

WHAT IS THE *ERIE* DOCTRINE? (AND WHAT DOES  
IT MEAN FOR THE CONTEMPORARY POLITICS  
OF JUDICIAL FEDERALISM?)

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*As when Erie Railroad Co. v. Tompkins was decided seventy years ago, federal courts today are seen as more favorable to corporate and business interests than many of their state-court brethren. The current situation is due in no small part to federal courts' comparatively pro-defendant approaches to summary judgment, class certification, and other procedural issues. The Court's decision in Bell Atlantic Corp. v. Twombly, which tilts federal pleading standards in favor of defendants, will likely have similar federalism implications. This Article presents a straightforward argument that the Erie doctrine may require federal courts to follow state-law standards on summary judgment, class certification, and pleading. This argument has strong support in Supreme Court case-law and the black-letter framework for resolving Erie issues, yet it would significantly recalibrate the conventional understanding of judicial federalism in civil adjudication. Ironically, the 2005 Class Action Fairness Act (CAFA)—whose expansion of federal diversity jurisdiction over high-stakes civil litigation was a major political victory for the defense side—strengthens Erie's preference for state law, because it confirms that procedural disparities between state and federal courts cause precisely the kind of forum-shopping and inequitable treatment that Erie aims to prohibit. Because Erie is likely to play a critical role in the politically-charged arena of contemporary*

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litigation, this Article also confronts some of the broader conceptual and theoretical problems that have plagued the Erie doctrine during its first seventy years. It proposes a theory that reconciles the reasoning of Justice Brandeis' Erie opinion with the subsequent evolution of the Erie doctrine and federal judicial power generally. This Article thus provides a coherent doctrinal framework for considering the challenges Erie may face in the years to come.

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INTRODUCTION

This year marks the seventieth anniversary of *Erie Railroad Co. v. Tompkins*.<sup>1</sup> During its first seven decades, *Erie* has achieved a mythic status,<sup>2</sup> and it has been a constant subject of scholarly debate and analysis.<sup>3</sup> So profound is *Erie*'s mystique that Professor Larry Lessig coined the term "*Erie*-effect" to describe legal developments that radically transform prevailing views of institutional authority.<sup>4</sup> *Erie*'s mandate was that federal courts lack the authority to create "federal general

1 304 U.S. 64 (1938).

2 It has retained this status despite scholarly attempts to repress the myth of *Erie*. See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595 (2008). For better or worse, *Erie* remains "a key part of the rite of passage through which most of us went . . . it may have such a hold on us that we can't leave well enough alone." Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 1015 (1998). *Erie* also has quite a hold on courts; according to a recent analysis, it was the tenth-most-cited Supreme Court decision in terms of citations by federal courts and tribunals. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006).

3 See, e.g., EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000); MARTIN H. REDISH, *FEDERAL JURISDICTION* 211-46 (2d ed. 1990); Bradford R. Clark, *Erie's Constitutional Source*, 95 CAL. L. REV. 1289 (2007); Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006); Ely, *supra* note 2; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637 (1998); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19 (1995); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751 (1998); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Rowe, *supra* note 2; Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135 (2008); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

4 Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1785-86 (1997).

common law,”<sup>5</sup> an authority that the Supreme Court had endorsed nearly a century earlier in *Swift v. Tyson*.<sup>6</sup> A federal court was therefore obligated to follow Pennsylvania law, as articulated by the Pennsylvania Supreme Court, with respect to the duty of care that Erie Railroad owed to Mr. Tompkins, a “trespasser” who was injured by an Erie-operated train while walking alongside the railroad tracks.<sup>7</sup>

Our septuagenarian *Erie* finds itself in a political and judicial environment that is eerily similar to the one prevailing at its birth. Then, as now, corporate and business interests tend to favor federal court, while their political and litigation adversaries tend to favor state court.<sup>8</sup> Justice Brandeis’ ruling in *Erie* restrained a pro-corporate federal judiciary by eliminating its power to create substantive rules of federal common law, which had operated to displace state rules that were often less favorable to corporate litigants.<sup>9</sup> While *Erie* put state and federal courts on equal footing when it came to the substantive elements of the litigants’ claims and defenses, the conventional wisdom is that it did not eliminate disparities with respect to many aspects of civil procedure. These procedural disparities are at the core of the contemporary politics of judicial federalism. As compared to their state brethren, federal courts are widely perceived to be more likely to grant summary judgment against plaintiffs, less likely to certify class actions, and (if the Supreme Court’s recent decision in *Bell Atlantic Corp. v. Twombly*<sup>10</sup> is any indication) more likely to dismiss cases on the pleadings.<sup>11</sup> When it comes to high-stakes civil litigation,

5 *Erie*, 304 U.S. at 78.

6 41 U.S. (16 Pet.) 1, 19 (1842).

7 See *Erie*, 304 U.S. at 69–71, 80.

8 See PURCELL, *supra* note 3, at 1–2, 18–19 (describing how federal and state judiciaries were viewed in the years prior to *Erie*); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1528 (2008) (“[CAFA] gave new life to the view that the federal courts are ‘business men’s courts.’”); David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1260–61, 1296–1304 (2007) (comparing the “judicial preferences” of federal courts during the period prior to *Erie* and today’s federal courts).

9 One of *Erie*’s great ironies is that its corporate litigant—Erie Railroad Company—preferred state law over federal common law for that particular case. See *infra* notes 42–44 and accompanying text. Generally, the federal common law authorized by *Swift* worked to the advantage of corporate litigants. See PURCELL, *supra* note 3, at 52–55; THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE* 598 (2d ed. 2008).

10 127 S. Ct. 1955 (2007).

11 See *infra* notes 213–17 and accompanying text. This Article is the first to explore the federalism implications of *Bell Atlantic Corp. v. Twombly*. Cf. Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure*

these trends generally make federal courts more desirable for defendants, who tend to be corporate and business interests, and state courts more desirable for plaintiffs (and plaintiffs' attorneys).<sup>12</sup> This is precisely why recent expansions of federal court jurisdiction—most notably, the Class Action Fairness Act (CAFA) of 2005<sup>13</sup>—have been so controversial. CAFA is an enormous victory for the defense side because it places more class actions and other multiparty cases in federal court.<sup>14</sup>

The scholarly discourse on judicial federalism after CAFA has run the gamut. Some have argued that CAFA augurs the end of *Erie*.<sup>15</sup> On this view, CAFA's mandate that most high-stakes civil litigation should proceed in federal court leaves little place for the federalism values that *Erie* represents; federal courts should thus have the power to dictate—as a matter of federal common law—quintessentially substantive legal standards, such as the elements of claims and defenses in product liability or consumer fraud actions.<sup>16</sup> Another scholarly proposal, which is more modest but would also increase federal judicial power vis-à-vis the states, would permit the federal judiciary to develop its own horizontal choice-of-law rules for choosing which of several states' laws apply in a given case.<sup>17</sup> On the other end of the spectrum, scholars have mounted a vigorous defense of state law prerogatives, arguing on federalism grounds that CAFA's expansion of

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8(a)(2): *Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2007) (examining *Twombly* as a matter of procedural policy and consistency with precedent); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1879–84 (2008) (examining the impact of *Twombly* on the Seventh Amendment right to a jury trial).

12 See *infra* notes 280–96 and accompanying text; see also Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1529 (2005) (attributing perceptions about the federal judiciary in part to the fact that “Republicans have controlled federal judicial appointments for twenty-four of the last thirty-six years and have in general been more aggressive in nominating judges who espouse their views than have Democrats”).

13 Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

14 See *infra* note 294 for a description of CAFA's jurisdictional provisions.

15 See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415–20 (2006); Sherry, *supra* note 3, at 2135–36.

16 See *supra* note 15.

17 See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008). For almost as long as we have had *Erie*, we have had *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), which requires federal courts to use state choice-of-law rules for deciding which of several states' laws apply to a particular issue. See *id.* at 495–96.

federal court jurisdiction is unconstitutional.<sup>18</sup> This view—if accepted—would preserve a state court forum for the cases that CAFA aims to sweep into federal court, with state courts adjudicating those claims under state law procedural rules.

