ESSAY

DEFORMING THE FEDERAL RULES: AN ESSAY ON WHAT'S WRONG WITH THE RECENT *ERIE* DECISIONS

Earl C. Dudley, Jr. and George Rutherglen[*]

INTRODUCTION

THE Supreme Court's most recent decisions under the *Erie* doctrine[1] seem to lose track of the constitutional principles underlying that doctrine in a maze of procedural detail. From "one of the modern cornerstones of our federalism,"[2] *Erie* apparently has been demoted to the role of an esoteric procedural technicality, one whose true meaning is hard to discern and whose application is impossible to predict. The deceptively simple essence of *Erie* is that in our federal system, state law is paramount unless and until displaced by some valid piece of federal law. The main area of difficulty in applying the *Erie* doctrine has involved potential clashes between state law and the Federal Rules of Civil Procedure.

In *Gasperini v. Center for Humanities, Inc.*,[3] the Court held that a state statute providing for enhanced appellate review of jury verdicts must be followed by federal trial courts (but not federal courts of appeal) in diversity cases. This decision creates a rule that is a pastiche of federal and state law, but neither the one nor the other. Through such ad hoc lawmaking, the decision almost turns the *Erie* doctrine on its head by creating "'a transcendental body of law outside of any particular State but obligatory within it.'"[4] In

[*] Professor of Law and John Barbee Minor Distinguished Professor of Law, respectively, at the University of Virginia School of Law. We would like to thank participants at a faculty workshop for their comments on an earlier draft of this Essay and Catherine Ware Kilduff and Molly Mitchell for their work as research assistants.

[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[2] Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

[3] 518 U.S. 415 (1996).

[4] *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

Semtek International Inc. v. Lockheed Martin Corp.,[5] the Court held that a dismissal that "operates as an adjudication upon the merits"[6] nevertheless does not preclude a subsequent action in a different forum on the same claim. We are left to wonder what kind of judgment is necessary to bring litigation to a close.

These decisions are puzzling and for that reason have attracted a chorus of academic criticism.[7] Yet decisions so complex and counterintuitive demand explanation as much as criticism, and this Essay will seek to explain how the Supreme Court has reached this impasse in applying and expounding the *Erie* doctrine. Part I will locate the initial problem in the unwonted complexity of the Court's holdings. Convoluted legal doctrine may be the natural consequence of hard-fought constitutional controversies, but the principles underlying the *Erie* doctrine should have been long settled by now. Debates over *Erie* issues hardly elicit the same passionate intensity as controversies over abortion, affirmative action, sexual freedom, or capital punishment. In *Gasperini* and *Semtek*, the Court could have reached a better decision in each case by the simple expedient of directly confronting the choice whether to give full effect to a Federal Rule of Civil Procedure, and if not, declaring it partially or wholly invalid. Part II will offer an explanation of why the Court did not take this course. There are three components to this explanation: first, implicit or explicit doubts about the scope and validity of the Federal Rules; second, a tendency to give the Federal Rules an artificially narrow interpretation to avoid perceived conflicts with state law; and third, a resort to case-by-case determinations as the dominant means of resolving questions under the *Erie* doctrine when a federal rule is claimed to infringe upon a state substantive right. This Essay will conclude with some

[5] 531 U.S. 497 (2001).

[6] Fed. R. Civ. P. 41(b).

[7] Most of the critics find that these opinions fail to give enough guidance about when to apply federal or state law. See Michael A. Berch & Rebecca White Berch, An Essay Regarding *Gasperini v. Center for Humanities, Inc.* and the Demise of the Uniform Application of the Federal Rules of Civil Procedure, 69 Miss. L.J. 715, 747–48 (1999); Wendy Collins Perdue, The Sources and Scope of Federal Procedural Common Law: Some Reflections on *Erie* and *Gasperini*, 46 U. Kan. L. Rev. 751, 768–75 (1998); Patrick Woolley, The Sources of Federal Preclusion Law After *Semtek*, 72 U. Cin. L. Rev. 527, 530 (2003). Professor Burbank is alone in seeking to take credit for the decision in *Semtek*. Stephen B. Burbank, *Semtek*, Forum Shopping, and Federal Common Law, 77 Notre Dame L. Rev. 1027, 1055 (2002).

reflections on the consequences of these decisions for the stability of the Federal Rules and their ability "to secure the just, speedy, and inexpensive determination of every action."[8]

I. THE CASES

Despite the complexity of the opinions in *Gasperini* and *Semtek*, the question in each case can be simply framed and clearly answered. In *Gasperini*, it was whether a federal court was required to follow state standards for review of jury verdicts on claims otherwise governed by state law. This question implicates the right to jury trial under the Seventh Amendment and the standards for granting new trials under Federal Rule of Civil Procedure 59(a)(1). The Court gave too much attention to the former and not enough to the latter, resulting in a decision that largely followed state law at the expense of the federal rule.

In *Semtek*, the question was whether the preclusive effect of a federal judgment dismissing a state claim based on the state statute of limitations was determined by state law. This question involves, among other issues, the meaning of a dismissal "upon the merits" under Federal Rule 41(b). The Court closely examined this issue, but again gave too little weight to the federal rule, essentially allowing the federal court's dismissal "upon the merits" to be reopened on collateral attack.

We believe that the Court reached the wrong result in each case for essentially the same reason: It discounted the effect of the relevant federal rule by failing to appreciate how the rule furthered procedural values in the operation of the federal judicial system that extend beyond the Federal Rules themselves.

A. Gasperini v. Center for Humanities, Inc.

Gasperini, a journalist and photographer, supplied 300 slides he had taken of war and conflict in Central America to the Center for Humanities for inclusion in an educational videotape. The Center promised to return the slides on completion of the project, but it lost them. Gasperini sued for the value of the slides in the United States District Court for the Southern District of New York, invok-

[8] Fed. R. Civ. P. 1.

ing the court's diversity jurisdiction. Liability was uncontested, and the trial was limited to damages.[9] The plaintiff's expert testified that the "'industry standard' within the photographic publishing community" for a lost transparency was $1500, representing "the average license fee a commercial photograph could earn over the full course of the photographer's copyright." In addition, Gasperini testified that he had earned more than $10,000 from his part-time photography work between 1984 and 1993, and that he intended to produce a book of his best Central America photographs. The jury awarded Gasperini $450,000, which it said in response to a special interrogatory represented the $1500 testified to by the expert for the 300 lost slides. The Center moved for a new trial under Rule 59(a)(1), arguing inter alia that the verdict was excessive. The district court denied the motion without opinion, and the Center appealed.[10]

In reviewing the case, the Second Circuit invoked a statute, adopted by the New York legislature in 1986 as part of a series of tort reform measures, that directed state appellate courts reviewing damage awards to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."[11] The object was apparently to exert greater control over jury damage awards without adopting a specific numerical cap on such awards. The Second Circuit held that this standard controlled its review of the district court's denial of a new trial, and upon reviewing the evidence concluded that only fifty slides merited the $1500 "industry standard" testified to by the plaintiff's expert. Thus, it set aside the verdict and ordered a new trial unless Gasperini accepted a remitted award of $100,000.[12]

The Supreme Court vacated and remanded for further proceedings in the district court. In her opinion for the Court, Justice Ginsburg posited that the traditional federal standard for review of the size of jury verdicts was whether the award "'shocked the conscience of the court,'"[13] a standard more deferential to the jury's

[9] See *Gasperini*, 518 U.S. at 419.

[10] See id. at 420.

[11] N.Y. C.P.L.R. 5501(c) (McKinney 2006).

[12] See *Gasperini*, 518 U.S. at 421.

[13] Id. at 422 (quoting Consorti v. Armstrong World Indus., 72 F.3d 1003, 1012 (2d Cir. 1995)).

finding than the New York standard. On the Seventh Amendment issue, she held that the New York statute as written—a directive to appellate courts—would raise constitutional problems. Appellate courts themselves could not engage in less deferential review of the jury's findings without running afoul of the Amendment's Reexamination Clause, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[14] The prevailing federal standard for appellate review of damages was whether the trial court—not the jury—had abused its discretion in granting or denying a motion for new trial. The Court went on, however, to hold that nothing in the Seventh Amendment prevented federal district courts from applying the New York standard, on the ground that it was substantive and that, as a matter of New York law, it also applied to trial courts. Thus, it remanded the case with instructions to the district court to determine whether the jury verdict "'deviates materially from what would be reasonable compensation.'"[15]

Both the majority and the dissenting opinions in *Gasperini* were almost wholly concerned with the Seventh Amendment. The Amendment protects both the right to have a jury in the first place and, through its Reexamination Clause, the right to limited review of facts found by a jury. These findings can be reexamined only "according to the rules of the common law."[16] Like the Seventh Amendment as a whole, the Reexamination Clause has been interpreted to impose a historical test on procedural innovations, such as the New York statute, that permit judicial review of jury verdicts through procedures not recognized at common law. Whether the historical test should be static, looking back to the common law as it existed in 1791, when the Seventh Amendment was ratified, or dynamic, taking account of developments in civil procedure since that time, is a longstanding issue in Seventh Amendment jurisprudence.[17] Justice Scalia, in his dissent in *Gasperini*, emphasized the

[14] U.S. Const. amend. VII.

[15] *Gasperini*, 518 U.S. at 425 (quoting N.Y. C.P.L.R. 5501(c) (McKinney 1995)).

[16] U.S. Const. amend. VII.

[17] See, e.g., Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 574–81 (1990) (Brennan, J., concurring in part and concurring in the judgment); Tull v. United States, 481 U.S. 412, 421 (1987); Ross v. Bernhard, 396 U.S. 531, 538 (1970); Id. at 549–50 (Stewart, J., dissenting); Dairy Queen v. Wood, 369 U.S. 469, 477–79 (1962); Beacon Theatres v. Westover, 359 U.S. 500, 509–10 (1959).

static view, in accord with his originalist approach to most issues of constitutional law.[18] Justice Ginsburg, writing for the Court, adopted a dynamic view that would provide at least some greater measure of flexibility in reviewing jury verdicts. Much can be said on each side in this debate, and even among the authors of this paper, we are divided on which side has the better of the argument.

