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Erie as a Choice of Enforcement Defaults

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Abstract

The *Erie* doctrine governs, among other things, when a federal court sitting in diversity jurisdiction may use a federal procedure that differs from the procedure a state court would use. Displacing the state procedure with the federal procedure (or not) may impact the substantive objectives of either state or federal law, but the current *Erie* doctrine provides little guidance. This Article argues that the *Erie* doctrine is best understood as governing a choice of enforcement defaults. As argued below, the primary function of civil liability is to protect a substantive entitlement to avoid the legal violation, either directly through specific performance remedies or through deterrence. Accordingly, procedures in federal and state court can be understood as default procedures to enforce this substantive entitlement, and these defaults are often abrogated by private contract or through legislation. Understood in this way, the *Erie* doctrine governs when a federal court may abrogate a state enforcement default and replace it with a federal one. This Article then uses the existing literature on default rules to argue that the *Erie* doctrine itself should use default rules to force information from both state and federal governments about the relationship of default procedures to substantive policies. This way, federal courts can make better choices between enforcement defaults.

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INTRODUCTION

> [T]he courts can play a useful role in forcing Congress to perform its constitutionally-contemplated functions. Helping devise such judicial Congress-prodding doctrines thus seems to me the most productive use that can currently be made of a constitutional scholar's time; at any rate it's how I've been spending mine lately.[1]

The *Erie*[2] doctrine is notoriously difficult.[3] Impossible to state succinctly and the subject of significant disagreement, the *Erie* doctrine governs, among other things, when a federal court sitting in diversity jurisdiction[4] must apply a procedure defined under state law, even if the procedure would conflict with a federal common law procedure.[5] The doctrine is further complicated by the Rules Enabling Act, which provides a different standard that applies when a Federal Rule of Civil Procedure defines the federal procedure.[6] The judicial choice between state and federal procedure addressed by the *Erie* doctrine raises fundamental

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1. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833, 878–79 (1991).

2. The doctrine derives its name from *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

3. As one titan in the field of civil procedure has put it, "[n]o issue in the whole field of federal jurisprudence has been more difficult." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 369 (5th ed. 1994).

4. *See* U.S. CONST. art. III § 2 (limiting the subject matter jurisdiction of federal courts, among other things, "to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); 28 U.S.C. § 1331 (2006) (codifying and limiting the diversity jurisdiction set forth in Article III).

5. Admittedly, the *Erie* doctrine is not limited to diversity cases, but "applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 563 (6th ed. 2009) [hereinafter HART & WECHSLER, 2009] (quoting Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540–41 n.1 (2d Cir. 1956)). This Article focuses on the application of *Erie* to the choice of different procedures in diversity cases, but acknowledges the broader scope of the *Erie* doctrine from time to time. *See infra* Section I.A.

6. 28 U.S.C. § 2072(a) & (b) (2006) (permitting the Supreme Court to promulgate rules of procedure, but only if they would not "abridge, enlarge or modify any substantive right"); Hanna v. Plumer, 380 U.S. 460, 470 (1965) (holding that *Erie* does not apply to the Federal Rules of Civil Procedure).

questions about the scope of federal common law power, federalism, and the separation of powers between federal courts and Congress.[7] The *Erie* doctrine has been refined significantly since *Erie* was decided in 1938,[8] but courts and scholars continue to struggle with it to this day.

This Article addresses the *Erie* doctrine, and, like other scholars, I focus on the choice of law problem the doctrine addresses.[9] This Article situates *Erie* among a larger class of problems—the problems associated

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7. As a number of scholars have noted, *Erie* is a "brooding omnipresence" which arguably defines the limits of federal common law power, and thus applies to every instance of federal common law, including statutory interpretation. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 901, 915 (1986) (discussing *Erie* in the context of the scope of federal common law (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting))); *see also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1989–90 (2011) (arguing that state law on interpretative methods should be considered substantive state law for purposes of *Erie*); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("[F]ederal common law is not qualitatively different from textual interpretation, but rather is an extension of it . . . ."). Since the *Erie* doctrine is understood to define the limits of a federal court's lawmaking power, it necessarily implicates a federal court's relationship to the states, as well as its relationship to other coordinate branches, particularly Congress. *See infra* Section I.C (discussing *Erie* as a constitutional doctrine).

8. *See, e.g.*, *Hanna*, 380 U.S. at 467–69 (refining the "outcome-determinative" test). Recent cases include *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (addressing an *Erie* and Rules Enabling Act challenge to a class action of state law claims certified under Rule 23) and *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418–19 (1996) (reviewing conflict between a state law procedure for reviewing the excessiveness of a damage award and the Reexamination Clause of the Seventh Amendment). Some scholars, however, have questioned the significance of these more recent decisions. *See, e.g.*, Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 990 (2011) (arguing that *Shady Grove* "does little to move the *Erie* doctrine"); *cf.* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 19–20 (2010) (arguing that the Court missed an opportunity to refine the Rules Enabling Act in light of the policies that underlie Rule 23 and the class action).

9. The seminal article on *Erie* has argued that it is a "myth," albeit an "irrepressible" one, insofar as the *Erie* problem arises from an "indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases," and that this admixture "has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation." John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 697–98 (1974). This Article follows the framework provided by Ely, with some refinements. *See infra* Part II. Nevertheless, this Article argues that this framework only clarifies the issues implicated by the choice of procedural law, which, as the Article demonstrates below, remains a difficult one. *See infra* Part III.

The other articles that have addressed the *Erie* doctrine and the related Rules Enabling Act are legion. Aside from the articles discussed here, recent contributions include, for example, Special Issue, *Federal Courts, Practice & Procedure*, 86 NOTRE DAME L. REV. 939 (2011) (collecting articles on the *Erie* doctrine in light of *Shady Grove*); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129 (2012) (denouncing *Erie* in a symposium about the worst Supreme Court decisions of all time).

with setting and altering default rules.[10] My goal is not to solve, minimize, or do away with the *Erie* doctrine. Instead, the goal of this Article is to clarify the concerns that animate the *Erie* doctrine and suggest some methods for dealing with them. This Article ultimately argues that an improved understanding of the choice of law at the heart of the *Erie* doctrine can improve the doctrine.

This Article first argues that the existing *Erie* doctrine is flawed, in part, because it fails to acknowledge the enforcement function of civil liability. Specifically, it argues that, in applying the *Erie* doctrine, federal courts have incorrectly concluded that the claim and its constitutive entitlements, such as the right to compensation, are substantive entitlements rather than procedural ones.[11] In doing so, federal courts have ignored the fact that the claim is designed to protect a higher order, primary entitlement—the right to avoid the legal violation in the first place.

Accordingly, this Article first argues that the current *Erie* doctrine should recognize the right to avoid the legal violation as the relevant substantive right, rather than procedural entitlements like the claim used to enforce that right. As I argue below, conceptual clarity with respect to the dividing line between substance and procedure further clarifies the differences between the "relatively unguided *Erie*" analysis that applies to federal common law procedures and the analysis that applies to the Federal Rules of Civil Procedure.[12] In fact, recognizing the avoidance of the legal violation as the substantive right permits greater use of class actions and similar aggregation procedures under both the *Erie* doctrine and the Rules Enabling Act. Although procedures like the class action may impair the right to bring a claim, this Article argues that these procedures should be permitted in many cases because they would not be outcome-

10. The seminal article on default rules is Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). A recent symposium held at Florida State University School of Law discussed the impact of the article in many areas of the law. Symposium, *Default Rules in Private and Public Law*, 33 FLA. ST. U. L. REV. 557 (2006). In a recent article Professor Ian Ayres discusses the role of "altering rules," or rules that provide "the necessary and sufficient conditions for displacing a default legal treatment with some particular other legal treatment." Ian Ayres, *Regulating Opt Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2036 (2012). A more precise title for this Article may be Erie *as a Law of Altering Rules*, since it focuses precisely on the conditions for displacing a state procedural default with a federal procedural default and vice versa.

11. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (concluding that a Rule which would preclude a state cause of action would "abridge, enlarge or modify" a "substantive right" in violation of the Rules Enabling Act); *see also infra* Section II.B.

12. *See infra* Section II.C; *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965) (distinguishing the "relatively unguided *Erie*" test under the Rules of Decision Act and the test of validity under the Rules Enabling Act).

determinative[13] or otherwise abridge, enlarge, or modify the substantive right the claim enforces.[14]

Once the enforcement function of civil liability is acknowledged, this Article further argues that the *Erie* doctrine can be understood as governing a choice of enforcement defaults. In essence, the *Erie* doctrine governs the choice a federal court must make between a two default procedures—one federal, the other state—to enforce substantive rights.

In fact, almost all of the law of civil procedure can be understood as a law of enforcement defaults.[15] For example, many discovery rules self-consciously set defaults that the parties can "stipulate" around.[16] Likewise, as evidenced by forum-selection clauses[17] and arbitration clauses,[18] parties can choose *ex ante* the procedures to resolve their disputes. Parties can even avoid procedures altogether through settlement.[19]

One can also contract around procedure at a wholesale level. Federal and state legislatures often abrogate existing, default procedures in certain substantive areas of the law, most notably in the context of prison litigation[20] and securities litigation.[21] In fact, Congress can partially

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13. *See infra* Section II.D.

14. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (plurality opinion) (concluding that a Rule 23 class action of state law claims that could not be brought as a class action in state court did not violate the Rules Enabling Act, but only "insofar as it allows *willing* plaintiffs to join their separate claims against the same defendants") (emphasis added). *But see infra* Sections II.B & II.C (arguing that this view is mistaken).

15. Admittedly, many scholars have recognized the default nature of procedures. However, most have not but discussed the enforcement function of civil procedure in any detail. *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1333–34 nn.21–22 (2012) (citing sources). Moreover, those who have discussed the enforcement function of civil procedure have not discussed the use of default rules or otherwise discuss the *Erie* Doctrine. *See* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

16. FED. R. CIV. P. 29(b) (providing, with some exceptions, that "the parties may stipulate that . . . other procedures governing or limiting discovery be modified").

17. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (holding that a forum-selection clause on a cruise ticket was enforceable because of the absence of a "bad-faith motive"); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (holding that a forum-selection clause was enforceable because there was not a "strong showing that it should be set aside").

18. 9 U.S.C. § 2 (2006) (providing that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration" disputes arising out of the contract "shall be valid, irrevocable, and enforceable").

19. *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing against the encouragement of settlement by existing procedural law).

20. *See, e.g.*, Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 42 U.S.C. § 1997e; Antiterrorism and Effective Death Penalty Act of 1996; Pub. L. No. 104-132, 110 Stat. 1214.

21. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

abrogate the jurisdiction of Article III courts and similar state courts, as with state law tort claims involving vaccines,[22] or can entirely abrogate their jurisdiction, as it has in the bankruptcy context.[23]

Accordingly, both state and federal courts can be understood as public options for the enforcement of substantive rights. Courts are off-the-rack, one-size-fits-all institutions that provide parties a default forum and a set of procedures for the enforcement of the parties' substantive entitlements. Parties can use contract to customize existing procedures, and state and federal governments can customize procedures in certain contexts to fit their policies.

Although contracting around enforcement defaults is pervasive, courts often struggle over when, and how, to limit this practice. During its 2011-2012 Term, the Supreme Court in *AT&T Mobility LLC v. Concepcion* examined whether the Federal Arbitration Act, which expresses a Congressional preference for the enforcement of arbitration clauses, prevents California state courts from finding unconscionable certain consumer arbitration clauses prohibiting class action-type procedures.[24] The Term before that, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court addressed whether a state law prohibition on class actions for state law statutory damage claims prohibited the use of Rule 23, the federal default rule for class actions, for the same claims in federal court.[25] These same difficulties arose in an earlier generation of cases, exemplified by *Arnett v. Kennedy*,[26] in which the Court struggled with whether termination of a federal employee for cause required a pre-deprivation hearing, the default established in *Goldberg* v. *Kelly* in interpreting the Due Process Clause.[27]

In all of the above contexts, the Court addressed whether there were limits to abrogating existing enforcement defaults, regardless of whether

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22. *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1082 (2011) (holding that the National Childhood Vaccine Injury Act of 1986, which sets up a no-fault compensation scheme administered by the Court of Federal Claims, preempted state law tort claims).

23. *See* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1379 (2010) ("Bankruptcy courts have exclusive jurisdiction over a debtor's property." (quoting Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004))). Admittedly, there are limitations to the use of Article I tribunals to abrogate Article III and state court jurisdiction. However, these limitations arise out of separation of powers and due process concerns which are not discussed in this Article. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (rejecting statutory grant of supplemental jurisdiction to bankruptcy courts for some state law claims due to separation of powers and due process concerns). I address some of these concerns in a separate article. *See* Sergio J. Campos, Class Actions and Justiciability (Sept. 2012) (unpublished manuscript) (on file with author).

24. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745–46 (2011).

25. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010).

26. 416 U.S. 134, 151 (1974), *overruled by* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

27. Goldberg v. Kelly, 397 U.S. 254, 262–64 (1970).

those defaults were defined under a statute, a procedural rule, or the Constitution. More importantly, in all of these contexts, the Court struggled with the issue, which resulted in less than ideal results. *AT&T v. Concepcion* is already being mocked for its application of contract and statutory interpretation doctrines.[28] Similarly, *Shady Grove* has been criticized for making the waters of *Erie* and the Rules Enabling Act even murkier.[29] In fact, the Supreme Court overruled *Arnett v. Kennedy* a decade later because of the tortured doctrine that resulted from the decision's due process analysis.[30]

The problem of determining how to set and alter enforcement defaults arises from information costs. Due to institutional limitations, federal courts have insufficient information to determine what defaults to set and when to limit (or permit) their alteration. Thus, federal courts as they are currently configured are doomed to make bad choices. This Article focuses on the special problems that arise under the *Erie* doctrine, where a federal court must choose between two competing enforcement defaults defined by two different governing entities—one established by federal law (either through common law or a Rule) and another established by state law. In the *Erie* context, a federal court has to determine the respective policies of a state government and the federal government before it can even begin to assess the substantive impact of the choice of default procedure on those policies.

This Article argues that federal courts can avoid the information costs that arise in the *Erie* context to a large extent by shifting those costs back to state and federal governments. In other words, a federal court can avoid the costs of choosing enforcement defaults by using default rules themselves to force state governments and the federal government to reveal relevant information about the relationship between the default procedure and the substantive right. Indeed, the information-forcing effect of such default rules can be found in a variety of contexts, most notably in the use of liability rules themselves to give parties "options" to reveal information about their preferences for conflicting entitlements.[31]

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28. *See, e.g.*, Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS. 129, 144–45 (2012).

29. *See* Burbank & Wolff, *supra* note 8, at 20 ("*Shady Grove* called for a restrained and enlightened interpretation of both the Enabling Act and Rule 23, but the Justices did not deliver.").

30. *See Loudermill*, 470 U.S. at 540–41 (rejecting then-Justice Rehnquist's plurality opinion in *Arnett v. Kennedy* and stating that "[i]f a clearer holding is needed, we provide it today").

31. Indeed, one can see liability rules as providing divided entitlements. A plaintiff is assigned the initial entitlement, but the defendant has, in effect, a call option to take the entitlement from plaintiffs when the defendant values it more, with the exercise price usually set at the damages caused by the taking. *See* IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS (2005) (arguing that liability rules create options that force the parties to reveal their valuations of conflicting entitlements); Louis Kaplow & Steven Shavell, *Property Rules versus Liability Rules:*

For example, if a federal court is unsure whether a state procedure is "bound up" in a substantive right, it can condition applicability of the state procedure on a statement that the procedure is, in fact, "bound up" in the right.[32] Such a default rule would effectively require a "clear and manifest" statement of the substantive importance of the procedure.[33] Likewise, because of the Supremacy Clause, Congress can reveal its preferences and abrogate a state law default by passing a statute.[34] The Rules Enabling Act, in fact, provides a mechanism by which Congress, through its oversight of the Rules Advisory Committee, can speak without incurring the transaction costs of passing legislation.

By forcing a dialogue between states and Congress, federal courts can shift the information costs associated with determining the substantive justification (if any) for a procedure and the procedure's substantive impact. Indeed, and counterintuitively, it may actually be better for federal courts to articulate bright-line, seemingly arbitrary default rules to facilitate the forcing of information. These rules, in isolation, may lead to suboptimal results, and most likely would not reflect what Congress and state legislatures would have chosen *ex ante*. However, like "penalty defaults," such rules would induce legislatures to reveal relevant information concerning the substantive justification and impact of a procedure.[35]

This Article finally suggests that federal courts should reduce, rather than shift, the information costs associated with setting and altering enforcement defaults by improving the courts' capacity to collect and use relevant information. the Article suggests a number of institutional reforms, most notably a body within the judiciary that provides cost-benefit analysis of different procedures, to allow judges to make more informed

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An Economic Analysis, 109 HARV. L. REV. 713, 725 (1996) (noting that "the virtue of the liability rule is that it allows the state to harness the information that the injurer naturally possesses about his prevention cost"); *cf.* Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1406–07 (2005) (arguing that options can be used to reveal information about subjective valuation preferences).

32. *See infra* Section III.B; *see also* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958) (emphasizing that a federal court must determine whether a state procedure "is bound up with [substantive] rights and obligations in such a way that its application in the federal court is required").

33. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) (noting that, in the preemption context, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

34. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

35. *See* Ayres & Gertner, *supra* note 10, at 97 (defining "penalty defaults" as defaults that would not reflect what the parties would have wanted, but that would "encourage the production of information").

decisions in cases involving the *Erie* doctrine (and, arguably, other issues that implicate federal jurisdiction). The Article also addresses concerns about the legitimacy of the courts in engaging in such policy making, and argues that any such objections are not well-founded. As argued below, such judicial intervention is not only supported by the text and structure of the Constitution, but may be necessary when political institutions malfunction.[36]

The Article has three Parts. Part I provides background on the *Erie* doctrine and the choice of law problem it addresses. Part II discusses the distinction between substance and procedure, and argues for a common sense approach that takes the enforcement objectives of civil liability into account. Part III discusses the difficulty of setting and altering defaults in the *Erie* context, and argues that these difficulties can be avoided by either shifting or reducing information costs.

I. *ERIE*

A. *The* Erie *Case*

The *Erie* doctrine is hard enough as it is, so it is worth discussing in some detail. The *Erie* doctrine arose from *Erie Railroad Co. v. Tompkins*, a case in which the plaintiff, Harry Tompkins, was walking parallel to a moving train when his right arm was severed by the open door of a freight car.[37] The freight car was operated by the defendant, the Erie Railroad Company, which was incorporated in New York.[38] The accident occurred in Hughestown, Pennsylvania, and the parties did not dispute that Pennsylvania state law would apply to the case.[39]

The case, however, was complicated by the strategic opportunities provided by *Swift v. Tyson*.[40] *Swift* concerned the Rules of Decision Act, which essentially provided, then, as now, that:

> The laws of the several states, except where the Constitution or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.[41]

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36. *See infra* Section III.C; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 102–03 (1980) (defending an "antitrust" conception of judicial review that permits judicial intervention when political "markets" malfunction).

37. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938); Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law, in* CIVIL PROCEDURE STORIES 21, 37–38 (Kevin M. Clermont ed., 2d ed. 2008).

38. *Erie*, 304 U.S. at 69.

39. *Id.* at 69–70.

40. 41 U.S. 1 (1842).

41. 28 U.S.C. § 1652. The Rules of Decision Act was enacted as § 34 of the Federal Judiciary Act of 1789, and was codified at 28 U.S.C. § 725 when *Erie* was decided. At the time the Act

The *Swift* Court, in an opinion by Justice Joseph Story, concluded that the Act did not include common law precedent by state courts within the "laws of the several states," except for precedents involving "strictly local" matters.[42] Under *Swift*, Tompkins could avoid Pennsylvania common law, which required Tompkins to show that the railroad committed "wanton or willful" negligence, by filing the action in New York federal court under diversity jurisdiction, where federal common law only required a showing of ordinary negligence.[43] Tompkins did just that, and after trial, a the jury returned a verdict in his favor.

The *Erie* Court reversed, and in doing so, rejected "the oft-challenged doctrine of *Swift v. Tyson*."[44] The Court, in the last opinion by Justice Louis Brandeis, initially emphasized that the *Swift* rule led to forum shopping, which, in the Court's view, raised equal protection concerns.[45] In particular, the Court noted that nonresidents like Tompkins could strategically avail themselves of federal courts when they found federal common law more favorable.[46]

But this "equal protection" concern was, at best, a "metaphor."[47] One could imagine a rational basis for the *Swift* rule, as "fight[ing] bias against out-of-staters by giving them access to a body of law . . . developed by persons beholden to no particular state."[48] Moreover, the disparate impact of the *Swift* rule on residents is not as significant as the *Erie* Court

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referred to "statutes of the United States" rather than "Acts of Congress," and also stated that the Act "shall be regarded as rules of decision *in trials at common law, in the courts of the United States, in cases where they apply*." 28 U.S.C. § 725 (1940) (emphasis added). The differences are not material to this discussion.

42. *Swift*, 41 U.S. at 18 ("In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the [Rules of Decision Act] limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.").

43. *Erie*, 304 U.S. at 70.

44. *Id.* at 69.

45. *Id.* at 75. The Court actually began by citing a law review article by legal historian Charles Warren, who reviewed the legislative history of the Rules of Decision Act and argued that Congress intended "laws of the several states" to include state court common law. *See id.* at 72–73 & n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84–88 (1923)). Recent scholars, however, have cast doubt on Warren's analysis. *See* 19 CHARLES ALAN WRIGHT, ARTHUR MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4502, at 13–14 & n.30 (2d ed. 1996) (citing sources). The Court also discussed the criticism surrounding *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), where a corporation reincorporated in a different state to take advantage of more favorable federal common law. *Erie*, 304 U.S. at 73 & n.6.

46. *Erie*, 304 U.S. at 74–75.

47. Ely, *supra* note 9, at 712–13.

48. *Id.*; *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (holding that statutes that discriminatorily impact an unprotected class are subject to rational basis review).

suggested.[49] Finally, the more one equalizes the parties, the more "one deviates from the rationale of diversity jurisdiction," which is, in fact, to discriminate in favor of nonresidents by giving them an unbiased forum.[50] The *Erie* Court, in fact, prefaced its equal protection analysis by acknowledging that "[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."[51]

The concern with forum shopping can be understood, in part, as a requirement of the Rules of Decision Act.[52] In contrast to *Swift*, the *Erie* Court interpreted the Act as requiring a federal court to use the "rules of decision" of a state, including state common law, which would have applied had the plaintiff brought the action in state court. In other words, the *Erie* Court interpreted the Act as requiring "vertical uniformity" between a state court and a federal court sitting in diversity, as opposed to the "horizontal uniformity" among federal courts that the *Swift* rule produced.[53] Accordingly, applying the *Swift* rule when the Act required the application of state "rules of decision" would have resulted in "the unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen."[54]

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49. Specifically, the resident plaintiffs can equally avail themselves of *Swift* if the defendant is a nonresident. Admittedly, nonresident defendants can, with some restrictions, avail themselves of federal court when federal common law is more favorable, while resident defendants cannot. *Compare* 28 U.S.C. § 1446(b) (2006) (prohibiting the removal of any action based on diversity jurisdiction "more than 1 year after commencement of the action"), *with* 28 U.S.C. § 1441(b) (2006) (removal of action based on diversity jurisdiction only permitted "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"). However, it is unlikely that this disparity would lead to a structural bias in favor of resident defendants, particularly given the availability of governing law and forum-selection clauses. *See* Ely, *supra* note 9, at 712–13 (arguing that the unfairness caused by the *Swift* rule concerned more than "the vicissitudes of the removal provisions"); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (holding that a forum-selection clause on a cruise ticket was enforceable); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481–82 (1985) (interpreting the governing law clause in a diversity action as evidence of the "purposeful availment" necessary to confer personal jurisdiction).

50. Ely, *supra* note 9, at 712 n.111; *see also* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1188 (2010) (noting that "diversity jurisdiction's basic rationale" is to "open[] the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties").

51. *Erie*, 304 U.S. at 74.

52. Ely, *supra* note 9, at 713.

53. *Id.* at 714 n.125.

54. *Id.* at 712; *see also* Hanna v. Plumer, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

B. *The* Erie *Doctrine*

The current *Erie* doctrine ensures the Rules of Decision Act's requirement of vertical uniformity by prohibiting federal common law procedures that differ so substantially from the procedure that would apply in state court that they are "outcome-determinative."[55] The basic idea is that the choice of procedure can so affect the outcome of a case as to be a "rule of decision" under the Act.[56] The Court initially interpreted the outcome-determinative test as requiring virtually all state procedures to apply in a given case.[57] After all, if the parties are arguing over the choice of a federal procedure or a state procedure, then the choice obviously has some impact on the outcome.[58] The outcome-determinative test was later tempered in *Hanna v. Plumer*, where the Court recast the test as determining whether the choice of procedure would cause "forum shopping" in other cases or otherwise lead to the "inequitable administration of the laws."[59]

The Court has also tempered the outcome-determinative test by permitting courts to consider federal "affirmative countervailing considerations."[60] For example, in *Byrd v. Blue Ridge Rural Electrical Cooperative*, the Court upheld the use of a jury to determine the factual issue of employment, even though state law required the issue to be decided by a judge.[61] The *Byrd* Court upheld federal jury fact-finding over state judge fact-finding in part because the differences were only marginally outcome-determinative, especially given the role of federal judges in reviewing jury determinations.[62] But the *Byrd* Court also concluded that the Seventh Amendment, which protects a right to a trial by

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55. *Hanna*, 380 U.S. at 468 (discussing and refining the "'outcome determination' test").

56. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (Frankfurter, J.) ("In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, *so far as legal rules determine the outcome of a litigation*, as it would be if tried in a State court.") (emphasis added); Ely, *supra* note 9, at 714 (noting that the test is whether application of the federal procedure would not be "materially more or less difficult . . . nor likely to generate an outcome different from that which would result were the case litigated in the state court system and the state rules followed") (citations omitted).

57. *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

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

59. *Id.* ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *see also* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (applying a modified "outcome-determinative" test in interpreting the scope of Rule 41(b)).

60. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

61. *Id.* at 533–38.

62. *Id.* at 539–40.

jury in certain cases, reflects a "strong federal policy" in favor of jury fact-finding, which further justified the use of the federal procedure.[63]

The Court would again resort to federal "countervailing affirmative interests" to support a federal procedure in *Gasperini v. Center of Humanities*.[64] There, the Court again pointed to the Seventh Amendment, this time the Reexamination Clause, to limit the application of a New York state procedure for judicial review of large jury awards for excessiveness.[65]

Based on the above, *Erie* can be understood as a case of statutory interpretation. The *Erie* Court interpreted the Rules of Decision Act to require vertical uniformity with respect to the "rules of decisions" that apply to the adjudication of a state law claim, regardless of whether the claim is brought in state court or in federal court under diversity jurisdiction. Moreover, the Court has since interpreted *Erie* as providing a limited outcome-determinative test for determining when a conflict between state and federal procedure is so great that applying the federal procedure would, in effect, change the state law "rule of decision." Finally, *Erie* allows a court to consider federal "countervailing affirmative interests" in support of a federal procedure separate and apart from the Rules of Decision Act's interest in maintaining vertical uniformity between state and federal courts.[66]

C. Erie *and the Constitution*

But *Erie* did more than quibble with *Swift* over the proper interpretation of the Rules of Decision Act. The Court emphasized that the Constitution mandated its holding. In *Swift*, the Court had previously concluded that, with respect to "general law," the Court had the power "to express [its] own opinion of the true result of the commercial law upon the question now before [it]."[67] In contrast, the *Erie* Court pointed out that the Constitution does not authorize courts to create a "federal general common law" as to all matters.[68] Thus, the *Swift* Court erred in supplanting state law without identifying any basis in the Constitution for expressing its own opinion.[69]

Arguably the *Erie* Court went further and held that the federal government had no power to regulate (either directly through legislation or

63. *Id.* at 537. The Court did not consider whether the Seventh Amendment did, in fact, apply in that case. *Id.* at 537 n.10.

64. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–32 (1996).

65. *Id.* at 438. The Court, in particular, concluded that a district court could review a jury award that deviates materially from what would be reasonable compensation, but, unlike the state practice, a federal appellate court would only review the district court's determination for an "abuse of discretion." *Id.* at 438.

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

67. Swift v. Tyson, 41 U.S. 1, 19 (1842).

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

69. *Id.* at 79–80.

by authorizing common law) interstate disputes like the *Erie* case itself. However, "it seems fair to infer" that the Court "meant that Congress [and therefore the federal government] had no power to adopt a code of laws governing *wholly intrastate questions* of contract or tort which would be binding upon the federal and state courts alike."[70] Understood in this way, *Erie* is an offshoot of the general rule that the federal government's powers are limited under the Constitution and that all residual powers reside with the states.[71] Consequently, in the Court's view, federal courts cannot create the system of horizontal uniformity contemplated by *Swift* because "the founders of our Republic—by not including any such power in the Constitution, and even more clearly by enacting the Rules of Decision Act—refused to do it."[72]

For the *Erie* Court, *Swift* may have been an easy case of a court assuming a power of "federal general common law" at odds with the system of limited powers that the Constitution affords the federal government. The harder issue is the proper scope of the judicial common law power even in nondiversity cases.[73] This common law power is probably the most controversial aspect of a federal court's "judicial power" because, unlike the enumerated powers of Congress or the President, the "judicial power" is only restricted to the jurisdictional limitations contained in Article III. Indeed, one possibility that *Erie* foreclosed, perhaps unjustifiably,[74] is that the "judicial power" includes a power to create "federal general common law" as an implication of the Constitution's grant of diversity jurisdiction.[75]

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70. Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 445 (1958) (emphasis added).

71. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Accordingly, one should not understand *Erie* as concerned with encroaching on an "enclave" of state power. Instead, the concern is with overreach by the federal government, which, by implication, would invade each state's residual powers. *See* Ely, *supra* note 9, at 702–04 ("The prior interpretation was unconstitutional, but not because the federal common law rules that had been developed under it were encroaching on areas of 'state substantive law' or 'state law governing primary private activity' . . . . It was unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*.").

72. Ely, *supra* note 9, at 713.

73. *See* HART & WECHSLER, *supra* note 5, at 563 (noting that *Erie* applies in federal question and other cases); *see also* Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103, 107 (1939) (holding that *Erie* applies to state law issues in federal question cases).

74. *See* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133 (2011) (arguing that the Court's constitutional interpretation in *Erie* was wrong on all levels).

75. Field, *supra* note 7, at 915 (noting that *Erie* "clearly rejected" the possibility that "courts can make federal common law whenever they have jurisdiction").

As an initial matter, and as suggested by Professor Ely, one could simply ignore the constitutional issue since the Rules of Decision Act is at least as, if not "significantly more[,] protective of the prerogatives of state law."[76] But that leaves open the possibility that the Court's judicial power could be at least as expansive as Congress's enumerated powers under the Constitution. *Erie* itself supported this suggestion by noting that, under *Swift*, "[t]he federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which *Congress* was confessedly without power to enact as statutes."[77] Many scholars oppose such an expansive view of judicial power.[78] Professor Paul Mishkin, in particular, argued for a more limited scope because "[p]rinciples related to separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress)."[79]

The separation of powers concern that Mishkin expressed becomes more evident once one considers the different, "guided *Erie*" framework that applies to the Federal Rules of Civil Procedure.[80] In *Hanna v. Plumer* the Court concluded that, unlike federal procedures not governed by a Rule, the sole test for a procedure defined by a Rule is whether the Rule is consistent with the Rules Enabling Act and the Constitution.[81] The Rules Enabling Act's first sentence provides:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.[82]

The Act's second sentence further provides: "Such rules shall not abridge, enlarge or modify any substantive right."[83]

The Court treated the Rules differently because the Rules, and the Enabling Act that permitted such rulemaking, were created pursuant to a

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76. Ely, *supra* note 9, at 698 (arguing that the constitutional issue "is functionally irrelevant because the applicable statutes are significantly more protective of the prerogatives of state law").

77. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (emphasis added); *see also* Field, *supra* note 7, at 923, 927 (noting that "[i]n rejecting courts' power to act beyond the area of congressional competence, the *Erie* Court may have implied that courts can act up to the limits of Congress's power," but concluding that *Erie* is "ambiguous" on this point).

78. *See, e.g.*, Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974); Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974); *see also* Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1290–302 (2007); Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 394–98 (1964); Hill, *supra* note 70, at 440–41.

79. *See* Mishkin, *supra* note 78, at 1683 (disagreeing with Ely's proposition that "courts would have the same range of lawmaking power as Congress").

80. Hanna v. Plumer, 380 U.S. 460, 473–74 (1965).

81. *Id.*

82. 28 U.S.C. § 2072(a) (2006).

83. *Id.* § 2072(b).

"congressional power to make rules governing the practice and pleading in [federal] courts."[84] In other words, the Rules were not judge-made procedures that *could not* displace state law, but creatures of statute based on the exercise of a valid constitutional power that *could* displace state law. Thus, in the Court's view, a court can refuse to apply a Rule only when it "transgresses . . . the terms of the Enabling Act" or "constitutional restrictions."[85] To subject such Rules to the stricter *Erie* analysis would "disembowel either the Constitution's grant of power over federal procedure or Congress'[s] attempt to exercise that power in the Enabling Act."[86]

The Rules Enabling Act highlights the separation of powers dimension to the scope of federal common law power. *Erie* concerned the constitutional authority of courts to displace state law. Thus, the *Erie* Court was primarily concerned with federalism. But the Rules Enabling Act, which Congress enacted prior to *Erie* in 1934, was designed to prevent courts from displacing congressional power beyond what Congress delegated through the Enabling Act. As recognized by the Court in *Hanna v. Plumer*, Congress passed the Enabling Act pursuant to its power to define the practices and procedures of federal courts, a power implied from its Article III power to create "inferior courts."[87] The first sentence of the Rules Enabling Act delegates that power to create practices and procedures to the Supreme Court.[88] Given that delegation, the Rules Enabling Act included the second sentence to emphasize to the Supreme Court that it cannot enact a rule which would "abridge, enlarge or modify any

84. *Hanna*, 380 U.S. at 472.

85. *Id.* at 471.

86. *Id.* at 473–74.

87. *See* U.S. CONST., art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and *in such inferior courts as the Congress may from time to time ordain and establish.*") (emphasis added); *see also* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in those courts.").

