A POX ON BOTH YOUR HOUSES: WHY THE COURT CAN'T FIX THE *ERIE* DOCTRINE

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INTRODUCTION

As *Erie Railroad Co. v. Tompkins*[1] celebrates its 75th anniversary, it is becoming more apparent that it is on a collision course with itself. The Court keeps trying—and failing—to sort out the tensions within the *Erie* doctrine, and between it and the Federal Rules of Civil Procedure. The Court's latest *Erie* decision, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[2] was yet another attempt to separate substance from procedure and navigate the strait between the Rules of Decision Act[3] and the Rules Enabling Act.[4] It was a disaster. It produced two distinct methodological approaches, three opinions—none commanding a majority—and a rash of academic commentary choosing sides between the two approaches. What it did not produce, unfortunately, is any recognition that the source of the problem is the internal incoherence of the *Erie* doctrine itself and its profound incompatibility with the guiding principles of the Federal Rules of Civil Procedure. In this article, I identify the problem and suggest a solution.

Shady Grove brings to the forefront two key questions that the Court has failed to confront, one technical and doctrinal and the other more broadly jurisprudential. The doctrinal question is how a court in a diversity case should treat a Federal Rule of Civil Procedure that, in general, has no effect on substantive rights but that affects substantive rights in particular states or particular types of cases. *Shady Grove* itself is an example of this type of Rule; Rule 23 has no significant substantive effect in most states or most cases, but does so in cases seeking statutory damages under New York law. But the same problem also underlies other recent *Erie* cases. Courts have three real options in this situation: (1) the Federal Rule governs regardless of its effect on state substantive rights, (2) the Federal Rule governs unless it has a demonstrable effect on state substantive rights, or (3) the Federal Rule governs only when it has no imaginable effect on state substantive

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1 304 U.S. 64 (1938).

2 130 S. Ct. 1431 (2010).

3 28 U.S.C. § 1652 (2012).

4 28 U.S.C. § 2072 (2012).

rights. Choosing among those three options requires a normative justification. That justification, in turn, depends on whether we place a greater value on the uniformity and transsubstantivity of the Federal Rules of Civil Procedure, or on states' ultimate authority to define substantive rights.

My suggestion is that instead of filtering that normative choice through the convoluted and self-contradictory *Erie* doctrine, we confront it directly. Courts make exactly this value choice in other, similar contexts, including certain choice-of-law decisions, the dormant commerce clause doctrine, the application of federal common law in limited "enclaves," and the determination of whether state law should be preempted on the ground that it serves as an obstacle to the fulfillment of the purpose of a federal statute. Courts confronting a possible conflict between federal and state law in the *Erie* context should use the same overarching framework that governs those situations.

That framework, like *Erie* itself, ultimately raises the deeper jurisprudential question: Under what circumstances is lawmaking by the federal judiciary justified? I contend that we should give the same answer in the *Erie* context that we do in these other contexts: whenever federal interests are sufficiently important to warrant judicial protection.

Framing the question as one of judicial authority reveals that a large part of the problem with *Erie* is that it, contrary to these other cognate doctrines, depends on two false dichotomies (which my proposal eliminates). First, by allowing the federal legislature but not the federal judiciary to determine that federal interests justify overriding state substantive law, *Erie* draws an unwarranted distinction between federal legislative power and federal judicial power. Second, by allowing some "enclaves" of federal common law to remain, the *Erie* doctrine draws an unspoken and unjustified distinction between those federal interests that require legislative codification before the judiciary can act and those federal interests that can be protected by the judiciary without prior legislative authorization.

Reframing the *Erie* inquiry as asking whether protecting the transsubstantivity and uniformity of the Federal Rules of Civil Procedure is a sufficiently important interest to justify overriding state substantive law makes *Erie* both internally coherent and consistent with kindred doctrines. It also solves the *Shady Grove* puzzle. And, as I note briefly at the end of this article, it has broader implications for cases arising out of our nationalized consumer economy.

I. DEFINING THE PROBLEM

The difficulty stems from the underlying goals of the *Erie* doctrine. According to Justice Brandeis's majority opinion, the decision in *Erie* was

necessary because of two major problems with *Swift v. Tyson*[5]: *Swift* led to unfair differences in the treatment of similarly situated litigants,[6] and it transgressed the state's primary authority by allowing the federal judiciary to "invad[e] rights which . . . are reserved by the Constitution to the several states."[7] Two decades later, the Court reaffirmed these purposes of *Erie*, although without the constitutional gloss, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[8] The *Byrd* Court described the core of *Erie* as a command that "the federal courts in diversity cases must respect the definition of state-created rights and obligations" and thus must apply state law if that law is "bound up with [state] rights and obligations."[9] In addition, according to *Byrd*, the *Erie* doctrine "evince[s] a broader policy" that federal courts should follow all state rules—even procedural ones not bound up with rights and obligations—if "the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply" state law.[10] These policies are the same as the two identified by *Erie*, in reverse order. Then, in the seminal case of *Hanna v. Plumer*[11] the Court again reiterated one of the policies, noting that *Erie* was rooted 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 federal court."[12]

One goal underlies both of these frequently invoked policies and forms the core purpose of, and justification for, the *Erie* doctrine. This key unitary goal is that our dual court systems should not result in disparate regulation of what Justice Harlan later called "primary decisions respecting human

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5 41 U.S. 1 (1842).

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

7 *Id.* at 80. The Court also reinterpreted the Rules of Decision Act, 28 U.S.C. § 1652 (2012). For critiques of this decidedly creative act of statutory interpretation, see Samuel Issacharoff, *Federalized America: Reflections on* Erie v. Tompkins *and State-Based Regulation*, 10 J.L. ECON. & POL'Y 199 (2013); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133–37 (2011).

8 356 U.S. 525 (1958).

9 *Id.* at 535.

10 *Id.* at 536–37. The *Byrd* Court went on to balance the potential for different outcomes against "countervailing" federal interests. *Id.* at 537–38.The adoption of such a balancing test has never been explicitly reaffirmed by the Supreme Court, and is probably limited to *Byrd* itself. *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie–Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 998–99 (1998). The status of the balancing test, however, is entirely distinct from the two goals identified in text, which are uncontroversial.

11 380 U.S. 460 (1965).

12 *Id.* at 467. The Court also focused on the need to prevent forumshopping, but for purposes of identifying the goals underlying *Erie*, there is little or no difference between unfairness and forumshopping. The *Hanna* Court did not mention the policy of protecting state authority, perhaps because by 1965 the constitutional basis for *Erie* had been discredited. There is nothing in *Hanna* to indicate abandonment of the basic concept of keeping state and federal authority within proper bounds.

conduct."[13] The consequences of behavior that takes place outside the courtroom should not vary as a result of which seal adorns the courthouse door.

But the *Erie* doctrine is, and has to be, more nuanced than the mechanical implementation of this goal, because we do have dual court systems. And so accommodating differences between those systems—drawing lines between what happens inside the courtroom and what happens outside it—is a necessary part of the doctrine. As the Court found—to its detriment—early in the application and development of *Erie*, we cannot blithely assert that any state rule that affects the outcome in a diversity case must be applied notwithstanding contrary federal rules. Every difference between state and federal rules, however minor or "procedural," has the potential to affect the outcome of litigation. To direct that in every such case the state rule controls is to ignore the reality of dual court systems with different legislative bodies exercising control over their procedures. And Congress *has* exercised its control over federal court procedures by adopting the Rules Enabling Act (REA).[14] The REA authorized the creation of uniform rules of procedure for federal courts, which, in a well-recognized irony, took effect the same year as *Erie*.

