
FEDERAL COMMON LAW AND THE COURTS’
REGULATION OF PRE-LITIGATION
PRESERVATION

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INTRODUCTION

The unanimous view of the federal courts is that federal law imposes upon a party a duty to preserve relevant evidence from the time that the party can reasonably anticipate litigation. The courts regularly rule on the scope of that duty and impose sanctions for spoliation of evidence that occurs after that duty to preserve arises. The costs of the required preservation of evidence can be staggering and the potential sanctions for spoliation can determine the outcome of a case. Yet the source of the federal courts' authority to impose this federal-law duty of preservation and to craft sanctions for spoliation that occurs before a federal action is commenced is uncertain.

Federal Rule of Civil Procedure 37 gives federal courts power to sanction a party that violates a discovery order. Furthermore, it is well accepted that the federal courts have authority to protect the integrity of their proceedings by sanctioning parties who spoliates evidence after an action has commenced.¹ Courts have less to rely on, however, when they create a duty that arises prior to the invocation of the court's jurisdiction.

Nevertheless, the federal courts recognize a common law duty of preservation that arises before a claim is filed and assert an inherent power to impose sanctions for the breach of that duty.² This Article seeks to clarify the authority of federal courts to create federal common law in this area by examining different approaches that bear on whether or how courts should regulate pre-litigation preservation duties. In Part I, this Article looks to the case law to see how courts have exercised their asserted power to regulate pre-litigation preservation and how they have justified that exercise. Courts have generally relied on their inherent authority to regulate their proceedings. However, rather than clarifying the federal courts' authority, such reliance only begs the question of what source of power grants courts this inherent authority to regulate pre-litigation conduct. Part II, therefore, examines possible sources for the courts' authority to create a pre-litigation duty to preserve evidence and to sanction for breach of that duty. Continuing under the assumption that the federal courts have the power to create common law in this area, Part III

1. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002) ("Even in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs."); *cf.* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (alteration in original) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))).

2. *See Pension Comm'n of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) ("The common law duty to preserve evidence relevant to litigation is well recognized. The case law makes crystal clear that the breach of the duty to preserve . . . may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.").

examines whether, in imposing a preservation duty, federal courts should create a federal standard or should apply the preservation law of the state in which they sit. Potential answers to this question are analyzed separately with regard to federal courts exercising diversity jurisdiction and federal courts exercising federal-question jurisdiction. Lastly, Part IV considers whether common lawmaking is the appropriate device through which this law should be developed, or whether litigants would be better served if the Supreme Court promulgated Federal Rules governing the matter.

It is important to note a few points at the outset of this discussion. The first is that the exercise of a court's inherent power is an instance of federal common lawmaking. Thus, an exercise of the court's inherent power must be justified the same way that a federal court must justify its creation of common law post-*Erie*—by relying on some positive grant of lawmaking power. Similarly, a federal court is limited in its use of its inherent power by the restrictions that *Erie* places on the application of federal common law in diversity cases. Notably, courts have claimed that the common law grants them the power to impose spoliation sanctions both in cases arising under federal law and those arising under state law.³ Second, the federal government is competent to make a rule regarding pre-litigation preservation of evidence. At the very least, the combination of Article III of the Constitution and the Necessary and Proper Clause gives Congress the power to regulate the preservation of evidence.⁴ Congress has not exercised this power, however, and the federal courts have instead created common law in this area. Third, it is clear that this federal common law is not preemptive—state courts follow state law in determining when the duty of preservation is triggered and what sanctions might be warranted for pre-litigation spoliation. Thus, the federal courts have created federal common law in an area that is within federal competence to regulate. This common law is limited by the fact that it is not preemptive, applying only in federal courts. But it is expansive in that this federal common law applies in both federal-question and diversity cases. While many judge-made rules of procedure follow this pattern, the duty of preservation is exceptional (and perhaps unique) because it governs pre-litigation conduct.

3. See, e.g., *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449 (4th Cir. 2004) (noting that even when a federal court sits in diversity jurisdiction “the decision to impose . . . a sanction [for spoliation of evidence] is governed by federal law”).

4. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”).

I. THE CASE LAW CONCERNING THE AUTHORITY OF FEDERAL COURTS TO REGULATE THE PRE-LITIGATION PRESERVATION OF EVIDENCE

The federal courts have unanimously held that federal law governs the question of when a party's obligation to preserve evidence is triggered.⁵ Furthermore, every federal court to have confronted the issue has held that the duty of preservation arises prior to the initiation of litigation.⁶ In a common formulation of this rule, the Court of Appeals for the Second Circuit has stated that "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."⁷ The federal courts also agree that federal law governs the determination of whether or which sanctions are appropriate when a party breaches its duty of preservation.⁸

When federal courts justify their authority to impose sanctions for pre-litigation spoliation, they often consider Rule 37 as a source of such authority.⁹ But, for the most part, the courts have held that Rule 37 is inapplicable in such cases.¹⁰ Rule 37(b) allows a court to impose sanctions where a party "fails to

5. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) ("We conclude . . . that a federal law of spoliation applies because . . . the power to sanction for spoliation derives from the inherent power of the court, not substantive law."); *Adkins v. Wolever*, 554 F.3d 650, 651-52 (6th Cir. 2009) (en banc) (overruling circuit precedent to hold, like "every other federal court of appeals to have addressed the question," that federal law governs the imposition of spoliation sanctions); *Chrysler Realty Co. v. Design Forum Architects, Inc.*, No. 06-CV-11785, 2009 WL 5217992, at *2-3 (E.D. Mich. Dec. 31, 2009) (citing *Adkins* to apply federal law to determine the trigger for the duty to preserve evidence).

6. See Advisory Committee on Civil Rules, Agenda Book, November 7-8, 2011, at 101-07, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf> (citing case law from nearly every circuit holding that the duty to preserve evidence arises when litigation is foreseeable, even before a claim is filed); Memorandum from Andrea Kuperman to the Discovery Subcommittee, at 5-17 (Sept. 23, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Case%20Law%20on%20Elements%20of%20a%20Potential%20Preservation%20Rule.pdf ("The courts generally require that a party begin preservation efforts once it knows or should know that that evidence is likely to be relevant to pending or future litigation.").

7. *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

8. See *Adkins*, 554 F.3d at 651-52.

9. When federal courts sanction parties for the spoliation of evidence that occurred during the pendency of litigation, they most often rely on Rule 37 as a basis for such power. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. REV. 789, 798-802 (2010). The second most common basis that courts cite for this authority is their inherent power. *Id.*

10. A few older opinions have relied on Rule 37 as a source of authority for sanctioning the pre-litigation spoliation of evidence. See, e.g., *Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 440 (N.D. Ill. 1976) (citing defendant's pre-litigation destruction of documents as a factor in the court's decision to impose sanctions under Rule 37). However, more recent opinions have abjured reliance on Rule 37 for such sanctions.

obey an order to provide or permit discovery.”¹¹ A party who destroys evidence prior to the start of litigation, however, is normally not subject to any relevant court order.

Most courts have held, therefore, that Rule 37 does not grant a court authority to impose sanctions for pre-litigation conduct:

Rule 37 . . . is applicable to the “normal” disputes, delays, or difficulties occurring in civil litigation. . . . Rule 37 enables a court to punish the litigant who has not responded adequately to discovery requests of an opposing party or to orders of the court compelling discovery. Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests.¹²

Moreover, a number of courts have held that Rule 37 is not a source of authority for sanctions for the spoliation of evidence that occurs even during the pendency of litigation. The Court of Appeals for the Ninth Circuit has strictly construed the language of Rule 37(b) and enforced the “requirement that there be some form of court order.”¹³ Thus, unless there was a court order to preserve or produce evidence, some courts will not rely on Rule 37 to sanction a party that destroys evidence.¹⁴

Recognizing that there is no rule or statute that covers this situation, courts have generally held that the duty to preserve evidence prior to litigation arises from the common law, and have relied on their inherent authority to sanction for breach of that duty.¹⁵ In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Judge Shira Scheindlin attributed this duty to the common law, stating that “[t]he common law duty to preserve evidence relevant to litigation is well recognized.”¹⁶ In *Capellupo v.*

11. FED. R. CIV. P. 37(b)(2)(A).

12. *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 n.14 (D. Minn. 1989).

