guarantees, or . . . rooted in tenth amendment principles of residual sovereignty, rather than seemingly unconnected and disparate doctrines”

Id.

171. See *supra* notes 107–13 and accompanying text.

172. See *supra* notes 110–13 and accompanying text; see also *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) (“Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”).

173. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

174. See *infra* notes 209–14 and accompanying text.

The *Hanna* dichotomy¹⁷⁵—that *Erie* cases always involve a choice between, on the one hand, state law and federal statutory or rule-based law or, on the other, between state law and federal judge-made law—overlooks a third category of *Erie* cases, a category exemplified by the *Erie* case itself. Since *Erie*, the solution to such cases has become so obvious that they are little discussed within the *Erie* doctrine. But remembering the issue serves to clarify the array of possible *Erie* issues and to introduce the analysis of preemption of state law by unwritten federal law. This third category consists of cases in which a party argues that federal law displaces state law, but it is revealed that no federal law actually exists.¹⁷⁶ Such decisions are thus not a choice between state law and federal law (of any type) because the conclusion is that there is no federal law to choose. This accurately describes the *Erie* case itself. The rationale of that case was not that there was a federal law concerning persons walking along customary footpaths next to railroad tracks and that this federal law did not apply as against state law; instead, the ruling was that there was no such federal law at all. Congress lacks power to create rules of decision on matters of general common law.¹⁷⁷ The federal judiciary has no greater power.¹⁷⁸ And so, as noted above,¹⁷⁹ there being no law to displace it, state law applies by default.

Such cases no longer arise today as *Erie* issues. *Erie* put a spike in the heart of the general federal common law that had previously existed. *Erie* is now so basic to our understanding of federalism that no litigant argues for a general federal common law, no lower court accepts such an argument, and consequently there are no appellate decisions treating this aspect of the *Erie* doctrine. But there are cases today concerning federal common law where, as in *Erie*, the question is whether federal law exists.¹⁸⁰

Despite *Erie*'s admonition,¹⁸¹ federal common law of course does exist. It is simply not the wayward, free-roaming, untethered common law that had previously existed. Federal courts do not have the authority to make rules of decision for broad issues of tort and contract and property. But they do have the authority to make rules regulating court operations (procedural rules) and also to make rules of decision

175. See *supra* note 18 and accompanying text.

176. Today's counterpoints to *Erie* are cases in which a party unsuccessfully argues for the recognition of federal common law. In such a case, state law applies because the Court finds an absence of federal common law. See, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994) (“[T]he remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation.”).

177. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Congress has no power to declare substantive rules of common law . . .”).

178. *Id.* (“[N]o clause in the Constitution purports to confer such a power upon the federal courts.”).

179. See *supra* notes 166–70 and accompanying text.

180. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400–01 (1964); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). See generally Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 878–81 (2007) (identifying and explaining parameters of federal common law).

181. See *Erie*, 304 U.S. at 78 (“There is no federal general common law.”).

(substantive rules) in certain federal enclaves.¹⁸² As examples of federal common law controlling procedural matters, federal courts have the “inherent power to impose sanctions for . . . bad-faith conduct” by litigants appearing before them.¹⁸³ This power exists independent of statutory authorization.¹⁸⁴ Despite the fact “that no federal textual provision addresses the claim-preclusive effect of a federal-court judgment,”¹⁸⁵ federal common law controls the preclusive effect of federal court judgments,¹⁸⁶ whether the judgment was in a federal question case¹⁸⁷ or in a diversity case.¹⁸⁸ Forum non conveniens is another example of a procedural federal common law rule. Federal courts dismiss under their own authority cases that are significantly inconvenient even when a federal venue statute indicates the forum chosen is proper.¹⁸⁹ Forum non conveniens thus amounts to a “federal common-law venue rule.”¹⁹⁰ Finally, “whether a question is one of law or fact, and the correlative decision whether appellate review shall be searching or modest,” is a matter of federal common law.¹⁹¹

Federal common law also extends to matters of substance. A government contractor’s liability for defective product designs implicates “uniquely federal interests,”¹⁹² and so is governed by “federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”¹⁹³ Congress occasionally all but expressly asks the federal courts to create a substantive federal common law, most famously in the Labor Management Relations Act,¹⁹⁴ in which it created subject-matter jurisdiction to adjudicate claims under collective bargaining agreements but provided no rules of decision applicable to such contracts.¹⁹⁵ In such cases, “the substantive law to apply . . . is federal law, which the courts must fashion from the policy of our national labor laws.”¹⁹⁶ Federal common law also governs in nuisance cases brought by one state against another for pollution.¹⁹⁷ Federal common law may also govern when the United States is a party

182. See *infra* notes 198–207 and accompanying text.

183. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

184. *Id.*

185. See *Semtek Int’l, Inc., v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001).

186. See *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

187. See *id.*

188. See *Semtek*, 531 U.S. at 508 (“[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.”).

189. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (“[Although] the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York . . . that does not settle the question This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.”).

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

191. See *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1438 (7th Cir. 1993).

192. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus. Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

193. *Id.*

194. See 29 U.S.C. § 185 (2012).

195. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957).

196. *Id.* at 456.

197. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 335 (1981) (Blackmun, J., dissenting)

to litigation concerning some action of the United States in one of its “proprietary transactions,”¹⁹⁸ such as acquiring real property¹⁹⁹ or issuing commercial paper.²⁰⁰

The question of federal common law does not arise as an *Erie* issue today. The question in the cases noted above is not a choice between federal and state law (*Erie*), but instead is the more fundamental question of the existence of federal (common) law. The Court in such cases addresses whether there is a reason to recognize federal common law; if the Court concludes that federal common law exists, there is no question of federal common law failing to supersede state law.²⁰¹ Indeed, a key factor in finding that federal common law exists is precisely the need to overcome state law that may pose obstacles to the achievement of federal interests. Thus, federal common law will exist only when there is “a ‘significant conflict’ . . . between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”²⁰² Recognizing the existence of federal common law is a matter of “exclusion of state authority.”²⁰³ If federal common law exists, it is “a question . . . upon which neither the statutes nor the decisions of either State can be conclusive.”²⁰⁴ Thus, the question of recognizing federal common law is one of “displacement of state law.”²⁰⁵

This preemption model fits with the non-*Hanna* branch of *Erie*. A federal court in diversity that applies a judge-made federal standard on a “procedural” issue is displacing state law in the same way that state law is preempted (i.e. displaced) by “substantive” federal common law. One could object that in the *Erie* context it is the Rules of Decision Act, which provides that the “laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply”²⁰⁶ that commands the application of state or federal law, not a doctrine of preemption. But this merely places the preemption issue inside a statutory wrapper. The Act provides, to paraphrase, that state laws are to apply—they are the “rules of decision”—“in cases where they apply.” The Rules of Decision Act thus does not advance the analysis because it “begs the question.”²⁰⁷

(“[F]ederal common law enunciated by this Court assured each State the right to be free from unreasonable interference with its natural environment and resources when the interference stems from another State or its citizens.”).

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

199. See *id.* (action to quiet title to government-owned land).

200. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943) (“The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”).

201. This is true when the federal common law is of a substantive nature. When the federal common law is merely procedural, when it provides a procedural rule for the federal courts, it does not supersede state law in state courts on the procedural issue.

202. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 (1988) (quoting *Wallis v. Pan Am. Petrol. Corp.*, 384 U.S. 63, 68 (1966)); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

203. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

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

205. See *Boyle*, 487 U.S. at 507.

206. See 28 U.S.C. § 1652 (2012).

207. See *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983).

The non-*Hanna Erie* cases (ones in which the federal law is not embodied in a federal rule or statute) differ from cases addressing whether substantive federal common law exists in two ways. First, it is usually, although not necessarily, the case that in the *Erie* context federal common law has previously been recognized; that is, the federal courts have created a procedural rule for their use in federal question cases.²⁰⁸ In the federal common law cases, the existence of federal common law is the issue. Thus, for example, in *Coplay Cement Co. v. Willis & Paul Group*,²⁰⁹ the court considered whether the meaning of a contract is a question of law or a question of fact. Federal courts had already answered the question as a matter of federal common law in earlier cases.²¹⁰ The next question was whether to apply that federal common law or instead to apply state law.²¹¹ Thus, the *Erie* issue arose after it had already been decided in another context that there was federal common law. But this chronology need not obtain; the Court might consider simultaneously the question of federal common law and its applicability in a diversity case.²¹²

The second difference relates to the first. In “normal” federal common law preemption cases, federal law invalidates state law entirely for the subject matter at hand. The federal common law is the rule in federal court and in state court (if jurisdiction is concurrent). There is no question of federal common law and state law coexisting. This is true not only of preemption via federal common law but also in cases of statutory preemption. Thus, if a federal drug labeling regulation or car safety standard preempts state tort law, a plaintiff may not rely on state tort law in either state or federal court.²¹³ But in the *Erie* context, the preemption is limited. State law does not apply in federal diversity cases, but it certainly does in state court actions. Thus in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*,²¹⁴ the state law that a particular fact question in workmen’s compensation cases was for the judge, not the jury, would continue to apply in state court even though federal courts would put the fact question to the jury under the federal common law practice. Likewise, under *Gasperini v. Center for Humanities, Inc.*,²¹⁵ state appellate courts would continue to review the

208. For example, in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958), the Court noted that the practice in federal courts “assigns the decisions of disputed questions of fact to the jury.” The question in *Byrd* was whether this extant federal practice “should yield to” a state rule that made a particular fact question one for the judge. *See id.* at 538.