88. 28 U.S.C. § 2072(a) (2006); *Burlington*, 480 U.S. at 5 n.3 ("In the Rules Enabling Act, Congress authorized this Court to prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals."). There is some question whether this delegation is constitutional. In *Sibbach v. Wilson & Co.*, the Court, shortly after deciding *Erie*, concluded that Congress not only had "undoubted power to regulate the practice and procedure of federal courts," but "may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or [C]onstitution of the United States." *See* 312 U.S. 1, 9–10 & n.7 (1940) (citing cases); *see also* Mistretta v. United States, 488 U.S. 361, 387 (1989) (citing *Sibbach* in upholding the delegation of sentencing to the Sentencing Commission). Some scholars, however, have questioned the constitutionality of this delegation. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 62–85 (2009).

substantive right."[89] As noted by Professor Stephen Burbank, Congress designed the first two sentences of the Enabling Act "to allocate lawmaking power between the Supreme Court as rulemaker and Congress."[90] Indeed, the Enabling Act applies even in cases that are not based on diversity jurisdiction, presumably to prevent courts from using its delegated powers to legislate from the bench.[91]

As it turns out, the line between substance and procedure defined by the Rules Enabling Act would not only define the relative domains of Congress and federal courts, but would also have the "probable effect" of preventing the unconstitutional exercise of federal power vis-à-vis the states.[92] After all, "[t]he broad command of *Erie* [is] . . . identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law," even though the lines each drew to define "substance" and "procedure" materially differ.[93] That "probable effect" is undeniable because outside the boundary of the power to create federal procedures resides the power to enact law affecting all other substantive areas. As noted by the second Justice John Marshall Harlan in his concurrence in *Hanna v. Plumer*, it is this outer domain where Congress can exercise limited power under the Constitution to regulate the "primary activity of citizens," and states can exercise all other residual powers.[94]

It is also this outer domain that formed the basis of Professor Mishkin's intuition that the scope of the judiciary's "common law" power probably cannot extend as far as Congress's enumerated powers. In Mishkin's view, a court exercising a Congressional power "unauthorized by Congress" would be invading the separate sphere of Congress's power (or, if Congress did not act, the state's residual power).[95] Consequently, it is not enough that Congress can legislate on an issue. As evidenced by the Rules Enabling Act itself, Congress must also authorize the courts to assume that power before a court can constitutionally exercise it.

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89. 28 U.S.C. § 2072(b) (2006); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107–09 (1982) (arguing that, based on a survey of the legislative history, the second sentence was "surplusage" that "served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence").

90. Burbank, *supra* note 89, at 1106.

91. *See* United States v. Poland, 533 F. Supp. 2d 199, 209–10 (D. Me. 2008) (interpreting the Federal Rules of Criminal Procedure so as to comply with the second sentence of Rules Enabling Act).

92. Burbank, *supra* note 89, at 1106.

93. Hanna v. Plumer, 380 U.S. 460, 465 (1965); *see also* Ely, *supra* note 9, at 718–38 (arguing that the second sentence of the Rules Enabling Act can be interpreted as protecting state concerns).

94. *Hanna*, 380 U.S. at 474–75 (Harlan, J., concurring) ("[*Erie*] recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.").

95. *See* Mishkin, *supra* note 78, at 1683.

In essence, the issue of the scope of federal common law power in diversity cases, what can be called the constitutional "thread"[96] of *Erie*, arises from a gap created by the federalism and separation of powers features of the Constitution. The Constitution provides for diversity jurisdiction, with Congress assigned the power to create "inferior courts" with that jurisdiction, and thus the implied power to promulgate the practices and procedures that would apply in those inferior courts. The laws that would apply in those courts would follow the hierarchy of laws under the Supremacy Clause, including any procedures that Congress directly legislates.[97] As shown by the Rules Enabling Act, Congress can delegate some of its power to create procedures to the courts, subject to limitations it imposes. In some cases, Congress has provided no guidance on the procedure that would apply, either by legislating the procedure directly or by delegating limited discretion to create the procedure. In those situations, a federal court sitting in diversity jurisdiction would have to determine for *itself* the procedures that should apply consistent with federalism and the separation of powers. Here the only guidance would be the Rules of Decision Act, which, under *Erie*, "is merely declarative of the rule which would exist in the absence of the statute."[98] It is in this gap where the "murky waters" of *Erie* reside.[99]

As noted above, the exercise of federal common law power only arises when gaps emerge that neither the exercise of a valid congressional power nor a valid state power cover. Consequently, federal common law power is probably best understood not as an affirmative power with precise contours, but as a residual power that operates only when both Congress and the states fail to speak to an issue.[100] Thus, like the residual powers of the states protected under the Tenth Amendment, the federal common law power can only be defined by reference to what powers have already been exercised by Congress and the states.

This may explain why, under the *Erie* doctrine, the outcome-determinative test does not mandate that all state procedures apply in diversity actions. Instead, courts can exercise some discretion over practice and procedure to fill gaps in procedural law. The Constitution permits diversity jurisdiction and Congress has created inferior courts with that

96. *Id.* at 1688.

97. Clark, *supra* note 78, at 1290–302 (arguing that the Supremacy Clause's recognition of the sources of law entitled to supremacy excluded federal common law). *But see* Field, *supra* note 5, at 923–27 (arguing that the text of the Supremacy Clause does not exclude federal common law).

98. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (quoting Mason v. United States, 260 U.S. 545, 559 (1923)).

99. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (Scalia, J.) (plurality opinion).

100. Field, *supra* note 7, at 923, 928 (concluding that, under *Erie*, "[d]eciding whether common law can be made in any given case is a matter of interpreting each possible enabling authority to see whether or not it supports federal common law").

jurisdiction.[101] It would be anomalous if the creation of these courts did not entail some differences between state courts and federal courts. The whole point of diversity jurisdiction is to create an unbiased, and therefore different, forum for nonresident parties.[102] It would also be anomalous if these courts could not engage in essential functions like voir dire because Congress had not spoken on the issue.[103] Thus, two logical implications of the Congressional creation of inferior courts with diversity jurisdiction are that (1) the practices and procedures that apply in those courts may differ from state practices, and (2) those federal procedures may require affirmative judicial creation.

The current *Erie* doctrine takes these commonsense considerations into account by giving courts some discretion to create practices and procedures so long as those procedures are not so outcome-determinative that they effectively displace state law. Moreover, the current *Erie* doctrine permits federal courts to consider federal "countervailing affirmative considerations" to prevent state law from exploiting a gap. Admittedly, the use of such "countervailing affirmative considerations" in *Byrd* and *Gasperini* arose from the Constitution. But one could also imagine situations where the federal interest is implied by features of congressional procedural design. One example that the Court suggests is a limited federal common law practice of precluding state law claims that are not otherwise precluded under state law when it would be necessary to effectuate the sanctions available under the discovery provisions of the Rules.[104]

The exercise of federal common law power to define practices and procedures in diversity jurisdiction is akin to the common law power exercised by federal courts in other contexts. For example, in the maritime context, the existence of federal common law power is based on the existence of maritime jurisdiction, the existence of "inferior courts," and the necessity of creating law to decide individual cases.[105] Since, presumably, the federal government has exclusive jurisdiction over maritime actions, federal courts do not need to worry about displacing state

101. 28 U.S.C. § 1331 (2006) (providing for diversity jurisdiction based on grant of jurisdiction under Article III).

102. Ely, *supra* note 9, at 712 n.111.

103. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32, 33–34 (1812) (noting that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," but concluding "jurisdiction of crimes against the state is not among those powers").

104. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) ("If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of its own processes might justify a contrary federal rule.").

105. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction."); Field, *supra* note 5, at 891 (noting that "the grant of judicial power over 'all Cases of admiralty and maritime Jurisdiction' has served as the basis for judge-made admiralty rules").

law.[106] Thus, in the maritime context, the absence of the federalism demands of *Erie* provides greater residual power for federal courts. In some cases there is greater but still incomplete congressional guidance on procedure, such as in cases under the Sherman Act, which defines antitrust violations but not much else.[107] Because Congress "did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations," courts have concluded that Congress "expected the courts to give shape to the statute's broad mandate [fill in the gaps] by drawing on common-law tradition."[108]

D. *Overreach and Safeguards*

One potential problem for federal courts is determining whether there is, in fact, a gap that they can fill through their common law power. If a federal court can exercise its common law power on the basis of implied congressional authority and the existence of a gap, then there may be situations where it is uncertain whether that authorization is *really* implied such that there *really* is a gap. It may turn out that a gap is really a conclusion by Congress not to pursue a matter, and federal common law would be an instance not of gap-filling but of overreaching.[109] The same problem may arise in determining the scope of state law, where statutory interpretive methods may not make clear whether the choice of procedure would be outcome-determinative in any given case.[110]

There are at least two potential safeguards to overreaching through the exercise of federal common law power. One safeguard can be found in the Supremacy Clause. The Supremacy Clause only defines the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made" as "the supreme

106. This point is hotly disputed. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part and concurring in judgment) (arguing that current admiralty common law is "an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional text or principle").

107. *See* 15 U.S.C. §§ 1–2 (2006) (provisions defining antitrust violations); *see also* 15 U.S.C. § 15(a) (2006) (provisions of the Clayton Act permitting private rights of action).

108. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (discussing "rule of reason" as arising from common law doctrine).

109. That may be unlikely. *See* Field, *supra* note 7, at 925 (noting that "Courts sometimes decide that congressional silence" means that "no federal lawmaking should exist," but concluding that "congressional failure to legislate in an area in its competence surely does not invariably or even usually carry that meaning"); Sherry, *supra* note 74, at 18 (noting that "in other arenas in which Congress has the last word, we do not assume that congressional silence always leaves state law in place or disempowers the federal courts").

110. In fact, there may be a question as to whether the interpretive methods themselves are part of the "rules of decision" defined by state law, particularly when different methods would yield different outcomes. Gluck, *supra* note 7 (arguing that state law on interpretative methods should be considered substantive law for purposes of *Erie*).

Law of the Land."[111] Assuming that "the Laws of the United States" are limited to Acts of Congress, one negative implication of the Clause is that federal common law power cannot displace state law—an implication reflected by *Erie*'s interpretation of the Rules of Decision Act.[112]

The Supremacy Clause thus protects the powers of Congress because Congress can effectively abrogate federal common law through legislation.[113] But one can also imagine states, either through legislation or precedent, making clear their own views that their state procedure is outcome-determinative when a federal court has decided otherwise. Again, a federal court must apply state law as the "rules of decision" under the Rules of Decision Act, which, as interpreted by *Erie*, is reflective of the negative implication of the Supremacy Clause. Thus, a federal court would be required to interpret such law consistent with the state's own interpretation of it, which in some cases may require the certification of questions to a state court.[114]

The second safeguard to judicial overreaching is the Due Process Clause.[115] The Constitution outlines the procedures by which laws are validly enacted by the federal government and, through the Supremacy Clause, defines the relative hierarchy of those laws. Moreover, state laws are presumably subject to procedures of valid enactment under state constitutions. Accordingly, if federal common law power improperly displaces the laws that would otherwise apply, then the consequences of that displacement would be a deprivation of "life, liberty, or property" without "due process of law."[116]

Unlike the political safeguard provided by congressional or state action to correct an overreach, this safeguard would protect against overreaching through judicial review. It would permit a federal court to review whether the use of federal common law so undermines the processes for lawmaking

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111. U.S. CONST., art. VI, cl. 2.

112. *See* Clark, *supra* note 78, at 1303. *But see* Field, *supra* note 7, at 897 n.64 (noting that "it is now settled that federal common law is 'law' within the meaning of the supremacy clause," citing Friendly, *supra* note 78, at 405).

113. This is sometimes referred to in the literature as a "structural" safeguard, but the better term may be "political" safeguard because the safeguard relies on politics influencing congressional action. *See, e.g.*, Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 870 (2011) (arguing that "political factions are particularly likely to use their structural veto to block jurisdiction-stripping legislation favored by their opponents"). As an aside, congressional action arguably can also be used to protect state interests given the selection procedures of senators and representatives to Congress. *See* Clark, *supra* note 78, at 1289–90 (making this argument).

114. Gluck, *supra* note 7, at 1995–96 (discussing scholars who advocate greater use of certification of legal questions to state courts).

115. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

116. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

outlined in the Constitution that it would violate due process. The reverse can also be true. One possibility would be for courts to consider whether existing positive law itself has run afoul of constitutionally defined processes (either under the federal constitution or state constitutions) so that following such law, rather than displacing it through common law, would itself be a deprivation of due process.[117]

II. SUBSTANCE AND PROCEDURE

A. *Separate Piles v. Common Sense*

For both the *Erie* doctrine and the Rules Enabling Act, much turns on whether the federal procedure falls within the federal courts' limited power to make procedural law. Consequently, when a federal common law procedure conflicts with the procedure that a state court would use, federal courts have been preoccupied with whether the federal procedure would displace a state procedure "bound up with rights and obligations" under state law.[118] Likewise, in the Rules Enabling Act context, federal courts have focused on whether a Rule "really regulates procedure"[119] which would not otherwise "abridge, enlarge or modify a substantive right."[120] But the distinction between substantive rights and procedure has caused significant confusion because it is unclear where substance ends and procedure begins. The "hazy" line between substance and procedure was recognized by the *Erie* Court itself, and has been invoked repeatedly in subsequent cases.[121]

One source of confusion is what Professor John Hart Ely described as the "primitive" view that there are "two separate piles marked 'substance' and 'procedure.'"[122] Under this separate piles view, substance and procedure are considered mutually exclusive categories. Either a procedure is in the substance pile or it is not.

Ely illustrated the separate piles view by discussing *Sibbach v. Wilson*.[123] There, the plaintiff challenged Rule 35, which permits a party to

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117. *Cf.* Atkins v. Parker, 472 U.S. 115, 129–30 (1985) (rejecting a procedural due process claim under the Due Process Clause because the plaintiffs failed to allege, among other things, "any defect in the legislative process").

118. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958).

119. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (Scalia, J.) (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1940)).

120. 28 U.S.C. § 2072(b) (2006).

121. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part and dissenting in part) ("The line between procedural and substantive law is hazy but no one doubts federal power over procedure."); *see also Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in judgment) (same, citing cases).

122. Ely, *supra* note 9, at 735.

123. 312 U.S. 1 (1941).

compel the medical examination of another party in discovery.[124] The Court concluded that, based on the first sentence of the Rules Enabling Act, Rule 35 was valid because it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[125] The Court, however, ignored the second sentence of the Enabling Act, which, by its terms, further requires a Court to determine whether any such procedure would "abridge, enlarge or modify any substantive right."[126]

Professor Ely surmised that the *Sibbach* Court's neglect of the second sentence of the Rules Enabling Act was a consequence of the separate piles view. Because the Court had already put Rule 35 in the "procedure" pile, the Court's interpretation of the Rules of Decision Act at the time did not require any application of state law because federal courts had discretion to define procedure.[127] Accordingly, the *Sibbach* Court made no effort to identify which procedure applied in state court, nor whether displacement of that state law procedure would "abridge, enlarge or modify any substantive right."[128]

Ely further noted that, had the Court concluded that Rule 35 was in the procedure pile but nevertheless affected substance, the second sentence of the Enabling Act would invalidate the Rule. But in the pre-*Hanna* state of the *Erie* doctrine, the *Sibbach* Court, having already concluded that medical examination procedures under Rule 35 are really procedures, would then have to apply federal common law under the Rules of Decision Act to define the appropriate examination procedure. Thus, according to Ely, had the *Sibbach* Court given effect to the second sentence of the Enabling Act, the Court would have only "shift[ed] control from the Federal Rules to the federal courts."[129] Rather than engage in that pointless exercise, the *Sibbach* Court simply ignored the second sentence of the Rules Enabling Act.

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124. *Id.* at 14; *see also* FED. R. CIV. P. 35(a)(1) ("The court where the action is pending may order a party whose mental or physical condition – including a blood group – is in controversy to submit it to a physical or mental examination by a suitably licensed or certified examiner"). The plaintiff also challenged Rule 37, which was used to enforce Rule 35. *See Sibbach*, 312 U.S. at 8–9.

125. *Sibbach*, 312 U.S. at 14.

126. 28 U.S.C. § 2072(b) (2006).

127. Ely, *supra* note 9, at 736 (noting that the *Sibbach* Court likely concluded that "if the Rules of Decision Act did not mandate application of state law, nothing did"). Indeed, Ely would later debate Professor Abram Chayes over what procedure, in fact, would have applied in state court in *Sibbach*. *Compare* Abram Chayes, *Some Further Last Words on* Erie*—The Bead Game*, 87 HARV. L. REV. 741 (1974), *with* John Hart Ely, *Some Further Last Words on* Erie*—The Necklace*, 87 HARV. L. REV. 753 (1974).

128. 28 U.S.C. § 2072(b) (2006).

129. Ely, *supra* note 9, at 737.

In contrast to the separate piles view, Ely argued for a common sense approach. Under this approach, a "procedural rule" is "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[130] In contrast, a "substantive rule" or "substantive right" arises from "those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity."[131] This common sense definition of substance includes the objectives of "deterrence and compensation."[132] It also includes other substantive rights unrelated to the objectives of litigation, but which may be undermined by litigation procedures.[133]

Under Ely's common sense view, a procedure could affect substance yet remain in the procedure pile. A procedure, in fact, may have both procedural and substantive justifications. A statute of limitations, for example, could be promulgated because it reduces the size of the docket—a procedural justification. The same statute of limitations could also be promulgated because, in some cases, it provides a "feeling of release" deemed important outside the confines of litigation, which would be a substantive justification.[134]

Accordingly, Professor Ely argued that the second sentence of the Enabling Act requires an additional step beyond the identification of a procedure as "really regulat[ing] procedure."[135] It would require a federal court to determine whether that procedure would otherwise "abridge, enlarge or modify any substantive right" based upon a review of the justifications for the procedure.[136] If the procedure lacked any substantive justification, then it would not run afoul of the second sentence of the Enabling Act.[137] But if it did have a substantive justification, among others, then it would violate the Enabling Act. In Ely's view, this second inquiry was harder, but "not a great deal harder."[138]

Although others have proposed the common sense view of "substance,"[139] the Court has never embraced it explicitly.[140] The Court,

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130. *Id.* at 724.