13. *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992).

14. *See Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 505-06 (D. Md. 2009) (contrasting the court’s inherent power to impose spoliation sanctions with its Rule 37 power that is applicable “if the spoliation violates a specific court order or disrupts the court’s discovery plan”).

15. The Advisory Committee Note to Rule 37(f) also recognizes that a preservation obligation might arise from the common law. FED. R. CIV. P. 37(f) advisory committee’s note (2006) (“A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.”). The little scholarly work that exists regarding pre-litigation preservation obligations has not identified a source for the courts’ claimed inherent authority. *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 *FORDHAM L. REV.* 2005, 2006-07 (2011) (accepting without further justification that “the ordinary pre-litigation duty to preserve is a consequence of the inherent authority of courts to sanction parties who culpably permit the loss or destruction of relevant evidence prior to the initiation of an action.”).

16. 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). *See also* *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 519-21 (D. Md. 2010) (“[T]he duty to preserve relevant evidence is a common law duty, not a rule-based duty The common law imposes the

FMC Corp., the United States District Court for the District of Minnesota imposed harsh sanctions on a party that had intentionally destroyed evidence when it had notice of potential litigation.¹⁷ In doing so the court “relie[d] on its inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices.”¹⁸

The federal courts derive support for this inherent power from two Supreme Court cases in particular: *Roadway Express, Inc. v. Piper*¹⁹ and *Chambers v. NASCO, Inc.*²⁰ In *Roadway Express*, the Supreme Court reaffirmed the “‘well-acknowledged’ inherent power of a court to levy sanctions in response to abusive litigation practices.”²¹ The Court identified the inherent powers of the courts as “those which ‘are necessary to the exercise of all others.’”²² Notably, though, the Supreme Court did not address the question of whether a court may impose sanction for abusive pre-litigation conduct.

In *Chambers*, the trial court had found that the defendant, Chambers, had abused the judicial process in several ways. Once Chambers received notice that NASCO would be filing suit against him, he sought to put disputed property beyond the reach of the court by transferring ownership to a trust.²³ During the pendency of the action Chambers refused to allow NASCO to inspect his company’s corporate records, in defiance of a preliminary injunction, and he filed meritless motions and pleadings to delay the proceedings.²⁴ The district court found that neither Rule 11 nor 28 U.S.C. § 1927 affirmatively authorized sanctions for much of Chambers’ conduct and instead imposed sanctions relying on its inherent power.²⁵ The Supreme Court affirmed the order of the lower court and held that “the sanctioning scheme of the statute and the rules [do not] displace[] the inherent power to impose sanctions for [certain] bad-faith conduct.”²⁶ The Court held that the sanctions had not been imposed for Chambers’ breach of substantive law, but because of his conduct in and against the court.²⁷ Thus, although this was a diversity action, the *Erie* doctrine was not implicated and federal (common) law governed the district court’s decision to impose sanctions.²⁸

obligation to preserve evidence from the moment that litigation is reasonably anticipated.”).

17. 126 F.R.D. 545, 553-54 (D. Minn. 1989).

18. *Id.* at 551 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980)).

19. 447 U.S. 752 (1980).

20. 501 U.S. 32 (1991).

21. *Roadway Express*, 447 U.S. at 765.

22. *Id.* at 764 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). See *Chambers*, 501 U.S. at 43-46 (citing cases that outline the scope of the inherent power of the federal courts).

23. *Chambers*, 501 U.S. at 36-37.

24. *Id.* at 38.

25. *Id.* at 41-42.

26. *Id.* at 46.

27. *Id.* at 54.

28. *Id.* at 55.

District courts frequently cite *Chambers* when asserting inherent power to sanction pre-litigation spoliation.²⁹ However, in claiming this case as authority to impose sanctions for pre-litigation conduct, the courts ignore the fact that in *Chambers* the Supreme Court focused on Chambers' conduct following the initiation of litigation. In his dissent, Justice Antonin Scalia points out that the district court's opinion seemed to imply that in imposing sanctions it considered Chambers' bad-faith breach of contract that gave rise to the litigation.³⁰ Justice Scalia notes that even the majority seemed to have a problem with the district court imposing a common law sanction on Chambers' "prelitigation primary conduct"³¹ and that this is why the majority recharacterized the sanctions as being imposed for conduct that occurred "throughout the course of the litigation."³² Thus, while the Supreme Court in *Chambers* clearly held that a court has inherent power to sanction a party for bad-faith conduct during the course of litigation, its characterization of the sanctionable conduct suggests that a court does not have inherent power to sanction pre-litigation primary conduct. The question of whether a court may sanction pre-litigation conduct relating to the proceeding (such as pre-litigation spoliation of evidence), as opposed to pre-litigation primary conduct, was not addressed or answered by the Court.

When federal courts sanction a party for the destruction of evidence that occurred before any claim was filed, they punish a party for conduct that occurred before the jurisdiction of the federal court was invoked. In *Chambers*, the Court authorized sanctions that punished a party for "fraud . . . perpetrated upon the court" or for "tampering with the administration of justice" in a manner that involved "a wrong against the institutions."³³ In that case, Chambers' conduct clearly fit that description. However, it is not clear that pre-litigation conduct can constitute a wrong against an institution whose jurisdiction over the matter has yet to be invoked. The Court's reasoning in *Chambers* might not apply to sanctions for pre-litigation spoliation.

Lower courts stand on firm ground when they cite Supreme Court

29. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Pension Comm'n of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 466 & n.24 (S.D.N.Y. 2010) ("The case law makes crystal clear that the breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.") (citing *Chambers*, 501 U.S. 32).

30. *Chambers*, 501 U.S. at 73 (Scalia, J., dissenting).

31. *Id.*

32. *Id.* at 54-55 & n.17 (majority opinion) (observing that the district court noted "the allegedly sanctionable acts were committed in the conduct and trial of the very proceeding in which sanctions were sought, and thus the sanctions imposed applied only to sanctionable acts which occurred in connection with the proceedings in the trial Court") (alterations omitted) (citations omitted) (quotation omitted).

33. *Id.* at 44 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944)).

precedent for the assertion that courts possess inherent power to sanction abusive litigation practices that occur during the pendency of a claim. But they have generally failed to acknowledge that this power might not grant them the authority to impose sanctions for pre-litigation conduct. The Supreme Court has not addressed the question of whether the inherent power of the courts to regulate litigation conduct might be extended to reach conduct occurring before the jurisdiction of the courts is invoked.

II. POSSIBLE SOURCES OF AUTHORITY TO SANCTION PRE-LITIGATION SPOILIATION

Federal courts might better be able to justify their reliance on their inherent powers to regulate pre-litigation conduct if they can identify the source of those inherent powers. Alternatively, courts may be on firmer ground in regulating pre-litigation preservation if they can claim the power to do so through some extrinsic source. This Part considers a number of different possible bases for courts' authority to regulate pre-litigation preservation and to sanction pre-litigation spoliation.

A. *The Rules Enabling Act*

Courts may be able to rely on some statutory grant of power in crafting rules to govern pre-litigation preservation. Because there is no statute that directly addresses this matter, the most likely source of such authority is the Rules Enabling Act, which contains a broad grant of rulemaking authority to the federal courts.