Nevertheless, it is an argument that is remote from the standard *Erie* problem. If the Seventh Amendment does not permit the federal courts to follow New York law, then the Supremacy Clause dictates application of federal law.[19] This conclusion might well result in forum shopping by plaintiffs seeking narrower review of jury verdicts in federal court than in state court, but this consequence arises because the Seventh Amendment applies only to "the courts of the United States" and does not govern state courts through the Fourteenth Amendment.[20] If, on the other hand, New York law is consistent with the Seventh Amendment, and no other source of federal law applies, the federal courts are bound to apply New York law precisely in order to eliminate the incentives that plaintiffs otherwise would have to engage in forum shopping. Thus, it is surprising that the decision makes New York law binding on the federal district courts but not on federal courts of appeals. The Reexamination Clause draws no distinction between trial and appellate courts, and thus if it bars heightened review of jury verdicts, it should do so equally at both levels. *Erie* enters into this analysis only peripherally.[21]

Rule 59, by contrast, speaks directly to the issue of judicial review of verdicts, and it raises important questions under the *Erie* doctrine, which are all but neglected by the majority opinion in *Gasperini*. Rule 59(a)(1) provides that district courts may grant motions for new trial in jury cases "for any of the reasons for which new trials have heretofore been granted in actions at law in the

[18] Ironically, Justice Scalia would later take the opposite position on similar issues in his opinion for the Court in *Semtek*, ultimately applying state law in that case while he argued for applying federal law in *Gasperini*. See infra Section I.B.

[19] See U.S. Const. art. VI, cl. 2.

[20] Walker v. Sauvinet, 92 U.S. 90, 92 (1876).

[21] Indeed, the best criticism of the majority opinion in *Gasperini* is found in its characterization of the dissent as creating a "sphinx-like, damage-determining law" with "a state forepart, but a federal hindquarter." *Gasperini*, 518 U.S. at 438 n.23.

courts of the United States."[22] This language has remained the same since the Federal Rules were first promulgated in 1938, when it was proposed as a replacement for a provision in the Judicial Code[23] that was itself derived from the Judiciary Act of 1789.[24] That Act accomplished many things, of course, among them enacting the provision, now known as the Rules of Decision Act,[25] that is at the foundation of the *Erie* doctrine. In addition, the Judiciary Act granted the newly created federal courts the "power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law."[26] This provision bears an obvious resemblance to the Seventh Amendment's Reexamination Clause, which was proposed by the First Congress just before it considered this portion of the Judiciary Act. The framers of the Judiciary Act apparently intended the statutory provision to conform to the Reexamination Clause.

A century and a half later, the rulemakers adopted more cautious and less flexible language. Unlike the Reexamination Clause, Rule 59(a)(1) refers only to past practice— "for which new trials have heretofore been granted"—and only to practice in federal court— "in actions at law in the courts of the United States."[27] The rule takes a completely backward-looking view of the power to grant new trials, resembling the static approach to interpreting the Seventh Amendment, and it limits its view entirely to prior federal practice, neglecting procedure in state court. Although the rulemakers did not explain their decision to depart from the statutory language, it may be partly attributable to perceived restrictions on their rulemaking authority. In authorizing a unified set of rules governing actions in both law and equity, the Rules Enabling Act specifically provided that "the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."[28] This provision has

[22] Fed. R. Civ. P. 59(a)(1).
[23] 28 U.S.C. § 391 (1934); see also Rev. Stat. § 726 (1874).
[24] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).
[25] 28 U.S.C. § 1652 (2000).
[26] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).
[27] Fed. R. Civ. P. 59(a)(1).
[28] Act of June 19, 1934, ch. 651, § 2, Pub. L. No. 73-415, 48 Stat. 1064. In codifications of the Act, this provision was consolidated with the requirement that the rules

since been deleted from the codified version of the Rules Enabling Act on the ground that it is unnecessary.[29] Yet it remains relevant to the interpretation of Rule 59(a)(1) because it reveals why the rulemakers would have tried to avoid any practice that threatened rights under the Seventh Amendment.

The other distinctive feature of Rule 59(a)(1) is its reference only to federal procedure.[30] Unlike the First Congress, the rulemakers could rely upon a developed tradition of federal practice, which, of course, did not exist at all when the Judiciary Act of 1789 was passed. The reason for the rulemakers' preference for federal practice is understandable. Since the Seventh Amendment applies only in federal court, it was only the federal courts that would have addressed questions under the Reexamination Clause. Before *Gasperini*, innovations in state law, like the New York statute in that case, never counted in interpreting or applying the rule. As Justice Scalia pointed out in his dissent, while there have been several formulations of the standard for reviewing jury determinations, no federal court had ever permitted a damage award to be set aside because it "deviates materially" from what the reviewing court finds from the evidence and decisions in other comparable cases to be "reasonable compensation."[31] On a literal reading of Rule 59(a)(1), it is only federal practice that counts.

The majority presumably rejected a literal reading of the rule in order to avoid a conflict with state substantive rights. It did so by comparing the New York standard for reviewing jury verdicts to a cap on damages.[32] The latter is plainly substantive, and so the Court

not affect substantive rights and "shall preserve the right of trial by jury." 28 U.S.C. § 2072 (1976).

[29] See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648–49 (1988); H.R. Rep. No. 99-422, at 20 n.4 (1985). The current version of the Act only restricts the rules from affecting substantive rights. 28 U.S.C. § 2072(b) (2000).

[30] To the extent that the rulemakers looked to state practice, it was only in adopting the innovation of partial new trials. See Fed. R. Civ. P. 59 advisory committee's note. A partial new trial, of course, overturns fewer findings of a jury than the grant of a complete new trial, and therefore raises no new questions under the Reexamination Clause.

[31] *Gasperini*, 518 U.S. at 458–61 (Scalia, J., dissenting).

[32] For a defense of *Gasperini* along these lines, see Richard D. Freer, Some Thoughts on the State of *Erie* after *Gasperini*, 76 Tex. L. Rev. 1637, 1641–44, 1660 (1998).

asserted that the former was too. There was, however, no dispute in *Gasperini* about whether the measure of damages should be governed by New York law. The only issue was the extent of the federal court's power to determine whether the jury had properly applied that measure of damages, an issue that Justice Scalia correctly identified as one concerned with the allocation of authority between judge and jury.[33] This issue could still be substantive under one influential test for determining the difference between substantive and procedural rights: those focused on conduct outside of litigation as opposed to judicial proceedings alone.[34] The New York law might have been directed at the misallocation of damages caused by excessive verdicts and the accompanying distortions of conduct outside of court. Alternatively, it might have concerned only the accuracy and fairness of jury verdicts as a component of litigation.

Regardless of how this issue is resolved, it focuses on only one of two constraints imposed upon the drafters of Rule 59(a)(1). The other constraint is that Congress acted to protect the right to jury trial by statute, in both the Judiciary Act of 1789 and the original version of the Rules Enabling Act. Rule 59(a)(1) has been framed accordingly. It is no ordinary federal rule, whose broad interpretation might "abridge, enlarge or modify" state substantive rights and be invalid for this reason.[35] The rule follows the command of Congress to avoid any infringement of the right to jury trial under the Seventh Amendment. As the advisory committee's note to the original version of the rule said, the prior federal statute is "substantially continued in this rule."[36]

If accepted, this reasoning would avoid several of the difficulties resulting from the majority's position in *Gasperini*. First, it would replace the awkward compromise of following state procedure at trial and federal procedure on appeal in resolving motions for new trial. Federal practice at both stages of litigation would remain unchanged. Although no Federal Rule of Appellate Procedure codifies the standards for reviewing the grant or denial of a new trial, it

[33] See *Gasperini*, 518 U.S. at 450–51 (Scalia, J., dissenting).

[34] See Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 724–25 (1974).

[35] 28 U.S.C. § 2072(b) (2000).

[36] Fed. R. Civ. P. 59 advisory committee's note.

would hardly make sense for the federal courts of appeals to reverse rulings of the district courts that were not themselves erroneous. Implicit in Rule 59(a)(1) is the principle that appellate review, whether de novo or for abuse of discretion, allows reversal only of decisions contrary to past federal practice. A second, and related, benefit would be that the rule would be read to mean what it says, without the implied exception that the majority creates for ignoring federal practice in favor of state procedures. The justification for following the rule looks beyond its literal terms—as the justification for any rule does—but the rule itself continues to serve as the touchstone for deciding motions for new trial. This leads to a third benefit: avoiding a problematic inquiry into whether application of the rule might affect substantive rights granted by New York law. As noted earlier, the New York procedure for enhanced review of damage awards might be motivated by concerns extrinsic to judicial proceedings, involving overdeterrence of conduct with potential economic value, or intrinsic to such proceedings, involving the integrity of jury verdicts.[37] Relying on congressional enactments protecting the right to jury trial locates the source of federal authority outside this limitation on the federal rulemaking power. It invokes, instead, the broad power of Congress to regulate federal procedure as part of its power "[t]o constitute Tribunals inferior to the supreme Court."[38] This reasoning also removes from consideration any concerns with forum shopping under the "outcome-determinative" test,[39] since the risk of forum shopping derives entirely from the limited scope of the right to jury trial under the Seventh Amendment and statutes designed to protect that right. As discussed more fully in Part II, an undue emphasis on this feature of the *Erie* doctrine has unfortunate consequences, not just for decisions like *Gasperini*, but for federal procedure generally.

A further benefit of taking this approach, of course, is that it would leave resolution of the constitutional question in *Gasperini* for another day,[40] a point that leads us to the constitutional implica-

[37] See supra note 34 and accompanying text.

[38] U.S. Const. art. I, § 8, cl. 9.

[39] Guaranty Trust v. York, 326 U.S. 99, 109 (1945); see infra Section II.A.

[40] The Supreme Court avoided a similar constitutional question under the Seventh Amendment in another *Erie* case. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 n.10 (1958); see Ely, supra note 34, at 709.

tions of the decision. Does the Court's conclusion that there is no obstacle to enhanced review of jury verdicts under the Seventh Amendment undercut any reason for protecting the right to jury trial under Rule 59(a)(1)? If there is no constitutional right to jury trial at stake in *Gasperini*, why read the rule expansively in order to protect it? The answer has more to do with the way in which federal practice should change than with what the changes should be. Consider, for instance, the scope of *Gasperini* itself. The Court's decision, as already noted, sought to leave federal appellate practice unchanged, but the preservation of limited federal appellate review of jury verdicts is more apparent than real. The standard for appellate review of a *judge's* decision on a motion for new trial remains unchanged, but the effective scope of appellate review of a *jury's* verdict necessarily must change. As the grounds for granting new trials expand at the trial level, so do the grounds for affirming such rulings at the appellate level. The appellate court's power over jury verdicts expands along with the trial court's.

