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Toil and Trouble: How the *Erie* Doctrine Became Structurally Incoherent (and How Congress Can Fix It)

Alan M. Trammell
Washington and Lee University School of Law, atrammell@wlu.edu

TOIL AND TROUBLE: HOW THE *ERIE* DOCTRINE BECAME STRUCTURALLY INCOHERENT (AND HOW CONGRESS CAN FIX IT)

*Alan M. Trammell**

The Erie *doctrine is still a minefield. It has long been a source of frustration for scholars and students, and recent case law has exacerbated the troubles. Although other scholars have noted and criticized these developments, this Article explores a deeper systemic problem that remains undeveloped in the literature. In its present form, the* Erie *doctrine fails to protect any coherent vision of the structural interests that supposedly are at its core—federalism, separation of powers, and equality.*

This Article argues that Congress has the power to fix nearly all of these problems. Accordingly, it proposes a novel statute to revamp the Erie *doctrine in a way that actually protects important structural interests and also streamlines the doctrine to make it more easily administrable. First, the statute defines states' federalism interests with greater precision and concomitantly expands federal courts' power to create rules that are not clearly substantive. Second, it unifies the various strands of the* Erie *doctrine into a single test that serves that vision of federalism. Finally, drawing on lessons from administrative law, the statute gives federal courts new discretion as to the means by which they may adopt nonsubstantive rules. The result is a simpler and more coherent* Erie *doctrine.*

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* Visiting Assistant Professor of Law, Brooklyn Law School. For comments and suggestions on earlier drafts, I am grateful to Derek Bambauer, Jane Bambauer, Fred Bloom, Y.K. Brony-Lee, Kevin Clermont, Andy Coan, Robin Effron, Maria Glover, Toby Heytens, Caleb Nelson, Jim Park, George Rutherglen, Adam Zimmerman, and the participants in a Junior Faculty Workshop at Brooklyn Law School. I also thank Jourdain Poupore for superb research assistance. Finally, I thank Dean Nicholas Allard for the generous support that I received from the Dean's Summer Research Fund.

[*I*]*t is a tale . . . full of sound and fury, signifying nothing.*[1]

INTRODUCTION

Over the last seventy-five years, *Erie Railroad Co. v. Tompkins*[2] has become more than an iconic case. It is a repository for countless theories of federalism,[3] separation of powers,[4] and even international law.[5] Yet the modern doctrine, for all of its sound and fury, indeed might signify nothing.

Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.[6] That basic dichotomy is straightforward.[7] The wrinkles and unending trouble for judges, scholars, and first-year law students stem from the significant overlap between substance and procedure—what Professor Walter Wheeler Cook memorably dubbed the "twilight zone."[8] Although the basic framework for navigating that twilight zone has been in place for nearly fifty years,[9] recent cases and scholarship demonstrate that the *Erie* doctrine has become increasingly cumbersome and unpredictable.[10]

The problem is actually worse than scholars have appreciated for reasons that remain undeveloped in the literature. In fact, the deficiencies are far deeper and more systemic than a convoluted test or a wrongly decided case. In its present form, the *Erie* doctrine is not merely complicated; it is a deeply entrenched construct devoid of a guiding principle.

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1. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

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

3. *See, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

4. *See, e.g.*, Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989).

5. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

6. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

7. This is what some scholars regard as *Erie*'s narrow holding. *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 11 (2006). The "*Erie* megadoctrine," *id.* at 50, concerns a host of other interesting issues, including the extent to which state courts, when applying federal substantive law, must apply certain federal procedures. Preemption questions also fall within the "megadoctrine." This Article, however, focuses on the judicial choice-of-law issues that have posed many of the most difficult *Erie*-related questions, particularly ones that arise when a federal court sits in diversity. *See also* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 614–15 (2008). References to the "*Erie* doctrine" in this Article thus pertain to the narrow doctrine.

8. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 334 (1933).

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

10. *See* Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707 (2006); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); *cf.* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998) (arguing that *Hanna* created "a reasonably stable, workable, and sensible structure").

Although the doctrine's complexity long has been a source of frustration, complexity in itself is not an evil, particularly if it serves fundamental interests. Indeed, for decades, courts and scholars have treated *Erie* as a guardian of vital structural interests, including federalism, separation of powers, and equality. This Article develops a unique criticism of the *Erie* doctrine and argues that it actually accomplishes *none* of those goals.

There is, however, a way out of the *Erie* wilderness. Congress can fix nearly all of these problems, and this Article proposes a novel statute that revamps the *Erie* doctrine. The proposed statute expands the scope of federal rulemaking authority, allowing courts to create a more comprehensive procedural regime that will apply consistently across federal courts. Perhaps counterintuitively, the proposed statute also solves the current structural problem by defining states' federalism interests more narrowly, albeit with greater precision, and offering more robust protection for those concrete interests. Finally, on a practical level, the proposed statute consolidates the various strands of the *Erie* doctrine into a single test that federal courts can apply with greater ease and predictability.

The Article proceeds in three Parts. Part I offers a brief overview of the *Erie* doctrine for those who have forgotten (or willfully expunged from their memory) all things *Erie*. It demonstrates that nearly every difficult *Erie*-related question has concerned matters within the "twilight zone." After offering haphazard answers to those questions for several decades,[11] the U.S. Supreme Court provided a measure of clarity in 1965 with *Hanna v. Plumer*,[12] which created the structure of the modern doctrine.

Although *Hanna* succeeded in certain respects, it essentially was a brilliant game of Jenga. The Supreme Court subtly removed the central support for the *Erie* doctrine—the constitutional justification—and left intact the doctrinal structure and precedents. While the Court correctly recognized that the Constitution does not compel *Erie*, the doctrine's modern incarnation is structurally weak and bereft of a sound theoretical grounding. At times it is overly deferential to state law, and at other times it allows federal procedure to trump significant state policies. Moreover, in recent years, new uncertainties have crept into the doctrine and revealed deeper problems.

Part II demonstrates that the *Erie* doctrine fails to protect any coherent vision of the structural interests that supposedly are at its core. The problem derives from the Supreme Court's interpretation of the two statutes at the heart of the modern doctrine—the Rules Enabling Act (Enabling Act) and the Rules of Decision Act (Decision Act). As other scholars have recognized, the Court's theory about the Enabling Act has remained elusive and inconsistent.

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11. *Compare* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949) (refusing to apply Federal Rule of Civil Procedure 3 for *Erie*-related reasons), *with* Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (applying Federal Rule of Civil Procedure 35 without discussing *Erie* implications).

12. 380 U.S. 460 (1965).

The more salient and overlooked problem, which this Article is the first to explore, is that the Court has applied the Decision Act in an anomalous way that does not protect any lucid conception of federalism or equality. The Decision Act, as interpreted since *Hanna*, seeks to avoid vertical forum shopping—a litigant's preference between state and federal court—and the inequality to which it supposedly leads. In *Erie* itself, the Court treated the potential difference in outcomes between state and federal courts as constitutionally problematic. But the Constitution does not compel *Erie*, nor does it require exact equality of results in different courts. Indeed, the Supreme Court has rejected the same arguments regarding the importance of identical outcomes when different states apply each other's laws. Forum shopping, therefore, is not a symptom of unconstitutional behavior. Moreover, the focus on forum shopping obscures states' far more significant interest in regulating conduct within their borders. In other words, the modern *Erie* doctrine does not advance a defensible vision of either federalism or equality and thus has become a solution in search of a problem.

Part III proposes a statutory revision with three significant innovations. First, it defines states' federalism interests with greater particularity. Specifically, states should retain the ability to adopt truly substantive rules—rules that seek to regulate conduct directly, most often expressed in the elements of a cause of action and the defenses that respond directly to those elements. In this way, the revised statute protects a coherent vision of federalism by encouraging states to make their substantive policy choices clear and directing federal courts to protect those choices more rigorously.

Second, the statute unifies the *Erie* analysis into a single test that expands the scope of federal rulemaking authority and more clearly vindicates the proper role of federalism. Simply put, Congress should authorize federal courts to create any rules that are unquestionably procedural or fall within the twilight zone.[13] Congress has the power to promulgate such rules on its own. Consistent with current doctrine, Congress also may delegate such rulemaking authority to the federal courts, which enjoy a unique expertise on procedural questions. Just as the statute protects states' substantive policy choices more robustly, it promotes uniformity and predictability within the federal procedural regime.

Third, federal courts should retain the power to adopt rules through the current, formal rulemaking process and also to create rules interstitially when adjudicating specific cases. From a policy perspective, the proposed regime finds support in administrative law. Federal agencies have latitude to choose how they announce new procedural rules, whether through a

13. I leave for another article a question that others have addressed at length—the federal courts' power to create truly substantive common law. *See, e.g.*, Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Green, *supra* note 7; Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

formalized notice-and-comment process or more informally through adjudications. Such discretion has been a mainstay of administrative law and generally has been a virtue rather than a recipe for chaos. The parallels to administrative law are especially apt in this context since federal courts would exercise discretion in an area—federal procedure—in which they have particular expertise, just as administrative agencies enjoy discretion within their areas of core competence.

The statutory revision thus creates a more predictable and easily administrable doctrine. Moreover, unlike the current *Erie* doctrine, it effectuates coherent structural concerns about the allocation of power among states, Congress, and the federal courts.

I. THE MODERN *ERIE* DOCTRINE

This Part offers a brief overview of how the modern *Erie* doctrine developed, including an analysis of how *Hanna v. Plumer* subtly recast the doctrine. It also demonstrates how *Hanna*'s edifice of clarity and workability has begun to crumble.

A. The Symmetry of 1938: Erie *and the Federal Rules of Civil Procedure*

Erie's narrow holding—despite doubts about some of its reasoning, the torrent of scholarship that the case has unleashed, and the doctrinal complexity that has ensued—is simple. In diversity cases, federal courts apply state substantive law. All of it.[14]

At issue in *Erie* was the proper interpretation of the Rules of Decision Act, which the first Congress enacted as section 34 of the Judiciary Act of 1789.[15] Despite certain stylistic changes over the years, the substance of the Decision Act has remained unchanged since then. It provides, in relevant part, that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[16]

In 1842, in *Swift v. Tyson*, the Supreme Court had interpreted the Decision Act to mean that a federal court, when hearing a state-law claim based on diversity jurisdiction, must apply a state's substantive *statutory* law but not necessarily a state's *judge-made* law (or, common law).[17] Federal courts thus had authority to disregard state judge-made law and instead create their own common law to apply in diversity actions. In 1938, *Erie* declared that *Swift*'s interpretation of the Decision Act was both incorrect and unconstitutional.[18] Speaking through Justice Louis Brandeis, the Court held: "There is no federal general common law. Congress has no

14. *See supra* note 7 (distinguishing *Erie*'s narrow application to diversity cases and *Erie*'s "megadoctrine").

15. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

16. Act of June 25, 1948, ch. 646, 62 Stat. 944 (codified at 28 U.S.C. § 1652 (2012)).

17. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

18. *See Erie*, 304 U.S. at 72–79.

power to declare substantive rules of common law applicable in a state . . . . And no clause in the Constitution purports to confer such a power upon the federal courts."[19] *Erie* thus made clear that states have full authority to announce their own substantive law, whether through statutes or judicial decisions, and that federal courts must apply that law.

A certain symmetry arose in 1938. In addition to the Court's decision of *Erie*, the first Federal Rules of Civil Procedure (FRCP) went into effect. Promulgated pursuant to the Rules Enabling Act of 1934, the FRCP aspired to create a uniform system of procedure for the federal courts. Thus, the dual developments meant that federal courts sitting in diversity were to apply federal procedural law and state substantive law.[20]

The symmetry of 1938 quickly foundered on the stark reality that substance and procedure can become frustratingly enmeshed and that procedure often affects the outcome of litigation. For instance, a statute of limitations, though not purporting to be substantive in the sense of regulating someone's conduct, can have a dispositive effect on whether a plaintiff may bring a lawsuit.[21] The burden of proof[22] and rules governing contributory negligence[23] similarly seek to govern litigation conduct but nonetheless also can dictate which side wins.

B. Hanna*'s Creation of the Modern* Erie *Doctrine*

In the early years of *Erie* and the FRCP, the Court struggled to find a coherent methodology for navigating the questions that fall within the twilight zone between substance and procedure.[24] Part of the problem was the Court's conflation of three distinct sources of law that make up the *Erie* doctrine: the Constitution, the Rules of Decision Act, and the Rules Enabling Act. The Constitution establishes the outer bounds of federal lawmaking authority. The Decision Act, as interpreted since *Erie*, declares that state substantive law provides the rule of decision in diversity cases. And the Enabling Act authorizes the Supreme Court to establish "general rules of practice and procedure" for the federal courts (including the now-familiar FRCP).[25] In those early years, the Court viewed nearly every *Erie*-related question through the same lens and focused on whether application of the federal rule, regardless of whether it was nominally "substantive" or "procedural," would change the outcome of a case.[26] That test nearly

19. *Id.* at 78.

20. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

21. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (treating a state statute of limitations as outcome determinative even though a federal doctrine of laches might have led to the identical outcome).

22. *See, e.g.*, Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939).

23. *See, e.g.*, Palmer v. Hoffman, 318 U.S. 109 (1943).

24. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532–33 (1949).

25. Others include the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure.

26. *See Bernhardt*, 350 U.S. at 202; *Ragan*, 337 U.S. at 532–34; *Guaranty Trust Co.*, 326 U.S. at 109; *see also* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536–37

always forced federal law to yield to state law. The Court made occasional nods to the FRCP[27] and the vague possibility of "countervailing considerations,"[28] but it never devised a systematic way to navigate those various interests. Consequently, the results and logic of the early cases were inscrutable.

The contours of the modern *Erie* doctrine came into focus in 1965 with *Hanna v. Plumer*,[29] which disaggregated the three sources of law and largely crafted the tests that courts apply when analyzing them.[30] *Hanna* reasoned, correctly, that the original outcome-determinative test—which the Court had applied rather indiscriminately—proves too much. Every procedural variation between state and federal rules has the potential to affect the outcome of litigation.[31] Indeed, in the years between *Erie* and *Hanna*, the Court concluded that nearly every federal rule was outcome determinative and thus "often bent over backwards to apply state law."[32] As a result, the earlier unvarnished outcome-determinative test had threatened to swallow even the most mundane procedural rules.[33] In charting a new course, *Hanna* made three important moves that gave rise to the modern *Erie* doctrine.

1. Modifying the Outcome-Determinative Test

First, the Court declared that the mere prospect of a different outcome was not the appropriate test. Instead, it crafted what has become known as the "unguided *Erie* choice"[34] or the "modified outcome-determinative test."[35] *Hanna* held that courts must apply the test "with[] reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[36] In so doing, the Court made clear that the relevant time for assessing whether application of

(1958) (recognizing the outcome-determinative test but noting "affirmative countervailing considerations").

27. *See supra* note 11.

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

29. 380 U.S. 460 (1965). In fact, *Hanna* is so central to the current *Erie* analysis that Professor Thomas Rowe refers to the doctrine as the "*Erie-Hanna* doctrine." Rowe, *supra* note 10, at 966.

30. *See generally* Ely, *supra* note 3.

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

32. Hendricks, *supra* note 10, at 112.

33. The earlier outcome-determinative test could have undermined even the service of process rules at issue in *Hanna* itself. *See Hanna*, 380 U.S. at 468. *Hanna* involved a conflict between what was then Rule 4(d) (now Rule 4(e)), which permitted service of process on any person of suitable age at the defendant's dwelling place, and the Massachusetts rule that required personal service on the executor of an estate. In *Hanna*, the defendant's wife was served at their home in compliance with the federal rule but not the state rule. *See id.* at 461–62.

34. *Id.* at 471.

35. Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 712 (1995); *see also* Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 360 (1977) (referring to *Hanna*'s "modified outcome determination test").

36. *Hanna*, 380 U.S. at 468.

a particular rule would be outcome determinative is at the point when forum shopping might occur—at the *start* of litigation.[37]

2. Bifurcating the *Erie* Analysis

Second, *Hanna* created a bifurcated approach for dealing with certain conflicts between federal and state law. In diversity cases, federal courts usually apply state substantive law; that is just the narrow rule from *Erie* itself.[38] But if there is a conflict between federal and state law regarding an issue that is not clearly substantive, then a court must follow one of two routes, depending on the source of the federal law. The modified outcome-determinative test, with its focus on avoiding forum shopping, applies only when the source of the federal rule is judge-made law (such as abstention or the equitable doctrine of laches).

On the other hand, the Rules Enabling Act provides the mode of analysis when the FRCP or other congressionally authorized rules are at issue. Under this prong of *Hanna*, the standards of *Erie* itself and the modified outcome-determinative test are irrelevant.[39] The validity and applicability of the FRCP are subject to a much more generous standard—as long as the FRCP "really regulates procedure,"[40] then it is valid and applicable.[41]

By bifurcating the *Erie* analysis, *Hanna* essentially saved the FRCP. As noted above, the original outcome-determinative test had threatened to leave almost no room for the FRCP to operate in the face of contrary state law. Similarly, the modified outcome-determinative test would have called for the FRCP to yield to state law in many instances.[42] Thus, by creating a different mode of analysis for the FRCP and other congressionally authorized rules—a test that overwhelmingly favored their validity and applicability—*Hanna* ensured that the FRCP would apply broadly in all federal cases.