Congress provided in 28 U.S.C. § 2071(a), “[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”³⁴ However, Section 2071(b) requires that such rules “be prescribed only after giving appropriate public notice and an opportunity for comment.”³⁵ Section 2071 does not give courts authority to formulate rules through their case law, but rather through rulemaking.³⁶

Section 2072 authorizes the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts.”³⁷ Section 2073, though, sets out detailed procedures that the Court must follow in promulgating such rules,³⁸ thus dispelling any argument

34. 28 U.S.C. § 2071(a) (2006).

35. *Id.* § 2071(b) (2006).

36. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 836 (2008) (“[R]ead in light of the subsections that follow it, Section 2071(a)’s statutory grant clearly authorizes federal courts to ‘prescribe rules’ through the process of rulemaking, not adjudication.”).

37. 28 U.S.C. § 2072(a) (2006).

38. See *id.* § 2073 (2006). Section 2073(e) contains an escape clause, providing that

that the Supreme Court utilized its power under the Rules Enabling Act in *Chambers* and similar cases by authorizing the lower courts to sanction for abusive litigation practices. Furthermore, Section 2074 requires that before any rules authorized under Section 2072 become effective, the Supreme Court must send the proposed rules to Congress.³⁹ Section 2072 does not mean to authorize the development of procedural rules through common law processes.

Federal Rule of Civil Procedure 83 authorizes judges to “regulate practice in any manner consistent with federal law.”⁴⁰ This rule seems to authorize judges to adopt procedures in the absence of any governing federal law or rule. However, the rule was meant to allow courts to issue standing orders and internal directives,⁴¹ rather than to authorize judges to create generally applicable rules through common law processes.⁴² Furthermore, to the extent that Rule 83 does authorize federal judges to create common law, the rule may be invalid because it exceeds the grant of authority that the Rules Enabling Act bestows on the Supreme Court.⁴³ While the Rules Enabling Act may authorize the Supreme Court to promulgate a rule imposing a pre-litigation duty to preserve evidence,⁴⁴ the Court has not done so.

B. *Interstitial Common Lawmaking Power*

The federal courts have not properly exercised any rulemaking authority that they might have under the Rules Enabling Act to create a pre-litigation duty of preservation and to establish sanctions that will be imposed for breach of that duty. However, this does not mean that the courts’ power to create law in this area does not stem from the Federal Rules of Civil Procedure. More specifically, the courts may have authority to create such a duty and to sanction for its breach through their role in interpreting and filling the interstices of the Federal Rules of Civil Procedure. Once the Supreme Court has properly promulgated Federal Rules under the Rules Enabling Act, those Rules have the

“[f]ailure to comply with this section does not invalidate a rule prescribed under section 2072.” 28 U.S.C. § 2073(e) (2006). There is no similar escape clause for the procedures mandated by Section 2074, however.

39. 28 U.S.C. § 2074 (2006).

40. FED. R. CIV. P. 83(b).

41. See FED. R. CIV. P. 83(b) advisory committee’s note (“The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules.”).

42. See Barrett, *supra* note 36, at 837 & n.71 (“Despite the breadth of the language, it is not at all clear that either Federal Rule of Civil Procedure 83(b) or Federal Rule of Appellate Procedure 47(b) authorizes procedural common law in the sense of generally applicable rules worked out by judges on a case-by-case basis.”).

43. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 773-74 (1986) (noting that “Federal Rules cannot validly provide for the creation of federal common law”).

44. See *infra* Part IV.

force of law like any act of Congress.⁴⁵ Although the federal courts cannot create valid Federal Rules outside of the process designated by the Rules Enabling Act, the courts can create federal common law filling the interstices of the Federal Rules just like they do with regard to statutes enacted by Congress.⁴⁶ The Federal Rules can also act as a source of federal common law by expressing policies in areas that are not directly covered by the Rules.⁴⁷

As already discussed, the federal courts have generally agreed that Rule 37 does not expressly provide them with the power to sanction parties for pre-litigation spoliation. However, Rule 26 and various other Federal Rules lay out a number of discovery-related duties, which might act as a source for federal common law. Rule 26(b) creates a general rule that makes a broad swath of material relating to litigation discoverable.⁴⁸ Rule 27 evinces a policy of perpetuating evidence for use in litigation.⁴⁹ And Rule 34 provides for the discovery of documentary evidence.⁵⁰ Although Rule 37 by its terms does not deal with pre-litigation preservation or destruction of evidence, it allows courts to order a discovery response and to sanction a party's failure to comply with such an order.⁵¹ Together with the statement in Rule 1 that all of the Federal Rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding,"⁵² these Rules create a substantial body of procedures and policies surrounding discovery in the federal courts.

A federal court might reasonably find that in order to effectuate the detailed discovery scheme codified in the Federal Rules, efforts to preserve evidence must begin even before an action is filed. Furthermore, a court might find that if parties are allowed to spoliage evidence prior to the commencement of litigation, the goal of ensuring free access of both parties to all relevant information, as embodied in the Federal Rules, would be undermined. In

45. *Cf.* *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) (noting that Congress exercises its power over federal procedure through its delegation to the Supreme Court in the Rules Enabling Act).

46. *See* *Burbank*, *supra* note 43, at 773-74 ("In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 58 n.247 (1985) ("[T]here is no reason why preemptive lawmaking could not also be based on the need to preserve or effectuate policies articulated by federal courts pursuant to delegated lawmaking. In other words, there is no reason why preemptive lawmaking cannot 'piggyback' on top of delegated lawmaking."); *Cf.* *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974) (interpreting the federal rules so as to protect the policies underlying Rule 23).

47. *Burbank*, *supra* note 43, at 774.

48. FED. R. CIV. P. 26(b)(1).

49. *Id.* R. 27.

50. *Id.* R. 32.

51. *Id.* R. 37.

52. *Id.* R. 1.

interpreting and effectuating the Federal Rules, therefore, a federal court might legitimately create a pre-litigation duty of preservation as a matter of federal common law in the interstices of the Rules.

C. *Procedural Common Law as an Enclave of Intense Federal Interest*

One of the standard justifications of substantive common law is that there are certain enclaves of intense federal interest in which the Constitution impliedly requires that federal law govern.⁵³ For example, in *Southern Pacific Co. v. Jensen*, the Supreme Court held that maritime actions must be governed by federal law.⁵⁴ In the absence of federal legislation on the matter, federal courts would develop “general maritime law.”⁵⁵ Similarly, in *Clearfield Trust Co. v. United States*, the Supreme Court held that the rights and duties created by the commercial paper of the United States are a matter of national concern governed by federal law.⁵⁶ Because Congress had not created a governing law, the Supreme Court held that “it is for the federal courts to fashion the governing rule of law according to their own standards.”⁵⁷ Thus, federal courts properly make federal common law in areas of national concern.

Similarly, the procedure of the federal courts is a matter of exclusive federal control.⁵⁸ In *Wayman v. Southard*, the Supreme Court rejected in strong terms the proposition that state legislatures might be able to control federal procedure.⁵⁹ In *Wayman*, Chief Justice Marshall, writing for the Court, stated that the Necessary and Proper Clause gives Congress the power to regulate the proceedings of the federal courts and that Congress may delegate that power to the courts.⁶⁰ Even if this were not the case, however, the Court considered it “extravagant” even to consider that state legislatures might have the power to control procedure in the federal courts.⁶¹

One of the primary purposes of having a system of federal courts is to

53. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (“When Congress has not spoken to a particular issue, however, and when there exists a ‘significant conflict between some federal policy or interest and the use of state law,’ the Court has found it necessary, in a ‘few and restricted’ instances, to develop federal common law.”) (footnote omitted) (citations omitted); *Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934 F.2d 209, 213 (9th Cir. 1991) (“[F]ederal courts may formulate federal common law in those areas dominated by strong national or federal concerns such as controversies between states, admiralty matters, or foreign relations.”).

54. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214-17 (1917).

55. *Id.*

56. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

57. *Id.* at 367.

58. See *Barrett*, *supra* note 36, at 838-40.

59. 23 U.S. 1, 49-50 (1825).

60. *Id.* at 21-22, 42-43.

61. *Id.* at 49.

escape the self-serving bias that might be found in the state courts.⁶² The ability of the federal courts to promote this purpose would be undermined if state legislatures were able to control the procedures employed in the federal courts. The federal structure of the Constitution simply does not contemplate a role for state law in crafting federal procedure. The procedure of the federal courts, therefore, is a matter for the federal government to regulate exclusively.⁶³

Because this constitutional scheme does not contemplate state control of federal procedure, in the absence of congressional action on the issue of a pre-litigation duty of preservation, it is for the federal courts to fill the void.⁶⁴ Under this theory, there is no reason why a rule that affects pre-litigation conduct might be on less firm ground than procedural rules that regulate the conduct of parties after litigation has commenced. Issues of pre-litigation preservation implicate the same strong federal interests as those implicated by the procedures of litigation itself. The effectiveness of the truth-seeking mechanisms of the federal courts requires that the federal government be able to regulate pre-litigation preservation duties. Thus, preservation duties are central to the effective functioning of the federal courts as conceived by the Constitution, and may fall within an area of intense national interest that the Constitution contemplates is reserved for federal regulation.

D. *Article III Grant of Power to the Federal Courts to Prescribe Procedural Rules*

Another possible source of the federal courts' authority to prescribe rules governing pre-litigation preservation lies in Article III of the Constitution. The federal courts might have the power to create procedural law "simply because Article III denominates them 'courts' in possession of 'the judicial power.'"⁶⁵ The theory that federal courts may create procedural rules because those rules lie in an area of intense federal interest addresses the interests of the federal

62. See THE FEDERALIST, NO. 80 (Alexander Hamilton) (noting that among the purposes of the federal courts is the resolution of disputes among the states and cases "in which the State tribunals cannot be supposed to be impartial and unbiased").

63. This does not mean that federal courts may never employ state-created procedure, but only that they do so as a matter of federal common law. See *infra* Part III.B.

64. There is an area of procedure in which the federal courts are, in fact, supreme and in which Congress cannot create rules contrary to those developed by the courts. See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75 (1999) (asserting that the Constitution "preclude[s] legislation subverting the judicial independence that is crucial to the justice our Constitution was designed to establish"). Scholars disagree on the exact scope of this area of federal court procedural supremacy. See Barrett, *supra* note 36, at 833-35. It is not necessary to try to resolve the question of which branch has paramount authority to create a pre-litigation duty of preservation, however, because Congress has not attempted to create a rule in this area.

65. *Id.* at 842; see also *id.* at 852-78 (providing historical arguments supporting the proposition that Article III grants the federal courts inherent power to adopt procedural rules).

government as a whole, as seen in the federal structure of the Constitution, and gives power to the courts to create rules because Congress has failed to do so (or, in the context of procedure, because the judiciary is the branch with the most expertise in the area). The theory that recognizes Article III as a source of rulemaking power, however, focuses on the role and prerogatives of the judicial branch in particular, and places emphasis on the separation of powers structure of the Constitution.⁶⁶

Professor Amy Barrett notes that there are two arguments in support of a judicial power to regulate procedure stemming from Article III. The first is that the authority to regulate procedure in the courts is part of the “judicial power” with which Article III vests the Supreme Court and inferior courts.⁶⁷ The second argument says that, although this power is not explicitly given by the Constitution, it is implicitly granted to the courts as a necessary corollary for the implementation of judicial power.⁶⁸

Regardless of the exact mechanism through which Article III grants the federal courts the authority to adopt procedural rules, this authority may include the power to adopt rules governing pre-litigation preservation. Under either theory, the federal courts possess those powers that are necessary for the exercise of the judicial power—that is, for the effective and efficient adjudication of cases before the courts. The accurate and full presentation of relevant evidence is necessary for the performance of the courts’ judicial functions. Thus, the “judicial power” might include the power to ensure that when a case comes before the court, all of the facts necessary to reach a just disposition are available to the court.⁶⁹ It makes more sense under this theory, therefore, to think of the duty of preservation as a duty to the court to take action that will later assist the court in duly executing its functions, rather than as a duty to the opposing party. Because the preservation of evidence is essential to the just resolution of cases and the performance of the courts’

66. This theory explains why congressional, as opposed to judicial, regulation of some areas of procedure may be limited. *See supra* note 64; *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65-67 (noting that there are limits on Congress’s power to modify the courts’ contempt power).

67. Barrett, *supra* note 36, at 847.

68. *Id.* at 847-48. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution [sic] must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”).

69. Article III provides that “[t]he judicial power shall extend to all *cases*.” U.S. CONST. art. III (emphasis added). One might make the textual argument that this language limits the courts’ power to proceedings already in the courts—that is, *current* or *pending* cases. However, the same reasoning discussed in the text could be used to dispose of this argument. The “judicial power” over a case might, of necessity, arise even before the case is filed, either because of the fact that the case later *is* filed in (or removed to) the federal courts or because that case could *potentially* reach the federal courts later.

judicial functions, Article III may vest the federal courts with an inherent power to regulate the duty to preserve evidence, both before and after litigation formally begins.

E. *Sources of Authority: Conclusions*

This Part has considered four possible sources of authority to prescribe a pre-litigation rule of preservation. Because the courts have not promulgated such a rule in conformance with the Rules Enabling Act, that statute cannot justify the courts' exercise of this power. The courts are supported in their creation of a pre-litigation duty of preservation by their power to create common law interpreting and effectuating validly-prescribed Federal Rules, however. They might also claim power to create a rule in the absence of congressional action in this area because this subject matter is one relegated by the constitutional structure to federal control. Finally, in creating pre-litigation duties of preservation, federal courts may be able to rely on the judicial power vested in them by Article III.

As noted already, courts have justified their actions in this area by citing a court's "inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices."⁷⁰ However, courts have not identified the nature of this inherent power. It is most likely that the inherent power that the federal courts contemplate is one that arises from the judicial power vested in them by Article III.

This Article III-based theory of judicial power comports with courts' citation to *Chambers* because there the Supreme Court notes that "[t]he imposition of sanctions . . . transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself."⁷¹ Additionally, the Court notes that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"⁷² This discussion of the inherent powers of the court aligns most closely with the theory that courts derive certain powers from Article III by virtue of their being established as courts with "judicial power." The Court in *Chambers* spoke of the importance of the courts' inherent powers with regard to the institution of the courts themselves. The Court did not believe that these were inherent powers vested in the federal government by reason of the federal structure of the Constitution, but rather were powers vested with the courts by reason of the nature of that institution.

To the extent that federal courts merely cite a transcendent "inherent

70. *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989).

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

72. *Id.* at 43 (alteration in original) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

power” to create common law in this area, they fail to justify adequately their exercise of power. In *McCulloch v. Maryland*, Chief Justice Marshall emphasized that the government has no inherent powers—it was created by the people and it “deriv[es] its powers directly from them.”⁷³ However, federal courts have a number of theories on which they can rely that account for a positive grant of power to create a pre-litigation duty to preserve relevant evidence. Despite the fact that this duty targets pre-litigation conduct, the theories for judicial power in this area do not foreclose common law rules that apply before litigation commences in the federal courts.