The REA thus requires courts to adapt the *Erie* doctrine by taking into account the existence of the Federal Rules of Civil Procedure. And I contend that this accommodation, whatever form it takes, *is* a part of the *Erie* doctrine—*pace* John Ely[15]—because it stems from the same sources and serves the same goals as *Erie* itself. In determining whether a state rule (of any kind) or a Federal Rule (of Civil Procedure) governs, we are necessarily specifying exactly how far the *Erie* doctrine extends. At its broadest, the *Erie* doctrine might command that a Federal Rule give way any time its application would result in a different outcome than the one that a state court, applying state rules of procedure, would reach. At its narrowest, *Erie*'s command to use state law might be fully trumped by any applicable Federal Rule, despite its effect on state policies or litigation outcomes. But in either case—and all the cases in between—it is the *Erie* doctrine that we are delineating. As Richard Freer noted more than two decades ago, the *Erie* doctrine "is actually comprised of two separate principles of vertical

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[13] *Id.* at 475 (Harlan, J., concurring).

[14] 28 U.S.C. § 2072 (2012).

[15] *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 697–98 (1974) (suggesting that the validity and applicability of a Federal Rule of Civil Procedure does not implicate either *Erie* or the Rules of Decision Act). *But see* Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 752 (1974) ("[N]ot even the most luminous analytic framework relieves us of the necessity of discerning the state and federal policies at stake in cases involving a choice between state and federal law, whether the case arises under the Rules of Decision Act or the Enabling Act.").

choice of law," one embodied in the Rules Enabling Act and the other in the Rules of Decision Act.[16]

Navigating the boundaries of *Erie* has not proven easy. Over the years, the Court has suggested several different approaches to accommodating the commands of *Erie* in the context of the Federal Rules. In a spate of cases in the 1940s, the Court appeared to adopt an extremely broad reading of *Erie*, refusing to apply the Rules in diversity cases if they produced a litigation outcome different from the outcome a state court would have reached.[17] Almost simultaneously, however, the Court in *Sibbach v. Wilson & Co.*[18] upheld a district court order under Rule 35—requiring a plaintiff to undergo a physical examination—in a diversity case in which it was quite likely that a state court would have lacked authority to issue such an order. Without even mentioning *Erie* (then only three years old), the Court found that Rule 35 "really regulates procedure" and thus had to be applied.[19] *Sibbach* might be viewed as representing a very narrow reading of *Erie*, the polar opposite of the 1940s cases.

These early cases reflect significant confusion about the breadth of *Erie* and its relationship to the Federal Rules. The Court tried to sort out the confusion in *Hanna v. Plumer*.[20] *Hanna* reconciled the conflicting lines of precedent by arranging them along a new axis. The Court distinguished situations "covered by one of the Federal Rules"[21] (like *Sibbach)* from those in which there is no governing Federal Rule (like the 1940s cases). In the former, the *Sibbach* test applies, and a federal court should follow the Federal Rule unless it does not really regulate procedure. To do otherwise, the Court suggested, would "disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[22] In other words, *Erie*'s contours and scope are limited by the existence of the federal power to adopt rules of procedure for federal courts. But in the absence of a Federal Rule—which the Court called "the typical, relatively unguided *Erie* choice"[23]—the *Hanna* Court adopted a modified "outcome-determinative" test: A federal court should

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16 Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1089–90 (1989). He adds: "Together, these principles are intended to protect state sovereignty by ensuring that a federal court enforcing state claims acts substantively as a court of the state would act. At the same time, these principles also recognize the legitimate need of the federal courts, as a separate judicial system, to dictate their own procedures." *Id.* at 1090.

17 *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–45 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555–56 (1949); Woods v. Interstate Realty Co., 337 U.S. 535, 537–38 (1949); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 111–12 (1945).

18 312 U.S. 1(1941).

19 *Id.* at 14.

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

21 *Id.* at 471.

22 *Id.* at 473–74.

23 *Id.* at 471.

follow the state rule if applying federal law would run afoul of the "twin aims" of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws."[24] As Ely pointed out, the *Hanna* Court thus protected state prerogatives more vigorously in the absence of a Federal Rule than in the presence of one.[25]

This solution may reconcile the precedents, but it does not solve the underlying problem. The *Erie* doctrine tells us that federal courts sitting in diversity must respect state policy choices on matters of substance, to avoid both unfairness and the aggrandizement of federal court authority. But the doctrine also tells us—in *Sibbach* and reaffirmed in *Hanna*—that federal courts sitting in diversity must apply all valid Federal Rules of Civil Procedure. What should we do when the application of an otherwise valid Federal Rule runs afoul of a state policy choice on a matter of substance?

Commentators have recognized a form of this dilemma, but have wrongly attributed it to the Court's failure to give any meaning to the second section of the Rules Enabling Act, which prohibits federal rule makers from adopting procedural rules that "abridge, enlarge or modify any substantive right."[26] According to many scholars, the problem is that the Court has wrongly ignored the possibility that a "procedural" Federal Rule might nevertheless impair substantive rights and therefore be invalid as beyond the rule makers' authority.[27]

But framing the question as one of the validity of the Federal Rule under the REA—as *Sibbach* did—hides the real *Erie* issue: Application of a Federal Rule might impair substantive rights in one state but not in another, or in one type of case but not another. And it is the *Erie* doctrine, not the REA, that controls the decision of whether a particular state rule prevails over a conflicting federal one. The REA is all or nothing; if a Federal Rule is invalid, it is invalid in all cases—including not only in diversity cases in which there is no conflicting state law but also in federal-question cases. Alternatively, as Kevin Clermont puts it so nicely, a Rule that is valid under the REA is "immune to any 'as-applied' challenge."[28] *Erie*, however, is quite explicitly tailored to protecting the substantive law and policies of individual states and thus allows federal law to operate in some states but not others.

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24 *Id.* at 468.

25 Ely, *supra* note 15, at 720–22.

26 28 U.S.C. § 2072(b) (2012).

27 Ely, *supra* note 15, at 718–20; *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1033–35 (1982); Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 48–62 (1998); Martin Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural–Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26–34 (2008).

28 Kevin Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1017 (2011); *see also* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1182–83 (2011).

For example, consider a situation that has been before the Supreme Court twice. Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." State law in Kansas and Oklahoma (and some but not all other states) provides that the statute of limitations is tolled only when the defendant is served, not when the complaint is filed. If we conclude—as the Court did in two cases thirty years apart[29]—that the service requirement is bound up with, or an integral part of, state substantive law, then *Erie* seems to prohibit a federal court from concluding that the statute of limitations is tolled by filing, regardless of what Rule 3 says. But that does not mean that Rule 3 is invalid under the REA or that it cannot be applied to toll the statute of limitations in federal-question cases or in diversity cases applying the law of states that do not have a law like the ones in Kansas and Oklahoma. (I will return later to how the Court managed to avoid confronting that issue in these cases.) The applicability of Rule 3 in any particular diversity case is an *Erie* question, not an REA question.

Thus, we must face the question of what to do when the application of a truly procedural Federal Rule, valid under the REA, nevertheless impairs substantive state rights.[30] The two halves of the *Erie* doctrine—protecting state substantive policies and accommodating dual court systems—collide in such a case. And there is precedential support on both sides: *Sibbach* suggests that the Federal Rule should prevail, and *Byrd* suggests that state law should prevail. This tension within the *Erie* doctrine is exacerbated when we try to harmonize *Erie* with the goals underlying the Federal Rules of Civil Procedure. One primary guiding principle of the Federal Rules of Civil Procedure is transsubstantivity: the Rules should apply uniformly in all cases in federal court. This principle is in obvious tension with the half of *Erie* that prohibits applying a Federal Rule if, and only if, it impairs state rights and obligations.