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37. *See id.* at 468–69.

38. State law, of course, is always subject to the trump of a federal constitutional command or a federal statute that preempts state law. *See* Clermont, *supra* note 7, at 5–9. As noted earlier, the present analysis deals principally with *Erie*'s application to diversity actions rather than *Erie*'s megadoctrine of federal-state relations. *See supra* note 7 and accompanying text.

39. *Cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (blending *Hanna*'s two prongs).

40. *Hanna*, 380 U.S. at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

41. *Hanna* noted that an FRCP still must be constitutional; however, the constitutional test is quite lax, permitting any FRCP that "fall[s] within the uncertain area between substance and procedure" and is "rationally capable of classification as either." *Id.* at 472; *see also infra* note 212.

42. The Court at times has acknowledged that determining which *Hanna* test applies—the modified outcome-determinative test or the "really regulates procedure" test—can be dispositive. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010); *see also* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1136 (2011); Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1012 (2011).

3. Deconstitutionalizing *Erie*

Hanna's third move, while less explicit, effectively deconstitutionalized the *Erie* analysis, at least with respect to the twilight zone, which has been the source of nearly all *Erie*-related difficulties.

Erie was self-consciously a constitutional decision. The Court reasoned that "the unconstitutionality of the course pursued has now been made clear," and such unconstitutionality compelled the Court's interpretation of the Decision Act.[43] *Erie*'s constitutional arguments, though sparse, were rooted in two notions of federalism, both of which were wrong when the Court decided *Erie* and over time have become even more obviously erroneous.

The first constitutional argument was predicated on the notion that the states and the federal government were separate sovereigns. According to *Erie*, federal courts, by creating substantive general common law, had "invaded rights which . . . are reserved by the Constitution to the several States."[44] That argument largely echoes the Tenth Amendment, which provides that powers not granted to the federal government "are reserved to the States respectively."[45]

Erie scholarship has not been kind to this species of the federalism argument, and after *Erie* the Supreme Court alluded to it only once more.[46] The "separate sovereigns" approach, which effectively treated states as independent nations, was "controversial from the beginning"[47] and in recent years has met with "near-universal disdain."[48] It was "steeped in now-discredited views of state autonomy" that were a relic of *Lochner*-era federalism.[49] Moreover, the Tenth Amendment does not obviously displace Article III, which expressly provides for diversity jurisdiction. Some scholars have argued that implicit within the grant of diversity jurisdiction is federal courts' power to create even *substantive* law that applies in

43. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938).

44. *Id.* at 80.

45. U.S. CONST. amend. X. Moreover, *Erie* cited approvingly to an opinion that had offered a full-throated defense of the idea that the Tenth Amendment recognizes the states as "separate and distinct sovereignties." Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

46. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956); *see also* Ely, *supra* note 3, at 704–06; *cf. Hanna*, 480 U.S. at 475 (Harlan, J., concurring) (arguing that federal law should not substantially affect "those primary decisions respecting human conduct which our constitutional system leaves to state regulation").

47. Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *As the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 142 (2011).

48. Green, *supra* note 7, at 608; *see also* Ely, *supra* note 3, at 701–02 (rejecting state-enclave theory); David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1276–77 (2007) (arguing that United States v. California, 297 U.S. 175, 183–84 (1936), effectively foreclosed the Tenth Amendment argument). *But see* Friendly, *supra* note 3, at 395 (offering one of the few modern defenses of the Tenth Amendment justification for *Erie*).

49. Green, *supra* note 7, at 608; *see also* Sherry, *supra* note 47, at 143.

diversity cases,[50] a view espoused by certain Founders.[51] Thus, even in its own time, *Erie*'s separate-sovereigns argument was wrong as a matter of constitutional theory because it represented a fundamental misunderstanding of federal-state relations.

The second version of the federalism argument propounded by *Erie* was based on the idea that the federal government is one of enumerated powers and may regulate only when the Constitution so authorizes.[52] When the Court decided *Erie*, the enumerated-powers argument was strained on the facts of the case. The Erie Railroad, a New York company operating in Pennsylvania, engaged in interstate commerce; consequently, Congress had latitude, even under the narrow view of the Commerce Clause that prevailed in the early twentieth century, to regulate the railroad's activities.[53] Precisely because federal power was broad enough to regulate the railroad, *Erie* itself was a poor case in which to announce a categorical rule derived from the limited nature of federal power.

The enumerated-powers explanation had become even less plausible by 1965, when the Court decided *Hanna*. To the extent that that explanation relies on the federal government's lack of particular powers, such that neither Congress nor a court may exercise certain lawmaking authority, the argument proves little.[54] By 1965, the federal government had acquired vast regulatory powers that bordered on plenary.[55] There indeed might be

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50. *See* Green, *supra* note 7, at 609. Some scholars have argued that implicit within the Article III grant of diversity jurisdiction is federal courts' power to create even *substantive* law that applies in diversity cases. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 98, 118 (1993); Field, *supra* note 13, at 915–19; Sherry, *supra* note 47, at 146.

51. At the Pennsylvania Ratifying Convention, James Wilson argued:

> [I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island. I ask, further, how will a creditor feel, who has his debts at the mercy of tender laws in other states?

2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 519 (Merrill Jensen ed., 1976).

52. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts.").

53. *See* Green, *supra* note 7, at 608–09 (arguing that *Erie* relied in part on the logic of "*Lochner*-era federalism" that initially impeded much of the New Deal legislation); *id*. at 612 (arguing that *Erie* involved facts that indisputably fell within Congress's legislative powers); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 974 n.164 (2013) (same); Sherry, *supra* note 47, at 143–44 (same); *see also* S. Ry. Co. v. United States, 222 U.S. 20, 27 (1911).

54. *See* Green, *supra* note 7, at 613; Sherry, *supra* note 47, at 144 & n.87. One could certainly make the argument that courts' lawmaking powers are even more narrowly circumscribed than Congress's. But that was not *Erie*'s argument. *See infra* notes 300–10 and accompanying text.

55. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Even today, recent high-profile decisions have limited that power only at the margins. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Roberts, C.J.); *id.*

some cases that are within a federal court's diversity jurisdiction but nonetheless concern matters over which the federal government has no lawmaking power. But the number of those cases had become—and remains—vanishingly small.[56] Consequently, as most scholars recognize, the concept of enumerated powers cannot explain why the rule of *Erie* should govern the lion's share of cases.[57]

Hanna implicitly acknowledged the problems with *Erie*'s constitutional arguments and, without saying so, changed the Court's interpretation of the *Erie* doctrine's essence. The Court effectively deconstitutionalized *Erie* by ignoring the constitutional arguments and turning *Erie*'s basic holding into a matter of statutory interpretation. At no point does the *Hanna* opinion refer explicitly to either the Constitution or the Decision Act. The scholarly consensus, though, is that *Hanna*'s modified outcome-determinative test is a means of applying the Decision Act rather than the Constitution.[58]

Indeed, it would be strange for *Hanna*'s many references to the "*Erie* rule," and the identification of the rule's twin aims, to pertain to anything other than the Decision Act. *Hanna* makes plain that when an FRCP is at issue, its validity and applicability are *not* subject to the modified outcome-determinative test—i.e., the "*Erie* rule"—but, instead, to the much more forgiving inquiry of whether the rule "really regulates procedure."[59] If an FRCP passes that test, it satisfies the Enabling Act and governs, irrespective of whether it would be outcome determinative. Consequently, the outcome-determinative test does not derive from a constitutional imperative because, if it did, it would apply even to the FRCP. *Hanna*'s bifurcation of the Decision Act and the Enabling Act is the key to understanding how the Court subtly relegated the Constitution to the background of almost every difficult *Erie* question.[60]

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at 2642 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

56. *See* Green, *supra* note 7, at 612–14.

57. Modern scholars who still believe that *Erie* has constitutional underpinnings recognize that the enumerated-powers explanation has little purchase. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14–15 (1985); Redish, *supra* note 4, at 766 n.19; *see also* Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1416 (2001). *But see* Ely, *supra* note 3, at 702–04 (offering a limited defense of the enumerated-powers rationale to justify *Erie*'s actual holding but arguing that, beyond that, "the Constitution's utility as a point of reference was ended").

58. *See, e.g.*, Ely, *supra* note 3, at 707–18; Rowe, *supra* note 10, at 985; *see also* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 314–15 (2008).

59. *See* Hanna v. Plumer, 380 U.S. 460, 464, 470–71 (1965) (noting that validity is governed by the *Sibbach* test).

60. *See* Ely, *supra* note 3, at 707–18.

* * *

After *Hanna*, the *Erie* world seemed clearer. The Constitution, at most, compels federal courts to apply unambiguously substantive state law, but the two relevant statutes govern matters within the twilight zone. When the source of the federal rule is judge-made law, the Decision Act requires courts to apply the modified outcome-determinative test, which puts a thumb on the scale, favoring application of state law. When the source of the federal rule is an FRCP adopted pursuant to the Enabling Act, the test is whether the FRCP really regulates procedure. That test favors application of the FRCP rather than any conflicting state rule.[61]

C. Newfound Uncertainty

Despite *Hanna*'s aura of predictability, over the last two decades, the Supreme Court has pursued what Professor Jennifer Hendricks characterizes as a confusing and ill-fated "third way" of the *Erie* doctrine.[62] The first phase, in the immediate aftermath of *Erie* itself, was overly deferential to state law. The second phase, beginning with *Hanna*, saw the almost universal applicability of the FRCP, notwithstanding even important state policies to the contrary.[63] Since 1996, though, the Supreme Court has decided three cases that embody an equivocal approach—a labyrinthine third way—under which lower courts and litigants cannot readily discern whether and to what extent federal law will apply in diversity cases.[64]

Each of the three cases introduced a new element of uncertainty into the *Erie* calculus. The first, *Gasperini v. Center for Humanities, Inc.*,[65] concerned a clash between New York's heightened standard for appellate review of jury awards and the more deferential federal standard. Applying *Hanna*'s "twin aims" analysis under the modified outcome-determinative test, the Court concluded that the state standard was substantive for *Erie* purposes.[66] Nonetheless, it noted that the Seventh Amendment governs the allocation of authority between trial and appellate courts in the federal system.[67] To accommodate both of those conclusions, the Court performed rather elaborate statutory surgery. It directed federal *trial* courts to apply New York's heightened *appellate* standard in reviewing jury awards for excessiveness, thus giving "effect to the substantive thrust" of New York law.[68] But federal appellate courts were to continue reviewing lower court decisions according to the more deferential federal standard, thereby

61. *See, e.g.*, Steinman, *supra* note 42, at 1136.
62. Hendricks, *supra* note 10, at 124–25.
63. *See id.* at 105.
64. *See id.* at 105–06.
65. 518 U.S. 415 (1996).
66. *See id.* at 428. *But see id.* at 467–68 (Scalia, J., dissenting) (arguing that the source of federal law was Rule 59, governing motions for new trials, and that *Hanna* counseled application of that particular Rule).
67. *See id.* at 432 (majority opinion).
68. *Id.* at 426, 438.

preserving the Seventh Amendment's division of authority among federal courts.[69] The Court's attempt at a Solomonic solution did not receive high marks for clarity, administrability, or coherence.[70]

The second case, *Semtek International Inc. v. Lockheed Martin Corp.*,[71] gave an exceedingly narrow construction[72] to Rule 41(b),[73] which governs whether a dismissal "operates as an adjudication upon the merits."[74] Virtually every court system had given claim-preclusive effect to "merits" dismissals (despite some disagreements about which dismissals belonged in that category).[75] But *Semtek* rejected the idea that a merits dismissal pursuant to Rule 41(b) was one to which preclusion attached. Such an unnatural cabining of Rule 41(b) stemmed from the Court's fear that a rule regulating preclusion would be "too substantive" and thus run afoul of the Enabling Act's prohibition against rules that "abridge, enlarge or modify any substantive right."[76] Instead of applying state law, though, the Court decided to create federal common law on preclusion. Then, in a second head-fake, the Court borrowed the relevant state law and incorporated it into the federal common law.[77]

Most recently, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[78] the Court divided on a number of questions regarding how to assess the validity and applicability of the FRCP, specifically with regard to Rule 23, which regulates federal class actions. For instance, the plurality argued that an FRCP's validity turns only on whether it is sufficiently procedural or impermissibly substantive; the procedural or substantive nature of the affected state law is immaterial.[79] By contrast, the concurrence and dissent argued that the nature of the conflicting state law does matter.[80] The Court also evinced disagreement about whether an FRCP that is valid under the Enabling Act nonetheless might be inapplicable in a given case.[81] Although a majority of justices held that Rule 23 should apply broadly, there was no majority opinion regarding

69. *See id.* at 438.

70. *See* Dudley & Rutherglen, *supra* note 10, at 708; Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1663 (1998); Hendricks, *supra* note 10, at 125–26; *cf.* Rowe, *supra* note 10, at 966 (offering a mild defense of *Gasperini*).

71. 531 U.S. 497 (2001).

72. *See* Clermont, *supra* note 42, at 1012 (noting the "strangely narrow scope" that the Court gave Rule 41(b)); Hendricks, *supra* note 10, at 120 (noting the "implausible reading of Rule 41(b)"); *see also* Dudley & Rutherglen, *supra* note 10, at 723.

73. FED. R. CIV. P. 41(b) (governing involuntary dismissal of actions).

74. *Semtek*, 531 U.S. at 501.

75. *See* Dudley & Rutherglen, *supra* note 10, at 723.

76. *Semtek*, 531 U.S. at 503; *see also* 28 U.S.C. § 2072(b) (2012).

77. *See Semtek*, 531 U.S. at 508–09; *see also* Hendricks, *supra* note 10, at 120–21.

78. 130 S. Ct. 1431 (2010).

79. *See id.* at 1443–44 (plurality opinion).

80. *See id.* at 1449, 1450–52 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1460–64 (Ginsburg, J., dissenting).

81. *Compare id.* at 1443–46 (plurality opinion), *with id.* at 1450–52 (Stevens, J., concurring in part and concurring in the judgment).

some of the most salient disagreements about how courts should interpret and apply the Enabling Act.

In short, the Court has unsettled the stability that *Hanna* initially offered. Over the last twenty years, the cases have qualified the strong presumption in favor of the validity and applicability of codified federal rules and have shown more amenability to case-by-case challenges. Perhaps these are only hard cases at the margins. Nonetheless, they have created doctrinal instability to no useful end and, more tellingly, have begun to reveal the shaky foundations on which the doctrine rests.

II. THE MODERN BREAKDOWN

The previous Part explored not only *Hanna*'s innovations, but also how *Hanna* failed to create a workable doctrine. Although it probably comes as no surprise to most judges, scholars, and students that *Erie* presents enduring practical difficulties, this Part identifies a deeper and more insidious problem that, until now, the literature has not treated comprehensively.

Erie's complexity serves no useful end because the doctrine fails to protect any coherent vision of the structural interests that supposedly lie at its core. In recent years, scholars have discussed certain tensions within the Court's Enabling Act jurisprudence. This Part begins by demonstrating that in spite of that recognition, neither scholars nor courts are gravitating toward a solution. The lack of consensus derives from the doctrine's larger structural problems.

More significantly, this Part develops a novel criticism of the Court's current approach to the Decision Act and its focus on avoiding forum shopping.[82] Scholarly grumbling generally has bemoaned that approach's incompleteness or lack of clarity.[83] But hardly anyone has questioned the fundamental assumption that vertical forum shopping is an inherent evil that leads to unfairness. This Part challenges the received wisdom of nearly all courts and scholars and argues that the supposed evil of forum shopping, and the perceived unfairness to which it might lead, are chimerical. One of the bedrock policies that has animated the *Erie* doctrine for seventy-five years is, quite simply, wrong.

The ultimate conclusion is not that the *Erie* doctrine is just unduly complex or leads to the occasional unfortunate decision. Rather, the current doctrine fails to protect any defensible conception of federalism, separation of powers, or equality. Until courts and scholars confront that overarching problem, no amount of tweaking at the margins will yield significantly better results.

82. *See, e.g.*, Rowe, *supra* note 10, at 984–85; Steinman, *supra* note 58, at 326–27.
83. *See, e.g.*, Clermont, *supra* note 42, at 998–1003; Rowe, *supra* note 10, at 1005.

A. Pervasive Disputes About the Rules Enabling Act

Courts and scholars frequently note that the Supreme Court never has invalidated an FRCP.[84] That truism belies pervasive disagreements among scholars who have identified new uncertainty in the Court's approach to the Enabling Act. In some respects, though, that uncertainty always lurked just beneath the surface of *Hanna*. What has become clear is that the tensions within the Court's Enabling Act jurisprudence seem largely insuperable.