III. THE CHOICE BETWEEN FEDERAL AND STATE PRESERVATION LAW

Concluding that the federal courts have the power to create a pre-litigation duty of preservation and corresponding sanctions for breach of that duty does not end the inquiry as to what law the federal courts should apply. In diversity cases, federal courts must ask whether *Erie* requires them to apply state preservation law. Even in cases arising under federal law, federal courts might adopt state law by incorporation in order to ensure uniformity between the federal and state courts.

Not all states impose a duty on parties to preserve relevant evidence from the time that litigation is reasonably foreseeable. In Florida, for instance, at least some state courts have held that there is no duty to preserve evidence until litigation actually arises and have rejected a “common law duty to preserve evidence before litigation has begun.”⁷⁴ In other states, although the trigger of the duty to preserve might be the same as that under the prevailing federal common law, there is variance in terms of what sanctions may be imposed for spoliation. In *Large v. Mobile Tool International, Inc.*, the District Court for the Northern District of Indiana considered the application of harsher spoliation sanctions under federal law, even though state law may have “preclude[d] any sanction greater than an evidentiary inference and the associated jury instruction.”⁷⁵ Given differences between federal common law and state law,⁷⁶ federal courts must consider whether the federal common law can properly be

73. *McCulloch*, 17 U.S. (4 Wheat.) at 404.

74. *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845-46 (Fla. Dist. Ct. App. 2004); *see also* *Gayer v. Fine Line Constr. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. Dist. Ct. App. 2007) (“Because a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request.”).

75. *Large v. Mobile Tool Int’l, Inc.*, No. 1:02cv177, 2008 WL 2116967, at *6 (N.D. Ind. May 20, 2008).

76. *See* ADVISORY GROUP TO THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL, HARMONIZING THE PRE-LITIGATION OBLIGATION TO PRESERVE ELECTRONICALLY STORED INFORMATION IN NEW YORK STATE AND FEDERAL COURTS 23-27 (2010), *available at* <http://www.courts.state.ny.us/publications/pdfs/PreLitReport.PDF> (discussing conflicts between New York state and federal law regarding pre-litigation preservation of electronically stored information).

applied in cases arising under the courts' diversity jurisdiction, and what the substance of the federal common law should be in federal question cases.

A. *The Application of Federal Preservation Law in Diversity Cases*

Before applying a federal preservation rule in a case arising under the court's diversity jurisdiction, a federal court must determine that doing so will not run afoul of *Erie*'s lesson that a federal court is bound by state common law just as it is bound by state statutory law.⁷⁷ The federal courts generally have not considered whether *Erie* dictates the application of state preservation and spoliation law. Rather, where they have given any justification for their application of federal law, they rely on broad assertions that spoliation is an evidentiary issue and that "federal courts generally apply their own evidentiary rules in both federal question and diversity matters."⁷⁸ The federal courts have sometimes compared application of federal law in this area to their application of the Federal Rules of Evidence in diversity cases.⁷⁹ However, very different standards apply when a court considers the application in a diversity suit of a validly enacted law like the Federal Rules of Evidence on the one hand, and judge-made federal common law on the other.⁸⁰ The federal courts are mistaken merely to assume that federal preservation law applies in diversity cases.

The Supreme Court's current understanding of the *Erie* doctrine is most clearly laid out in *Hanna v. Plumer*.⁸¹ In *Hanna*, the Court held that a federal court must apply any valid controlling federal statute or federal rule.⁸² The Court went on to explain, in dictum, that if no federal statute or federal rule applies, the federal court must apply an outcome-determination test, asking whether the application of federal law would materially affect the character or result of litigation.⁸³ The court's application of this outcome determination test is to be guided by the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁸⁴ A federal court

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

78. *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009).

79. *See, e.g., Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005) (noting that the court's application of federal law concerning the spoliation of evidence "is consistent with the law of our circuit regarding the rules of evidence, where we have held that, 'in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in the federal courts.'" (quoting *Johnson v. William C. Ellis & Sons Works, Inc.*, 609 F.2d 820, 822 (5th Cir. 1980))).

80. *See Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965) ("*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.>").

81. *Id.*

82. *Id.* at 473-74.

83. *Id.* at 467.

84. *Id.* at 468.

need only apply state law where doing so would further these two goals.

As discussed above, the federal law regarding the pre-litigation duty to preserve evidence is not codified in a law or in the Federal Rules of Civil Procedure, but is a judge-made common law rule. Therefore, the federal obligation of preservation creates an *Erie* question to be analyzed under the full analysis laid out by *Hanna's* dictum. The application of the federal law of preservation may, in some cases, materially affect the outcome of a case. Spoliation sanctions may be as severe as granting summary judgment for the party disadvantaged by the spoliation. If a federal court finds that a party breached its duty of preservation where a state court would have found no such duty, or if a federal court imposes a stricter sanction on a spoliating party than a state court would have, that application of federal law may change the outcome of a case.

Furthermore, the application of federal common law in this context may lead to forum shopping. A plaintiff who suspects that a defendant has destroyed evidence that may be relevant to litigation has an incentive to file his lawsuit in the forum that recognizes such destruction as spoliation and that punishes it most severely. A defendant considering whether to remove an action to federal court would likely consider whether doing so may leave itself or the plaintiff liable for spoliation sanctions.

The application of federal preservation law may also, in certain circumstances, result in the inequitable administration of the laws. Generally, if more relevant evidence is preserved, a court is more likely to reach a just and equitable resolution of the claims. To the extent that federal preservation laws are stricter in requiring the preservation of evidence, the application of a federal preservation rule might push litigation toward a more equitable resolution. However, federal preservation rules may also be more lenient than state preservation law. In that case, the application of a federal rule might allow a party that has breached the state duty of preservation to prevail on state law claims where it would not have done so had the litigation been located in state court. A more lenient duty of preservation will generally benefit the party that controls more evidence—in state law tort actions, often the defendant. The application of a federal rule of preservation may run afoul of *Erie*, therefore, by materially changing the result of litigation in a manner that will lead to forum shopping and, in some circumstances, the inequitable administration of the laws.

A federal rule may nevertheless be warranted, however, if “affirmative countervailing considerations” dictate the application of a federal standard.⁸⁵ In

85. *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525, 537 (1958). It is unclear whether *Byrd* continues to have vitality after *Hanna v. Plumer*. Since *Hanna*, the Supreme Court has only discussed *Byrd* in any depth in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431-36 (1996). Even in *Gasperini* it is not clear that *Byrd* was essential to the Court’s holding. If *Byrd* is no longer good law, of course, then the argument is even stronger

Byrd, the Supreme Court resisted the application of a state rule that would have “disrupt[ed] the federal system of allocating functions between judge and jury.”⁸⁶ This distribution of trial functions constituted an “essential characteristic” of the “independent [federal] system for administering justice to litigants who properly invoke its jurisdiction.”⁸⁷ Rules of preservation and sanctions for spoliation may constitute an “essential characteristic” of the federal judicial system. Such rules intimately affect the just resolution of cases brought in the federal courts. There may be strong countervailing federal interests, therefore, against application of state preservation rules that undermine these aspects of the federal system.⁸⁸ However, the determination of whether a state rule does undermine the strong federal interest in ensuring that evidence is preserved for litigation should probably be made on a case-by-case basis depending on the particular state rule to be applied.

The foregoing discussion makes clear that the application of federal preservation and spoliation law in diversity cases is not a simple matter. *Erie* seems to counsel for the application of state law in this area because having a different rule in federal courts is likely to affect the outcome of litigation and result in forum shopping and the inequitable administration of justice. The determination that there are countervailing interests that require that federal preservation rules be applied should be made on a case-by-case basis after an inquiry into the nature of the particular state law that the federal court is considering. By uniformly applying a federal law of preservation, federal courts have not been living up to the principles of *Erie*.