209. 983 F.2d 1435 (7th Cir. 1993).

210. *Id.* at 1438.

211. *Id.*

212. The Court has adverted to this scenario: “If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called ‘twin aims of the *Erie* rule’ If application of federal judge-made law would disserve these two policies, the district court should apply state law.” *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

213. *See, e.g., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1072 (2011) (holding that the National Childhood Vaccine Injury Act of 1986 preempts state-law design-defect claims); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (holding that the Federal Motor Vehicle Safety Standard preempts state common-law tort actions).

214. 356 U.S. 525, 531–32 (1958).

215. 518 U.S. 415, 437 (1996).

size of jury verdicts even though federal appellate courts in diversity could not.²¹⁶ Preemption under *Erie* is thus a partial preemption, obviating state law in federal courts but not in state courts.

That state law survives to apply in state court in these cases does not make them any less a species of preemption. Preemption operates in a nuanced fashion, superseding some laws but not other, even closely related, laws. In the context of express preemption, it is common for Congress to specify that some state laws are preempted and that others in the same field are not. In *Medtronic, Inc. v. Lohr*,²¹⁷ for example, the Court considered the express preemption provisions of the Medical Device Amendments.²¹⁸ The Court noted that the language of the preemption provision indicated that “pre-emption occur only where a *particular state* requirement threatens to interfere with a specific federal interest.”²¹⁹ The “statute and regulations . . . require a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations.”²²⁰ Thus, a state-by-state analysis of the effect of an express preemption clause is required.²²¹

In the context of conflict preemption, a state-by-state approach to preemption is inherent. The basic inquiry is whether compliance with both state law and federal law is impossible or whether state law stands as an obstacle to the purposes and objectives of Congress.²²² Any such analysis necessarily requires one to examine state laws on a state-by-state basis. Some state laws will be an obstacle to Congress’ purposes while others are not. Thus, the question in such cases is whether federal law “conflicts with a *particular state law*.”²²³ For example, in *Cipollone v. Liggett Group, Inc.*, the Court analyzed a variety of state tort claims individually and concluded that federal law preempted some claims but not others.²²⁴

Preemption operates along other axes as well. We are most familiar with a substantive form of preemption, the rules of substantive liability under state law being displaced by substantive rules of federal law,²²⁵ but procedural preemption also occurs. The so-called “reverse *Erie*” problem²²⁶ involves litigation of federal causes of action in state court: to what extent may a state apply its procedural rules that may

216. *See id.* at 437–38.

217. 518 U.S. 470 (1996).

218. *See* 21 U.S.C. § 360k (2012).

219. *Medtronic*, 518 U.S. at 500 (emphasis added).

220. *Id.*

221. *See* Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 522 (2010) (arguing that preemption cases raise the question whether a “particular state law at issue [is] in fact preempted . . . [which] asks whether Congress’ exercise of preemptive authority affects a specific state law”).

222. *See supra* notes 158–60 and accompanying text.

223. Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 672 (2011) (emphasis added).

224. 505 U.S. 504, 530–31 (1992).

225. *See, e.g.,* *Wyeth v. Levine*, 555 U.S. 555 (2009) (deciding whether compliance with federally required warnings precluded liability under state tort law).

226. *See generally* Clermont, *supra* note 165, at 44.

impede recovery under the federal cause of action? May a state, for example, dismiss a civil rights claim under § 1983 for failure to comply with a state notice of claim statute?²²⁷ Such displacement of state procedural law in state court is correctly viewed as a “question . . . of pre-emption.”²²⁸

Preemption can even lead to the displacement of state procedural law in state courts on *state* causes of action. The National Bank Act at one time provided that venue for suits against nationally chartered banks was proper in a “court of the United States held within the district in which such association may be established, *or in any State, county, or municipal court in the county or city in which said association is located.*”²²⁹ The Supreme Court held that the statute meant what it appeared to say: venue *in state courts* of actions against national banks is governed by federal, not state, law.²³⁰

Preemption is also partial in another sense. When state law impermissibly conflicts with a federal statute, it is preempted, but, naturally, only to the extent of federal statute. And whatever ambiguities exist concerning the federal statute’s intended scope, it certainly can extend no further than the underlying source of constitutional authority under which Congress is legislating. For example, in finding preemption of state tort law due to its conflict with federal drug labelling laws in *Mutual Pharmaceutical Co. v. Bartlett*,²³¹ the Court noted that the state law was “pre-empted with respect to FDA-approved drugs *sold in interstate commerce.*”²³² This limitation of course follows from the constitutional scheme of enumerated and limited federal powers. The congressional power underlying preemption may be, as in *Bartlett*, the commerce clause,²³³ but it need not be so. It was the constitutional “power to ‘establish an uniform Rule of Naturalization,’” for example, that underlay preemption in *Arizona v. United States*.²³⁴ Whatever the source of federal power, preemption leaves untouched areas not within the grant of authority, such as activities not in interstate commerce. Preemption is here, again, partial, as it does not displace all state laws on a given subject.

227. See *Felder v. Casey*, 487 U.S. 131, 138 (1988) (“The question before us today, therefore, is essentially one of pre-emption: is the application of the State’s notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead ‘stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?’” (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971))).

228. See *id.*; see also *Clermont*, *supra* note 165, at 5.

229. See *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 556 (1963) (emphasis added). The current version of the venue statute for national banks has a similar provision mandating venue in state court actions, but it is limited to cases in which the bank is in receivership of the Federal Deposit Insurance Corporation. See 12 U.S.C. § 94 (2012) (“in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association’s principal place of business is located”).

230. See *Mercantile Nat’l Bank*, 371 U.S. at 558 (deciding whether “a federal statute, rather than a state statute, determines in which state court a national bank may be sued”).

231. 133 S. Ct. 2466 (2013).

232. *Id.* at 2477 (emphasis added).

233. *Id.*; see also *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135 (2011).

234. 132 S. Ct. 2492, 2498 (2012) (quoting U.S. CONST. art. I, § 8, cl. 4).

In *Erie*, the grant underlying preemption is Article III, § 1 of the Constitution, which grants to Congress the power to “ordain and establish” the “inferior Courts.”²³⁵ As the Court said in *Hanna*, “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts.”²³⁶ This source of lawmaking authority explains the limited scope of *Erie* preemption. State law is not preempted in state courts in the *Erie* context because the federal power in question here is limited to “ordain[ing] and establish[ing]” the federal courts. Just as legislation under the Commerce Clause can preempt only as to matters in interstate commerce, so too preemption by federal procedural law is limited to actions in the federal courts.

Preemption therefore presents an array of applications. Federal law can preempt state substantive law, displacing the substantive rules normally applicable in state court. But it may preempt only some state laws and not others, depending on the extent and nature of the conflict between state and federal law. It can displace state procedural rules in actions in state courts as well when federal law supplies the substantive rule of decision (the reverse-*Erie* problem).²³⁷ It may even displace state procedural law when state law supplies the substantive rule of decision (the National Bank Act).²³⁸ In the last context, it should be noted that the procedure Congress demands of a state court will sometimes differ from that laid out for a federal court. In actions against a national bank in receivership, the current venue statute places federal venue in the district where the bank’s “principal place of business is located.”²³⁹ The provision for state venue, while also using the principle place of business as the test for venue, specifies a county.²⁴⁰ Thus, if the bank is headquartered in a county that does not contain the federal district court for that district, actions will be in different venues (counties) depending upon whether the case is in federal court or state court. Congress could have specified an identical venue rule for federal and state courts by placing state court venue in the county in which the action would have been brought had suit been in federal court. Instead, Congress has displaced (preempted) state procedural law with a federal procedural law not applicable in federal court.