While these thoughtful proposals merit serious consideration, they all would require a significant departure from existing precedent. The idea that CAFA's expansion of federal diversity jurisdiction abrogates federal courts' duty to follow state law flies in the face of *Erie* itself, which rejected the idea that the mere existence of jurisdiction carries with it the power to dictate substantive legal standards.<sup>19</sup> But those who would declare CAFA's expansion of federal jurisdiction unconstitutional must confront the Supreme Court's longstanding view that federal diversity jurisdiction is constitutionally permissible when, as with CAFA, minimal diversity exists between the opposing parties.<sup>20</sup>

This Article offers an alternative response that would preserve CAFA's expansion of federal jurisdiction but insist on a greater role for state law procedural rules in federal court. Just as *Erie* required federal courts to follow state law on the duty of care that *Erie* owed Mr. Tompkins, so too may it require them to follow state law on critical aspects of civil procedure such as summary judgment, class certification, and pleading (at least in cases where the claims and defenses are governed by state law). This argument would significantly recalibrate the status quo, because disparities between state and federal approaches to civil procedure lie at the heart of contemporary views of judicial federalism. Yet, as this Article explains, the federal courts' obligation to follow state law on such ostensibly procedural

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18 See C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 507–11 (2006); C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 661–71 (2004); JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 777–78 (2004); Marcus, *supra* note 8, at 1310–13; Justin D. Forlenza, Note, *CAFA and Erie: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1098–102 (2006).

19 Indeed, CAFA's legislative history explicitly stated that the *Erie* doctrine would apply in cases subject to CAFA jurisdiction. See S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46 ("[T]he Act does not change the application of the Erie Doctrine . . ."); see also *infra* note 297 and accompanying text (noting that the language of CAFA does not alter the *Erie* doctrine and that lower courts have applied *Erie* in CAFA cases).

20 See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (upholding constitutionality of federal jurisdictional statute that "require[d] only 'minimal diversity,' that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens").

issues is supported by a straightforward application of the black letter *Erie* doctrine as it is currently understood.

Some may reject this argument out of hand. *Erie*, after all, is often described as requiring federal courts to apply state substantive law and federal procedural law.<sup>21</sup> But this quip simply reflects the tautology that state law must be applied if it is deemed “substantive” for purposes of *Erie*, and federal law is permissible only if it is deemed “procedural” for purposes of *Erie*. Making that characterization requires navigating the complicated terrain of the contemporary *Erie* doctrine.<sup>22</sup>

As an initial matter, federal approaches to summary judgment, class certification, and pleading may so profoundly impact a litigant’s ability to enforce substantive rights that they exceed the federal judiciary’s statutory authority to promulgate positive law procedural rules such as the Federal Rules of Civil Procedure.<sup>23</sup> In addition, the Supreme Court has instructed that *Erie*’s “twin aims” are the “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>24</sup> If this is so, our septuagenarian *Erie* would not approve of what the kids are up to these days. The common perception is that state courts and federal courts administer very different brands of justice when it comes to civil litigation.<sup>25</sup> This, in turn, leads to precisely the kind of forum shopping that *Erie* is supposed to forbid—plaintiffs craft lawsuits with an eye toward keeping them in state court, and defendants strive mightily to justify removal of such lawsuits

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21 See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (“Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”).

22 See *id.* (“Classification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”).

23 One aspect of the contemporary *Erie* doctrine concerns whether federal standards set forth in the Federal Rules of Civil Procedure violate the Rules Enabling Act’s command that such Rules may not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2006). Assuming that current federal approaches to summary judgment, class certification, and pleading are mandated by the Federal Rules themselves, there are strong arguments that they are invalid under this substantive-rights provision. See *infra* Part III.C.

24 *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). These twin aims govern situations where the federal standard is not compelled by federal positive law such as a Federal Rule of Civil Procedure. See *infra* notes 92–96 and accompanying text. Arguably, current federal approaches to summary judgment, class certification, and pleading are products of federal procedural common law rather than the text of the Federal Rules themselves, and thus are permissible only if they comport with *Erie*’s twin aims. See *infra* Part III.B.

25 See *infra* notes 195–225, 281–95 and accompanying text.

to federal court.<sup>26</sup> Such forum shopping was a key motivator for CAFA—Congress sought to end forum shopping by making federal court all-but-unavoidable in major class actions and other multiparty litigation.<sup>27</sup> Under *Erie*, however, such disparities are precisely what obligate federal courts to *adopt* state-court practices.

This argument is more than just academic. Because CAFA's expansion of federal jurisdiction will force cases out of the state courts that plaintiffs have come to prefer, plaintiffs and their attorneys may have a strong incentive to argue that *Erie* at least requires federal courts to follow state law practices on important aspects of civil procedure. Accordingly, *Erie* is poised to have a remarkable impact on judicial federalism in the twenty-first century. This fact makes it even more urgent to examine a number of uncertainties, incoherencies, and other problems that have plagued the *Erie* doctrine and its evolution during the last seventy years.<sup>28</sup> These puzzles include the relationship between the *Erie* doctrine and the Supreme Court's endorsement of unquestionably substantive federal common law in certain situations,<sup>29</sup> the relationship between the *Erie* decision itself (which concerned such a quintessentially substantive issue as the tort law standard of care) and the cases constituting *Erie's* so-called progeny (which principally concern the propriety of federal procedural lawmaking),<sup>30</sup> and whether the *Erie* doctrine is compelled by the Constitution, by federal statutes, or by the very federal common law that it purported to prohibit.<sup>31</sup>

26 See *infra* notes 284–95 and accompanying text.

27 See *infra* notes 293–95 and accompanying text.

28 It is not uncommon for congressional action (such as CAFA) to prompt scholarly reexamination of the *Erie* doctrine. It was Congress' scuttling of the proposed Federal Rules of Evidence thirty-five years ago (exactly half of *Erie's* current lifetime) that spurred Professor Ely to write his groundbreaking article *The Irrepressible Myth of Erie*, *supra* note 2. See *id.* at 693 (“The ones I feel sorry for are the people who paid \$150 for the cassette tapes explaining the Federal Rules of Evidence.”).

29 See *infra* Part IV.A.1. An example is the federal common law “government contractor defense” for manufacturers of federally procured products. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–13 (1988). See generally Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. REV. 585 (2006) (crafting a theory that both justifies federal courts' power to create common law and explains the courts' discretion in exercising this power).

30 See *infra* Part IV.A.2.

31 See *infra* Part IV.A.5. Justice Brandeis' opinion states unequivocally that the result in *Erie* was constitutionally compelled, see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–80 (1938), but many commentators read *Erie* as merely a reinterpretation of the Rules of Decision Act, see *infra* note 390. Others have suggested (perhaps somewhat playfully) that the holding in *Erie* was a product of federal common law. See Weinberg, *supra* note 3, at 806 (“Like that favorite of logicians, the liar who insists he



To address these and other persistent questions, this Article proposes a theory of the *Erie* doctrine that makes sense of *Erie*'s first seventy years and lays the foundation for the challenges to come. Properly understood, *Erie* sets forth a constitutional principle that federal judicial lawmaking cannot dictate substantive rights where such lawmaking has only an *adjudicative* rationale—that is, where it is justified solely on the basis that there is federal authority to adjudicate a dispute or to create procedures for such adjudication. The “fallacy”<sup>32</sup> of *Swift v. Tyson* was the idea that the mere existence of jurisdiction provided the power to impose judicially created federal law standards in derogation of state law substantive rights. A similar constitutional fallacy would occur if the mere authority to create procedural rules could override such substantive rights. Thus, *Erie* scrutinizes the relationship between the impact of a federal rule on substantive rights and the justification for that federal rule. A federal rule that interferes with substantive rights requires a justification other than the mere authority to assert federal court jurisdiction or to regulate federal court procedure.<sup>33</sup>

This core constitutional principle is the lynchpin of a broader framework for choosing between state and federal law. Orbiting *Erie* are two distinct choice-of-law problems, which this Article labels “super-*Erie*” and “sub-*Erie*.” In the first category are the Supreme Court’s contemporary federal common law cases, in which courts must decide whether there is a sufficient “‘uniquely federal interest [ ]’”<sup>34</sup> to justify federal judicial lawmaking that does override substantive rights. A “sub-*Erie*” choice-of-law question presents itself when interference with substantive rights is not threatened but a federal court might nonetheless opt to follow a state court rule. Under current law, the sub-*Erie* choice depends on the “twin aims” of discouraging forum shopping and avoiding inequitable administration of laws; the super-*Erie* choice depends on whether there is a need for nationally uniform standards or whether significant conflict exists between federal policy or interests and the operation of state law.<sup>35</sup>

This theory of *Erie* coherently resolves many of the problems that have hounded the *Erie* doctrine during its first seventy years. It recon-

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cannot speak truth, judge-made federal law tells us that judges cannot make federal law.”).