The untoward consequences of *Gasperini* do not stop there. Under the majority opinion, expanded review by federal trial courts apparently is available only for verdicts on claims governed by New York law (or by the similar law of any other state). Review of jury verdicts on other claims, and, in particular, on claims governed by federal law, remains subject to the literal terms of Rule 59(a)(1). But the reference of those terms has now changed, because *Gasperini* expanded the "reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[41] Do the added reasons under New York law create a new baseline for granting new trials on claims governed by federal law? This risk might appear to be based on the fanciful consequences of an overly literal reading of the rule, but a functional reading of the rule, limiting it to protecting actual rights under the Seventh Amendment, fares no better. If Rule 59(a)(1) limits motions for new trial to precisely the same extent as the Reexamination Clause, then the rule has changed in meaning along with the clause. Because *Gasperini* has reduced the scope of the Reexamination Clause, it also has arguably reduced the restrictions on granting new trials under Rule 59(a)(1).

[41] Fed. R. Civ. P. 59(a)(1).

Perhaps the risk of inflated jury verdicts is great enough to justify this change in procedure, but if so, it would have been better to accomplish it through an amendment to the rule itself. Unlike a silent departure from the literal terms of the rule, an amendment would have given everyone—judges, lawyers, and their clients—notice that the rule had changed. As the rule stands now, it is a misleading and uncertain guide to what federal practice actually is. Unfortunately, *Gasperini* was not the last case to distort a federal rule in this way.

B. Semtek International Inc. v. Lockheed Martin Corp.

The underlying preclusion question in *Semtek* was an awkward one, made more awkward by the way the Court resolved it: What is the preclusive effect of a judgment based on the expiration of the statute of limitations? Semtek sued Lockheed in state court in California, alleging an array of business torts. Lockheed removed the case to federal court on diversity grounds, and the district court then granted Lockheed's motion to dismiss the case as barred by California's two-year statute of limitations. In its dismissal order, the court expressly provided that its judgment was "'on the merits and with prejudice.'"[42] Semtek then brought the identical claims in state court in Maryland, whose three-year limitations period had not yet run. Lockheed moved to dismiss the suit as precluded by the judgment of the federal court. Semtek argued that a dismissal based on the statute of limitations did not, under California law, preclude an action on the same claims in another state with a longer limitations period. The Maryland courts rejected this argument, holding that California law was irrelevant and that the second suit was precluded because the effect of the judgment was governed by federal law and the judgment provided that it was "on the merits."[43]

The Supreme Court reversed unanimously in an opinion by Justice Scalia. Semtek argued that the case was governed by *Dupas-*

[42] Petition for Writ of Certiorari at App. 59a, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (No. 99-1551), available at 2000 WL 33979612 (quoted in *Semtek*, 531 U.S. at 499).

[43] *Semtek*, 531 U.S. at 500.

seur v. Rochereau,[44] an 1875 decision of the Court which held that state law governed the preclusive effect of a federal judgment in a diversity case. Lockheed contended that the issue was controlled by Federal Rule of Civil Procedure 41(b), which provides that a dismissal under these circumstances operates "as an adjudication upon the merits."[45] Justice Scalia, in a preliminary part of the opinion, disposed of both contentions.[46]

Dupasseur was inapplicable, he held, because it was rendered under the combined regime of the Conformity Act,[47] which required the federal courts to apply state procedures in common law cases, and under *Swift v. Tyson*,[48] which allowed federal courts to apply general common law in diversity cases. That regime was stood on its head in 1938 by the promulgation of the Federal Rules of Civil Procedure and by the decision in *Erie*, requiring federal courts to apply state substantive law in diversity cases. Rule 41(b), Justice Scalia decided, did not govern for several reasons, most prominently because the meaning of the term "adjudication upon the merits" had shifted over time and was not synonymous with full preclusive effect.[49]

Having rejected the contentions of both parties as to the controlling law, Justice Scalia then turned to the question of what law should be applied. Here, he posited that, in the absence of any constitutional or statutory provision, the preclusive effect of *any* federal judgment, regardless of the basis of the court's jurisdiction, is governed by federal common law. According to the Court, that conclusion only raised the question of the content of federal common law.[50] The Court chose, in light of *Erie* and its progeny, to look to the law of the state where the federal court that rendered the first judgment was sitting. Justice Scalia justified this choice essentially on two grounds: First, the articulation of independent federal preclusion doctrine might well give rise to forum shopping and inequity, because parties might choose between federal and state

[44] 88 U.S. (21 Wall.) 130, 135, 138 (1875).
[45] Fed. R. Civ. P. 41(b).
[46] *Semtek*, 531 U.S. at 500–06.
[47] Id. at 501; Conformity Act of 1872, ch. 255, § 6, 17 Stat. 196, 197.
[48] 41 U.S. (16 Pet.) 1 (1842).
[49] *Semtek*, 531 U.S. at 504–06.
[50] See id. at 506–08.

courts based on the desired preclusive effect of the anticipated judgment and because only parties who could invoke diversity jurisdiction could take advantage of the different rules; and second, given the command of *Erie* to apply state substantive law in diversity cases, "there is no need for a uniform federal rule."[51] The Court acknowledged, however, that a different rule would be appropriate where "state law is incompatible with federal interests."[52] It cited only one example: where the federal court dismissed for "willful violation of discovery orders."[53] Finding no such conflict with federal interests in *Semtek* itself, the Court reversed and remanded with directions to determine what preclusive effect California courts would give a judgment predicated on the statute of limitations.[54]

As even this brief summary reveals, the Court's reasoning in *Semtek* was complex, involving a number of steps, each of which could have been resolved differently, resulting in a different ultimate outcome.[55] The Court could have held that Rule 41(b) resolved the question of claim preclusion by labeling the judgment "upon the merits." Or it could have held that federal common law determined this issue without reference to state law. Or it could have held that California law on the effect of a judgment "upon the merits" was to be given priority over California law on the effect of a dismissal under the statute of limitations. No one of these steps is free of controversy or free of implications for related issues, illustrating the complexity inherent in adjusting federal and state law.[56] Yet this process of adjustment, no matter how complex, should yield rules that facilitate, rather than obstruct, the operation of a procedural system. Otherwise, the system in the course of resolving disputes generates additional disputes that themselves become the focus of litigation. Such disputes are likely to

[51] Id. at 508–09.
[52] Id. at 509.
[53] Id.
[54] See id.
[55] Professor Burbank nevertheless finds that "the Court accomplished a great deal, unanimously and in short order," in part by "suppressing the desire to maximize efficiency in adjudication." Burbank, supra note 7, at 1038. Perhaps he meant these observations to be taken ironically.
[56] See Paul J. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 802–04 (1957).

be magnified, along with their attendant costs, as the parties engage in strategic behavior to exploit the ambiguities and uncertainties inherent in the novel use of familiar terminology. As one of the leading scholars of the *Erie* doctrine observed, "much of the point of a set of procedural rules is to let people get used to and rely on the routine of doing things in a certain way."[57] This point seems to have been lost somewhere among the intricacies of the analysis in *Semtek*.

The crucial ruling in this case was the federal district court's dismissal of Semtek's claims under California law for failure to satisfy California's two-year statute of limitations. The federal district court characterized this judgment as one "on the merits and with prejudice," and neither in that court, nor on a subsequent appeal, did the defendant object to this characterization of the judgment.[58] As it eventually turned out, the district court was wrong to characterize its decision as one "on the merits" because, under California law, a dismissal under the statute of limitations has no claim-preclusive effect.[59] Instead, a dismissal on this ground bars only the refiling of the case in a California court.[60] As a corollary to this proposition, the California courts have held that such a dismissal cannot be characterized as "on the merits."[61]

If the federal district court in *Semtek* had followed California law, it would have characterized its own judgment differently, as it was allowed to do by Federal Rule 41(b). The relevant provision creates only a default rule for characterizing a judgment of dismissal. A judgment under Rule 41(b) "operates as an adjudication upon the merits," but not if "the court in its order for dismissal otherwise specifies."[62] Semtek could have sought a modification of the judgment to this effect, specifying that the dismissal was "with-

[57] Ely, supra note 34, at 730 (footnote omitted).

[58] *Semtek*, 531 U.S. at 499.

[59] Or so it was held by the Maryland trial court on remand from the Supreme Court. See Semtek Int'l Inc. v. Lockheed Martin Corp., No. 97183023/CC3762, 2002 WL 32500569, at *2 (Md. Cir. Ct. Mar. 20, 2002).

[60] See W. Coal & Mining Co. v. Jones, 167 P.2d 719, 724 (Cal. 1946).

[61] "[A] judgment not rendered on the merits does not operate as a bar." Koch v. Rodlin Enter., 273 Cal. Rptr. 438, 441 (Ct. App. 1990). This court then went on to hold that a prior action dismissed under the statute of limitations did not bar further litigation. See id.

[62] Fed. R. Civ. P. 41(b). Certain other exceptions also apply: for dismissals based on lack of jurisdiction, improper venue, or for failure to join a necessary or indispensable party.

out prejudice" to a later lawsuit in another state.[63] Semtek failed to do so, however, or to object to the contrary wording of the judgment proposed by the defendant, at trial or on appeal.

In any normal case, that would have been the end of the matter. The district court might have made a mistake in applying California law, but that would be no grounds for denying preclusive effect to its judgment. It is hornbook law, often repeated by the Supreme Court, that collateral attack is no substitute for an appeal.[64] The whole thrust of the doctrine of res judicata is to prevent reconsideration of previously entered judgments. Yet the Supreme Court in *Semtek* essentially allowed the district court's decision to enter its judgment "on the merits and with prejudice"[65] to be reconsidered and then ignored in subsequent litigation.

The essential step in the Court's reasoning was to search for, and then to exaggerate, any ambiguity in the phrase "upon the merits" in Rule 41(b). This phrase may indeed be ambiguous, but not in the way supposed by the Court. There is genuine disagreement about which judgments should be characterized as "upon the merits," but not about the preclusive effect of a judgment so characterized. Even the California cases, on which the Court ultimately relied to determine the effect of the federal judgment, equate a judgment "upon the merits" with one having full preclusive effect.[66] The cases and secondary authorities cited by the Court consider only the issue of which judgments should be deemed "upon the merits." This issue arises from the modern trend to grant full preclusive effect to judgments that are not rendered after a determination of the facts and the substantive law applicable to the underly-

[63] Rule 41(a) uses the phrase "without prejudice" as the opposite of "upon the merits" in Rule 41(b). A judgment entered under Rule 41(a) is presumed to be "without prejudice" unless specified conditions are met. Fed. R. Civ. P. 41.

[64] See, e.g., Fauntleroy v. Lum, 210 U.S. 230, 237 (1908). The Supreme Court has most frequently made this point with respect to collateral attacks on criminal convictions. See, e.g., Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment) ("It hardly bears repeating that habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials.").