B. *The Incorporation of State Law as Federal Common Law*

Even after *Erie*, federal courts properly apply federal procedural common law in federal question cases and, in certain instances, in diversity jurisdiction cases. However, in deciding the content of the federal common law to be applied in these cases, federal courts often consider “adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.”⁸⁹ Federal courts should consider

that the federal courts should apply state preservation law.

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

87. *Id.*

88. *Cf. Hoffman v. CSX Transp., Inc.*, No. 1:04CV293, 2006 WL 38954, at *3 (S.D. Ohio Jan. 5, 2006) (holding that under *Erie* state spoliation doctrine applies “unless the spoliation issue clearly implicates an overriding federal rule or interest”), *abrogated by Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009).

89. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (holding that the federal rule governing the preclusive effect of a dismissal by a federal court sitting in diversity should be “the law that would be applied by state courts in the State in which the federal diversity court sits”); *see also De Sylva v. Ballentine*, 351 U.S. 570, 580 (“The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”); Paul J. Mishkin, *The Variousness of*

applying state law governing pre-litigation duties of preservation and spoliation sanctions for breach of that duty, even in cases arising under federal law.

In *United States v. Kimbell Foods, Inc.*, the Supreme Court held that federal law governs the priority of liens arising from federal lending programs.⁹⁰ However, the Court noted that this did not necessarily mean that the matter would be governed by uniform federal rules; “judicial policy” might require the federal courts to adopt state law as the rule of decision.⁹¹ In making this choice, the Court held that a federal court has to consider whether the governmental interests at stake require a nationally uniform body of law, whether the application of state law would frustrate federal interests, and whether the application of a federal rule would disrupt expectations formed on the basis of state law.⁹² In *Kimbell Foods* itself, the Court decided that a uniform rule was not necessary for the effective administration of the federal programs concerned and that incorporation of state law would not harm federal interests.⁹³ Given the significant reliance interests of the business community that were predicated on state law, the Court held that the “prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.”⁹⁴ Indeed, the prevailing presumption is that federal courts should borrow state law as federal law absent a demonstrated need for a federal rule of decision.⁹⁵

Rather than incorporating state law, federal courts have crafted a federal standard that governs the pre-litigation duty of preservation. Despite a presumption that courts should do so, the courts have not considered incorporating and applying state law as federal common law on this issue. One possible exception is the Court of Appeals for the Eleventh Circuit, which has held that a court’s application of federal law in this area is to be “informed by” state law.⁹⁶ In that circuit, therefore, in applying federal common law governing pre-litigation preservation, a federal court takes into account any duties that might be imposed by state law and any expectations of the parties that might rely on that law.⁹⁷ Even in the Eleventh Circuit, however, federal

“Federal Law”: *Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802-04 (1957) (“The power to choose [the governing law] may also be exercised by adopting state law as the governing rule—by incorporating the local rules for decision as the ‘federal law’ for this purpose.”).

90. 440 U.S. 715, 726 (1979).

91. *Id.* at 728.

92. *Id.* at 728-29.

93. *Id.* at 729-38.

94. *Id.* at 739-40.

95. RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 628 (6th ed. 2009).

96. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005).

97. *See, e.g., In re Elec. Mach. Enters., Inc.*, 416 B.R. 801, 874 (Bankr. M.D. Fla. 2009) (holding that “[i]n light of” the fact that in the Eleventh Circuit “a determination of whether to impose spoliation sanctions must be ‘informed by’ state law . . . this Court cannot

courts do not directly incorporate state law into federal law. Courts have not even considered the factors the Supreme Court laid out in *Kimbell Foods*.

1. Uniformity

The first factor that the Supreme Court considered in *Kimbell Foods* when deciding whether to incorporate state law into the federal rule was whether there was a need for a “nationally uniform body of law.”⁹⁸ A uniform national spoliation standard would aid parties who are not sure where they might be sued. A company doing business across state lines or an individual who travels throughout the United States may not always be able to predict where an action will be brought against him or where he may later desire to bring an action. In determining what evidence the party needs to preserve, a uniform national standard would help the party predict the consequences of its handling of evidence. On the other hand, because state courts would continue to apply their own state preservation law, the benefits of uniformity across federal courts would largely be eroded by nonuniformity among the state courts and between the state and federal courts.⁹⁹ Because it is impossible to achieve both vertical uniformity (application of the same standard in a federal court and a court of the state in which it sits) and horizontal uniformity (application of the same standard across different states) the argument that a uniform national spoliation standard is necessary in the federal courts is not compelling. In this instance, a national standard in the federal courts would not provide an assurance of true uniformity.

justify imposing sanctions for actions taken at a time when the parties were under no duty to preserve evidence under Florida law.”). *In re Electric Machinery Enterprises* was a rare opinion in which the court held that because state law did not create a pre-litigation duty of preservation, it would not sanction breach of the federal duty to do so. However, even the bankruptcy court in that case did not cite to any other cases where a court had held similarly, demonstrating just how rare this holding is.

98. *Kimbell Foods*, 440 U.S. at 728.

99. Most federal common law is applicable in both federal courts and state courts. Thus, federal common lawmaking can usually ensure both vertical and horizontal uniformity. The bases of authority discussed above that might give federal courts the power to make common law regarding pre-litigation spoliation, however, suggest that this is a procedural issue wherein the federal common law would only govern in suits in the federal courts: because the Federal Rules of Civil Procedure only apply in federal proceedings, common law in the interstices of the Rules must be similarly limited in its application; the federal structure of the Constitution suggests an intense federal interest only in regulating the proceedings of the federal courts; and the judicial power vested by Article III in the federal courts can only give them power to regulate their own judicial proceedings, not the proceedings of another system of courts. Congress certainly has authority to prescribe a national rule for preservation that would be applicable in all cases arising under federal law both in federal and state courts. Because of the effects of preservation standards on corporate litigants, the Commerce Clause may also give Congress the power to regulate preservation in cases arising under state law. Absent congressional action on the matter, however, horizontal nonuniformity in the state courts is almost inevitable both in cases arising under federal law and cases arising under state law.

2. Federal Interests

There are significant federal interests that suggest that a federal court might apply a distinct federal spoliation rule rather than incorporate state law by reference. The application of a federal standard may be necessary to ensure the integrity of the judicial process, which might be threatened by discovery abuse. In *Semtek*, the Supreme Court suggested in dictum that a state law that fails to sanction discovery abuse properly would be “incompatible with federal interests.”¹⁰⁰ “If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule.”¹⁰¹ If state spoliation law allows litigants to manipulate the judicial system, either because state law does not create a duty of preservation that begins at an appropriately early juncture, because the scope of the state preservation duty is too narrow, or because state law does not allow for severe enough sanctions to deter or remediate spoliation, federal interests might necessitate the application of a unique federal standard.

Federal courts have relied on this federal interest in creating federal spoliation law. The Court of Appeals for the Fourth Circuit explained that “[t]he policy underlying th[e] inherent power of the courts [to regulate preservation] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”¹⁰² The judicial process relies on the good faith presentation of all relevant available evidence. “The courts must protect the integrity of the judicial process because, ‘[a]s soon as the process falters . . . the people are then justified in abandoning support for the system.’”¹⁰³ Although states may prescribe spoliation law to be applied in their own courts, federal courts are responsible for ensuring that the federal common law that they apply upholds the integrity of the federal court system.

Although there may be a strong federal interest in ensuring that the applicable spoliation law serves to uphold the integrity of the courts, this does not necessarily suggest that federal courts should create a federal standard to be applied in every case. Rather, the federal courts should apply state law by default, and only when that law fails to safeguard federal interests sufficiently should they apply the federal standard.¹⁰⁴ Where the need for national

100. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001).

101. *Id.*

102. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001).

