COMMENT

TOWARDS A UNIFIED THEORY OF "REVERSE-*ERIE*"

OMAR K. MADHANY[†]

[†] Senior Editor, Volume 162, *University of Pennsylvania Law Review*. J.D. Candidate, 2014, University of Pennsylvania Law School; B.A., 2011, University of Western Ontario. I am grateful to Professor Stephen Burbank for his advice and guidance during the writing process, as well as to the editors of the *University of Pennsylvania Law Review* for their thoughtful suggestions.

INTRODUCTION

A "reverse-*Erie*"[1] problem arises when a state court is hearing a federal cause of action[2] and confronts a situation in which a state law and a federal law conflict. The term finds its etymological origin in *Erie Railroad Co. v. Tompkins*, which dealt with the opposite problem of a federal court sitting in diversity confronting a situation where a state law and a federal law conflict.[3]

As Professor Kevin Clermont noted in one of the only in-depth scholarly papers exclusively on reverse-*Erie*, the topic is "strangely ignored by most scholars" and often "misunderstood, mischaracterized, and misapplied by judges and commentators."[4]

Although reverse-*Erie* problems are regularly dealt with at the state court level,[5] they are rarely dealt with at the federal level. Since a reverse-*Erie*

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1 Some commentators alternatively use the term "converse-*Erie*," Joseph R. Oliveri, *Converse-*Erie*: The Key to Federalism in an Increasingly Administrative State*, 76 GEO. WASH. L. REV. 1372 (2008), or "inverse-*Erie*," Gregory Gelfand & Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937, 941 n.10 (1988). For consistency, this Comment refers to the concept as "reverse-*Erie*."

2 *See* Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 (2012) (noting that concurrent state court jurisdiction over federal causes of action is a presumption rebuttable only by express congressional intent for exclusive federal court jurisdiction); Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that state courts of competent jurisdiction may not refuse to hear federal causes of action).

3 308 U.S. 64 (1938).

4 Kevin M. Clermont, *Reverse-*Erie, 82 NOTRE DAME L. REV. 1, 2 (2006).

5 *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1960 (2011) ("[S]imply by virtue of their numbers, state courts hear more federal-question cases than do federal courts, and so these state cases have a significant effect

problem, by definition, can arise only in state court, the only federal court that can consider a reverse-*Erie* problem is the U.S. Supreme Court on a writ of certiorari from a state court of last resort[6]—an infrequent occurrence.[7] Indeed, commentators consider only four reverse-*Erie* cases to be seminal[8] in the development of the current doctrine.

Given that these four cases were decided decades apart from each other and do not use a consistent methodology,[9] state courts facing reverse-*Erie* problems are left to resolve the Supreme Court's ambiguity in this area. The result has been virtual chaos, with state courts approaching reverse-*Erie* problems with different methodologies that lead to divergent results.[10] This Comment attempts to develop an analytically cogent framework for the treatment of reverse-*Erie* problems.

At the outset, it is important to note that a reverse-*Erie* problem can occur when (1) a federal constitutional provision conflicts with a state law; (2) an express federal statutory provision conflicts with a state law; (3) federal common law fashioned or endorsed by the U.S. Supreme Court conflicts with a state law; (4) federal common law fashioned or endorsed by an inferior federal court conflicts with a state law; or (5) a state law conflicts with the interests inherent in a federal statute (i.e., the creation of federal common law may be justified where it does not already exist).[11]

In the first three categories, a state court operating under the command of the Supremacy Clause is bound to follow the federal rule as long as it is pertinent and valid.[12] Thus, this Comment focuses on categories four and

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on the meaning of federal law."); *infra* notes 246-49 (providing a range of cases where state courts faced reverse-*Erie* problems).

6 *See* 28 U.S.C. § 1257(a) (2012) (allowing the U.S. Supreme Court to hear appeals from decisions of "the highest court of a State in which a decision could be had" implicating federal law).

7 *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1269 (2012) (noting that, between the Court's 1993 and 2008 terms, appeals from a state supreme court constituted only thirteen percent of the Court's docket).

8 *See* Clermont, *supra* note 4, at 23 (identifying these seminal decisions as *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949); *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952); *Felder v. Casey*, 487 U.S. 131 (1988); and *Johnson v. Fankell*, 520 U.S. 911 (1997)).

9 *See infra* note 244.

10 *See infra* notes 246-48 and accompanying text.

11 *But see* Clermont, *supra* note 4, at 20 (defining reverse-*Erie* more narrowly to include only the first three categories that this Comment identifies).

12 *See* U.S. CONST. art. VI ("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."); Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 689 (N.C. 1999) ("[F]ederal common law rules . . . are binding on the states through the supremacy clause."); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 897 &

five, where pertinent federal common law created or endorsed by an inferior federal court exists or where pertinent federal common law has yet to be created by any federal court.

The goal of this Comment is to examine the limitations on the federal courts in creating federal common law and to apply these limitations in developing a unified theory for treating reverse-*Erie* problems. This Comment develops an analytical framework for state court judges to use when facing a situation where a state rule conflicts with federal common law fashioned by an inferior federal court or with federal statutory interests that may justify the creation of federal common law.

Part I recounts the facts and legal holdings of the Court's four seminal reverse-*Erie* cases. These cases are used for illustrative purposes throughout the Comment. Part II demonstrates that the Supreme Court is creating common law, rather than engaging in statutory interpretation, in its reverse-*Erie* cases. Thus, the Supreme Court's four seminal reverse-*Erie* cases fall within the fifth category of reverse-*Erie* identified above.

Part III introduces the Rules of Decision Act (RDA)[13] as the main limitation on the power of the Court to create federal common law. Part III demonstrates that, once the RDA is seen as a limitation on the Court's power to create common law, the notion that the Court is "preempting" state law in its reverse-*Erie* cases is misleading.

Additionally, given that the Court is fashioning common law in its reverse-*Erie* cases, Part III provides an in-depth examination of the nature of the RDA limitation on the power of the Court to create federal common law.[14] The primary question when the Court is deciding whether it should fashion federal common law under an RDA approach is: Has Congress required in its statute that the Court create a uniform judge-made rule? To this end, Part III examines the Court's federal common law jurisprudence with the goal of illuminating when the Court is more or less likely to determine that a federal statute has required the creation of a uniform judge-made rule.

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n.64 (1986) (citing U.S. Supreme Court cases that hold federal common law to be binding on state court judges).

[13] *See* 28 U.S.C. § 1652 (2012) ("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.").

[14] A discussion of the power of federal courts to create common law is beyond the scope of this Comment. This Comment assumes that federal courts have the power to create common law under a delegated theory of federal common law making power and discusses only the limits on that power. For a discussion of the delegated theory of federal common law making power, see generally Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 862-77 (2005).

The Comment then evaluates the Court's four seminal reverse-*Erie* cases against this RDA theory of federal common law making to determine how faithful the Court has been to this statutory limit on its power. Part III concludes that the Court has been inconsistent in its reverse-*Erie* cases with the methodology it has used in determining that a federal statute has or has not required that the Court fashion federal common law.

With the limits on the power of federal courts to create common law explored, Part IV develops an analytical framework for state court judges to use when facing a reverse-*Erie* problem in categories four and five. This analytical framework is based on the idea that a state court facing a problem of federal law must decide the issue as it believes the U.S. Supreme Court, which is bound by the RDA, would decide the issue.

Part IV begins by addressing the fourth category of reverse-*Erie* (pertinent federal common law created by inferior federal courts). The Comment argues that state court judges should give federal common law created by federal courts of appeals a presumption of correctness. That is to say, a state court should presume that the federal court of appeals acted within its RDA limit as outlined in Part III of this Comment. However, where the state court finds that the federal court of appeals' creation of the common law was clearly erroneous (i.e., the federal court of appeals clearly erred by not adhering to the RDA limit on its power), the state court should not be required to follow the common law.

As to the fifth category of reverse-*Erie* (yet uncreated federal common law), Part IV links the inconsistency of the Supreme Court in dealing with its reverse-*Erie* cases to the inconsistency of the state courts in dealing with such cases. Part IV applies the RDA limit developed in Part III to propose an analytical framework for state courts to use when facing a situation where the interests inherent in a federal statute may justify the creation of federal common law where it does not already exist. Finally, the Comment selects a variety of state court cases dealing with reverse-*Erie* problems in this fifth category and evaluates them against the proposed analytical framework.

I. THE SUPREME COURT'S FOUR SEMINAL REVERSE-*ERIE* CASES

The first step in developing a unified theory of reverse-*Erie* is to review the Court's four seminal reverse-*Erie* cases—*Brown*,[15] *Dice*,[16] *Felder*,[17] and *Johnson*.[18]

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[15] Brown v. W. Ry. of Ala., 338 U.S. 294 (1949).

A. Brown v. Western Railway of Alabama

The Supreme Court laid the foundation for modern reverse-*Erie* doctrine in *Brown v. Western Railway of Alabama*.[19] Brown was an employee of the Western Railway of Alabama.[20] He filed a Federal Employers Liability Act (FELA) claim[21] in Georgia state court against his employer after he was injured at work.[22] He alleged that the Railway had negligently allowed clinkers[23] to accumulate along the side of the railway tracks, which had injured him after he stepped on them while performing his job.[24]

At the time of his suit, Georgia state courts operated under a local pleading rule that required the court to construe pleading allegations in favor of the defendant.[25] In faithfully following the local pleading rule, the state court inferred that Brown had been injured due to his own negligence.[26] The Georgia state court thus sustained the Railway's demurrer and dismissed the case.[27]

The Supreme Court reversed.[28] It determined that Brown's allegations were sufficient to permit a jury to infer negligence on the part of the Railway under FELA.[29] In doing so, the Court noted that "the [allegations] if proven would show an injury of the precise kind for which Congress has provided a recovery [in FELA]."[30] The Court added that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[31]

Thus, *Brown* framed the reverse-*Erie* problem as a question of the extent to which a state rule can interfere with the effectuation of a federal statute's purpose. This insight laid the foundation for the Court's subsequent reverse-*Erie* jurisprudence.

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16 Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952).

17 Felder v. Casey, 487 U.S. 131 (1988).

18 Johnson v. Fankell, 520 U.S. 911 (1997).

19 *Brown*, 338 U.S. at 294.

20 *Id.*

21 *See* 45 U.S.C. § 51 (2006) ("Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . .").

22 *Brown*, 338 U.S. at 294.

23 Clinkers are jagged pieces of rock that are the byproduct of burning coal.

24 *Id.* at 297.

25 *Id.* at 295.

26 *Id.*

27 *Id.*

28 *Id.* at 299.

29 *Id.* at 298.

30 *Id.* at 297.

31 *Id.* at 298.

B. Dice v. Akron, Canton & Youngstown Railroad Co.

Only three years after *Brown*, the Court decided the second of its four seminal reverse-*Erie* cases—*Dice v. Akron, Canton & Youngstown Railroad Co.*[32] Dice was a railroad fireman who filed a FELA negligence claim in Ohio state court against his employer, a railroad company, after being injured during a work accident.[33] The railroad defended the claim by producing a document signed by the fireman releasing the railroad from all liability for a sum of money.[34] Dice claimed that the railroad fraudulently induced him to sign the document.[35]

A jury ruled in favor of Dice, finding fraud on the part of the railroad, but the trial court subsequently entered a judgment notwithstanding the verdict.[36] The trial court ruled that, under Ohio law, it was Dice's responsibility to read the release document before signing it, regardless of any fraud.[37] On appeal, the Ohio Supreme Court found that state law, not federal law, governed the validity of the release and affirmed the trial court's judgment.[38]

The U.S. Supreme Court reversed.[39] The Court began by noting that the issue before the Court—the validity of a release under FELA—was a federal issue to be determined by reference to federal law.[40] However, no federal common law existed on this topic.[41] When a court determines that an issue is to be decided in reference to federal common law, but no pertinent common law yet exists, the court can either (1) create a uniform judge-made federal rule; or (2) adopt state law as the federal rule of decision.[42] The Court held that incorporating state law as a federal rule of decision would be inconsistent with the "general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently

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32 342 U.S. 359 (1952).
33 *Id.* at 360.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at 361.
39 *Id.* at 364.
40 *Id.* at 361.
41 *Id.*
42 *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 92 (1991) (adopting a state rule of demand futility as the federal rule of decision in a stockholder derivative action brought under a federal statute); United States v. Kimbell Foods, Inc., 440 U.S. 715, 739 (1979) (adopting state law as the federal rule of decision regarding the priority of liens arising from federal government lending programs); *see also generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 757-58 (1986).

inflicted by their employers."[43] Based on this finding, the Court announced a uniform judge-made rule that a release to a FELA claim is void if fraudulently induced.[44]

The Court additionally held that the state practice of having a judge rather than a jury determine certain aspects of fraud was improper.[45] It explained that "[t]he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and that it is part and parcel of the remedy afforded railroad workers under [FELA]."[46]

Where *Brown* understood reverse-*Erie* to be a question as to what extent a state rule could inhibit the vindication of a federal statute's purpose, *Dice* provided the theoretical basis for that inquiry. The Court could engage in the *Brown* inquiry because reverse-*Erie* presented questions that were to be determined in reference to federal law.