Adding to this list the preemption of state law in actions in a federal court by force of federal procedural common law—that is, the non-*Hanna Erie* context—requires no great leap. Federal common law has the power to preempt just as federal statutory law does.²⁴¹ A “few areas involving ‘uniquely federal interests,’ . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”²⁴² In the *Erie* context, this preemption is limited to preemption of state law in

235. U.S. CONST. art. III, § 1.

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

237. *See supra* notes 226–28 and accompanying text.

238. *See supra* notes 229–30 and accompanying text.

239. 12 U.S.C. § 94 (2012).

240. *See id.* (Venue is proper in “such court in the county or city in which that association’s principal place of business is located.”).

241. *See supra* notes 201–05 and accompanying text.

242. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

federal court actions; it does not displace state law in state court actions. But this follows perfectly from the nature of the underlying federal lawmaking power and from the requirement of preemption that the matter involve “uniquely federal interests.”²⁴³ There is rarely a unique federal interest in the procedure applied in state courts in actions governed by state substantive law. The scope of the preemption in such cases is necessarily limited to actions in federal court.

Finally, one case—*Semtek International, Inc., v. Lockheed Martin Corp.*²⁴⁴—draws many of these strands together, nicely illustrates that *Erie* cases are preemption cases whether or not a federal rule is involved, and demonstrates that the same factors are at play on either side of the supposed dichotomy of *Hanna*. In *Semtek*, the Court addressed the “question whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.”²⁴⁵ The Court rejected an argument that the matter was governed by Federal Rule of Civil Procedure 41(b), which provides that certain dismissals (including the type of dismissal involved in the case) were “an adjudication upon the merits” unless the district court “otherwise specifies.”²⁴⁶ The Court read Rule 41 more narrowly than the parties advocated for because of concerns that Rule 41, if read literally, might violate the Rules Enabling Act²⁴⁷ and “the federalism principle of *Erie* . . . by engendering ‘substantial’ variations [in outcomes] between state and federal litigation which would ‘[l]ikely . . . influence the choice of a forum.’”²⁴⁸ Having concluded that no federal rule or other written law governed the matter (“no other federal textual provision, neither of the Constitution nor of any statute, addresses the claim-preclusive effect of a judgment in a federal diversity action”²⁴⁹), the Court held the matter to be governed by “federal common law.”²⁵⁰ Significantly, once the Court had shifted the analysis from Rule 41 and the *Hanna* side of the analysis to federal common law and away from *Hanna*, it *again* utilized the same *Erie* policies to determine the content of the federal common law. Federal common law would in this case consist of borrowed state law, since deviating from the content of state law would produce results “that *Erie* seeks to avoid.”²⁵¹ The Court left open, however, the possibility that in some cases the content of federal common law would deviate from state law:

243. *Id.*

244. 531 U.S. 497 (2001).

245. *Id.* at 499.

246. *See id.* at 501; *see also* FED. R. CIV. P. 41.

247. *Semtek*, 531 U.S. at 504 n.1.

248. *Id.* at 504 (quoting *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965)). The concern was that if claim preclusion did not apply to a statute of limitations dismissal under state law but did apply under federal law, a defendant could nationalize its statute of limitations victory by removing to federal court and then moving for dismissal. Cases dismissed by a state court, in contrast, would arguably not qualify for claim preclusive effect, leaving the plaintiff free to file another action on the claim in another state with a longer statute.

249. *Id.* at 507.

250. *Id.* at 508.

251. *Id.* at 509.

“This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.”²⁵²

Semtek is thus a buffet table of preemption and *Erie*. It first considers a federal rule as potentially governing, but reads it narrowly in order to uphold *Erie* policies.²⁵³ Then, there being no federal rule to apply, the Court proceeds to declare the content of federal common law.²⁵⁴ And in deciding that question, the Court found the same *Erie* policies relevant and also invoked “federal interests” as limitation on state law.²⁵⁵ In short, the same analysis applied no matter which side of the supposed *Hanna* dichotomy the case fell on and that analysis was a preemption analysis.

C. How *Erie* Analysis Is Improved by Considering It as a Preemption Doctrine

Because the *Erie* doctrine, in any of its forms, is a doctrine of preemption, one should be able to import, or at least analogize from, doctrines and factors that appear in other preemption cases. In fact, one sees traces of certain preemption doctrines in some of the *Erie* cases. In particular, the non-*Hanna* *Erie* cases, those in which unwritten federal law (federal common law) displaces state law, reveal a significant commonality to standard preemption doctrines. Cases under the other (*Hanna*) branch of *Erie*, those considering displacement of state law by a federal rule or by a federal statute, show less overt similarities to the preemption cases. But it is my contention that preemption doctrines better explain the results in these cases.

There are five areas of inquiry in common between standard preemption and the *Erie* cases: the importance of federal interests, the importance of the nature of state law, an analysis of whether one may comply with both state and federal law or whether the two cannot coexist, the need to consider explicit statutory or regulatory directives as to preemption, and the need to balance the competing values of legal uniformity and legal diversity.

1. Federal Interests

The Supreme Court has provided two versions of the proper approach to take in cases in which state law conflicts with unwritten federal law: the holding of *Byrd*²⁵⁶ and the dicta from *Hanna*.²⁵⁷ Both ask about the effect on the outcome of following federal rather than state law. But *Byrd* adds a factor not present in *Hanna*'s dicta: balanced against the concern of different outcomes and forum-shopping is the validation of “countervailing considerations”²⁵⁸ of “federal policy.”²⁵⁹ Making use of the *Byrd* analysis and offsetting other *Erie* concerns with a concern for federal

252. *Id.*

253. *See id.* at 503–04.

254. *See id.* at 508.

255. *Id.* at 509.

256. *See* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958); *see also supra* notes 47–54 and accompanying text.

257. *See* *Hanna v. Plumer*, 380 U.S. 460, 467–468 (1965); *see also supra* notes 41–46 and accompanying text.

258. *Byrd*, 356 U.S. at 537.

259. *Id.* at 538.

interests does much to explain the *Erie* cases. Moreover, this mode of analysis—measuring the applicability of state law as against competing federal law in light of federal interests—is entirely consistent with the preemption doctrine.

The preemption cases are also concerned with the existence and weight of federal interests. A predicate for preemption of a whole field by federal law is the existence of a “federal interest [that] is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁶⁰ Similarly, in the context of conflict preemption, when it is argued that state law is preempted because it “conflicts with Congress’ purposes and objectives,” the inquiry into federal “purposes and objectives” necessarily requires an examination of the “nature of the federal interest.”²⁶¹ In other words, “[w]hat is a sufficient obstacle [to find preemption] is . . . informed by examining the federal statute as a whole and identifying its purpose and intended effects.”²⁶²

Now, preemption plays out differently in the *Erie* context, as the question there is not a field preemption in which one displaces the entirety of state law in the area of the field of regulation. The scale of preemption in *Erie* is smaller. But because preemption in *Erie* is accomplishing less, the magnitude of the federal interest need not be as great to call for the displacement of state law by federal law. The context of *Erie* also leads to another difference: the federal interests are of a procedural nature, not, as in standard preemption, substantive. Yet despite these differences, both preemption and this branch of *Erie* are concerned with preserving federal interests.

The role of federal interests in *Erie* is nicely illustrated by *Stewart Organization, Inc. v. Ricoh Corp.*²⁶³ *Stewart* held that 28 U.S.C. § 1404,²⁶⁴ the federal statute that addresses transfers between federal courts, was applicable and controlled under *Hanna* as against a state law that was hostile to forum-selection clauses.²⁶⁵ That § 1404 speaks to the question of forum-selection clauses is far from obvious, as its text says nothing about them.²⁶⁶ But there is a good reason to read federal law expansively here so as to preempt state law. The case was to be tried in *some* federal court in any event (subject-matter jurisdiction was undoubted and not in issue) and the only question was whether the case was to be tried in a federal court in New York or a federal district court in Alabama.²⁶⁷ Allocating the business of the federal courts among different districts—that is, determining proper venue—implicates important federal interests. It is an issue of the internal operations of the federal judicial system and thus properly under the control of federal, not state, law. The presence of strong

260. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

261. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013).

262. *Crosby v. Nat’l. Foreign Trade Council*, 530 U.S. 363, 373 (2000).

263. 487 U.S. 22 (1998). *See generally supra* notes 98–101 and accompanying text.

264. *See* 28 U.S.C. § 1404 (2012).