131. *Id.* at 725 (1974) (quoting HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953) [hereinafter HART & WECHSLER, 1953]).

132. *Id.* at 726.

133. *Id.*

134. *Id.* (discussing statutes of limitations).

135. Sibbach v. Wilson, 312 U.S. 1, 14 (1941) (discussing the first sentence of the Enabling Act).

136. *See* Ely, *supra* note 9, at 727–28.

137. *Id.* at 732–33 (discussing "door-closing" rules like statute of limitations).

138. *Id.* at 728.

139. *See* HART & WECHSLER, *supra* note 5, at 665–66 (discussing the views of Henry Hart); Hanna v. Plumer, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring) ("[*Erie*] recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.").

however, has rejected the separate piles view, and one plausible inference from that rejection is the acceptance of the common sense approach. For example, all of the Justices on the current Court recently acknowledged in *Shady Grove* that "procedural rules" can "affect[] a litigant's substantive rights," strongly suggesting, consistent with the common sense approach, that a procedure can affect substance without losing its procedural character.[141]

The Court's implicit acceptance of the common sense approach is understandable. Most obviously, the common sense approach gives meaning to the second sentence of the Rules Enabling Act. But more importantly, the common sense approach better accords with the purpose of the Rules Enabling Act, which was to delegate congressional lawmaking power over the litigation process, but not over other areas of the law.

Despite the Court's rejection of the separate piles view, vestiges of it surface from time to time. Take, for example, Justice John Paul Stevens's concurrence in *Shady Grove*. There, the plaintiffs sought to certify claims under New York insurance law, which provided a statutory penalty for failure to pay insurance benefits on time.[142] The statutory penalty, defined as 2% interest per month, was larger than the actual damages which accrued from the late payment—approximately $500 for all of the plaintiffs.[143] The proposed class action further "transform[ed] [the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty."[144] A majority, including Justice Stevens, concluded that Rule 23 permitted a federal court to certify New York state law claims for statutory interest even though a state law, New York Civil Practice Law and Rules section 901(b), prohibited class actions for all statutory damage claims.[145]

The Court unanimously concluded that Rule 23 satisfied the first sentence of the Rules Enabling Act because, following *Sibbach*, Rule 23

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140. *See* Ely, *supra* note 9, at 697 ("But the Supreme Court is the Supreme Court, and seven is a majority of nine even when Justice Harlan is one of the two. *Hanna* therefore may not be *Erie*, but it seems to be the law."); *see also* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1940 (2006) (noting that "Justice Harlan was writing only for himself in his plea for a Hartian vision of *Erie* in *Hanna v. Plumer*").

141. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J.) (plurality opinion) ("The test is not whether the rule affects a litigant's substantive rights; most procedural rules do."); *id.* at 1455, 1459 n.18 (Stevens, J., concurring in part and concurring in judgment); *id.* at 1471–72 n.13 (Ginsburg, J., dissenting).

142. *Id.* at 1438 (Scalia, J.) (citing N.Y. INS. LAW ANN. § 5106(a)).

143. *Id.* at 1460 (Ginsburg, J., dissenting).

144. *Id.* at 1443 (Scalia, J.) (plurality opinion) (second alteration in original) (citations and quotations omitted).

145. *Id.* at 1437 (citing N.Y. C.P.L.R. ANN. § 901); *see also* N.Y. C.P.L.R. ANN. § 901(b) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

"really regulates procedure."[146] Indeed, although they disagreed on the result, both Justice Antonin Scalia's plurality and Justice Ruth Bader Ginsburg's dissent concluded that, under *Sibbach*, satisfying the first sentence of the Enabling Act was sufficient to establish the validity of Rule 23.[147]

In contrast to both Justice Scalia's plurality and Justice Ginsburg's dissent, Justice Stevens further concluded that the Enabling Act requires a separate inquiry as to whether Rule 23 would otherwise "abridge, enlarge or modify any substantive right."[148] Based on this separate inquiry, Justice Stevens concluded that the purposes of section 901(b), as revealed by its text and its legislative history, do "not clearly describe a judgment that section 901(b) would operate as a limitation on New York's statutory damages."[149] After reviewing the legislative history, Stevens observed that the history supported two competing narratives. The first narrative viewed section 901(b) as preventing "excessive penalties."[150] The second narrative understood section 901(b) as a conclusion that there was "no need to permit class actions in order to encourage litigation" when statutory damages are involved.[151] Because Justice Stevens viewed the second narrative as procedural, he found that these "two plausible competing narratives" made it ambiguous whether section 901(b) was substantive, and thus applied Rule 23 given that section 901(b)'s text was, on its face, procedural.[152]

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146. Sibbach v. Wilson, 312 U.S. 1, 14 (1940).

147. *See Shady Grove*, 130 S. Ct. at 1444 (Scalia, J.) (plurality opinion) ("We have held since *Sibbach,* and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure."). Justice Ginsburg's agreement is implied from the fact that she interpreted Rule 23 so as not to be procedural, out of fear that it would apply because it really "regulates procedure." *Id.* at 1461 (Ginsburg, J., dissenting) (arguing that the Court must avoid "immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing interest"); *see also* Clermont, *supra* note 8, at 1015 (arguing that "[t]he dissent, by Justice Ginsburg for Justices Kennedy, Breyer, and Alito, signified assent to the plurality's understanding of *Sibbach* mainly by silence").

148. *Shady Grove*, 130 S. Ct. at 1451–52 (Stevens, J., concurring in part and concurring in judgment) (quoting 28 U.S.C. § 2072(b) (2006)). Despite his position in *Shady Grove*, Justice Scalia, like Justice Stevens, also agrees that a separate inquiry is required as to whether a Rule would otherwise "abridge, enlarge or modify any substantive right," but, as discussed below, his conception of what constitutes a "substantive right" is quite limited. *See infra* Part II.B. Moreover, Justice Ginsburg implicitly agrees with a separate inquiry as to the substantive impact of the procedure, but subsumes this inquiry into the interpretation of the Rule. I reject that approach later in this Article. *See infra* Section III.C.

149. *Shady Grove*, 130 S. Ct. at 1451–52 (Stevens, J., concurring in part and concurring in judgment). He also concluded that the text of section 901(b) was ambiguous because it applied to all claims, not just claims of New York law. *Id.* at 1457–58.

150. *Id.* at 1458.

151. *Id.* at 1458.

152. *Id.* at 1459–60.

Although, in his concurrence, Justice Stevens explicitly rejects the separate piles view, he neglects the fact that a procedure can have both procedural and substantive justifications. There was no need for Justice Stevens to frame the justifications as competing narratives, since, as Ely pointed out, a procedure can have multiple justifications.[153] In fact, under the common sense approach, only one of the competing narratives has to be substantive in order for a Rule to violate the second sentence of the Enabling Act, and certainly that was the case in *Shady Grove*.[154] Thus, Justice Stevens, in rejecting the separate piles view, adheres to it by searching for the correct pile to assign section 901(b).

As evidenced by Justice Stevens difficulty in parsing the legislative history of section 901(b), a state may fail to clearly articulate its substantive rationale for a procedure. A federal court therefore could exploit any such ambiguity to displace state law procedures with federal ones. Conversely, a state may strategically provide a substantive justification for a procedure even though the procedure bears little or no relation to that justification.

Consequently, Ely's common sense view of the distinction between substance and procedure is flawed. He focuses solely on the stated substantive justifications for a procedure and ignores the actual substantive impact a procedure has apart from those justifications.[155] A better common sense approach would take into account both the substantive justification for a procedure and its actual substantive impact to prevent opportunistic behavior by both federal courts and state courts.

B. *Avoiding the Wrong as the Substantive Right*

Professor Ely's reference to deterrence and compensation as matters of substance reveals another primitive view that continues to pervade the *Erie* doctrine. Courts and scholars have generally agreed that the "substantive right," at least for purposes of the Rules Enabling Act, should be understood as the claim and its constitutive entitlements, such as the right to control the claim or the right to compensation.[156] As a result, the claim

153. Ely, *supra* note 9, at 732–33.

154. *Id.* at 732–33 (discussing "door-closing" rules like statutes of limitations).

155. Ely, *supra* note 9, at 724 n.170 (arguing that "[t]he test suggested is geared to the purposes underlying the state rule and not to whether the rule 'in fact' serves substantive or procedural ends," since, in his view, a full blown "'effects test' would seem destined either to unintelligibility or to the invalidation of every Federal Rule thereby rendering the Enabling Act entirely self-defeating"). Although I agree that an "effects test" would be difficult to administer, I disagree that an "effects test" would either be "unintelligib[le]" or "self-defeating." *See infra* Sections III.B & III.D. Nevertheless, this Article later provides a partial defense to Ely's approach. *See infra* Section III.C.

156. 28 U.S.C. § 2072(b) (2006); *see also* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1092–93 (2012) (discussing the "bundle" of entitlements that comprise the claim, such as the right to control and the right to compensation).

cannot be "abridge[d], enlarge[d], or modif[ied]" under the Rules Enabling Act.[157]

In *Semtek International, Inc. v. Lockheed Martin Corp.*, for example, the Court addressed whether Rule 41(b), which governs involuntary dismissals, permitted a federal court to preclude a state law claim for failing to comply with the statute of limitations defined under California state law.[158] If Rule 41(b) permitted the district court to preclude the claim, the Rule could have conflicted with California state law if California law permitted a claim to be brought in another forum with a longer statute of limitations, in that case Maryland.[159] But the Court interpreted Rule 41(b) only to bar the plaintiff from bringing the same claim again in the same federal court.[160] According to the Court, in a unanimous opinion by Justice Scalia, "if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's *extinguishment of that right* (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate" the second sentence of the Rules Enabling Act.[161] Here the Court expressly identified the relevant "right" as the claim.

For support, the *Semtek* Court cited *Ortiz v. Fibreboard Corp.*, in which the Court invalidated a settlement class action under Rule 23(b)(1)(B) of state law asbestos claims.[162] Rule 23(b)(1)(B) permits mandatory class actions, understood as class actions that do not allow a plaintiff to exit the class to file his claim separately.[163] Moreover, Rule 23(b)(1)(B) class actions typically apply to "limited fund" situations where the Court distributes any recovery on a pro rata basis.[164] The Court, in an opinion by Justice David Souter, invalidated the class action in part because of Rules Enabling Act concerns.[165] The Court highlighted "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law."[166] Here the substantive "rights of the tort victims at law" included the right to not only

157. 28 U.S.C. § 2072(b) (2006).

158. 531 U.S. 497 (2001); *see also* FED. R. CIV. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule . . . operates as an *adjudication on the merits.*") (emphasis added).

159. *Id.* at 503. The Court did not address whether the district court's application of Rule 41(b) conflicted with California preclusion law. *See id.* at 503–04.

160. *Id.* at 506.

161. *Id.* at 503–04 (emphasis added).

162. Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999).

163. *See* FED. R. CIV. P. 23(b)(1)(B); *id.* 23(c)(2)(A) (providing that for class actions certified under Rule 23(b)(1) and 23(b)(2), "the court may"—not *shall*—"direct appropriate notice to the class," and failing to require a means of opting out of the class).

164. *Ortiz*, 527 U.S. at 834–35 (discussing historical origins of Rule 23(b)(1)(B)).

165. *Id.* at 845.

166. *Id.*

bring the claim individually, but to seek the unconstrained individualized damages that come with an individually filed claim.

Justice Scalia, following *Semtek* and *Ortiz*, would return to the conception of the claim as a substantive right in *Shady Grove*. Again, *Shady Grove* concerned whether a New York state law, section 901(b), which prohibited class actions for claims seeking state statutory damages, prevented a federal court from certifying the same class under Rule 23.[167] Writing for a plurality, Justice Scalia concluded that Rule 23 could do so without violating the Rules Enabling Act, "at least insofar as [the Rule] allows *willing* plaintiffs to join their separate claims against the same defendants in a class action."[168] As in *Semtek* and *Ortiz*, the Court suggested that an involuntary taking of the claim through a class action would run afoul of the second sentence of the Rules Enabling Act.[169]

In sum, the current Court has defined an enclave of substantive law in which the Court takes the second sentence of the Enabling Act seriously. In the Court's view, the second sentence of the Rules Enabling Act defines the claim and its constitutive entitlements the relevant "substantive right" which a Rule cannot "abridge, enlarge or modify."[170] Indeed, although the legislative history as to what constitutes a "substantive right" under the Enabling Act is far from clear,[171] the first Advisory Committee concluded that the Rules cannot extinguish or otherwise limit the claim, such as by defining "the effect of judgments on persons who are not parties."[172]

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

168. *Id.* at 1443 (Scalia, J.) (plurality opinion) (emphasis added); *see also* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1164 (2011) (highlighting this caveat and its relationship to Justice Scalia's position in *Semtek*).

169. *See* Campos, *supra* note 155, at 1076–78 (arguing that the class action is a judicial assignment of the legal title and a partial beneficial interest of the plaintiffs claims to the class action attorney).This focus on the claim as the relevant substantive right has extended to individual defenses, which can be understood as the defendant's version of the claim. *Cf.* Campos, *supra* note 156, at 189 n.148 (noting that the Due Process Clause applies to both claims and individual defenses). In *Wal-Mart Stores, Inc. v. Dukes*, for example, the Court rejected a proposed federal procedure to distribute damages in a massive Title VII class action by taking a random sample of claims to determine the total aggregate liability of Wal-Mart. 131 S. Ct. 2541, 2561 (2011). Justice Scalia, writing for a unanimous Court, concluded that such a "Trial By Formula" would violate the Rules Enabling Act because it would infringe upon the defendant's rights under Title VII (in this case a federal law) to assert statutory defenses against individual plaintiffs. *Id.*

170. 28 U.S.C. § 2072(b) (2006).

171. *See* Burbank, *supra* note 89, at 1122–31 (noting only that main concern was to protect "substantive rights already recognized by the law"); *cf.* Steinman, *supra* note 168, at 1162–64 (noting Supreme Court precedent concluding that preclusion and statute-of-limitation periods would violate the Rules Enabling Act, which both would infringe upon the claim).

172. Burbank & Wolff, *supra* note 8, at 55 (noting that the Rules Advisory Committee that promulgated the 1938 version of Rule 23 "consider[ed] it beyond their functions to deal with the question of the effect of judgments on persons who are not parties"); *see also* Diane Wood

A number of scholars have also subscribed to the view that the claim is the relevant "substantive right" for Rules Enabling Act purposes.[173] For example, Professor Martin Redish has criticized small claims class actions in which a substantial number of plaintiffs fail to collect from the recovery.[174] In his view, when a small claims class action does not compensate a substantial number of class members, it transforms into a "disguised bounty hunter action" that enriches the class attorney by assigning to him each plaintiff's dispositive control over the claim along with a cut of the recovery.[175] In taking away the claim from the plaintiffs for the class attorney's benefit, these "bounty hunter" class actions "effectively transform[] the essence of the pre-existing private right" in violation of the Rules Enabling Act.[176] Professor Redish, moreover, contends that such "bounty hunter" class actions allow courts to abrogate surreptitiously the compensatory function of the claim, which extends beyond the limited delegation of power to promulgate procedures provided by the Enabling Act.[177]

Hutchinson, *Class Actions: Joinder or Representational Device*, 1983 SUP. CT. REV. 459, 459–60 (discussing historical vacillation over issue of preclusion in class actions).

173. *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 84 (2007) (arguing against the use of mandatory class actions in mass tort litigation, since the "the delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights"); Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 880–81 (2011) (arguing that under both the *Erie* doctrine and the Rules Enabling Act, federal courts cannot "choose a rule that affects th[e] expected value" of the claim).

174. REDISH, *supra* note 88, at 35–69; *see also* Martin H. Redish et al. *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 617 (2010).

175. *Id.* at 35; *see also id.* at 26–27 (analogizing such class actions to "qui tam" actions in which a noninjured third party asserts claims belonging to the victim, although, unlike qui tam actions, "class action bounty actions" have not "been explicitly authorized by congressional statute").

176. *Id.* at 38 (criticizing Professor David Shapiro's entity view of the class action, because "the laws establishing" the claim "vest compensatory rights not in an entity of plaintiffs but rather in individual victims"); *see also* Campos, *supra* note 156, at 1076–78 (noting that the class action assigns dispositive control and a partial interest in the plaintiffs' claims to the class attorney).

177. REDISH, *supra* note 88, at 41 ("To allow a rule that purports to do nothing more than create a procedural mechanism to transform pre-existing private compensatory rights into a crude form of parens patriae action is to abuse the rules of procedure.").

Professor Redish further argues against the "paternalism" of the class action, which presupposes that the control over the plaintiffs' claims should be assigned to the class action attorney because she will make better decisions in the litigation than the plaintiffs themselves. *Id.* at 40. He argues that this paternalism "flies in the face of foundational normative premises of democratic theory, grounded in respect for the individual's ability to decide for herself what her best interests are." *Id.* I disagree that a plaintiff's control over the claim is a "foundational normative premise[] of democratic theory," as I have argued elsewhere. *See* Campos, *supra* note 156, at 1110–15.