103. *Id.* (alterations in original) (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

104. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596-97 (1973) (“The Court in the past has been careful to state that, even assuming in general terms the appropriateness of ‘borrowing’ state law, *specific* aberrant or hostile state rules do not provide appropriate standards for federal law.”) (emphasis added).

uniformity does not suggest that federal courts should create a unique federal standard, the *selective* application of a federal standard strikes the proper balance between protecting the federal interests at stake and upholding reliance interests predicated on state law.

3. *Reliance Interests and Vertical Uniformity*

The third factor that the *Kimbell* Court suggested that a federal court should consider before creating unique federal common law is the presence of justified expectations predicated on state law.¹⁰⁵ Because the creation of a federal preservation standard would not preempt the application of state preservation law in state court, these reliance interests might be particularly threatened by the prospect of vertical nonuniformity—that is, the application of different law in a federal court and in a court of the forum state. A party that foresees litigation often may not know the forum in which it will litigate. A plaintiff may file a claim in state court and later find that his claim is subject to removal to federal court. A defendant may or may not know that it can remove a case filed against it to federal court. The possibility of removal may depend on the plaintiff's theories in the case or the amount in controversy, which may not be clear at the time that parties first foresee the possibility of litigation.¹⁰⁶ Given that parties may not always know what forum they will be litigating in, it may be more equitable for federal courts to adopt state preservation standards.¹⁰⁷

The law governing the pre-litigation duty of preservation implicates significant commercial interests. In an age of electronically stored information, the amount of material that could become subject to a duty to preserve is staggering. Companies scared of losing a big case because of an adverse inference or other spoliation sanction may expend huge amounts to preserve all potentially relevant documents.¹⁰⁸ These preservation problems are aggravated

105. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979) (noting that “businessmen depend on state commercial law to provide . . . stability”).

106. Cf. Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 561 (1958) (“It is often impossible to predict at the ‘primary’ or prelitigative stage of business or economic activity who the parties to a possible controversy will be, how they will be aligned in the controversy, and what their citizenship will be.”).

107. Litigants, of course, do not only face uncertainty with regard to whether they will appear in federal court or state court. They also may not be sure before litigation is actually filed which state they will be litigating in. It is true that the horizontal nonuniformity in this area moderates the potential benefits of vertical uniformity. Nevertheless, the fact that a party may have to consider multiple different state preservation laws does not imply that the federal courts should create an additional standard with which the party will have to contend.

108. See Notes from the Mini-Conference on Preservation and Sanctions 2-4 (Sept. 9, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20MiniConference%20on%20Preservation%20and%20Sanctions.pdf [hereinafter Mini-Conference Notes].

in the pre-litigation context. Because there is not yet an adverse party, potential litigants cannot negotiate about what documents they will undertake to preserve.¹⁰⁹ There is no judge to whom the parties can turn to issue a definitive ruling about what efforts and expenses are required.¹¹⁰

There is scant reliable empirical data regarding the costs of preservation, and in particular the cost of pre-litigation preservation.¹¹¹ Anecdotal evidence, however, suggests that these costs can be enormous. In August 2011, Microsoft reported that it currently had in place 14,805 separate custodian legal holds in 329 separate matters.¹¹² This corresponded to several warehouses full of documents.¹¹³ Only about one third of those litigation holds related to active litigation—the rest constituted pre-litigation preservation of documents.¹¹⁴ At a recent conference on preservation, one corporate general counsel described his company's efforts to preserve evidence in anticipation of litigation concerning a matter.¹¹⁵ Because there was not yet an adverse party, the company could not negotiate about these preservation issues.¹¹⁶ His company had already spent \$5 million on preservation and was paying \$100,000 per month to segregate and preserve evidence for this potential litigation.¹¹⁷

Some of these pre-litigation costs of preservation could certainly be minimized if parties had clear rules regarding the trigger of the duty to preserve and what material was covered by that duty. Not only does this require that the law be clear on the matter, however, but it also means that parties must know what law to look to in determining the extent of their duty to preserve. Although there will continue to be nonuniformity among state laws governing preservation, if potential litigants know that federal courts will adopt state preservation law, this may limit the number and variety of preservation obligations that parties have to contend with. By the time litigation is foreseeable, parties will often know the states in which the relevant transactions took place and might be able to predict which state's law might be invoked.

109. *Id.* at 2.

110. *Id.* at 6.

111. See Letter from Nicholas M. Pace and James N. Dertouzos, RAND Inst. for Civil Justice, to David Campbell, Mark Kravitz, and Lee H. Rosenthal, Judicial Conference of the U.S. 2-5 (Sept. 7, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/RAND%20Corporation.pdf (discussing the many difficulties of collecting reliable data on the cost of preservation).

112. Letter from David M. Howard, Corporate Vice President, Deputy Gen. Counsel, Microsoft Corp., to David G. Campbell, Chair, Advisory Comm. on Civil Rules, September 9, 2011 Committee Meeting on Preservation and Sanctions 3 (Aug. 31, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Microsoft.pdf.

113. *Id.*

114. *Id.*

115. Mini-Conference Notes, *supra* note 108, at 2.

116. *Id.*

117. *Id.*

Applying state preservation law as the federal rule of decision will keep federal courts from penalizing parties that have lived up to their state preservation duties but that may not have expected to be held to a federal standard. Parties will be free to rely only on the state law governing preservation.

Given that divergent state preservation laws would continue to be applied in state courts and thus would diminish the benefits of a uniform national standard in the federal courts, federal courts should strongly consider respecting reliance interests predicated upon state preservation law by incorporating the state law as the federal rule of decision in this area.¹¹⁸ Where the state standard is so lax that it undermines federal interests, federal courts can apply a federal rule that will adequately protect those interests.

IV. FEDERAL RULEMAKING AS AN ALTERNATIVE TO COMMON LAWMaking

The federal standard governing the preservation of evidence before litigation commences is currently a matter of judge-made common law. This topic may be better addressed, however, through the rulemaking process.¹¹⁹ One of the primary complaints of practitioners who deal with issues of spoliation is that the law is too inconsistent.¹²⁰ The results of a recent survey by the Sedona Conference of its membership showed that over half of respondents believed the current state of the law provides adequate guidance as to the circumstances that trigger a duty of preservation only “sometimes,” “rarely,” or “never.”¹²¹ Over seventy percent of respondents reported that the law was clear

118. There is a stronger argument for the application of a federal preservation standard in cases within the exclusive jurisdiction of the federal courts. In those cases, a uniform federal rule might create predictability for litigants and the confounding factor of disparate state standards may be irrelevant. Additionally, there might be a greater federal interest in a federal preservation standard in these cases. Where there is concurrent state and federal jurisdiction over a cause of action, the federal interest in preservation is contingent on the suit being brought in federal court. Where there is exclusive federal jurisdiction over a cause of action, however, the federal interest is no longer a contingent one (or, perhaps, it is only contingent on suit being brought at all). Even in these situations, however, it may be the case that one series of transactions has given rise to a number of possible causes of action. Although one or more of those might be within the exclusive jurisdiction of the federal courts, the transactions may have also given rise to state causes of action. In that case, litigants will still be confronted with the burden of complying with varying state preservation duties.

119. *Hanna v. Plumer*, 380 U.S. 460 (1965), makes clear that the Rules Enabling Act allows the Supreme Court to do through rulemaking what it cannot do through common law. *Erie* considerations do not apply where a federal rule dictates procedure. *Id.* at 469.

120. See Letter from Robert D. Owen to David G. Campbell, Chairman, Advisory Comm. on Civil Rules, Restoring the Balance: An Expanded Proposal Concerning Preservation 2-4 (Oct. 24, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Robert_Owen_Adv_Comm_Submission_final.pdf (“The current judge-made regimen produces different outcomes in different jurisdictions, leading to confusion and unfairness.”).