C. Felder v. Casey

After *Dice*, over thirty-five years passed before the Court decided its next meaningful reverse-*Erie* case—*Felder v. Casey*.[47] Felder was a Wisconsin citizen who was stopped by Milwaukee police officers for questioning.[48] An altercation ensued and Felder filed a § 1983 action nine months later against the officers for violating his federal constitutional rights.[49] The officers moved to dismiss the claim for failure to satisfy a Wisconsin notice-of-claim requirement that required a plaintiff suing a state or local officer to notify the officer within 120 days of the alleged injury of his intent to file suit.[50]

The Wisconsin Supreme Court held that the state notice-of-claim provision was applicable.[51] It reasoned that a party that chooses to bring a federal action in state court must abide by state procedures.[52] It further noted that the remedial and deterrent goals of § 1983 were not compromised by the state notice-of-claim provision and that the state had legitimate interests in enacting a notice-of-claim provision.[53]

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43 *Dice*, 342 U.S. at 362.
44 *Id.*
45 *Id.* at 363.
46 *Id.* (internal quotation marks omitted).
47 487 U.S. 131, 134 (1988).
48 *Id.*
49 *Felder*, 487 U.S. at 135.
50 *Id.* at 135-36.
51 *Id.* at 137.
52 *Id.*
53 *Id.*

Yet again, the U.S. Supreme Court reversed.[54] In doing so, the Court noted that the reverse-*Erie* question is a question of obstacle preemption.[55] The Court began by holding that the state notice-of-claim provision was not a neutral and uniformly applicable state rule of procedure[56] and was inconsistent with the remedial aims of § 1983.[57] In light of these two facts, it noted that any legitimate reasons that the state had for enacting such a notice-of-claim provision were immaterial.[58]

The Court then went a step further and, citing *Erie*, held that the state provision was also obstacle preempted by § 1983 because it was outcome-determinative.[59] The state provision "predictably alter[ed] the outcome of § 1983 claims depending solely on whether they [were] brought in state or federal court."[60] Finally, the Court noted that the state rule "discriminate[d]" against the federal statute because it applied only to the precise type of action that the federal statute authorized—a claim against a governmental defendant.[61]

Felder changed the landscape of the reverse-*Erie* inquiry. Although the Court had undertaken the traditional *Brown* inquiry, rather than embracing the *Dice* theory that reverse-*Erie* problems presented federal issues to be determined in reference to federal law, the *Felder* Court framed the inquiry in the language of preemption. In addition to this theoretical shift, the Court introduced three new tests that asked (1) whether the state rule was of uniform and neutral applicability; (2) whether the application of the state rule was outcome-determinative; and (3) whether the state rule discriminated against the federal right.

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54 *Id.* at 138.

55 *Id.* ("The question before us today . . . is essentially one of pre-emption: . . . does the enforcement of [the state] requirement . . . 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"(quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

56 A neutral and uniformly applicable state rule of procedure is also known as a transsubstantive rule. Transsubstantive "procedural" rules are rules that apply to all cases regardless of their subject matter. In the state law context, such rules would be found in the states' equivalent of the Federal Rules of Civil Procedure.

57 *Felder*, 487 U.S. at 144-45.

58 *Id.* at 143.

59 *Id.* at 151 & 153.

60 *Id.*

61 *Id.* at 146.

D. Johnson v. Fankell

The Court's final meaningful reverse-*Erie* case came almost ten years later in *Johnson v. Fankell*.[62] Fankell, a terminated Idaho state employee, filed a § 1983 action against state officials, alleging a violation of her due process rights.[63] The state officials moved to dismiss based on qualified immunity.[64] The trial court denied the state officials' motion, and the Idaho Supreme Court dismissed the officials' appeal of that decision.[65] In dismissing the appeal, the Idaho Supreme Court held that a denial of a motion to dismiss for qualified immunity was not appealable under state law.[66]

This time the U.S. Supreme Court affirmed.[67] The Court began by observing that the rule regarding the appealability of the denial of a pretrial motion was "a neutral state Rule regarding the administration of the state courts."[68] Citing *Felder*, the Court then held that the state rule was not outcome-determinative because the denial of a motion to dismiss for qualified immunity would be reviewable by the state courts after a trial.[69] The Court noted that, unlike *Felder*, the state rule did not "discriminate" against the federal right.[70]

Finally, the Court found no right to an interlocutory appeal in § 1983 itself.[71] Rather, the Court noted that the right to such an appeal is found in 28 U.S.C. § 1291,[72] a statute that has no application to state courts.[73] It concluded that § 1983 did not preempt the state rule.[74]

Thus, *Johnson* cemented the modern approach to reverse-*Erie* that the Court had established in *Felder*. The Court now treats reverse-*Erie* problems as questions of preemption, rather than viewing them as matters to be decided in reference to federal law as it did in *Dice*. Additionally, the Court continues to apply the concept from *Brown* and *Dice* that a state rule may

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62 520 U.S. 911 (1997).

63 *Id.* at 913.

64 *Id.*

65 *Id.* at 913-14.

66 *Id.* at 914.

67 *Id.*

68 *Id.* at 918.

69 *Id.* at 921.

70 *Id.* at 918 n.9.

71 *Id.* at 921 n.12.

72 28 U.S.C. § 1291 (2012) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."). A ruling on qualified immunity would be appealable in federal court pursuant to § 1291 under the collateral order doctrine. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

73 *Johnson*, 520 U.S. at 921 n.12.

74 *Id.* at 923.

have to yield when it conflicts with the purpose of a federal statute. However, unlike in *Brown* and *Dice*, the Court also uses the neutral and uniformly applicable state rule test, the outcome-determination test, and the state rule discrimination test in deciding whether a state rule will be preempted.

With an understanding of the Court's four seminal reverse-*Erie* cases, Part II discusses why the three cases that resulted in new federal rules—*Brown*, *Dice*, and *Felder*—were instances of federal common law making.

II. REVERSE-*ERIE* AS FEDERAL COMMON LAW MAKING

As Part I explains, the modern Court views reverse-*Erie* as a problem of obstacle preemption. There are two ways to view the task performed by the Court when it preempts a state rule: the Court is either engaging in statutory interpretation or federal common law making.[75] A careful examination of the Court's reverse-*Erie* cases leads to the conclusion that the Court is fashioning federal common law in these cases, rather than engaging in mere statutory interpretation.

Over time, two general definitions of federal common law have emerged, one broad and one narrow. Under the broad definition, a court engages in common law making if it is looking beyond the text of a statute when it formulates a legal rule to fill a gap in a statute.[76] An alternative formulation of this broad view states that a court creates federal common law when the text of a statute does not clearly suggest the resulting legal rule.[77]

The broad view of common law has intuitive appeal. It strains the English language to consider a legal rule that is not provided for or clearly suggested by the text of a statute to be the product of statutory (i.e., textual) interpretation. What is being interpreted when a court engages in statutory interpretation if not the meaning of the words of the statute itself?

The broad view easily encompasses the Court's reverse-*Erie* cases. In *Brown* and *Dice*, the Court never identified an express provision of FELA that explicitly addressed or clearly suggested pleading requirements, the validity of releases, or the requirement of a jury trial. Similarly, in *Felder*, the Court did not identify an express provision of § 1983 that explicitly

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75 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 278 (2000).

76 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7 (1985) ("[F]ederal common law . . . refers to legal rules (substantive or procedural) that . . . are not found on the face of an authoritative federal text . . . .").

77 *See* Field, *supra* note 12, at 890 (stating that federal common law is "any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments*" (footnote omitted)).

addressed or clearly suggested any notice-of-claim requirement or lack of notice-of-claim requirement. Under the broad view, the Court was creating common law in all three cases.

In contrast, some scholars prefer a narrow view that places federal common law and statutory interpretation on a continuum instead of using a bright-line rule. The oft-quoted maxim of this approach is that "[t]he difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind."[78]

Under this narrow view, the inquiry focuses on whether a court is looking beyond the specific intent of the drafters of the legislation and trying to ascertain their general intent.[79] The proponents of this narrow view presumably use the continuum to deal with tough in-between cases where it is unclear whether a court is following the specific intentions of the draftsmen or more general intentions in filling in a gap in a statute.

None of the Court's reverse-*Erie* cases fall in this in-between zone. Nowhere in *Brown* did the Court identify any potential specific intent of Congress regarding pleading requirements for FELA actions. Rather, the Court based its "new"[80] pleading requirement for FELA actions on the proposition that the facts set out in the complaint "if proven would show an injury of the precise kind for which Congress has provided a recovery."[81] This proposition is fairly characterized as the general intent of Congress that plaintiffs with such allegations should have their day in court.

Similarly, in *Dice*, the Court based its new jury requirement in FELA actions on the fact that a jury trial was "part and parcel of the remedy afforded railroad workers under [FELA]."[82] The Court failed to point to any specific intent of Congress to support this proposition[83] but found it sufficient that "[t]he right to trial by jury is a basic and fundamental feature

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78 Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980).

79 *See* Merrill, *supra* note 76, at 5 ("[Under the narrow] view, federal common law is not qualitatively different from textual interpretation, but rather is an extension of it, with 'interpretation' now understood in a broader sense than the search for the specific intentions of the draftsmen.").

80 The term "new" is used in this context to mean that the rule was not provided for by statute or prior common law.

81 Brown v. W. Ry. of Ala., 338 U.S. 294, 297 (1949).

82 Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952) (internal quotation marks omitted).

83 *See id.* at 367-68 (Frankfurter, J., dissenting) ("[FELA] does not require a State to have juries for negligence actions brought under the Federal Act in its courts. . . . Nothing in [FELA] or in the judicial enforcement of the Act for over forty years forces such judicial hybridization upon the States.").

of our system of federal jurisprudence."[84] This reasoning supports the view that the Court was looking to Congress's general intent. Congress legislated against the backdrop of this principle and thus the principle's continued vitality was part of Congress's general intent.[85]

As for the Court's new rule in *Dice* regarding the validity of a release of a FELA claim, the Court was more explicit that it was following the general intent of Congress. In declaring the rule that a fraudulently obtained release of a FELA claim was not valid, the Court noted that "[a]pplication of [the opposite] rule to defeat a railroad employee's claim is wholly incongruous with the *general policy* of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers."[86]

Finally, in *Felder*, the Court did not identify any specific intent of Congress not to have a notice-of-claim requirement in § 1983 actions, such as a proposed, but rejected, notice-of-claim amendment to § 1983.[87] Rather, the Court based its decision on the notion that a notice-of-claim requirement was inconsistent with the "compensatory goals of the federal legislation"[88]—in other words, the general intent of Congress. Specifically, the Court found "the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action in state court" to be "utterly inconsistent with the remedial purposes" of § 1983.[89]

Thus, under either the broad or narrow definition of common law, the Court created common law in its three reverse-*Erie* cases that resulted in a new federal rule—*Brown*, *Dice*, and *Felder*. In all three cases, the Court used the general intent of the enacting Congress to fill in a statutory gap, rather than developing a rule provided for or clearly suggested by the text of the statute in question.

Once one understands that the Court is creating federal common law in its reverse-*Erie* cases, the question becomes: What are the limits on the power of the Court to create federal common law? It is here that the RDA enters the conversation.

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84 *Id.* at 363 (majority opinion) (internal quotation marks omitted).

85 *See* Allison C. Giles, Note, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEO. L.J. 359, 380 (1990) (noting that Congress's general intent can be illuminated by examining the "background against which Congress was operating when it enacted the statute").

86 *Dice*, 342 U.S. at 362 (emphasis added).

87 *See infra* note 234.

88 Felder v. Casey, 487 U.S. 131, 143 (1988).

89 *Id.* at 149.

III. THE RULES OF DECISION ACT AS A LIMITATION ON FEDERAL COMMON LAW MAKING

> 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.[90]

These words limit the power of federal courts to create uniform judge-made rules (i.e., make common law)[91] to situations in which the Constitution or a federal statute "require[s] or provide[s]."[92]

The "provide" language encompasses areas where the Constitution or Acts of Congress are interpreted to grant the judiciary the power to fashion an entire body of federal common law. For example, the Constitution provides that "[t]he judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction."[93] Federal courts have seen this as an implicit grant of power to the federal judiciary to fashion a body of federal admiralty common law.[94] This same logic can be applied to other bodies of federal common law based on similar provisions in the Constitution[95] or in federal statutes.[96]

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90 28 U.S.C. § 1652 (2012) (emphasis added).

91 In common usage, a court "makes" or "creates" federal common law when it develops a uniform judge-made rule instead of adopting state law as a federal rule of decision. This Comment uses those terms in that spirit. However, for the sake of analytical precision, it is important to note that the act of "making" or "creating" federal common law is recognizing that an issue is to be determined in reference to a federal rule of decision. Thus, a court truly "makes" or "creates" federal common law both when it develops a uniform judge-made rule and when it adopts state law as a federal rule of decision.

92 *See* D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 469 (1942) (Jackson, J., concurring) ("[F]ederal courts may not apply their own notions of the common law at variance with applicable state decisions except 'where the constitution, treaties, or statutes of the United States [so] require or provide.'" (second alteration in original)); Burbank, *supra* note 42, at 759 (arguing that the creation of federal common law must be justified based on the language of the Rules of Decision Act).

93 U.S. CONST. art. III, § 2.

94 Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1642 (2008).

95 *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (finding, based on the language of Article III, that the apportionment of water in an interstate stream is a matter of federal common law); *see also* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1244 (1988) (identifying other bodies of federal common law that are justified in reference to "an explicit jurisdictional grant in article III," such as interstate boundaries, riparian boundaries, and transactions in which the federal government is a participant).

96 The Alien Tort Statute (ATS) is an example of a federal *statute* that, as interpreted, provides for the judiciary to fashion a body of common law. *See* 28 U.S.C. § 1350 (2012) ("The district

In this way, the "provide" language can be seen as charging the judiciary to create federal common law when the designated sources of law, as interpreted, speak to that question directly, whereas the "require" language can be seen as charging the judiciary to create federal common law when the designated sources of law, as interpreted, "require" it in order to effect federal policy.

This Part does not continue to discuss the relatively straightforward "provide" language. Rather, it focuses on the "require" language to determine when a statute "require[s]" that something other than state law provide the rule of decision (i.e., when Congress wishes the Court to develop a uniform judge-made rule).