265. The Court has recently confirmed that “a forum-selection clause . . . may be enforced through a motion to transfer under § 1404(a).” *Atlantic Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 579 (2013).

266. *See* 28 U.S.C. § 1404; *see also Stewart*, 487 U.S. at 37 (Scalia, J., dissenting) (“Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.”).

267. *See* 487 U.S. at 24.

federal interests similarly explains *Burlington Northern Railroad Co. v. Woods*.²⁶⁸ There the Court read Federal Rule of Appellate Procedure 38, which addresses sanctions on frivolous appeals, expansively, finding it to conflict with and thus preempt a state law awarding a penalty on all losing appeals.²⁶⁹ One could have read federal law in a way that allowed it to coexist with state law, but the Court declined to do so. *Burlington* can be understood as giving a relatively expansive reading to federal law in order to vindicate federal interests. Imposing costs on an appeal makes it more expensive. There is a federal interest in determining when and in what amount to tax an appeal. After all, the higher the cost of appeals, the fewer there will be. If a rule of sanctioning losing appeals prevailed, there would be fewer appeals. The federal system would then be forced to take additional steps to assure that cases are correctly resolved in the district courts since intervention by the appellate courts to correct errors would be less frequent. This would then require a redeployment of resources toward the district courts. All of this—the disincentives to appeal, the frequency of appeals, and the allocation of resources to trial courts—are matters of federal concern when the courts in question are federal courts.

Of course, *Stewart* and *Burlington* are on the *Hanna* side of the *Erie* analysis. They involve conflicts between federal statutory law and state law. The injunction in *Byrd* to consider federal interests was in a case on the non-*Hanna* side of *Erie*, dealing with unwritten federal law. But the Court has now made clear that, despite *Hanna*, written federal law does not woodenly apply under *Erie*. Courts are to “interpret[] the Federal Rules . . . with sensitivity to important state interests and regulatory policies.”²⁷⁰ And one cannot assess the importance of state policies without considering the other half of the equation, the federal interests behind federal law. “[I]mmoderate interpretations of the Federal Rules” should be avoided if they “would trench on state prerogatives without serving any countervailing federal interest.”²⁷¹

The approach I argue for leads to a recoupling of the *Hanna* and non-*Hanna* branches of *Erie*. On either side of the analysis, one must consult some ordering principles to aid in the interpretation of the scope of federal law. Once it is admitted that federal rules or statutes have to be interpreted in an *Erie* case, one must necessarily provide a basis for interpretation. What are the factors that will lead a court to read written federal law broadly such that it conflicts with state law or narrowly such that the two can coexist? Not surprisingly, given the preemption context of *Erie*, one such factor is the existence and strength of any federal interest. This should be obvious, but the *Hanna* cases do not expressly refer to an examination of federal interests and in fact at one point expressly disavowed engaging in any process of interpretation.²⁷² But if one understands *Erie* as a preemption doctrine, then examining federal interests is unavoidable.

268. 480 U.S. 1 (1987). See generally *supra* notes 102–06 and accompanying text.

269. See *Burlington*, 480 U.S. at 7 (holding that the Federal “Rule’s discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama’s affirmative penalty statute”).

270. *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996).

271. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 439 (2010) (Ginsburg, J., dissenting).

272. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (“This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct

2. The Nature of the State Law

The foregoing shows how federal interests are regarded in an *Erie* analysis. The *Byrd* test also asks about the nature of the state law—whether it is “bound up with” “state-created rights and obligations” or is merely a rule of “form and mode.”²⁷³ If state law is of the former type, it is to apply in diversity cases.²⁷⁴ This concern about the nature of state law is also present in preemption analysis. The Court has attempted to preserve from preemption areas that are “traditionally occupied by the States.”²⁷⁵ Thus “courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”²⁷⁶ There is, for example, “‘a presumption against preemption’ of state laws governing domestic relations.”²⁷⁷ This is a strong presumption, but can be overridden when the state’s family law does “‘major damage’ to ‘clear and substantial’ federal interests.”²⁷⁸ This presumption in favor of state law in areas of traditional state regulation stems from “respect for the States as ‘independent sovereigns in our federal system.’”²⁷⁹

These principles are familiar to a student of the *Erie* doctrine. Respect for states as autonomous actors in the federal system lies at the heart of the *Erie* doctrine. “[T]he Constitution of the United States,” said the Court in *Erie*, “recognizes and preserves the autonomy and independence of the States.”²⁸⁰ The *Erie* doctrine is driven by the principle that “our constitutional system leaves to state regulation” certain “primary decisions respecting human conduct.”²⁸¹ The results of the *Erie* cases reflect this. In *Gasperini v. Center for Humanities, Inc.*,²⁸² the issue was the applicability in a diversity case of a state law providing for “closer surveillance” of the size of jury awards than was given under federal practice.²⁸³ The Court held that state law controlled.²⁸⁴ The Court applied the analysis from the *Hanna* dicta rather than its holding, implicitly characterizing the *Erie* issue as involving a dispute

collision’ with state law. The Federal Rules should be given their plain meaning.”)

273. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535, 536 (1958).

274. *See id.* at 535 (“[F]ederal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine [state law] to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.”).

275. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

276. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

277. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001)).

278. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)).

279. *Wyeth*, 555 U.S. at 565–66 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

280. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (quoting *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

281. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

282. 518 U.S. 415 (1996).

283. *Id.* at 424.

284. *Id.* at 438–39.

between state law and unwritten federal law.²⁸⁵ But why wasn't, as Justice Scalia argued, the matter governed by Federal Rule of Civil Procedure 59, which explicitly identified the "reasons" for which new trials could be granted?²⁸⁶ Consistent with the common roots of *Erie* and preemption, this constrained reading of a federal rule can be explained as a desire to be "attentive to a State's regulatory policy."²⁸⁷ The state law in *Gasperini* was a "tort reform measure[]"²⁸⁸ designed "to curtail medical and dental malpractice, and to contain 'already high malpractice premiums.'"²⁸⁹ Such a law, one recalibrating the scope of tort liability, lies in an area, in the words of the preemption cases, "traditionally occupied by the States."²⁹⁰ This explains the Court's narrow reading of Rule 59.

And so in general, whether the *Erie* issue involves either written or unwritten federal law, one should look at the nature of the competing state law. If the *Erie* issue is one of a conflict between state law and unwritten federal law, *Byrd* commands this inquiry directly. If the federal law exists in the form of a federal rule or statute, the nature of the state law it allegedly conflicts with is relevant to the application of a canon of construction: federal law is not to be read "cavalierly" to preempt areas traditionally the domain of the states.²⁹¹

3. The Dual Compliance Problem: Does State Law Supplement Federal Law or Conflict with It?

As noted above,²⁹² how to assess whether state law conflicts with a federal rule or statute or instead can coexist with it as a supplemental requirement recurs as an unanswered puzzle in the *Erie* cases. The Supreme Court has variously phrased the nature of the conflict it is looking for: are state and federal law in "direct collision?"²⁹³ Is the "clash . . . unavoidable?"²⁹⁴ It has said that a federal rule is to be applied if it is "sufficiently broad to control the issue."²⁹⁵

A similar problem exists in the preemption cases. One branch of the doctrine holds that state law is preempted when it "conflicts" with federal law. Impossibility

285. See *id.* at 428, 430–31. The Court used the analysis given in *Hanna* for case in which no federal rule or statute was on point. Compare *Gasperini*, 518 U.S. at 428 (the question was whether state law is "outcome affective" in that failure to apply it in federal court would "unfairly discriminate" or "be likely to cause a plaintiff to choose the federal court"), with *Hanna*, 380 U.S. at 468, 470 (stating these as the "twin aims" of *Erie* that are to be the basis of analysis when "no Federal Rule" covers the matter).

286. See *supra* notes 96–97 and accompanying text.

287. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 441–42 (2010) (Ginsburg, J., dissenting).

288. *Gasperini*, 518 U.S. at 423 (1996).

289. *Id.* at 423 n.3 (quoting Legislative Findings and Declaration, Ch. 266, 1986 N.Y. Laws 470 (McKinney)).

290. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

291. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("Congress does not cavalierly pre-empt state-law causes of action.").

292. See *supra* notes 116–32 and accompanying text.

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

294. *Id.* at 470.

295. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

of compliance with both federal and state law is thus one way to find conflict preemption.²⁹⁶ If, on the other hand, dual compliance is possible, preemption also exists when state law stands as an “obstacle to the . . . full purposes and objectives of Congress.”²⁹⁷ The former branch of conflict preemption—impossibility—is “a demanding defense.”²⁹⁸ It is a “rare creature,”²⁹⁹ “vanishingly narrow,”³⁰⁰ requiring that “compliance with both federal and state [law be] a physical impossibility.”³⁰¹ Because this type of preemption is so rarely found,³⁰² the majority of conflict preemption cases are funneled into the other branch, “obstacle” preemption. While impossibility, if found, categorically results in a finding of preemption,³⁰³ obstacle preemption is more nuanced.³⁰⁴ Conflict preemption, then, is dominated by factors rather than categorical rules.

The same is, or should be, true of *Erie*. It is a pretense to suggest that cases involving a federal rule or statute are easily decided under a categorical rule that depends on no further analysis of the nature of the competing state law or the nature of a federal interest. It is a mistake for the Court to say that it need not “wade into *Erie*’s murky waters” if a federal rule “answers the question in dispute” because “it governs.”³⁰⁵ Just as in preemption cases, the presence of a rule or statute does not end the inquiry, it instead begins it. One must *interpret* the statute or rule to determine whether it was intended to displace state law. And in the *Erie* context, as in preemption, that interpretation is aided by a presumption of not displacing state law in areas of traditional state regulation³⁰⁶ and an examination of the purposes of the federal law.³⁰⁷ Thus, looking for an “impossibility” of complying with state and federal law will decide few cases under *Erie*.

The *Erie* cases in which it is unclear if state law should be read as conflicting with federal law or merely supplementing it support this conclusion. For example, is a requirement that a plaintiff post a bond in a derivative action in “conflict” with Federal Rule of Civil Procedure 23.1, which sets out the requirements for

296. See *supra* note 158 and accompanying text.

297. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

298. See *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

299. See Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1193 (2010).

300. See Nelson, *supra* note 9, at 228.

301. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

302. The Supreme Court has recently invoked impossibility preemption. See *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011). Whether this was an aberration or the start of a trend remains to be seen.

303. See *Bartlett*, 133 S. Ct. at 2477 (“Because it is impossible for Mutual and other similarly situated manufacturers to comply with both state and federal law, New Hampshire’s warning-based design-defect cause of action is pre-empted . . .”).

304. See *id.* at 2486 (Sotomayer, J., dissenting) (“[T]here are other types of pre-emption. Courts may find that state laws . . . are pre-empted for reasons apart from impossibility But absent a direct conflict between two mutually incompatible legal requirements, there is no impossibility and courts may not automatically assume that Congress intended for state law to give way. Instead, a more careful inquiry into congressional intent is called for . . .”).

305. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

306. See *supra* notes 275–79 and accompanying text.

307. See *supra* notes 260–62 and accompanying text.

derivative actions but does not require (or forbid) a bond? In *Cohen v. Beneficial Industrial Loan Corp.*,³⁰⁸ the Court held that the federal rule did not “conflict with the statute in question.”³⁰⁹ The Court did not take the silence in the rules on the matter of a bond as a prohibition of one. State law could permissibly impose supplemental burdens on the plaintiff.³¹⁰ This treatment is consistent with the preemption cases on “impossibility.” That narrow preemption doctrine is limited to state and federal laws that “impose directly conflicting duties . . . as they would, for example, if the federal law said, ‘you must [do X],’ while the state law said, ‘you may not.’”³¹¹ If it is possible to comply with both, then there is no “impossibility” preemption. “[E]ven if one sovereign’s law purports to give people a right to engage in conduct that the other sovereign’s law purports to prohibit,” dual compliance is not truly impossible because “a person could comply with both state and federal law simply by refraining from the conduct.”³¹² In the *Erie* context, when under federal law a litigant is given a right to proceed without being burdened by a particular procedural requirement (such as a bond) but state law would impose that burden, compliance with both federal and state law is possible. *Cohen* supports this approach in finding no conflict between federal and state law; rather than using the blunt instrument of impossibility, it instead looked at the nature of state law, found it to substantively create a new liability, and held it applicable for that reason.³¹³

Of course one could bend *Hanna* to fit the same template. *Hanna* involved whether service could be left at the defendant’s residence. Federal Rule of Civil Procedure 4 allowed this but state law forbade it.³¹⁴ One sovereign allowed something (leaving service at a residence) that the other forbade. One could comply with both laws by forgoing leaving process at the defendant’s residence; such service under Rule 4 was *not required*, only permitted.³¹⁵ Nonetheless, the Court characterized state and federal law as having a “clash [that] is unavoidable”³¹⁶ and applied federal law under the Supremacy Clause. Although the result is certainly correct, the better explanation is that given the nature of the state law (it was not a law designed to impact “primary decisions respecting human conduct”³¹⁷) and the federal interests in providing a means of service in its own court proceedings that

308. 337 U.S. 541 (1949).

309. *Id.* at 556.

310. *See* Rensberger, *supra* note 68, at 94. The Court held that the bond requirements of state law must apply, but nowhere suggested that the requirements of the Federal Rule did not also apply. *See Cohen*, 337 U.S. at 556.

311. *See* Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996).

312. *See* Nelson, *supra* note 9, at 228 n.15.

313. *See Cohen*, 337 U.S. at 556.

314. *See* Hanna v. Plumer, 380 U.S. 460, 461–62 (1965).

315. *See* FED. R. CIV. P. 4(e)(2)(B) (providing that service “may” be made by “leaving a copy . . . at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there”).

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

317. *Id.* at 475 (Harlan, J., concurring). *See generally supra* notes 280–81 and accompanying text.

accommodates concerns of cost and efficacy of actual notice, no reason existed to not find state law preempted by Rule 4.

Searching in *Erie* cases for conflicts between state and federal law that rise to an “impossibility” of dual compliance is a fool’s errand, an exercise in futility. Few of the federal rules are compulsory.³¹⁸ One could imagine, I suppose, a state law forbidding the joinder of a particular counterclaim that federal law would consider a compulsory counterclaim. But setting aside such outliers, the federal rules much more often enable rather than require. The implication, then, is that one must have some other basis beyond “impossibility” to decide the cases. And those *Erie* cases that discuss the nature of state law and the existence of federal interests do provide that framework, just as do the preemption cases that analyze obstacle preemption.

4. Express Preemption and Agency Preemption: The Role of the Enabling Act and the Supreme Court as an Agency

I have left to one side express preemption,³¹⁹ which is perhaps the core preemption doctrine. Since preemption is a matter of congressional intent, there is no better source for determining preemption than an explicit statement by Congress of its intent—an express preemption provision.

In the *Erie* context, express preemption could focus on the Rules Enabling Act, which provides—after granting the Supreme Court the power to create rules of practice, procedure, and evidence—that “[a]ll laws in conflict with such rules shall be of no further force or effect.”³²⁰ The problem with the Enabling Act as an express guide to preemption is its breadth. It would purport under its broadest reading to eliminate all laws that conflict in any way with a federal rule. This would change the result, it would seem, in *Ragan v. Merchants Transfer & Warehouse Co.*,³²¹ *Walker v. Armco Steel Corp.*,³²² *Cohen v. Beneficial Industrial Loan Corp.*,³²³ and *Gasperini v. Center for Humanities, Inc.*³²⁴ In each of these cases, one could have characterized a federal rule as conflicting with state law.³²⁵ That the Supreme Court did not so conclude means that the Enabling Act is not to be given its broadest possible interpretation. But then what interpretation is to be given to it? We are left to once again chase the wild boar of congressional intent, a wily creature, difficult to track and harder still to bring to ground.

318. Exceptions to the generally permissive structure of the Federal Rules are Rule 13(a) on compulsory counterclaims and Rule 19 on mandatory joinder. See FED. R. CIV. P. 13(a); FED. R. CIV. P. 19.

319. See generally *supra* notes 153–54 and accompanying text.

320. 28 U.S.C. § 2072(b) (2012).

321. 337 U.S. 530 (1949).

322. 446 U.S. 740 (1980).

323. 337 U.S. 541 (1949).

324. 518 U.S. 415 (1996).

325. On *Ragan*, *Walker*, and *Gasperini*, see *supra* notes 78–97 and accompanying text. On *Cohen*, see *supra* notes 120–22 and accompanying text.