1. Tensions Regarding the Structural Purpose of the Enabling Act's Restrictions

One of the most conspicuous disagreements concerns the purpose of the Enabling Act's directive that an FRCP may not "abridge, enlarge or modify any substantive right."[85] Since the early years of the *Erie* doctrine, the Supreme Court has treated the restriction as one that protects federalism,[86] and in his iconic article, Professor John Hart Ely proceeded on the same assumption.[87] But in a comprehensive history of the Enabling Act, Professor Stephen Burbank has argued persuasively that the restriction regarding substantive rights serves primarily to protect separation of powers interests—*Congress's* authority to craft substantive policies.[88] Since then, scholars overwhelmingly have embraced the separation of powers explanation even when they disagree about what lessons to draw from Professor Burbank's insights.[89] Notwithstanding general scholarly agreement, though, the Court has continued to regard federalism as the driving force behind the Enabling Act.[90]

Misconstruing the underlying purpose of the Enabling Act can lead to odd and deleterious consequences. Federalism and separation of powers interests often will be complementary, but not always. Most conspicuously,

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84. *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 41 (2010); Dudley & Rutherglen, *supra* note 10, at 739.

85. 28 U.S.C. § 2072(b) (2012).

86. *See* Burbank & Wolff, *supra* note 84, at 27–31 (tracing federalism rationale to Sibbach v. Wilson, 312 U.S. 1 (1941)).

87. *See* Ely, *supra* note 3, at 718–40.

88. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–12 (1982).

89. *See, e.g.*, Clermont, *supra* note 42, at 1007–08, 1014–15; Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 92 (1998); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 56 (2008); Rowe, *supra* note 10, at 979–80; *see also* Max Minzner, *The Criminal Rules Enabling Act*, 46 U. RICH. L. REV. 1047, 1057–60 (2012). *But see* Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1063 (2011) (arguing that the displacement of substantive state law by an FRCP presents federalism problems); Kelleher, *supra*, at 90–91 & n.189 (noting the tendency of earlier scholarship to view the Enabling Act through a federalism lens).

90. *See* Minzner, *supra* note 89, at 1059–60; *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001).

a focus on federalism can lead the Court to conclude that an FRCP has a narrower meaning in diversity cases than it does in federal question cases. For example, the Court has construed Rule 3, which governs the commencement of an action through the filing of a complaint, as *not* regulating whether such filing in federal court tolls a state statute of limitations.[91] In other words, in the diversity setting, the Court has construed Rule 3 narrowly out of deference to state tolling provisions.[92] By contrast, the Court has held that in federal question cases, Rule 3 is broader in scope and *does* operate as a tolling provision.[93] The centrality of federalism concerns thus drove the divergent interpretations of Rule 3. On the other hand, an orientation toward separation of powers likely would have avoided such a seemingly strange result. The relevant inquiry would not have turned on myriad *state* policies but instead on the single question of whether *Congress* had addressed the issue or, through the Enabling Act, left its resolution to the federal courts.[94]

The anomaly that an FRCP can mean different things in different contexts becomes increasingly likely when the Supreme Court treats the Enabling Act as a protector of federalism.[95] As the Court's jurisprudence has demonstrated, that approach threatens to undermine the goal of uniformity, which was among the Enabling Act's chief objectives.[96]

2. Debate About the Scope of the FRCP

Closely related is the issue of how broadly to construe an FRCP. As discussed in Part I, *Hanna* bifurcated the analysis of *Erie* questions depending on whether the federal rule derived from judge-made law or instead from a congressionally authorized rule, such as the FRCP. Because the FRCP are subject to the more forgiving "really regulates procedure" test (as opposed to the modified outcome-determinative test), they are almost certainly valid. In light of that strong presumption, the dispositive question often is not whether an FRCP is valid but instead which particular issues come within its ambit.[97] Therein lies the real difficulty—figuring out whether an FRCP covers any given matter.

As Professor Adam Steinman has noted, the Supreme Court still has not provided concrete guidance on whether an FRCP governs a case.[98] The

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

92. In *Walker* and *Ragan*, state law provided that the statute of limitations was tolled only upon service, rather than filing, of the complaint. *See Walker*, 446 U.S. at 752–53; *Ragan*, 337 U.S. at 532–34.

93. *See* West v. Conrail, 481 U.S. 35, 38–39 (1987).

94. *See* Burbank & Wolff, *supra* note 84, at 44.

95. *See* Hendricks, *supra* note 10, at 120 (arguing that *Semtek* likely means Rule 41(b) will operate differently in diversity and federal question cases); *see also* Burbank & Wolff, *supra* note 84, at 42 (noting that an exclusive focus on federalism would render the Enabling Act "a dead letter in federal question cases").

96. *See* Redish & Murashko, *supra* note 89, at 56.

97. *See Walker*, 446 U.S. at 749.

98. *See* Steinman, *supra* note 42, at 1135.

various formulations for this inquiry include whether an issue "is covered by one of the Federal Rules,"[99] whether there is a "'direct collision' between the Federal Rule and the state law,"[100] whether the state and federal rules "can exist side by side,"[101] and "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."[102] Moreover, the Court has vacillated on the methodology for interpreting the FRCP.[103] On some occasions, it has observed that "Federal Rules [of Civil Procedure] should be given their plain meaning" rather than an unduly narrow construction that averts "a 'direct collision' with state law."[104] At other times, though, the Court has abandoned that approach and expressly approved of narrowing constructions that are "sensitiv[e] to important state interests and regulatory policies."[105] The Court's more explicit embrace of narrowing constructions is a relatively new development and lends further credence to the notion that the Court's *Erie* jurisprudence is increasingly unstable.

Although other scholars have explored the indeterminacy of the Court's current approach to ascertaining the scope of a given rule,[106] one example succinctly illustrates the murkiness. In *Burlington Northern Railroad Co. v. Woods*,[107] the Supreme Court considered a potential conflict involving an Alabama statute that imposed a mandatory 10 percent penalty when a losing party seeks to stay a judgment, by posting a bond, but then loses the appeal. The Court noted that the statute's purpose was to deter frivolous appeals and unnecessary delays.[108] By contrast, Federal Rule of Appellate Procedure 38 made a penalty discretionary rather than mandatory.[109] Under one of the Court's earlier formulations, the two rules arguably could exist "side by side"; under Rule 38, nothing prevents a federal court from imposing the 10 percent penalty required by Alabama law. But the Court found a "direct collision" between the discretionary federal rule and the inflexible Alabama rule.[110] In essence, the Court held that because the two competing rules sought to govern precisely the same question, the state law

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

100. *See Walker*, 446 U.S. at 749.

101. *Id.* at 752.

102. *Id.* at 749–50; *see also* Steinman, *supra* note 42, at 1135–36 (collecting other formulations).

103. *See* Clermont, *supra* note 42, at 1010–13, 1021–23.

104. *Walker*, 446 U.S. at 750 n.9; *see also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988).

105. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001).

106. *See, e.g.*, Burbank & Wolff, *supra* note 84, at 35–41; Clermont, *supra* note 42, at 1019–27; Steinman, *supra* note 42, at 1169–73.

107. 480 U.S. 1 (1987).

108. *See id.* at 3–4.

109. *See id.* at 4. The Federal Rules of Appellate Procedure, like the FRCP, are authorized by the Enabling Act and are subject to the same analysis.

110. *See id.* at 4–8.

had to yield, but it made no serious attempt to reconcile the seemingly disparate standards that purport to determine the scope of an FRCP.[111]

3. Uncertainty About How Litigants May Challenge the FRCP

Courts and scholars also have disagreed about the extent to which litigants may challenge the validity or applicability of the FRCP and the standards that govern such questions. Some have argued that only wholesale (facial) challenges are permissible, while others maintain that retail (as-applied) challenges are also acceptable. At issue is the interaction between two provisions of the Enabling Act: the directive in § 2072(a) that the Supreme Court may promulgate "general rules of practice and procedure" and the qualification in § 2072(b) that "[s]uch rules shall not abridge, enlarge or modify any substantive right."

The dominant approach in the jurisprudence and literature favors the wholesale approach—an FRCP, if valid under the Enabling Act, is applicable in all cases and not susceptible to case-by-case challenges. But disagreements are pervasive even among those who regard the wholesale approach as appropriate. Scholars long have disputed the appropriate standard for assessing an FRCP's validity[112] and, in particular, whether an FRCP runs afoul of § 2072(b)'s "substantive rights" restriction.[113]

Other scholars and at least one Supreme Court justice have suggested that the Enabling Act permits case-by-case challenges to the FRCP. Justice John Paul Stevens's concurrence in *Shady Grove* exemplifies such an approach, which essentially says that even if an FRCP is generally *valid* under § 2072(a) because it is sufficiently procedural in nature, it nonetheless might be *inapplicable* in a given case because the FRCP disturbs a substantive right created by state law.[114] In the wake of *Shady Grove*, some scholars have written approvingly about the possibility of as-applied challenges to the FRCP.[115]

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111. *See id.*

112. The Court's early approach treated substance and procedure as mutually exclusive, such that compliance with one prong of § 2072 signaled compliance with the other. *See* Redish & Murashko, *supra* note 89, at 58–61 (discussing the Court's approach in Sibbach v. Wilson & Co., 312 U.S. 1 (1941)). Professor Ely disagreed, arguing that a rule might be sufficiently procedural under § 2072(a) but nonetheless might affect substantive rights and thereby run afoul of § 2072(b). *See* Ely, *supra* note 3, at 718–20.

113. *Compare* Burbank, *supra* note 88, at 1160 (arguing that an FRCP violates § 2072(b) and is invalid if it has a "predictable and identifiable" effect on substantive law), *with* Redish & Murashko, *supra* note 89, at 87–93 (arguing that an FRCP is valid under § 2072(b) even if it has an "incidental" impact on substantive rights). Many scholars have argued that the Court should give more teeth to § 2072(b). *See, e.g.*, Kelleher, *supra* note 89, at 108–09; Minzner, *supra* note 89, at 1048–49; Rowe, *supra* note 10, at 996.

114. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1451–55 (Stevens, J., concurring in part and concurring in the judgment).

115. *See generally* Ides, *supra* note 89; Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181 (2011).

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As one scholar has observed, the conundrum of interpreting the Enabling Act, particularly in light of the elusive purpose and meaning of its "substantive rights" limitation, is "inherently unresolvable."[116] In some ways, the Supreme Court has fomented the confusion with several recent opinions.[117] In other ways, the problem is inherent in the Enabling Act itself. The drafters of the statute generally thought of substance and procedure as mutually exclusive categories, and the Enabling Act's language reflects that idea, even though the twilight zone between substance and procedure is capacious.[118] In other words, the tensions within the Enabling Act likely are insuperable precisely because the statute is infused with false assumptions. It should come as no surprise, then, that courts and scholars are not gravitating toward any sort of consensus about how to interpret and apply the Enabling Act.

B. The Incoherence of the Modern Understanding of the Rules of Decision Act

The remainder of this Part challenges the prevailing wisdom about the current interpretation of the Rules of Decision Act, specifically its focus on applying *Erie*'s "twin aims"—avoiding forum shopping and inequitable administration of the laws.[119] That vision of the Decision Act is erroneous, represents bad policy, and does not advance a coherent vision of federalism. I trace the problem back to *Hanna*. As discussed above, *Hanna* imposed needed order on the *Erie* doctrine but made a seemingly subtle move—grafting some of *Erie*'s constitutional analysis onto the Decision Act—that has had deleterious consequences.

1. *Hanna*'s Importation of *Erie*'s Constitutional Analysis into the Decision Act

Hanna's greatest achievement was rescuing the FRCP. If the Court had continued to apply the old outcome-determinative test to every potential conflict between state and federal law, nearly every FRCP might have foundered on the possibility that it could alter the end result of litigation.[120] Moreover, *Hanna* recognized that the Constitution plays, at most, an

116. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997).

117. *See supra* Part I.C.

118. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1311 (2006); *see also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 896–97 (1999).

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

120. *See id.* at 473–74 (noting that the unmediated outcome-determinative test risked "disembowel[ing] either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act").

insignificant role in the *Erie* doctrine, which always has been more solicitous of state prerogatives than the Constitution requires.[121]

The problem, which has gone largely unrecognized in the *Erie* literature, is that *Hanna* imposed what Justice Brandeis thought was an essential part of *Erie*'s constitutional justification—the evils of forum shopping and disparate treatment of litigants between state and federal court—onto the Decision Act.[122] While *Hanna* effectively interred the constitutional analysis, the Court also tried not to upset the entire body of *Erie* doctrine precedents. Most conspicuously, *Hanna* refused to abandon the outcome-determinative test that had become a hallmark of earlier decisions.[123] But the current statutory interpretation, unmoored from *Erie*'s original constitutional analysis, lacks any sound theoretical justification and has led to untoward results, including unnecessary layers of complexity that do not actually protect federalism interests.

As demonstrated above, Justice Brandeis clearly regarded *Erie*'s result as constitutionally compelled.[124] At the heart of the Court's analysis, and the impetus for the sea change wrought by *Erie*, was what the Court perceived as the "unconstitutionality" of the earlier regime in which fundamental notions of federalism were offended when state and federal courts applied different substantive law.[125] The other evils against which the Court inveighed, including forum shopping and the "grave discrimination" occasioned by unequal enforcement of rights,[126] were derivative of the putative constitutional problem.

The best reading of *Erie* is that forum shopping and differential outcomes were not actually problems in themselves, even though Justice Brandeis's strong language might suggest otherwise. Instead, forum shopping and variance between the substantive law applied in federal and state courts were indicative of an overarching violation of federalism principles.[127] In other words, the "twin aims of the *Erie* rule"[128] that *Hanna* reformulated into the modified outcome-determinative test were part and parcel of *Erie*'s constitutional analysis.

The difficulty for the modern incarnation of the twin aims is now twofold (appropriately enough): first, constitutional federalism does not compel *Erie*;[129] second, *Hanna* incorporated the twin aims analysis, divorced from

121. *See* Ely, *supra* note 3, at 704.

122. *Cf.* Steinman, *supra* note 58, at 314 ("There is . . . an uncomfortable mismatch between *Erie*'s purported constitutional basis and the current framework for applying the *Erie* doctrine.").

123. *See Hanna*, 380 U.S. at 468–69.

124. *See supra* notes 43–52 and accompanying text.

125. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75, 77–78 (1938).

126. *Id.* at 74.

127. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512–13 (1954) (noting the "triviality of the principle" of mitigating forum shopping, which is a "relatively minor consideration" in addressing overarching federalism problems).

128. *Hanna*, 380 U.S. at 468.

129. *See supra* notes 46–58 and accompanying text.

its original context, into the current interpretation of the Rules of Decision Act. As a result, the vestigial structure of *Erie* is a solution in search of a constitutional problem. One might argue that even if the twin aims no longer protect constitutional federalism, they still might serve a useful purpose. I consider and reject several possibilities below.

2. The Irrelevance of Forum Shopping to the Rules of Decision Act

One possible defense of the current approach is that even if *Erie* was wrong about the constitutional question, the Decision Act independently disapproves of forum shopping. Put another way, the Decision Act itself could embody a judgment that vertical forum shopping is inherently undesirable. Such an argument is strained for two reasons. First, recent historical scholarship argues that both *Swift* and *Erie* were wrong.[130] The Decision Act's command that "[t]he laws of the several states . . . shall be regarded as rules of decision"[131] might not call for application of state law, whether written or unwritten. At the time of the Founding, "the several states" often referred to the states collectively, whereas "the respective states" referred to the states individually. Historical evidence—based on grammar, the location of the Decision Act in the Judiciary Act of 1789, and the debates in the First Congress—thus suggests that the Decision Act might have directed federal courts to apply American (rather than British) law.[132]

Second, even if one accepts the position that the Decision Act requires that state substantive law apply in diversity actions,[133] it strains credulity to argue that a "rule of decision" is a rule that influences a choice of forum.[134] The statute itself says nothing about forum shopping. An interpretation of the Decision Act that focuses on forum shopping seems odd because it embraces an anomalous construction of the term "rule of decision," which generally refers to the clearly substantive law that applies to a case.[135] Moreover, it fails to protect states' actual interests. Why would states care

130. *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 83–87 (1990).

131. 28 U.S.C. § 1652 (2012).

132. *See* RITZ, *supra* note 130, at 83–87; *see also* Sherry, *supra* note 47, at 134–35 (accepting Ritz's conclusions). *But see* Michael G. Collins, *Justice Iredell, Choice of Law, and the Constitution—A Neglected Encounter*, 23 CONST. COMMENT. 163 (2006) (arguing that early interpretations of the Decision Act do not support Ritz's argument); Nelson, *supra* note 53, at 958–59 (challenging Ritz's conclusions).

133. *See, e.g.*, Nelson, *supra* note 53, at 959.

134. I am not aware of any court or scholar who has propounded such a definition of "rule of decision," at least outside of the context of the Rules of Decision Act.