Shady Grove squarely raised the question of whether to apply a Federal Rule that impairs state substantive rights in some states but not in others. As the next section elaborates, four Justices explicitly followed *Sibbach* and five implicitly followed *Byrd*—although one of the *Byrd* Justices concluded that there was no impairment of state substantive rights and thus joined the four *Sibbach* Justices to direct application of the Federal Rule. Unfortunate-

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[29] Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532–34 (1949); Walker v. Armco Steel Corp., 446 U.S. 740, 750–53 (1980).

[30] Commentary prior to *Shady Grove* addressed this question from a different angle, missing the problem that I seek to identify. In defining what *counts* as affecting substantive rights, one might take any of three approaches: (1) nothing procedural counts; (2) anything that has any effect on a substantive right counts; or (3) anything that has more than an incidental effect on a substantive right counts. *See* Redish & Murashko, *supra* note27, at 28–30. My concern is not about the scope of the effect, but rather about what should happen if the requisite effect is found.

ly, none of the Justices confronted the incompatibility between the two parts of the *Erie* doctrine.

II. TWO PATHS THROUGH *SHADY GROVE*

The facts of *Shady Grove* are mundane, although the implications are anything but. Shady Grove tendered a claim for insurance benefits to Allstate, which eventually paid the claim, but not within the thirty days required by a New York state statute. Allstate also refused to pay the statutorily required interest of 2% per month on the late payment. Alleging that Allstate routinely paid claims late without paying the statutory interest, Shady Grove filed a class action in federal court under diversity jurisdiction. The minimum jurisdictional amount was satisfied only if the suit could be maintained as a class action, because the actual interest due to Shady Grove alone was less than $500.[31]

Although the suit apparently met all the requirements of Federal Rule 23 for a class action, the district court dismissed for lack of jurisdiction because it found that under New York law the suit could not be maintained as a class action.[32] New York Civil Practice Law § 901(b) prohibits class actions "to recover a penalty, or minimum measure of recovery, created or imposed by statute,"[33] which, the district court found, included the statutory interest provision at issue. The court of appeals affirmed,[34] and the Supreme Court had to decide whether Rule 23 or § 901(b) governed.

Eight of the Justices approached the issue as a technical question of interpretation of the Federal Rules. The case lent itself to that approach because of the way the Court had avoided the internal *Erie* tensions in prior precedent. In *Walker v. Armco Steel Co.*,[35] one of the Rule 3 cases described earlier, the Court had sidestepped the question of what to do when a Federal Rule impairs state substantive rights. It did so by interpreting Rule 3 as not intended to toll a statute of limitations but rather to set the date from which timing requirements within the Federal Rules run. The Federal Rule was therefore irrelevant to the tolling question, and did not apply. *Walker* directed that the Rules should be interpreted according to their "plain mean-

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31 The total amount in controversy for the whole class, however, was more than $5 million, and thus there was federal jurisdiction over the class action (but not the individual actions) under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2) (2012).

32 Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 471–72 (E.D.N.Y. 2006).

33 N.Y. C.P.L.R § 901(b)(Consol. 2012).

34 *See* Shady Grove Orthopedic Assocs.v. Allstate Ins. Co., 549 F.3d 137 (2d Cir. 2008).

35 446 U.S. 740 (1980).The earlier of the two cases, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), was one of those decided in the 1940s, when the Court seemed unsure of how to accommodate the Federal Rules; it simply held that because the suit would have been barred in a Kansas court, it could not be brought in a federal court.

ing"[36] and should apply only if they are "sufficiently broad to control the issue"[37]—that is, if there is a "direct collision" between the Federal Rule and a state rule.[38]

Under *Walker*, then, the fate of Shady Grove's class action hung on whether there was a direct collision between Rule 23 and § 901(b). If so, then under *Sibbach* and *Hanna*, Rule 23 governed unless it was itself invalid as beyond Congress's power to regulate. If not, then § 901(b) governed under *Hanna*'s modified "outcome-determinative" test, for surely a case that could be brought as a class action in federal court but not in state court would create inequities and induce forumshopping.[39]

Four Justices took a mechanical and formalist approach to interpreting Rule 23. Justice Scalia, writing for a plurality that included Chief Justice Roberts, Justice Thomas, and (for part of the opinion) Justice Sotomayor, placed the two rules side by side and concluded that there was a direct conflict between them. Rule 23 states that a class action "may be maintained" but § 901(b) says that a class action may not be maintained. Hence, under *Hanna*'s reading of *Sibbach*, Rule 23 trumps § 901(b) unless Rule 23 is itself invalid. And since (unsurprisingly) no Justice was willing to hold Rule 23 invalid, the plurality held that the suit could be maintained as a class action, New York state law notwithstanding.

Four Justices adopted a more functionalist approach to interpreting Rule 23. Justice Ginsburg, dissenting in an opinion joined by Justices Kennedy, Breyer, and Alito, argued that Rule 23's potential to "transform a $500 case into a $5,000,000 award"[40] required the Court to interpret Rule 23 more narrowly to prevent "trench[ing] on state policy prerogatives."[41] Justice Ginsburg—like the courts below—argued that while Rule 23 governs the considerations relevant to class certification, New York's § 901(b) instead governs the availability of a particular remedy. As she pointed out, § 901(b) would not be an obstacle to a class action in a New York state court if the only remedy sought were actual damages or an injunction; New York law bars class actions only in suits to recover statutory penalties. Because there was no conflict between state and federal law, both could be given their intended scope. Hence, under *Hanna*'s reading of *Erie*, state law

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36 *Walker*, 446 U.S. at 750 n.9.

37 *Id.* at 749.

38 *Id.*

39 It seems problematic to have to resort to *Hanna*'s outcome-determinative test once the Court has concluded that the Federal Rule does not apply: after all, if there is no applicable Federal Rule, the only source of law is state. But the Court in *Walker* did invoke the "twin aims" of *Erie* to conclude that state law should apply, even though it had already concluded that the Federal Rule was not broad enough to reach the question. That, however, is the least of *Walker*'s problems.

40 Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct.1431, 1460 (2010) (Ginsburg, J., dissenting).

41 *Id.* at 1461.

should govern because there was no conflicting Federal Rule of Civil Procedure and applying state law would prevent inequities and forumshopping.

Is this just a simple difference of interpretive opinion? No, as Justice Stevens's separate opinion—concurring in the judgment only—makes clear. Justice Stevens agreed with the plurality that Rule 23 conflicts with § 901(b). And Justice Stevens ultimately agreed that Rule 23 should prevail. But he did so only after concluding that the New York legislature did not intend § 901(b) as a substantive rule. In other words, he followed (without citing or quoting[42]) the *Byrd* suggestion that *Erie* commands the use of *any* state law, however procedural it may appear, if it is "bound up with [the] rights and obligations" of the parties. The dissent's approach is just a version of this same *Byrd* analysis. While Justice Stevens—like *Byrd* itself—makes the character of the state law an independent inquiry, the dissenting Justices fold it into the interpretation of Rule 23. Either way, if the state legislature intended the state rule to operate substantively rather than procedurally, the Federal Rule must give way.