[65] *Semtek*, 531 U.S. at 499.

[66] See W. Coal & Mining Co. v. Jones, 167 P.2d 719, 724 (Cal. 1946); *Koch*, 273 Cal. Rptr. at 441.

ing dispute.[67] The Court itself recognizes that dismissals based on litigation misconduct might have such preclusive effect.[68]

None of these cases, however, extends this ambiguity over which judgments are "upon the merits" to the preclusive effect of such judgments. Once a judgment is found to be "upon the merits," virtually every court to consider the issue gives it full preclusive effect. The Court, by contrast, holds that a judgment "upon the merits" bars only the refiling of the same claim in the same court.[69] The Court could not have reached this conclusion based on the commonly understood meaning of the phrase. As already noted, this was not the meaning given to the phrase by the California courts. Nor is it a usage that, so far as we have been able to determine, has been adopted anywhere else, let alone in the federal system in interpreting Rule 41(b). All the decisions we have found follow the usage of the California courts;[70] the narrow construction of the phrase "adjudication upon the merits," to the extent it has achieved any currency at all, originated in *Semtek* itself.[71]

[67] See *Semtek*, 531 U.S. at 502–03; Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n.3 (1981) (holding that dismissal for failure to state a claim is on the merits). A number of cases address the issue whether Rule 41(b) correctly identifies the judgments that are "upon the merits" and therefore entitled to full preclusive effect. See, e.g., Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 570–73 (5th Cir. 1996). Considering a prior dismissal based on forum non conveniens ("f.n.c."), the court in *Baris* held that "we cannot regard such an f.n.c. dismissal as 'on the merits' for res judicata purposes as to the entire claim." Id. at 572. The court held that such dismissals were equivalent to those for lack of venue and therefore within this exception in Rule 41(b). See id. As commentators have noted, the default provision in Rule 41(b) may be too broad in treating dismissals for forum non conveniens as an adjudication upon the merits. See 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2373 (2d ed. 1994). Note, however, that the default rule did not come into play in *Semtek* because the federal district court dismissed the plaintiff's claim "on the merits and with prejudice." 531 U.S. at 499.

[68] See *Semtek*, 531 U.S. at 509.

[69] See id. at 506.

[70] See *W. Coal & Mining Co.*, 167 P.2d at 724; *Koch*, 273 Cal. Rptr. at 441.

[71] Justice Scalia also attributes ambiguity to the contrast drawn between judgments "without prejudice" under Rule 41(a) and judgments "upon the merits" under Rule 41(b). The former do not bar relitigation of the same claim (even in the same court) and the latter are generally equated with judgments "with prejudice." From these observations, he correctly concludes that these two categories of judgments are mutually exclusive, but erroneously infers that they are also jointly exhaustive: that judgments "upon the merits" constitute all judgments that are not "without prejudice." He therefore concludes that judgments "upon the merits" need have only minimal preclusive

If the Court's search for ambiguity is more than a little strained, its motivation for going to such lengths is clear: to avoid doubts about the validity of Rule 41(b) on the ground that it affects substantive rights, and in particular, those involved with preclusion.[72] The Federal Rules, according to the Court, do not themselves determine the preclusive effect of federal judgments, which must be determined instead by federal common law. This 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, which presumably determine the preclusive effect of any resulting judgment. Moreover, this reasoning does not assure any protection of state interests because lawmaking authority still rests in the federal courts through the amorphous process of making federal common law. To be sure, at the end of the day, the Court rescues the effect of state law by adopting it as a matter of federal common law, but this reference to state law deprives it of any independent force and leaves it subject to preemption by an indefinite list of superior federal interests.

From their inception, the Federal Rules have been subject to persistent doubts about whether they can determine issues of preclusion. Yet the drafters of the Federal Rules have resolutely persisted in addressing such issues, offering an occasional disclaimer that they are actually doing so.[73] Indeed, it is hard to imagine how a comprehensive set of procedural rules can be framed without reference to preclusion. The rules of joinder and judgments, comprehensively addressed by the Federal Rules,[74] provide the necessary background for framing and applying rules of preclusion. Likewise, the rules on dismissal, such as Rule 12, the rules on sanctions for litigation misconduct, such as Rules 11 and 37, and Rule 41 itself implicate issues of preclusion. If the Federal Rules have such an intimate connection with preclusion, it may be well worth dispelling the persistent doubts about whether preclusion really is a matter of substantive rights beyond the authority of the rulemakers under the Rules Enabling Act.

effect, barring only relitigation of the same claim in the same court. *Semtek,* 531 U.S. at 505–06.

[72] Id. at 503.

[73] See, e.g., Fed. R. Civ. P. 23(c)(3) advisory committee's note.

[74] See Fed. R. Civ. P. 13–14, 17–25, 54–60.

For example, some states still do not have compulsory counterclaim rules. If a defendant in a federal diversity action in one of those states ignores Rule 13(a) and fails to assert a compulsory counterclaim, *Semtek* would allow that party to make a strong argument that the claim should not be precluded in subsequent litigation between the parties, even subsequent litigation in federal court. Of course, giving preclusive effect to a judgment compromises important rights, notably the right to notice and opportunity to be heard,[75] but it does not follow that those rights are substantive. In the usual formulation of the distinction between procedural and substantive rights, procedural rights are concerned primarily with conduct internal to litigation, as opposed to rights involving conduct outside it.[76]

Disputes over substance and procedure are perhaps interminable, even if the limitation on the rulemaking authority in the Rules Enabling Act makes them inevitable. One way to minimize their significance, exploited in *Hanna v. Plumer*, is to reframe these questions in the more tractable terms of traditional conflicts analysis by asking whether the rule can be rationally classified as procedural.[77] *Semtek* seeks to reframe the question in a different way, by narrowly interpreting Rule 41(b), but in doing so, casts doubt on the meaning and validity of other Federal Rules. The Court's reliance on federal common law complicates, rather than simplifies, the interpretation of the rules.

The Court fails to justify its authority to make federal common law in this setting, simply assuming that the effect of a federal judgment is a matter of federal law. The usual source of federal common law in its modern form is some specific act of Congress or some provision of the Constitution,[78] in order to avoid *Erie*'s condemnation of "federal general common law."[79] The Court relied on

[75] See, e.g., Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (finding notice and opportunity to be heard or adequacy of representation necessary for a proceeding to be accorded finality); Hansberry v. Lee, 311 U.S. 32, 40 (1940) (same).

[76] See Ely, supra note 34, at 724–25.

[77] 380 U.S. at 463–65.

[78] See Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 407 (1964); Henry P. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 12–14 (1975).

[79] *Erie*, 304 U.S. at 78.

neither and instead quoted one pre-*Erie* decision, *Deposit Bank v. Frankfort*,[80] only to discredit another, *Dupasseur v. Rochereau*.[81] Perhaps the Court's brief reference to the Full Faith and Credit Clause in the Constitution[82] and the implementing legislation in the full faith and credit statute[83] were meant to supply the missing justification.[84] Although the Court recognizes that neither provision directly addresses the effect of federal judgments, it might have tacitly read them to support a federal policy of giving effect to judgments according to the law of the jurisdiction in which they are rendered. The Court also refers to a book and an article that rely on the inherent authority of courts to determine the effect of their judgments and the intent of Congress, in creating the lower federal courts, to confer such authority upon them.[85] All of these arguments make the force and effect of a judgment depend upon the jurisdiction and procedures of the court that rendered the judgment, not on those of some other judicial system. To the extent that this principle supports the Court's reliance on federal common law, however, it makes the Court's ultimate reference to state law all the more puzzling.

Even if the Federal Rules do not, by themselves, determine issues of preclusion, they operate as part of a procedural system in which they provide the conditions and structure under which these issues are resolved. Federal common law should be formulated to make this system operate as smoothly and coherently as possible. The decision in *Semtek* threatens to do the opposite, raising a variety of questions about the preclusive effect of judgments entered under different rules. As suggested earlier, we think that a much simpler and more easily understood principle should be put in its

[80] 191 U.S. 499 (1903). The one case after *Erie* cited by the *Semtek* Court—and it was decided only a few months after *Erie*—goes off on the question of subject-matter jurisdiction, holding that a state court is bound by a federal court's finding of jurisdiction in determining the effect of its judgment. Stoll v. Gottlieb, 305 U.S. 165, 171–72 (1938).

[81] 88 U.S. (21 Wall.) 130 (1875).

[82] U.S. Const. art. IV, §1.

[83] 28 U.S.C. § 1738 (2000).

[84] See *Semtek*, 531 U.S. at 506–07.

[85] Id. at 508 (citing R. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 1473 (4th ed. 1996) and Ronan E. Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976)).

place: Federal judgments mean what they say, and if they say they are "upon the merits," then they operate with full preclusive effect.

This analysis does not require any appeal to amorphous "federal interests" in competition with restraints on forum shopping. Whatever relevance they have would come in at the earlier stage in the litigation, when the judgment is entered. Contrary to the Court's delphic footnote asserting that objections or appeals on this ground cannot be made so early,[86] that is exactly when they should be made. A formalist like Justice Scalia should be receptive to rules that require the judgment to be correctly framed in the first instance and to be literally interpreted thereafter. Moreover, invoking the *Erie* analysis at this earlier point creates no conflict with the Federal Rules, fully respects substantive state law, and creates no incentive to engage in forum shopping.

What has gone wrong in *Semtek* is the same thing that went wrong in *Gasperini*: an ad hoc departure from the literal terms of a Federal Rule and its commonly understood meaning, made to achieve an accommodation with some (possibly idiosyncratic) piece of potentially inconsistent state law, but resulting in untoward consequences. Pulling a few elements out of the Federal Rules and giving them exceptional treatment has implications for the entire system of federal procedure. These two decisions, taken by themselves, hardly threaten the overall integrity of the Federal Rules. Perhaps they are no worse than Justice Owen Roberts's metaphorical railroad ticket, "good for this day and train only."[87] It is nonetheless important to recognize the adverse consequences of these decisions and to stop them from spreading. The cautionary example of what has happened in the related field of conflicts of laws, where case-by-case balancing of interests has threatened to destabilize the entire field, should lead the Supreme Court to reinforce rather than retreat from a uniform interpretation of general rules of procedure. Part II examines the systemic implications of pursuing the course taken in these decisions.