135. *Black's Law Dictionary* defines "rule of decision" as "[a] rule, statute, body of law, or prior decision that provides the basis for deciding or adjudicating a case." BLACK'S LAW DICTIONARY 1448 (9th ed. 2009); *see also* Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 (2012) (using "rules of decision" to refer to clearly substantive law); Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2536 (2011) (same); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010) (same); Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 242–43 (2012) (defining "rule of decision," or "right," as a clearly expressed, enforceable, mandatory obligation).

whether litigants choose state or federal courts? Other things being equal—including the outcome of the litigation and the state's ability to ensure that its substantive law applies—they probably do not. At most, states might have a dignitary interest[136] in not being regarded as "inferior" to the federal government.[137] But such constitutional dignity is a far cry from the dignity associated with individual litigants' *perceptions* of different court systems (and the myriad reasons why a litigant might prefer one court over another).[138] Even if that sort of dignitary interest were cognizable—and that seems unlikely—it would be strange for a statute to attempt to protect such an interest so obliquely through an anomalous use of the phrase "rule of decision." One would expect the Decision Act to have been clearer on that point.

More likely, states have a far greater interest in either the ultimate outcome of the litigation or in influencing people's primary conduct. Although states might be concerned about the outcome of litigation, the central fallacy of the early *Erie* cases was their assumption that such an interest should be dispositive. For the reasons discussed above, the unvarnished outcome-determinative test proves too much and would leave little room for the operation of federal procedural law.[139] Consequently, *Hanna* correctly rejected the idea that the Decision Act protects a state's or litigant's interest in exact equality of outcome between state and federal courts.[140]

As I argue in Part III, though, states do have an interest in regulating people's primary conduct. That interest seems paramount, especially in comparison to an amorphous desire to influence litigants' forum choices. Consequently, it would make much more sense if federal courts treated a "rule of decision" as a rule directed at primary conduct rather than one that influences choices at the start of litigation.

136. To be sure, one premise of the Constitution is that "state courts enjoy parity of constitutional competence with the lower federal courts." Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1154–55 (1988); *see also* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1952).

137. One might argue that a state has an interest in maintaining control of the entire apparatus that governs the creation, enforcement, and adjudication of laws. But the entire concept of federal diversity jurisdiction refutes the idea that such an interest is cognizable under the Constitution.

138. Moreover, it is hard to see how a state's dignitary interest is negatively affected when forum shopping leads a litigant to choose state court. Yet the modern approach to the Decision Act regards such forum shopping as equally problematic.

139. *See supra* notes 34–42 and accompanying text.

140. *Hanna* emphasized that only "substantial" or material differences were problematic. *See* Hanna v. Plumer, 380 U.S. 460, 467 (1965). But that attempted revision only begs the question. A party who loses because of differences between state and federal courts surely would view that difference as material.

3. Forum Shopping Is Not an Inherent Evil

The idea that forum shopping is inherently evil has become part of the received wisdom about *Erie*, especially after *Hanna* treated the discouragement of forum shopping as one of the doctrine's driving forces.[141] Scholars largely have accepted that received wisdom,[142] even when they criticize the *Erie* doctrine on other grounds.[143]

Despite the fact that courts have been decrying forum shopping for the better part of a century, it is not an evil in itself.[144] At most, it is a symptom of a problem. Sometimes forum shopping might be completely benign—say, when an out-of-state lawyer prefers to litigate in federal court because she is more familiar with federal procedure.[145] The incentive to forum shop stems from the uniformity of the FRCP throughout the country, and such uniformity, after all, was one of the FRCP's goals.[146] In at least one important respect, the notion of forum shopping is embedded in the Constitution.[147] The whole point of diversity jurisdiction was to give out-of-state litigants an unbiased forum that they might find more hospitable than a local state court.[148]

Courts and scholars thus should resist the temptation to identify forum shopping and assume that that is the end of the matter; instead, they should probe the causes of forum shopping in a given context and figure out whether those causes are actually problematic.[149] *Erie* did just that. The Court explained that forum shopping resulted from what it believed was federal courts' failure to respect the Constitution's federalism limitations. Although that problem turned out to be illusory (or, perhaps more charitably, it no longer holds sway), the Court's methodology at least was correct. With that in mind, the question becomes whether forum shopping

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141. *See id.* at 468.

142. *See, e.g.*, Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1054–55 (2002); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1935, 1982 (2011); Steinman, *supra* note 58, at 299–301; *see also* Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61, 67 (2010) (arguing that *Erie* was concerned with "far more than the evils of forum shopping"). *But see* Redish & Phillips, *supra* note 35; Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

143. *See, e.g.*, Sherry, *supra* note 47, at 139 (treating forum shopping, and its attendant "[d]iscrimination," as a necessary evil in a federal system).

144. Professor Ely acknowledged that point in passing. *See* Ely, *supra* note 3, at 710; *see also* Hart, *supra* note 127, at 512–13 (making a similar point but before the Court decided *Hanna*). As I argue below, however, Professor Ely concluded erroneously that forum shopping was indicative of "simple unfairness." *See* Ely, *supra* note 3, at 712; *infra* notes 179–95 and accompanying text.

145. *See* Dudley & Rutherglen, *supra* note 10, at 747.

146. *See* Burbank, *supra* note 88, at 1023–24, 1065–68.

147. *See* U.S. CONST. art. III, § 2, cl. 1.

148. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 119–21; *see also* Borchers, *supra* note 50, at 79–80.

149. *See* Note, *supra* note 142, at 1695 ("Forum shopping represents a continuum of activities within the legal universe; it cannot be dismissed merely as an evil to be avoided.").

bespeaks any modern-day evil. As the following subsections argue, it does not.

4. The Twin Aims' Failure To Protect a Coherent Vision of Federalism

The most plausible defense of the current twin aims analysis is that it protects a prudential version of federalism that is more deferential to state law than the Constitution requires.[150] But the twin aims advance no such vision.

The structural incoherence is exemplified by horizontal choice-of-law standards, which govern how states apply one another's laws. On matters within the twilight zone, state courts tend to be far less solicitous than their federal counterparts of other states' laws. Such lax horizontal choice-of-law standards are not necessarily problematic; in fact, they often do a better job than the *Erie* doctrine of vindicating states' principal interests in crafting conduct rules that regulate primary activity. The broader point is that the mismatch between horizontal and vertical choice-of-law standards demonstrates that the *Erie* doctrine does not foster an identifiable or defensible version of federalism.

Although the first prong of the twin aims analysis—avoiding forum shopping—often requires a federal court to apply state law, such an approach does not necessarily lead to greater respect for state prerogatives. By its own terms, *Erie* focused solely on vertical forum shopping (the choice between state and federal court) rather than horizontal forum shopping (the choice among different states).[151] *Hanna* incorporated that same focus into the present Decision Act analysis. While *Erie*, and now the Decision Act, arguably have fostered uniformity of substantive law *within* a given state, they also have led to greater divergence *among* the states. Although the twin aims analysis might combat vertical forum shopping, it has created incentives for litigants to engage in horizontal forum shopping—seeking out different law in different states.[152] Neither *Erie* nor *Hanna* explained why vertical forum shopping is worse, or indicative of a greater problem, than horizontal forum shopping. In both situations, a litigant chooses a particular forum with the hope of obtaining one set of laws to the exclusion of another.

Horizontal forum shopping is a part of modern litigation. To be sure, it probably was much more difficult when the Court decided *Erie* because defendants might not have been amenable to personal jurisdiction in more than one state.[153] Today, however, many defendants—particularly large

150. *See* Ely, *supra* note 3, at 706 (arguing that although the Constitution does not embrace the "state enclave model" of federalism, Congress imposed that model through the Decision Act).

151. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 76 (1938).

152. *See* Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from* Shady Grove, 44 CREIGHTON L. REV. 29, 32 (2010); Sherry, *supra* note 47, at 138–39.

153. *See* Nelson, *supra* note 53, at 969.

corporations—are subject to personal jurisdiction in multiple states,[154] thereby affording plaintiffs an opportunity to choose the state in which to bring suit. And the ability to choose where to litigate often entails the power to select a different set of substantive laws.[155] In fact, lawyers have indicated that the applicable substantive law is among the factors that they consider when deciding where to litigate a case.[156] Moreover, recent studies have shown that lawyers have changed their horizontal forum shopping habits in the wake of the Class Action Fairness Act of 2005,[157] which enables defendants to remove class actions from state court to federal court more easily. In the past, plaintiffs' lawyers would bring suit in state courts known for being particularly plaintiff friendly. Now, with the knowledge that the case likely will wind up in federal court, lawyers are bringing cases in federal courts at the outset, and they are choosing courts that are most sympathetic to class actions.[158] That lawyers adapt their horizontal forum shopping to new legal structures underscores the existence of such behavior.

One reason for the prevalence of horizontal forum shopping is the extent to which horizontal choice-of-law principles call for the application of forum law. For instance, in the horizontal choice-of-law context, a state generally applies its own law regarding issues of "judicial administration," i.e., rules prescribing the conduct of litigation.[159] Among the vast swath of issues that pertain to judicial administration, and thus usually are governed by the forum state's law, are discovery rules,[160] costs and security for costs,[161] the burdens of production[162] and persuasion,[163] the standard for sufficiency of the evidence,[164] and statutes of limitation.[165]

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154. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–57 (2011); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

155. Admittedly, horizontal forum shopping will not always lead State *A* to apply different substantive law than State *B*. Both states' choice-of-law principles might call for the application of the same substantive law. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that in diversity cases federal courts must apply state choice-of-law rules). On the other hand, studies have demonstrated that a forum is "much more likely" to apply its own substantive law rather than a sister state's law. Borchers, *supra* note 152, at 32; *see also* Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1266–74 (2011) (noting various presumptions counseling application of forum law); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 830–31 (2010) (noting the historical pedigree of the *lex fori* approach—calling for application of forum law—to conflict of laws); Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869, 871 (1981).

156. *See generally* Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529 (2010).

157. 28 U.S.C. § 1332(d) (2012).

158. *See* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1611–14 (2008).

159. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

160. *See id.* § 127 cmt. a.5.

161. *See id.* § 127 cmt. a.8.

162. *See id.* § 134.

163. *See id.* § 133.

164. *See id.* § 135.

In contrast, federal courts have much less latitude to apply their own law in the vertical choice-of-law context. The modified outcome-determinative test prescribes a significantly stricter approach, militating *against* application of federal law regarding many of those same issues.[166] Consequently, there is a wide divergence between the approaches to horizontal and vertical choice of law.

The mere existence of horizontal forum shopping does not undermine the federalism rationale for the twin aims approach so much as federal courts' general indifference to it.[167] The Supreme Court never has entertained a serious challenge to the horizontal choice-of-law principles that give states broad discretion to apply their own law regarding the issues discussed above, which all fall within the twilight zone. Moreover, the Supreme Court has held that the Full Faith and Credit Clause[168] and the Due Process Clause[169] impose only nominal constraints on a state's ability to apply its own substantive law to a dispute.[170] And the Court has held that even when one state has an obligation to apply a sister state's substantive law, the forum has broad discretion to interpret the sister state's law. Only the most blatant misinterpretation will violate the Constitution.[171]

All of these aspects of horizontal choice of law—the preference for application of forum law regarding many issues in the twilight zone, the minimal constitutional constraints on states' ability to apply their own law, and the existence of horizontal forum shopping—fundamentally undermine the idea that the twin aims protect a coherent vision of federalism. It makes

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165. *See id.* § 142. Borrowing statutes, which direct the forum to apply the statute of limitations of the state that supplies the cause of action (if that statute of limitations is shorter than the forum's), mitigate the potential for disparate outcomes.

166. *See, e.g.*, Garcia v. Wal-Mart Stores, Inc., 209 F.3d 1170 (10th Cir. 2000) (holding that state law governed an award of "actual costs"); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) (applying a state's anti-SLAPP (strategic lawsuit against public participation) provisions regarding the dismissal of a lawsuit); Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261 (5th Cir. 1997) (applying state court rules regarding fees). See also pre-*Hanna* cases that the Supreme Court has not repudiated. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (applying a state law requiring security of costs); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (holding a state statute of limitations to be applicable).

167. The lax horizontal choice-of-law standards have been controversial. *See* Green, *supra* note 155; *see also* Borchers, *supra* note 152, at 32. My objective here is not to take sides in that debate but rather to demonstrate the widely different standards that apply to vertical and horizontal federalism questions.

168. *See* U.S. CONST. art. IV, § 1.

169. *See* U.S. CONST. amend. XIV, § 1.

170. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion) (noting that the Constitution allows a state to choose its own law if there is "a significant contact or significant aggregation of contacts, . . . such that choice of its law is neither arbitrary nor fundamentally unfair"); *see also id.* at 320–32 (Stevens, J., concurring in judgment). In *Allstate*, the decedent and his wife lived in Wisconsin, and he was involved in a fatal vehicular accident in Wisconsin with another Wisconsin resident. A Minnesota court's application of local law was permissible, though, based on contacts that were irrelevant to the accident—the decedent worked in Minnesota, and his widow later moved to Minnesota. *See id.* at 305.

171. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988).

little sense that the Decision Act would strive to protect federalism so painstakingly through vertical choice-of-law rules when horizontal choice-of-law rules, free from almost all constraints, could undermine similar federalism values.

Two rejoinders to the mismatch between vertical and horizontal choice of law seem possible, but neither is persuasive. First, one might note that the Decision Act, as currently interpreted, protects vertical federalism more robustly than the Constitution does, whereas the lax restrictions on horizontal federalism derive solely from the Constitution. Descriptively, that's correct. But that argument cannot explain why the Court has construed the Decision Act as it has when such an interpretation does not represent a natural reading of the statute and is at odds with the almost negligible constraints that federalism imposes on horizontal choice-of-law principles. As noted above, the text of the Decision Act says nothing about the twin aims. Furthermore, it gives no indication that its use of the term "rule of decision" is so anomalous as to include any rule that might induce vertical forum shopping.[172] In other words, the incongruity—beefed-up vertical federalism versus ineffectual horizontal federalism—is not compelled by the Decision Act and is instead of the Court's own making. The explanation for the Court's unnatural interpretation of the Decision Act thus seems less to do with a well-conceived notion of vertical or horizontal federalism than it does with the happenstance of grafting *Erie*'s constitutional analysis onto the statutory construction of the Decision Act.

The second possible rejoinder is that the Constitution's structure protects vertical federalism and is far less concerned about horizontal federalism. Professor David Marcus has noted that horizontal federalism "has an unclear relationship to the Constitution's federalism architecture," such that horizontal federalism, in a sense, is "false federalism."[173] Although the roots of horizontal federalism are less clear, it is a concept around which a rich literature has developed[174] and that Congress recently embraced when it passed the Class Action Fairness Act.[175] Moreover, while the Supreme Court has not always spoken clearly regarding horizontal federalism,[176] the notion that states must respect one another's sovereignty has clearly animated recent decisions regarding punitive damages[177] and personal

172. *See supra* notes 133–38 and accompanying text.

173. Marcus, *supra* note 48, at 1298–99.

174. *See, e.g.*, Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Green, *supra* note 155; Judith Resnik, *Foreign As Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

175. *See* Marcus, *supra* note 48, at 1297–99.

176. *See* Erbsen, *supra* note 174, at 501–02; Marcus, *supra* note 48, at 1299.

177. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421–22 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571–72 (1996).

jurisdiction.[178] The point is not that vertical and horizontal federalism protect state sovereignty in precisely the same way but simply that horizontal federalism can provide meaningful protection of state prerogatives. In light of that axiom, the Court's jurisprudence is especially strange: when it comes to vertical federalism, the federal government must bend over backwards to respect state sovereignty; with regard to horizontal federalism, though, one state has only the most minimal obligation to respect a sister state's sovereignty.

5. The Twin Aims' Failure To Protect a Coherent Personal Liberty Interest

While the first of the twin aims (discouraging vertical forum shopping) fails to promote a rational structural view of federalism, the second aim (preventing inequitable administration of the laws)[179] seeks to uphold nonexistent personal liberty interests. Thus, on both fronts, the twin aims approach is incoherent.

Erie and *Hanna* are replete with references to "inequity," "unfairness," and "discrimination." *Erie* referred to the situation in which out-of-staters could choose more favorable law in federal courts as "grave discrimination by noncitizens against citizens"[180] and maintained that the discrimination had become "far-reaching."[181] *Hanna* quoted those passages approvingly as it argued that one of *Erie*'s principal purposes was to mitigate "inequitable administration of the laws."[182]

Erie's holding that federal courts must apply state substantive law in diversity cases reflected a gut instinct that it is unfair for a lawsuit to have vastly different results depending on the forum.[183] Although *Erie* and its progeny cloaked that instinct in federalism arguments, it remains little more than an intuition that does not withstand serious analysis.

For all of the cases' breathless language about unfairness and discrimination, nothing in the Constitution or the relevant statutes requires state and federal courts to reach the same results in any given case. *Hanna*

178. The Court embraced horizontal federalism in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). Two years later, in an opinion by Justice Byron White, who also authored *World-Wide Volkswagen*, the Court seemingly disavowed the notion that restrictions on personal jurisdiction derive from horizontal federalism. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). More recently, though, the plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011), sought to reinvigorate horizontal federalism as part of the personal jurisdiction analysis.