In the end, then, the opinions in *Shady Grove* break down into two opposite approaches to this basic *Erie* dilemma. One—that of the plurality—makes the character of the state law irrelevant; the only question is whether the *federal* Rule is procedural. As the plurality put it: "[I]t is not the substantive or procedural nature of the state law that matters, but the substantive or procedural nature of the Federal Rule."[43] The other—that of both the concurrence and the dissent—makes the character of the *state* law dispositive: Justice Stevens "agree[d] with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies."[44]

The varying approaches in *Shady Grove* thus expose the real problem with the *Erie* doctrine's command—made most explicit in *Hanna*—to follow the Federal Rules of Civil Procedure but avoid impairing state substantive rights and obligations. Whenever a doctrine or statute has dual rationales, of course, the possibility exists that a case will arise pitting one rationale against the other. *Shady Grove* is that case, and the three opinions in the case perfectly illustrate the three responses to such a dilemma: privilege one rationale, privilege the other rationale, or pretend that the rationales can be harmonized. Justice Scalia's plurality opinion, by applying *Sibbach* despite acknowledging its imperfections in cases that implicate state policy choices, opts for the transsubstantivity of the Federal Rules. Justice Stevens favors state policy choices, even though doing so might mean that Rule 23

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42 He did quote *Byrd* once, for the platitude that federal courts sitting in diversity operate as "an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* at 1448 (Stevens, J., concurring).

43 *Id.* at 1444 (plurality opinion).

44 *Id.* at 1448 (Stevens, J., concurring).

applies differently in different states or different causes of action.[45] And the dissenters try to have it both ways by interpreting Rule 23 in light of state policy choices—but that is a false alternative, because it means that Rule 23 would be interpreted differently in a diversity case applying New York law than in a diversity case applying the law of a state that had not adopted the policies underlying § 901(b). Academic commentators on *Shady Grove* can likewise be divided into those who think Justice Scalia got it right, those who think Justice Stevens got it right, and those who try to make the problem go away.[46]

The underlying issue, therefore, is not merely a question of interpreting Federal Rules or separating substance from procedure. The real question is what should be done when a federal procedural rule conflicts with a state substantive rule—however we ultimately define "procedural" and "substantive." Unfortunately, the *Erie* doctrine itself provides conflicting answers. Both of the approaches in *Shady Grove* are fully supported by *Erie* and its progeny. And the tension between them is inherent in the *Erie* doctrine; it cannot be resolved as long as that doctrine remains established law. The next section shows that while *Shady Grove* may be the most recent—and perhaps the clearest—example of this unresolvable tension, it has manifested itself in many of the Court's recent *Erie* cases.[47] And, as in *Shady*

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[45] Because Justice Stevens ultimately concluded that New York's § 901(b) does *not* represent a substantive policy choice, he did not have to live with the uniformity-undermining consequences of his approach. Nevertheless, his opinion indicates quite strongly that he would be willing to do so.

[46] Those supporting Justice Scalia's plurality approach include Jennifer S. Hendricks, *In Defense of the Substance–Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011); Richard A. Nagareda, *The Litigation–Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011); Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907 (2011). Those supporting Justice Stevens' concurring approach include Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011); Struve, *supra* note 28. Those supporting Justice Ginsburg's dissenting approach include Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011); Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 320–30 (2010); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 52 (2012); *see also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of*Shady Grove, 159 U. PA. L. REV. 17 (2010) (criticizing the Court generally).

[47] The same issue also arises frequently in lower courts. For example, one current dispute is how to apply the relatively relaxed pleading standards of Fed. R. Civ. P. 8 and the minimal requirements of Fed. R. Civ. P. 11 to cases in which the applicable state law requires that malpractice complaints be accompanied by an affidavit or certificate attesting that the claim has merit. *Compare, e.g.*, Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011), *with, e.g.*, Braddock v. Orlando Reg'l Health Care Sys., Inc., 881 F. Supp. 580 (M.D. Fla. 1995). One scholar has also suggested that "procedure is embedded in substantive law" insofar as the drafters of the law assumed particular procedures when calibrating the law to the desired level of deterrence. Thomas O. Main, *The Procedural Foundations of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010). If he is correct, then virtually *every* diversity case raises the *Shady Grove* issue.

Grove, different Justices have had different responses to the conflict; moreover, some Justices have used different and inconsistent approaches in different cases.

III. A RECURRENT PROBLEM

As several commentators have noted, *Shady Grove* was in many ways a replay of *Gasperini v. Center for Humanities, Inc.*[48] but with the opposite side prevailing. In *Gasperini*, the Court was faced with a conflict between state and federal standards for review of an allegedly excessive jury verdict. A New York statute instructed courts of appeals to overturn an award if it "deviate[d] materially" from reasonable compensation.[49] Federal courts, by contrast, adhered to the commonlaw rule that a jury's verdict should stand unless it was so unreasonable that it "shock[ed] the conscience."[50] Justice Ginsburg wrote the majority opinion, taking the same "split the baby" approach as in her *Shady Grove* dissent. After concluding that Federal Rule 59—governing the grant of a new trial—did not mandate the adoption of a "shocks the conscience" test, and that the New York statute represented a substantive policy choice, she held that both the state and federal interests could be accommodated by having federal trial courts—rather than appellate courts, as the New York statute dictated—apply the "deviates materially" standard.[51] Justice Scalia's vehement dissent instead interpreted Rule 59 as incorporating the "shocks the conscience" standard and insisted that under *Hanna*, Rule 59 must prevail even over a contrary state policy decision on substantive rights.[52] As in *Shady Grove*, then, Justice Scalia chose federal-court uniformity over the state's substantive policy choice, and Justice Ginsburg preferred to pretend that accommodating state choices was not in conflict with the Federal Rules or with transsubstantivity.[53]

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[48] 518 U.S. 415 (1996). *See, e.g.*, Adam N. Steinman, *Our Class Action Federalism*: Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1146–47 (2011).

[49] N.Y. C.P.L.R. § 5501(c) (Consol. 2012).

[50] *See Gasperini*, 518 U.S. at 422 (describing the federal standard).

[51] *Id.* at 437–39.

[52] Justice Scalia also argued that the Seventh Amendment precluded the use of the "deviates materially" standard and that the Court misapplied even the "unguided" *Erie* prong in finding the difference between the two standards to be substantive. *Id.* at 464–68 (Scalia, J., dissenting).

[53] The different results in the two cases were not due to any Justice changing his or her mind, but rather to a change in personnel. Justice Stevens dissented in *Gasperini* on technical grounds, but noted that he "agree[d] with most of the reasoning in the Court's opinion." 518 U.S. at 439. As noted earlier, he similarly agreed with the reasoning, but not the result, of the dissenters in *Shady Grove*. His vote made no difference in *Gasperini* because there were five votes without him, but in *Shady Grove* his vote was the deciding one because Justice Ginsburg had lost an ally. Justices Kennedy and Breyer voted consistently with Justice Ginsburg for state policy choices, Justice Thomas voted consistently with Justice Scalia for the Federal Rules, and Chief Justice Roberts replaced Chief Justice Rehnquist as an additional vote for the Federal Rules. But, although Justices O'Connor and Souter both voted with

Gasperini thus provides an example of the Justices disagreeing about how to resolve the *Erie* dilemma. But in *Walker v. Armco Steel Corp.*, the Rule 3 case previously discussed, a unanimous Court was seemingly unaware of the problem.[54] Recall that under Rule 3 "[a] civil action is commenced by filing a complaint with the court."[55] In *Walker*, the plaintiff in a diversity suit had filed—but had not served the defendant—before the statute of limitations expired; state law required service of the complaint in order to toll the statute. The Court, purportedly interpreting Rule 3 according to its "plain meaning," held that Rule 3 had nothing to say about tolling the statute of limitations and thus that it was not in conflict with the state law: "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."[56]

A few years later, however, in *West v. Conrail*,[57] the Court interpreted Rule 3 in a federal-question case and held that filing *does* toll the statute of limitations. Ironically, Justice Stevens' unanimous opinion in *West* distinguished *Walker* in a footnote:

> Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit 'be considered part and parcel of the statute of limitations.' . . .This requirement, naturally, does not apply to federal-question cases.[58]

Having first interpreted Rule 3 in *Walker* supposedly without regard to state policies (ignoring the problem), the Court then offhandedly and unself-consciously adopted what has now become the hotly contested position that Rules should apply differently—or at least be interpreted differently—depending on whether state substantive policies are at stake.