Nevertheless, it is worth noting here that Redish ignores other areas of the law which place paternalistic limits on a plaintiff's control over a claim. For example, a plaintiff cannot sell the

But defining the relative substantive right as the claim ignores the enforcement function of the claim. This enforcement function implies a further entitlement—a right to be free from the legal violation.[178] Under tort law, for example, the claim not only compensates, but also protects the victim's entitlement to be free from the tortious conduct.[179] Similarly, antitrust law provides for antitrust claims precisely to enforce a private right to be free from antitrust violations.[180] In fact, many scholars, including Redish, acknowledge that the claim is a "provision of a remedy or remedies by which . . . behavioral regulations are to be enforced."[181]

It is this right to be free from violations of the law, and not the claim, that should be considered the relevant substantive right. This is because, under the common sense approach, this higher order entitlement arises from "those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity."[182] After all, "[t]he rights protected by tort law are, by and large, *rights against being mistreated in certain ways by others*."[183] This point is "blindingly obvious" but nevertheless missed under the current *Erie* doctrine.[184] Indeed, the plain language of the Enabling Act supports recognition and protection of

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claim except in very limited circumstances. *See id.* at 1074–76 (discussing limits on the alienability of the claim under the law of champerty and maintenance). Moreover, a potential plaintiff often must pay for a claim she doesn't want, as when a party can purchase a car with antilock brakes, coupled with a right to sue for any defect, but cannot waive her right to a remedy to pay a lower price for the car. *See* CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 53–54 (2003) (noting this paternalistic aspect of tort law).

178. *See* Campos, *supra* note 156, at 33–37 (noting and discussing this distinction).

179. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Calabresi and Melamed note that "[t]he state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected," such as through liability rules that provide a cause of action for the damages that result from the lost entitlement. *Id.* at 1090–92.

180. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130–31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.").

181. REDISH, *supra* note 88, at 23 (recognizing that laws containing liability rules, including "state tort laws . . . all contain two fundamental elements: the proscription or regulation of an actor's 'primary behavior' and the provision of a remedy or remedies by which these behaviorial regulations are to be enforced").

182. Ely, *supra* note 9, at 725 (quoting HART & WECHSLER, 1953, *supra* note 131, at 678); *see also* REDISH, *supra* note 88, at 23 (recognizing liability rules in all contexts as providing "the proscription or regulation of an actor's 'primary behavior'").

183. John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibilities in the Law of Torts*, *in* RIGHTS AND PRIVATE LAW 251, 262 (D. Nolan & A. Robertson eds., 2012).

184. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 976–77 (2010).

these "substantive right[s]," even if the legislative history is ambiguous on this point.[185]

Arguably whether a claim implies a primary, substantive right to avoid a legal violation may depend on whether, in a given context, "deterrence is plausibly deemed the main goal of litigation."[186] But deterrence (or, more broadly, enforcement) is the main goal of litigation in *all* contexts, both as a positive and a normative matter.

As a positive matter, all claims are premised on a finding of liability, which arises from a failure to act in a certain way defined by the liability rule. Thus, a claim (which, after all, is a claim that your rights were violated) cannot be understood in the absence of a substantive right to be free from the underlying legal violation. More importantly, a claim, as a positive matter, is designed to induce a party not to violate the law. This is readily apparent in cases where the remedy is specific performance, since the claim only effectuates the substantive right to force the party to act a certain way. But even with claims involving substitutionary remedies like compensatory damages, the expected liability that arises from these claims also has an effect on whether the defendant engages in lawful behavior. The defendant, after all, can avoid or reduce its liability by following the law.[187] Accordingly, as a positive matter, a claim ensures legal compliance, either directly or through deterrence, regardless of what function a state or Congress ascribes to the claim.[188]

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185. Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quoting and paraphrasing from United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (internal quotation marks omitted)).

186. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1522 n.329 (2008) (criticizing scholarship that has argued that deterrence is the primary function of small claims litigation); *cf.* REDISH, *supra* note 88, at 23 (arguing that deterrence is only an "incidental benefit" of the claim, and not its primary function).

187. More precisely, a claim for substitutionary remedies like damages reflects a "divided entitlement" in which the plaintiff has an entitlement to be free from a legal violation, with the defendant having an "option" to take the entitlement only if he or she pays the exercise price of damages. *See* AYRES, *supra* note 31, at 5 ("The crucial jumping off point is to see that liability rules give potential takers an option to take."). Such an "option" to take entails an underlying entitlement. *Id.* at 4–5 (noting that entitlements can include "the right to bodily security" or "the right to a pollution-free atmosphere").

188. Admittedly, a state (or Congress) may consider compensation the primary goal of the litigation, with deterrence an "incidental" effect. *Cf.* REDISH, *supra* note 88, at 31 ("By seeking to benefit the individual litigants . . . adjudication may have the incidental impact of advancing the public interest."). However, if states identify the primary goal of the claim as compensation, then they have chosen a strange way to provide it. Why, for example, would a state condition compensation on a finding of liability rather than, for example, a finding of actual loss, unless it also cared about the victim's right to lawful behavior? Moreover, why would a state use the court system to compensate victims given the high costs of litigation? Finally, if states only cared about

As a normative matter, in most cases where the remedy is substitutionary, as in claims for compensatory damages, the compensation sought cannot fully substitute for the loss because many losses are nonpecuniary, or irreplaceable.[189] Even if all of the losses are replaceable, any compensation provided by the claim would not cover the entire loss because litigation is costly and, under the American Rule, the parties bear their own litigation costs. Because, again, a claim, as a positive matter, prevents a legal violation (as in the case of specific performance actions), or deters the violation (as in the case of substitutionary remedies), individuals would always prefer the claim's function of avoiding the loss to its function of providing inherently incomplete compensation for it.[190] Thus, both positively and normatively, deterrence is *always* the main goal of litigation in all contexts, and should not be sacrificed for compensatory or other purposes.

This is not to say that civil liability does not have a compensatory function, or that compensation is not otherwise important. In fact, in most cases, protecting the compensatory function of the claim also means protecting its enforcement function. Instead, the point is to show that the primary entitlement provided by the liability rule is the avoidance of the legal violation. To the extent that protection of the claim conflicts with that primary entitlement, then the claim and its constitutive entitlements should give way.

Consider, again, *Shady Grove*. Justice Ginsburg, in dissent, agreed with the Court that Rule 23 would apply if it covered the issue, but contended that section 901(b) did not prohibit a class action. Instead, Justice Ginsburg interpreted section 901(b) to limit the *remedy* available in a class action because the Rules should be interpreted "with awareness of, and sensitivity to, important state regulatory policies."[191] Accordingly, in Justice Ginsburg's view, the Rules of Decision Act applied, and, under *Erie*, section 901(b) should apply because permitting a Rule 23 class action would be "outcome affective."[192] Specifically, a class action increased the potential recovery significantly, leading to obvious forum shopping.[193]

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compensation, why not provide compensation directly, or subsidize insurance? *Cf.* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329–32 (2008) (criticizing an approach that would focus on "full compensation" divorced from other substantive interests).

189. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW § 6.4, at 133 (1987) (defining non-pecuniary losses as losses that are not a single good, such as wealth, or capable of being produced by that good); *see also* RESTATEMENT (SECOND) OF TORTS § 903 (1979) (same); Lee Anne Fennell, *Unbundling Risk*, 60 DUKE L.J. 1285, 1290–93 (2011) (same, citing sources).

190. *See* Campos, *supra* note 156, at 1084–85 (discussing preference for avoidance of a risk over incomplete compensation for it).

191. *Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting).

192. *Id.* at 1471–72.

193. *Id.*

Stephen Burbank and Tobias Wolff also agree with Justice Ginsburg that Rule 23 was in some "tension" with "the goals of the underlying law."[194] While Justice Ginsburg reconceptualized section 901(b) as a law that places a limit on remedies, Burbank and Wolff reconceptualize Rule 23 as a tool to enforce "important public norms."[195] In particular, they contend that "rigid formal categories are inadequate, even counterproductive, when one seeks to describe and justify the permissible bounds of a class action proceeding and the binding effect of a resulting judgment."[196] Instead, Burbank and Wolff argue that one must "reject[] dogmatic adherence to transsubstantive procedure and the allure of artificially crisp formalisms, recognizing instead the dialectic relationship that necessarily exists between the prospective intentions of rulemakers and the actual application of open-textured provisions over time."[197] In their view, "[s]uch a mode of analysis" would have rejected the application of Rule 23 in *Shady Grove*.[198]

Neither Justice Ginsburg nor Burbank and Wolff had to resort to concepts like "remed[ies]," "important public norms," or "the dialectic relationship that necessarily exists between the prospective intentions of rulemakers and the actual application of open-textured provisions over time." The old "rigid formal categories" work just fine. One can understand their concern with ratcheting up an action worth $500 to one worth $5,000,000 as a concern with overdeterrence. As a matter of legislative history and common sense, New York provided statutory penalties for late payments because, in the absence of such penalties, no one would have any incentive to bring a lawsuit, and thus insurers would have no incentive to pay insurance proceeds on time.[199] But the class action similarly vindicates "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[200] These are not complementary measures except under certain circumstances.[201] You can have one or the other, but you cannot have both because it would lead to an excessive penalty that may lead to "annihilating

194. Burbank & Wolff, *supra* note 8, at 64.

195. *Id.* at 57.

196. *Id.* at 53.

197. *Id.* at 65–66 (criticizing Justice Scalia's plurality opinion in *Shady Grove*).

198. *Id.* at 66.

199. *See Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring in part and concurring in judgment) (noting that "[t]he legislative history of § 901 thus reveals a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required," but concluding that the legislative history is sufficiently ambiguous to permit the application of Rule 23).

200. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (discussing Rule 23).

201. *But see* infra Part III.B (discussing multiplier damages as complementary to class actions).

punishment of the defendant."[202] In fact, given the risk of such excessive penalties for a late payment, some insurers may avoid providing certain types of insurance at all, thereby defeating the purpose of having the penalties in the first place. Taken together, application of Rule 23 to the case in *Shady Grove* would violate the Enabling Act because it would modify a substantive right—the right to insurance which pays its benefits on time.

C. *Avoiding the Wrong and the Rules Enabling Act*

Defining the substantive right as the right to avoid a legal violation has the benefit of clarifying the two different tests of validity that apply to Federal Rules of Civil Procedure and to federal common law procedures in the "relatively unguided *Erie*" context.[203]

In part, the confusion that surrounds the outcome-determinative test in the unguided *Erie* context and the test that applies in the Enabling Act context arises from a failure by courts to use the *ex ante* perspective. This is especially true in the context of the outcome-determinative test, where, prior to *Hanna v. Plumer*, courts took an *ex post* perspective to determine whether the choice of procedure affected the outcome in the case before it, which it always did.[204] An *ex ante* perspective, in contrast, would determine whether, at the outset of litigation, the choice of procedure would affect the outcome of a case. This ex ante perspective would not only be forward looking, but would also acknowledge the fact that the procedures at issue would apply to all cases generally, not just the one before the court. Thus, from this *ex ante* perspective, a court can more properly determine whether the choice of the state procedure or the federal procedure would affect the "twin aims" of *Erie* in avoiding "forum shopping" and the "inequitable administration of the laws."[205]

But recognizing avoidance of the legal violation as the relevant substantive right under the Enabling Act further demonstrates that the two tests consider different points in time. The outcome-determinative test looks to the effect of the choice of procedure on any given case. Accordingly, the test limits its perspective to the beginning of litigation, not to any primary conduct before it.

In contrast, the test under the Rules Enabling Act focuses on a much earlier point in time to see whether the contemplation of litigation (even if

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202. *See Shady Grove*, 130 S. Ct. at 1458.

203. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (distinguishing the "relatively unguided *Erie*" test under the Rules of Decision Act and the test under the Rules Enabling Act).

204. *Id.* at 468 (noting that, under this *ex post* approach, "*every* procedural variation is 'outcome-determinative'").

205. *Id.*; *see also* Tidmarsh, *supra* note 173, at 908–10 (arguing also for the comparison of procedures based on their effect on the claim's "ex ante expected value," but applying this principle to both the *Erie* and Rules Enabling Act contexts).

it did not occur) would abridge, enlarge, or modify a substantive right. For example, the deterrent effect of a claim for damages, which secures the substantive right of avoiding a legal violation, is achieved by forcing the potential defendant to contemplate potential litigation "at the stage of primary private activity."[206] In fact, if the deterrent effect of the damage claim works properly, the litigation may never materialize under certain liability rules.

To see the difference between the two tests, consider a highly stylized example. Suppose that a law in state *X* prohibits a company from producing cars with safety defects. Moreover, state *X* enforces this prohibition through a strict-liability rule.[207] Further suppose that the compensatory interests of the parties are nonexistent because all individuals in the state are required to insure against all losses caused by car accidents.[208] Assume that State *X* and all other states have also adopted a "collateral source rule" which would require courts to reduce any damages awarded by the insurance benefits received by the victims.[209]

Now suppose that a Rule is adopted through the Rules Enabling Act which would require courts to apply a negligence rule to all car defect cases in diversity jurisdiction. This rule would limit the number of cases filed in federal courts because a victim can sue damages caused by a car defect only when she can additionally allege negligence.[210] Assume that the Advisory Committee is aware of this advantage, and thus promulgates the negligence rule with the justification that it would "clear the dockets so they do juster justice in other cases."[211]

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206. Ely, *supra* note 9, at 725 (quoting HART & WECHSLER, *supra* note 131, at 678).

207. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(a) (1998) (providing for strict liability for "a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product"); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) (justifying imposition of strict liability for manufacturing risks because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business").

208. Many states mandate insurance coverage for car accidents. *See* Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000); *cf.* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Products Liability*, 123 HARV. L. REV. 1437, 1491 (2010) (noting that the availability of third-party insurance for losses is a consideration in favor of "curtailing" products liability).

209. *See, e.g.*, N.Y. C.P.L.R. § 4545(a) (defining collateral sources, including "insurance," that must be used to offset any damage award).

210. *See* Steven Shavell, A Fundamental Enforcement Cost Advantage of the Negligence Rule Over Regulation 3 (Sept. 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2144553 (noting that, all things being equal, "the superiority of the negligence rule . . . rest[s] on the observation that under the rule, compliance with a standard reduces the number of instances in which behavior is examined").

211. *Cf.* Ely, *supra* note 9, at 706–07 n.77 (arguing that a "no fault liability" rule designed to "clear their dockets" would be permitted under the first sentence of the Enabling Act since it would "really regulate procedure," even though it would violate the second sentence); Mishkin, *supra* note

Would a Federal Rule of Civil Procedure mandating the use of a negligence rule when a strict-liability rule would apply under state law violate the Enabling Act? Under certain restrictive assumptions, it may not. Assume that the car manufacturer is from state *Y*, and thus all citizens of state *X* could bring a diversity suit in either federal court or state court. If the negligence rule applies only when the defendant has not exercised the optimal level of care, and the levels of care of the car manufacturer are the only determinants of safety, then it would induce the same level of safety as a strict-liability rule.[212] In other words, the use of the negligence rule under these assumptions would not "abridge, enlarge or modify" the "substantive right" of a reasonably safe vehicle, since you get the same safe vehicle under either rule.[213] Moreover, given the lack of any need for compensation due to the existence of compulsory insurance, the use of a negligence rule also would not abridge any right, substantive or not, in compensation for any losses. Indeed, the collection of insurance proceeds would offset any receipt of compensation.[214]

Of course, if any of the underlying assumptions change, such as the number of cars manufactured and on the road being a determinant of the overall safety of the car, then it would not satisfy the second sentence of the Enabling Act.[215] But it is important to emphasize that the relevant inquiry for Enabling Act purposes is whether the *right* to a safe car is substantially "modif[ied]," not whether the *claim* is substantially modified. Admittedly, the Rule would "abridge" the claims of injured plaintiffs whose injuries were not caused by the car manufacturer's negligence. In the absence of a strict-liability rule, these plaintiffs would not be able to bring a claim for damages. Nevertheless, the rule would be valid because it would not "abridge, enlarge or modify" the right to a safe car.

78, at 1684 & n.10 (criticizing Ely, and arguing that neither Congress nor the courts could adopt such a rule).

212. SHAVELL, *supra* note 189, at 9 (noting that, under the above assumptions, "[b]oth forms of liability result in the same, socially optimal behavior").

213. 28 U.S.C. § 2072(b) (2006).

214. Arguably the substantive rights of the car manufacturer would be modified because, under a strict-liability rule, the car manufacturer would have to pay for all losses, while, under a negligence rule, the manufacturer would only have to pay for losses caused by its negligence. Under certain assumptions, however, the rights of the car manufacturer would also not be modified. In a competitive market, the expected liability of the car manufacturer under either rule would be passed on to the customers. Moreover, assuming no deadweight losses caused by reduced sales, the impact of either rule would be the same for the car manufacturer, although the customers would have to pay a higher price for the car under a strict liability rule. Even then, the higher price a customer would pay would be offset by the lower premium the customer would pay to the insurance company.

215. SHAVELL, *supra* note 189, at 17 (noting differences between negligence and strict liability rules when certain dimensions change, such as the level of activity); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1–6 (1980) (arguing that the negligence rule is optimal when levels of care determine risk of injury, while the strict liability rule is optimal when levels of activity determine risk of injury).

In contrast to the Enabling Act inquiry, if federal courts adopted a negligence rule for car defect cases as a matter of federal common law, then such a choice of procedure obviously would be outcome-determinative. But, as with the Enabling Act inquiry, this is not because the federal common law negligence rule would abridge the plaintiffs' claims. In fact, unlike the Rules Enabling Act, the Rules of Decision Act does not mention substance at all.[216] Instead, such a rule, evaluated from an *ex ante* perspective taken at the beginning of the litigation, would substantially determine the outcome of those cases. In fact, citizens of state *X* would never file suit in federal court, but would always be removed to federal court by the car manufacturer, a citizen of *Y*. Here the forum shopping would be manifest, even though the underlying level of safety would be the same.