179. *See* Donald L. Doernberg, *"The Tempest":* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1168 n.135 (2011) (arguing that the "two parts of the formulation are only different sides of the same coin" since "forum-shopping . . . is what *caused* the inequitable administration of the laws").

180. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

181. *Id.* at 75.

182. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965); *see also id.* at 468 n.9; Note, *supra* note 142, at 1685.

183. *See* Ely, *supra* note 3, at 712–13.

recognized as much when it modified the outcome-determinative test.[184] A more moderate formulation of the perceived inequality—that only *substantial* variations give rise to concerns of unfairness—is still conceptually problematic. Virtually any variation can be dispositive, depending on when during the litigation the difference between the state and federal rules becomes relevant. Sometimes those variations matter at the stage of primary activity. Such was the case in *Erie* itself, in which federal and state law defined the negligence standard differently.[185] At other times, the variation becomes manifest only at the beginning of litigation, when, for example, two courts apply different limitations periods.[186] Those differences do not affect primary conduct (such as the actual accident in a tort action), but they can have a tremendous effect on the litigation at its inception. Even differences that appear to have no influence on either primary conduct or forum selection can have "a marked effect upon the outcome of the litigation."[187] Such was the situation in *Hanna* when different rules governing service of process became relevant much later in the case.[188]

Hanna treated a rule as significant for purposes of the Decision Act to the extent that it mattered at the start of litigation. That exercise in line-drawing sought to prevent forum shopping; it did not derive from some inherent notion of what makes a rule important or significant to the litigants. Arguably, a better indicium of significance is whether a rule would affect people's primary conduct choices. In any event, the possibility that different courts—applying indisputably valid law—might lead to different, and even significantly different, results in a given case is a long way from rank discrimination.

Discrimination is a loaded concept that has little, if any, applicability in the choice-of-law context.[189] In law, invidious discrimination usually connotes predictable and intentional differentiation, often based on animus.[190] Progressives, including Justice Brandeis, tended to regard diversity jurisdiction, and the ability to choose the general common law, as a privilege that systematically benefitted corporations or out-of-staters.[191]

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184. *See Hanna*, 380 U.S. at 469.

185. *See Erie*, 304 U.S. at 70.

186. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Another example includes rules governing whether a plaintiff may "stack" insurance claims (i.e., multiply damages based on the existence of multiple insurance policies covering a single loss). *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 305 (1981).

187. *Hanna*, 380 U.S. at 469.

188. *See id.* at 468–69.

189. Even some critics of *Erie* occasionally lapse into describing the application of different law as "discrimination." *See* Sherry, *supra* note 47, at 139.

190. Equal Protection Clause jurisprudence relies heavily on this concept. *See, e.g.*, Akins v. Texas, 325 U.S. 398, 403–04 (1945) ("A purpose to discriminate must be present which may be proven . . . by unequal application of the law to such an extent as to show intentional discrimination.").

191. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 64–67, 155–62 (2000).

But no such systemic privilege existed, as the contours of any given case dictated which party stood to gain from application of general common law rather than state law.[192] In fact, one of the ironies of *Erie* is that the Court, by rejecting the general common law in favor of Pennsylvania law, ruled in favor of a corporate defendant at the expense of a small-fry plaintiff.

The multitude of situations in which courts do not reach exactly equal results demonstrates that discrimination is not necessarily at work when federal courts, sitting in diversity, do not behave exactly as state courts would. In making discretionary decisions, judges often reach different conclusions.[193] Different circuits might have different interpretations of the same law.[194] And, as noted above, a state usually applies its own law regarding such issues as statutes of limitation and burdens of proof, even if such rules substantially affect how the forum state effectuates a sister state's substantive law.[195] Those differences do not rise to the level of discrimination. In cases where duly constituted courts apply law enacted by democratically legitimate legislatures and executives—without bias toward any particular party or groups of people—"discrimination" is an inappropriate way to describe varied outcomes.[196]

Consequently, the inequity that *Erie* perceived, and that *Hanna* enshrined in the twin aims analysis, is misplaced. There is no good reason to believe that choice-of-law rules derive from systemic bias or work an invidious discrimination.

6. The Persistence of Vertical Forum Shopping

Finally, I note briefly that the twin aims analysis neither has achieved its goal of eliminating vertical forum shopping (even if that were a coherent or laudable goal) nor created an easily administrable rule. Federal courts sitting in diversity have found ways around applying state law that they find

192. *See* Sherry, *supra* note 47, at 138 (noting other cases in which state law, rather than federal general law, benefitted corporate litigants).

193. *See, e.g.*, United States v. Dockery, 955 F.2d 50, 54 (D.C. Cir. 1992) ("Abuse of discretion review means 'that the court has a range of choice, and that its decision will not be disturbed *as long as it stays within that range* and is not influenced by any mistake of law.'" (quoting Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984))).

194. *Compare* Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006) (holding that plaintiff need not plead the absence of probable cause in order to state a claim of retaliatory arrest), Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002), *and* DeLoach v. Bevers, 922 F.2d 618, 620 (10th Cir. 1990), *with* Dahl v. Holley, 312 F.3d 1228, 1236 (11th Cir. 2002) (holding that the absence of probable cause is required in retaliatory-arrest claims), Keenan v. Tejeda, 290 F.3d 252, 261–62 (5th Cir. 2002), Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001), *and* Smithson v. Aldrich, 235 F.3d 1058, 1063 (8th Cir. 2000).

195. *See supra* notes 159–66 and accompanying text.

196. The only other possible source of discrimination is an opposing party who tries to gain a litigation advantage. But use of a lawful litigation tactic by a party does not infringe a cognizable liberty interest and thus cannot amount to discrimination by a governmental entity.

antiquated or simply objectionable.[197] For instance, they can treat state law as unsettled, such that the federal court may assume the authority to make an "*Erie* guess" as to how the highest court of the state would resolve the particular question presented by a case.[198] On rare occasions, federal courts baldly refuse to follow state law with which they disagree.[199]

Moreover, vertical forum shopping still happens. Even when litigants know that federal courts will apply state substantive law, litigants often have a strong preference for one forum rather than another. For instance, a plaintiff might want a particular jury pool.[200] Such was the case in *World-Wide Volkswagen Corp. v. Woodson*,[201] one of the venerable personal jurisdiction cases that most civil procedure students read. The plaintiffs sought to include two relatively minor defendants in the litigation in order to destroy diversity and thus keep the case out of federal court. If that tactic had succeeded, the plaintiffs could have tried their lawsuit in state court in Creek County, Oklahoma, which had a reputation for outsize jury awards.[202] The vertical forum shopping could not have been more transparent.

Sometimes a plaintiff might assume that a state judge applying the law of his own state might apply that law more sympathetically than a federal judge.[203] Although federal statutes prohibit litigants from manufacturing diversity (say, by moving to a state other than the defendant's home state),[204] litigants may destroy diversity by moving to or incorporating in the defendant's home state. And the frequency of litigation over tactics that destroy diversity suggests that vertical forum shopping has not become a relic of the pre-*Erie* past.[205]

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197. *See* Sherry, *supra* note 47, at 141 & n.68 (noting that "federal courts have found ways to ignore state decisions" and citing cases demonstrating lack of intrastate uniformity).

198. *See, e.g.*, Webber v. Sobba, 322 F.3d 1032, 1035 (8th Cir. 2003); *see also* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1677–80 (1992) (noting the prevalence of "*Erie* guesses" and frequent errors by federal courts in predicting development of state law).

199. For example, the Oklahoma Supreme Court in *Peevyhouse v. Garland Coal & Mining Co.* held that the measure of damages is the cost of repair rather than the diminution of value. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 114 (Okla. 1962). Oklahoma state courts continue to adhere to this somewhat anomalous rule. *See, e.g.*, Schneberger v. Apache Corp., 890 P.2d 847, 849–50 (Okla. 1994). Several federal courts, however, explicitly decline to follow the rule when applying Oklahoma law. *See, e.g.*, Davis v. Shell Oil Co., 795 F. Supp. 381, 385 (W.D. Okla. 1992) (citing Tenth Circuit precedent and stating that "[t]his Court likewise will not follow *Peevyhouse*"); *see also* Blackburn v. Del. PrimeEnergy Corp., No. CIV-91-664-W, 1992 WL 184071 (W.D. Okla. July 8, 1992) (declining to follow *Peevyhouse*).

200. *See* Borchers, *supra* note 156, at 533.

201. 444 U.S. 286 (1980).

202. *See* Charles W. Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122, 1128 (1993).

203. *See* Marcus, *supra* note 48, at 1251–53 (arguing that *Erie* and CAFA both assumed that federal judges evince preferences for corporate defendants).

204. *See* 28 U.S.C. § 1359 (2012).

205. *See* Go Computer, Inc. v. Microsoft Corp., No. C 05-03356 JSW, 2005 WL 3113068 (N.D. Cal. Nov. 21, 2005); *see also* Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969) (making a partial assignment to create diversity jurisdiction); Grassi v. Ciba-Geigy, Ltd., 894

III. THE GOALS OF A PROPOSED STATUTORY REVISION

The preceding Parts have demonstrated that the current *Erie* doctrine, as applied in federal court, is problematic on a number of levels. It does not advance any meaningful conception of structural interests, and it remains notoriously difficult to administer. In this Part, I discuss objectives for a proposed statutory revision that resolves nearly all of those tensions. A serious effort to effectuate these objectives could take many forms. Although the focus of this Part lies in conceptualizing how the various facets of the *Erie* doctrine should interact, Appendix A concretizes these ideas in actual statutory language. I hasten to add, though, that the Appendix is simply a conversation starter for how drafters might implement the ideas developed in this Part.

I begin by outlining the statute's goals of unifying the various strands of the *Erie* doctrine and expanding federal courts' power to regulate what I call nonsubstantive matters—purely procedural rules as well as the extensive twilight zone between substance and procedure. I then explore why the revision makes sense both theoretically and practically, with reference to instructive concepts from administrative law.

A. The Statute's Goals

The statutory revision that I propose should accomplish three principal goals.

First, the statute should define states' actual federalism interests with greater specificity and clarify that federal courts are required to apply only truly substantive state law. To do so, the statute should codify, in more direct language, the interpretation of the Decision Act from *Erie* itself—a federal court sitting in diversity must apply state substantive law. That is the core of *Erie*, and regardless of whether one regards it as prudential or constitutionally compelled, it embodies important federalism ideals. As I argue in the following section, allowing states to craft truly substantive law, and requiring federal courts sitting in diversity to apply such law, is a cognizable federalism interest.

The trouble with the current approach to the Decision Act is that it calls for federal courts to apply much more than truly substantive state law, and it does so in a haphazard way that fails to effectuate a coherent policy. The statutory revision would put an end to that practice. It would eliminate the modified outcome-determinative test and the twin aims analysis that the Supreme Court has treated as the touchstone of the current Decision Act. Instead, the revised statute would focus on identifying substantive state law directed at primary activity.

F.2d 181 (5th Cir. 1990) (extending *Kramer*'s partial assignment ruling to a case in which the plaintiff attempted to destroy diversity); JMTR Enters., LLC v. Duchin, 42 F. Supp. 2d 87 (D. Mass. 1999); Ivanhoe Leasing Corp. v. Texaco, Inc. 791 F. Supp. 665 (S.D. Tex. 1992); Douglas Energy of N.Y., Inc. v. Mobil Oil Corp., 585 F. Supp. 546 (D. Kan. 1984); Gentle v. Lamb-Weston, Inc., 302 F. Supp. 161 (D. Me. 1969).

As a side benefit, the revision would remove a minor cloud of uncertainty. Recent historical scholarship suggests that the Decision Act, as originally framed, might not have intended for federal courts to apply any particular state's law but, instead, a body of American (rather than British) law.[206] The revision would affirm *Erie*'s basic holding and finally dispense with the debate about *Erie*'s potentially dubious historical grounding.

Second, I propose that the revised statute empower federal courts to create any *general nonsubstantive rule*. That single, unified concept should replace the language of the current Enabling Act, which allows the Supreme Court "to prescribe *general rules of practice and procedure*," provided that "[s]uch rules *shall not abridge, enlarge or modify any substantive right*."[207] As discussed above, pervasive uncertainty has characterized courts' and scholars' understanding of how the two phrases in the Enabling Act interact and thus the extent of the Court's rulemaking powers.[208]

By focusing on the concept of nonsubstantive rules, the proposed statute would make plain that courts may create any truly procedural rule and any rule that falls within the twilight zone. The proposed statute defines courts' rulemaking power in a negative way—a rule passes muster as long as it is not clearly substantive. In so doing, the revision takes some pressure off of the substance-procedure dichotomy on which the Enabling Act now relies. Unlike the term "procedure," as used in the current statute, the concept of nonsubstantive rules does not require an independent, a priori meaning. The proposed statute defines what qualifies as truly substantive law and then permits courts to adopt rules outside the purview of such law. Moreover, the generality requirement—prohibiting courts from adopting rules directed at specific kinds of cases—helps ensure that a court-adopted rule will not impinge on the elected branches' power to declare substantive law.[209]

By granting the federal courts power to craft any nonsubstantive rule, the proposal would extend such rulemaking power beyond its current limits. The Enabling Act, as presently understood, does not allow the Supreme Court to regulate statutes of limitation or preclusion questions; such matters have too many substantive undertones and thus are removed from the Court's rulemaking domain.[210] But early theorists of the substance-procedure dichotomy recognized that those issues, as well as evidentiary questions, qualified as procedural.[211] Precisely because those issues govern judicial administration, notwithstanding collateral effects on substantive

206. *See* RITZ, *supra* note 130, at 83–87; *see also supra* notes 130–32 and accompanying text.

207. 28 U.S.C. § 2072(a)–(b) (emphasis added).

208. *See supra* Part II.A.

209. *See infra* notes 242–43 and accompanying text.

210. *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1023–25 (statute of limitations); *Hendricks*, *supra* note 10, at 128 (preclusion).

211. *See* D. Michael Risinger, *"Substance" and "Procedure" Revisited: With Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 196–97 (1982).

rights, the power to regulate them would fall within the ambit of the new statute.

Consequently, the proposed statute adopts a true "arguably procedural" test that permits courts to regulate all matters that are not unambiguously substantive. Although one formulation of the current Enabling Act test inquires whether an FRCP is "arguably procedural," that description is incomplete and perhaps even wrong.[212] Matters such as statutes of limitation and preclusion are "arguably procedural" for the reasons just discussed, but they presently lie outside the Court's rulemaking power. Thus, the current Enabling Act places additional restrictions on that power (presumably based on the "substantive rights" limitation of § 2072(b), although the Court sometimes is cagey about that). The proposed statute removes those other constraints and clarifies the capacious standard for assessing courts' rulemaking authority.

Third, the statute should expand the means by which federal courts may adopt nonsubstantive rules. It would leave in place the basic Enabling Act structure, which empowers the Supreme Court, through formal rulemaking,[213] to create general prospective rules of practice and procedure for the federal courts. That process in many ways mirrors the rulemaking process followed by administrative agencies under the Administrative Procedure Act[214] (APA). Currently, the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure essentially solicit input regarding any proposed changes through a notice-and-comment process. The proposed revision to the FRCP then goes to the Judicial Conference of the United States, which, if it approves the proposal, forwards it to the Supreme Court. The Court, in turn, transmits the proposal to Congress by May 1 of the year in which the new provision is to become effective. If Congress takes no contrary action, the provision takes effect on December 1.[215]

In addition to that formalized structure, which should remain the default method for adopting new rules, the statute should give courts the power to create rules through less formalized means. Such additional avenues should include local rulemaking, which the Enabling Act already authorizes.[216] But courts' rulemaking ability should extend further and allow the Supreme Court and lower courts to create other nonsubstantive rules interstitially

212. Professor Clermont has suggested that the "arguably procedural" test (Justice John Marshall Harlan's words in *Hanna*) is more permissive than the "really regulates procedure" test from *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941). *See* Clermont, *supra* note 42, at 1004–06. According to Professor Clermont, the former test captures the outer boundaries of Congress's ability to prescribe rules for diversity cases, whereas the slightly more stringent "really regulates procedure" test governs the Enabling Act. *See id.* at 1016.

213. *See* 28 U.S.C. §§ 2071, 2073–2074, 2077 (2012).

214. *See* 5 U.S.C. § 553.

215. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002).

216. *See* 28 U.S.C. § 2071. Consistent with the remainder of the proposal, Congress should repeal § 2071(f), which states that § 2071 is the exclusive means by which federal courts may promulgate local rules.

through the process of adjudication. Such a delegation of common law–making power would give the Supreme Court discretion to promulgate rules formally, to adopt them through adjudication as such rules become necessary, or to leave certain procedural matters within the discretion of the lower courts.

Explicitly expanding the means by which federal courts may adopt procedural rules helps effectuate the statute's broader mandate. It allows federal courts, and the Supreme Court in particular, to adapt to unforeseen situations and fill procedural gaps. Moreover, as some scholars recognize, the Supreme Court already engages in common law rulemaking.[217] By bringing greater candor to that legitimate process, the statute would foster better decisionmaking and greater dialogue between courts, rulemakers, and Congress.