32 *Erie*, 304 U.S. at 79.

33 See *infra* notes 397–405 and accompanying text.

34 *Boyle*, 487 U.S. at 504 (quoting *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981)).

35 See *infra* notes 421–27 and accompanying text. For a chart illustrating the relationship between *Erie* and these two choice of law realms, see *infra* Part IV.B.1.

ciles the Supreme Court's contemporary federal common law cases, explains the relationship between *Erie* and its procedural progeny, and heeds Justice Brandeis' instruction that *Erie's* departure from *Swift* was compelled by constitutional principle, not merely a reinterpretation of federal statutes. This theory also bolsters this Article's argument that the contemporary *Erie* doctrine requires federal courts to follow state law on ostensibly procedural matters like summary judgment, class certification, and pleading. The Constitution itself forbids a federal approach to these issues that would override state law substantive rights, even if federal courts believe that their view is better in terms of procedural policy. Even where a federal procedural standard would not unconstitutionally interfere with substantive rights, a sub-constitutional choice of law framework (such as the Supreme Court's twin-aims test) may nonetheless require deference to state-law standards. This Article's theory of *Erie* is flexible enough, however, to allow civil adjudication to evolve in the federalizing direction that some commentators propose, such as by allowing federal courts to dictate horizontal choice of law rules or even the substantive elements of claims and defenses relating to nationally marketed goods.<sup>36</sup>

Part I of this Article summarizes the *Erie* decision itself and the *Erie* doctrine's early evolution. Part II describes the modern *Erie* doctrine, including the distinction between "guided" and "unguided" *Erie* choices and many of the important decisions applying *Erie* as it is currently understood. Part III summarizes the disparities between federal and state practice on summary judgment, class certification, and pleading. It then argues that under a straightforward application of the *Erie* doctrine, federal courts may be required to follow state court practice on these issues. Part IV examines the *Erie* doctrine from a more theoretical standpoint, highlighting some of its deeper conceptual puzzles. It then proposes a new theory of *Erie* that reconciles the actual reasoning of Justice Brandeis' *Erie* opinion with the subsequent evolution of the *Erie* doctrine and federal judicial power more generally. Finally, it considers the impact of this new understanding on some of the key challenges that federal courts will face in the years to come.

## I. *ERIE* AND ITS FIRST THIRTY YEARS

This Part describes the early years of the *Erie* doctrine. Subpart A describes the *Erie* decision itself, which celebrates its seventieth anni-

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36 See *infra* notes 441–51 and accompanying text.

versary this year. Subpart B describes how the *Erie* doctrine evolved during its first three decades.

#### A. *The Case of Erie Railroad Co. v. Tompkins*

The facts of *Erie* are familiar to most law students during their first year, even if they are promptly forgotten shortly thereafter.<sup>37</sup> Mr. Tompkins was injured in Pennsylvania by a freight train operated by the Erie Railroad Company.<sup>38</sup> He had been walking along a footpath beside the tracks and was struck by an open door projecting from one of the cars.<sup>39</sup> Mr. Tompkins then sued Erie in a federal district court, invoking federal diversity jurisdiction.<sup>40</sup> The key legal issue was the standard of care that Erie owed to Mr. Tompkins.<sup>41</sup> Erie argued that liability was governed by Pennsylvania law, and that according to the decisions of Pennsylvania's Supreme Court, Mr. Tompkins was a trespasser who could recover only if Erie acted with wanton or willful negligence (not mere negligence).<sup>42</sup> Tompkins, on the other hand, argued that a federal court was not bound by the decisions of the Pennsylvania Supreme Court on these issues.<sup>43</sup> Tompkins thus urged the federal court to determine that wanton or willful negligence was not required to establish liability.<sup>44</sup> The district court ruled for Tompkins on this issue, and he ultimately garnered a \$30,000 verdict.<sup>45</sup>

Tompkins' position relied on a principle that the Supreme Court had endorsed nearly a century earlier in *Swift v. Tyson*. Under *Swift*, "federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court."<sup>46</sup> Rather, federal courts may "exercise an independent judgment as to what the common law of the State is—or should be."<sup>47</sup> The *Swift* doctrine was based on a particular interpretation of section 34 of the Judiciary Act of 1789, also known as the Rules of Decision Act, which provides that

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37 For a more thorough account of the factual and procedural history of *Erie*, see PURCELL, *supra* note 3, at 95–114.

38 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 70.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 71 (citing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842)).

47 *Id.* (citing *Swift*, 41 U.S. (16 Pet.) at 18–19).

“[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”<sup>48</sup> The *Swift* Court had reasoned that the Rules of Decision Act required federal courts to follow only “the positive statutes of the state.”<sup>49</sup> It did not require federal courts to follow decisions by state courts on “questions of a more general nature,”<sup>50</sup> or issues for which state courts simply “ascertain upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case.”<sup>51</sup> The U.S. Supreme Court granted certiorari in *Erie* to determine “whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.”<sup>52</sup> In an opinion written by Justice Brandeis, the Court reversed the judgment for Tompkins and overruled *Swift*.<sup>53</sup>

Brandeis’ opinion in *Erie* criticized *Swift* on several grounds. He noted the work of legal historian Charles Warren, whose research suggested that *Swift* misread the intentions of the first Congress in drafting the Rules of Decision Act; according to Warren, the statute’s legislative history revealed that its drafters meant for federal courts to follow rules of decision set forth by state courts as well as state legislatures.<sup>54</sup> Brandeis also emphasized that a consequence of *Swift* was that citizens’ substantive rights would vary depending on whether a case was adjudicated in state court or federal court.<sup>55</sup> This disparity “prevented uniformity in the administration of the law of the State,”<sup>56</sup>

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48 28 U.S.C. § 1652 (2006). This quote is the current statutory language. The version in effect at the time of *Erie* was slightly different. See *Erie*, 304 U.S. at 71 (“The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.” (quoting the statute then-codified at 28 U.S.C. § 725)).

49 *Swift*, 41 U.S. (16 Pet.) at 18.

50 *Id.*

51 *Id.* at 19.

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

53 *Id.* at 80.

54 *Id.* at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

55 *Id.* at 74–75.

56 *Id.* at 75. Proponents of *Swift* had argued that federal judicial authority to determine substantive common law rules would promote national uniformity of law, because they believed that state courts would choose to conform their common law to the federal standards. See *id.* at 74 & n.7. Justice Brandeis noted that this “benefit[ ] expected to flow from the [*Swift*] rule did not accrue” because of the “[p]ersistence of state courts in their own opinions on questions of common law.” *Id.* at 74.

led to “mischievous results,”<sup>57</sup> and “rendered impossible equal protection of the law.”<sup>58</sup> Particularly troubling was the ease with which parties seeking the benefits of the federal version of common law could manipulate the existence of diversity jurisdiction.<sup>59</sup> Justice Brandeis gave as an example the notorious case of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>60</sup> where a Kentucky corporation reincorporated in Tennessee in order to manufacture diversity jurisdiction and thereby enforce in federal court a contract that would be void under the common law of Kentucky.<sup>61</sup>

Despite the strength of these critiques, Brandeis wrote that they were not sufficient grounds to overrule *Swift* and its interpretation of the Rules of Decision Act.<sup>62</sup> He stressed that “[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”<sup>63</sup> But he then explained why *Swift* was “‘an unconstitutional assumption of powers by courts of the United States’”<sup>64</sup>:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>65</sup>

The “fallacy” of *Swift* was the idea that federal courts could evade these constitutional limitations on federal power by invoking the “common law” (which Justice Holmes had earlier derided as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute”)<sup>66</sup> and then claiming for

57 *Id.* at 74.

58 *Id.* at 75.

59 *Id.*

60 276 U.S. 518 (1928).

61 *See Erie*, 304 U.S. at 73–74. Justice Brandeis noted that individual (non-corporate) litigants could manipulate diversity jurisdiction as well. *Id.* at 76 (“[I]ndividual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.”).

62 *Id.* at 77.

63 *Id.*

64 *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)); *see also id.* at 77–78 (stressing the constitutional limits placed on federal courts).

65 *Id.* at 78.