In contrast, a unanimous Court took exactly the opposite approach in *Burlington Northern Railroad v. Woods*,[59] a case decided between *Walker* and *West*. The Court ignored the problem by applying *Hanna* without any discussion of the possible substantive nature of the state law. *Burlington Northern* presented a conflict between Federal Rule of Appellate Procedure

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Justice Ginsburg in *Gasperini*, their successors split, with Justice Alito joining Justice Ginsburg's dissent in *Shady Grove* and Justice Sotomayor joining most of the majority opinion (although not the portion directly taking issue with Justice Stevens's concurrence). Because Justice Sotomayor appears not to have taken a strong position, and Justice Kagan has replaced Justice Stevens, it is impossible to predict where the Court will go in the future. The only certainty is that the Court will face this question again, and it will implicate the same conflicting rationales.

54 446 U.S. 740 (1980).

55 *See* FED. R. CIV. P. 3.

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

57 481 U.S. 35 (1987).

58 *Id.* at 39 n.4.

59 480 U.S. 1 (1987).

38—which makes the award of costs and damages for a frivolous appeal discretionary—and an Alabama statute that made such an award mandatory for unsuccessful appeals in particular circumstances. The Court concluded that the Federal Rule could "reasonably be classified as procedural" and would under *Hanna* displace the Alabama statute.[60] There was no discussion of the purposes behind the state statute or whether it might be "part and parcel" of, for example, substantive state tort-reform policies.[61]

Although *Walker*, *West*, and *Burlington Northern* were all unanimous—but not consistent with one another—dissension arose a year after *Burlington Northern*, as the Court began to fracture along the line between federal uniformity and state substantive policy. Surprisingly, however, it was Justice Scalia who urged attention to state policies. *Stewart Organization, Inc. v. Ricoh Corp.*[62] involved a clash between a federal court's discretionary power to transfer venue under 28 U.S.C. § 1404(a) and an Alabama statute that prohibited the enforcement of contractual forum-selection clauses. The majority viewed the case as a straightforward *Hanna* issue, concluding that because the two laws directly conflicted and § 1404(a) was within Congress's power to enact, federal law governed. Justice Scalia dissented, arguing (in language later quoted by the dissent in *Shady Grove*) that "in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."[63] The majority responded to this argument much as Justice Scalia himself eventually did in *Shady Grove*: "Not the least of the problems with the dissent's analysis is that it makes the applicability of a federal statute depend on the content of state law."[64]

In another recent situation, the Court avoided the problem by recharacterizing the issue as not about the *Erie* doctrine at all. At the same time, its reasoning highlighted and further confused the core problems of *Erie*. In *Semktek International Inc. v. Lockheed Martin Corp.*,[65] a California

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60 *Id.* at 8.

61 Contrast this absence of discussion to the majority opinion in *Gasperini*, which carefully noted that the New York statute "invit[ing] more careful appellate scrutiny" of damage awards was "part of a series of tort reform measures." Gasperini, 518 U.S. at 423.

62 487 U.S. 22 (1988).

63 *Id.* at 37–38 (Scalia, J., dissenting) (quoted in *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting)).

64 *Id.* at 31 n.10 (majority opinion); *cf.* Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441(2010) (plurality) ("The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature . . . would mean . . . that one State's statute could survive preemption (and accordingly affect the procedures in federal court) while another State's identical law would not."); *id.* at 1440 n.6 (stating that "nothing in our decision [in *Walker*] suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the law's ostensible objectives").

65 531 U.S. 497 (2001).

federal court sitting in diversity dismissed Semtek's California state-law claims with prejudice on statute-of-limitations grounds. Semtek refiled the claims in a Maryland state court under Maryland law; Maryland had a longer statute of limitations. The question before the Supreme Court was whether the federal-court dismissal was claim preclusive, barring the Maryland suit. After concluding that neither precedent nor Federal Rule of Civil Procedure 41(b) answered the question, the Court held that the preclusive effect of a federal-court judgment is governed by federal common law, but that in diversity cases the content of federal preclusion law is the law that would be applied in state court.

Semtek is a minefield under *Erie*, and Justice Scalia's unanimous opinion tiptoed across it, bobbing and weaving to avoid disaster. *Erie* itself made several cameo appearances, each one creating more questions than answers.

To begin with, the *Semtek* Court suggested that to interpret Rule 41(b)[66] as directing that all dismissals "on the merits" be accorded claim-preclusive effect—regardless of whether state law would give such dismissals preclusive effect—would "arguably" violate both the Rules Enabling Act and *Erie* by modifying substantive rights and encouraging forumshopping.[67] This is exactly the kind of state-sensitive interpretation of the Federal Rules that the Court adopted in *Walker* and that the dissent urged in *Shady Grove*. The citation to the REA in *Semtek* might distinguish *Walker* and *Shady Grove* and resolve the tension between following state substantive policies and applying the Federal Rules transsubstantively; the Court seems to be suggesting that Rule 41(b) can *never* be interpreted to equate "on the merits" with claim preclusion. But in an odd footnote, Justice Scalia acknowledged the possibility that Rule 41(b) might be interpreted differently in different situations:

> Rule 41(b), interpreted as a preclusion-establishing rule, would not have the two effects described in the preceding paragraphs—arguable violation of the Rules Enabling Act and incompatibility with *Erie*—if the court's failure to specify an other-than-on-the-merits dismissal were subject to reversal on appeal *whenever it would alter the rule of claim preclusion applied in the State in which the federal court sits*. No one suggests that this is the rule, and we are aware of no case that applies it.[68]

In other words, although one might interpret Rule 41(b) as preclusiondeterminative only when doing so did not impair state rights, that interpretation is not plausible under the caselaw. But both the plurality in *Shady Grove* and the majority in *Stewart* rejected the possibility of differen-

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[66] Rule 41(b), governing involuntary dismissals, provides in relevant part that any nonvoluntary dismissal (with three exceptions not relevant to the case) "operates as an adjudication on the merits" "[u]nless the dismissal order states otherwise." FED. R. CIV. P. 41(b).

[67] *Semtek*, 531 U.S. at 503–04.

[68] *Id.* at 504 n.1 (citation omitted and emphasis added).

tial application of the Federal Rules as a matter of principle, not precedent. That is a far cry from the unadorned suggestion, in the *Semtek* footnote just quoted, that differential application is not supported by precedent. So *Semtek* ultimately leaves the dilemma unresolved: Maybe *Erie* and the Rules Enabling Act work together to invalidate any interpretation of any Federal Rule that might possibly impair substantive rights in any state, or maybe they are still at cross-purposes insofar as *Erie* commands interpreting or applying the Rules in light of particular state law.

Even more peculiar is the Court's treatment of the ultimate question in *Semtek*: the source of law governing the preclusive effect of a federal-court diversity judgment. At first glance, this seems like a straightforward *Erie* question. Because there is no Federal Rule or statute on point, the Court should apply *Erie* (as articulated in the portion of *Hanna* dealing with the "unguided" *Erie* choice) and ask whether applying federal commonlaw preclusion doctrines, rather than state law, would create inequities or encourage forumshopping.