B. Protecting a Coherent Vision of Federalism

One of the statute's major accomplishments would be the clarification of what, until now, has been an amorphous notion of federalism running through the *Erie* doctrine. My proposal promotes a coherent view of federalism as a commitment to protecting states' interest in creating positive law that directly regulates individual conduct. That vision of federalism, though not constitutionally compelled,[218] seeks to protect concrete state interests as a prudential matter.

As I have argued in earlier work, a government's authority to "craft[] conduct rules is the preeminent power and the one that deserves the most rigorous protection."[219] Conduct rules govern primary rights, obligations, and prohibitions, and they usually include the elements of a cause of action and defenses that respond directly to those elements.[220] This is not to say that states do not care about the process of adjudicating those conduct rules, but such concern should not be a cognizable federalism interest when a federal court sits in diversity.

The primacy of the power to enact conduct rules, and the usual reservation of that power to democratically accountable actors, is an idea interwoven through the *Erie* doctrine. Indeed, the doctrine's various sources—the Constitution, the Decision Act, and the Enabling Act—have differentiated between substance and procedure, albeit by drawing the line in different places.[221] The current proposal seeks to refocus the *Erie* doctrine on the conduct rules that embody states' regulatory choices and thus reflect their most salient federalism interests.

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217. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012).

218. *See supra* notes 43–57 and accompanying text.

219. *See* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1142 (2013).

220. *See id.* at 1136–37.

221. *See* Ely, *supra* note 3, at 697–700.

The proposed statute simultaneously recognizes federal courts' interest in impartially maintaining control over their own methods of judicial administration. For these reasons, the statute authorizes courts to create any *nonsubstantive* rule—i.e., one that actually regulates judicial administration. It eschews the term "procedure" in order to avoid confusion with the Enabling Act's scope and to clarify that courts' rulemaking authority now encompasses all matters within the twilight zone. Accordingly, the notion of "nonsubstantive" rules is broader than almost any working definition of "procedural" rules.[222] The fact that a nonsubstantive rule has collateral substantive *effects* is, without more, unproblematic. The relevant question is whether the rule directly regulates a matter of judicial administration; if it does, then it passes muster.[223]

This prudential vision of federalism (and, to a certain extent, separation of powers), is rooted in a functional theory of those structural interests. Professor Victoria Nourse has argued that such interests fundamentally address "risks to the decisionmaking relations between the people and their government."[224] In other words, the diffusion of power among the states and the various branches of the federal government reflects an implicit judgment about which constituencies, through their representatives, should make certain decisions. Accordingly, any allocation of decisionmaking authority should be sensitive to the risk of upsetting the "representative relation."[225]

Viewed through that lens, the proposed statute relies on the basic democratic assumption that the people's direct representatives should craft substantive laws that announce the rules governing daily life.[226] By contrast, appointed judges presumptively should not be in the business of making such conduct rules. That presumption can be overcome, of course, but the federal courts' power to create substantive common law is narrowly circumscribed[227] precisely because shifting such power to judges risks a drastic change in the representative relation.

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222. *See* Trammell, *supra* note 219, at 1140.

223. In one sense, decoupling substantive and procedural rules is artificial. Justice Oliver Wendell Holmes's "bad man" theory of the law argued that a person is not interested in the law's definition of conduct rules per se but, rather, in the likely consequences of certain actions. Predicting such consequences depends on the entire body of law. But the Holmesian view has not prevailed, as the Court for decades has differentiated between rights and enforcement mechanisms. *See* Mulligan, *supra* note 135, at 244–48. Moreover, the entire concept of diversity jurisdiction, particularly in light of the Decision Act, rests on the notion that federal courts can decouple state-defined rights from their enforcement mechanisms.

224. V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 871 (2004). One need not accept Professor Nourse's argument that her theory is constitutional in nature; the theory provides a useful blueprint to guide subconstitutional structural analyses.

225. *Id.* at 888.

226. This Article does not treat the question of which level of elected representatives (local, state, or national) are best positioned to address particular matters. Such questions have generated a rich literature but ultimately are not pertinent to the present discussion.

227. *See supra* note 13.

On the other hand, the risk analysis points the other way regarding rules of judicial administration. Unlike conduct rules, which convey policy judgments about how people should behave in society, nonsubstantive rules strive to implement a predictable system that enforces conduct rules. Nonsubstantive rules do not directly implicate the representative relation for several reasons. First, such rules are not presumptively the domain of democratically accountable representatives. To the contrary, the federal judiciary long has enjoyed the presumption that it is competent to regulate such matters and may do so absent congressional interference. Moreover, courts have a reserve of inherent power that even Congress may not abridge.[228] Second, the risk of disuniformity and unpredictability in federal procedure far outweighs any minimal concern about courts' insulation from popular sentiment regarding those procedural questions. Finally, the very nature of diversity jurisdiction reflects an assumption that decoupling conduct rules (which in diversity cases usually come from states) from federal procedure (which at times might lead to different outcomes) will not disturb vital structural interests.[229]

The framework overlaying the proposed statute is premised on the idea that the difference between substance and procedure is both meaningful and discernible. Scholars and judges long have recognized that the distinction is far from precise. At the extreme end of legal realism, several scholars in the early twentieth century argued that any distinction between substance and procedure was meaningless and illusory.[230] More charitable critics, including Professor Walter Wheeler Cook, observed that an inherent and crisp line did not demarcate the two concepts, thus leading to his memorable description of the wide "no-man's land, the twilight zone" between substance and procedure.[231] Even one of the architects of the FRCP, Professor Charles Clark, described the substance-procedure dichotomy as "shadowy at best."[232] But scholars like Professors Cook and Clark recognized that the line, however elusive, can be useful as long as its purpose is clear.[233] The insight of focusing on why the dichotomy matters in a particular context has enabled scholars and lawyers to have productive discussions about substance and procedure.

228. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833–35 (2008).

229. At the very least, the Constitution envisions slightly different federal procedures, such as adjudication before life-tenured judges. Admittedly, Congress only recently has given federal courts a wide berth to apply federal procedural law. Before the adoption of the Enabling Act in 1934, the Process Act of 1789 and the Conformity Act of 1872 had directed federal courts to apply state procedure in actions at law. *See* Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196; Act of Sept. 29, 1789, ch. 21, 1 Stat. 93.

230. *See* Risinger, *supra* note 211, at 201 & n.48 (collecting sources).

231. Cook, *supra* note 8, at 355.

232. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 519 (1925).

233. *See* Charles E. Clark, *Procedural Aspects of the New State Independence*, 8 GEO. WASH. L. REV. 1230, 1234 (1940); Cook, *supra* note 8, at 336–37, 341; *see also* Kelleher, *supra* note 89, at 108–09.

Scholarship on the Enabling Act in particular has grappled with the overarching question of what purpose the distinction serves,[234] especially because the Enabling Act expressly invokes the dichotomy.[235] Despite asking the right questions, though, such scholarship is almost doomed to yield inconclusive answers. In the late nineteenth and early twentieth centuries, the legal reform movement conceptualized substantive and procedural law as mutually exclusive. Procedure, in the minds of some legal scientists, was value neutral and capable of reformation.[236] Consequently, because many reformers thought that substance and procedure operated in distinct realms, they failed to appreciate the significant overlap between the two.

With a more sophisticated understanding of how substance and procedure interact, recent scholarship has elucidated the dichotomy's continuing relevance for purposes of the *Erie* doctrine and the role of federal courts, in particular. Those insights inform the substance-procedure dichotomy on which I rely and help explain the allocation of power in the proposed statute. Specifically, my proposal draws the line between conduct rules and nonsubstantive rules in a new and innovative way that homes in on states' preeminent interest in regulating primary behavior.

Professor Jennifer Hendricks has explored the state-level benefits that derive from distinguishing between substance and procedure in the *Erie* context. "Separating substance from procedure, artificial as it may be in some senses, has the virtue of requiring the legislature to speak as clearly as possible in the substantive law."[237] A regime that provides a wide berth for federal courts to regulate procedure does not usurp state prerogatives; rather, it fosters candor among elected officials by discouraging state legislators from masking their policy choices within procedural garb.[238] Moreover, the dichotomy, as represented in the proposed statute, provides clarity and predictability that are wanting in the current *Erie* doctrine. Not only does the proposed statute encourage greater candor from state lawmakers, it also conveys a firmer commitment to protecting states' interest in regulating conduct. At the same time, the statute promotes greater predictability with respect to the application of federal procedure, which no longer would be subject to displacement by state procedures.

The proposed statute admittedly will call for the application of state law less often than does the current *Erie* doctrine, but that change does not undermine federalism principles. The current approach to the Decision Act, with its focus on the twin aims, respects state law to the extent that variance between federal and state rules influences a litigant's choice of forum. As

234. *See, e.g.*, Burbank & Wolff, *supra* note 84; Burbank, *supra* note 88, at 1107–08; Kelleher, *supra* note 89, at 182; Redish & Murashko, *supra* note 89.

235. *See* 28 U.S.C. § 2072(a)–(b) (2012); *see also* Ely, *supra* note 3, at 723–24.

236. *See* David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 397–98 (2010); Redish & Amuluru, *supra* note 118, at 1311; *see also* Bone, *supra* note 118, at 896.

237. Hendricks, *supra* note 10, at 146.

238. *See id.* at 138–40; *see also* Clermont, *supra* note 42, at 1017.

discussed above, a state's interest in which court a party chooses pales in comparison to two other state interests—the actual outcome of litigation and the regulation of conduct at the primary stage of activity.[239] Moreover, the current doctrine protects federalism interests in the context of the Enabling Act even more obliquely. For instance, the Court has demonstrated great solicitude for state law in some contexts (for example, allowing state law rather than the FRCP to determine whether *filing* or *service* of a complaint tolls the running of a statute of limitations).[240] On the other hand, the Court has refused to vindicate what appears to be a far greater state interest regarding the availability (or unavailability) of class actions to enforce certain claims.[241] Although there might be good reasons why the cases come out as they do, often turning on what the Court perceives to be the scope of the FRCP at issue, the current approach protects states' interests in haphazard and unpredictable ways. By contrast, my proposal actually strengthens a commitment to federalism by delineating more precisely what federalism protects and how states can more predictably ensure that federal courts will respect their substantive policies.

Precisely because the proposed statute affords federal courts greater discretion to craft and apply nonsubstantive rules, federalism concerns require that courts not abuse that authority. One touchstone for identifying whether a court has exercised its power properly, or whether a rule is too substantive and thus violates federalism principles, is trans-substantivity. The Enabling Act aspired to create a set of rules that would apply in all federal cases, regardless of a lawsuit's underlying substance. Professor Marcus has argued that trans-substantivity is not simply a value that promotes uniformity and ease of administration. Instead, the concept captures what Professor Clark described as a policy commitment to the proper division of power between the elected branches and the federal courts.[242] That insight regarding the current Enabling Act applies equally to the proposed statute. When a court adopts a trans-substantive rule, there is a much stronger presumption that the rule is nonsubstantive. Any of its substantive effects are most likely collateral and unproblematic for purposes of the allocation of authority. By contrast, if a court promulgates a rule that does not apply across all areas of substantive law, a much greater concern exists that the court has exercised nominally procedural powers in order to regulate substantive matters.[243]

239. *See supra* notes 133–40 and accompanying text.

240. *See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

241. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

242. *See* Marcus, *supra* note 236, at 416.

243. *See id.* at 420–21; William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1896–90 (2002).

* * *

The substance-procedure dichotomy, while defined in a new way, is an essential tenet of the proposed statute because it effectuates concrete federalism interests, albeit ones that are prudential rather than constitutional. It strengthens the representative relationship between the people and conduct rules while affording federal courts greater control over their own procedure. Even though substance and procedure are not immutable terms and might not always lead to easy classification of particular issues, they usefully capture important policy commitments. First, unlike the current doctrine, the statute relies on the dichotomy to protect states' identifiable and preeminent interest in regulating primary behavior through the creation of conduct rules.[244] Second, the dichotomy encourages state lawmakers to make their policy preferences clear through substantive law rather than specialized procedures. In so doing, the dichotomy allows federal courts to identify and respect those choices more readily and also fosters ease of administration. Finally, the dichotomy identifies the nonsubstantive matters, usually concerning judicial administration, that federal courts legitimately may regulate. As long as courts do not stray into regulating conduct as such, they will respect the federalism limits that the statute embodies.

C. (Re)unifying the Doctrine

At a theoretical level, the statute unifies (or, perhaps more appropriately, reunifies) the *Erie* doctrine. In the years between *Erie* and *Hanna*, the Supreme Court had generally approached the doctrine in an undifferentiated way.[245] The problem was not the desire to fashion a unified doctrine. Rather, as *Hanna* noted, the earlier unified approach had become untenable because of the Court's extreme deference to state law through the outcome-determinative test, which threatened to make the FRCP virtually impotent.[246] *Hanna* correctly seized on precedents that counseled deference to the FRCP, cabined the reach of the outcome-determinative test, and deemphasized the role of the Constitution in *Erie* questions.[247] For all of the difficulties that *Hanna* caused, many of which I have discussed in the previous Parts, *Hanna*'s differentiation of the three sources of the *Erie* doctrine was necessary in its time.

There is much to commend a unified approach, though. From a practical perspective, courts and litigants will have to negotiate a single test, rather than the current multiplicity of tests that draw lines between substance and procedure in different and sometimes idiosyncratic ways. If streamlining

244. *See* Marcus, *supra* note 236, at 380 (noting the traditional definition of a substantive rule as one that "characteristically and reasonably affect[s] people's conduct at the stage of primary private activity").

245. *See* Henry Paul Monaghan, *John Ely: The Harvard Years*, 117 HARV. L. REV. 1748, 1749 n.5 (2004).

246. *See supra* notes 29–33 and accompanying text.

247. *See supra* notes 34–60 and accompanying text.

the analysis and eliminating the "twin aims" approach to the Decision Act were the only goals of a statutory revision, one solution might be to impose the current Enabling Act standards onto the Decision Act. While that solution would tidy up much of the current complexity in the *Erie* doctrine, it would fall short of achieving other goals.

The proposed statute does not merely streamline the *Erie* analysis; it also expands the realm of nonsubstantive issues that federal courts may regulate. Such an expansion would alleviate most of the problems elucidated in Part II. As discussed above, this approach is consistent with a structural vision of *Erie*'s principal purpose. It reserves to the states the power to craft truly substantive law—conduct rules—and thereby vindicates a coherent notion of federalism by protecting the preeminent power exercised by the federal and state governments.[248] The other side of that coin is that federal courts may regulate any nonsubstantive matters, broadly defined. By expanding federal courts' rulemaking powers, a unified test also fosters predictability and uniformity in several important respects.

First, the proposed statute would make clear that federal rules, as long as they are not clearly substantive, would apply in diversity cases without exception. Under the current regime, even when an FRCP is sufficiently procedural to pass muster under the Enabling Act, the Supreme Court continues to give certain FRCP an unnaturally, even implausibly, narrow construction.[249] Consequently, the same FRCP might have one meaning in a diversity case but another meaning in a federal-question case, a state of affairs that has engendered pointed scholarly criticism.[250] The statutory revision would alleviate that anomaly.

Second, and in a similar vein, the revision would avoid the contentious battles of recent years in which the Supreme Court has debated whether contrary state procedural law may trump an FRCP. *Shady Grove* was the most recent such case. The justices disagreed whether Rule 23, governing class actions, should yield to New York's proscription of class actions when the claims at issue fell below a certain monetary threshold.[251] Rule 23 does not regulate a clearly substantive matter, a point on which the otherwise divided Court agreed.[252] Under my proposal, that would be the end of the

248. *See supra* Part III.B.

249. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 497 (2001) (construing Rule 41(b) as not governing claim preclusion); Walker v. Armco Steel Corp., 446 U.S. 740, 748–53 (1980) (construing Rule 3 as not governing the tolling of a statute of limitations in diversity actions); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1459–73 (2010) (Ginsburg, J., dissenting) (arguing that Rule 23 should yield to a state proscription of class actions in cases involving claims below a certain monetary threshold).

250. *See supra* notes 91–96 and accompanying text.

251. *See Shady Grove*, 130 S. Ct. 1431 (plurality opinion); *id.* at 1448 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1460 (Ginsburg, J., dissenting).

252. *See id.* at 1442–44 (plurality opinion) (arguing that Rule 23 "really regulates procedure"); *see also id.* at 429–33 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1463 (Ginsburg, J., dissenting) (arguing that the Court should construe Rule 23 "with sensitivity to important state interests" but not that Rule 23 was categorically invalid (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996))).

inquiry, and *Shady Grove* would have been an easy case. Because Rule 23 is a valid exercise of the Court's rulemaking power, it should apply without exception and not be subject to narrowing by contrary state law.

Third, the expanded scope of judicial rulemaking would avoid situations, such as *Gasperini*, in which the Court carved up and spliced together certain features of the state and federal standards of review for particular jury awards.[253] The complexity and unpredictability of such an approach has proved notoriously difficult for lower courts to apply.[254] Again, in the absence of concrete federalism interests, such complexity and unpredictability are unnecessary. To the contrary, the approach of cases like *Gasperini* undermines the uniformity of the FRCP.