66 *Id.* (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

themselves “the power to use their judgment as to what the rules of common law are.”<sup>67</sup>

Thus, *Erie* held that a federal court must apply Pennsylvania’s liability standard in adjudicating Mr. Tompkins’ claim, even if that standard was articulated by the state’s judiciary acting as a common law court.<sup>68</sup> The *Swift* doctrine, which had allowed federal courts to do otherwise, “invaded rights which in our opinion are reserved by the Constitution to the several States.”<sup>69</sup>

### B. Early Erie Cases

The *Erie* decision left many issues unresolved. A critical question was *Erie*’s impact on federal authority to develop rules of procedure for the federal courts. This was a particularly timely concern, because only four years before *Erie*, Congress passed the Rules Enabling Act, which empowered the federal judiciary “to prescribe general rules of practice and procedure.”<sup>70</sup> In the *Erie* decision itself, this issue drew the attention of Justice Reed, who wrote a concurring opinion stressing that “no one doubts federal power over procedure.”<sup>71</sup>

In the three decades following *Erie*, the Supreme Court decided a number of cases that shaped the doctrine to which *Erie* would lend its name. One was *Guaranty Trust Co. v. York*,<sup>72</sup> which addressed whether New York’s statute of limitations was binding in a federal court action.<sup>73</sup> Justice Frankfurter’s opinion began with the then-prevailing wisdom (rooted in Justice Reed’s *Erie* concurrence) that federal courts must enforce state substantive rights, but were not required to apply state procedural rules.<sup>74</sup> He explained, however, that a crude distinction between substance and procedure was inadequate.<sup>75</sup> The proper distinction was that a federal court may disregard a state law that “concerns merely the manner and the means by which a right to recover . . . is enforced,”<sup>76</sup> but it must follow a state law that

is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be con-

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67 *Id.*

68 *Id.* at 80.

69 *Id.*

70 28 U.S.C. § 2072(a) (2006).

71 *Erie*, 304 U.S. at 92 (Reed, J., concurring).

72 326 U.S. 99 (1945).

73 *Id.* at 100–01.

74 *Id.* at 107–10.

75 *Id.* at 108.

76 *Id.* at 109.

trolling in an action upon the same claim by the same parties in a State court?<sup>77</sup>

*Guaranty Trust Co. v. York* was widely read as establishing an “outcome-determinative” test.<sup>78</sup> But the subsequent decision in *Byrd v. Blue Ridge Rural Electric Cooperative*<sup>79</sup> raised new questions about the formula for choosing between state and federal law. *Byrd* examined whether a federal court must follow South Carolina’s requirement that a judge (not a jury) determines whether a defendant is exempt from liability under South Carolina’s Workmen’s Compensation Act.<sup>80</sup> Writing for the majority, Justice Brennan held that federal courts must follow the federal practice of allowing juries to determine such issues, and his reasoning suggested a more complex analysis for applying the *Erie* doctrine.<sup>81</sup> Brennan read *Erie* as requiring federal courts to “respect the definition of state-created rights and obligations by the state courts,” as well as state rules that are “bound up with” state law substantive rights and obligations.<sup>82</sup> Like Justice Frankfurter in *Guaranty Trust Co.*, he recognized that even where a state law simply provides the “form and mode” for adjudicating state substantive rights, *Erie* requires federal courts to consider whether that law would have a substantial impact on the outcome.<sup>83</sup> But Justice Brennan explained that this effect on outcome must be balanced against the fact that “[t]he federal system is an independent system for administering justice.”<sup>84</sup> An “essential characteristic of that system,” according to Brennan, was how it “distributes trial functions between judge and jury.”<sup>85</sup> Although Brennan acknowledged the possibility that “the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury,”<sup>86</sup> he ultimately concluded that “the federal policy favoring jury decisions of disputed fact questions”<sup>87</sup> overrode *Guaranty Trust Co.*’s concern that different outcomes would be reached by federal and state courts.<sup>88</sup>

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77 *Id.*

78 *See, e.g.*, 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4504, at 26–30 (2d ed. 1996).

79 356 U.S. 525 (1958).

80 *Id.* at 533–34.

81 *Id.* at 538.

82 *Id.* at 535.

83 *Id.* at 536–37.

84 *Id.* at 537.

85 *Id.*

86 *Id.* (“[W]ere ‘outcome’ the only consideration, a strong case might appear for saying that the federal court should follow state practice.”).

87 *Id.* at 538.

88 *Id.* at 538–39.

In 1965, Chief Justice Warren handed down the Court's decision in *Hanna v. Plumer*<sup>89</sup>—arguably the most significant *Erie*-doctrine decision of the last seventy years.<sup>90</sup> *Hanna* raised the question whether service of process in a state law personal injury action was governed by Rule 4 of the Federal Rules of Civil Procedure or by state law.<sup>91</sup> Warren recognized that where, as in *Hanna*, “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.”<sup>92</sup> *Hanna* thus enshrined a bifurcated approach to *Erie* questions. In the so-called “unguided” *Erie* situation, the court's choice between state and federal law must vindicate “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>93</sup> On the other hand, where an issue “is covered by one of the Federal Rules,” the federal court must apply that Federal Rule unless the Rule violates either the Rules Enabling Act (the statutory authority for the Federal Rules) or the U.S. Constitution.<sup>94</sup> The Rules Enabling Act authorizes the Supreme Court to promulgate “general rules” prescribing the “practice and procedure” of the district courts of the United States in civil actions,<sup>95</sup> but provides that such rules “shall not abridge, enlarge or modify any substantive right.”<sup>96</sup> Warren reasoned that the principal constitutional authority for the Federal Rules is “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause).”<sup>97</sup>

Chief Justice Warren concluded that federal courts were not bound by state law service of process methods,<sup>98</sup> and he analyzed the issue using both prongs of his bifurcated approach. Warren held that the Federal Rules' service provision was a proper exercise of authority under the Rules Enabling Act and consistent with the federal government's constitutional authority.<sup>99</sup> With respect to the “twin aims” that would govern if no Federal Rule were on point, Warren held that a different federal standard would not encourage forum shopping, because insisting on the state-law standard would not “wholly bar

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89 380 U.S. 460 (1965).

90 See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (calling *Hanna* a “pathmarking case”).

91 *Hanna*, 380 U.S. at 461.

92 *Id.* at 471.

93 *Id.* at 468.

94 *Id.* at 471.

95 28 U.S.C. § 2072(a) (2006).

96 *Id.* § 2072(b).

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

98 *Id.* at 474.

99 *Id.* at 473–74.



recovery,” but rather “would have resulted only in altering the way in which process was served.”<sup>100</sup> He also concluded that the difference between state and federal service methods was not “sufficiently ‘substantial’ to raise the sort of equal protection problems to which the *Erie* opinion alluded.”<sup>101</sup>

## II. MIDDLE-AGED *ERIE*: THE MODERN *ERIE* DOCTRINE

This Part summarizes the black letter *Erie* doctrine as it is currently understood. Subpart A describes the Supreme Court’s instructions for determining which prong of *Hanna*’s bifurcated approach to the *Erie* doctrine applies to a particular issue. Subpart B summarizes the Supreme Court’s guidance for “typical, relatively unguided *Erie* choice[s],”<sup>102</sup> and Subpart C summarizes the Court’s treatment of *Erie* issues that are controlled by federal positive law such as the Federal Rules of Civil Procedure.

### A. *Guided or Unguided? Whether Federal Positive Law Governs the Issue*

The *Erie* doctrine’s threshold inquiry is which of *Hanna*’s two modes of analysis applies to a given issue. As shorthand, this Article refers to the two prongs of *Hanna* as “guided” and “unguided” *Erie* choices.<sup>103</sup> Briefly stated, a guided *Erie* choice is one where state law is potentially trumped by federal positive law that enshrines a federal law standard for resolving that same issue. Most typically, the federal standard is embodied in a true Federal Rule<sup>104</sup>—one promulgated in accordance with the Rules Enabling Act.<sup>105</sup> If the Federal Rules do

100 *Id.* at 469.

101 *Id.*

102 *Id.* at 471.

103 Other commentators have suggested different terminology to describe this distinction. Professor Rich Freer, for example, calls the guided *Erie* choice the “*Hanna* prong” and the unguided *Erie* choice the “RDA prong” (after the Rules of Decision Act). Freer, *supra* note 3, at 1637.