[86] *Semtek*, 531 U.S. at 506 n.2.
[87] Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

II. VALIDITY OF THE FEDERAL RULES

A. Substance and Procedure

If we can still say that the *Erie* doctrine is "one of the modern cornerstones of our federalism,"[88] it is one that seems to be planted in shifting sands. In the same Term that *Erie* was decided, the Federal Rules of Civil Procedure were also promulgated, inverting the previous relationship between state and federal law in much federal litigation. Prior to 1938, the Conformity Act had dictated adherence by federal courts in actions at law to the procedural rules of the states where they sat.[89] And prior to *Erie*, the regime of *Swift v. Tyson* had permitted federal courts to ignore state law in diversity cases on substantive issues of general common law. The new regime replaced conformity with state procedure with uniform national rules, and general law with mandated adherence to state common law in diversity cases.[90] The new regime had little in common with the old, except for the fateful reliance on the distinction between "procedure" and "substance." As Justice Reed pointed out in his concurrence in *Erie*, "no one doubts federal power over procedure" in the federal courts.[91] Unfortunately, this distinction proved to be shifting and uncertain almost from the beginning.

This distinction became all the more significant because of another coincidence in timing. The decision in *Erie* was handed down the same day as *United States v. Carolene Products Co.*, with its famous dictum suggesting a heightened standard for judicial review of legislation disadvantageous to "discrete and insular minorities."[92] This dictum marked the emergence of "process theory" as a distinctive movement in American jurisprudence.[93] In constitutional law, it took the form of focusing judicial review on protecting groups who could not protect themselves through the political process.[94] Process theory focused on the way government reached

[88] *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).
[89] Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.
[90] See *Erie*, 304 U.S. at 78.
[91] Id. at 92 (Reed, J., concurring).
[92] 304 U.S. 144, 152 n.4 (1938).
[93] See Bruce Ackerman, 1 We the People: Foundations 119–29 (1991).
[94] *Carolene Products Co.*, 304 U.S. at 152 n.4.

decisions rather than with what those decisions actually were.[95] The central tenet of process theory was that courts, and particularly federal courts, were better suited to regulate procedure than substance: to remedy defects in the way in which decisions were made rather than correcting the outcome of those decisions.[96] The authority of the Supreme Court to make rules of procedure under the Rules Enabling Act, and the requirement that federal courts follow state substantive law in *Erie*, fit this theory of judicial power perfectly.

Implementing the distinction between substance and procedure was another matter. The early decisions under the *Erie* doctrine lacked any clear intellectual coherence. Burdens of proof were held to be substantive,[97] as were choice-of-law rules,[98] even though strong arguments could be made that both fell on the procedural side of the great divide. In *Guaranty Trust Co. v. York*, decided seven years after *Erie*, the Supreme Court faced the question whether statutes of limitation were substantive or procedural under the *Erie* doctrine.[99] The fact that such laws were almost universally characterized as "procedural" in other choice-of-law contexts[100] had the undesirable implication that, if federal courts were free under established equity principles to ignore state statutes of limitations, litigants with access to federal courts sitting in diversity could engage in precisely the kind of forum shopping that *Erie* condemned. Justice Frankfurter's opinion for the Court attempted to avoid this conclusion by trying to dispense entirely with the distinction between substance and procedure. He replaced it instead with a standard requiring that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules

[95] See Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy 253–55 (1992). See generally Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 143–58 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[96] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 21, 75–77 (1980).

[97] See Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 210–12 (1939).

[98] See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[99] Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945).

[100] Id. at 107–08.

determine the outcome of a litigation, as it would be if tried in a State court."[101]

His opinion, unfortunately, is subject to two opposing but mutually reinforcing misconstructions: that it did too little in some respects and too much in others. Justice Frankfurter's extended and subtle analysis of the substance-procedure distinction left some with the impression that the outcome-determinative test was just one means of drawing this distinction.[102] At the opposite extreme, the outcome-determinative test could be taken literally, as requiring federal courts in diversity cases to duplicate, to the extent possible, the outcomes that would prevail in state court.[103] If so, one might well wonder what the point was of having federal courts take these cases at all, since they would be required to act as a "ventriloquist's dummy" for state courts.[104] Both of these misconstructions, while seemingly inconsistent, combined to threaten the integrity of the Federal Rules.

The threat to the Federal Rules became apparent in *Ragan v. Merchants Transfer & Warehouse Co.*,[105] one of three cases decided soon after *Guaranty Trust*.[106] *Ragan* posed the question when a

[101] Id. at 109.

[102] See John C. McCoid II, *Hanna v. Plumer*: The *Erie* Doctrine Changes Shape, 51 Va. L. Rev. 884, 891–92 (1965) (noting the ambiguity in *Guaranty Trust*).

[103] See id. at 892–94; Ely, supra note 34, at 708–09.

[104] "When the state law is plain, the federal judge is reduced to a 'ventriloquist's dummy to the courts of some particular state.'" Henry J. Friendly, Federal Jurisdiction: A General View 142 (1973) (quoting Richardson v. Comm'r, 126 F.2d 562, 567 (2d Cir. 1942)). Even when state law is not plain, the Supreme Court for a time insisted that federal courts should follow the decisions of the lower state courts, only later holding that the decisions of state supreme courts were truly dispositive. King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 160–61 (1948).

[105] 337 U.S. 530 (1949).

[106] The other two cases also applied the outcome-determinative test in a seemingly mechanical fashion but could be justified on grounds that did not undermine federal law. One of them concerned a state "door-closing" statute that barred an out-of-state corporation from suing in state court unless it consented to be sued in state court. Woods v. Interstate Realty Co., 337 U.S. 535, 537–38 (1949). The Court applied the statute to prevent a nonconsenting corporation from invoking the diversity jurisdiction to sue in federal court, a result that seemed to give state law priority over the federal statute conferring diversity jurisdiction, 28 U.S.C. § 1332. This conflict could nevertheless properly be resolved in favor of state law because it had the same aim as federal law, which was to assure evenhanded treatment of in-state and out-of-state parties. The other case concerned a conflict between a state statute requiring security for expenses and imposing liability for such expenses on losing plaintiffs in derivative actions. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 543 (1949). That statute

statute of limitations is tolled.[107] Most statutes of limitations merely require that an action be "commenced" within a certain period after a claim arises. Federal Rule 3 provides, simply and unequivocally, that "[a] civil action is commenced by filing a complaint with the court."[108] *Ragan* was a diversity case arising in Kansas. The complaint was filed in federal court within the limitations period, but process was not served on the defendant until after the limitations period had expired, contrary to the requirements of Kansas law.[109] Despite the fact that the straightforward language of Rule 3 could not be clearer, the Supreme Court held that the federal court had to follow state practice because otherwise a recovery could be had in federal court that would be barred in state court.[110] State law was substantive both for this reason and because it was "an integral part of the Kansas statute of limitations."[111]

This reasoning is problematic because it assumes that the outcome-determinative test provides the proper standard for determining whether to apply a Federal Rule. Perhaps this mistake was understandable at the time, but it had dire consequences for the interpretation of the Federal Rules. If state law must be applied whenever it would lead to a different outcome than the rules, the rules themselves would have virtually no independent force in diversity cases (or in cases where state claims come into federal court through supplemental jurisdiction). Moreover, even if the outcome-determinative test is not given this exaggerated reading, the implications drawn by the Court for interpreting the rules threaten to distort them far beyond any fair interpretation of their meaning.

The seeds of *Gasperini* and *Semtek* thus were sown in *Ragan*, where the Court took the further step of suggesting that the timely filing of a complaint, without prior service of process, was sufficient

seemingly conflicted with the Federal Rule on derivative actions, which imposed no such requirements. See Fed. R. Civ. P. 23.1. The Federal Rule, however, did not address these issues at all and so could be fairly interpreted to be consistent with state law. See *Cohen*, 337 U.S. at 556. As we argue in the text, no such interpretation was possible in *Ragan*.

[107] See *Ragan*, 337 U.S. at 531–32.

[108] Fed. R. Civ. P. 3.

[109] See *Ragan*, 337 U.S. at 531 & n.4.

[110] See id. at 532–34.

[111] Id. at 534.

to satisfy the statute of limitations for a federal claim.[112] This suggestion later became a holding in *West v. Conrail*, which treated the issue as a self-evident matter of plain meaning under Rule 3.[113] A plaintiff who asserts a state claim, by contrast, cannot rely on the plain meaning of Rule 3 to determine whether the statute of limitations has been tolled. Parties today who rely on Rules 41(b) and 59(a)(1) face a similar situation. These rules mean what they say only with respect to federal claims.

The tension between the general applicability of the Federal Rules and case-by-case application of the outcome-determinative test led the Supreme Court to reorient the *Erie* doctrine in *Hanna v. Plumer*. In the process, the Court put a new structure in place designed to preserve the integrity of the Federal Rules. In some ways, the factual circumstances of *Hanna* resembled those of *Ragan*. Suit was brought in a federal court in Massachusetts against the administrator of an estate with jurisdiction based on diversity of citizenship.[114] Pursuant to Rule 4(d)(1) as it then read,[115] service of process was accomplished by leaving a copy of the summons and complaint at the defendant's home with his wife, a "person of suitable age and discretion."[116] Massachusetts law, however, required in-hand service upon the representative of an estate.[117] The First Circuit sustained dismissal of the complaint, and the Supreme Court reversed.[118]

Simple outcome-determinative analysis would have dictated, as in *Ragan*, the application of state law. Here, however, the Court unanimously recognized that a focus on outcome, to the exclusion of all else, proves too much.[119] Any rule at the moment of its application is potentially outcome-determinative. If *Erie* demands the application of state law whenever following even an obviously procedural federal law might change the outcome, the Federal Rules, with their hard-won national uniformity, would simply disappear in diversity cases. Moreover, as the Court took pains to point out,

[112] See id. at 533.
[113] 481 U.S. 35, 39 (1987).
[114] See *Hanna*, 380 U.S. at 461.
[115] This provision is now found in Fed. R. Civ. P. 4(e)(2).
[116] *Hanna*, 380 U.S. at 461.
[117] See id. at 461–62.
[118] See id. at 462–64.
[119] See id. at 468–69.

state law would apply even in the absence of a federal rule only if the choice of federal law would result in forum shopping and the "inequitable administration of the laws."[120]

Instead of relying on the outcome-determinative test, the Court in *Hanna* substituted a more straightforward analysis rooted in the Supremacy Clause to determine whether a federal rule applies over inconsistent state law. *Hanna* accepted the fundamental principle underlying *Erie* that, in our federal system, all law is state law unless and until displaced by some valid federal law. But, the Court reasoned, if valid federal law applies, it overrides any conflicting state law,[121] implicitly relying upon the Supremacy Clause as the fundamental unifying principle of our federal system. The Rules of Decision Act simply restates these constitutional principles by making state law binding in federal court, "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[122] Since the application of Rule 4(d)(1) was clear on the facts of *Hanna*, the only remaining question concerned its validity. This question, in turn, depended on two issues: whether the Rules Enabling Act was a constitutional exercise of congressional power "[t]o constitute Tribunals inferior to the supreme Court,"[123] and whether the rule itself transgressed the Act's requirement that the "'rules shall not abridge, enlarge or modify any substantive right.'"[124] As a practical matter, only the second of these issues was significant, since the power of Congress to legislate over federal procedure follows directly from its power to create the lower federal courts.[125] Thus, as Chief Justice Warren framed the issue in *Hanna*:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the

[120] Id. at 468.