A. *Two Common Misconceptions About Federal Common Law Making—Preemption and Separation of Powers*

In plain English, the RDA is a directive from Congress to all federal courts to use state law as a federal rule of decision in federal court unless the Constitution or a federal statute "otherwise require[s]."[97] Thus, the RDA is an instruction from Congress as to when a federal court should use a uniform judge-made federal rule and when a federal court should use existing state law as a federal rule.[98]

The necessary antecedent to Congress providing the Court with such a directive is that Congress itself has the power to choose which sovereign's law should be used as the federal rule of decision in federal court.[99] It has this power under its authority to make laws which "shall be necessary and proper" for the functioning of the federal courts and for the exercise of its Article I legislative powers.[100]

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courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (recognizing that the ATS provides for the federal judiciary to "recognize private claims under federal common law for violations of . . . [certain] international law norm[s]"). *But see id.* at 743 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the ATS is merely a jurisdictional statute that does not authorize the federal judiciary to create a body of federal common law). In this case, since the federal courts' interpretation of the text of the ATS would result in the creation of uniform judge-made rules, the statute would "provide" for the creation of federal common law.

97 28 U.S.C. § 1652 (2012).

98 *See* Westen & Lehman, *supra* note 78, at 316 ("[T]he court applies the appropriate state law . . . because Congress, through the Rules of Decision Act, has *chosen* to use state law as a federal rule of decision." (emphasis added)).

99 If Congress does not have this power, then it cannot possibly direct the Court in the RDA to determine how to exercise this power. *Cf.* Merrill, *supra* note 76, at 11 ("[T]he question of the *power* of federal courts to make law should precede questions about the content of that law.").

100 U.S. CONST. art. I, § 8, cl. 18.

Recognizing Congress's power to choose whether courts should create a federal rule or use a state rule as a federal rule in federal court (i.e., power to promulgate the RDA) is critical to understanding why the Court is wrong in framing its reverse-*Erie* cases as preemption cases. Preemption is an appropriate term only when the "preempted" rule would govern of its own force in the absence of the supposed "preemptive" rule.[101]

Going back to first principles (i.e., a world without the RDA), in federal court, state law does not govern of its own force in the absence of a federal rule.[102] The only reason state law would apply in federal court is because Congress, which has the independent constitutional power to legislate in the area, has chosen state law. The ultimate choice between state law and federal law rests with Congress, and the resultant rule is always a *federal* rule of decision regardless of the source of the rule's content.

Reintroducing the RDA, the only reason state law would apply in federal court is because the Court has determined, pursuant to *Congress's* instruction in the RDA, that a federal statute does not "require" a uniform judge-made rule.[103] Viewed in this light, the separation of powers concerns that some scholars express with respect to federal common law making by federal courts[104] lose their force. Although the Court may be exercising congressional power to make a choice between creating a uniform judge-made rule and adopting state law as a federal rule, it is doing so as part of a constitutionally permissible delegation of power.

The RDA represents a delegation by Congress of its power to choose whether the Court should use state law or a uniform judge-made federal rule in any given situation. This delegation is permissible as long as it is accompanied by an "intelligible principle" by which the Court can exercise

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101 *See, e.g.*, Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (2012) (expressly "supersed[ing]" existing state law "relat[ing] to any employee benefit plan").

102 The only exception to this proposition is in those rare situations where the Constitution requires federal courts to apply state law. *See* Burbank, *supra* note 42, at 756 & n.99 ("So long as federal courts exist and have jurisdiction to adjudicate cases in which the Constitution requires them to apply state law, that law may be said without linguistic strain to govern 'of its own force.'").

103 *Cf.* Westen & Lehman, *supra* note 78, at 359 ("[H]aving refrained from creating a rule of decision . . . *Congress* can be constitutionally presumed to have intended to choose state law." (emphasis added)).

104 *See, e.g.*, Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1255 (1996) ("The rise of federal common law is problematic because such law is . . . in tension with important features of the constitutional structure, particularly . . . the separation of powers."); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 436 (2008) ("Although typically associated with delegations to agencies, the constitutional principles on which the nondelegation doctrine is based apply with full force to delegations to courts.").

the delegated power.[105] The explicit "intelligible principle" which would make the delegation permissible is the language of the RDA. In the RDA, Congress directs the Court that it should always use state law as the rule of decision unless the Constitution or a federal statute "otherwise require[s] or provide[s]."[106] Since the Court is following this intelligible principle from Congress, rather than engaging in an independent assessment of the merits of a federal uniform rule versus incorporating state law, there is no separation of powers problem in this regard.[107]

There may be a residual separation of powers concern with respect to the fact that, once the Court determines that a federal statute has "required" a uniform judge-made rule, it must then provide the content of that uniform judge-made rule. However, this concern is not as great as it seems at first glance. The Court is not developing a rule "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."[108] Rather, the content of the rule is informed and guided by the general intent of Congress through its statute.[109]

Although some may suggest, using nondelegation terms, that the general intent of Congress is not an explicit "intelligible principle" that can guide the judiciary's development of a uniform rule, the Court has previously been comfortable with implicit intelligible principles in the form of federal policy.[110] There is no reason why the general intent of Congress in a federal

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105 *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (alteration in original) (internal quotation marks omitted)).

106 28 U.S.C. § 1652 (2012).

107 *Cf.* Westen & Lehman, *supra* note 78, at 341 (suggesting that, even if the Court incorrectly divines that Congress required the creation a uniform judge-made rule, that decision would not be such an "egregious" abuse of the Court's statutory interpretation authority to rise to the level of a separation of powers violation).

108 O'Melveny & Myers v. Fed. Deposit Ins. Co., 512 U.S. 79, 89 (1994); *see also* Burbank, *supra* note 42, at 789-90 ("Federal courts are not free to conjure up 'interests'; rather, they must tie them to policies already articulated in, or at least articulable from, valid legal prescriptions.").

109 *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 451-57 (1957) (developing a federal common law rule providing for specific performance of arbitration clauses in collective bargaining agreements based on the general intent of Congress in a statute); *supra* notes 81-89 and accompanying text; *cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979) ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.").

110 *See, e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (rejecting a claim of violation of separation of powers in a congressional delegation of power to the SEC where the intelligible principle was not explicit, but rather was "derive[d] . . . from the purpose of the Act, its factual background and the statutory context in which [it] appear[ed]"); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 416 (1935) (determining whether there was a violation of separation of powers in a congressional delegation of power to the President by "examin[ing] the context to ascertain if it

statute cannot be seen as an implicit intelligible principle as part of a constitutionally permissible delegation of power to the judiciary.[111] This view placates separation of powers concerns about the Court specifying the content of a uniform judge-made rule.

B. *Three Common Misconceptions About the Rules of Decision Act—"Rules of Decision," "In Cases Where They Apply," and "In the Courts of the United States"*

The argument could be made that the RDA does not apply to reverse-*Erie* cases because the term "rules of decision" denotes substantive rather than procedural law. As an initial matter, resort to substance–procedure labels as a proxy for the meaning of "rules of decision" is imprecise and distracts from a real discussion of whether the RDA applies.[112] It is also unhelpful because the Court sometimes finds a rule to be both substantive and procedural.[113]

In its cases that reference the RDA, the Court does not follow a procedure–substance construction of the term "rules of decision." The Court has implicated the RDA twice when assessing whether state statutes of limitations conflicted with federal policy.[114] While a statute of limitations

furnishes a declaration of policy or a standard of action, which can be deemed to relate to the [statute] and thus to imply what is not there expressed"); *cf.* Philip J. Weiser, Chevron*, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 9 (1999) ("[D]elegation to an agency can be implicit as well as explicit.").

111 Professor Thomas Merrill advances two arguments that the separation of powers concerns in the context of delegations of power to the judiciary are greater than that of delegations to agencies: (1) agencies, unlike the judiciary, are accountable to the electorate through the President; and (2) agency decisions are reviewable by the courts. Merrill, *supra* note 76, at 41 n.182.

However, just as agencies are accountable to the electorate through the President, the federal judiciary is accountable to the electorate through Congress, which has the power to change the "intelligible principle" it has given the courts. Moreover, just as agency decisions are reviewable by the courts, the federal judiciary's decisions on the creation of common law are reviewable by Congress. *See infra* note 159 and accompanying text (noting that Congress always retains the power to abrogate federal common law).

112 *Cf. infra* notes 181-87 and accompanying text (outlining the dangers of using these labels in reverse-*Erie* cases).

113 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) (finding a New York state rule that allowed its appellate courts to review and set aside excessive jury verdicts to be both "substantive" and "procedural"); *cf.* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) ("[T]he words 'substantive' and 'procedural' themselves . . . do not have a precise content, even (indeed especially) as their usage has evolved.").

114 *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 147 (1987) ("[T]he Rules of Decision Act . . . requires application of state statutes of limitations unless a timeliness rule drawn from elsewhere in federal law should be applied." (citations and internal quotation marks omitted)); *id.* at 162-63 (Scalia, J., concurring in the judgment) (recognizing that the RDA applies to a situation where a state statute of limitations conflicts with the vindication of

skirts the substance–procedure boundary, the Court still implicated the RDA.[115]

Rather, scholars have defined a "rule of decision" as "any rule by which issues in a case are decided."[116] Similarly, *Black's Law Dictionary* defines a "rule of decision" as a "rule, statute, body of law, or prior decision that provides the basis for deciding or adjudicating a case."[117] Under this definition, any rule, procedural or substantive, qualifies as a rule of decision if it is the basis for deciding a case. The Court's statute of limitations cases that reference the RDA embrace this definition as they were decided in the lower courts on the *basis* of the statutes of limitation.

Applying this definition to the Court's reverse-*Erie* cases, it appears that the state rules in question were "rules of decision" in three out of four cases. In *Brown*, the state pleading rule was the basis upon which the state courts dismissed Brown's case.[118] In *Dice*, the state rule regarding fraudulent releases was the basis upon which the state courts denied recovery to Dice.[119] In addition, the state practice of allowing a judge to determine fraud notwithstanding the jury's verdict for Dice was the basis upon which he lost the case.[120] In *Felder*, the state notice-of-claim provision was the basis upon which Felder's case was dismissed in the state courts.[121] However, in *Johnson*, the state rule about whether to allow an interlocutory appeal was not the basis for deciding the case because the appeal was interlocutory—the case had not been decided yet.[122]

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a federal right); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) (recognizing that the RDA is implicated in determining whether a state statute of limitations should be applied to a federal cause of action); *id.* at 174 n.1 (O'Connor, J., dissenting) (same); *id.* at 173-74 (Stevens, J., dissenting) (using the RDA as a basis for borrowing state statute of limitations as a federal rule of decision).

115 *See Sun Oil*, 486 U.S. at 736 ("The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.").

116 Westen & Lehman, *supra* note 78, at 366 n.165 (internal quotation marks omitted).

117 BLACK'S LAW DICTIONARY 1448 (9th ed. 2009).

118 338 U.S. 294, 298 (1949).

119 342 U.S. 359, 362 (1952).

120 *Id.* at 363.

121 487 U.S. 131, 152-53 (1988).

122 520 U.S. 911, 922-23 (1997). This Comment nevertheless extracts lessons from *Johnson* as to the Court's conformity (or lack thereof) to the RDA limit on its power to fashion common law because the Court did not make a distinction between *Johnson* and its three other reverse-*Erie* cases. It is fair to say that, in the absence of any indication to the contrary, the Court believed that it was operating under the RDA in *Johnson* just as it was in the other reverse-*Erie* cases. *Cf. infra* notes 135-39 and accompanying text (arguing that the Court's federal common law cases that do

Under this definition of "rules of decision," the Court's preoccupation with "outcome-determination" to decide whether a uniform judge-made rule is warranted in the reverse-*Erie* context is puzzling. The Court defined "outcome-determination" in *Johnson* as affecting the "ultimate disposition of the case."[123] This is just another way of saying "the basis for deciding the case." Thus, when a state rule is outcome-determinative, it is also necessarily a rule of decision, and the RDA is then implicated. If a state rule is not outcome-determinative, then it is not a rule of decision and the RDA is not implicated.[124]

The Court's analysis of outcome-determination thus is not a helpful tool in assessing Congress's intent concerning the creation of a uniform judge-made rule or adoption of state law as the federal rule of decision. Rather, the outcome-determination test is a useful inquiry only for asking whether, as an initial matter, the RDA is even implicated.

Some legal scholars have also suggested that the language of "in cases where they apply" limits the RDA's reach to diversity cases.[125] This would render the RDA inapplicable to reverse-*Erie* cases, which are, by definition, federal question cases in state court. The problem is that there is no actual evidence to support it this argument.[126] Furthermore, commentators have advanced compelling reasons against such a narrow interpretation.[127]

Finally, some argue that the language stating that the RDA applies only to "the courts of the United States" renders the RDA inapplicable to state

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not reference the RDA can serve as implicit interpretations of it). Thus, the Court's treatment of the legal issues in *Johnson* provides valuable insight into its conformity with the RDA theory of federal common law making advanced in this Comment.

123 520 U.S. at 921.

124 What the Court should do in a situation where a state rule that is not a rule of decision and a federal rule conflict, as was the case in *Johnson*, is beyond the scope of this Comment. For the purposes of this Comment, it suffices to say that the RDA would not be implicated as a limitation on the power of the Court to fashion a uniform judge-made rule.

125 *See* David P. Currie, *On Blazing Trails: Judge Friendly and Federal Jurisdiction*, 133 U. PA. L. REV. 5, 8 n.27 (1984) (characterizing the diversity-only view as a "popular rumor").

126 *See* Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895) (rejecting the claim that the RDA applies only to diversity cases because the RDA "neither contains nor suggests such a distinction"); Westen & Lehman, *supra* note 78, at 366-68 (stating that neither the RDA nor *Erie* jurisprudence support this view).

127 *See, e.g.*, Note, Clearfield*: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991, 994-95 (1953) (arguing against the diversity-only reading by noting that (1) the First Congress could have specified that the RDA applied only to diversity cases if it so desired; (2) a diversity-only interpretation would leave the federal courts without a congressional directive on how to proceed in nondiversity cases; and (3) the federal courts have applied the RDA in nondiversity cases in the past); *cf. supra* note 114 and accompanying text (citing federal question cases where the Court implicated the RDA).

courts.[128] This proposition ignores the widely accepted view that a state court must decide a matter of federal law as it believes that the U.S. Supreme Court—which is constrained by the RDA—would decide the issue.[129] In this way, the RDA constrains a state court's ability to create a uniform judge-made rule or use state law as a federal rule of decision even though the RDA's language does not explicitly constrain state courts.[130]

With these five misconceptions about federal common law making and the RDA clarified, we can now examine how the RDA serves as a limit on federal common law making.