104 Taking a cue from Professor Ely, this Article uses the capitalized “Federal Rule” to mean a rule promulgated under the Rules Enabling Act (e.g., a Federal Rule of Civil Procedure) and the lowercase “federal rule” to mean other rules developed by the federal courts, such as by the process of adjudication and stare decisis. See Ely, *supra* note 2, at 697 n.31; see also REDISH, *supra* note 3, at 212 n.14 (using “Federal Rule” to refer to a rule promulgated under the Rules Enabling Act and “federal rule” to refer to any other rule followed in one or more federal courts); Rowe, *supra* note 2, at 970 n.30 (capitalizing in the same manner as Ely).

105 See *supra* notes 94–97 and accompanying text. An *Erie* choice might also be guided by a federal statute. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988). In such cases, federal courts must follow the federal statute on point unless it is unconstitutional. See *id.* at 27.

not dictate a federal standard for the issue at hand, the federal court must make an “unguided *Erie* choice.”<sup>106</sup> In that situation, the federal court must choose between following state law and following a judicially created federal standard that is not embodied in positive federal law such as a Federal Rule of Civil Procedure.

Because guided and unguided *Erie* choices are made according to different standards,<sup>107</sup> characterizing a particular *Erie* choice is critical. The Supreme Court’s guidance on this issue is muddled, however. It has at various times described the distinction as: whether the issue “is covered by one of the Federal Rules”;<sup>108</sup> whether there is a “‘direct collision’ between the Federal Rule and the state law”;<sup>109</sup> whether the “clash” between state law and a Federal Rule is “unavoidable”;<sup>110</sup> “whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court”;<sup>111</sup> whether following state law would “command[ ] displacement of a Federal Rule by an inconsistent state rule”;<sup>112</sup> whether the Federal Rule “leav[es] no room for the operation of [state] law”;<sup>113</sup> whether the Federal Rule and state law “can exist side by side, . . . each controlling its own intended sphere of coverage without conflict”;<sup>114</sup> and whether “the purposes underlying the [Federal] Rule are sufficiently coextensive with the asserted purposes of the [state law] to indicate that the Rule occupies the [state law’s] field of operation.”<sup>115</sup> In one decision, the Supreme Court flatly rejected the idea that Federal Rules should be construed narrowly in order to avoid possible conflicts with state law.<sup>116</sup> But a subsequent decision instructed that the scope of the Federal Rules (and their corresponding ability to displace state law)

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106 *Hanna*, 380 U.S. at 471.

107 *See supra* notes 92–97 and accompanying text; *see also Stewart Org.*, 487 U.S. at 27 & nn.5–6 (citing *Hanna*, 380 U.S. at 468, 471) (summarizing the tests for guided and unguided *Erie* choices).

108 *Hanna*, 380 U.S. at 471; *accord* *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996).

109 *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (quoting *Hanna*, 380 U.S. at 472).

110 *Hanna*, 380 U.S. at 470.

111 *Walker*, 446 U.S. at 749–50.

112 *Hanna*, 380 U.S. at 470.

113 *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

114 *Walker*, 446 U.S. at 752.

115 *Burlington*, 480 U.S. at 7.

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

should be determined “with sensitivity to important state interests and regulatory policies.”<sup>117</sup>

It is also difficult to extract meaningful guidance from the results the Supreme Court has reached in cases presenting this issue. The service of process issue in *Hanna* fell quite easily on the “guided” side of this distinction; the Federal Rules unambiguously authorized a method of service that was impermissible under Massachusetts law.<sup>118</sup> In *Walker v. Armco Steel Corp.*,<sup>119</sup> the Court confronted the more challenging question of whether Rule 3’s command that “[a] civil action is commenced by *filing* a complaint with the court”<sup>120</sup> overrode Oklahoma’s rule that mere filing of a complaint did not toll the Oklahoma statute of limitations (Oklahoma law required that a complaint be *served* on the defendant within the relevant statutory period).<sup>121</sup> The Court held that Rule 3 did not displace state law with respect to this issue, reasoning that “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”<sup>122</sup>

Just a few years later, the Court indicated that Federal Rules might pose a more significant obstacle to invoking state law in federal court. *Burlington Northern Railroad Co. v. Woods*<sup>123</sup> involved an Alabama statute providing that, when a trial court’s money judgment against a defendant is unsuccessfully appealed, the defendant must pay a penalty in the amount of ten percent of the judgment.<sup>124</sup> The defendant argued that Alabama’s mandatory ten percent penalty did not apply in federal court because Rule 38 of the Federal Rules of Appellate Procedure gave federal courts discretion to “award just damages and single or double costs” in the event of a frivolous

117 *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996); *see also id.* at 437 n.22 (noting that the Court “has continued . . . to interpret the [F]ederal [R]ules to avoid conflict with important state regulatory policies” (quoting RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 729–30 (4th ed. 1996))).

118 *See Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (“Here, of course, the clash is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that inhand service is not required in federal courts.”).

119 446 U.S. 740 (1980).

120 *Id.* at 750 (emphasis added) (quoting FED. R. CIV. P. 3).

121 *Id.* at 742–43.

122 *Id.* at 751. This holding was consistent with the Court’s pre-*Hanna* decision in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949), which had held that Kansas’ rule requiring that service occur within the limitations period was binding in federal court.

123 480 U.S. 1 (1987).

124 *Id.* at 3–4 (citing ALA. CODE § 12-22-72 (1986)).

appeal.<sup>125</sup> The Supreme Court found that the Alabama statute did not apply because the Federal Rule's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute."<sup>126</sup>

Recently, however, the Court was more reluctant to read the Federal Rules to displace state law. *Gasperini v. Center for Humanities, Inc.*<sup>127</sup> considered whether federal courts were bound by a New York statute requiring a new trial if a jury's verdict "'deviates materially from what would be reasonable compensation.'"<sup>128</sup> The plaintiff argued that Rule 59 of the Federal Rules of Civil Procedure mandated a federal standard that was more deferential to jury verdicts.<sup>129</sup> Rule 59, which empowers federal district courts to "grant a new trial . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court,"<sup>130</sup> had long been construed to allow a new trial because of excessive damages only where the jury's award "shock[s] the conscience."<sup>131</sup> The Court concluded that Rule 59 did not displace New York law on this issue: "Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York."<sup>132</sup>

Inconsistencies in the Supreme Court's case law make it difficult to confidently derive a precise test for determining whether or not an issue is "guided" by federal positive law. It remains, however, a threshold issue for proper application of the *Erie* doctrine. The next two subparts summarize the methods for choosing between state and federal law once an issue is characterized as guided or unguided.

### B. *The Unguided Erie Choice: Should Federal Courts Develop Procedural Common Law?*

Where federal practice on a particular issue is not dictated by federal positive law, a federal court faces a "typical, relatively unguided *Erie* choice."<sup>133</sup> In this situation, the court's choice is either (a) to

125 *Id.* at 4 (quoting FED. R. APP. P. 38).

126 *Id.* at 7.

127 518 U.S. 415 (1996).

128 *Id.* at 423 (quoting N.Y. C.P.L.R. 5501(c) (Consol. 2008)).

129 *Id.* at 431.

130 FED. R. CIV. P. 59(a)(1).

131 *Gasperini*, 518 U.S. at 429–30, 429 n.10.

132 *Id.* at 437 n.22.

133 *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Some commentators view "unguided *Erie* choice[s]" as wholly governed by the Rules of Decision Act, *see, e.g.*,

follow the state law on that issue, or (b) to develop what is essentially a federal common law rule to decide the issue. For the last forty years (since *Hanna*), the Supreme Court has consistently stated that such choices must be made with reference to “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>134</sup> If federal judicial lawmaking “would disserve these two policies,” then the federal court must follow state law.<sup>135</sup>

### 1. *Erie’s* Twin Aims in Action

The forty years since *Hanna* have witnessed several Supreme Court decisions applying the twin-aims test. Most recently, in *Semtek International Inc. v. Lockheed Martin Corp.*,<sup>136</sup> the Court indicated that it would contravene *Erie’s* twin aims to disregard California claim preclusion principles that would permit refiling of a lawsuit dismissed on statute of limitations grounds.<sup>137</sup> The Court was particularly troubled by the possibility that a more rigorous federal rule of preclusion might lead to forum shopping; it feared that “[o]ut-of-state defendants sued on stale claims in California . . . would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.”<sup>138</sup>

A few years earlier in *Gasperini*, the Supreme Court had applied the twin-aims test to choose between a New York law authorizing a new trial where a jury’s damage award “‘deviates materially from what

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Ely, *supra* note 2, at 707–18, 716 n.126, and even refer to this aspect of *Erie* as the “RDA prong,” Freer, *supra* note 3, at 1637. It is far from clear, however, what the Rules of Decision Act’s role is in choosing between state and federal law in this situation. See *infra* notes 433–37 and accompanying text. Accordingly, this Article uses the label provided by *Hanna* itself—the “unguided *Erie* choice”—to identify situations where federal positive law (e.g., the U.S. Constitution, a federal statute, or a Federal Rule) does not impose a particular federal standard.