[121] See id. at 471–73.

[122] 28 U.S.C. § 1652 (2000).

[123] U.S. Const. art I, § 8, cl. 9. See also U.S. Const. art. III, § 1 (vesting the judicial power in the Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish").

[124] *Hanna*, 380 U.S. at 463–64 (quoting the Rules Enabling Act, 28 U.S.C. § 2072 (1958)).

[125] See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

> Federal Rule, and can refuse to do so only if 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.[126]

Rule 4(d)(1) plainly passed this test because the manner of service of process was a procedural issue, concerned entirely with giving the defendant notice that an action had been filed against him.

The Court went on to distinguish *Ragan* on the ground that it did not concern how process was served but whether it was served within the statute of limitations. On the Court's view, this issue was outside the scope of Rule 3.[127] Justice Harlan, in his concurrence, disagreed with this reasoning and would have overruled *Ragan*.[128] Some lower courts also took this position, suggesting that *Ragan* had been overruled *sub silentio* in *Hanna*. Rule 3, in their view, was just as much concerned with procedure as Rule 4(d)(1).[129] If both were valid Federal Rules, then both had to be applied despite inconsistent state law.

These doubts about the vitality of *Ragan* were eventually dispelled in *Walker v. Armco Steel Corp.*,[130] a case with facts identical to those in *Ragan*: filing of the complaint within the limitation period but service of process outside it. State law was identical as well, and the Supreme Court concluded, as in *Ragan*, that it applied and Rule 3 did not. Following the suggestion in *Hanna*, the Court concluded that Rule 3 did not address the issue of when an action was commenced for purposes of the statute of limitations.[131] Otherwise, however, the Court undermined the attempt in *Hanna* to endorse broadly the validity of the Federal Rules. Instead, questions about whether a federal rule was valid were transformed into questions about whether the federal rule applied at all. In *Walker*, the Court also repeated the reservation in *Ragan* that Rule 3 might

[126] *Hanna*, 380 U.S. at 471.

[127] See id. at 470 & n.12.

[128] See id. at 476–77 (Harlan, J., concurring).

[129] See Newman v. Freeman, 262 F. Supp. 106, 110–11 (E.D. Pa. 1966); see also Chappell v. Rouch, 448 F.2d 446, 448–50 (10th Cir. 1971); Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 604–05 (2d Cir. 1968); Grabowski v. United States, 294 F. Supp. 421, 422–23 (D. Wyo. 1968); Elizabethtown Trust Co. v. Konschak, 267 F. Supp. 46, 48 (E.D. Pa. 1967); Callan v. Lillybelle, Ltd., 39 F.R.D. 600, 601–02 (S.D.N.Y. 1966).

[130] 446 U.S. 740 (1980).

[131] See id. at 750–51.

determine this issue for claims governed by federal law.[132] This dictum soon became a holding. In *West v. Conrail*,[133] a case mentioned earlier, the Court held that for federal claims, Rule 3 means exactly what it says. The action is commenced, and hence the statute of limitations is tolled, when the complaint is filed.[134]

To our minds, *West* got this issue right and *Walker* got it wrong. Most of the significant time limits under the Federal Rules, such as those for answering the complaint, run from the date of service, not the date of filing.[135] It follows that the main purpose of Rule 3 is not to set a definite starting point for time limits that run after an action is filed, but to set the end point for determining whether the statute of limitations has been satisfied. The added period for effecting service of process after filing a complaint—120 days from filing or such additional period as the district court directs[136]—would make service of process an unreliable guide for determining whether the statute of limitations has been satisfied.[137] It would also give defendants further perverse incentives to evade service of process in the hope that the statute of limitations might have run. As the Court candidly recognized, the only reason for giving Rule 3 a narrower interpretation in diversity cases was to avoid an effect on what might be characterized as state substantive rights.[138] The upshot of *Walker* and *West* is that Rule 3 means one thing for federal claims and something else—in effect, whatever state law says it should mean—for state claims. Regardless of which decision is cor-

[132] See id. at 751 n.11.

[133] 481 U.S. 35 (1987).

[134] See id. at 38–39.

[135] Fed. R. Civ. P. 12(a); see also Fed. R. Civ. P. 16(b) (scheduling pretrial conferences). The Federal Rules do not use the commencement of the action as a baseline for any time limit imposed upon the parties or the court. The closest they come is in imposing waiting periods starting from the commencement of the action for dismissals or for motions of summary judgment. See id. 17(a), 56(a). The other references to the commencement of the action refer to steps taken before or after the action was filed. See id. 13(a)(1) (creating an exception to the compulsory counterclaim rule for claims previously made); id. 14(a) (allowing filing of a third-party complaint); id. 38(b) (allowing filing a demand for jury trial); id. 64 (making remedies available from the commencement of the action); id. 71A(c)(2) (requiring joinder of defendants known at commencement of action for condemnation of property).

[136] Id. 4(m).

[137] See *West*, 481 U.S. at 38–39.

[138] See id. at 39 n.4.

rect, they cannot stand together: Either the scope of the rule covers the statute of limitation or it does not.

Exactly the same vice infects the decisions in *Gasperini* and *Semtek*. In both cases, the Court gave a federal rule an artificially narrow reading to avoid a conflict with state law on state claims but preserved a literal reading of the rule for federal claims. After *Gasperini*, federal courts in federal question cases still must follow the literal terms of Rule 59(a)(1),[139] and after *Semtek*, a federal court's dismissal of a federal claim "upon the merits" under Rule 41(b) still has full preclusive effect.[140] Narrowly interpreting the Federal Rules to avoid a conflict with state law has the deleterious consequence of making the rules themselves a disconcertingly unreliable guide to what federal procedure actually is. Sometimes it departs from the literal terms of a rule and sometimes it follows them exactly. This degree of complexity is familiar, even if it is not entirely desirable, in areas of federal law marked by profound disagreement, as noted earlier with respect to a variety of constitutional issues. Yet the *Erie* doctrine does not now, and perhaps never did, generate the same degree of controversy. Even ardent advocates of states' rights seldom attack the rulemaking process as an unjustified federal intrusion on matters reserved to the states.

Indeed, recent attacks on procedural irregularities have emphasized the vicissitudes of state law rather than federal law, and where the Federal Rules have been criticized, such as Rule 23 on class actions, the problem is not with intrusion on state substantive rights, but interference with federal policy.[141] The last major attack on the rulemaking process itself concerned the proposed Federal

[139] See Correia v. Fitzgerald, 354 F.3d 47, 54 (1st Cir. 2003); 19 Charles Alan Wright et al., Federal Practice and Procedure § 4511, at 111 & n.21.85 (2d ed. Supp. 2005).

[140] The holding in *Semtek* was explicitly limited to diversity cases, 531 U.S. at 508–09, as lower courts have recognized in interpreting the decision. See In re Bridgestone/Firestone, Tires Prods. Liab. Litig., 333 F.3d 763, 767–68 (7th Cir. 2003); Peia v. United States, 152 F. Supp. 2d 226, 234 (D. Conn. 2001); see also Matosantos Commercial Corp. v. Applebee's Int'l, 245 F.3d 1203, 1207–08 (10th Cir. 2001).

[141] See Class Action Fairness Act of 2005, § 2(a)(4), Pub. L. No. 109-2, 119 Stat. 4, 5; Multiparty, Multiforum Trial Jurisdiction Act of 2002, § 11020, Pub. L. No. 107-273, 116 Stat. 1758, 1826–27 (codified as amended at 28 U.S.C. § 1369 (Supp. 2002)). Both acts, instead of limiting federal jurisdiction, expanded it at the expense of state courts and state rules of procedure. See 28 U.S.C. §§ 1332(d), 1369, 1441(e) (2000 & Supp. 2002); see also Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (modifying requirements for lead plaintiffs in securities class actions).

Rules of Evidence and the attempt in those rules entirely to displace state evidentiary privileges.[142] The response to this controversy is instructive. It led to reconsideration and redrafting of the disputed rules themselves by Congress, not to a piecemeal process of reform through reinterpretation.[143] If less visible conflicts between the Federal Rules and state law actually call into question the validity of a federal rule, then the rule should be revised in the ordinary course of the rulemaking process. Without letting such conflicts rise to a level that prompts congressional intervention, the rulemakers should amend the rules, where necessary, to accommodate state substantive rights.

The absence of such a systematic approach to *Erie* problems remains the single largest obstacle to clarifying when state law applies to claims in federal court. Most conflicts between state and federal law are not even conceived of as *Erie* problems, but simply as routine issues under the Supremacy Clause. If the Constitution determines an issue, as it does the right to jury trial in federal court, then state law must give way.[144] So, too, federal legislation, so long as it is constitutional, has the same preemptive effect on state law,[145] as does the "new federal common law," based ultimately on the Constitution or a federal statute.[146] No one denies that the question whether federal law exists in any of these forms is often difficult or that it raises issues of federalism analogous to those under the *Erie* doctrine. Once a conflict between valid federal law and state law has been identified, however, there is no doubt that federal law prevails. At the opposite extreme, the "federal general common law" condemned in *Erie* has been eliminated as a source of substantive rights for claims based on state law.[147] That leaves conflicts between the Federal Rules and state law as the principal arena in which controversies persist under the *Erie* doctrine. The recent decisions of the Supreme Court attempt to resolve these controversies through narrow and esoteric interpretations of the

[142] See Ely, supra note 34, at 693–95.

[143] See Earl C. Dudley, Jr., Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law, 82 Geo. L.J. 1781, 1787–88, 1792–94 (1994).

[144] See Simler v. Conner, 372 U.S. 221, 222 (1963).

[145] Stewart Org. v. Ricoh Corp., 487 U.S. 22, 31–32 (1988).

[146] See Friendly, supra note 78, at 405.

[147] See text accompanying supra note 79.

Federal Rules. The question is whether a better approach is possible.