Finally, the proposed statute would alleviate the uncertainty of as-applied challenges to the FRCP. If a nonsubstantive rule is valid under the proposed statute, it should apply broadly and consistently. The statute accomplishes this goal by eliminating the language that some courts and scholars have invoked to justify as-applied challenges under the Enabling Act.[255]

The potential for as-applied challenges under the current system has created uncertainty but few, if any, corresponding benefits. Some scholars have argued that such challenges are unproblematic.[256] Professor Catherine Struve has noted that the Supreme Court always has entertained certain kinds of as-applied challenges to the FRCP and that those challenges have not unduly compromised the goal of uniformity. Even if there has not been unmitigated chaos, the fact remains that such challenges reduce predictability for litigants and consume judicial resources. Recent decisions essentially have signaled that the Supreme Court is increasingly receptive to as-applied challenges,[257] but to no useful end. Such challenges do not serve actual federalism interests, nor do they protect individual liberty. Although the uncertainty of as-applied challenges in the context of clearly substantive rights—conduct rules—might be a price worth paying in order to allow people to understand and enforce their primary rights and responsibilities, an analogy to the procedural context is inapposite.[258] As-applied challenges to nonsubstantive rules usually are a post hoc attempt to gain a litigation advantage rather than an effort to protect settled expectations about rights and responsibilities. Consequently, the broad application of nonsubstantive rules under the proposed statute fosters predictability without undermining significant countervailing interests.

In short, a unified standard to govern nonsubstantive matters in federal court would foster uniformity and predictability. It also would recognize the federal judiciary's legitimate interest in controlling its own

253. *See Gasperini*, 518 U.S. at 436–38.

254. *See* Hendricks, *supra* note 10, at 147–48; *see also* Houben v. Telular Corp., 309 F.3d 1028, 1038 (7th Cir. 2002).

255. *See* 28 U.S.C. § 2072(b) (2012) (substantive-rights limitation).

256. *See* Ides, *supra* note 89, at 1060–63; Struve, *supra* note 115, at 1238–39.

257. *See supra* Part I.C.

258. *See* Ides, *supra* note 89, at 106–66; Struve, *supra* note 115, at 1204–08.

administration and procedure. In effect, it captures the converse of an axiom that Professor Hart expressed pithily sixty years ago[259]: state law should take the federal courts as it finds them.

D. The Advantages of Discretion in Rulemaking

In addition to unifying the *Erie* analysis and expanding judicial power to create nonsubstantive rules, the statute gives federal courts greater discretion to choose the manner by which they craft such rules. Lessons from administrative law demonstrate that such flexibility is desirable as a policy matter, particularly with regard to the nonsubstantive questions about which federal courts have expertise. Such discretion fosters the prominent role that the statute envisions for courts in crafting nonsubstantive rules, allows courts to adapt to unanticipated circumstances, and promotes greater candor.

1. Common Law Rulemaking by Federal Courts Today

In an important sense, federal courts already adopt procedural rules through case-by-case adjudication. As a formal matter, though, the Enabling Act envisions that the Supreme Court may adopt procedural rules only through a process that resembles notice-and-comment rulemaking by administrative agencies.[260] On the other hand, as recent scholarship has elucidated, federal courts also craft procedural rules through the process of adjudication.[261]

Perhaps the most prominent example of such common law rulemaking through adjudication is the new pleading standard under Rule 8(a). The text of the rule provides that a pleading need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[262] For decades, the Supreme Court had emphasized that under a liberal regime of notice pleading, Rule 8(a) meant that a pleading was sufficient unless it "appear[ed] beyond doubt that the plaintiff [could] prove *no set of facts* in support of his claim which would entitle him to relief."[263] Yet in 2007, the Supreme Court devised a new test that requires a plaintiff to demonstrate that her factual allegations are actually "plausible."[264] As scholars have recognized, the plausibility standard essentially created a heightened pleading standard for all complaints and was untethered to either the text of Rule 8(a) or any existing precedents.[265] In essence, the Court crafted a new

259. *See* Hart, *supra* note 127, at 508 ("[F]ederal law takes the state courts as it finds them.").

260. *See* Struve, *supra* note 215, at 1110, 1140.

261. *See generally* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012); Mulligan & Staszewski, *supra* note 217.

262. FED. R. CIV. P. 8(a)(2).

263. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (emphasis added).

264. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

265. *See* Mulligan & Staszewski, *supra* note 217, at 1195–97; Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832

rule through adjudication. Because the plausibility standard was a policy innovation, rather than a purely legal interpretation of Rule 8(a),[266] many scholars have argued that the Court should have adopted the new pleading standard only through the Enabling Act's formalized rulemaking process.[267]

Another example comes from the rules of joinder, which seek to create efficiencies by bringing together different claims and parties in the same lawsuit. The FRCP that govern joinder generally require a fairly minimal showing of "commonality," such as the presence of a "common question of law or fact."[268] According to Professor Robin Effron, courts have responded to fairly lax joinder requirements by devising "shadow rules" that identify situations in which joinder will (or will not) lead to the desired efficiencies.[269] For instance, courts often insist that various claims should not simply evince a common question of law or fact; rather, they often apply a rule of "implied predominance," requiring that the commonalities actually outweigh the differences between the claims.[270] After careful analysis of several shadow rules, Professor Effron concludes, much like scholars who have analyzed the new plausibility pleading standard, that federal courts have not merely reached disparate interpretations of any given FRCP. Instead, through case-by-case adjudication, courts have created new rules that govern joinder decisions.[271]

2. Analogy to Agency Discretion in Adopting Procedural Rules

Unlike federal courts, administrative agencies enjoy explicit discretion to adopt new rules either through notice-and-comment rulemaking or through case-by-case adjudication. Comparisons between court rulemaking and agency practice seem especially apt now that federal courts, and the Supreme Court in particular, effectively have assumed the power to craft new procedural rules through both adjudication as well as the formal rulemaking process outlined by the Enabling Act. Until a recent contribution by Professors Lumen Mulligan and Glen Staszewski, this potentially fruitful analogy to administrative law had gone largely unexplored.[272]

The analogy begins with reference to one of the seminal cases in administrative law, the second iteration of *SEC v. Chenery Corp.* (*Chenery*

(2010). *But see Twombly*, 550 U.S. at 570 (asserting that the plausibility standard is not a heightened pleading standard).

266. *See* Mulligan & Staszewski, *supra* note 217, at 1196–98.

267. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 883–85 (2010); Clermont & Yeazell, *supra* note 265, at 850; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 453–54 (2008).

268. Effron, *supra* note 261, at 764; *see also id*. at 819–21 (cataloguing and classifying joinder rules that require a demonstration of commonality).

269. *Id.* at 762–63.

270. *See id.* at 789–804; *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

271. *See* Effron, *supra* note 261, at 805.

272. *See generally* Mulligan & Staszewski, *supra* note 217.

II).[273] In that case, the Supreme Court declared that an agency has wide latitude to choose how it announces a new rule—either through the rulemaking process or in the course of adjudicating a case.[274] To be sure, the difference between adjudication and rulemaking can be stark. In an adjudication, an agency can promulgate a new substantive policy without having given prior notice to the public or even the affected party. By contrast, the rulemaking process requires an agency to provide notice of its intent to adopt a new prospective rule, solicit public comments on the proposal, and offer reasons for why it has adopted the rule. Despite those critical differences, *Chenery II* recognized that the formal protections of the rulemaking process might not be desirable or feasible in all instances. Unexpected problems arise, an agency does not always have sufficient expertise to create a generally applicable rule, and an agency might confront a narrow, particularized problem. In those situations, a formal rule might be inadvisable or unnecessary.[275]

Although *Chenery II* remains good law, such that agencies retain significant discretion to craft new substantive policies either through rulemaking or adjudication,[276] it has attracted significant scholarly criticism. Specifically, scholars have argued in favor of the superiority of rulemaking over adjudication, insofar as rulemaking usually is more transparent and fosters participatory values.[277] Despite that preference, administrative law scholars have recognized the continuing salience of discretion and argued that without such discretion the administrative state would come to a grinding halt, crippled by the inability to act only through the cumbersome rulemaking process.[278]

Professors Mulligan and Staszewski rely heavily on the analogy to *Chenery II* and, in particular, modern criticism that overwhelmingly favors rulemaking over adjudication. In light of the superiority of rulemaking in the agency context, they argue that courts, when adopting new procedural

273. 332 U.S. 194 (1947). When the case appeared before the Supreme Court for the first time in *Chenery I*, the Court announced another seminal principle of administrative law—that an administrative agency must provide reasons for its policy choices. *See* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

274. *See Chenery II*, 332 U.S. at 203.

275. *See id.* at 202–03.

276. *Cf.* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 536–37 (2003) (arguing that United States v. Mead Corp., 533 U.S. 218 (2001), curtailed the degree of deference owed to an agency's decision to proceed through adjudication or the more transparent rulemaking process).

277. *See, e.g.*, Warren E. Baker, *Policy by Rule or* Ad Hoc *Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658, 671 (1957); Bressman, *supra* note 276, at 537–44; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1403–04 n.69 (2004) (reviewing earlier literature and noting that scholars overwhelmingly concluded that "agencies should use rulemaking more often than they did"); Mulligan & Staszewski, *supra* note 217, at 1206–08; *see also* William D. Araiza, *Limits on Agency Discretion To Choose Between Rulemaking and Adjudication: Reconsidering* Patel v. INS *and* Ford Motor Co. v. FTC, 58 ADMIN. L. REV. 899, 915 (2006) (praising limits on agency choice between rulemaking and adjudication).

278. *See* Russell L. Weaver & Linda D. Jellum, Chenery II *and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815 (2006).

rules, also should adhere to a strong presumption in favor of rulemaking rather than adjudication. Such notice-and-comment procedures allow greater public participation and debate about the choices that will govern federal adjudication. They identify several factors that militate in favor of rulemaking, including the presence of policy considerations that apply broadly beyond the context of a given case.[279] But they also recognize the occasional utility of adopting rules through adjudication.[280]

Although many of the conclusions by Professors Mulligan and Staszewski make good policy sense, the analogy that they draw to administrative law is at least incomplete. They are correct to identify the modern preference for rulemaking when agencies adopt new substantive rules. But they err in equating such *substantive* rulemaking by agencies with federal courts' adoption of *procedural* rules (or, in the parlance of my proposed statute, nonsubstantive rules).[281]

In many ways, the better analogy is not to *Chenery II*, which gives agencies discretion in terms of how they promulgate new substantive rules, but to the Administrative Procedure Act,[282] which expressly permits agencies to adopt "rules of agency organization, procedure, or practice" without having to go through notice-and-comment rulemaking.[283] An agency thus has almost unfettered latitude to adopt procedural rules—through rulemaking or adjudication, or simply by issuing them. For all of the criticism that *Chenery II* has garnered with respect to the means by which agencies adopt substantive rules, the APA's lax standards for the adoption of procedural rules have been decidedly uncontroversial.[284] Indeed, I am aware of no debate about an agency's choice of how to adopt procedural rules.

Although the scope of rules that qualify as procedural under the APA might be narrower than my definition of nonsubstantive rules, any daylight between the two concepts appears to be slight. As the D.C. Circuit has recognized, a rule still qualifies as procedural for purposes of the APA, and need not go through the notice-and-comment process, even if the rule has an impact on substantive rights. Instead, the question is "whether the agency action . . . encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[285] At a conceptual

279. *See* Mulligan & Staszewski, *supra* note 217, at 1215.

280. *See id.* at 1213–15, 1223.

281. *See id.* at 1228, 1231 n.262.

282. Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended at 5 U.S.C.).

283. 5 U.S.C. § 553(b)(3)(A) (2012).

284. The real debate concerns § 553(b)(3)(A)'s authorization of "interpretive rules" and "general statements of policy," which need not go through notice-and-comment rulemaking. Distinguishing between those categories and legislative rules, which do have to go through the notice-and-comment process, long has occupied courts and scholars. *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000).

285. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987); *see also id.* (noting that the D.C. Circuit has "move[d] away from looking solely into the substantiality

level, such a definition tracks the distinction that I have drawn between clearly substantive rules that seek to regulate conduct and a residual category of nonsubstantive rules.

Finally, the analogy between courts, as rulemakers, and administrative agencies is sound because federal courts, like agencies, have particular expertise in the areas calling for the exercise of discretion—judicial administration. Courts and judges are familiar with practices that govern litigation, and the current rulemaking process recognizes as much. The Advisory Committee consists of a broad range of judges from all levels of the judiciary as well as practitioners.[286]

3. The Statute's Incorporation of Judicial Discretion in Adopting Procedural Rules

The proposed statute draws on the lessons from the administrative law context and federal courts' recent experience in crafting procedural rules through adjudication. It includes two essential elements: first, it creates a presumption in favor of adopting nonsubstantive rules through the current rulemaking processes; second, it expressly introduces a new element of flexibility by empowering courts to adopt rules in the course of adjudication.

The presumption in favor of rulemaking, while significantly less rigid than the one Professors Mulligan and Staszewski envision, draws on many of the scholarly insights about the advantages of rulemaking. Most conspicuously, notice-and-comment rulemaking gives advance warning to the various stakeholders and fosters meaningful participation by those constituencies. It also creates transparency and thus reduces the element of surprise to litigants in any given case.[287] Moreover, rulemaking allows courts to craft comprehensive solutions—such as rewriting a rule entirely—whereas adjudication simply does not allow for overarching structural changes to a procedural regime.[288] For these reasons, the statute does not disturb either the current process by which the Supreme Court, with the assistance of the Advisory Committee, promulgates prospective rules for the entire federal court system or the mechanism by which individual courts may adopt prospective local rules.

In addition to the current rulemaking process, the statute introduces new flexibility so that courts may adopt rules in the course of adjudication in order to respond to unforeseen circumstances or other exigencies.[289] When

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of the impact" because "even unambiguously procedural measures affect parties to some degree").

286. *See* Struve, *supra* note 215, at 1109.

287. *See supra* note 277 and accompanying text.

288. *See* Mulligan & Staszewski, *supra* note 217, at 1210–11; Struve, *supra* note 215, at 1123.

289. Such flexibility is consistent with Jeremy Bentham's belief that judges should have wide latitude to implement the law's substantive commands. *See* Marcus, *supra* note 236, at 386–90 (citing 5 JEREMY BENTHAM, *Scotch Reform*, *in* THE WORKS OF JEREMY BENTHAM 1, 3, 5–6 (John Bowring ed., Edinburgh, William Tait 1843) (1808)).

courts create nonsubstantive rules through adjudication, they primarily should do so interstitially. By explicitly conferring such power on federal courts, the statute recognizes that gap filling is often necessary and seeks to promote greater candor when courts need to exercise such power.

With this framework in mind, I offer a few preliminary thoughts about how the proposed statute would regard three instances in which agencies and courts have adopted nonsubstantive rules. The first, from the administrative law context, in some ways is the easiest. In 1995, the Securities Exchange Commission adopted a comprehensive revision to its Rules of Practice, rules that govern adjudication much like the FRCP govern litigation in federal court.[290] The Commission observed that such rules fell within the ambit of procedural rules that the APA exempts from notice-and-comment procedures. Nevertheless, it recognized that the comprehensive nature of the revisions counseled the use of notice-and-comment to solicit public participation.[291] To my mind, that unquestionably was the correct choice and the one that the proposed statute clearly would favor if the same situation arose in the judicial context, as the Commission was revising its entire procedural regime.

Second, the statute would approve at least some of the shadow rules of joinder. This is one example in which the presumption that I envision would be less rigid than that proposed by Professors Mulligan and Staszewski.[292] For many of the reasons that Professor Effron discusses, the joinder rules, as embodied in the current FRCP, do not necessarily lead to desirable or predictable outcomes.[293] Professor Effron has elucidated the possibilities and pitfalls of shadow rules that respond to those deficiencies. In many ways, the breadth of the joinder rules invites judges to exercise discretion and, in common law fashion, figure out when the joinder of certain parties and claims will lead to more efficient litigation.[294] That exercise of common law powers seems legitimate. But when exercising delegated discretion, a court has a concomitant responsibility to justify its decisions and "persuade other courts that it has come to the *correct* decision."[295] Under the present regime, though, judges indulge the fiction that they are *not* creating a new rule.[296] The proposed statute would improve the status quo by encouraging courts to identify situations in which they need to craft a gap-filling rule and then to do so with greater candor. Such explicit reasoning has the potential to promote dialogue among courts and thereby alleviate the unpredictability and disuniformity characteristic of common law rulemaking that occurs in the shadows.

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290. *See* Rules and Regulations, 60 Fed. Reg. 32,738 (June 23, 1995) (codified at scattered sections of 17 C.F.R.).

291. *See id.* at 32,739 n.7.

292. They suggest that such rules, which they deem legislative in nature, require notice-and-comment procedures. *See* Mulligan & Staszewski, *supra* note 217, at 1215.

293. *See* Effron, *supra* note 261, at 772–73.

294. *See id.* at 808.