134 *Hanna*, 380 U.S. at 468; see also, e.g., *Gasperini*, 518 U.S. at 428 (quoting *Hanna’s* statement regarding the twin aims of *Erie*); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (same).

135 *Stewart*, 487 U.S. at 27 n.6.

136 531 U.S. 497 (2001).

137 See *id.* at 503–04, 508–09.

138 *Id.* at 504; see also *id.* at 508–09 (“[A]ny other rule would produce the sort of ‘forum-shopping . . . and . . . inequitable administration of the laws’ that *Erie* seeks to avoid, since filing in, or removing to, federal court would be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal.” (omissions in original) (citation omitted) (quoting *Hanna*, 380 U.S. at 468)).

would be reasonable compensation,'”<sup>139</sup> and the common law federal standard allowing a new trial only if a jury’s award “shock[s] the conscience.”<sup>140</sup> The Supreme Court concluded that “New York’s check on excessive damages implicates what we have called *Erie*’s ‘twin aims,’”<sup>141</sup> because if federal courts “persist in applying the ‘shock the conscience’ test to damage awards on claims governed by New York law, “substantial” variations between state and federal [money judgments]’ may be expected.”<sup>142</sup> *Gasperini* explained that “*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”<sup>143</sup>

*Chambers v. NASCO, Inc.*<sup>144</sup> used the twin-aims test to review a federal court’s order that the defendant pay the plaintiff’s attorneys’ fees as a sanction for bad-faith conduct. The defendant argued that federal courts must follow state law on this issue, while the plaintiff maintained that federal courts could develop and apply federal standards with respect to such sanctions.<sup>145</sup> The Supreme Court found that “neither of [*Erie*’s] twin aims is implicated by the [federal court’s] assessment of attorney’s fees as a sanction for bad-faith conduct.”<sup>146</sup> Because such sanctions depend “not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation,”<sup>147</sup> the Court found that “there is no risk that the exception will lead to forum-shopping. Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed.”<sup>148</sup>

In *Walker v. Armco Steel Corp.*, the Supreme Court held that *Erie*’s twin aims did not permit federal courts to ignore a state law statute of limitations rule requiring that a complaint be served on the defendant within the relevant statutory period (rather than merely filed with the court clerk within the relevant period).<sup>149</sup> The Court was skeptical that disregarding this state rule would lead to forum shopping,<sup>150</sup> but

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139 *Gasperini*, 518 U.S. at 423 (quoting N.Y. C.P.L.R. 5501(c) (Consol. 2008)).

140 *Id.* at 429–30 & n.10.

141 *Id.* at 430.

142 *Id.* at 429–30 (alteration in original) (quoting *Hanna*, 380 U.S. at 467–68).

143 *Id.* at 431.

144 501 U.S. 32 (1991).

145 *See id.* at 51–52.

146 *Id.* at 52.

147 *Id.* at 53.

148 *Id.*

149 *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752–53 (1980).

150 *Id.* at 753 (“[I]n this case failure to apply the state service law might not create any problem of forum shopping . . . .”); *id.* at 753 n.15 (“There is no indication that

it found that failing to apply the state rule would result in inequitable administration of laws by allowing a state law claim that “concededly would be barred in the state courts by the state statute of limitations” to survive in federal court.<sup>151</sup>

## 2. Beyond *Erie*'s Twin Aims: Balancing Federal Interests?

One puzzle concerning unguided *Erie* choices is the vitality of the suggestion in *Byrd* that a federal interest in rules that are essential to the federal courts' independent system of administering justice might outweigh the concern that different rules in federal and state court would lead to different litigation outcomes.<sup>152</sup> When *Hanna* articulated *Erie*'s “twin aims” without mentioning any need to consider the federal interest in a particular rule, many believed that *Byrd* had been implicitly overruled.<sup>153</sup> And indeed, that aspect of *Byrd* was ignored by the Supreme Court for the better part of forty years.<sup>154</sup> In 1996, however, the Court's *Gasperini* decision cited *Byrd* for the notion that the “outcome-determinate” test that began with *Guaranty Trust Co. v. York* (and was refined in *Hanna*) must be balanced against “counter-vailing federal interests.”<sup>155</sup>

On closer analysis, *Gasperini*'s endorsement of *Byrd*-balancing is ambivalent at best. The New York statute at issue in *Gasperini* had two components. First, it provided that a new trial is proper if the damage

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when petitioner filed his suit in federal court he had any reason to believe that he would be unable to comply with the service requirements of Oklahoma law or that he chose to sue in federal court in an attempt to avoid those service requirements.”)

151 *Id.* at 753.

152 See *supra* notes 79–88 and accompanying text (describing *Byrd*).

153 See, e.g., REDISH, *supra* note 3, at 221 (“By attacking the lower court’s use of what amounted to a balancing test in disregard of the issue of forum shopping, the *Hanna* Court seems indirectly to have been attacking much of the *Byrd* analysis.”); Ely, *supra* note 2, at 717 n.130 (“[T]here is no place in the [*Hanna*] analysis for the sort of balancing of federal and state interests contemplated by the *Byrd* opinion.”); Arthur R. Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 714 (1967) (“[*Hanna*] [a]pparently abandoned . . . the notion derived from *Byrd* by several courts and commentators that competing state and federal practices must be balanced . . . .”); see also Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 516–17 (2005) (“In every way imaginable short of overruling the decision, the Court in *Hanna* made it clear that it did not approve of balancing.”).

154 See Rowe, *supra* note 2, at 986 (“[T]he Supreme Court never returned to *Byrd*-style balancing . . . . This treatment left *Byrd* in a puzzling limbo as a case never overruled but studiously avoided at the Supreme Court level . . . .”).

155 *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) (citing *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)).

award “deviates materially” from reasonable compensation (in contrast to the shock-the-conscience standard that had traditionally applied in federal court).<sup>156</sup> Second, it gave New York appellate courts the authority to examine damage awards de novo (in contrast to the federal appellate courts’ practice of reviewing a trial court’s ruling on a new-trial motion for abuse of discretion).<sup>157</sup> As to the first issue, *Gasperini* held that it would contravene the *Erie*’s twin aims to disregard New York’s deviates-materially standard.<sup>158</sup> If *Gasperini* had truly endorsed *Byrd*’s interest-balancing approach, one would have expected the Court then to inquire whether a “countervailing federal interest” in the shock-the-conscience standard overrode the result of the twin-aims test. But *Gasperini* never undertook such an inquiry, nor did it imply that such an inquiry was required.<sup>159</sup>

Rather, *Gasperini* cited *Byrd* only in connection with the second aspect of the New York statute—the standard that appellate courts should use to review a trial court’s ruling on a new-trial motion. Just as *Byrd* held that an “essential characteristic” of the federal system is that disputed questions of fact must be determined by the jury,<sup>160</sup> *Gasperini* held that a “characteristic of the federal court system” is that the district court decides whether a jury’s verdict is so excessive as to require a new trial, and the court of appeals may only review that decision for abuse of discretion.<sup>161</sup> Accordingly, *Gasperini* rejected the Second Circuit’s view that a federal appellate court could assess the excessiveness of a jury’s verdict de novo.<sup>162</sup> But it was never contended in *Gasperini* that New York’s vesting of de novo review in state appellate courts was outcome determinative or otherwise ran afoul of *Erie*’s twin aims. So for *Gasperini* to insist on the traditional allocation of authority among federal trial and appellate courts does not suggest

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156 *Id.* at 418–19.

157 *Id.*

158 *See supra* notes 139–43 and accompanying text.