C. *The Nature of the RDA Limit on Federal Common Law Making*

The Rules of Decision Act has been the subject of renewed scholarly attention since the Court interpreted it in *Erie*. The cryptic language of the RDA has led to divergent theories of how the RDA constrains the ability of federal courts to create common law.

1. A Troubled RDA Theory of Federal Common Law Making

One theory of the RDA limit on federal common law making focuses on the Supremacy Clause. Under this theory, federal courts have the authority

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128 *See, e.g.*, Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 865 (1989).

129 *See* La Bonte v. N.Y., New Haven & Hartford R.R. Co., 167 N.E.2d 629, 632 (Mass. 1960) ("Since the Supreme Court has not spoken on . . . . [the validity of FELA releases], we are obliged to decide the question as we think that court would decide it."); City of Lancaster v. Chambers, 883 S.W.2d 650, 658-59 (Tex. 1994) ("When deciding issues of federal law, we find ourselves in the unique role . . . of an intermediate appellate court, anticipating the manner in which the United States Supreme Court would decide the issue presented."); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1559 n.51 (1992) (noting that, since state court decisions on federal common law are reviewable by the Supreme Court, state courts should decide questions of federal common law as they believe the Supreme Court would decide those questions); Clermont, *supra* note 4, at 31-32 (same); Field, *supra* note 12, at 890 n.30 (same); *cf.* Bellia, *supra* note 14, at 907-08 (arguing that state courts that "create" federal common law have the authority to do so only "when [they] make[] law as a necessary consequence of [their] best efforts to apply existing principles of federal law" because "[t]he specific intent of the Supremacy Clause was to preclude individual states from making their own judgments of what national policy should be"); Clermont, *supra* note 4, at 30 ("Sometimes the state court has to be the very first to enunciate federal law. It has authority to do so, if it decides in accordance with existing federal law by trying to discern what the federal courts would decide is the law, rather than by undertaking to formulate federal law either in pursuit of strictly forward-looking policies that might guide a legislature or in accordance with nonpositivist principles that might guide a freely law-creating court.").

130 *Cf. infra* note 171 and accompanying text (outlining the ways in which Congress can indirectly compel state courts to use substance-specific "procedural" rules).

to fashion federal common law when the Supremacy Clause "requires."[131] Proponents argue that the Supremacy Clause "requires" the creation of federal common law when a federal policy is implicated in a court's choice to use a state rule or fashion a uniform judge-made rule.[132]

The basis for a court creating a uniform judge-made rule is that any conflicting state policy, as expressed in the state rule in question, is subordinate to the federal policy expressed in a federal statute under the Supremacy Clause. Accordingly, the Supremacy Clause is said to "require" that the court fashion a uniform judge-made rule.

However, under a plain reading of the text of the Supremacy Clause, the Supremacy Clause does not subordinate state policy to federal policy because the Supremacy Clause does not apply to inchoate federal policies. The Supremacy Clause applies only to federal *laws*.[133] Therefore, the Supremacy Clause cannot enter the analysis until a law has been formulated. It is not a source from which a court can plausibly justify the creation of a law; it is merely a directive to judges that once a federal law has been created it is supreme.[134]

Viewed in this light, the Supremacy Clause, as an instruction on how to treat existing laws, cannot "require" the creation of federal common law in the way that a statute, which contains substantive law expressing federal policy, can "require" the creation of a uniform judge-made rule. Additionally, as a matter of simplicity, why use an extra inferential step to route the federal policy embodied in a statute through the Supremacy Clause when the federal statute itself "require[s]" that something other than state law apply?

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131 *See* Weinberg, *supra* note 128, at 865 ("[T]he supremacy clause requires courts to . . . fashion . . . federal case law."); *id.* at 870 ("[A]ll courts must work under the federal common law when the supremacy clause so 'requires.'").

132 *See id.* at 872 ("Thus, before federal common law is fashioned for a case, *all that can be said to be supreme under article VI is inchoate federal policy*. But it is supreme nevertheless.").

133 *See* U.S. CONST. art. VI ("This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby . . . ." (emphasis added)).

134 *See* Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 613 (1979) ("[T]hough [the Supremacy Clause] is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause." (footnote omitted)); Burbank, *supra* note 129, at 1559 n.51 ("The Supremacy Clause is not a source of lawmaking power; it merely states that valid and pertinent federal law is supreme.").

2. The Correct RDA Theory of Federal Common Law Making

Before delving into the proper RDA theory of federal common law making, it is important to note that the Supreme Court, by and large, does not reference the RDA in its federal common law cases.[135] Thus, with few exceptions, the cases cited in this subsection do not purport to construe the RDA.

Nevertheless, one can sensibly view all of the Court's federal common law making cases as implicitly interpreting the "require" language of the RDA.[136] In the few federal common law making cases where members of the Court have explicitly viewed the RDA as a constraint on the Court, they have proceeded on the basis that a federal statute "requires" a uniform judge-made rule where the state rule at issue conflicts with the policy of the federal statute[137]—the same test the Court uses in its federal common law making cases that do not reference the RDA.[138] This is not surprising given the Court's oft-quoted maxim that the RDA is "no more than a declaration of what the law would have been without it."[139] Thus, this Comment proceeds on the basis that, even if the Court does not explicitly reference the RDA in its federal common law making cases, it is still operating under its principles and implicitly construing the RDA.

As noted in subsection III.C.1, the proper question for the Court to ask under an RDA theory of federal common law making is whether Congress, through a source of positive federal law, required that something other than state law apply. If Congress had, ex ante, made a determination about

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135 For rare exceptions to this general proposition, see *supra* note 114, and *infra* note 137.

136 *Cf.* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 727-30 (1974) (treating *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), as interpreting the RDA although the cases do not reference it).

137 *See, e.g.*, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) (concluding that the "policies and requirements of the underlying [federal] cause of action" "require or provide" for the creation of a uniform judge-made rule); Robertson v. Wegmann, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting) ("Rules of Decision Act cases disregard state law where there is conflict with federal *policy*, even though no explicit conflict with the terms of a federal statute [exists] . . . ."); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. Hoosier Cardinal Corp., 383 U.S. 696, 709 (1966) (White, J., dissenting) ("[S]tate law is applied [under the RDA] only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires.").

138 *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) ("Displacement will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law." (alteration in original) (internal quotation marks omitted)); United States v. Yazell, 382 U.S. 341, 352 (1966).

139 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 n.2 (1938); *see also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 162 (1987) (Scalia, J., concurring in the judgment) (quoting Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 464 (1831)).

whether to fashion a uniform rule or incorporate state law as the federal rule of decision, it would have to take into account two competing principles: (1) the federal interest in the uniformity of federal law; and (2) the federal[140] and state interest in having a state rule govern (i.e., federalism concerns). Since Congress cannot specify how it would resolve this tension with regard to every possible state rule that could conflict with its statute, it promulgated the RDA. To determine whether Congress's statute "requires" a uniform judge-made rule on any given issue, the Court must pick up on certain clues as to how Congress would have decided the issue.

The first step in answering the question is to consider whether "a *significant conflict* exists between an identifiable federal policy or interest and the [operation] of state law."[141] To determine whether a significant conflict exists, the Court must identify some kind of "clear and substantial" goal or policy of the federal legislation with which the state rule conflicts.[142] Thus, the starting point of the RDA inquiry has two components: (1) identifying a pertinent federal policy; and (2) determining if the state law is in conflict with that policy.[143]

Under the proper RDA theory of federal common law making, the more clear and substantial this federal policy and the more significant the conflict between the state rule and federal policy, the more likely the statute requires that something other than state law apply. By the same token, if there is no clear and substantial federal policy and/or there is no significant conflict, the statute does not require that something other than state law apply.

To find the federal policy, the Court looks to Congress's general intent in the relevant statute.[144] The federal policy is more "clear" (and potentially

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140 *See infra* note 156 and accompanying text (discussing the nature of the *federal* interest in vertical uniformity of the law).

141 *Boyle*, 487 U.S. at 507 (alteration in original) (emphasis added) (internal quotation marks omitted); *see also Robertson*, 436 U.S. at 598 (Blackmun, J., dissenting); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law."); *Hoosier Cardinal*, 383 U.S. at 709 (White, J., dissenting).

142 *Yazell*, 382 U.S. at 352; *cf.* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 89 (1994); Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 621 (1958) (declining to hold federal legislation as preempting state law when the policy of the federal legislation was only in "remote" conflict with the state law).

143 *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) ("[W]e must . . . determine whether application of state law would frustrate specific objectives of the federal programs.").

144 *See Wallis*, 384 U.S. at 69; *cf.* Justin Plaskov, Comment, *Geothermal's Prior Appropriation Problem*, 83 U. COLO. L. REV. 257, 299 n.303 (2011) ("While it is most important to determine

more "substantial") when it is readily identifiable in the legislative history of the statute.[145] In addition, it is more "clear" (and potentially more "substantial") when it has been clearly expressed by Congress in analogous statutes.[146] This is especially true where the Court believes that, in promulgating the analogous statute, Congress weighed the same federal and state interests implicated in the statute in question.[147]

If a "clear and substantial" federal policy exists, the inquiry turns to the level of conflict between the state rule and the federal policy. If there is a conflict (however small), then there is at least a small federal interest in a uniform judge-made rule. However, one must be careful not to put the cart before the horse. The analytically precise inquiry asks first about the existence of a conflict and then, from this conflict, *infers* a federal interest in a uniform judge-made rule—not the other way around.[148]

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if Congress intended to override state law, where a statute is ambiguous as to that specific point, the general intent of the statute becomes significant.").

If this discussion of federal policy sounds familiar, it is because it is similar to the test for whether the Court is creating common law or engaging in statutory interpretation under the narrow definition of common law. Under the narrow definition of common law, the Court is creating common law when it bases its decision on the general intent of a statute. *See supra* note 79 and accompanying text. General intent is essentially another term for the policy behind a statute. *See* United States v. Haggar Apparel Co., 526 U.S. 380, 392-93 (1999); Jonathan P. Rich, Note, *The Attorney–Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145, 157 (1988).

Thus, one can view the Court's inquiry about the general intent of a statute in reverse-*Erie* cases as part of this "significant conflict" inquiry. For examples in the reverse-*Erie* context where the Court found a state rule conflicted with the general intent of a statute, see *supra* notes 81-89 and accompanying text.

145 *See* Burks v. Lasker, 441 U.S. 471, 480-85 (1979) (quoting from the legislative history of a statute to support a finding that the federal policy is "clear").

146 *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) ("Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules . . . when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand."); *cf.* Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 495 (1980) (declining to consider attorney's fees in a calculation of damages in a FELA action where FELA was silent on the matter but similar federal statutes explicitly provided for compensation of attorney's fees).

147 *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 169 (1983) ("[W]e have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.").

148 *Cf.* Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213, 220 (1997) ("To invoke the concept of 'uniformity,' however, is not to prove its need."); O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 88 (1994) ("What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. . . . Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules.").

And a simple conflict is not enough—the conflict must be "significant." The more significant the conflict, the more likely the Court's inference that the statute requires a uniform judge-made rule. There will not be a "significant" conflict when the state law can coexist with minimal disruption to the federal policy or properly effectuate the federal policy.[149]

But the Court has been hesitant to find that a statute has "required" a uniform judge-made rule even when there is a "significant conflict" with a "clear and substantial" federal policy and, thus, a strong need for a uniform judge-made rule; such a finding is a necessary but not sufficient condition.[150] The federal policy–conflict inquiry is only the first part of the analysis.

The second part of the analysis consists of a variety of federalism inquiries the Court looks to for clues as to whether the statute does not require that something other than state law apply even in the face of a significant conflict with a clear and substantial federal policy.

First, the statute is less likely to have "required" a uniform judge-made rule where there is a strong state interest in using the state rule. The state interest is particularly strong in areas of law that are traditionally reserved to the states.[151]

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149 *See Wallis*, 384 U.S. at 69-70 (declining to create federal common law where state law was sufficient to carry out the federal policy of promoting the assignability of mineral leases); *id.* at 71 ("Apart from the highly abstract nature of this [federal] interest, there has been no showing that state law is not adequate to achieve it.").

150 This is likely because the concept of the general intent behind a statute is so nebulous. Determining the general intent of a statute is a difficult and imprecise task because, by its definition, the enacting Congress did not precisely lay out the general intent. *See* Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment) (expressing doubts as to the constitutionality of preempting state laws based on "generalized notions of congressional purposes that are not embodied within the text of federal law").

Nevertheless, the Court must play some role in effectuating the general intent of Congress. The Court is in a better institutional position than Congress to carry into effect the general intent of Congress on a day-to-day basis. *Cf.* Lemos, *supra* note 104, at 453 ("[A]gencies are better able than Congress to adapt rules to respond to new information or changed circumstances.").

Moreover, Congress cannot expressly provide uniform rules whenever a new state rule becomes inconsistent with the general intent of its statute. *Cf.* Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that, in an "increasingly complex society," Congress must sometimes delegate its power in order to effect its will).

151 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) ("[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (citation and internal quotation marks omitted)); United States v. Yazell, 382 U.S. 341, 352 (1966) (noting that the Court will create federal family common law instead of using state family law only where a federal policy will "suffer major damage"); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (observing that family law is traditionally a "matter of state concern" and should generally supply the federal rule of decision).

Second, as the Court has noted on occasion, "Congress acts . . . against the background of the total *corpus juris* of the states."[152] This implies that the statute is less likely to have required a uniform judge-made rule where the state rule occupies a well-developed area of state law.[153]

Third, Congress is in a better institutional position to legislate than the Court.[154] Thus, the statute is less likely to have required a uniform judge-made rule where the question of fashioning common law touches on a host of policy considerations (which legislatures are in a more legitimate position to weigh than courts).[155]

Finally, the Court has been hesitant to find that the statute required a uniform judge-made rule where state citizens have predicated their commercial relationships on state law.[156] This concern ostensibly carries more weight in the Court's determination about Congress's intent where the state law has been in place for a long period of time.