As evidenced by the negligence-rule example, defining the relevant substantive right for Rules Enabling Act purposes as avoiding the legal violation has the further implication of defining the claim as part of procedure. It is part of the *ex post* enforcement procedure by which the primary entitlement is protected. Indeed, the issue of whether to recognize a cause of action is not that different functionally from procedural doctrines such as standing.[217]

D. *Avoiding the Wrong and the "Unguided* Erie*" Doctrine*

The negligence-rule example above shows how extinguishing one's cause of action may not necessarily "abridge, enlarge or modify" a "substantive right," properly understood.[218] But it is unclear how a common law procedure that modifies the claim can avoid being outcome-determinative.

Consider, however, another example, one more grounded in reality. In 2005 Congress passed the Class Action Fairness Act (CAFA), which, among other things, exploited the diversity jurisdiction provided by the Constitution to permit the removal of multistate class actions to federal court.[219] Although Congress expanded diversity jurisdiction for multistate

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216. Ely, *supra* note 9, at 722–23 (noting that, under the Rules of Decision Act, "the court need ordinarily not concern itself with whether the federal rule urged by one party, or the state rule urged by the other, is most fairly designated as substantive or procedural").

217. *See generally* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (analogizing standing doctrines to procedures like the class action).

218. 28 U.S.C. § 2072(b) (2006).

219. Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding diversity jurisdiction and imposing limitations on class action settlements to prevent class action attorneys from selling out the class); *see also* 28 U.S.C. § 1332(d) (2006) (providing for diversity jurisdiction for multistate class actions and similar "mass action[s]"). Specifically, CAFA exploited the "minimal diversity" provided under Article III of the Constitution but not available due to the complete diversity rule. *See* Exxon Mobil Corp. v.

class actions, it did not otherwise provide for any other substantive law to apply to those actions. Consequently, scholars have debated the extent to which federal courts applying common law could fill in the gap left by Congress.[220]

One significant issue is the choice of law rule that would apply to the removed class actions under CAFA. Specifically, to what extent can federal courts modify or create a choice of law rule to facilitate the certification of class actions?[221] A change to the choice of law rule would be necessary to avoid the "commonality" and "predominance" problems that would arise from a federal court having to apply up to fifty different state laws.[222]

Courts and scholars have generally concluded that both *Erie* and *Klaxon Co. v. Stentor Electric Manufacturing Co.*[223] limit the changing of choice of law rules to facilitate class certification. In *Klaxon*, decided after *Erie*, the Supreme Court held that in diversity cases, "[t]he conflict of laws rules to be applied by the federal court . . . must conform to those prevailing in [the] state courts" where the federal court is located.[224] Consequently, "federal courts in these class action, choice of law cases [have] felt bound under *Erie* and *Klaxon* to adopt the choice of law approach of the respective states in which they sat, and thus were limited as to how they might expressly shape choice of law to accommodate aggregate litigation."[225] In fact, the *Klaxon* rule has been invoked by courts and scholars as requiring, in most cases, a federal court in a class action with claims from multiple states to apply the state law that would apply to

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Allapattah Servs., Inc., 545 U.S. 546 (2005) (noting this constitutional "minimal" diversity in the context of a multistate class action).

220. *See, e.g.*, Burbank, *supra* note 140, at 1943 & n.129 ("[T]here is evidence that in enacting CAFA, Congress did not intend to alter the ordering of federal and state lawmaking authority established by *Erie* v. *Tompkins* and its progeny."); Burbank, *supra* note 186, at 1529 (quoting S. Rep. No. 109-14 (2005) for the proposition that CAFA does not change the application of *Erie*); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1419–20 (2006) (explaining need, and possibly potential, for "incremental decisional law"); Suzanna Sherry, *Overruling* Erie*: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2136 (2008) (arguing that CAFA effectively "overrul[ed] *Erie Railroad Co.* v. *Tompkins*, at least for the national-market cases that it places within federal court jurisdiction").

221. *See* Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2002 (2008) (arguing for an "anti-*Klaxon*" rule for choice of law issues arising from national market class actions); Sherry, *supra* note 220, at 2136.

222. *See* FED. R. CIV. P. 23(a)(2) (requiring that all class actions that "there are questions of law or fact common to the class"); FED. R. CIV. P. 23(b)(3) (requiring a finding that "questions of law or fact common to class members predominate over any questions affecting only individual members"); *see also In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.) (concluding that common issues did not predominate because of multiple state laws).

223. 313 U.S. 487 (1941).

224. *Id.* at 496.

225. Silberman, *supra* note 221, at 2015 (discussing cases).

each individual claim, since many states would apply "the law where the harm occurred."[226] Of course, such a requirement prevents certification of the class action because an action where different state laws would apply depending on the individual claim would lack the "predominance" of common issues necessary to make the class action manageable.[227]

But *Erie* and *Klaxon*, properly understood, do not prevent a federal court from considering creative options in certifying a class action with claims based on multiple state laws. As argued above, the outcome-determinative test is best understood as a test that evaluates, from the *ex ante* perspective of a case about to be litigated, whether the choice of a procedure would materially affect the outcome of the case. Accordingly, this *ex ante* perspective permits any federal common law procedure if it would not materially affect the expected liability facing the defendant or the expected recovery of each of the plaintiffs at the outset of the litigation.[228]

Indeed, *Klaxon* is merely an application of *Erie*'s outcome-determinative test. In *Klaxon*, the Court adopted a rule that courts must follow the choice of law rules of the forum state because it concluded that *Erie* "extends to the field of conflict of laws."[229] Thus, the *Klaxon* Court adopted its choice of law rule because "[a]ny other ruling would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based."[230] In other words, the *Klaxon* rule is only an offshoot of the Rules of Decision Act's requirement of vertical uniformity.[231]

The Court, in fact, has deviated from the *Klaxon* rule when applying the rule would frustrate vertical uniformity. In *Van Dusen v. Barrack*, for example, the Court considered whether the *Klaxon* rule applied when the defendant sought to transfer the action to a different state with a choice of law rule more favorable to the defendant.[232] Specifically, under the choice of law rules of the transferee court, Massachusetts law would apply to the plaintiffs' claims, which was more defendant-friendly than the Pennsylvania law that would apply to the plaintiffs' claims under the

226. *See, e.g.*, *Firestone*, 288 F.3d at 1016 (noting that Indiana is a "lex loci delicti" state); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996); Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799.

227. *See, e.g.*, *Firestone*, 288 F.3d at 1016 (denying class certification for a lack of predominance given that adjudicating individual claims under multiple state laws would make the class action unmanageable).

228. *See* Tidmarsh, *supra* note 173, at 908–10 (arguing also for the comparison of procedures based on their effect on the claim's "ex ante expected value").

229. *Klaxon*, 313 U.S. at 496.

230. *Id.*

231. Ely, *supra* note 9, at 714–15 n.125 (arguing that *Klaxon* is required by the Rules of Decision Act).

232. 376 U.S. 612 (1964); *see also* 28 U.S.C. § 1404(a) (2006) (permitting transfer of venue "to any district or division in which it could have been brought").

choice of law rules of the original, transferor court.[233] The plaintiffs opposed by stressing that, under *Klaxon*, the transfer "would be accompanied by a highly prejudicial change in the applicable state law."[234] Thus, the plaintiffs argued that permitting the defendants to change the conflict of law rules via transfer, when the defendant could not do so in state court, would disrupt vertical uniformity.[235]

The *Van Dusen* Court agreed, noting that, although it was construing a statute, its departure from the *Klaxon* rule "is supported by the policy underlying *Erie*."[236] The Court pointed out that, under *Erie*, "we should ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."[237] Accordingly, the Court applied the conflict of law rules of the original, transferor forum since "the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed."[238]

The *Van Dusen* Court demonstrates the *Klaxon* rule can, and should, give way when the rule would undermine the vertical uniformity between state courts and federal courts in diversity cases. Moreover, the *Van Dusen* Court shows that the key perspective in determining whether procedure either maintains or undermines vertical uniformity is the *ex ante* expectations of the parties at the outset of the litigation. The Court, in particular, focused on the *anticipated* prejudice that would result from the transfer, not any actual prejudice, to conclude that vertical uniformity would be disrupted by the application of the *Klaxon* rule.

Thus, *Erie* and *Klaxon* (via *Van Dusen*) allow for creative uses of choice of law rules in the CAFA context. In CAFA litigation involving small claims, the defendant's *ex ante* liability at the outset of the litigation would be based on the aggregate net expected recovery of the plaintiffs. One could calculate that aggregate expected recovery by trying a random sample of the plaintiffs' claims to get a fairly accurate determination of the aggregate amount of actual damages.[239] Thus, the defendant's *ex ante* expectations would be the same under such sampling procedures. Moreover, one could use the same procedures to approximate the expected recovery for each plaintiff, and similarly would not be outcome-determinative.

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233. *Id.* at 627.

234. *Van Dusen*, 376 U.S. at 626.

235. *Id.* at 637–38.

236. *Id.* at 637.

237. *Id.* at 638.

238. *Id.* at 639.

239. *See* Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOKLYN J. OF INT'L. L. 751, 786–88 (discussing accuracy of random sampling and citing sources).

One could also apply the "average law" to each claim, thus ensuring both "commonality" as to issues of law and that the outcome would be the same as if the defendant litigated each claim separately.[240] In other words, applying the average law to all claims would result in the same aggregate expected liability as applying the relevant state law to each claim.[241] In fact, where the claims are small, the difference in the expected recovery for each plaintiff would most likely be negligible, and thus not be outcome-determinative such as to foster forum shopping.[242]

Admittedly, these two approaches would substantially modify the claims and defenses of the parties. But none of these approaches would be outcome-determinative under either *Erie* or *Klaxon*, properly understood. Indeed, and somewhat counterintuitively, the size of the class would make it easier, not harder, for courts to conclude that any of the above averaging procedures would not affect the outcome of the case. The large number of plaintiffs would increase the likelihood that an attempt to determine average liability would mimic what a plaintiff would obtain in actual, one-on-one litigation.

It is worth noting that the use of averaging as a choice of law rule would not only be consistent with *Erie*, but would also be consistent with the purposes behind CAFA. CAFA was enacted primarily to prevent abusive multistate class actions certified by state courts by permitting removal of such class actions to federal court.[243] But scholars fail to acknowledge that we continue to allow states to regulate strictly local matters. It follows that multistate class actions in state court are problematic because they could lead to outcomes that substantially differ from those that would be reached if each claim were to be brought in state court as a local matter. Accordingly, if the federal choice of law rule could mimic in a class action what would result if each claim was brought separately in state court, then the concerns of CAFA are adequately addressed, fully consistent with *Erie*.

Arguably, such procedures would not mimic the outcome of separate actions because many of the actions, particularly those involving small claims, would not be brought at all. But defining this practical reality as the relevant baseline would raise Rules Enabling Act concerns. In the CAFA context, a federal court not only has to determine whether it can make common law concerning choice of law rules, but also whether it can apply

240. Luke McCloud & David Rosenberg, *A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 375–77 (providing such a proposal).

241. *Id.* at 27 (noting that "[a]pplying the average law 'accurately' reproduces the aggregate outcome for both deterrence and compensation purposes").

242. Such a rule, in fact, may even be non-outcome-determinative for large claims if, as suggested in the negligence rule example set forth above, all states had a collateral source rule and all plaintiffs would be insured for their losses.

243. *See generally* Burbank, *supra* note 186.

the Rules to the litigation. Thus, for any proposed class action in the CAFA context, federal courts would have to evaluate whether its application of Rule 23 would "abridge, enlarge or modify any substantive right."[244]

Accordingly, a court would not only have to be sensitive to the concerns with the abuse of the class action that animated the passage of CAFA, but would also have to be aware that it cannot simply permit removal of multistate class actions to kill them. Instead, it would have to determine whether the application of Rule 23 would abridge or modify each plaintiff's substantive right to avoid the legal violation reflected in the liability rule. CAFA would permit a federal court to use Rule 23 because it would facilitate the imposition of the defendant's aggregate liability, which would be consistent with the enforcement objectives of the claim.[245] In fact, CAFA arguably *requires* a federal court to use Rule 23 because the lack of a class action would "deprive" each plaintiff's right to avoid the violation.[246]

III. THE CHOICE OF ENFORCEMENT DEFAULTS

A. *Procedures as Enforcement Defaults*

Defining the relevant substantive right as the right to avoid the legal violation recasts the choice of law that the *Erie* doctrine governs. Because, as this Article argues above,[247] the primary function of all civil procedures, indeed of all civil liability, is to prevent the legal wrong, then the choice of using a state procedure or a federal procedure can be understood as a choice between different *enforcement defaults*. In other words, in creating a court system to adjudicate claims arising from civil liability, both state governments and the federal government are providing off-the-rack, public options for enforcing the substantive rights associated with those claims.

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244. 28 U.S.C. § 2072(b) (2006).

245. *See* Campos, *supra* note 156, at 1082–85 (arguing that optimal deterrence requires imposition of total aggregate liability, citing sources); Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOKLYN J. OF INT'L. L. 751, 796–800 (2012) (same); *see also* Cover, *supra* note 216, at 735 (arguing that the use of Rule 23 class actions in most contexts would be permissible under the Rules Enabling Act given its "substantive impact" on the "substantive values" at stake).

It should be noted that, as mentioned earlier, the Court has considered such averaging procedures as violations of the Rules Enabling Act because they focus on the claim and its constituent entitlements, including individual defenses, the relevant "substantive right" for Enabling Act purposes. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (rejecting such a "Trial By Formula" as a violation of the Rules Enabling Act since it would infringe the defendant's right to assert statutory defenses). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 782–87 (9th Cir. 1996) (permitting the use of random sampling of claims to determine aggregate damages in a class action involving human rights abuses). However, as argued above, this conclusion stems from ignoring the avoidance of the legal violation as the relevant "substantive right."

246. *Cf.* Campos, *supra* note 156, at 1096–98 (arguing that deterrence is a "liberty" interest protected by the Due Process Clause).

247. *See supra* Section II.B.

But these off-the-rack defaults are just that, defaults. As an initial matter, the parties themselves can elect to use their own procedures rather than state or federal courts, as when parties agree to submit claims to arbitration.[248] Moreover, a state or federal government could define different enforcement mechanisms for the protection of these rights, as it does when it promulgates administrative procedures.[249] Both state governments and the federal government could protect a substantive right to safety through public enforcement, such as through attorney general actions, rather than through a private right of action.[250] Likewise, *ex ante* regulation may by itself be sufficient to protect the substantive right to safety.[251]

B. *The Difficulty of the Choice*

Conceptualizing the *Erie* choice as a choice of enforcement defaults, however, poses two additional problems. The first problem is determining the relevant justifications for a procedure. For example, if the Rules Enabling Act prohibits a Rule that would "abridge, enlarge or modify any substantive right,"[252] then it will matter whether a conflicting state procedure has a procedural justification or a substantive one.[253] This conundrum is exemplified by Professor Ely's exchange with Professor Abram Chayes[254] over the Court's decision in *Erie* cases like *Sibbach*.[255] In *Sibbach*, again, the Court examined Rule 35, which permits a party to compel medical examinations.[256] As Ely noted, the Court held that the Rule was valid because it "really regulates procedure," but was "almost

248. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750–53 (2011) (upholding arbitration clause in contract for cell phone services); *see also* Bone, *supra* note 15, at 1337 (noting that parties can contract around procedure, such as through arbitration).

249. *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1082 (2011) (holding that the National Childhood Vaccine Injury Act of 1986, which sets up a no-fault compensation scheme administered by the Court of Federal Claims, preempted state law tort claims).

250. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 317–18 (2010) (suggesting *parens patriae* suits as a substitute for class actions given the difficulty of certifying consumer class actions).

251. *Cf.* Wyeth v. Levine, 555 U.S. 555, 581 (2009) (concluding that state law tort claims were not preempted by *ex ante* regulatory scheme of the federal Food and Drug Administration).

252. 28 U.S.C. § 2072(b) (2006).

253. Ely, *supra* note 9, at 722–23.

254. Chayes, *supra* note 127; Ely, *supra* note 127. Chayes and Ely also discussed *Hanna* and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), but their discussion of *Sibbach* suffices to demonstrate the difficulty of inferring state policies.

255. Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

256. *Id.*; *see also* FED. R. CIV. P. 35(a)(1) ("The court where the action is pending may order a party whose mental or physical condition—including a blood group—is in controversy to submit it to a physical or mental examination by a suitably licensed or certified examiner.").

willfully blindered" to the issue of whether it would "abridge, enlarge or modify" a "substantive right" in violation of the Enabling Act.[257]

Ely concluded that the issue was ambiguous because the Court never determined the state law procedure that would have applied in the absence of the Rule.[258] But as Professor Chayes pointed out in response, even if the Court had tried to determine the procedure under state law and the justifications for it, it still would have had a hard time determining whether any such practice was substantive in the Enabling Act sense. Specifically, Chayes showed that Illinois state law most likely would have applied, and that Illinois courts had prohibited such medical examinations.[259] The Illinois state courts barely mentioned any rationale for the rule other than a procedural one—the concern that "a physician designated by the court will have excessive weight with the jury, as compared to that of experts called by the parties."[260]

This would suggest that application of Rule 35 would not abridge a substantive right. However, Chayes complicates matters further by noting that Illinois courts likely ruled in the shadow of *Union Pacific Railway* v. *Botsford*, where the Supreme Court, in a pre-Rules decision, prohibited medical examinations in part because of the "sacred . . . right of every individual to the possession and control of his own person, free from all restraint or interference by others"[261] Although Illinois courts were not influenced by *Botsford*, other states were, which would have complicated any analysis of the justification for prohibiting medical examinations in discovery.[262] Professor Chayes does not read the *Botsford* language as sufficient in itself to provide a substantive justification for a prohibition of medical examinations in discovery. Nor did he consider the state responses to *Botsford* as sufficiently providing a substantive justification. However, one could imagine that the Court would encounter some difficulty in determining whether a substantive rationale for a state procedure existed based on a bare statement like the one in *Botsford*.