159 *Gasperini*, 518 U.S. at 427–31 (holding that the New York excessiveness standard governed in federal court without considering *Byrd*); *see also* Freer, *supra* note 3, at 1654 (“Surprisingly . . . , the Court never mentions *Byrd* on this point.”); Rowe, *supra* note 2, at 998 (noting that as to this issue the Court “relies entirely on the *Hanna* ‘twin aims’ rendition of *Erie* and *York* and—like every other Supreme Court invocation of the ‘twin aims’ test—conspicuously omits *Byrd*”); J. Benjamin King, Note, *Clarification and Disruption: The Effect of Gasperini v. Center for Humanities, Inc. on the Erie Doctrine*, 83 CORNELL L. REV. 161, 184 (1997) (noting that as to this issue “the Court neither mentioned the federal interests nor weighed them against New York’s interest”).

160 *Gasperini*, 518 U.S. at 432 (quoting *Byrd*, 356 U.S. at 537).

161 *Id.* at 437–38.

162 *Id.* at 439.



that a federal interest in that allocation would override a disparity between state and federal law that *did* contravene *Erie*'s twin aims. Accordingly, many have read *Gasperini* not as reinvigorating *Byrd*'s consideration of "countervailing federal interests," but rather as recognizing constraints on appellate review that are imposed by the Seventh Amendment itself.<sup>163</sup>

### C. *The Guided Erie Choice: Is the Federal Positive Law Valid?*

*Hanna* made clear that federal courts must follow federal positive law as long as that law is valid.<sup>164</sup> For a judicially promulgated Federal Rule (such as a Federal Rule of Civil Procedure), a prerequisite for validity is compliance with the Rules Enabling Act.<sup>165</sup> The Rules Enabling Act provides that such rules "shall not abridge, enlarge or modify any substantive right."<sup>166</sup> This so-called substantive-rights provision is usually the most significant obstacle to the application of Federal Rules in the context of what this Article calls a "guided" *Erie* choice.<sup>167</sup>

163 *E.g.*, 19 WRIGHT ET AL., *supra* note 78, § 4511, at 321–22 (stating that *Gasperini* decided that the Seventh Amendment prohibits de novo appellate review of a jury's damage award); *see also Gasperini*, 518 U.S. at 432 ("[The Seventh Amendment] controls the allocation of authority to review verdicts, the issue of concern here."); Rowe, *supra* note 2, at 1005 ("*Gasperini* speaks at one point as if it is reaching the Seventh Amendment issue and finding it dispositive . . ."). *But see* King, *supra* note 159, at 185 ("The *Gasperini* Court never stated that the Seventh Amendment *required* the deferential abuse of discretion review . . .").

164 *See supra* notes 94–97 and accompanying text.

165 *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.5 (1988) ("Federal Rules must be measured against the statutory requirement of the Rules Enabling Act . . ."). As discussed *supra* note 105, a federal statute might also "guide" the choice between state and federal law. The Rules Enabling Act does not govern Congress' authority to enact statutes bearing on federal court procedure. *See Stewart*, 487 U.S. at 26–27.

166 28 U.S.C. § 2072(b) (2006).

167 Two other potential constraints on Federal Rules are the Constitution and the Rules Enabling Act's requirement that a Federal Rule qualify as a "general rule[ ] of practice and procedure." *Id.* § 2072(a). These limits, however, place no greater constraint on rulemaking than the Rules Enabling Act's substantive-rights provision itself. The constitutional authority for the Federal Rules derives from "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)." *Hanna*, 380 U.S. at 472. Under current case law, it would be constitutional to allow Federal Rules "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.*; *see also, e.g., Stewart*, 487 U.S. at 32 (concluding that because the contested statute is "capable of classification as a procedural rule," it "falls comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause" (emphasis added)). The Rules Enabling Act provides that even if a Federal Rule is rationally classifiable as procedural, it is invalid if it also abridges, enlarges, or

The Supreme Court has given little concrete direction on the scope of the Rules Enabling Act's substantive-rights provision. In the Court's very first Rules Enabling Act case, it rejected the idea that all "important and substantial rights" qualified as "substantive rights" that were insulated from interference by Federal Rules.<sup>168</sup> The Court has also stated that incidental effects on substantive rights do not violate the Rules Enabling Act, provided such effects are "reasonably necessary to maintain the integrity of the system of federal practice and procedure."<sup>169</sup> But it has failed to elucidate what *do* qualify as "substantive rights," or where the line is between a permissible "incidental effect" on substantive rights and an impermissible "abridge[ment], enlarge[ment] or modif[ication]"<sup>170</sup> of such rights.

For the better part of the twentieth century, Supreme Court precedent on the substantive-rights provision led many to wonder whether it provided any meaningful check on federal rulemaking.<sup>171</sup>

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modifies substantive rights. See 19 WRIGHT ET AL., *supra* note 78, § 4509, at 259–61. *But cf.* Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 855 (1974) ("[A] proper construction of the Rules Enabling Act would be that the limitations on rulemaking power . . . should be coextensive with constitutional limitations on the delegation of rulemaking power."). Similarly, the Rules Enabling Act's substantive-rights provision is generally viewed as being at least as strict (and certainly not less strict) than the Rules Enabling Act's requirement that Federal Rules be "general rules of practice and procedure." 28 U.S.C. § 2072(a); see Ely, *supra* note 2, at 719 ("Not only must a Rule be procedural; it must in addition abridge, enlarge or modify no substantive right."). Professor Burbank has made a compelling argument that the Rules Enabling Act's drafters believed that limiting rulemaking authority to "procedure" did "impose significant restrictions on court rulemaking," such that the substantive-rights provision was "surplusage." Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107–08 (1982) ("In the opinion of the [Rules Enabling Act's] draftsman . . . , the second sentence served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence."). But it has not been suggested that the requirement that Rules regulate "procedure" places a *greater* limit on the rulemaking process than the substantive-rights provision.

168 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941).

169 *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 552 (1991) (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987)).

170 28 U.S.C. § 2072(b).

171 See Paul D. Carrington, "*Substance*" and "*Procedure*" in the Rules Enabling Act, 1989 DUKE L.J. 281, 286–87 ("Inasmuch as the Supreme Court has not applied [the substantive-rights provision] to affect the outcome of a single case in the fifty years of its operative history, the sentence might be considered excess verbiage." (footnote omitted)). Indeed, some of the Court's early Rules Enabling Act cases could be read to suggest that *any* Rule that played some arguably procedural function would comply with the Rules Enabling Act's substantive-rights provision. *Accord Sibbach*, 312 U.S. at 14 (rejecting challenge to a Federal Rule because the party challenging it "admitted"

The Court has rejected Rules Enabling Act challenges to Federal Rules dictating the time for effecting service of process after a complaint is filed,<sup>172</sup> authorizing methods of serving process,<sup>173</sup> permitting suit in a particular federal district,<sup>174</sup> and empowering courts to order parties to submit to mental or physical examinations.<sup>175</sup> An important recent case is *Business Guides, Inc. v. Chromatic Communications Enterprises*,<sup>176</sup> which upheld Rule 11's authorization of monetary sanctions against a party who files documents in federal court without a reasonable inquiry into the merits of the factual and legal claims made therein.<sup>177</sup> The Court rejected the argument that such sanctions violated the Rules Enabling Act by creating an impermissible substantive tort remedy.<sup>178</sup> It reasoned that "[t]he main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses."<sup>179</sup> In *Burlington Northern Railroad Co. v. Woods*, the Court allowed the Federal Rules of Appellate Procedure to displace an Alabama law requiring defendants to pay plaintiffs an additional ten percent of the trial court judgment if they unsuccessfully challenged the judgment on appeal.<sup>180</sup> The Court explained that the Federal Rules' choice of a discretionary cost-shifting regime for frivolous appeals "affects only the process of enforcing litigants' rights and not the rights themselves."<sup>181</sup>

While these examples suggest that the Rules Enabling Act's substantive-rights provision poses minimal restrictions on federal rulemaking, more recent rulings reveal a possible change in attitude. Since the 1990s, the Supreme Court has suggested on a number of occasions that certain Federal Rules would violate the substantive-

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that the Rule "really regulates procedure"); see *Hanna*, 380 U.S. at 464. See generally Burbank, *supra* note 167, at 1028-35 (discussing *Sibbach* and *Hanna*).

172 See *Henderson v. United States*, 517 U.S. 654, 656 (1996).

173 See *Hanna*, 380 U.S. at 473-74.

174 See *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946).

175 See *Sibbach*, 312 U.S. at 13-14. The Court made clear, however, that federal courts lacked power to hold parties in contempt for failing to submit to a court-ordered mental or physical examination. See *id.* at 14, 16.