Thus, cases where the Court declined to create a uniform judge-made rule[157] can be seen as situations where the federal policy (i.e., general intent of Congress) was not "clear and substantial" enough to overcome the federalism-based indicators noted above. In such cases, Congress likely did

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152 *Atherton*, 519 U.S. at 218 (citation and internal quotation marks omitted).

153 *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1977) (declining to create federal corporate common law since state corporate law was firmly established).

154 *Cf. Wallis*, 384 U.S. at 68 ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress.").

155 *See* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 89 (1994) ("Within the federal system, at least, we have decided that that function of weighing and appraising [policy considerations] is more appropriately for those who write the laws, rather than for those who interpret them." (citation and internal quotation marks omitted)).

156 *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 674 (1979) ("*Private landowners rely on state real property law when purchasing real property* . . . . There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest." (emphasis added)); United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) ("Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule *would disrupt commercial relationships predicated on state law*." (emphasis added)); *Santa Fe*, 430 U.S. at 479 ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." (citation and internal quotation marks omitted)).

One might initially consider this factor a part of the inquiry that asks whether the state interest in using its rule is strong. However, the hesitancy to disrupt commercial relationships predicated on state law is, at its heart, a discrete federal interest. *See* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949 (2006) (recognizing that the interest in vertical uniformity of the law is a federal interest); Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1229 (2011) (same).

157 *See, e.g.*, *supra* note 42.

not intend its statute to "require" the creation of a uniform judge-made rule. While none of the factors noted above are individually dispositive,[158] they contribute to an overall finding that the statute did not "require" the creation of a uniform judge-made rule.

Viewed in this light, the Court's determination of Congress's intent is based on a sliding scale of factors. If the federal policy is more clear or substantial, or the conflict between the policy and a state rule is more significant, the Court will give less weight to the federalism factors identified above. If the federal policy is less clear or substantial, or the conflict between the policy and a state rule is less significant, the federalism factors will be accorded more weight.

It is also worth noting that, after the Court's analysis, Congress always has the option of overruling the Court. Congress can tell the Supreme Court that it came to an incorrect determination in finding that a statute required the creation of federal common law by abrogating the common law.[159]

3. Evaluating the Court's Reverse-*Erie* Cases Against the Correct RDA Theory of Federal Common Law Making

The methodology that the Court uses in its reverse-*Erie* cases does not explicitly follow the inquiry for the creation of federal common law outlined in subsection III.C.2. The simple explanation for this is that the Court has not recognized that a reverse-*Erie* case is a decision about whether or not to create federal common law, rather than a variant of the *Erie* problem. Nonetheless, the Court's reverse-*Erie* jurisprudence can fit into the framework for the creation of federal common law outlined above.

As to the first part of the federal common law analysis, the Court considers whether there is a significant conflict between a state rule and a clear

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158 *Cf. Santa Fe*, 430 U.S. at 479 (noting that the mere existence of a parallel state law remedy does not prohibit the Court from creating a federal common law remedy).

159 *See* Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) ("[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is subject to the paramount authority of Congress." (citation and internal quotation marks omitted)); Sergio J. Campos, Erie *as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1593 (2012) (noting that Congress can always abrogate common law through legislation); Westen & Lehman, *supra* note 78, at 339 (suggesting the Act of State Doctrine as an example of Congress abrogating a common law rule fashioned by the Court); *cf. id.* at 340 ("When the federal courts . . . misperceive the law as implicitly expressed through the enactments . . . of the legislature . . . the law they make can be said to be invalid.").

and substantial federal policy in its reverse-*Erie* cases. The Court has been faithful to this part of the analysis.

In *Brown*, the Court implicitly identified the general intent of Congress in FELA as the promotion of victim compensation.[160] It found, as it does in the federal common law context,[161] that the state rule could not coexist with the federal policy without disrupting it and, thus, that there was a significant conflict between the state rule and Congress's general intent.[162]

In *Dice*, the Court found that the right to a jury trial in the federal system of jurisprudence, with which the state rule conflicted, was so fundamental that Congress drafted FELA with it in mind—that is to say, its continued vitality was part of Congress's general intent in the statute.[163] The Court found the general intent of the jury requirement in the values animating the Seventh Amendment to the Constitution,[164] just as the Court finds the general intent of Congress in analogous statutes in the federal common law setting. Even though the analogous document in *Dice* was the Constitution, the general principle applies—looking to a document other than the statute itself can illuminate Congress's intent.[165]

In *Felder*, the Court found that the state rule conflicted with the general intent of Congress in § 1983 related to victim's compensation.[166] Finally, in *Johnson*, the Court declined to fashion a uniform judge-made rule and instead used the state rule because it found no general intent of Congress in § 1983 about interlocutory appeals.[167] Again, it reached this determination by looking to analogous statutes,[168] just as the Court does in the federal common law context.

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160 *See supra* note 81 and accompanying text.

161 *See supra* note 149 and accompanying text.

162 *See* Brown v. W. Ry. of Ala., 338 U.S. 294, 298-99 (1949) (holding that using the state rule would lead to federal rights in FELA being "defeated under the name of local practice" (citation and internal quotation marks omitted)).

163 *See supra* notes 82-85 and accompanying text.

164 *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence." (internal quotation marks omitted) (citing Bailey v. Cent. Vt. Ry., Inc., 319 U.S. 350, 354 (1943))). *Bailey*, in turn, cited an earlier case, *Jacob v. New York City*, 315 U.S. 752, 752 (1942), which added that the jury right stemmed from the Seventh Amendment.

Although the Seventh Amendment does not apply to the states, the Court in *Dice* recognized that Congress drafted FELA with the expectation that the value of having a trial by jury, expressed in the Seventh Amendment, should be protected.

165 *See supra* note 146 and accompanying text.

166 *See supra* notes 88-89 and accompanying text.

167 *See supra* notes 71-73 and accompanying text.

168 *See* Johnson v. Fankell, 520 U.S. 911, 921 n.12 (1997) (noting that the expression of congressional intent with respect to interlocutory appeals is found in § 1291 rather than in § 1983).

As to the second part of the federal common law analysis, the Court has been far less on-point in its reverse-*Erie* cases. The Court has engaged in only *one* of the relevant federalism inquiries—whether a state rule occupies an area of law that is traditionally reserved to the states.[169]

In the "procedural" arena (where reverse-*Erie* cases lie), the area of law that is traditionally reserved to the states involves transsubstantive procedural rules.[170] The federalism concerns implicated by Congress requiring that a state court use a uniform judge-made rule, rather than a transsubstantive state rule, are significant.[171] Such a decision by Congress would displace a component of the underlying state judicial system.

This concern is absent when Congress requires that a state court use a uniform judge-made rule rather than a *substance-specific*[172] state rule.[173] A state has a great interest in creating a body of transsubstantive procedural rules and then applying them in its own courts. This interest is far greater than the state's similar interest with respect to narrow substance-specific procedural rules, an area of law not traditionally reserved to the states.

Thus, one can view the Court's inquiry into whether the state rule is of general applicability (i.e., transsubstantive) or narrow applicability (i.e., substance-specific) in its reverse-*Erie* cases as part of this larger inquiry regarding areas of law traditionally reserved to the states.

Justice Frankfurter was the first member of the Court to engage in the transsubstantive–substance-specific inquiry by intimating a distinction in

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169 *See supra* note 151 and accompanying text.

170 *See supra* note 56 (providing a definition of transsubstantive "procedural" rules).

171 Transsubstantive federal "procedural" rules do not apply in state courts hearing federal causes of action. Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 558 n.102. However, Congress can, and does, override state "procedural" rules with federal substance-specific "procedural" rules since any substance-specific common law established by the U.S. Supreme Court derived from a federal statute binds state court judges. *See supra* note 12. Additionally, in cases where common law does not already exist, a state court hearing a federal cause of action must create substance-specific common law and thus decline to use a state rule when it believes the U.S. Supreme Court would do so. *See supra* note 129. In these two ways, Congress can indirectly require that a state court use a uniform judge-made "procedural" rule rather than a state rule.

172 Substance-specific "procedural" rules are rules that apply only to cases in a certain substantive area. A state notice-of-claim requirement for all civil actions against state governmental officials is an example of a substance-specific rule.

173 *Cf.* Felder v. Casey, 487 U.S. 131, 145 (1988) ("We . . . cannot accept the suggestion that this requirement is simply part of the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of the cause of action as applied to any given plaintiff." (citation and internal quotation marks omitted)).

his dissent in *Dice*.[174] The Court then fully adopted this inquiry in *Felder*[175] and reaffirmed it later in *Johnson*.[176]

Beyond asking whether the state rule occupies an area of law traditionally reserved to the states, the Court does not engage in any of the other federal common law making inquiries outlined in subsection III.C.2. Instead, the Court mistakenly uses three other tests to decide reverse-*Erie* cases: (1) a substance-specific state rule discrimination test; (2) a procedural–substantive distinction; and (3) an outcome-determination test.

The Court first used the substance-specific state rule discrimination test in *Felder* by inquiring as to whether a substance-specific state rule discriminated[177] against a federal right.[178] It continued this error in *Johnson*.[179] This

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174 *See* Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 368 (1952) (Frankfurter, J., concurring for reversal but dissenting from the Court's opinion) ("Ohio and her sister States with a similar division of functions between law and equity are not trying to evade their duty under the Federal Employers' Liability Act; nor are they trying to make it more difficult for railroad workers to recover, than for those suing under local law.").

Interestingly, Justice Frankfurter, apparently without realizing it, used the language of the RDA in finding that the Court should use the state rule rather than create federal common law.

> [C]ertainly the Employers' Liability Act *does not require* a State to have juries for negligence actions brought under the Federal Act in its courts. Or, if a State chooses to retain the old double system of courts, common law and equity—as did a good many States until the other day, and as four States still do—surely there is *nothing in the Employers' Liability Act that requires* traditional distribution of authority for disposing of legal issues as between common law and chancery courts to go by the board. . . . Nothing in the Employers' Liability Act or in the judicial enforcement of the Act for over forty years *forces such judicial hybridization* upon the States.

Id. at 367-68 (emphasis added). Justice Frankfurter's dissent recognizes that there is no basis for creating common law because Congress, through the statute in question (FELA), did not *require* the creation of a uniform judge-made rule. Even though Justice Frankfurter does not explicitly reference the RDA, this is a perfect example of the long-held view that the RDA is "no more than a declaration of what the law would have been without it." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 n.2 (1938); *cf. supra* notes 135-139 and accompanying text (arguing that the Court's federal common law cases that do not reference the RDA can serve as implicit interpretations of it).

The Court in *Erie* appears to be referring to a federal common law rule, animated by federalism concerns, which would prescribe the same rule as the RDA. It is important to note that this principle noted in *Erie* is not mandated by the Tenth Amendment because reverse-*Erie* cases occur in areas where Congress has independent constitutional law making power. *See supra* notes 99-100 and accompanying text. Therefore, this principle in *Erie* does not undermine the argument that reverse-*Erie* cases are not truly preemption cases. *See supra* notes 101-03 and accompanying text.

175 *See supra* note 173.

176 *See* Johnson v. Fankell, 520 U.S. 911, 918 (1997) (finding that the state rule was "a neutral state Rule regarding the administration of the state courts"); *id.* at 919 ("The States . . . have great latitude to establish the structure and jurisdiction of their own courts." (citation and internal quotation marks omitted)).

177 The Court and this Comment use the term "discrimination" to refer to a state rule that applies only to the type of claim that the federal statute in question authorizes. *See Felder*, 487 U.S. at 141-42 ("[T]he notice provision discriminates against the federal right. While the State

inquiry is not a component of the first part of federal common law analysis. Whether a state rule discriminates against a federal right has no bearing on whether it significantly conflicts with a "clear and substantial" federal policy. A state rule that applies broadly to a wide range of causes of action can easily conflict significantly with a "clear and substantial" federal policy and vice versa.

Under the second part of the federal common law analysis, as this Comment notes, substance-specific state rules, like the rule in *Felder*, do not occupy an area of law traditionally reserved to the states.[180] And the Court has not used this substance-specific inquiry in the normal federal common law making context in order to determine whether a statute required the Court to fashion a uniform judge-made rule.

The Court also mistakenly engages in an inquiry about whether the federal or state rule is one of "procedure" or "substance" to determine whether to follow the state rule.[181] The Court often applies this test by stating that it is well-settled that a rule is either "substantive" or "procedural."[182] Under the Court's view, the state interest in having state procedural laws govern categorically outweighs the federal interest in a uniform judge-made procedural rule and vice versa.

Under an RDA approach, one might argue that this inquiry could be relevant as a proxy for congressional intent. Under this view, the Court would always presume that Congress's statute did not require that something other than state procedural rules apply and that Congress's statute did require that something other than state substantive rules apply. Under this

affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right.").

178 *See id.* at 146 ("Here, the notice-of-claim provision most emphatically does discriminate in a manner detrimental to the federal right: only those persons who wish to sue governmental defendants are required to provide notice within such an abbreviated time period."). *But see id.* at 160 (O'Connor, J., dissenting) (noting that the state rule "applies to all actions against municipal defendants, whether brought under state or federal law" and thus is not discriminatory).

179 *See Johnson*, 520 U.S. at 918 n.9 ("Unlike the notice-of-claim rule at issue in [*Felder*], [the state rule] does not target civil rights claims against the State.").

180 The exception to this proposition is in areas of unique state interest, such as family law and corporate law.

181 *See* St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985) ("FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal."); Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 511-12 (1915) ("As long as the question involves a mere matter of procedure . . . the state court can . . . follow their own practice even in the trial of suits arising under the Federal law.").