B. Validity, Interpretation, and Rulemaking

The central insight in *Hanna* is that the validity of a federal rule should be determined as a general matter, not through case-by-case reconsideration of whether in a specific context it "abridge[d], enlarge[d] or modif[ied] any substantive right."[148] This insight was implemented through a presumption in favor of the validity of the Federal Rules based on the prima facie judgment of the rulemakers that any particular federal rule conformed to the requirements of the Rules Enabling Act. This presumption at once gave effect to the congressional limitation on the rulemaking power, limiting the rules to the proper sphere of procedure in federal court, and evaluated the rules according to a general standard of validity, allowing litigants and their attorneys to rely upon them.

The principal objection to this approach, voiced by Justice Harlan in his concurring opinion in *Hanna*, is that it went too far in erecting a presumption that the rules are invariably valid: In his words, they were "arguably procedural, *ergo* constitutional."[149] As this objection has been subsequently elaborated, it depends crucially on the difference between a federal statute and a Federal Rule: A federal statute requires affirmative action by both houses of Congress while a federal rule does not. Because Congress has plenary power over the existence and jurisdiction of the federal courts, its actions regulating federal procedure need only be subject to lenient judicial review. Critics of federal statutes who object on the ground that they infringe state substantive rights have ample opportunity to block such legislation in Congress itself. Article I of the Constitution imposes the entire burden of getting Congress to act on the advocates of expanded federal power, who must obtain majorities in both houses of Congress (and supermajorities if the legislation is vetoed).[150]

By contrast, the federal rulemaking process imposes no such burden on the supporters of a federal rule, instead leaving the task

[148] Rules Enabling Act, 28 U.S.C. § 2072(b) (2000).
[149] 380 U.S. at 476 (Harlan, J., concurring).
[150] U.S. Const. art. I, § 7.

of overcoming the inertia in the federal lawmaking process to their opponents. All that is required for a federal rule to take effect is a failure by Congress to act. The actual drafting of the rules is undertaken by the Advisory Committee on Civil Rules and the Standing Committee on Federal Rules of Practice and Procedure, whose proposals are submitted for approval to the Judicial Conference and then to the Supreme Court.[151] If approved by the Court, the rules take effect after Congress has had at least seven months to consider superseding legislation.[152] In the rulemaking process, defenders of state substantive rights have no opportunity to block a proposed rule simply by preventing Congress from acting, but instead must bear the considerable burden of getting Congress to act. It is therefore necessary, according to this objection, to impose higher standards for the validity of a federal rule than for the constitutionality of a federal statute; courts must engage in enhanced judicial review to assure that the Federal Rules do not infringe upon state substantive rights contrary to the narrow delegation of rulemaking authority under the Rules Enabling Act.[153]

Though never explicitly adopted by the Court, this objection seems to have carried some weight with it, since it has shown marked ambivalence toward *Hanna*. In a purely formal sense, the Court has continued to adhere to *Hanna*'s presumption in favor of the validity of the Federal Rules. It has never found a federal rule to be invalid, either before or after that decision.[154] But this formal adherence has come at the cost of narrowly interpreting the Federal Rules on a case-by-case basis to avoid questions of validity, compromising the basic insight in *Hanna* that the validity of the rules should be evaluated as a general matter. This ambivalence has resulted in the current practice of promulgating the rules

[151] See Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 676–77 (1975).

[152] 28 U.S.C. § 2074(a) (2000).

[153] See Paul J. Mishkin, Some Further Last Words on *Erie*—The Thread, 87 Harv. L. Rev. 1682, 1687–88 (1974); see also Herbert Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 559 (1954) (noting that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states").

[154] The closest the Court came to questioning the validity of a Federal Rule was in the early decision in Sibbach v. Wilson & Co., 312 U.S. 1, 14–15 (1941).

wholesale and evaluating their validity retail, resulting in the schizophrenic interpretation that the rules have received. The rules are literally applied in most cases and distorted beyond all recognition in a few cases in which they are thought potentially to conflict with state law.

The Court exhibits a similar ambivalence over its participation in the rulemaking process. It apparently feels some reluctance to disavow its initial approval of the Federal Rules in the rulemaking process. Yet it also apparently entertains doubts about its control over that process, expressed from time to time in the dissents of individual justices from the promulgation of particular rules[155] and in one instance, by the Court's refusal to approve an entire set of proposed rules.[156] The Court certainly exercises far more complete control over its interpretation of the rules in concrete cases, where it acts in its primary role as a court under Article III of the Constitution. In the rulemaking process, its role more closely resembles supervision of the rulemaking committees in the drafting process, which itself more closely resembles legislation than adjudication. It is only a short step from looking at the application of a federal rule in a particular case to evaluating it only as it applies to the facts of that case. Moreover, in examining the rules as they are applied in particular cases, the Court can take a second look at their effect on substantive rights, especially as those vary from state to state and change over time.

There is thus no question of abolishing judicial review of the rules through adjudication. The question is how to preserve review in a form that facilitates—rather than undermines—the generality of the Federal Rules. *Hanna* sought to do so through a presumption of validity, but any general approach to this question would be superior to the ad hoc and counterintuitive interpretations that the Court now embraces. As Justice Holmes said of a statute challenged for its constitutionality, "If it is right as to the run of cases a

[155] Amendments to Rules of Civil Procedure for the U.S. Dist. Courts, 374 U.S. 861, 865–70 (1963) (Black & Douglas, JJ.) (opposing submission of these rules); Amendments to Fed. Rules of Civil Procedure, 446 U.S. 995, 997–1001 (1980) (Powell, J., dissenting); 507 U.S. 1089, 1096 (1993) (Scalia, J., dissenting).

[156] See Friedenthal, supra note 151, at 676–77; Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 466 (1993).

possible exception here and there would not make the law bad."[157] The same could—and should—be said of a challenged Federal Rule. In particular, the rules could be evaluated generally without any presumption as to their validity, at least none beyond that attached to the constitutionality of statutes or the validity of administrative regulations. These sources of law are presumed to be valid until some argument has been advanced and accepted that they are not. So, too, a presumption in favor of the validity of the Federal Rules need go no further than applying a particular rule until its invalidity has been established. At that point, however, the rule (or some severable provision within it) would be held invalid in its entirety and the task of revising the rule and narrowing its scope would be returned to the rulemaking process.[158] The middle course of interpreting the rule to avoid conflicts with state law would no longer be the preferred means, as it is now, of assuring the validity of the Federal Rules.[159]

Nor would such an all-or-nothing choice beg the question in favor of validity, in effect reaffirming the presumption in *Hanna*. While we believe that this presumption has much to be said for it, it has not led the Court to endorse the Federal Rules consistently as written. A weaker presumption would reduce the need for artificially narrow interpretations of the rules, while strengthening the argument for deferring to the results of the rulemaking process, since the rulemakers would now be forced to explicitly address more questions of validity. A genuine cost of invalidating general

[157] Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41–42 (1928) (Holmes, J., dissenting).

[158] The question of severability is separate from the question whether a rule should be evaluated "on its face" or "as applied." This distinction, which has proved problematic in constitutional law, concerns how the validity of a legal rule is determined. See Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1321–27 (2000). Severability concerns the consequences of a finding of invalidity. Even though the Federal Rules do not have a severability clause, they should be given the same presumption in favor of severability as federal statutes are given: "[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Alaska Airlines v. Brock, 480 U.S. 678, 685 (1987). Thus, if a single sentence in a complex rule, like Rule 23, were held invalid, the rest of the rule would usually remain intact.

[159] Instead, it would be available only when a rule, like a statute, is subject to a construction that is "fairly possible by which the question [of validity can] be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932).

rules is that the act of invalidation, just like the rule itself, extends over a wide range of cases. Yet, to return to the model of judicial review, the cost of declaring a statute unconstitutional has not stopped the Court from taking this step.[160] If the Court can tolerate the disruptive effect of invalidating the work of other branches of government, its own rules should be subject to similar treatment.[161]

Consider, for example, the question of the validity of Rule 3 implicitly raised in *Ragan* and *Walker*. This question, in our view, does not depend upon the scope of Rule 3, because the rule plainly covers the issue of when the statute of limitations is tolled. It depends, instead, on whether state laws requiring service of process to toll the limitation are substantive. A well-known exchange between John Hart Ely and Abram Chayes discusses this question on the facts of *Ragan*.[162] Their arguments for and against the substantive character of state law are nothing short of a virtuoso performance on how to analyze this issue on the facts of a particular case. Far from solving the general problem of distinguishing substance and procedure, however, their subtle analysis demonstrates how intractable this distinction is. Some presumption is necessary to make this distinction workable in the general run of cases for ordinary lawyers and judges. It need not be a presumption, as in *Hanna*, that Federal Rules are procedural and therefore trump state law. It could be the opposite: that state law is substantive, for instance, on the plausible view that state laws that seek to regulate conduct

[160] In only rare cases has the Court taken the extraordinary step of staying its judgment to leave a statute in effect while Congress considers amending legislation. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982). The same is true of decisions invalidating administrative regulations. See Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 294–95, 377–81 (2003) (arguing that this procedure should not be used routinely).

[161] On examination, however, the resources of federal law should be sufficient to fill any gaps created by invalidating a Federal Rule until an amendment can be promulgated. If, for instance, the Court had invalidated Rule 59(a)(1) in *Gasperini*, it would have left in place the preexisting practice of federal courts for federal claims and for state claims with no inconsistent state law. Likewise, in *Ragan*, a rule of federal common law could have been adopted, as it has been on other issues governing the administration of the statute of limitations. See Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 465 (1975).

[162] See Ely, supra note 34, at 729–32; Abram Chayes, Some Further Last Words on *Erie*: The Bead Game, 87 Harv. L. Rev. 741, 748–50 (1974); John Hart Ely, The Necklace, 87 Harv. L. Rev. 753, 756–59 (1974).

both within and outside the litigation process are substantive because of their effect on primary conduct. The statute of limitations and the rules about when it is tolled are easily justified on this categorical ground, because they determine when a plaintiff must take a dispute from primary conduct outside of court to procedural conduct inside it. In terms of the interests or purposes served by state law, the statute of limitations serves the substantive value in repose and relief from exposure to liability, while it also serves procedural values in preventing litigation on stale and unreliable evidence. On this presumption, a party arguing for the application of Rule 3 over state law would have the burden of proving that state law was wholly procedural.