In discussing *Sibbach*, Professor Chayes suggests that the silence on the part of a state, or even statements like the one in *Botsford*, may not fully reflect the procedural or substantive justifications for a particular procedure. According to Chayes, "[i]t will not do to put too much significance on the language of a single opinion, especially on the reasons adduced at a particular moment for *not* changing the status quo."[263] Indeed, in concluding his response, Chayes highlights again that "not even the

257. Ely, *supra* note 9, at 733.
258. *Id.* at 734.
259. Chayes, *supra* note 127, at 742–43 (citing Parker v. Enslow, 102 Ill. 272 (1882)).
260. *Id.* at 743.
261. *Id.* at 742–48 (1974) (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)).
262. *Id.*
263. *Id.* at 748.

most luminous analytic framework relieves us of the necessity of discerning between state and federal policies at stake in cases involving a choice between state and federal law," and strongly recommends "fidelity to the context of history and system in which they spoke and acted."[264] Of course, "fidelity" to "context" is easier said than done. The problem, in fact, manifests itself on the federal side in determining whether there is a procedural "gap" or not.[265]

The second problem is assessing, as a factual matter, the substantive impact of a procedure.[266] Arguably, and as suggested by Professor Ely, the only problem is, and really should be, the first one of determining legislative intent.[267] In fact, as argued below, there are functional reasons for reducing the Enabling Act inquiry to the formal question of whether the procedure has an express procedural or substantive justification.[268]

But there are two reasons why courts should go beyond determining the intent behind a procedure. The first reason has to do with opportunism. As mentioned earlier in discussing problems associated with discerning whether a procedural gap exists, a state may decide to declare all procedures as matters of substance to control the result in diversity cases.[269] Indeed, one benefit of the outcome-determinative test under *Erie* is that it avoids relying upon the stated rationales for a practice by determining whether a state law procedure is, in fact, outcome-determinative and, even then, whether a federal procedure should still apply due to "countervailing affirmative considerations."[270]

The second reason is more subtle, and arises from the Due Process Clause.[271] It may turn out that a court cannot trust the stated rationales for a procedure due to legislative pathologies. A formal defect in legislative process or a more insidious defect, such as the complete subordination of minority interests, may taint the stated justification. Such defects would cast doubt on whether the procedure would, in fact, "promote the general Welfare."[272] Less dramatically, a proposed substantive justification for a

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264. *Id.* at 753.

265. *See supra* Section I.C.

266. *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987) (book review) (discussing the importance of determining "the impact of procedural rules" along with "the purposes of procedural rules").

267. *See* Ely, *supra* note 9, at 724 n.170 ("The test suggested is geared to the purposes underlying the state rule and not to whether the rule 'in fact' serves substantive or procedural ends.").

268. *See infra* Section III.B.

269. *See infra* Section I.C.

270. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

271. *See infra* Section I.C.

272. U.S. CONST. pmbl.; *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (applying rational basis review to legislation under the Due Process Clause, but noting in a footnote that such review may be more searching if the legislation affected "discrete and insular minorities"). Indeed, it is not out of the question to consider whether a procedure would "promote

procedure may not withstand scrutiny, or otherwise would be inconsistent with the procedural scheme already in place.

The second problem is much tougher than the first because judges, as attorneys, have significant training in legal interpretation, but hardly any in policy.[273] Consider, for example, *Carnival Cruise Lines v. Shute*, where the Court, sitting in maritime jurisdiction, addressed the enforceability of a forum-selection clause.[274] There, the plaintiffs, who resided in Washington, purchased a ticket for a cruise on the *Tropicale*, a cruise ship operated by Carnival. The back of the ticket provided the following forum-selection clause:

> It is agreed by and between the passenger and [Carnival] that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.[275]

The plaintiffs were injured on the cruise and filed suit in Washington federal court. The appeals court, sitting in maritime jurisdiction, concluded that the forum-selection clause was not enforceable based on a federal common law rule that such clauses were against public policy.[276]

But the Court in *Carnival* reversed, concluding, in an opinion by Justice Harry Blackmun, that the clause was enforceable because, unlike in prior cases, "we must . . . account for the realities of form passage contracts."[277] Specifically, the use of such form contracts provides some benefits for cruise lines like Carnival because it reduces the "time and expense" of litigating over the appropriate forum.[278] Forum-selection clauses further benefit passengers like the plaintiffs "in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[279] Finally, there was no evidence in the record of a

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the general Welfare" in evaluating procedures. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 265 (1970) ("Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.").

273. This is arguably one of the major failures of law school education. *See* David Rosenberg, *The Path Not Taken*, 110 HARV. L. REV. 1044, 1044 (1997).

274. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587 (1990).

275. *Id.* at 587–88 (quoting the terms and conditions of the ticket).

276. *Id.* at 588–89. The district court had dismissed the suit on personal jurisdiction grounds, but the appeals court reversed. *Id.* at 588.

277. *Id.* at 593 (distinguishing the "business contexts in which the respective contracts were executed" in this case and in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)).

278. *Id.* at 594.

279. *Id.*

bad faith motive on the part of Carnival to avoid liability, as well as no evidence of "fraud or overreaching."[280]

In his dissent, Justice Stevens suggested that the forum-selection clause was really an exculpation clause, and such clauses are typically not enforced as a matter of public policy.[281] Moreover, he emphasized that many passengers would not have even been aware of the forum-selection clause.[282] Even if they were, the "disparate bargaining power between the carrier and the passenger" would have prevented them from contracting around it, thus "undermin[ing] the strong public interest in deterring negligent conduct."[283]

Unlike in the *Erie* and Enabling Act contexts, the Court in *Carnival* did not face the choice between a state enforcement default and a federal default. Instead, the Court was sitting in maritime jurisdiction and could exercise practically unfettered common law power. But the Court's unfettered power did not make the default issue any easier. On the one hand, Justice Blackmun is correct to note that, in many contexts involving mass-produced products and services, the imposition of any additional procedures may simply be a wealth transfer. If the Court imposed a mandatory rule that forum-selection clauses are not enforceable, then it would result in Carnival passing on the costs of defending in multiple fora to the plaintiffs and other purchasers.[284] But that presumes that the market for cruises is competitive. If, as suggested by Justice Stevens's reference to "disparate bargaining power," Carnival could exercise monopolistic pricing power, it could impose costs, including forcing passengers to agree to an inconvenient forum, which may not be welfare-enhancing.

The Court's conclusion further presumes that the passengers are well informed, and that the choice to forgo a more convenient forum is either a considered choice or one that the passengers would have made had they known about it. In other words, the passengers were not willing to pay more for the option to sue in a more convenient forum. This presumption of consumer knowledge is far from likely,[285] and ignores the prevalence of loss aversion and other behavioral limitations on the rationality of

280. *Id.* at 595.

281. *Id.* at 598 (Stevens, J., dissenting).

282. *Id.* at 597

283. *Id.* at 598.

284. *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 918 (1984) (noting that, in the context of mass-produced products and services, "[i]n purchasing the product or service that resulted in exposure, every claimant—indeed, every exposed purchaser—bought from the firm what was in effect insurance against tortious injury").

285. *Cf.* Polinsky & Shavell, *supra* note 208, at 1459–61 (noting that products liability can increase safety given consumers' misperceptions of risk).

passengers,[286] Indeed, the quasi-"rule of reason" analysis that the Court engaged in suggests that the general enforceability of forum-selection clauses may be better understood as an antitrust issue rather than a contract law issue.[287]

The difficulty of the choice in *Carnival* is compounded by the fact that the Court is not only deciding a case, but choosing an *ex ante* rule that will apply to all future cases. Thus, in enforcing forum-selection clauses contained in "form passage contracts,"[288] the Court, in essence, set up the traditional doctrines of personal jurisdiction and venue as defaults that can be contracted around in *all* form contracts. Indeed, holding that these clauses are enforceable in form contracts would inevitably lead to strategic use of such clauses. As was probably the case in *Carnival*, Carnival had more information about the relative costs and benefits of designating different forums than the passengers, and likely tucked in the clause to "strategically withhold" information about the choice of forum from unsophisticated passengers.[289] Indeed, such strategic use of defaults would not necessarily imply "bad faith," "fraud[,] or overreaching."[290] After all, the passengers could have simply read the ticket.

The choice of defaults does not get easier once the conflicting interests of a state are involved. Consider *AT&T Mobility, LLC v. Concepcion*, where the Court considered the enforceability of an arbitration clause contained in a cell phone contract which prohibited consumers from bringing any claim "in any purported class or representative proceeding," even in arbitration.[291] Section 2 of the Federal Arbitration Act (FAA) provides that all arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[292] The FAA was passed primarily to curb "widespread judicial hostility to arbitration agreements," but § 2 includes a savings clause that contemplates that state contract law may permissibly be "grounds" for revoking an arbitration clause.[293]

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286. *See* RICHARD H. THALER, THE WINNER'S CURSE: THE PARADOXES AND ANOMALIES OF ECONOMIC LIFE 63–78 (1992) (discussing the tendency for individuals to have a higher, and divergent, "willingness-to-accept" over a "willingness-to-pay" for the exact same amount).

287. I thank David Rosenberg for suggesting this way of looking at the analysis in *Carnival*.

288. *Carnival*, 499 U.S. at 591–95 (distinguishing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (holding that forum-selection clause between two businesses was unenforceable)).

289. *See* Ayres & Gertner, *supra* note 10, at 124 (noting the importance of structuring formalities in contract to inform the uninformed); *cf. id.* at 106 (criticizing a rule holding ambiguous offers unenforceable, particularly when "the indefiniteness is clearly attributable to one party and induces inefficient reliance from the other party").

290. *Carnival*, 499 U.S. at 595.

291. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

292. 9 U.S.C. § 2 (2006).

293. *AT&T*, 131 S. Ct. at 1745.

Prior to *AT&T*, the California Supreme Court in *Discover Bank* v. *Superior Court* had held that such class waivers in consumer contexts were unconscionable, at least with respect to fraud claims arising from adhesion contracts. The California Supreme Court, in particular, concluded that "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'"[294] Accordingly, the arbitration clause in *AT&T* was revoked by the district court based on this state law ground, otherwise known as the *Discover* rule, and the plaintiffs were permitted to seek class arbitration.

However, the *AT&T* Court reversed, and concluded that the application of the *Discover* rule in *AT&T* would conflict with the FAA. Specifically, the Court concluded that the *Discover* rule, while not facially discriminatory against arbitration agreements, would "[i]n practice . . . have a disproportionate impact on arbitration agreements."[295] Moreover, the Court concluded that such class actions or similar procedures are inconsistent with the goal of the arbitration, which is to "allow for efficient, streamlined procedures tailored to the type of dispute."[296]

In the wake of *AT&T*, some scholars have forecasted the near-total demise of the consumer class action, and the resulting negative impact on deterrence.[297] Indeed, as I suggested above in discussing *Carnival*, it is likely that companies that provide mass-produced services will include such class waivers in all of their form contracts, most likely in small print to exploit uninformed consumers.

But, again, whether the proliferation of class waivers results in bad consequences will depend on the competitiveness of the market and the relative information available to the consumers. Assume that AT&T included in its cell phone services contract not just a class waiver, but an exculpation clause that limited all of its liability. In other words, cell phone services are to be purchased "as-is," with no realistic recourse to arbitration

294. Discover Bank v. Sup. Ct., 113 P.3d 1100, 1110 (Cal. 2005) (quoting CAL. CIV. CODE § 1668).

295. *AT&T*, 131 S. Ct. at 1747. Indeed, as noted by Professor Hiro Aragaki, the Court's nondiscrimination interpretation of the FAA is functionally a disparate impact standard, when a disparate treatment standard may be better. *See* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1192–93 (2011). Interestingly enough, the "outcome-determinative" test is also a disparate impact test. It would be interesting to study the existence of these disparate impact standards in these and other contexts and see what they can add to our understanding of disparate impact liability in the equality law and Equal Protection context.

296. *AT&T*, 131 S. Ct. at 1749.

297. Myriam Gilles, in fact, predicted this outcome six years before *AT&T*. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005); *see also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (discussing the impact of *AT&T* on the availability of class actions in consumer contexts, and concluding that some consumer class actions are still possible).

or the public judicial system. This may result in suboptimal liability. But if the market for cell phone services is sufficiently competitive, it may not. Assuming that there is demand for a right to bring suits to enforce rights, AT&T's competitors may market its phones as not having such exculpation clauses. More likely, AT&T may market its phone as a "no frills" option compared to the other services provided by its competitors. If consumers willingly take on these additional risks for a lower price, or demand such rights for a higher price, it is unclear whether there is, in fact, any loss in deterrence. In fact, the imposition of additional liability may distort prices, leading to suboptimal results.[298]

One could argue that fraud claims are different because the presumption of informed consumers is deliberately lacking when fraud occurs. But the case is not so clear cut with fraud. Consumers can take into account the relative trustworthiness of different vendors and factor in the risk of fraud in comparing products. Thus, companies that engage in shady practices would have to sell their products at lower prices or signal their good faith by, for example, including warranties that would mimic the liability rules abrogated by the exculpation clause. Moreover, *caveat emptor* liability rules are prevalent in contexts where there may be mistrust of vendors, such as garage sales, Craigslist, and street vendors. It is unclear that liability, let alone class action procedures, would enhance the trustworthiness of vendors in those contexts.

The task of determining the relevant state and federal interests further compound these considerations. Unlike in *Carnival*, the Court in *AT&T* was not deciding whether such waivers should be enforceable per se. Instead, it had a considered judgment by the California Supreme Court that the right to be free from fraud entailed the availability of class actions and similar proceedings for fraud claims arising out of contracts of adhesion. Moreover, the Court had to weigh this judgment against the purposes of the FAA.

Justice Scalia, who wrote for the majority, uncharacteristically looked beyond the plain text of the FAA to the purposes of the FAA to conclude that class action-type procedures like class arbitration are at odds with the FAA's preference for "efficient, streamlined" procedures.[299] That judgment is suspect, since, as pointed out by Justice Stephen Breyer in his dissent, the history and legislative history of the FAA did not demonstrate any

298. *See* Polinsky & Shavell, *supra* note 208, at 1459–61 (noting that in products liability circumstances, liability may not be necessary and may in fact distort prices).

299. *AT&T*, 131 S. Ct. at 1744, 1749. Indeed, Justice Clarence Thomas concurred in the judgment precisely because the majority opinion relied upon purposes of the FAA rather than the plain language. *See id.* at 1753 (Thomas, J., concurring) ("I write separately to explain how I would find that limit in the FAA's text."). Justice Thomas concluded that the class action waivers were enforceable despite the *Discover* rule because he read section two as requiring a "defect[] in the making of an agreement" before an arbitration can be invalidated on a state law ground, and the *Discover* rule did not identify any such defect. *Id.*

hostility toward class arbitration, and relevant statistics showed that class arbitration "*may take less time* than the average class action in court."[300] But Justice Scalia's resort to purposes was understandable because he was concerned with states using the savings clause of § 2 to opportunistically discriminate against arbitration in violation of the FAA.[301]

Accordingly, in *AT&T*, the Court not only had to determine the default that would apply, but also had to independently weigh the competing judgments of the state and federal government. Moreover, just as the default issue itself was difficult, it only exacerbated the difficulty of discerning legislative intent.

Finally, and counterintuitively, consider again *Shady Grove* and the defaults that arose in that case. As argued earlier, and in contrast to both *Carnival* and *AT&T*, *Shady Grove* was a relatively easy case.[302] One can understand the class action prohibition against claims for statutory damages under section 901(b) as prohibiting the use of two mutually exclusive procedures—statutorily defined damages and the class action—to encourage small claims litigation.

But statutory damages may have a different function that is complementary to the class action. In some instances, statutorily defined damages may be used to account for the difficulties in detecting legal violations. For example, federal antitrust laws permit the recovery of treble damages,[303] and scholars have justified such multiplier damages as necessary to deter antitrust violations when all violations cannot be detected.[304] For example, if the rate of detection of antitrust violations is 33%, then tripling actual damages would give potential defendants the same *ex ante* incentives to avoid antitrust suits as a detection rate of 100%. However, for these multiplier damages to work, they must multiply the total liability of the defendant in a given case. Consequently, in small claims litigation, the class action would be necessary when multiplier damages are involved, but section 901(b) would prohibit it.[305]

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300. *Id.* at 1756, 1759 (Breyer, J., dissenting) (emphasis added) (citing statistics from the American Arbitration Association).

301. *Id.* at 1745.

302. *See supra* Section II.B.

303. *See* 15 U.S.C. § 15(a) (2006) (providing that persons "injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

304. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (discussing the function of multiplier damages in antitrust and other substantive areas).

305. *See* N.Y. C.P.L.R. § 901(b) (MCKINNEY 2012) (prohibiting class actions for claims based on a "statute creating or imposing a penalty, or a minimum measure of recovery"). A "penalty" includes multiplier damages. *See* Sperry v. Crompton Corp., 863 N.E. 2d 1012, 1016–17 (N.Y. Ct. App. 2007) (concluding that section 901(b) prohibited treble damage provisions under state antitrust law based on ambiguous legislative history, but noted that such provisions "may vary depending on the context").