182 *See St. Louis*, 470 U.S. at 411 ("[I]t is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." (citation and internal quotation marks omitted)).

view, Congress would have made this determination based on federalism concerns.

Other than the glaring initial issue that Congress could easily have included the procedural–substantive language in the RDA if it so chose,[183] there are fundamental problems with engaging in this inquiry. Procedure and substance alone are not good proxies for federalism concerns,[184] and reducing complex congressional policymaking to such simplistic labels (absent congressional instruction to do so)[185] risks undermining the values of federalism safeguarded by the RDA federal common law making analysis outlined above.

A procedural state rule can significantly conflict with a "clear and substantial" federal policy just as a substantive state rule may significantly conflict with a federal policy. It is better to conduct the federal common law making analysis that this Comment outlines because that analysis focuses on congressional intent in a federal statute and the very federalism concerns judges express when they use the substance and procedure labels.

Moreover, labels like "procedure" and "substance" are easily capable of manipulation by hostile state court judges,[186] or, at the very least, are defined differently by different judges. As the Court has stated on many occasions in the context of *Erie* cases, it helps to think about procedure–substance labels only in reference to the underlying goals of classifying a rule as one or the other.[187] However, unlike in the *Erie* context, the Court

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183 The Rules Enabling Act is evidence that Congress, when it desires to make the application of federal or state law depend on a distinction between substance and procedure, knows how to do so. *See* 28 U.S.C. § 2072(a)–(b) (2012) ("The Supreme Court shall have the power to prescribe general *rules of practice and procedure* . . . for cases in the United States district courts . . . . Such rules shall not abridge, enlarge or modify any *substantive* right." (emphasis added)).

184 *See* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEX. L. REV. 1, 63 (1985) ("The substance versus procedure test arguably undermines rather than advances the values of federalism by deprecating deliberate . . . legislative policy based on this idea . . . ."); Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1941 (1991) ("[T]he appropriate allocation of authority in a federal union cannot be made by reference to the substance–procedure distinction. To the extent that respect for state autonomy is important to preserve through federal judicial conformity with state law, that autonomy is just as easily undermined by independent federal procedure as it is by independent federal substantive law." (footnote omitted)).

185 *See supra* note 183 (noting that Congress, in the Rules Enabling Act, demonstrated that it has the ability to prescribe rulemaking based on distinctions between "procedure" and "substance" when it so chooses).

186 *See infra* notes 217-19 and accompanying text (discussing the concern that state judges may improperly narrow the breadth of federal rights).

187 *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide

has never made a similar cautionary statement about state court judges using procedure and substance labels in the reverse-*Erie* context as a substitute for a meaningful analysis of congressional intent regarding the creation of common law.

The likely reason for the Court's use of this procedure–substance test is that the term "reverse-*Erie*" influences the Court to apply the principles of *Erie*[188] to a situation that is merely a decision about whether or not to create federal common law.[189]

Finally, the Court has also used an outcome-determination test to decide whether it should follow a state rule or create common law in its reverse-*Erie* cases. While the Court did not reference the test in either *Brown* or *Dice*, it adopted the test in *Felder*[190] and used it again in *Johnson*.[191]

However, under the federal common law making analysis outlined above, the Court has recognized that a state statute being outcome-determinative does not make it inconsistent with a federal statute.[192] The use of the outcome-determination test in the reverse-*Erie* context is a poor substitute for the real conflict analysis required when making federal common law. Thus, the Court should decline to use this outcome-determination test in the reverse-*Erie* context.

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cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").

188 *See* Hanna v. Plumer, 380 U.S. 460, 464-66 (1965) (applying the procedure–substance test as part of the *Erie* doctrine).

189 *Cf.* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1909-17 (2013) (arguing that the Supreme Court's reverse-*Erie* jurisprudence is influenced by the Court's implicit and incorrect view that the twin aims of *Erie* should guide state courts facing reverse-*Erie* problems). Following the Supreme Court's mistaken lead, both state courts and scholars frequently implicate the concerns of the *Erie* doctrine when discussing the reverse-*Erie* problem. *See, e.g.*, Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1272-73 (2012) (arguing against freedom for state court judges in interpreting federal law in reverse-*Erie* cases because it would implicate *Erie*'s concerns about disuniformity of the law and forum shopping).

190 *See* Felder v. Casey, 487 U.S. 131, 138 (1988) ("[B]ecause its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court.").

191 *See* Johnson v. Fankell, 520 U.S. 911, 918-20 (1997) (finding a state rule regarding interlocutory appeals not to be outcome-determinative because a party could have the subject of the interlocutory appeal reviewed at the conclusion of the trial).

192 *See* Burks v. Lasker, 441 U.S. 471, 479 (1979) ("[A] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation . . . ." (citation and internal quotation marks omitted)).

As noted earlier, the outcome-determination test is relevant in the standard federal common law making context (and, by extension, the reverse-*Erie* context) only in evaluating whether the RDA applies.[193] Again, the likely reason for the Court's use of this outcome-determination test is that it is influenced by the term "reverse-*Erie*" to apply the principles of *Erie*[194] to a mere federal common law making decision. As Justice O'Connor noted in her dissent from the Court's decision in *Felder*, the use of the outcome-determination test is "based on a sort of upside-down theory of federalism, which the Court attributes to Congress on the basis of no evidence at all."[195]

Under the RDA approach that this Comment advocates, Congress has expressed how its wishes to treat reverse-*Erie* problems. Congress commands the Court to use state law unless a federal statute otherwise "requires." And the Court should determine whether a federal statute otherwise requires by conducting the federal common law making analysis outlined above and not through the outcome-determination test.

IV. AN ANALYTICAL FRAMEWORK FOR STATE COURTS FACING REVERSE-*ERIE* PROBLEMS

This Part lays out an analytical framework for state courts to use when tackling reverse-*Erie* problems in the fourth and fifth categories—where an inferior federal court has fashioned or endorsed federal common law or where a state rule conflicts with the interests inherent in a federal statute (i.e., the creation of federal common law may be justified where it does not already exist). This Part then evaluates current state court practice against this framework.

A. *Where an Inferior Federal Court Has Established Federal Common Law*

Federal common law can be developed by three federal bodies—the U.S. Supreme Court, a U.S. court of appeals, and a U.S. district court. A state court is bound to apply pertinent federal common law fashioned or endorsed by the Supreme Court because the Court theoretically acts only

193 *See supra* notes 123-24 and accompanying text (equating the terms "rule of decision" and "outcome-determinative" to note that the RDA only applies in cases where the state rule in question is outcome-determinative).

194 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (formulating the outcome-determination test as an evolution of the *Erie* doctrine).

195 Felder v. Casey, 487 U.S. 131, 161 (1988) (O'Connor, J., dissenting).

within its statutory limits (i.e., the RDA) when fashioning a rule of common law.[196]

The more interesting case arises where a federal court of appeals has established or endorsed pertinent federal common law. The following hypothetical case is an illustration of a situation in which a state court would be confronted with "pertinent" federal common law established by a federal court of appeals. A federal court of appeals hears a case brought under federal statute XYZ in which the defendant argues for the application of state A's notice-of-claim provision, and the plaintiff argues that the application of state A's notice-of-claim provision would thwart the remedial goals of federal statute XYZ. The federal court of appeals rules in favor of the plaintiff, and state A's notice-of-claims provision is held not to apply to cases brought under federal statute XYZ.

In a subsequent unrelated case, a plaintiff brings an action in a court of state A under federal statute XYZ (which does not vest exclusive jurisdiction in the federal courts).[197] As in the prior case, the defendant argues for the application of state A's notice-of-claim provision, and the plaintiff argues that that the application of state A's notice-of-claim provision would thwart the remedial goals of federal statute XYZ.

The court of state A is not bound to accept the federal court of appeals' determination that the state notice-of-claim provision thwarts the remedial goals of federal statute XYZ.[198] However, the federal court of appeals considered precisely the same question with which the court of state A is now faced. It is in this sense that the federal common law fashioned by the federal court of appeals is "pertinent."

Another example is the Seventh Circuit's decision in what eventually became the U.S. Supreme Court case *Kamen v. Kemper Financial Services, Inc.*[199] In *Kamen*, the Seventh Circuit determined that the demand requirement for a stockholder derivative suit that was filed under the Investment Company Act of 1940 (ICA), a federal statute, should be determined in reference to federal law.[200] Declining to incorporate Maryland state law as the federal rule of decision, the Seventh Circuit fashioned a uniform judge-made rule that the futility of making a demand is not a valid excuse for failure to make a demand.[201]

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196 *See supra* note 12 and accompanying text.
197 *See supra* note 2 and accompanying text.
198 *See infra* note 203 and accompanying text.
199 500 U.S. 90 (1991)
200 908 F.2d 1338, 1342 (7th Cir. 1990).
201 *Id.* at 1347.

If the Supreme Court had not granted the petition for writ of certiorari in *Kamen*, the uniform judge-made rule that the Seventh Circuit had adopted would have stood. Any future stockholder derivative action under the ICA filed in Maryland state court would have presented the Maryland state court with the precise question that the Seventh Circuit faced; namely, whether the ICA "requires" a uniform judge-made rule defining a demand requirement or whether the federal rule of decision for a demand requirement can incorporate Maryland state law.[202] It is in this sense that the Seventh Circuit's holding in *Kamen* would have been "pertinent" to such a case in Maryland state court.

As an initial matter, it is important to note that scholars agree that state courts, being coordinate rather than inferior to federal courts, are not constitutionally bound to follow federal common law fashioned or endorsed by a federal court of appeals.[203] This rule does not, however, preclude a state court from treating a federal court's interpretation of federal law as persuasive.[204] As a normative matter, state courts should accord pertinent federal common law fashioned or endorsed by a federal court of appeals a presumption of correctness and refuse to follow the common law only where they believe the creation of the common law was clearly erroneous.

There is a federal interest in uniformity looming over all reverse-*Erie* questions. Even if a state court would decide not to fashion common law after conducting the same analysis as a federal court of appeals, once the federal common law is established by a federal court of appeals and has been applied by federal courts, the federal interest in uniformity is much greater than it was before. In the case where no federal common law exists at all

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202 *See* 15 U.S.C. § 80a-43 (2012) (providing for concurrent state court jurisdiction for cases brought under the ICA).

203 *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 (1994) (noting that, pursuant to Article III, state courts are not constitutionally bound to follow the decision of an inferior federal court because the inferior federal courts exercise no appellate review over the decisions of state courts); Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and* Erie *State Law Predictions*, 3 SETON HALL CIRCUIT REV. 1, 17-19 (2006) (observing that twenty-nine states do not treat federal courts of appeals' decisions on federal law as binding). *But see* Yniguez v. Arizona, 939 F.2d 727, 736 (9th Cir. 1991) (expressing doubts as to the "wisdom" of the view that state courts should not consider themselves bound by a decision of a federal court of appeals).

204 *See generally* Hall v. Pa. Bd. of Prob. & Parole, 851 A.2d 859, 863 (Pa. 2004) (noting that a vast majority of state supreme courts view a decision of an inferior federal court as "persuasive, but not binding, authority").

(i.e., the fifth category of reverse-*Erie*), the state rule is conflicting only with potentially vague notions of general intent behind a statute;[205] the federal interest in the uniformity of law is weaker here as it is examined only in reference to this conflict.

However, in the case where federal common law has been established by a federal court of appeals, the state rule conflicts with the general intent of Congress *and* existing federal common law, rendering the federal concern with disuniformity in the law more acute.[206] Presumably, this disuniformity concern is even greater where the federal common law has been in place for a long time,[207] the lower federal courts are in agreement,[208] or the common law in question was developed or endorsed by the state court's coordinate federal court of appeals.[209]

The disuniformity concern becomes even more troubling when one considers that the only mechanism for review of a state court's decision refusing to recognize federal common law that was endorsed or created by a federal court of appeals (a federal–state "split" case) is U.S. Supreme Court certiorari review. Procedural requirements, such as the requirement that a case must first reach the highest state court "in which a decision could be had,"[210] prevent many of these cases from being reviewed by the Court.[211]

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205 *See generally supra* note 150.

206 *Cf.* Red Maple Props. v. Zoning Comm'n, 610 A.2d 1238, 1242 n.7 (Conn. 1992) ("It would be a bizarre result if this court [adopted one standard] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [a different standard]. We do not believe that . . . Congress . . . intended to create such a disparate treatment of plaintiffs depending on their choice of a federal or state forum." (citation and internal quotations marks omitted)); Busch v. Graphic Color Corp., 662 N.E.2d 397, 403 (Ill. 1996) (noting that the interpretation of a federal statute by federal courts is binding on Illinois courts in order to give the statute uniform application).

207 The longer the federal common law has existed in the federal court of appeals without being overruled by the Supreme Court or abrogated by Congress, *see supra* note 159, the more likely that the federal court of appeals divined Congress's intent correctly. Thus, the longer the federal common law has existed, the more presumptive validity it has, and the more weight the state court should give it.

208 *See* State v. Riggs, 568 N.W.2d 101, 106 (Mich. Ct. App. 1997) ("Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts regarding federal questions when there is no conflict. . . . However, where an issue has divided the circuits of the federal court of appeals, this Court is free to choose the most appropriate view."); *Hall*, 851 A.2d at 864 (noting that Alabama, California, and Illinois treat the decisions of lower federal courts as binding where the decisions of those courts are "numerous and consistent").

209 Where the federal courts of appeals are split on an issue, the presumption of correctness is called into doubt and the state court should engage in the analysis proposed in Section IV.B. *See, e.g.*, Axess Int'l, Ltd. v. Intercargo Ins. Co., 30 P.3d 1, 7-8 (Wash. Ct. App. 2001) (employing an independent analysis of whether to create federal common law where the Second Circuit and Eleventh Circuit were in disagreement about whether federal common law should exist).

210 *See supra* note 6.