This again mirrors what one finds in preemption case law outside the *Erie* context. Express preemption clauses are useful but still must be construed. If a federal statute “contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”³²⁶ And in the context of express preemption, as in other areas of preemption, there exists a presumption against preemption in areas traditionally left to state law.³²⁷ The Court assumes that “Congress would not defeat the operation of traditional, historic police powers of the states without quite explicitly saying so.”³²⁸ Thus, even when one encounters an express preemption provision, bright-line rules are not to be found. Courts use a “variety of interpretive tools . . . to determine congressional intent, including an evaluation of the ordinary meaning of the terms of the statute, its structure, and its purpose as discerned through the legislative history.”³²⁹

And such is, and should be, the analysis under the Rules Enabling Act.³³⁰ The Enabling Act’s provision that states “[a]ll laws in conflict with [the federal] rules shall be of no further force or effect”³³¹ does not end the preemption analysis. Instead it heralds its initiation. Whether a state law is “in conflict” with a federal rule depends upon an interpretation of the scope of the state law and the scope of the allegedly conflicting federal rule. As the Court said in *Hanna*, sometimes a litigant relies on a federal rule as against state law but the federal rule is found to be “not as broad”³³² as was argued. In such cases, state law does not “conflict” under the Rules Enabling Act and is not preempted. But this interpretive effort, as I have attempted to demonstrate above, rests upon an analysis of the nature of the state law (is it within a traditional state domain?) and competing federal interests.³³³

There is another route available that would allow the Court to make use of express preemption in *Erie* cases. Under standard preemption doctrine, “an agency regulation with the force of law can pre-empt conflicting state requirements.”³³⁴ Whether there is preemption depends, of course, upon normal preemption analysis. The Court must determine whether Congress intended to occupy the field, whether dual compliance with state and federal law is impossible, and whether state law stands as an obstacle to the purposes and objectives of federal law.³³⁵ On this last point, the Court gives an agency’s explanation of a conflict between its regulation and state law some degree of deference:

326. *See* *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

327. *See supra* notes 275–79 and accompanying text.

328. *Davis, supra* note 154, at 1247.

329. *Id.* at 1221.

330. *See* *Thomas, supra* note 9, at 192–93 (arguing that courts should examine “the question of the scope of the Court’s rulemaking power [under the Rules Enabling Act] through preemption analysis”).

331. 28 U.S.C. § 2072(b) (2012).

332. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).

333. *See supra* notes 273–91 and accompanying text.

334. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *see also* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding preemption of state law by a regulation).

335. *See supra* notes 155–60 and accompanying text.

In prior cases, we have given “some weight” to an agency’s views about the impact of tort law on federal objectives when “the subject matter is technical[] and the relevant history and background are complex and extensive.” Even in such cases, however, we have not deferred to an agency’s *conclusion* that state law is pre-empted. Rather, we have attended to an agency’s explanation of how state law affects the regulatory scheme. While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The weight we accord the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.³³⁶

The process by which the Supreme Court assesses the preemption of state law by a federal rule is oddly back-loaded. Federal agencies, operating under their delegated authority from Congress, make rules and sometimes declare their understanding of the impact of their rules on state law.³³⁷ The Supreme Court similarly acts under a delegation from Congress, the Enabling Act, to create rules.³³⁸ It does *not*, however, at the time of adoption of a rule or amendment make statements concerning the applicability of the rule as against state law—it does not, that is, address preemption (i.e., *Erie*) questions. Instead, it transmits the rules to Congress and then *later* rules on the question of whether the rule preempts state law. To be sure, that the Court did transmit the rules to Congress indicates that it has at least provisionally determined that the rules are valid, that is, within the power granted under the Enabling Act. As the Court has said, “the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court . . . give the Rules presumptive validity under both the constitutional and statutory constraints.”³³⁹ But whether a state law conflicts with the federal rule and whether the rule will displace state law, in contrast, are not considered.³⁴⁰

336. *Wyeth*, 555 U.S. at 576–77 (alterations in original) (emphasis in original) (citations omitted). See generally William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1249–53 (2010) (discussing the appropriate degree of deference to an agency’s statements about the effect of state law upon the federal regulation).

337. See *Wyeth*, 555 U.S. at 575 (considering preemption in light of agency’s statement that the agency’s “approval of labeling . . . preempts conflicting or contrary State law” (internal quotation marks omitted)).

338. See 28 U.S.C. § 2072 (2012).

339. *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987).

340. Infrequently, some justices dissent from adoption of a set of amendments to Federal Rules. See, e.g., Amendments to Federal Rules of Civil Procedure, 85 F.R.D. 521, 521 (1980) (Powell, J. dissenting) (dissenting “from the Court’s adoption of the amendments to Federal Rules of Civil Procedure 26, 33, 34, and 37”). For a collection of dissents, see Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 481 n.118 (1997) (citing “numerous dissenting opinions filed over the years in opposition to the promulgation of particular revisions of the Rules”).

One might wonder at this. On its face this process seems both inefficient and disingenuous. It would obviously lower litigation costs if the applicability of a federal rule as against state law were known before, not after, litigation under the rule took place. The rule was before the Court once, at the time of adoption. Why not simply address *Erie* issues—both validity of the rule under the Enabling Act and the rule’s displacement of state law—when the Court first has the rule before it? The Court would then stand in the same position as an agency that has promulgated a rule and made a statement as to its displacement of state law. If agencies are granted this prerogative and their statements deserve deference, why should the Court treat itself worse? Agency determinations warrant deference when the agency has “a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”³⁴¹ If the Court does not have such a “unique understanding,” then we are all in trouble.

I can imagine three explanations for the Court’s failure to take this route and front-load the *Erie* analysis. One is somewhat embarrassing—having a little of the feeling of the emperor and his lack of clothes. It may be that the Court feels itself inadequate—in terms of time and resources—to assess the question of displacement of state law and give the *Erie* issue considered thought at the time of transmission to Congress. The Court is a busy institution. The Advisory Committee devotes many hours to proposed rules and amendments. The Court may decline to address the *Erie* issue at the time of adoption, in other words, because it has little useful to say at that point.

Several Justices on occasion have expressed a similar sentiment. Justice White noted, in commenting on the transmission of proposed rule amendments, that “the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference.”³⁴² From this fact he inferred that “a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process.”³⁴³ He believed, therefore, that “the Court’s role . . . is to transmit the Judicial Conference’s recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity.”³⁴⁴ Similarly, Justices Black and Douglas argued for removing the Court from the rule-making process entirely, making the path from the Rules Advisory Committee to Congress unmediated. They advocated this because of the greater investment of the Advisory Committee: “It is they . . . who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power.”³⁴⁵ They also argued that such a change would “relieve [the Court] of the embarrassment of having to sit in judgment on the constitutionality of rules which [it has] approved and which as applied in given situations might have to be declared invalid.”³⁴⁶

341. *Wyeth*, 555 U.S. at 577 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

342. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 502–03 (1993) (statement of White, J.).

343. *Id.* at 503.

344. *Id.* at 505.

345. Order of Jan. 21, 1963, 374 U.S. 865, 870 (1963) (statement of Black, J. & Douglas, J.).

346. *Id.*

But other considerations also might argue for the Court postponing the *Erie* issue until after transmission of the rules. Addressing the *Erie* question in the absence of an adversarial proceeding stretches the Court's institutional competence. The Court, of course, is not limited to acting solely in a judicial capacity: it makes rules for its own procedure.³⁴⁷ The Chief Justice presides over the judicial conference.³⁴⁸ And under the Enabling Act, it has a role in the creation of the rules for the lower courts.³⁴⁹ Such activities do not run afoul of strictures against advisory opinions.³⁵⁰ But they do take the Court to a ground where its footing is less certain. The Court has authority to make internal rules,³⁵¹ but in so acting it takes on the appearance of a "quasi-legislature,"³⁵² a role for which the Court lacks the basic institutional equipment. In short, the Court acts best when it acts as a court—a decider of disputes in litigation—and not as a rule maker. Moreover, if an *Erie* issue were to arise in litigation before the Court when it had previously addressed the *Erie* issue as a rule maker, the Court would have to entertain the possibility of overturning its prior conclusions on the rule. Wearing its judicial hat (or robe), it would reverse itself for an action done while wearing its agency hat. If this is unpalatable, the alternative may be worse. If it does not entertain the *Erie* issue, then a litigant is foreclosed from any judicial review in an adversarial proceeding concerning the applicability of an agency rule. As Justices Black and Douglas said, this would indeed be an "embarrassment."³⁵³

Finally, and somewhat related to the previous point, an *Erie* analysis does not consider a federal rule in isolation to determine its applicability in a diversity case. The Court must examine federal law as against a particular competing state law. *Erie* has this in common with preemption in general, which asks a particular question about a particular state's law: does it conflict with federal purposes and objectives?³⁵⁴ It would therefore be difficult, if not impossible, for the Court to transmit a rule or an amendment with a proviso that it does or does not displace state law. Such a statement is too broad. Under *Erie*, one must consider whether the state law interferes with a federal interest and whether the state law is in an area traditionally regulated by the states.³⁵⁵ Different state laws will have different

347. See generally SUP. CT. R.

348. See 28 U.S.C. § 331 (2012).

349. 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.").