But the Court did not take that route. It instead held that federal common law *always* governs the preclusive effect of a federal court judgment, but that in diversity cases, the content of federal common law should ordinarily mirror that of the state in which the diversity court sits: "This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."[69] At the same time, however, the Court supported this conclusion by citing *Gasperini*, *Walker,* and other *Erie* cases. It also went on to suggest that "any other rule would produce the sort of 'forum-shopping . . . and . . . inequitable administration of the laws' that *Erie* seeks to avoid."[70]

In *Semtek*, then, the Court used the principles underlying the *Erie* doctrine to require application of state preclusion law, but explicitly denied that *Erie* and its progeny were dispositive. One benefit of this approach becomes apparent when the reader gets to the next paragraph of the opinion. The Court noted there that "[t]his federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests."[71] Absent resurrection of the *Byrd* balancing test—which no Justice seems to favor—this preference for federal interests could not be accomplished under the *Erie* doctrine.[72] Holding *Erie* obliquely rather than

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[69] *Semtek*, 531 U.S. at 508. Not the least of the peculiarities of this holding is that it seems to ignore the teaching of *Klaxon Co. v. Stentor Electric Manuf. Co.*, 313 U.S. 487 (1941) by applying the preclusion law of the state in which the court sits rather than the preclusion law that that state would choose to apply. That oddity, however, is not relevant to my thesis.

[70] *Semtek*, 531 U.S. at 508–09.

[71] *Id.* at 509.

[72] Patrick Woolley has recognized the linkage between *Byrd* and *Semtek* (and considers *Gasperini* to be similar). He contends that all three cases illustrate a required balancing between two interests: "(1) the federal interest in avoiding differences in outcome (the *Erie* policy), against (2) the federal interest

directly relevant allows the Court an escape from state substantive policies of which it does not approve.[73]

The Court thus avoided the central dilemma of *Erie*—what to do when a state's substantive policy decisions clash with application of an arguably procedural federal rule[74]—by not applying *Erie* at all. There is no need for the interpretive contortions of a case like *Walker*: In federal-question cases, the courts are free to fashion any federal commonlaw preclusion doctrines they like, while in diversity cases they avoid any clash between federal preclusion law and state substantive policies by "borrowing" state preclusion law. And if a case arises in which the Court thinks that some federal interest—akin to the interest in the transsubstantive application of the Federal Rules—should trump state preclusion law, the Court will say so directly rather than insisting that it is the procedural nature of the federal interest that requires application of federal law.[75]

Notice, however, that this result is accomplished only by pretending that the *Erie* doctrine does not exist. Perhaps we should take that as a hint that the *Erie* doctrine *should* not exist. In other words, while most of the recent *Erie* cases illustrate the unavoidable internal conflict within the *Erie* doctrine, *Semtek* instead shows us an alternative to *Erie* that provides a way out of the dilemma. It is to that alternative that I now turn.

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in applying uniform rules to the issue in question." *See* Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 559, 563–64 (2003). My proposal extends this linkage to all *Erie* cases.

[73] Like both *Byrd* balancing and the ad hoc accommodation of state and federal interests by the *Gasperini* majority and the *Shady Grove* dissent, this expansion of judicial discretion has been criticized. *See, e.g.*, Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: As Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707 (2006); C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 B.Y.U. L. REV. 267; Hendricks, *supra* note 46, at 103.

[74] Some scholars have suggested that preclusion law should be considered substantive. *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 609–14, 638–44 (2006). Perhaps it should, in the end. But the whole point of the post-*Erie* cases I have been discussing is that the Court has interpreted "arguably procedural" to include anything that is not unarguably substantive; "arguably procedural" thus includes essentially everything other than core issues of standards of liability, elements of a cause of action, and related concepts that govern outside-the-courtroom activities.

[75] That *Semtek* in fact allows the Court to sidestep *Erie* is illustrated by a comparison between two scholars: Professor Stephen Burbank argues that *Semtek* adopted his view that state law should govern the preclusive effect of federal-court judgments in diversity cases because of "the limitations the Enabling Act places on the Court's power" over preclusion law, and Professor Patrick Woolley argues that it stands for the proposition that "neither the *Erie* policy nor the REA prevents recognition of the very strong federal interest in uniform federal rules of preclusion." Stephen B. Burbank, Semtek, *Forum Shopping and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1055 (2002); Woolley, *supra* note 72, at 529.

IV. THE ONLY VIABLE SOLUTION

The inescapable internal tension between the two rationales of the *Erie* doctrine has produced an unpredictable and inconsistent set of precedents as the Court—and sometimes an individual Justice—vacillates between one rationale and the other without recognizing the underlying dilemma. We could solve the problem by getting rid of diversity jurisdiction, which would eliminate the need for any kind of *Erie* doctrine.[76] We could also solve it by repealing the Rules Enabling Act and resurrecting the Conformity Act, which directed federal courts to apply state procedural rules in diversity cases. Neither of those options seems realistic.[77] The remaining solution is to eliminate the source of the problem by eliminating the *Erie* doctrine and substituting a different and more coherent way to accommodate state substantive policies with the demands of a separate and independent federal judicial system.

What would the world look like without *Erie*? In 1938, perhaps, it had to look like *Swift*. But seventy-five years later, there is no particular reason to return to *Swift*'s illusory distinction between local and general law or its invocation of a naturalist and antipositivist jurisprudence.[78] Instead, we can take a cue from *Semtek* and look at whether federal interests trump state policy choices in particular circumstances. If federal interests should prevail, federal law applies; if there is no pressing federal interest, the default option is to apply state law—not as a matter of constitutional command, but for the practical reasons recognized by the Court in both *Erie* and *Semtek*.[79]

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[76] Maybe. State-law questions might still arise under supplemental jurisdiction, see 28 U.S.C. § 1367, and in cases in which a federal-law question is embedded in a state cause of action, see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg, 545 U.S. 308 (2005).

[77] Although there is a lot to be said for eliminating diversity jurisdiction. *See* Suzanna Sherry, *Against Diversity*, 17 CONST. COMMENT 1 (2000); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV.97.

[78] Jack Goldsmith and Steven Walt make a good case that *Erie*'s commitment to legal positivism is irrelevant to its holding. Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998); Steven Walt, *Before the Jurisprudential Turn: Corbin and the Mid-Century Opposition to* Erie, 2 WASH. U. JURISPRUDENCE REV. 75 (2010).

[79] One scholar defends a similar presumption in favor of state law as constitutionally required on the ground that "a judicially created federal rule that imposes or overrides substantive rights requires a justification other than the mere authority to assert federal court jurisdiction or to regulate federal procedure." Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 319 (2008). Steinman makes this argument in the context of defending simultaneously the prescriptions of the *Erie* doctrine (in all its complexity) and the existence of enclaves of federal common law that trump state law. He thus uses an argument about federal interests to limit federal judicial power, while I use it to expand federal judicial power.

In short, perhaps a *Semtek*-inspired "new *Erie*" doctrine should look like implied preemption of the "purposes-and-objectives" type[80]: A presumption that state-law policy choices govern in diversity cases unless there is reason to believe that applying state law would interfere with some important federal interest or objective. Similarly, a focus on the state law's effect on federal interests would mirror current doctrine under the dormant Commerce Clause, which also allows uncodified federal interests to overcome state regulation.[81] Ironically, patterning the new *Erie* doctrine after implied preemption should be less controversial than the implied preemption doctrine itself.[82] Under implied preemption, the Court relies on federal interests to determine what happens in *state* court: a state-law claim that is preempted cannot be brought in either state or federal court. Under my proposal, the Court uses federal interests to determine only what happens in *federal* court, a much more justifiable result.[83]

And, despite its novelty, my proposal draws on existing doctrine. *Semtek* is not alone in its insistence that federal common law sometimes displaces state law notwithstanding *Erie*. The Court has applied federal common law that is inconsistent with state law when it finds that the differences between the two are not likely to produce forumshopping or inequities.[84]

More broadly, the Court has consistently held—beginning with a case decided on the same day as *Erie*[85]—that federal common law governs, even

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80 As the Supreme Court has explained, even in the absence of an express preemption provision in a federal statute, a state law is impliedly preempted when it "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *accord*, Arizona v. United States, 132 S. Ct. 2492, 2501 (2012); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000).