This problem is compounded by the Court's shrinking docket and reticence in taking cases from state supreme courts. [212]

Moreover, federal courts are experts on federal law[213] and at divining Congress's intent.[214] They fashion federal common law and conduct inquiries as to congressional intent on a daily basis. This fact is especially relevant in the reverse-*Erie* context where a court must determine whether a state rule conflicts with the nebulous general intent of Congress in a federal statute.[215] The inquiry about whether a statute requires that something other than state law apply is a largely intent-driven inquiry.[216] Presumably, state courts would be at a comparative disadvantage to federal courts in reaching an accurate answer to that question of congressional intent.

Applying a presumption of correctness would also alleviate much of the concern that state judges are hostile to federal rights.[217] This concern is

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211 *See* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) ("One might argue that this Court's appellate jurisdiction over state-court judgments in cases arising under federal law can be depended upon to correct erroneous state-court decisions and to insure that federal law is interpreted and applied uniformly. However, as any experienced observer of this Court can attest, Supreme Court review of state courts, limited by docket pressures, narrow review of the facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job." (citation and internal quotation marks omitted)).

212 *Cf.* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955) (explaining that granting exclusive jurisdiction to federal courts to hear a cause of action leads to more uniform application of the law due to the Supreme Court's limited docket); *see generally* Owens & Simon, *supra* note 7, at 1225-63 (discussing the Court's shrinking docket, possible reasons for it, and its implications).

213 The Court has noted in the past that deciding a federal case in federal court brings "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483-84 (1981); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 383 (1996); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-65 (1968) ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal questions were given to state courts."); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333 (1988) (recognizing that federal courts have a greater institutional competence than state courts in developing federal law).

214 *See Merrell Dow*, 478 U.S. at 827 (Brennan, J., dissenting) ("[T]he federal courts are comparatively more skilled at interpreting and applying federal law, and are much more likely correctly to divine Congress' intent in enacting legislation.").

215 *See generally supra* note 150.

216 *See supra* note 144 and accompanying text.

217 *See* THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The reasonableness of the agency of the national courts in cases in which the state tribunals cannot be supposed to be impartial speaks for itself."); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328 (1978) ("[F]ederal question jurisdiction [is based] upon [a]

particularly acute in the reverse-*Erie* context because the concept of general intent is so nebulous. State judges can claim that Congress did not "require" a uniform judge-made rule in its statute without being unambiguously wrong. It is precisely this area on the boundary of the federal right (i.e., where the Court would look to the general intent of the statute) that a state court judge would be most hostile to "extending" a federal right.

There is some evidence that Congress considers this hostility concern salient as well. Justice Brennan has attributed the hostility concern to Congress's decision to vest federal courts with original jurisdiction over federal question cases in the first instance.[218] Scholars have also attributed this hostility concern to Congress's promulgation of the federal statute that provides for Supreme Court review of state court decisions.[219]

Finally, simply as a matter of comity, it is desirable to have state courts respect the decisions of federal courts on matters of federal law.[220] As an interesting analogy, the clearly erroneous standard of review has long been invoked when comity is an important value of the reviewing court.[221] For

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fear of state court hostility to or misunderstanding of federal rights."); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 924 (2013) ("[N]otwithstanding their oath to uphold the federal Constitution, state judges are generally allegiant to the state rather than the federal government in the "reverse-*Erie*" context."); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953) ("Presumably judges selected and paid by the central government, with tenure during good behavior—and that determined by the Congress—and probably even somewhat insulated by a separate building, are more likely to give full scope to any given Supreme Court decision, and particularly ones unpopular locally, than are their state counterparts. By the same token, should a district judge fail, or err, a more sympathetic treatment of Supreme Court precedents can be expected from federal circuit judges than from state appellate courts." (footnote omitted)).

218 *Merrell Dow*, 478 U.S. at 827 n.6 (Brennan, J., dissenting). Some commentators have also suggested that Congress has considered the general federal–state "split" problem as serious enough to warrant vesting exclusive jurisdiction in the federal courts for certain federal causes of action. *See, e.g.*, Louis Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249, 1275 (1960) (suggesting the same with regards to the Securities Exchange Act of 1934).

219 *See* Mishkin, *supra* note 217, at 158 n.10 ("The statutory provisions for review by the Supreme Court of state court decisions have always reflected a fear that state judges might be prone to narrow unduly the scope of national power.").

220 *See* Littlefield v. State Dep't of Human Servs., 480 A.2d 731, 737 (Me. 1984) ("[E]ven though only a decision of the Supreme Court of the United States is the supreme law of the land on a federal issue . . . in the interests of existing harmonious federal–state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on . . . a federal question.").

221 It is only an analogy because, in the cases that follow this proposition, the reviewing court had direct appellate jurisdiction over the court being reviewed and thus its decision bound the lower court. *Cf. supra* note 203 and accompanying text (recognizing that state courts are not constitutionally bound to follow the decisions of inferior federal courts). This Comment argues that, *only as a matter of sound policy*, should state courts presume the correctness of the decisions of federal courts of appeals on matters of federal common law.

example, in *Bonet v. Texas Co.*, the Court used a clear error standard in reviewing the decisions of the Supreme Court of Puerto Rico on matters of local Puerto Rico law.[222]

More recently, the Third Circuit has allowed the nascent Supreme Court of the Virgin Islands, over which it exercises certiorari review,[223] to disregard Third Circuit case law interpreting local Virgin Islands law as long as the interpretation by the Supreme Court of the Virgin Islands of its local law is not manifestly erroneous.[224] The Third Circuit based its standard on the U.S. Supreme Court's standard in *Bonet*.[225] The Supreme Court noted that the standard of review in *Bonet* was premised on "the deference due [to] interpretations of local law by . . . local courts."[226] Stripped down to its essence, the standard used by the Court in *Bonet* is the product of Sovereign 1 (the United States) deferring to the decisions of Sovereign 2 (Puerto Rico) on Sovereign 2's local matters when Sovereign 1 is not compelled to defer.

Similarly, in a reverse-*Erie* case, a state court (Sovereign 1) would be deferring to the decisions of a federal court of appeals (Sovereign 2) on matters of federal common law (Sovereign 2's local matters) by refusing to follow the decision only if it is clearly erroneous. As in *Bonet*, the state court is in a situation where it is not compelled to defer to federal law.[227]

However, despite the foregoing reasons for applying a presumption of correctness to the decision of a federal court of appeals with respect to federal common law, it is important that the state court be able to ignore the decision if it finds that it is clearly erroneous. In such a situation, the state court would necessarily have to come to the conclusion that the U.S. Supreme Court would come out the opposite way from the federal court of

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222 308 U.S. 463, 471 (1940).

223 *See* 48 U.S.C. § 1613 (2006) (establishing relations between the Third Circuit and the courts of the Virgin Islands).

224 *See* Defoe v. Phillip, 702 F.3d 735, 744 (3d Cir. 2012). The "manifest error" standard is another term for the "clearly erroneous" standard; *see also* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 652 (1993) (Thomas, J., concurring in part and concurring in the judgment) (equating the terms "clear error" and "manifest error"); *Bonet*, 308 U.S. at 471 ("For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.").

225 *Defoe*, 702 F.3d at 744. The First and Ninth Circuits have also used this standard of review in similar situations based on *Bonet*. *See, e.g.*, Haeuser v. Dep't of Law, 368 F.3d 1091, 1099 (9th Cir. 2004) (using a manifest error standard of review in reviewing the decisions of the Supreme Court of Guam on matters of local law); C. Brewer P.R., Inc. v. Corchado, 303 F.2d 654, 654 (1st Cir. 1962) (using a manifest error standard of review in reviewing the decisions of the Supreme Court of Puerto Rico on matters of local law).

226 *Bonet*, 308 U.S. at 470.

227 *See supra* note 203 and accompanying text.

appeals. Since clear error is such a demanding standard, the state court would have to be *almost certain* that the Supreme Court would come out the opposite way. This near certainty would tip the scale and invoke the state court's duty to decide the way it believes the Supreme Court would,[228] overcoming the presumption of correctness accorded to the federal court of appeals.

Although state courts should presume correctness when it comes to the federal court of appeals, federal common law established by a federal district court should not be given the same presumption of correctness by a state court.[229] A similar presumption runs the risk of introducing disuniformity into the law—a result antithetical to the goal of the federal legislation.

A decision of a district court does not bind the same district court, a district court in the same state, or a court of appeals.[230] Moreover, a district court often does not have the final word on a point of law, especially on something as drastic as adopting a new uniform judge-made rule that is a likely subject for an appeal.

B. *Where No Federal Court Has Established Federal Common Law*

As noted above, a state court considering whether to create federal common law in light of a conflict between a state rule and a federal scheme of rights must do so only where it believes the U.S. Supreme Court would create common law.[231] In undertaking this task, the state court would have to take into account limitations on the Supreme Court's power, such as the RDA.[232] Based on the analysis in subsection III.C.2 regarding the situations in which the Supreme Court is likely to find that a federal statute requires that something other than state law apply, this Comment proposes the following analytical framework for state courts to use.

First, a state court should determine if the RDA would be implicated in the Supreme Court's federal common law determination. This analysis involves a determination about whether the state rule in question is a "rule

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228 *See supra* note 129 and accompanying text.

229 *See, e.g.*, Mills v. Monroe Cnty., 451 N.E.2d 456, 457 (N.Y. 1983) (applying a state notice-of-claim statute in a § 1981 action after disagreeing with the decisions of New York federal district courts that the state statute was in conflict with the policy embodied in the federal statute).

230 *See* Yniguez v. Arizona, 939 F.2d 727, 736-37 (9th Cir. 1991); Caminker, *supra* note 203, at 825 & n.31 (citing cases for this principle).

231 *See supra* note 129 and accompanying text.

232 *See* Burbank, *supra* note 129, at 1559 n.51.

of decision." As noted earlier, this phrase essentially asks whether the state rule is outcome-determinative.[233]

If the RDA is implicated, the state court should look for any specific intent of Congress with respect to the conflict between the state rule and federal statute in the federal statute's legislative history.[234] If specific intent from Congress exists as to whether the Court should or should not use the state rule, then all that is taking place is statutory interpretation (i.e., interpretation of the language of the federal statute).[235] If there is specific congressional intent to interpret a federal statute in a way that cannot accommodate the operation of the state rule, then the federal statute surely requires that something other than state law apply and the analysis ends.

If a state court is satisfied that there is no relevant specific intent, it should endeavor to ascertain any relevant general intent behind the federal statute. The state court can find this general intent in the statute in question, the legislative history of the statute in question, or analogous statutes.[236] The goal is to determine if the state rule is in conflict with a "clear and substantial" federal policy.

As we have already seen, the greater the conflict between the state rule and the federal policy, and the more "clear and substantial" the federal policy, the more likely it is that the statute should be deemed to require a uniform judge-made rule. But if the state rule can coexist with the federal policy with minimal disruption or if it actually accomplishes the federal policy, then the statute should not be deemed to require a uniform judge-made rule.[237] As noted earlier, this federal policy and conflict inquiry is only half of the required analysis.

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233 *See supra* notes 123-24 and accompanying text. For an example of a state rule that was not outcome-determinative, see text accompanying *supra* note 122.

234 For example, specific intent would exist if Congress had considered including a notice-of-claim requirement in § 1983 actions but then explicitly rejected such a requirement as inconsistent with the goals of § 1983. *See, e.g.*, Burks v. Lasker, 441 U.S. 471, 483 (1979) ("Attention must be paid as well to what Congress did *not* do."); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 181-82 (1978) (finding congressional intent in the Endangered Species Act to protect endangered species at great cost after Congress had considered and rejected a bill providing for the protection of endangered species whenever "practicable"); Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (declining to create a federal common law cause of action against federal officials for abuse of power where Congress had considered creating a statutory cause of action and refused to do so). *But see* Malone v. White Motor Corp., 435 U.S. 497, 515-16 (1978) (Stewart, J., dissenting) (considering "what Congress did *not* do" to be a mere "inference[]" insufficient to override Congress's general intent in a statute).

235 *See supra* note 79 and accompanying text.

236 *See supra* notes 144-47 and accompanying text.

237 *See supra* note 149 and accompanying text.

The state court must also determine whether there are any signs that the statute does not require that something other than state law apply. The state court should ask the following questions: Does the state rule occupy an area of state law that is well developed?[238] Does the decision to create a uniform judge-made rule touch on delicate federal policy considerations?[239] Have state citizens predicated their commercial relationships on the state rule's application to disputes?[240]

Finally, the state court should ask if a conflict between the federal policy and state rule arises in an area of traditional state regulation (i.e., within the state's traditional police power)?[241] A subsidiary question that is relevant in a reverse-*Erie* case is whether the state rule is of general (i.e., transsubstantive) or narrow (i.e., substance-specific) applicability.[242] The state court should *not*, however, use a distinction between procedure and substance as a proxy for the strength of federalism concerns.[243]

The ultimate goal here is for the state court to come to a reasoned and principled conclusion, based on the Supreme Court doctrine, as to when a federal statute requires that something other than state law apply.

C. *Evaluating Current State Court Practice Against the Proposed Analytical Framework*

Before proceeding to evaluate state court practice against the proposed analytical framework, it is important to note that state courts do not uniformly treat existing Supreme Court reverse-*Erie* precedent at a methodological level. State courts seemingly take their cue from the Supreme Court's confusing[244] and contradictory[245] jurisprudence in the reverse-*Erie* area.

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238 *See supra* note 153 and accompanying text.

239 *See supra* notes 154-55 and accompanying text.

240 *See supra* note 156 and accompanying text.

241 *See supra* note 151 and accompanying text.

242 *See supra* notes 170-76 and accompanying text.

243 *See supra* notes 181-87 and accompanying text.

244 *See* Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771, 1775 (2012) ("The Supreme Court's articulation of the contours of [reverse-*Erie*] analysis has not always been a model of clarity . . . .").