Although this rationale was not present in *Shady Grove*, it could be available in a different case before the Court. But the Court failed to recognize this possible rationale for statutory damages. Justice Scalia's approach permits all class actions under the Rules Enabling Act no matter what, as long as the plaintiffs are "willing" to be included in the class.[306] Justice Ginsburg's approach would continue to view section 901(b) as a limitation on the remedy, and thus prevent a class action even when it would be required to serve the multiplier function of the remedy.[307] This leaves Justice Stevens. Justice Stevens, like Justice Scalia, would actually arrive at the right answer and apply Rule 23, and, unlike Justice Scalia, reach the result through an analysis of the second sentence of the Enabling Act. But his arrival at the right answer would be a matter of serendipity rather than analysis. Justice Stevens would arrive at the decision by taking a "separate piles" approach to the distinction between substance and procedure.[308] If Justice Stevens can botch this analysis when applying the second sentence of Rules Enabling Act directly, what hope do we have in other cases?

C. *Shifting Information Costs*

It is understandable that courts may be ill-equipped to choose between a state default procedure and a federal default procedure. As noted above, the legislative justifications for the procedures may be ambiguous, and the actual substantive impact of the procedures may also be difficult to assess. Both problems arise from a lack of information. In some cases, courts may not have sufficient information about the relevant justifications for a procedure. Moreover, it is unlikely that a court will have sufficient information to ascertain the substantive impact of a procedure.

The latter problem of determining the actual substantive impact of a procedure is exacerbated by the fact that federal courts only have jurisdiction over certain "Cases" and "Controversies."[309] Although courts are aware that, through precedent, they create *ex ante* general rules,[310] they

306. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (plurality opinion); *see also* 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, 723–4 (2006) (concluding that *Semtek*'s "reasoning preserves the validity of Rule 41(b), but only at the expense of casting doubt on other Federal Rules, notably Rule 13(a) on compulsory counterclaims and Rule 23 on class actions).

307. *Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting).

308. *See supra* Section II.A.

309. U.S. CONST. art. III, § 2.

310. *See, e.g.*, U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994). In that case, the Court concluded that a settlement agreement alone does not permit vacatur of judgment on appeal as moot. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 26 (quoting Izumi Seimitsu

are nevertheless limited by evidentiary doctrines to examining *ex post* information about the parties' conduct that lead to the action before them.

In contrast, Congress and state legislatures, which explicitly promulgate *ex ante* general laws, can avail themselves of relevant information to determine the impact of any proposed general law, including a procedure. Unlike federal courts, Congress has no limitations, evidentiary or otherwise, on the information it can collect and use to legislate. Indeed, one should not be too hard on Justice Stevens in *Shady Grove* because he himself recognized in a different context involving the setting of multiplier damages that "Congress is far better situated than is this Court to assess the empirical data, and to balance competing policy interests, before making such a choice."[311]

But federal courts are not powerless to deal with the informational demands of choosing between state and federal procedures. In fact, one approach for dealing with both problems of determining ambiguous legislative intent and substantive impact is to shift the costs of those inquiries to the legislatures themselves. In other words, one method of dealing with the choice of enforcement defaults is to use defaults themselves to force information from Congress and the states.[312]

As suggested by economist Ronald Coase, the choice of initial default may be irrelevant because, due to the lack of transaction costs, the parties can bargain to the most efficient allocation of entitlements.[313] Indeed, one could imagine that in many cases involving arbitration, forum-selection clauses, or governing law clauses, such "Coasean irrelevance" obtains, thereby limiting the significance of the courts' choices of defaults.[314]

But even when transaction costs are positive, as in the case of the costs associated with the passage of federal and state legislation, appropriately chosen defaults may result in optimal decisions by judges with minimal costs in "contracting around" the default. Consider, yet again, *Shady*

Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)) (internal quotation marks omitted).

311. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 516, 520 (2008) (Stevens, J., concurring in part and dissenting in part) (disagreeing with the imposition of a multiplier to punitive damages as a matter of federal maritime common law).

312. *See* Ayres & Gertner, *supra* note 10, at 91 (emphasizing the function of contract defaults, particularly penalty defaults, "to reveal information to each other or to third parties (especially the courts)"). A state court, rather than a state legislature, may define a state law procedure. But even in these situations state courts most likely will be in a better position to assess the substantive justifications and substantive impact of a procedure. This is because, unlike federal courts, state courts are less constrained in exercising their jurisdiction. There may be exceptions, however, and thus, as I argue below, it would make sense to improve the information-gathering capabilities of federal courts to improve their choices in the *Erie* context. *See infra* Part III.D.

313. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–15 (1960).

314. *See* Ilya Segal & Michael D. Whinston, Property Rights, *in* HANDBOOK OF ORGANIZATION ECONOMICS 2 (R. Gibbons & J. Roberts, eds. forthcoming) (discussing possibilities of "Coasean Irrelevance" concerning the initial allocation of property rights).

Grove. There, Justice Scalia, writing for a plurality, concluded that Rule 23 applied because, following *Sibbach*, the Rule "really regulates procedure," consistent with the first sentence of the Enabling Act.[315] Earlier this Article criticized Justice Scalia's approach to the second sentence of the Enabling Act, where, in *Shady Grove* and in other cases, he identified procedural entitlements such as the claim as "substantive" when in fact they were procedural.[316]

But suppose that Justice Scalia either corrected his view of what constitutes relevant substantive rights or, more likely, ignored the inquiry altogether, making the second sentence surplasage as in *Sibbach*. Justice Scalia would arguably be justified in taking that approach for two reasons. The first would be deference. As suggested in *Hanna v. Plumer*, to refuse to apply any Rule that is "rationally capable of classification" as procedure would be to conclude that "the Advisory Committee[,] this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[317] Moreover, one could view the Rules Advisory Committee as better situated to consider the *ex ante*, general impact of a procedural rule given that it is tasked to consider such rules from that perspective, rather than the perspective of a case before it.[318] Indeed, the Rules Advisory Committee has the added advantage of reducing the transaction costs of congressional legislation by providing for a streamlined procedure for the promulgation of Rules that does not require bicameralism and presentment.[319]

The second reason for taking a *Sibbach* approach to applying the Rules would be to induce state legislatures to reveal information. By applying a Rule every time the Rule "really regulates procedure," a court, in a sense, is applying a "penalty default" to induce states to articulate when the application of a federal procedure over a conflicting state procedure would "abridge, enlarge or modify" a "substantive right."[320]

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315. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1435, 1443, 1444, 1445 (2010) (Scalia, J.) (plurality opinion) ("We have held since *Sibbach,* and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure."). This *Sibbach* rule may be justified for a different reason, which I discuss in this Article. *See infra* Part II.

316. *See supra* Section II.B.

317. Hanna v. Plumer, 380 U.S 460, 471, 472 (1965).

318. *See* David Marcus, *When Rules Are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, UTAH L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1852856 (arguing in favor of deference to the text and legislative history of the Rules given the institutional competence of the Advisory Committee).

319. *See id.* at 7–9 (describing the procedures that apply to the promulgation of Federal Rules of Civil Procedure).

320. Ayres & Gertner, *supra* note 10, at 97 (defining "penalty defaults" as defaults that "encourage the production of information").

This penalty default would be justified because, given the residual character of a state's powers under the Constitution, it is inherently ambiguous to read anything into a state's silence on the substantive justifications for a procedure, even though, admittedly, the second sentence of the Enabling Act imposes this "state enclave" view.[321] Accordingly, a state will always have more information with respect to its *own* substantive policies than the federal government, justifying the imposition of a penalty against the state to induce information as the better informed party.[322]

In forcing states to reveal the substantive justifications of a procedure, a federal court would not necessarily require a state to show a procedure's substantive rationale. Instead, a state can alter the default of a Rule's validity by parroting the language of the Enabling Act, stating, in appropriate cases, that the displacement of a state procedure would "abridge, modify, or enlarge a substantive right." This "altering rule," while arbitrary, would have the benefit of removing any doubt as to the justifications supporting a state procedure.[323] Thus, a court can avoid the stumbling of Justice Stevens in *Shady Grove* in interpreting legislative history, as well as the more intensive inquiry into the "context of history and system" that Professor Chayes suggested in determining the substantive justifications of a Rule.[324] Indeed, such an approach argues against interpreting the Rules with sensitivity to the state interests involved, an approach that all of the current Justices endorse.[325] Instead, courts should simply apply the Rule unless states utter the magic words to alter it.

Finally, to avoid any concern with state opportunism, federal courts can simply look to Congress to express any countervailing considerations through federal legislation. As an initial matter, one could give courts some discretion to reject the invocation of "magic words" by the state when the opportunism is obvious, which is another way of saying that a federal court

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321. *See* Ely, *supra* note 9, at 701–03.

322. *See* Ayres & Gertner, *supra* note 10, at 97 (noting that penalty defaults can be justified as "giving a more informed contracting party incentives to reveal information to a less informed party").

323. *See* Ayres, *supra* note 10, at 2080–81 (discussing "arbitrary" altering rules where "[i]ncluding unusual ('arbitrary') language . . . will assure that uninformed contractors will not unwittingly stumble upon the language"). Indeed, one benefit of the use of arbitrary altering rules is that it "is particularly well suited to reduce judicial error." *Id.* at 2082.

324. *See* Chayes, *supra* note 127, at 753.

325. *See, e.g.*, Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (Scalia, J.) (interpreting Rule 41(b) to avoid Enabling Act concerns); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1461 (2010) (Ginsburg, J., dissenting) (arguing that the Court must avoid "immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest"); *id.* at 1451 (Stevens, J., concurring in part and concurring in judgment) (noting that Rules must be interpreted with "sensitivity to important state interests and regulatory policies" (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)) (internal quotation marks omitted)).

could retain discretion to reject a procedure when the informational costs necessary to making that determination are low. But even when the opportunism is not obvious, Congress can pass legislation on any matter consistent with its enumerated powers in the Constitution. In fact, it has done so on numerous cases, particularly in the class action context, as evidenced by CAFA.[326]

Courts may also use defaults in the same manner in the "relatively unguided *Erie*" context.[327] Admittedly, the outcome-determinative test under *Erie* does not require a federal court to determine the substantive justification for a state procedure, only the impact of the procedure on the "twin aims" of forum shopping and the "inequitable administration of the laws."[328] Accordingly, the "unguided *Erie*" context does not lend itself to the use of formal methods to induce express declarations of substantive justifications.

Nevertheless, existing precedent suggests that similar methods can be devised in the *Erie* context. In *Byrd*, for example, the Court emphasized that a federal court must determine whether a state procedure "is bound up with [substantive] rights and obligations in such a way that its application in the federal court is required."[329] Scholars have debated whether this "bound up" language imposes a separate requirement other than the outcome-determinative test.[330] But perhaps it can be utilized to permit states to formally declare when a state procedure is "bound up" with a right. Moreover, and similar to parroting the language of the second sentence of the Enabling Act, such an arbitrary altering rule would eliminate any ambiguity associated with determining state intention.[331] It would also allow courts to avoid the costs associated with applying the outcome-determinative test, which is far from easy.

Finally, the use of such an altering rule as a penalty default in the *Erie* context would have the added advantage of giving presumptive validity to federal common law concerning gaps in federal procedure. In essence, the use of such default rules would optimize the political safeguards against common law overreaching. If a state concludes that a procedure is "bound up" with a right, or that a different procedure would "modify" a

326. *See* Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding diversity jurisdiction and imposing limitations on class action settlements to prevent class attorneys from selling out the class); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105–353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

327. Hanna v. Plumer, 380 U.S. 460, 471 (1964).

328. *Id.* at 468.

329. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958).

330. *See, e.g.*, Clark, *supra* note 78, at 1310 n.152 (concluding that the "bound up" requirement is separate requirement).

331. *See* Ayres, *supra* note 10, at 2080–81.

"substantive right," then it can say so.[332] Likewise if Congress disagrees with federal common law, it can pass a Rule, and if it further disagrees with a state's judgment as to the substantive impact of a procedure, it can pass a law. Indeed, using the "bound up" language in *Byrd* would allow a court to avoid the messy inquiry surrounding whether there are, in fact, federal "affirmative countervailing considerations" and simply wait for Congress to speak for itself.[333] Accordingly, a federal court can exercise common law power secure in the knowledge that if it oversteps its bounds, Congress and the states will let it know.

D. *Reducing Information Costs*

This Article concludes by briefly discussing the possibility that a federal court may have to do more than shift informational costs to other institutions. This is because the political safeguards against judicial overreaching may not work optimally due to other pathologies with congressional and state legislative procedure. As an initial matter, the transaction costs associated with altering a default may be too "sticky" to allow for optimal information revelation.[334] The stickiest default of all is the Constitution, which is, in essence, a contract that governs the allocation of power between the federal government and the states.[335] Given that it is nearly impossible to change the Constitution, this allocation of powers is difficult, if not impossible, to change,[336] and Courts, Congress, the President, and others have had to use creative ways to modify the Constitution outside of the Article V amendment process.[337] Indeed, the ossification of the Constitution also extends to the procedures that apply to Congress, which, compounded with the unavailability of courts to review Congress's discretionary procedures, makes reform difficult.[338]

Thus, there is the possibility that political safeguards may malfunction over time. There is, in fact, some evidence that some congressional procedures are already suboptimal. The increased use of the filibuster, for

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332. Indeed, such a penalty default would be an improvement over certifying questions to state courts, which is not only extremely costly, but also addresses the wrong branch of government. *But see* Gluck, *supra* note 7, at 1995–96 (advocating the greater use of certification of legal questions to state courts).

333. Byrd, 356 U.S. at 537.

334. *See* Ayres, *supra* note 10, at 2084–96 (discussing the advantages and disadvantages of "sticky" altering rules).

335. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1794 (2009) (showing parallels between the Constitution and international treaties).

336. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG 3–9 (2006) (noting this difficulty).

337. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 290 (1991) (discussing constitutional amendments outside of the framework of Article V).

338. *See* Powell v. McCormack, 395 U.S. 486, 502–05 (1969).

example, has exacerbated the already strong status quo bias that prevents the passage of legislation.[339] Moreover, the same pathologies could infect state legislative procedures, leading to further suboptimal results.

Given these possibilities, courts should consider improving their information-gathering capacity rather than relying upon defaults to shift the costs of information. Indeed, such a move would be in line with modern reforms of both the Executive Branch and Congress. For example, both branches have institutions that provide neutral, cost–benefit analyses of legislation or executive action. Specifically, the Executive Branch relies upon the Office of Management and Budget (OMB), while Congress similarly relies upon the Congressional Budget Office (CBO). It would make sense for the Judicial Branch to create a similar institution, if it has not already.[340] The Federal Judiciary Center, for example, which compiles statistics for the judiciary, has already begun policy analysis of different judicial procedures, such as its recent (although flawed) report on the effect of the pleading standards under *Ashcroft v. Iqbal* and *Bell Atlantic Corp. Twombly*.[341] Moreover, at the appellate level courts have experimented with utilizing amicus curiae to address the policy ramifications of precedent.[342]

Of course, there are restrictions on the evidence that courts can consider in their limited jurisdiction, but these evidentiary restrictions, like all Rules, are capable of change, either as a matter of federal common law or by Rule.[343] Moreover, the improvement of the Court's information-gathering capabilities would not otherwise impair the legitimacy of the political institutions. In fact, they would be premised on the failure of these institutions to fulfill their democratic functions.

More importantly, improving the federal court's information-gathering capabilities to ensure optimal interventions would be consistent with John Hart Ely's "antitrust . . . orientation" to democracy, which seeks to push substantive issues to the political branches, but allows for judicial

339. *See* GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010).

340. Admittedly, many have noted the deficiencies of cost-benefit analysis as it is currently practiced. But the imperfection of current analysis should not prevent us from trying to improve. *See, e.g.*, John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Well-Being Analysis vs. Cost-Benefit Analysis (2012) (unpublished manuscript), available at http://ssrn.com/abstract=1989202 (noting limitations of cost–benefit analysis and proposing "well-being analysis" as an alternative).

341. JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Mar. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. I address this study in a separate article. *See* Christopher Cotton & Sergio J. Campos, Pleading and Selection Effects (2012) (unpublished manuscript) (on file with authors).

342. *See, e.g.*, S.E.C. v. Tambone, 597 F.3d 436, 437–38, 441 (1st Cir. 2010) (en banc) (soliciting amicus briefs from relevant groups on proper interpretation of Rule 10b-5 liability).

343. Ely, *supra* note 9, at 738–40 (arguing that Federal Rules of Evidence are well within scope of rulemaking power under the Enabling Act).

intervention "when the 'market,' in [this] case the political market, is systematically malfunctioning."[344] Such approaches to enhanced judicial review, in fact, have been justified on policy grounds.[345] Indeed, one "pernicious" effect of *Erie* has been to undermine the legitimacy of court intervention in policy making when it may be necessary to preserve the functioning of our constitutional democracy.[346]

CONCLUSION

This Article has sought to clarify the *Erie* doctrine and suggest the use of legal techniques, specifically default rules, to improve the doctrine. But a larger goal of the Article is to demonstrate that the constitutional issues surrounding *Erie* which have preoccupied courts and scholars actually play virtually no role in assisting federal courts with the difficult choice of law that the doctrine addresses. Indeed, I have tried to show that the choice of law issue at the heart of *Erie* concerns mundane policy considerations concerning the enforcement function of civil liability, the relationship of litigation procedures to that function, and the ways in which the law can assist with the production and sharing of relevant information. Perhaps the irrepressible myth of *Erie* is that it matters at all.

344. ELY, *supra* note 36, at 102–03.

345. *See, e.g.*, Eric Maskin & Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 AM. ECON. REV. 1034, 1035–36 (2004) (arguing that countermajoritarian judicial review can be welfare-enhancing).

346. Sherry, *supra* note 74, at 132 (emphasizing this "pernicious" effect).