295. *Id.*

296. *See id.* at 802.

Finally, I confess a degree of ambivalence about how the proposed statute would regard the new plausibility pleading standard discussed above. On the one hand, the plausibility standard is an attempt, through adjudication, to give greater content to a broad rule—Rule 8(a)—that requires a pleading to contain no more than a "short and plain statement."[297] On the other hand, I sympathize with those who argue that the plausibility standard was not a gap-filling measure but, instead, akin to a significant revision of the notice-pleading regime.[298] My tentative conclusion is that the latter arguments are more persuasive and that, if any such changes were necessary or desirable, the notice-and-comment rulemaking process would have been the appropriate avenue.

E. Anticipated Objections

Although I have considered a number of possible objections throughout the Article, I briefly address three other potential concerns about the viability or desirability of the proposed statutory revision.

1. Is the Statute Unconstitutional?

In light of *Erie*'s firm conviction that its holding was constitutionally compelled, one might query whether a statute that expands federal courts' lawmaking power is constitutional.

a. Federalism Concerns

As discussed in Part I, *Erie* proffered two related theories of constitutional federalism in support of its argument that the *Swift* regime had been unconstitutional, but scholars now recognize that neither justifies *Erie*. First, the separate-sovereigns view of federalism long has been discredited and has no explanatory power. Second, although the enumerated-powers explanation might apply to a sliver of cases (preventing the federal government from regulating certain issues that nonetheless might come into federal court through diversity jurisdiction), *Erie* is a gross overreaction to a fairly small problem.[299] Consequently, modern scholarship overwhelmingly rejects these constitutional federalism arguments.

b. Separation of Powers Concerns

In light of the waning enthusiasm for the federalism rationale, the dominant constitutional justification in the literature is based on separation of powers (or, judicial federalism). The argument comes in a number of forms, but in essence it regards *Erie* as a limitation on federal courts' ability to impinge on powers that belong to the elected branches. According to this

297. FED. R. CIV. P. 8(a).
298. *See supra* notes 265–67 and accompanying text.
299. *See supra* notes 43–57 and accompanying text.

view, general common law, as created by federal courts, had intruded into Congress's lawmaking prerogative; such an intrusion was unconstitutional because Congress had not authorized such judicial lawmaking.[300] The separation of powers argument suggests that even if Congress has certain lawmaking powers that can trump state law, the *judiciary's* lawmaking authority is far narrower.[301]

Despite the increasing prevalence and acceptance of the separation of powers arguments, recent scholarship levels cogent criticisms against it. First, *Erie* itself did not make this argument.[302] Indeed, on the same day that the Supreme Court decided *Erie*, it created federal common law (in a decision authored by Justice Brandeis, no less).[303] Any separation of powers concerns would have been the same in both cases, thus suggesting that *Erie*'s principal concern was federalism.[304] Second, and relatedly, those who adhere to the separation of powers rationale have to figure out a way to differentiate between prohibited common law adjudication, on the one hand, and other permissible judicial actions, on the other hand.[305] Despite an extensive literature discussing such problems, they remain largely unresolved.[306]

Most importantly, even if the separation of powers rationale is accurate, it does not prohibit Congress from tweaking or overhauling the current *Erie* doctrine. The purported problem with pre-*Erie* federal common law was that federal courts had exercised certain authority absent congressional authorization.[307] But by that logic, as proponents of the separation of powers rationale recognize, Congress *could* authorize courts to create federal common law.[308] Indeed, based on the cooperative vision of separation of powers espoused by Justice Robert Jackson's concurrence in the *Steel Seizure* case,[309] Professor Craig Green has argued that federal

300. *See* Green, *supra* note 7, at 615–16; Sherry, *supra* note 47, at 144–45.

301. *See, e.g.*, Mishkin, *supra* note 4, at 1683; Henry P. Monaghan, *The Supreme Court 1974 Term Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975). Other scholars who have embraced the separation of powers argument include Bradley & Goldsmith, *supra* note 5; Clark, *supra* note 57; Redish, *supra* note 4.

302. *See* Green, *supra* note 7, at 616–18; Sherry, *supra* note 47, at 145.

303. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

304. *See* Sherry, *supra* note 47, at 145. Professor Craig Green also develops an extended criticism of the separation of powers argument in the context of customary international law. He argues that *Erie* was concerned exclusively with federal-state relations rather than the extent of judicial power. *See* Green, *supra* note 7, at 623–55.

305. Virtually every scholar concedes the necessity of some federal common law, such as in the realm of foreign relations. *See* Redish, *supra* note 4; *see also* Clark, *supra* note 13, at 1353–58.

306. *See, e.g.*, Friendly, *supra* note 3; Redish, *supra* note 4; Tidmarsh & Murray, *supra* note 13; *see also* Green, *supra* note 7, at 619–22.

307. *See* Sherry, *supra* note 47, at 146.

308. *See* Redish, *supra* note 4, at 801; *see also* Clark, *supra* note 57, at 1421–22.

309. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

courts should have the utmost latitude when Congress expressly approves the creation of common law.[310]

c. Congress's Power over Nonsubstantive Rules

The careful and imaginative work of recent scholarship has demonstrated, to my mind, that the Constitution does not compel *Erie*'s essential prohibition against federal common law. Even if one rejects those arguments, though, there is no valid constitutional objection to the statutory fix that I propose.

The Constitution gives Congress extremely wide power to prescribe rules for the federal courts, including rules that have a clear effect on substantive rights. Scholars who defend *Erie*'s constitutional foundation acknowledge that the Constitution at most prohibits federal courts from creating unambiguously substantive common law.[311] Professor Kevin Clermont has made the point eloquently:

> Congress and the federal courts could resolve any doubts in the hard cases under current doctrine either way—in favor of federal law or, for that matter, in favor of the state law—without substantial fear of unconstitutional usurpation or derogation of state or federal powers. They truly are choosing the law. Congress and the federal courts are largely free, as far as constitutional powers go, to rationalize and rework the *Erie* doctrine.[312]

Any rule within the vast twilight zone between substance and procedure thus falls outside of the purview of *Erie* itself. Consequently, Congress may grant federal courts much more leeway to promulgate rules as long as such rules are not clearly substantive in nature.

The power to create nonsubstantive rules is more expansive than current practice suggests. It extends to many more issues than Congress has addressed or than the Supreme Court, pursuant to the Enabling Act, currently may regulate. Perhaps the most conspicuous example is a statute of limitations. Although a federal limitations provision would be sufficiently procedural to pass constitutional muster, such a rule presently lies beyond the Court's rulemaking mandate.[313] Furthermore, some scholars have argued that in certain contexts, federal courts' inherent power

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310. *See* Green, *supra* note 7, at 655–59.

311. *See, e.g.*, Clark, *supra* note 57, at 1421–22; Ely, *supra* note 3, at 705; Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 77 (1995); Rowe, *supra* note 10, at 977; *see also* Redish, *supra* note 4, at 801.

312. Clermont, *supra* note 42, at 997–98.

313. *See, e.g.*, Burbank, *supra* note 210, at 1019–20; Ely, *supra* note 3, at 726; Rowe, *supra* note 10, at 973. *But see* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 307–09 (arguing that the Enabling Act already permits the Supreme Court to create a limitations provision).

over their own procedure might be even broader than Congress's authority to regulate procedure.[314]

The upshot is that no constitutional impediment prevents Congress from revising the *Erie* doctrine to allow federal courts to adopt any rule that falls within the twilight zone.

2. Is the Distinction Between Substantive and Nonsubstantive Rules Any Better Than the Current Regime?

The statute that I propose continues to rely on a distinction between substance and procedure, albeit by drawing the line in a different place than do the current sources of the *Erie* doctrine. One of the most vexing problems with the current doctrine is the uncertainty about which issues fall on which side of that line. Although my proposal will not resolve that uncertainty completely, it will mitigate the problem for several reasons.

First, the current interpretations of the Decision Act and the Enabling Act (and, by some accounts, the Constitution) rely on the distinction but locate the line of demarcation in slightly different places. For instance, the Court in *Shady Grove* gave Rule 23 (regarding class actions) a fairly broad construction but held that it was sufficiently procedural for Enabling Act purposes.[315] On the other hand, the current standards of the Decision Act probably would regard a broad construction of Rule 23 as substantive because it likely would lead to forum shopping.[316] The unified approach of the proposed statute alleviates this problem by streamlining the analysis, requiring courts and litigants to negotiate only one line, rather than the two (or possibly three) lines that the current doctrine draws.

Second, the inherent difficulty with the line that the Enabling Act draws between substance and procedure owes to the Court's failure, especially in recent years, to reach a point of clarity about which interests that division protects. The Court has treated the Enabling Act's restrictions as guardians of federalism, even though the Act actually protects separation of powers principles.[317] Moreover, there always has been some tension in the Court's ability to navigate difficult questions within the twilight zone because the Act's framers generally did not appreciate how many issues do not lend themselves to easy classification as either substantive or procedural.

The proposed statute provides clarity on all of these points by defining states' federalism interests with more precision. Courts thus can identify with greater ease which issues properly fall within states' lawmaking purview and which ones are within the scope of the judiciary's rulemaking

314. *See* Barrett, *supra* note 228, at 833–35 (noting general scholarly agreement about the reserve of judicial power over procedure that Congress may not abrogate).

315. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442–44 (2010).

316. *See* Clermont, *supra* note 42, at 1028; *see also id.* at 1033 n.214 (noting that Mississippi state law does not allow class actions).

317. *See supra* Part II.A.1.

power. As Professors Cook and Clark recognized,[318] the substance-procedure dichotomy becomes much more administrable once the purpose of the division becomes clear. The proposed statute, unlike the current *Erie* doctrine, makes significant progress in that direction.[319]

Finally, my proposal arguably makes courts' task a bit easier by focusing solely on the definition of substantive rights through the lens of conduct rules. Courts' rulemaking power is simply the mirror image of conduct rules and does not rely on any a priori notion of procedure.

In short, the distinction between substantive and nonsubstantive rules is easier to apply than the current doctrine because it streamlines the analysis into a single test. Moreover, it identifies the purpose of such differentiation, based on a concrete notion of states' interests in crafting conduct rules, thus making the unified test more coherent.

3. Will Greater Judicial Discretion Lead to Overreaching?

There are good institutional reasons to believe that courts would exercise their new authority appropriately. Justice Antonin Scalia has noted that when courts create a new rule in the process of adjudication, that rule applies to the case at hand, despite the litigants' lack of prior notice of the new rule. But the inability to create rules on a purely prospective basis is an important "check[] upon judicial lawmaking," without which courts would be "substantially more free to 'make new law.'"[320] In other words, the very nature of common law adjudication helps ensure that courts will create new nonsubstantive rules interstitially and as a matter of necessity rather than sheer will.

In many instances, courts probably will continue to allow state law to operate in a number of contexts over which federal courts would have authority. For instance, even when the Supreme Court asserts the power to make substantive or procedural common law, it frequently borrows state standards.[321] Congress has displayed particular sensitivity to rules of evidence, especially state rules governing privilege. In light of that sensitivity, it seems unlikely that federal courts would attempt to flout the carefully constructed balance. Similarly, Congress and courts historically have evinced solicitude for states' ability to define statutes of limitation, and it is difficult to imagine that federal courts would assert a special interest in such questions.

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318. *See supra* note 233 and accompanying text.

319. The statute also improves clarity regarding the Decision Act. As the Supreme Court has long conceded, the various forms of the Decision Act's outcome-determinative test do not really differentiate between substance and procedure. *See* Hanna v. Plumer, 380 U.S. 460, 466 (1965); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). Again, the statutory proposal alleviates such concerns.

320. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); *see also* Marcus, *supra* note 236, at 418.

321. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001); De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956); *see also* United States v. Little Lake Misere Land Co., 412 U.S. 580, 594–95 (1973).

One might wonder whether such humility will cause the proposal to unravel. In other words, will deference to state law raise the same sorts of difficult balancing choices that a revised doctrine seeks to avoid? I do not believe so. First, in the absence of a congressional directive, federal courts' application of state law usually will reflect the courts' borrowing of state law rather than because state law applies of its own force. Second, and relatedly, the federal courts' decision to borrow state law will not turn on myriad competing interests. Instead, it will stem from a conclusion that the federal government does not have an overriding interest in regulating particular questions (say, statutes of limitation). Finally, any decision to borrow state law because of a lack of federal interest is conclusive for all cases. No longer will federal courts have to consider states' potentially countervailing interests on a case-by-case basis.

CONCLUSION

The *Erie* doctrine, even after its reformulation in *Hanna*, never has been as stable as some scholars had hoped. Over the last two decades, the Supreme Court has introduced new uncertainty into the doctrine, undermining predictability and uniformity, which are among a procedural regime's most prized attributes. More importantly, a fresh look at the modern *Erie* doctrine reveals that it does not protect coherent notions of federalism, separation of powers, or equality. Despite *Erie*'s much-repeated language about the undesirability of forum shopping, the current doctrine does not actually alleviate any impropriety or inherent unfairness.

I have suggested a statutory revision that reorients the *Erie* doctrine to streamline the analysis and promote a more coherent vision of federalism. Giving federal courts a wider berth to adopt nonsubstantive rules, and greater discretion as to the means by which they do so, would promote a number of important policies. It simultaneously would protect states' actual federalism interests more robustly and create a more administrable procedural regime.

APPENDIX A

Although there are many ways to capture the principles outlined in Part III, one potential statutory formulation is below. Section 1 of the following text largely would preserve the current version of the Rules of Decision Act, 28 U.S.C. § 1652, and then add a clarification about how it applies in diversity cases. Section 2 would replace 28 U.S.C. § 2072 of the Rules Enabling Act.

* * *

Section 1. Rules of Decision.

(a) The laws of the respective 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.

(b) In any civil action over which the district courts have original jurisdiction founded on section 1332 of this title, the substantive law of the appropriate state or states shall provide the rules of decision.

Section 2. Power To Prescribe Nonsubstantive Rules.

(a) The Supreme Court shall have the power to prescribe general nonsubstantive rules for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) The Supreme Court, the United States courts of appeals, and the United States district courts, when adjudicating cases over which they have jurisdiction, shall have the power to adopt general nonsubstantive rules, as necessary, that are not inconsistent with rules adopted pursuant to subsection (a) of this section and relevant sections of this chapter. Such rules, when adopted by the Supreme Court, shall have the same force and effect as rules adopted pursuant to subsection (a).

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

* * *

Section 1(a) essentially preserves the current Decision Act in order not to upset the broader *Erie* megadoctrine, which covers a range of issues, including exactly which law should apply when state courts apply federal substantive law. Section 1(b) addresses the narrower question of which law federal courts should apply when they are sitting in diversity. It codifies the basic holding of *Erie* that a federal court sitting in diversity must apply state substantive law. That is the core of *Erie*, and regardless of whether one regards it as constitutionally compelled, it embodies important federalism principles, as discussed in Part III.B of the Article. Section 1(b) makes clear, though, that federal courts are required to apply only truly substantive state law. It thereby eliminates the twin aims analysis that the Supreme Court has treated as the touchstone of the current Decision Act. As a side

benefit, section 1 also removes a minor cloud of uncertainty about the Decision Act and clarifies that it indeed calls for application of state law in diversity cases.[322]

Section 2(a) leaves in place the basic structure by which the Supreme Court, through the formal rulemaking process,[323] may create general prospective rules of practice and procedure for the federal courts. It replaces the language of the current Enabling Act, which allows the Supreme Court "to prescribe general *rules of practice and procedure*," subject to the proviso that "[s]uch rules *shall not abridge, enlarge or modify any substantive right*."[324] In light of the prevailing uncertainty about the extent to which the italicized language of these clauses should interact, section 2(a) instead creates a single standard, permitting the Court to promulgate "general nonsubstantive rules." The concept that such rules should regulate practice and procedure remains the same, but the change in language clarifies that any rule adopted for a procedural purpose is valid even if it has a collateral substantive effect.

Section 2(b) essentially gives courts the power to create rules interstitially in the process of adjudication. It is a delegation of common law–making power to the federal courts that is coextensive with the Supreme Court's formal rulemaking power under section 2(a). The phrase "as necessary" seeks to ensure that courts exercise the power interstitially and, in general, defer to the formal rulemaking process. In essence, section 2 gives the Supreme Court discretion to promulgate rules formally, to adopt them through adjudication, or to leave certain rules within the discretion of the lower courts.[325]

Finally, section 2(c) preserves what is currently 28 U.S.C. § 2072(c) in order to make clear that the appeals statute does not preempt the rulemaking authority contemplated by section 2(a) and (b).

322. Specifically, it changes the current reference to "the laws of the several states" to "the laws of the respective states."

323. *See* 28 U.S.C. §§ 2071, 2073–2074, 2077 (2012).

324. *Id.* § 2072(a)–(b) (emphasis added).

325. To make the proposed statute fully effective, 28 U.S.C. § 2071(f), which states that § 2071 is the exclusive means by which federal courts may promulgate local rules, also should be repealed. Moreover, it would supersede the current Rule 83(b), which limits federal judges' power to craft procedures.