The Court has, on different occasions, used a substance–procedure distinction, *see supra* note 181, a discrimination test, *see supra* notes 177-79, an outcome-determination test, *see supra* notes 59-60 & 69, and a transsubstantive–substance-specific state rule distinction, *see supra* notes 56 & 68. The only area where the Court has been consistent in its reverse-*Erie* cases is in its determination, albeit implicitly rather than explicitly, of whether the state rule is in significant conflict with a clear and substantial federal policy. *See supra* notes 160-68 and accompanying text; *cf.* Jordan, *supra*, at 1775 ("[T]he consistent focus [of reverse-*Erie* analysis] has been on the substantiality of the federal . . . rule at issue.").

The three divergent ways that state courts deal with Supreme Court precedent in the reverse-*Erie* area provide evidence of this lack of uniform treatment. Courts either (1) use only certain parts of the analysis from a reverse-*Erie* case;[246] (2) use only the analysis from the reverse-*Erie* case that is closest in facts to the state court case;[247] or (3) use the analysis from the most recent Supreme Court reverse-*Erie* case.[248] This lack of uniformity in state court treatment of reverse-*Erie* precedent leads to disparate treatment for similarly situated parties in different states—a disturbing outcome.

Moving beyond state court mistreatment of existing reverse-*Erie* precedent at a methodological level, many state courts engage in an independent balancing of interests test that pits the federal interest in a uniform judge-made rule against the state's interest in having its rule apply.[249] This inquiry is mistaken since the state court's only duty here, like the duty of a federal court in a normal federal common law case, is to determine whether Congress "required" a uniform judge-made rule in its statute.[250]

Intimately related to this mistaken analysis is perhaps the most widespread (and demonstrably incorrect[251]) practice in which state courts engage—explicitly (and sometimes implicitly) deciding that "procedural"

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245 In its four seminal reverse-*Erie* cases, the Court has referenced only one scholarly article—Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)—which discusses state court enforcement of federal rights by noting that "federal law takes the state courts as it finds them." In a move typical of the Court's jurisprudence in the area, it expressly rejected Professor Hart's proposition in *Felder v. Casey*, 487 U.S. 131, 150 (1988), by declaring that it "ha[d] no place under [its] Supremacy Clause analysis," only to expressly endorse the proposition in *Johnson v. Fankell*, 520 U.S. 911, 919 (1997), nine years later.

246 *See, e.g.*, Blount v. Stroud, 877 N.E.2d 49, 59-63 (Ill. App. Ct. 2007) (engaging in an extensive *Felder* analysis of whether a state rule discriminated against a federal right, but not engaging in an outcome-determination analysis mandated by the same case), *rev'd on other grounds*, 904 N.E.2d 1 (Ill. 2009).

247 *See, e.g.*, Bean v. S.C. Cent. R.R. Co., 709 S.E.2d 99, 107-09 (S.C. Ct. App. 2011) (deciding a reverse-*Erie* problem about the validity of a FELA release based solely on *Dice*).

248 *See, e.g.*, Denari v. Superior Court, 264 Cal. Rptr. 261, 265-68 (Ct. App. 1989) (deciding a reverse-*Erie* problem about a state privilege rule based solely on *Felder*).

249 *See, e.g.*, Mills v. Monroe Cnty., 451 N.E.2d 456, 457-58 (N.Y. 1983) (finding that New York's interest in having a notice-of-claim statute for § 1981 actions was "important" and was "override[n]" only when a § 1981 suit was brought to "vindicate a public interest"); Axess Int'l, Ltd. v. Intercargo Ins. Co, 30 P.3d 1, 7-8 (Wash. Ct. App. 2001) (balancing Washington's interest in having a statute that awards attorney's fees to an insured who must litigate to establish coverage against the federal interest in a uniform judge-made rule in an admiralty case); *cf.* Clermont, *supra* note 4, at 33 ("[T]he lower courts . . . balance the state's interests in having its legal rule applied in state court on this issue in this case against the federal interests in having federal law displace the rule of this particular state . . . .").

250 *Cf.* Free v. Bland, 369 U.S. 663, 666 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.").

251 *See supra* notes 181-87 and accompanying text.

state law will always govern in a federal action in state court.[252] Under the state court's view, the state's interest in having its procedural laws govern categorically outweighs the federal government's interest in a uniform judge-made rule.

In basing reverse-*Erie* decisions on characterizing a state rule as either procedural or substantive, the state courts can find authority in Supreme Court decisions.[253] State courts mirror the Supreme Court's bare assertions that a federal rule is "procedural" or "substantive" by citing to their own decisions about whether the state rule in question is "substantive" or "procedural" and using the state rule if it is "procedural."[254] The error in this analysis is the same error that the Supreme Court makes when it conducts the procedural–substantive analysis. Procedural state laws can be in deep conflict with "clear and substantial" federal policy just as much as substantive state laws can. The labels of procedure and substance are capable of manipulation and have no bearing on the state court's task.

The better analysis asks if the state rule is transsubstantive or substance-specific. These labels are a better proxy for Congress's intent of creating a uniform judge-made rule because they are not subject to manipulation like the terms "procedure" and "substance." Moreover, the state will *always* have a strong interest in having its transsubstantive rules followed in its courts, and thus it is less likely that a federal statute requires something other than the transsubstantive rule to be applied.

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252 *See, e.g.*, Williams v. Horvath, 548 P.2d 1125, 1130 (Cal. 1976) ("[T]he filing of a claim for damages is more than a procedural requirement, it is a condition precedent to plaintiff's maintaining an action against defendants, in short, an integral part of plaintiff's cause of action." (citation and internal quotation marks omitted)); Dunn v. St. Louis–S.F. Ry. Co., 621 S.W.2d 245, 254 (Mo. 1981) (en banc) ("[T]he form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law."); Roberts v. CSX Transp., Inc., 688 S.E.2d 178, 184 (Va. 2010) ("Nor will applying the Virginia rule affect the 'rights and obligations of the parties' under the procedural/substantive rubric." (citation and internal quotations omitted)).

253 *See supra* notes 181-82 and accompanying text. Unfortunately, in the reverse-*Erie* context, the Supreme Court has not been explicit in cautioning courts about using labels like "procedure" or "substance" as it has in the *Erie* context. *See supra* note 187 and accompanying text.

254 *See, e.g.*, Ind. Dep't of Pub. Welfare v. Clark, 478 N.E.2d 699, 702 (Ind. Ct. App. 1985) ("[The state rule] is a procedural precedent which must be fulfilled before filing suit in a state court. Because it is a procedural precondition to sue, it overrides the procedural framework of § 1983 when the litigant chooses a state court forum." (citation omitted)), *overruled by* Felder v. Casey, 487 U.S. 131 (1988). The *Clark* court cited an Indiana Supreme Court case, *Thompson v. City of Aurora*, 325 N.E.2d 839 (Ind. 1975), for the proposition that the state rule was "procedural." *Id.* *Thompson* was a case that deemed the state rule procedural as a matter of state law. 325 N.E.2d at 842. The characterization of the state rule as procedural for state law purposes obviously has no application to whether the state rule is procedural when it comes to its clash with a federal law.

Some state courts twist this analysis in a way that leads to the use of a state rule. Most commonly, the state court will misinterpret the Supreme Court's general–specific state rule distinction. Instead of asking whether the state rule is substance-specific or transsubstantive, the state court asks whether a substance-specific state rule discriminates against the federal right.[255] Again, state courts can find authority in Supreme Court decisions when engaging in this discrimination inquiry.[256]

However, as noted earlier, the Supreme Court should give weight only to transsubstantive state rules "regarding the administration of the state courts."[257] A federal statute is less likely to require a uniform judge-made rule where a transsubstantive state rule is being used because an underlying part of the state judicial system is being displaced.[258] Simply because a substance-specific state rule does not discriminate against a federal right does not mean that a federal statute is more or less likely to require a uniform judge-made rule.

Other state courts distinguish the facts of the case they are considering from the Supreme Court's reverse-*Erie* cases and, having done so, find that there is nothing barring the court from using state law.[259] These courts are ostensibly looking for a Supreme Court case that deals precisely with the facts presented to them before they will disregard the state rule. This approach abdicates the state courts' obligation to determine whether the Supreme Court would find that a federal statute requires a uniform judge-made rule. Simply because such a federal common law rule does not yet exist, does not mean the Supreme Court, if presented with the case, would not find that a federal statute requires one.

Some state courts adopt the position that they will always defer to whatever federal policy comes into conflict with the state rule under the principle

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255 *See, e.g.*, Roccaforte v. Jefferson Cnty., 281 S.W.3d 230, 235 (Tex. App. 2009) (citing *Johnson* as a basis for using a state notice-of-claim statute because the state statute "uniformly applies to all plaintiffs in suits against a county and its officials"), *rev'd on other grounds*, 341 S.W.3d 919 (Tex. 2011). A state notice-of-claim statute that applies only in suits against a county and its officials is a substance-specific state rule, not a transsubstantive rule.

256 *See supra* notes 178-79 and accompanying text.

257 Johnson v. Fankell, 520 U.S. 911, 918 (1997).

258 *See supra* notes 171-73 and accompanying text; *cf. Johnson*, 520 U.S. at 918 ("[O]ur normal presumption against pre-emption is buttressed by the fact that the Idaho Supreme Court's dismissal of the appeal rested squarely on a *neutral state Rule regarding the administration of the state courts*." (emphasis added)).

259 *See, e.g.*, Bean v. S.C. Cent. R.R. Co., 709 S.E.2d 99, 107-09 (S.C. Ct. App. 2011) (distinguishing *Dice* and holding, without further reverse-*Erie* analysis, that a challenge to a FELA release does not preclude summary judgment).

of comity.[260] Because these state courts do so as a matter of state common law, their practice is not incorrect. However, this Comment lays out a framework for state court judges that clarifies the analysis and should make it unnecessary to always defer to federal law.

While comity plays a role in the weight a state court should give to decisions of lower federal courts,[261] it does not protect states' rights as well as a true federal common law creation analysis does. The better analysis is to undertake a searching inquiry as to whether the federal statute "requires" that something other than state law apply, rather than assume that a federal statute requires a uniform judge-made rule whenever it conflicts in a minor way with a state rule.

Finally, some state courts utilize an outcome-determination test that asks whether following the state rule would lead to a different outcome than if the case in question was filed in federal court.[262] Again, in basing reverse-*Erie* decisions on this outcome-determination principle, the state courts can find authority in decisions of the Supreme Court.[263] As explained earlier in this Comment, whether a state rule is outcome-determinative sheds little light on whether the federal statute requires that something other than state law apply.

However, despite many misguided approaches to reverse-*Erie* problems, some state courts do engage in some parts of the proposed analytical framework laid out in this Comment. Some courts try to determine the general intent of Congress to ascertain the clarity and substantiality of the

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260 *See, e.g.*, Ill. Cent. Gulf R.R. Co. v. Price, 539 So. 2d 202, 205-06 (Ala. 1988) ("Judicial comity causes us, as a state court, to defer to federal law . . . ."). In *Price*, the plaintiff brought a FELA action, and a state rule provided a mechanism for state court defendants to move to dismiss an action upon the death of the plaintiff if a motion for substitution was not made within six months of the death. *Id.* at 203. The defendant moved to dismiss on that basis, and the plaintiff objected, citing FELA's provision that "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative." *Id.* at 205. On its face, the FELA death provision did not foreclose a state from imposing limiting rules related to substitution. However, rather than engaging in any analysis regarding a potential conflict between the federal policy behind the FELA death provision and the state rule, the state court declined to follow the state rule. In doing so, the state court noted that "[u]nder the concepts of civility and courtesy (which we reach before we reach the concept that an Alabama law that interferes with a federal law must yield), we defer to federal law, whether it be substantive or procedural, in enforcing a federal cause of action . . . ." *Id.* at 206.

261 *See supra* note 220 and accompanying text.

262 *See* New Dimensions, Inc. v. Tarquini, 743 S.E.2d 267, 271 (Va. 2013) ("[W]e hold that application of Virginia pleading standards to the EPA affirmative defenses would not lead to a substantial difference in outcomes of state and federal EPA actions. Therefore, we will apply Virginia procedural law concerning the pleading of affirmative defenses in EPA actions brought in Virginia courts.").

263 *See supra* notes 190-91.

federal policy that is in conflict with a state rule.[264] Additionally, other courts correctly follow Supreme Court precedent, giving more weight in the federal common law creation analysis to transsubstantive state rules.[265]

CONCLUSION

The most critical departure this Comment has made from reverse-*Erie* scholarship is to proceed on the basis that reverse-*Erie* is just a decision about whether to create federal common law. Most of the analytical confusion about reverse-*Erie*—namely, that reverse-*Erie* cases can be analyzed using *Erie* doctrines like outcome-determination and the procedure–substance dichotomy—is a product of failing to understand that concept. In addition, this Comment regards the Rules of Decision Act as controlling the creation of federal common law and doing so in both federal *and* state court.

Based on these concepts, this Comment has presented one possible approach to treating reverse-*Erie* problems—a Rules of Decision Act approach. Such an approach would facilitate a uniform theory of reverse-*Erie* that would clear up the current confusion in the doctrine at the Supreme Court level (and, thus, also at the state court level).

However, because there are other theories of federal common law making than those that flow from a Rules of Decision Act approach, there are alternate theories of reverse-*Erie*. The next step is for scholars that subscribe to other theories of federal common law making to evaluate reverse-*Erie* under those theories as this Comment has done with the Rules of Decision Act.

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264 *See, e.g.*, Williams v. Horvath, 548 P.2d 1125, 1129-30 (Cal. 1976) (identifying the strong remedial policy of Congress behind § 1983 and declining to apply a state notice-of-claim statute that conflicted with this policy); Axess Int'l, Ltd. v. Intercargo Ins. Co, 30 P.3d 1, 8 (Wash. Ct. App. 2001) (following a state rule about reimbursement of attorney's fees in insurance litigation where the court found that the federal policy behind a uniform rule was not clear).

265 *See, e.g.*, Roberts v. CSX Transp., Inc., 688 S.E.2d 178, 184 (Va. 2010) (applying a state rule mandating that certain jurors be excused for cause by the court rather than through a peremptory strike because the rule applied to all jury trials in any action in the state courts).