Many lawyers, ourselves among them, might prefer the presumption in *Hanna*, which better serves the interests of uniformity and efficiency in the operation of the federal courts. The Supreme Court evidently does not, however, because it has twice presumed that statutes from two different states on this issue are substantive. The important point is not which presumption is adopted, but that some presumption, or other general method of analysis, is used instead of a case-by-case approach. Once it yields an answer, the consequences should be general as well. If a fair construction of the federal rule avoids the question of validity, then that construction should be applied to all cases within rule. If the rule—or a severable provision within it—is held invalid, then it should be invalid for all cases that the rule formerly covered. The federal rule of its own force should not, as is the current practice, be held valid as to federal claims and invalid as to state claims. A general method of analysis and a general finding of validity might entail some disruption of federal procedure, although we have argued that it would be no more over the short term than the current practice. It would have the singular advantage of forcing amendment of the rule onto the agenda of the rulemaking process—where it belongs.

C. Defects of a Case-by-Case Approach

The current practice of case-by-case analysis is fraught with temptations. The most frequently felt temptation—at least at the Supreme Court level—is to construe federal law narrowly to avoid a conflict with state law. That was certainly the temptation to which the Court succumbed in *Walker*, *Gasperini*, and *Semtek*. This

can have either or both of two untoward ramifications. First, decisions on questions of federal law may look very different when viewed through the prism of an effort to avert a clash with state law. One wonders, for example, whether a federal statute purporting to change the power dynamic between juries and judges in the manner of the New York statute at issue in *Gasperini* would have survived Seventh Amendment scrutiny. The other unhappy outcome is illustrated by *Walker* and *West*, where supposedly uniform federal procedural rules become two-headed monsters meaning different things depending on whether the plaintiff's claim is based on state or federal law.

A related temptation—more evident in the lower federal courts—is to do justice as the court perceives it in the individual case. This is a particular temptation on issues of choice of law, both between federal and state law and between the laws of different states. It is so apparent in the latter context that it led one scholar to formulate what he called "the better law" approach, based on the tendency of courts to select the law perceived to be better among two competing alternatives.[163] This tendency cannot be eliminated by any general standard for resolving choice of law issues, including *Erie* questions involving the Federal Rules. A degree of judgment and discretion inevitably enters into any analysis as complicated as that involving the validity of a federal rule or the precise contours of state law. After all, the common law is by design indeterminate and evolving, and precedents can almost always be distinguished.[164] Indeed, given the slim likelihood of reversal by a court of appeals on an obscure question of predicting unresolved points of state law, and the nonexistent risk that the Supreme Court will grant certiorari on such an issue, federal district courts

[163] See Robert Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 Cal. L. Rev. 1584, 1586–88 (1966); see also Lea Brilmayer, Conflict of Laws: Foundations and Future Directions 64–65 (1991).

[164] After a fumbling start in which the Supreme Court told federal courts to follow any state precedent, regardless of the level of the court that rendered the decision—what Judge Friendly called "the excesses of 311 U.S.," Friendly, supra note 78, at 400; see, e.g., Fid. Union Trust Co. v. Field, 311 U.S. 169 (1940)—the Court directed federal courts to do what a state court would do in the absence of binding precedent: predict as best they could how the state's highest court would resolve the issue. See, e.g., Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204–05 (1956).

today arguably possess greater freedom to reach desired results in diversity cases than they had under *Swift v. Tyson*.[165]

An extreme, but hardly unique, example is the decision of the Third Circuit in *McKenna v. Ortho Pharmaceutical Corp.*[166] The plaintiff had ingested a drug manufactured by the defendant, and years later received a diagnosis that her continuing serious physical debility had resulted from a defect in either the drug itself or the warnings that accompanied it. An Ohio resident, she sued in federal district court in Pennsylvania.[167] Under the Pennsylvania borrowing statute, the Ohio statute of limitations was controlling. The suit was brought long after the statute had run, if the triggering event was the plaintiff's initial purchase and ingestion of the drug. On the other hand, the suit fell within the Ohio limitations period if the statute did not begin to run until the plaintiff had discovered, or reasonably should have discovered, the cause of her condition.[168] The Ohio Supreme Court had on several occasions refused to adopt the "discovery" rule, most recently about five years before the decision in *McKenna*, on the ground that this kind of change in law was something that could be accomplished only by the Ohio legislature.[169] Nonetheless, the Third Circuit "predicted" that the Ohio Supreme Court would no longer follow its multiple precedents on this point but would instead at its next opportunity adopt the "discovery" rule. Hence Mrs. McKenna could bring a suit in federal court in Pennsylvania that would have been routinely dismissed by a state court in Ohio.[170] Observe how completely free of constraint the Third Circuit's decision was.[171] Not even under *Swift* was the authority of the federal courts so sweeping in individual cases, for it was not at all uncommon for appellate courts, including

[165] 41 U.S. (16 Pet.) 1 (1842). The last case that we have found in which the Supreme Court reversed a lower federal court solely on the ground that it incorrectly interpreted state law is *Conway v. O'Brien*, 312 U.S. 492, 496 (1941).

[166] 622 F.2d 657 (3d Cir. 1980).

[167] See id. at 658–59.

[168] See id. at 659–60.

[169] See Wyler v. Tripi, 267 N.E.2d 419, 423 (Ohio 1971).

[170] *McKenna*, 622 F.2d at 661–62.

[171] The force of this point is not diluted by the fact that the Third Circuit's decision was eventually vindicated, and that the Ohio Supreme Court did reverse itself a mere two years later and adopt the "discovery" rule without intervening legislative action. See Oliver v. Kaiser Cmty. Health Found., 449 N.E.2d 438, 439 (Ohio 1983).

the Supreme Court, to render decisions on what the general common law provided.

As this case illustrates, a federal court, whose decisions are not reviewable by the state's highest court, may feel less constrained than a state court in interpreting past state law precedents, and a party might well prefer federal court for this reason. This point brings us to the topic of forum shopping and its proper place in *Erie* analysis. Unquestionably the Court in *Erie*, and Justice Brandeis in particular, were concerned about the unfairness of giving parties who could invoke—or prevent an invocation of—the diversity jurisdiction as an advantage in the choice of substantive law to govern their cases.[172] Both Justice Brandeis and Justice Frankfurter, the author of *Guaranty Trust*, were opponents of the very existence of diversity jurisdiction, which they regularly lobbied Congress to abolish.[173] Thus the outcome-determinative test of *Guaranty Trust* was explicitly designed to eliminate any incentive to invoke the diversity jurisdiction. Justices Brandeis and Frankfurter lost the fight to get rid of the diversity jurisdiction, and sometimes the Court seems to see a threat to the *Erie* doctrine in any rule or practice that might create an incentive to litigate in federal court, without distinguishing adequately the small slice of forum-shopping behavior that *Erie* actually condemned.

Forum shopping is inevitable—and wholly proper—in a system such as ours, which often offers litigants a wide variety of courts from which to choose. It is not merely the diversity jurisdiction that creates such choices. Most, though not all, federal question cases can be brought in either state or federal court. Furthermore, under the broad personal jurisdiction doctrine of *International Shoe Co. v. Washington*[174] and its progeny,[175] many if not most cases can be brought in more than one state. Moreover, it is not only plaintiffs who can pick and choose among courts. Defendants have the right to remove to federal court many cases brought originally in state

[172] See *Erie*, 304 U.S. at 74–75.

[173] See Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: *Erie*, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America, 80–81, 144–45 (2000).

[174] 326 U.S. 310 (1945).

[175] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

court, and they may in appropriate circumstances seek transfers from one federal district to another.[176] A lawyer in this system who does not give careful consideration to the advantages that may accrue to a client from the choice of forum is simply not doing her job.

That said, *Erie* identified one fairly narrow brand of forum shopping that is inappropriate. Whatever its original rationale, the diversity jurisdiction should not be used to give those who invoke it more favorable rules of substantive law than they would have had in state court. The advantages that litigants seek to obtain through choice of forum, however, are not limited to the applicable substantive law. A civil rights plaintiff may choose a federal court in the belief that the federal system is generally more sympathetic to such claims, the majority of which are rooted in federal law. A tort plaintiff may choose a locale or choose between state and federal court based on the perception that the jury pool will be more favorable to her cause. One lawyer may choose a state court over a federal one because he knows and likes the judges, the procedural rules, or the pace of litigation there better. Another may choose federal court for precisely the converse reasons or because she thinks that the lifetime tenure of federal judges is somehow a significant consideration. Increasingly, with the growth of a nationalized bar, lawyers all around the country may choose federal courts because they understand and are familiar with the rules in those courts and wish to avoid what are sometimes arcane local practices. Congress's constant expansion of the scope of federal regulation creates a pressure to bring many cases in federal court, where the judges will be more familiar with the issues. Thus, simply because the result in a case appears likely to increase incentives on the part of some litigants to bring their cases to federal court does not mean that result should be avoided.

CONCLUSION

Decisions such as *Walker*, *Gasperini*, and *Semtek* can be seen as the product of impulses that led the Supreme Court to deemphasize the goals of uniformity and integrity of the operation of federal courts in an effort to promote compatibility with state law.

[176] 28 U.S.C. §§ 1404, 1406, 1631 (2000).

While this concern is legitimate and deserving of consideration, it compromises the entire federal court system when the Court overreacts and distorts the Federal Rules to accommodate state law. The efficient, fair, and uniform operation of the federal courts is a matter of ever-greater concern in a time of the increasing nationalization of law practice. The federal courts now handle over seven times as many diversity cases, and are staffed by over four times as many Article III judges, as when *Erie* was decided.[177] This growth in the volume of federal litigation and the size of the federal judicial system requires uniform rules applied without distortion to give clear guidance to the parties and to the judges who decide their cases. There is no magic prescription that can avoid the temptations that lead to this distortion, but at least with respect to the Federal Rules, these temptations can all be reduced by moving to a general analysis of the conflict between a rule and state substantive rights. Moreover, if a conflict is found, a general analysis should have general consequences: invalidating the federal rule (or a severable provision within it) and forcing the rulemakers to amend the rule accordingly. Without sacrificing respect for state substantive rights, this approach preserves the uniformity of practice within the federal judicial system, which, as the Supreme Court recognized several decades ago, "is an independent system for administering justice to litigants who properly invoke its jurisdiction."[178] The Federal Rules are now a distinctive and defining feature of that system. Having created the Federal Rules under the authority conferred by Congress, the Court cannot now disclaim the implications of its own commitments.

[177] See Annual Report of the Director of the Administrative Office of the United States Courts 26, 48 (1940) (listing 8938 civil cases filed in Fiscal Year 1940 based wholly or in part on diversity jurisdiction and 275 Article III judges); Judicial Facts and Figures, tbls.2.5, 4.6, http://www.uscourts.gov/judicialfactsfigures/contents.html (last visited Mar. 24, 2006) (listing 67,624 diversity cases filed in Fiscal Year 2004 and 1223 Article III judges).

[178] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958).