350. See generally Letter from Thomas Jefferson to Chief-Justice Jay and Associate Justices (July 18, 1793), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 app., at 747–51 (Maeva Marcus ed., 1998); Letter from Chief-Justice Jay and Associate Justices to President Washington (July 20, 1793), in *id.* at 752; Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in *id.* at 755; Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 15–23 (1998).

351. See generally William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997).

352. See *id.* at 782.

353. Order of Jan. 21, 1963, 374 U.S. 865, 870 (1963) (statement of Black & Douglas, JJ.).

354. See *supra* Part III.C.1.

355. See *supra* Part III.C.2.

degrees of interference with federal interests and will attempt to regulate different areas. So, a generic *Erie* answer is unavailable.

That being said, it would be useful if the Court (or the Advisory Committee) would at least preview the *Erie* question. It might, at a minimum, remove some *Erie* issues by declaring that certain rules are not to apply in diversity cases. Federal Rule of Civil Procedure 3 provides a simple illustration: it states that a “civil action is commenced by filing a complaint with the court.”³⁵⁶ This could mean that an action is timely under a statute of limitations if it is filed before the expiration of the statute even if the defendant is served afterwards. *Walker v. Armco Steel Corp.*³⁵⁷ held, however, that Rule 3 was inapplicable—there was “no indication that the Rule was intended to” apply³⁵⁸—to the statute of limitations issue in diversity cases. But it left untouched a line of cases that held that Rule 3 meant precisely that if the cause of action arose under federal law.³⁵⁹ The upshot is that Rule 3 defines what must be done to beat the statute of limitations in federal question but not diversity cases. Why couldn’t the Court have said that Rule 3 applies only to actions arising under federal law in the first place, when Rule 3 was initially promulgated? In fact, some rules do explicitly limit their application in diversity cases. Federal Rule of Civil Procedure 15 addresses the question whether an amendment to a pleading relates back to the date of the original pleading so as to satisfy statute of limitations concerns.³⁶⁰ It sets out a standard for determining this question, but supplies as an alternative to the federal rule of relation back in reference to state law: relation back is allowed if “the law that provides the applicable statute of limitations allows relation back.”³⁶¹ This is clearly a reference to state law, as it is state law that provides the statute of limitations in diversity cases.³⁶² Rule 15 thus has within it preemption guidance: it is not intended to provide the exclusive means of relation back in diversity cases; state law is intended to remain applicable as an alternative. So, even if the Court cannot answer all *Erie* issues in advance, there appears to be no reason why the Court could not at least avoid some of them by disavowing in the rule an intent to displace state law.

5. Preemption, *Erie*, and Uniformity

The concern of uniformity figures in both an *Erie* analysis and a preemption analysis. The kind of uniformity valued in preemption (national uniformity) is, however, quite different from the kind of uniformity most often mentioned in the *Erie* cases (uniformity within a state, i.e., between a federal court and a state court within a state). On the other hand, within the *Erie* cases lies a second uniformity value. When one takes that second *Erie* uniformity value into account, one again sees

356. FED. R. CIV. P. 3.

357. 446 U.S. 740 (1980).

358. *Id.* at 750.

359. *See Sentry Corp. v. Harris*, 802 F.2d 229, 231–32 (7th Cir. 1986). The Court in *Walker* expressly left the question of Rule 3’s role in federal causes of action open. 446 U.S. at 751 n.11.

360. FED. R. CIV. P. 15(c).

361. FED. R. CIV. P. 15(c)(1)(A).

362. FED. R. CIV. P. 15 cmt. 1991 Amendment (“Generally, the applicable limitations will be state law.”).

similarities between *Erie* and preemption. And when the pieces are fully put together, the two puzzles prove to have an identical solution.

In preemption analysis, the need for a nationally uniform body of law is a factor in favor of preemption. When Congress has extensively regulated an area and it is “one requiring national uniformity of regulation,” field preemption occurs.³⁶³ Likewise, the “perceived need for uniformity of standards is, and has always been, a critical factor” in assessing obstacle preemption.³⁶⁴ Preemption will occur in order to prevent states from interfering with legislation that Congress intended to be a “harmonious whole.”³⁶⁵ While this always remains a matter of Congress’ intent, that an area is ripe for national uniformity supports a conclusion that this is what Congress intended. Thus, a perceived need for national uniformity of regulation supports finding preemption.

The policy of uniformity in the *Erie* context usually means something else. In *Erie* itself, the Court delineated two different kinds of uniformity. *Swift v. Tyson*³⁶⁶ had “attempt[ed] to promote uniformity of law throughout the United States,” but ironically “the doctrine . . . prevented uniformity in the administration of the law of the State.”³⁶⁷ In other words, *Swift* valued national or interstate uniformity; *Erie* rejected that in favor of *intrastate* uniformity.³⁶⁸ Thus, as the Court put it in *York*, a federal diversity court is “in effect, only another court of the State.”³⁶⁹ Thus the federal court must achieve uniformity not nationally but with a state court in the state in which it sits:³⁷⁰ “the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.”³⁷¹ It would thus appear that *Erie*’s notion of uniformity is at odds with that of standard preemption.

But there are in *Erie* competing uniformity values. The uniformity policy in *Erie* discussed above is a factor that calls for the application of state law. The other type of uniformity policy in *Erie*, less frequently mentioned, pulls in the opposite direction, in favor of applying a federal rule. The “provision of uniform and consistent procedure in federal courts” is “the fundamental purpose of the Federal Rules.”³⁷² This goal of “bring[ing] about uniformity in the federal courts by getting away from local rules” was “[o]ne of the shaping purposes of the Federal Rules.”³⁷³

363. See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 970 (2002).

364. *Id.* at 1016; see also Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 348 (1993).

365. See *Arizona v. U.S.*, 132 S. Ct. 2492, 2502 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)).

366. 41 U.S. 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

367. *Erie R.R. v. Tompkins*, 304 U.S. 64, 75 (1938).

368. See *id.* (“In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.”).

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

370. This point was made clear in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that “[t]he conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts”).

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

372. *Marek v. Chesny*, 473 U.S. 1, 24 (1985) (Brennan, J., dissenting).

373. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (quoting *Lumbermen’s Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

This uniformity policy cuts against state-by-state variation in the federal courts. It is in fact a policy of national procedural uniformity. There are, in short, two *Erie* uniformity policies. The task is to accommodate the concern for national procedural uniformity with the concern for state autonomy in governing primary legal relations. *Erie* thus attempts to balance uniformity and diversity.

Seen in this light, *Erie* and preemption treat uniformity similarly. Both pay heed to a policy of national uniformity. This concern of uniformity pulls the analysis toward applying federal law. But in both areas, there is counterweight. In *Erie* it is a concern for the “the autonomy and independence of the States.”³⁷⁴ In preemption, it is a preservation of “the historic police powers of the States.”³⁷⁵ When preemption is not found in a substantive area, this has the effect, as does applying state law in *Erie*, of preserving the diversity of the states. The “presumption against preemption promotes federalism: states will be more free to be laboratories of democracy, allowing them to compete against the federal government and each other in the quest for efficient regulatory policies.”³⁷⁶ Finding preemption, on the other hand, “force[s] national uniformity on a particular issue, stifling state-by-state diversity and experimentation.”³⁷⁷ In short, in both areas there is a careful balancing of uniformity and diversity.

6. The Analysis Applied to *Shady Grove*

To illustrate how the principles of preemption apply to an *Erie* case, I will examine the Supreme Court’s latest *Erie* case, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,³⁷⁸ through this analytic lens.

At issue was the applicability in a diversity case of a New York statute providing that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”³⁷⁹ The claim in *Shady Grove* was for statutory interest on late-paid insurance benefits,³⁸⁰ which would seem to qualify for class treatment under Federal Rule of Civil Procedure 23. The Court fractured rather badly. Justice Scalia wrote an opinion, part of which commanded five votes.³⁸¹ It held that Rule 23 controlled the question of class action treatment.³⁸² It concluded that Rule 23 was a “categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”³⁸³ Justice Scalia then concluded that Rule 23 was valid under the Rules Enabling Act,³⁸⁴ using the test of

374. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (quoting *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

375. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

376. Jared P. Roscoe, *State Courts and the Presumption Against Banking Preemption*, 67 N.Y.U. ANN. SURV. AM. L. 309, 338–39 (2011).

377. Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 130 (2004).

378. 559 U.S. 393 (2010).

379. N.Y. C.P.L.R. 901(b) (McKinney 2010).

380. *Shady Grove*, 559 U.S. at 397.

381. *See id.* at 395 (identifying Justices joining various opinions).

382. *See id.* at 398 (stating that “Rule 23 provides an answer” to the question).

383. *Id.*

384. *See id.* at 410 (plurality opinion).

Sibbach v. Wilson & Co., which asks whether the rule “really regulates procedure.”³⁸⁵ Since Rule 23 did, Justice Scalia found it valid.³⁸⁶ And since it was valid, it controlled under *Hanna* and the Supremacy Clause.³⁸⁷ But this part of his opinion (on validity) drew only four votes; Justice Stevens departed from Justice Scalia to write a separate and different analysis of Rule 23’s validity.³⁸⁸ He believed Rule 23 was valid not simply because it really regulated procedure, but because New York law was not substantive and therefore Rule 23 did not “abridge, enlarge, or modify” state substantive rights.³⁸⁹ Finally, Justice Ginsburg, with Justices Kennedy, Breyer, and Alito dissented. They would not have found Rule 23 to violate the Enabling Act. Instead they would simply find it inapplicable. Justice Ginsburg characterized the line of *Erie* cases as “vigilantly read[ing] the Federal Rules to avoid conflict with state laws.”³⁹⁰ She chided the majority for departing from the prior approach of “avoid[ing] immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest”³⁹¹ and employing instead “a mechanical reading of Federal Rules, insensitive to state interests.”³⁹² In the view of the dissent, Rule 23 conflicted with a state policy that had “a manifestly substantive end: Limiting a defendant’s liability in a single lawsuit in order to prevent the exorbitant inflation of penalties.”³⁹³

The opinions may be divided into three approaches. Justice Scalia applies preemption under the Enabling Act remorselessly. If a federal rule, at least in part, touches on a procedural matter, it is valid and trumps contrary state law, regardless of the nature or purpose of state law: “it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.”³⁹⁴ Justices Stevens and Ginsburg, on the other hand, both think that solicitude for state law and the underlying state substantive policies that compete with the federal rule should influence the analysis. Where they differ is in the placement of this concern. Justice Stevens would seek to protect state prerogatives in a validity analysis: if the rule does “abridge, enlarge or modify” state substantive law it is invalid.³⁹⁵ Justice Ginsburg places the protection of state substantive policies within the interpretative phase: if there are significant state substantive policies, the rule should be read to avoid a conflict.³⁹⁶

Justice Ginsburg has the best of it here. Considering *Shady Grove* as a preemption case, one would start with a presumption against preemption. State law could more than plausibly be read as an effort to limit liability in cases of statutory penalties. The

385. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

386. *See Shady Grove*, 559 U.S. at 408 (2010) (plurality opinion).

387. *See id.* (plurality opinion) (“Rule 23 . . . falls within § 2072(b)’s authorization.”).

388. *See id.* at 424 (Stevens, J., concurring).

389. *Id.* at 431–36 (Stevens, J., concurring). *See generally* 28 U.S.C. § 2072(b) (2012) (“Such rules shall not abridge, enlarge or modify any substantive right.”).

390. *Shady Grove*, 559 U.S. at 439 (Ginsburg, J., dissenting).

391. *Id.*

392. *Id.* at 443.

393. *Id.* at 445.

394. *Id.* at 410 (plurality opinion).

395. *Id.* at 431–36 (Stevens, J., concurring).

396. *See id.* at 446 (Ginsburg, J., dissenting).

effort was “to avoid ‘annihilating punishment’” in the form of a class action to recover a penalty under state law.³⁹⁷ Setting the amount of a statutory penalty is in any sense of the word substantive. Since this is in an area of traditional state regulation, the presumption should exist in full force. This rules out Justice Scalia’s rigid approach, which ignores state policies.³⁹⁸

And Justice Ginsburg is to be preferred over Justice Stevens. Her approach allows moderation. Under Justice Stevens’s approach, there is no mechanism to protect state policies other than the draconian one of holding the federal rule invalid, a step he himself regards as extreme: “the bar for finding an Enabling Act problem is a high one.”³⁹⁹ Moreover, Justice Ginsburg’s approach more accurately captures the preemption issue: Is federal law to displace state law? Justice Stevens’s approach, on the other hand, replaces the question of accommodating federal and state law with one of invalidating federal law. If applied in a standard preemption case, his approach would seemingly find all state laws preempted unless the conflicting federal law was invalid. Federal law applies, according to Justice Stevens, unless it is invalid. This, if applied to standard preemption cases, would greatly expand the scope of federal law and change the result of many cases. Federal law would control so long as Congress did not exceed its legislative competence under, for example, the Commerce Clause. Such a result simply fails to describe the actual results of the preemption cases.

One final note on *Shady Grove*. Justice Scalia would have *Erie* questions under a federal rule answered uniformly throughout the nation. He concluded that Rule 23 is “valid in all jurisdictions.”⁴⁰⁰ In his understanding, a rule “is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law.”⁴⁰¹ This approach is also implicit in Justice Stevens’s approach. If he had found New York’s policy to be substantive, he would have invalidated Rule 23. But that would necessarily have a national application. Rule 23 would be invalid and inapplicable even in states that, unlike New York, had a procedural, not a substantive, policy in conflict with the rule or even had no conflicting policy whatsoever. Justice Ginsburg’s approach, on the other hand, is consistent with a preemption approach. The question is whether a particular state law is in conflict with federal law. This

397. *Id.* at 444 (quoting V. ALEXANDER, PRACTICE COMMENTARIES C901:11, reprinted in 7B MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANNUAL 104 (2006)).

398. Justice Scalia’s approach is however, internally consistent. He has elsewhere written against the presumption against preemption in express preemption cases. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., dissenting) (“But it seems to me that assumption [against preemption] dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the scope of that pre-emption is meant to be.” (emphasis omitted)); Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 272–73 (2011).

399. *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring).

400. *Id.* at 410 (plurality opinion).

401. *Id.* at 409.

necessitates—properly so—a state-by-state approach. And that is the pattern on preemption cases.⁴⁰²

CONCLUSION

In *Hanna v. Plumer*,⁴⁰³ the Supreme Court attempted to divide *Erie* issues into two categories, one straightforward (when a federal rule was involved) and the other more nuanced (when the conflicting federal law was judge-made). This division, I believe, cannot stand. In either type of case, one is examining a preemption problem, and preemption problems are anything but a straightforward and simple reading of the relevant federal statute or regulation. The question of interpretation, of scope, is always present. Applying the principles of interpretation used in the preemption cases—such as the presumption against preemption in areas traditionally left to the states and the assessment of a federal interest—actually does a better job of explaining the *Erie* cases than *Hanna* does. The reference to these interpretive tools is more explicit when the federal law in question is not in a federal rule. But the need for interpretation exists on both sides of the purported *Hanna* dichotomy, and the same factors and should be consulted whether a federal rule is involved or not.

It is preferable to examine the underlying state interests at the level of interpretation rather than validity of the federal rule. That is, if a federal rule touches too deeply upon areas traditionally left to the states and seems in that sense “substantive,” the better outcome is to declare that the rule was not intended to apply in that situation rather than declaring the rule to be invalid. In that way, the rule can be used in states in which there is no conflicting state substantive policy. This results in a patchwork of answers to *Erie* questions, a federal rule being used in diversity in some cases and not in others, but that is entirely appropriate if one remembers the preemption roots of *Erie*. Preemption is inherently a state-by-state proposition, since some state laws will conflict with or stand as obstacles to federal law and others will not.

Finally, the category of *Erie* cases in which the federal rule conflicts with state law in such a way as to render dual compliance impossible is and should be narrow. If, as will usually be the case, compliance with either state or federal law is possible, one should not automatically apply the federal law. Instead, consistent with obstacle preemption, a court should examine the underlying federal policy to see if state law is in fact an obstacle to it. Again, in line with the foregoing, this makes only a very few cases simple; the majority of *Erie* issues will require extended analysis. But this is a question of federalism, and there is no reason to think that the federalism issues in *Erie* are any more straightforward than they are elsewhere.

In the end, there is but a single bird that is our target. *Erie* and preemption are the same problem, albeit in somewhat different contexts. Remembering this, and applying to *Erie* the lessons of preemption, will in fact make *Erie* analysis more cogent as well as more accurate.

402. See *supra* notes 217–23 and accompanying text.

403. 380 U.S. 460 (1965).