121. The Sedona Conference, The Sedona Conference Working Group 1 Membership

with regard to the subject matters of information to be preserved only “sometimes,” “rarely,” or “never.”¹²² Counsel have called for “objective guideposts” that will allow them to minimize the risk to their client in crafting cost-effective preservation mechanisms.¹²³

Under the current common law system, preservation law often differs between different circuits, and even between different district courts.¹²⁴ Parties engaged in active litigation can seek a definitive ruling from a judge about their duty to preserve. But prior to the commencement of such litigation, parties who anticipate litigation are often forced to comply with the most stringent standards to ensure that they are not subject to sanctions in whichever court they end up. Prospective rulemaking, through the Federal Rules of Civil Procedure, would help to clarify the duties imposed upon parties before litigation is filed.

The Advisory Committee on Rules of Civil Procedure has been working on some rule amendments that would address the topic.¹²⁵ In September 2011, the Discovery Subcommittee held a conference in Dallas to address issues related to possible rulemaking concerning preservation and spoliation sanctions.¹²⁶

One recurring question in the discussions of a possible amendment to the Federal Rules is whether the Rules Enabling Act gives the Supreme Court and the rulemaking committee the authority to make rules concerning pre-litigation preservation. The rulemaking committee has focused on the substance of what any amendment to the rules might look like, and has pushed off the question of the Supreme Court’s authority to promulgate such a rule.¹²⁷ An examination of

Survey on Preservation and Sanctions 33 (Sept. 1, 2011) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/The%20Sedona%20Conference.pdf.

122. *Id.* at 42.

123. Mini-Conference Notes, *supra* note 108, at 5.

124. For instance, courts disagree on the exact moment at which litigation becomes foreseeable enough that the duty to preserve is triggered. *Compare* Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1032 (10th Cir. 2007) (“A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent . . .”), *and* Velocity Press, Inc. v. Key Bank, N.A., No. 2:09-CV-520 TS, 2011 WL 1584720, at *2 (D. Utah Apr. 26, 2011) (“For future litigation to be considered imminent, there must be ‘more than a mere possibility of litigation.’”) (quoting Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614, 621 (D. Colo. 2007)), *with* Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336, 1347 (Fed. Cir. 2011) (holding that the “the correct standard [is one] of reasonable foreseeability, without the immediacy gloss” and that spoliation sanctions may be appropriate where litigation is “reasonably foreseeable” even if “not imminent”).

125. *See* Committee on Rules of Practice and Procedure, Meeting of January 6-7, 2011, Minutes, 16-17 *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2011-min.pdf>.

126. *See* Spencer, *supra* note 15, at 2021-31 (proposing a set of federal rules that would address the trigger and scope of the duty to preserve evidence as well as the appropriate sanctions for spoliation).

127. *See id.* at 16 (“There was . . . concern about the committee’s authority under the

this issue indicates that these concerns are unfounded.

The Rules Enabling Act permits the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for *cases in* the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”¹²⁸ This language seems to limit the rules to application in cases already in the federal courts, precluding any rules purporting to govern pre-litigation conduct. Although this conclusion seems to follow from a plain reading of the Rules Enabling Act, Rule 27 serves as a counterexample to such a conclusion.¹²⁹ Rule 27 authorizes “[a] person who wants to perpetuate testimony about any matter cognizable in a United States court” to enlist the aid of the federal courts in doing so, even before an action is filed.¹³⁰ Equity jurisdiction had long allowed courts to entertain bills to perpetuate testimony before the original Federal Rules of Civil Procedure were promulgated.¹³¹ Thus, Rule 27 was merely a codification of that long-standing practice.¹³² Although the validity of Rule 27 has never been challenged on the grounds that it regulates proceedings before a claim is filed, after nearly seventy-five years of use, Rule 27 is presumptively valid. Rule 27, therefore, seems to indicate that the Rules Enabling Act was meant to allow the Supreme Court to create rules in aid of cases that will later be filed in the federal courts, including a rule governing duties of pre-litigation preservation.

The other limitation on the Supreme Court’s rulemaking power under the Rules Enabling Act is that the “rules shall not abridge, enlarge or modify any substantive right.”¹³³ The test for whether a rule would violate this limitation on the Supreme Court’s rulemaking power was set out in *Sibbach v. Wilson & Co.*: “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”¹³⁴ A rule that establishes a pre-litigation duty of preservation is concerned with the just administration of the law. The key here is that such a rule would be directly related to the functioning of the courts, even though it would regulate conduct that occurs before a claim is filed. Rules governing preservation are not meant to regulate primary conduct, but to ensure that the courts are able to

Rules Enabling Act to address preservation obligations Nevertheless . . . the subcommittee would move forward to draft a rule while the issue of the committee’s authority remains under advisement.”).

128. 28 U.S.C. § 2072 (2006) (emphasis added).

129. See Spencer, *supra* note 15, at 2019-21 (suggesting that Rules 11 and 65 also give federal courts authority to regulate pre-litigation conduct).

130. FED. R. CIV. P. 27(a)(1).

131. See *Arizona v. California*, 292 U.S. 341, 347 (1934) (“Bills to perpetuate testimony had been known as an independent branch of equity jurisdiction before the adoption of the Constitution.”).

132. FED. R. CIV. P. 27 advisory committee’s note.

133. 28 U.S.C. § 2072(b) (2006).

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

administer just remedy for the violation of substantive duties. *Sibbach's* interpretation of the Rules Enabling Act accords no weight to the fact that preservation obligations might be "substantive" in the sense that they are expensive. The current understanding of the Rules Enabling Act, therefore, would allow for the Supreme Court to promulgate a Federal Rule governing pre-litigation preservation. Promulgating such a Rule would create a predictable, consistent standard that could be applied across the federal courts.

CONCLUSION

Federal courts have relied on their inherent power to regulate litigation to create federal common law rules governing the pre-litigation duty to preserve evidence and sanctions for breach of that duty. Courts have not adequately supported their claim to such inherent power, particularly given that they seek to regulate behavior that occurs before their jurisdiction is invoked by the filing of a claim in federal court. Although courts have not sought to justify their authority in this area, there are a number of possible sources of authority that might give judges the power to impose a pre-litigation duty to preserve evidence. The federal courts might properly regulate pre-litigation preservation of evidence through their interstitial common lawmaking power, through their power to create federal common law in enclaves of intense federal interest, or through a power implicit in Article III's grant of "judicial power."

That federal courts might possess the power to create federal law in this area in federal-question cases, however, does not mean that they possess that power when sitting in diversity. The policies underlying *Erie* suggest that federal courts should apply state preservation law in diversity cases. Even in federal question cases, federal courts should consider adopting state law as the federal rule of decision. The incorporation of state law may create some measure of predictability for parties to potential litigation.

Ultimately, parties will be best served by predictable rules. If there is a need for federal preservation law, therefore, the Judicial Conference should continue its work crafting a Federal Rule that would create uniform and objective standards that could be applied throughout the federal courts. Although parties to potential litigation would still face multiple standards because they might find themselves litigating in state court, a predictable federal rule would ease some of the burden of complying with the duty of preservation. In order to further a move toward uniformity, the Uniform Law Commission might consider a project that would suggest a model preservation law to be applied in state courts.

Until the Federal Rules of Civil Procedure give federal courts and litigants more direction concerning the pre-litigation duty of preservation, federal courts should reconsider their approach to the matter. Their current assertion of lawmaking power in this area relies on an inapt analogy to federal evidentiary rules. The federal courts should recognize that because preservation law affects

important pre-litigation conduct, the courts should apply state law in this area, and sometimes might be required to do so. Constraining federal law in this area would better comport with principles of federalism and would likely be better policy.