81 *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994).

82 For criticism of implied preemption see, e.g., THOMAS O. MCGARITY, THE PREEMPTION WAR 265 (2008); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000); Wyeth v. Levine, 555 U.S. 555, 587–89 (2009) (Thomas, J., concurring).

83 Under the current *Erie* doctrine, state courts are not bound to follow what are frequently called "*Erie* guesses" by federal courts (including the Supreme Court) interpreting state law. Even under *Swift*, state courts did not consider themselves bound to follow the common law decisions of the Supreme Court. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 77 (2009) ("Neither federal nor state courts considered the other's decisions on questions of general law to be binding in subsequent cases"); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1561 (1984) (citing Waln v. Thompson, 9 Serg. & Rawle 115, 122 (Pa. 1822)); *see also* Stalker v. M'Donald, 6 Hill 93 (N.Y. Sup. Ct. 1843) (declining to follow the substantive holding of *Swift*).

84 Chambers v. NASCO, Inc., 501 U.S. 32, 51–54 (1991). The Court in *Walker* hinted at this possibility by resorting to the "twin aims" analysis after finding no directly controlling Federal Rule of Civil Procedure. *See supra* note 39.

85 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92. 110–11 (1938).

in diversity cases, if the suit implicates "uniquely federal interests."[86] State law is displaced whenever there exists a "significant conflict between some federal policy or interest and the use of state law."[87] To date, the Court has endorsed this use of federal common law in only six limited "enclaves,"[88] and scholars have defended these enclaves largely on historical or structural grounds.[89] My proposal generalizes from these limited enclaves to create a broader concept of conflict preemption: Courts may create and apply federal common law *whenever* doing so is necessary to protect federal interests that would be frustrated by the application of state law.

The primary difference between my proposal and the existing doctrines authorizing the use of federal common law, then, lies in its level of generality. Rather than creating narrow categories of federal enclaves and adding categories piecemeal by analogy, I suggest a new overarching standard to govern the displacement of state law. Replacing the Court's current categorical approach with a generalized standard has all the usual advantages of such a move, and is all the more beneficial in a jurisprudence as beset with problems and inconsistencies as the *Erie* doctrine.[90]

The final advantage of my proposal is that it eliminates the two unjustified dichotomies I mentioned earlier. It makes federal judicial power congruent with federal legislative power, and it treats *all* federal interests as potentially subject to judicial protection regardless of whether those interests fall into particular identifiable categories. Ironically, expanding federal judicial power in this way can itself be seen as mandated by one of *Erie*'s most basic moves. In overruling *Swift*, the *Erie* court dictated that *state* legislative and judicial lawmaking be treated identically. But current doctrine does not accord the same courtesy to *federal* judicial lawmaking; my proposal would align state and federal judicial (vis-à-vis legislative) power.[91]

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[86] Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

[87] Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

[88] The term "enclaves" is widely used. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004). Two scholars have recently traced the term to Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964), and identified the six accepted enclaves. Tidmarsh & Murray, *supra* note 74, at 588 n.16.

[89] *See, e.g.*, Tidmarsh & Murray, *supra* note 74; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

[90] My theory has the additional benefit of harmonizing the federal courts' authority to make common law with their authority in diversity cases; as many scholars have noted, there is a tension between *Erie* and the continued existence of even these pockets of federal law. "[T]he statutory, policy, and constitutional rationales of *Erie* are in tension with the continued existence of federal common law. . . . If federal (and state) courts have broad powers to make federal common law, then the power refused to federal courts in *Erie* pales in comparison to the power retained by federal (and state) courts to establish federal rules of decision." Tidmarsh & Murray, *supra* note 74, at 586–87.

[91] My proposal also eliminates a further distinction between state and federal court obligations. Currently, state courts are not bound under *Erie* to apply the law of a sister state to disputes arising in that sister state, and even when they do apply another state's law they often presume—sometimes al-

V. CONSEQUENCES

I turn finally to the consequences of adopting my new proposal. In many run-of-the-mill *Erie* cases—such as an auto accident between citizens of different states—the new *Erie* doctrine probably would not differ much from the old one. As long as there is no federal interest in a uniform federal auto-accident tort law, state law will apply to those cases by default.[92]

But replacing the *Erie* doctrine with a preemption approach would produce very different results in two particular types of cases. First, there are the cases that form the heart of this article, in which the old *Erie* doctrine issues conflicting commands. Under my proposal, the Court would instead have to decide explicitly whether the federal interest in uniform, transsubstantive procedural rules for federal courts is more important than allowing states to make substantive policy choices. If it is, then the Federal Rules will always prevail, even over a state law intended to operate substantively. That answer supports the *Shady Grove* plurality, the *Gasperini* dissent, and the unanimous *Stewart* and *Burlington Northern* cases; it undermines the *Shady Grove* concurrence and dissent, the majority in *Gasperini*, and the *Walker* and *West* combination. Determining that uniformity and transsubstantivity are not sufficiently important to trump state policy choices produces the opposite results. Whether a federal interest in uniformity and transsubstantivity *should* be considered important enough to override state substantive law is a separate question, which I do not address here.[93]

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most irrebuttably—that the other state's law mirrors their own. *See* Michael Steven Green, *Horizontal* Erie *and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1240 (2011) (documenting lack of *Erie* obligation on state courts and arguing that *Erie* should bind state courts as well as federal courts).

92 It is possible that a persuasive case can be made for a strong federal interest in uniform auto-accident tort law. In one sense, every accident is local and unique, and thus state law should apply. On the other hand, one might argue that factors such as the interstate highway system and the increased mobility of the population suggest the need for uniformity. As I will argue shortly, products-liability law necessarily affects federal interests; whether general tort law does so is an open question.

93 In the interest of transparency, I note that I lean toward favoring transsubstantivity. But one reason I do not want to address that question definitively in this essay is that I am not sure whether the Rules should remain transsubstantive even in federal-question cases. Although the Court insists that the Rules *are* transsubstantive, it seems to be applying them differently in different types of cases. *Compare* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), *and* Erickson v. Pardus, 551 U.S. 89 (2007), *with* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), *and* Ashcroft v. Iqbal, 556 U.S. 662 (2009). One way to reconcile these cases (and to cabin the potentially harmful effects of the latter two) is to suggest that transsubstantivity has outlived its usefulness. In addition, there are other contexts in which federal law varies depending on the content of state law, and a full discussion of the value of transsubstantivity would have to take these into account. Under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971), for example, the availability of an implied federal right of action under the Constitution depends in part on the adequacy of state-law remedies. *See, e.g.*, Minneci v. Pollard, 132 S. Ct. 617 (2012).

The key point is not how these cases should come out, but rather that the Court would be deciding them transparently and in the name of an overriding federal interest, rather than denying the existence of a conflict or pretending that the result turns on an interpretation of the Federal Rules of Civil Procedure.[94] In one sense, then, adopting a *Semtek*-like preemption approach in these cases takes a jurisprudential dispute that is currently being fought underground (or through proxies) and moves it into daylight where it can be addressed directly. The cases would also be more predictable—either the interest in uniformity or transsubstantivity is sufficient to overcome any state policy choice, or it is not. The case-by-case approach that has led to the confusing vacillation would disappear under my approach. The current doctrine is incoherent; my proposal at least yields coherence.[95] It is difficult to see why anyone would oppose a change with such salutary effects, except perhaps out of nostalgia, a misplaced allegiance to the purported constitutional basis for *Erie*,[96] or a visceral dislike of any doctrine that openly admits that judges actually exercise—and should exercise—discretion.

One further question about conflicts between state substantive law and Federal Rules remains to be discussed. Is the weighting of federal uniformity a one-time decision applicable across the board to all Federal Rules and all state laws, or does it depend on either the particular state interest or the particular Federal Rule?

As to variations in state laws, anything short of an all-or-nothing decision is simply a return to the current regime, albeit on a more transparent basis. There is little predictability in a jurisprudence that lets judges weigh each individual state interest against a federal interest in uniformity and allows different conclusions with regard to different state policies. In this, my proposal is unlike the analysis under preemption or dormant Commerce Clause doctrines, which depend on the actual threat that the particular state

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94 *See* Clermont, *supra* note 28, at 1029 (noting that lower court judges following Justice Ginsburg's lead will be engaging in "manipulation" that "hide[s] the real stakes"); Burbank & Wolff, *supra* note 46, at 37 (suggesting that under the current regime, "it is no surprise that . . . the Justices have lurched from one extreme to the other" in interpreting Federal Rules).

95 Some scholars do defend the coherence of at least parts of the current doctrine, including two of my favorite procedure scholars, whose views I usually agree with and always greatly respect. *See* Rowe, *supra* note 10; *see also* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 923 (2011).

96 For criticisms of the constitutional basis of *Erie*, *see, e.g.*, MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 226–32 (2012); *see generally* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595 (2008); Sherry, *supra* note 7, at 142–47. Underlying a constitutional basis for *Erie* is the expectation that state and federal courts can be substitutes for one another in diversity cases. While that expectation might have been accurate at one time, it seems inaccurate now that state and federal judges are selected and tenured in diametrically different ways. *See generally* Brian Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839 (2012).

law poses to implementation of the federal interest. The reason for the difference lies in the different nature of the federal interest in the *Erie* procedural cases: unlike an interest in particular federal policies (as in preemption) or free-flowing interstate commerce (as in the dormant Commerce Clause), an interest in *uniformity* is always necessarily undermined by allowing it to vary depending on the interests arrayed against it.[97]

I am more agnostic about whether the interest in uniformity and transsubstantivity might vary across different Federal Rules of Civil Procedure. It is certainly possible that uniformity might be more important for some Rules than for others, and thus the Court might conclude that some Rules apply regardless of their impact on state substantive choices and others do not. Such an approach sacrifices some predictability, but still retains the core idea of transparently analyzing the conflict as one between enabling state policy decisions and fostering the underlying goals of the Federal Rules.

The second type of case affected by my suggestion is likely to generate considerably more controversy, both because it is of more practical consequence and because it is further afield from the core question (*Erie* in the procedural context) of this article. For those reasons, I sketch my arguments only briefly; I hope to develop them further in a later article.

In our national (or global) consumer economy, much corporate activity is what Sam Issacharoff has labeled national market activity: "conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination."[98] If the goods are defective or cause injury, the effect is felt nationwide but liability is imposed state by state under potentially different substantive laws and policies. Those laws and policies, in turn, offer different protections for consumers in different states and also necessarily affect the incentives of corporations in their design and manufacturing of products. One state's law has the capacity to drive national standards; different state requirements might impose conflicting obligations on manufacturers; and consumers in some states may suffer uncompensated damage for which consumers in other states are compensated.[99] Particularly with regard to defendants, then, the substantive products-liability law of any given state has nationwide implications and effects. In short, substantive state policy judgments have the potential to wreak havoc on our national

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[97] There is some dispute about which of these two categories best describes the federal interest justifying enclaves of federal common law. *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008) (citing Tex. Indus. Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

[98] Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1842 (2006).

[99] For a thorough and interesting discussion of the economic implications of a "market for law," *see generally* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009) (discussing how these different laws create a "market for law" and what should be done about it).

economy.[100] Regardless of whether Congress chooses to federalize products-liability law,[101] there is thus a strong federal interest in uniform liability rules for corporations whose products are distributed indiscriminately to consumers in every state. On my theory, that interest is enough to override individual state policy choices and require federal courts to develop and apply a federal common law of products liability in diversity cases.

Using federal law to protect a national economy has a historical pedigree that predates even *Swift v. Tyson*. In 1821, Chief Justice Marshall equated the federal interest in national commerce with the federal interest in foreign affairs: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people."[102] This sentiment accords with the generally accepted basis of diversity jurisdiction as protecting national commercial interests from parochial state laws.[103]

The consequences of a replacing state substantive law with a federal common law of products liability are twofold. First, nationwide class actions under Rule 23, currently rarely certified, would become viable. As Judge Richard Posner has pointed out in denying certification to a nationwide class, "[t]he voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch."[104] Those different tunes mean that the same law will not apply to all members of a nationwide class of consumers, and thus certification is inappropriate for many—if not most—nationwide classes. My proposal, by requiring the application of federal common law to these national-market claims, makes the different tunes irrelevant and allows certification of a nationwide class. The flip side, however, is that once a nationwide class is certified in federal court—or even if individual suits are brought in federal court—federal, not state, law would determine liability. And because federal jurisdictional statutes require only minimal diversity in large class actions,[105] plaintiffs who prefer to stay in state court to take advantage of state law would be able to do so

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100 *See generally* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (describing these "spillover" effects and how various doctrines work to cabin them).

101 I have previously suggested that Congress *did* intend to federalize products-liability law by enacting the Class Action Fairness Act. *See generally* Suzanna Sherry, *Overruling* Erie: *Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008).

102 Cohens v. Virginia, 19 U.S 264, 413 (1821).

103 *See, e.g.*, David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1265–70 (2007) (collecting sources); Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1010–17 (2007); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 498 (1928).

104 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1301 (7th Cir. 1995).

105 28 U.S.C. § 1332(d)(2)(A) (2012).

only if they limited the class to consumers in one state. Both consumers and corporations would benefit: consumers would be able to consolidate their claims into a nationwide class action and would all receive the same levels of protection and compensation, and corporations would be protected from the idiosyncrasies of particular states and the potential for conflicting standards of liability.

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By citing—but not directly relying on—*Erie* and its progeny in *Semtek*, the Court showed us the way to bring back together two ideas that have been separated for seventy-five years. Federal court power to shape substantive law is intertwined with and depends on the existence of federal interests sufficient to overcome the limits on federal lawmaking and the premise of residual state power. Those federal interests exist regardless of whether they have been codified by Congress. But *Erie* sheared off some of those federal interests and insisted that they could not be protected in the absence of congressional codification. The *Erie* doctrine and the development of enclaves of federal common law are, at one level, a history of attempts to figure out which federal interests require codification as a prerequisite to judicial protection and which do not. My proposal, inspired by *Semtek*, is to unify the two inquiries with a transparent standard that asks directly whether there exists a sufficient federal interest to demand the application of federal rather than state law.

CONCLUSION

The *Erie* doctrine is a mess. Every time the Court wades into it, it gets worse. The Court's failure to save *Erie* should not be surprising: The underlying problem is that the doctrine itself is internally incoherent. The only solution is to scrap *Erie* and replace it with a more coherent vision of the role of federal courts in a regime of dual sovereigns. And the role of federal courts should be the same as the role of the federal government in general: protecting national interests from individual state policy choices detrimental to the nation as a whole. Seventy-five years ago, when *Erie* limited the role of federal courts, the federal government was barely beginning to exercise its authority. Isn't it time that the federal courts catch up with the massive expansion of the rest of federal power?