176 498 U.S. 533 (1991).

177 *Id.* at 554.

178 *Id.* at 553 ("[W]e are confident that district courts will resist the temptation to use sanctions as substitutes for tort damages.").

179 *Id.*; see also *id.* at 552 ("[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts.") (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990)).

180 See 480 U.S. 1, 3-4 (1987).

181 *Id.* at 8.

rights provision if interpreted in a particular way. In *Semtek International Inc. v. Lockheed Martin Corp.*, the defendant argued that Rule 41(b) required particular dismissals by federal district courts to have claim-preclusive effect on subsequent litigation.<sup>182</sup> The Court held that Rule 41(b) did not mandate that such dismissals be preclusive and noted that a contrary reading “would seem to violate” the substantive-rights provision if, under state law, such a dismissal would not foreclose future litigation.<sup>183</sup> In *Ortiz v. Fibreboard Corp.*,<sup>184</sup> the Court expressed concern that allowing Rule 23(b)(1)(B) to permit the certification of a massive asbestos class action with no opportunity for class members to opt out would violate the Rules Enabling Act’s substantive-rights provision.<sup>185</sup> It noted that the equitable, pro rata recoveries that would result from such a limited fund<sup>186</sup> class action were in “tension” with the “rights of individual tort victims at law.”<sup>187</sup> In *Gasperini*, the Supreme Court strongly implied that it would violate the substantive-rights provision to read Rule 59 as imposing a federal standard for determining whether a damages award is excessive.<sup>188</sup> And in *Kamen*

182 *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501 (2001).

183 *Id.* at 503–04 (“In the present case, for example, if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court’s extinguishment of that right (through Rule 41(b)’s mandated claim-preclusive effect of its judgment) would seem to violate [the Rules Enabling Act].”).

184 527 U.S. 815 (1999).

185 *See id.* at 864–65.

186 The class-certification theory pursued in *Ortiz* was that the aggregate value of asbestos claims exceeded the resources available to pay those claims, *id.* at 828–30; thus individual lawsuits could exhaust a “limited fund” and effectively prevent other claimants from collecting. *See* FED. R. CIV. P. 23(b)(1)(B) (authorizing a class action where individual lawsuits “would substantially impair or impede [class members’] ability to protect their interests”).

187 *Ortiz*, 527 U.S. at 845. Two years earlier, in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court held that Rule 23 did not permit a similarly sprawling asbestos class action, and it noted that “Rule 23’s requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’” *Id.* at 613 (quoting 28 U.S.C. § 2072(b) (2006)).

188 *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 n.22 (1996). Although the Court did not explicitly so state, it pointedly cited and quoted the substantive-rights provision after holding that New York law must govern whether a damage award is excessive:

Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York. *See* 28 U.S.C. §§ 2072(a) and (b) (“Supreme Court shall have the power to pre-

*v. Kemper Financial Services, Inc.*,<sup>189</sup> the Court stated that it would violate the substantive-rights provision to read Rule 23.1 as imposing a requirement that plaintiffs in shareholder derivative lawsuits seek relief directly from the corporation's directors before filing suit.<sup>190</sup>

For these reasons, it is difficult to glean concrete guidance on the critical question of what constitutes improper interference with substantive rights for purposes of the Rules Enabling Act. It is fair to say, however, that Supreme Court decisions in the last decade or so suggest that the substantive-rights provision may be a more robust check on federal rulemaking than it appeared to be for most of the twentieth century.

### III. DOES *ERIE* TOLERATE THE CURRENT DISPARITIES BETWEEN STATE AND FEDERAL COURT PRACTICE?

This Part examines the differences between state and federal court practice on summary judgment, class certification, and pleading. It then explains how *Erie* has the potential to upset the conventional wisdom that the party who wins the "battle of the forums" between state and federal court will reap the benefits of its preferred forum's procedural law. Just as *Erie* required federal courts to follow state law on the duty of care that *Erie* owed Mr. Tompkins, so too may it require them to follow state law on issues like summary judgment, class certification, and pleading requirements (at least in cases where the claims and defenses are governed by state law).<sup>191</sup> This Article

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scribe general rules of . . . procedure"; "[s]uch rules shall not abridge, enlarge or modify any substantive right").

*Id.* (alteration and omission in original); see also Rowe, *supra* note 2, at 996 ("[T]he Court seemed to be hinting that construing Rule 59 in such a way as to trump the state verdict-excessiveness standard just might raise a problem under the REA." (citing *Gasperini*, 518 U.S. at 437 n.22)).

189 500 U.S. 90 (1991).

190 See *id.* at 96–97 ("[T]he function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'").

191 For the most part, this argument will apply in diversity cases, whether under the general diversity jurisdiction statute, 28 U.S.C. § 1332(a) (2006), or the Class Action Fairness Act, CAFA § 4(a), 28 U.S.C. § 1332(d), but it might also apply in other cases considering claims and defenses created by state law. See ROWE, SHERRY & TIDMARSH, *supra* note 9, at 598 ("*Erie* applies to all state claims in federal court, whether brought there under diversity jurisdiction or under supplemental jurisdiction."); Rowe, *supra* note 2, at 982 n.76 ("Most of the time, of course, state law applicable under *Erie-Hanna* governs only in diversity cases or on the state-law aspects of claims in federal court under supplemental jurisdiction, because it is substantive law governing state-law claims and defenses to them."). For reasons discussed below, the

does not pretend to predict that federal courts will necessarily accept this argument.<sup>192</sup> On that score, it is wise to heed Professor Tom Rowe's caution that "confident prophecy would be rash" when forecasting the twists and turns of the *Erie* doctrine.<sup>193</sup> But the argument that federal courts should be following state law standards for summary judgment, class certification, and pleading has surprisingly strong support—strong enough that it should be playing a more significant role in contemporary debates about judicial federalism in civil litigation. From a normative standpoint, requiring federal courts to follow state law on these procedural issues may strike a sensible balance between state and federal authority in civil adjudication, while addressing both plaintiff-side and defense-side concerns about class action litigation in particular.<sup>194</sup>

A. *The Federal Judiciary's Contemporary Approaches to Summary Judgment, Class Certification, and Pleading*

The tail-end of the twentieth century and the beginning of the twenty-first century witnessed significant changes in the federal judiciary's approach to several aspects of civil procedure. One change came in 1986, when the Supreme Court decided a trio of cases known as the summary judgment trilogy.<sup>195</sup> Until that point, summary judgment

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*Erie* doctrine is best understood to apply in the federal question context as well, see *infra* Part IV.A.4, with the caveat that Congress' enactment of substantive federal legislation (which exists by definition in federal-question cases) likely gives federal courts greater lawmaking power in areas relating to that legislation. See *infra* notes 344–54, 406–08 and accompanying text.

192 See *infra* notes 307–12 and accompanying text (examining whether the federal judiciary is likely to be receptive to applying the *Erie* doctrine in this way).

193 Rowe, *supra* note 2, at 995 n.126.

194 See *infra* notes 312–24 and accompanying text.

195 These cases were *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See generally Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990) (examining the effects of the summary judgment trilogy on expanding the use of summary judgment); Arthur R. Miller, *The Pretrial Rush to Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (same); Steinman, *supra* note 2 (same). Because two of the three trilogy decisions were diversity cases (*Anderson* and *Celotex*), some have argued that those decisions answer the *Erie* question in favor of federal summary judgment standards. See *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334 (7th Cir. 1994); Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271, 310 (1994). But *Anderson* and *Celotex* do nothing of the sort. Neither case considered whether state or federal standards should apply in a diversity action, so they can hardly be read as resolving that issue.

was “an infrequently granted procedural device,”<sup>196</sup> in part because federal doctrine placed significant burdens on defendants seeking summary judgment.<sup>197</sup> The 1986 trilogy invited federal courts to relax—if not eliminate—the burdens on defendants seeking summary judgment.<sup>198</sup> Federal courts have also used the trilogy to impose increased burdens on plaintiffs opposing summary judgment, taking an ever more skeptical view of whether a plaintiff’s evidence is sufficient to justify a trial.<sup>199</sup>

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*See Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”). It is also worth noting that *Anderson* considered a summary judgment on the issue of whether the defendant in a defamation action acted with actual malice—an element that is mandated by the federal Constitution per *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See Anderson*, 477 U.S. at 247 (“Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment.”). In this sense, *Anderson* is a far cry from the typical diversity case where the claims and defenses likely to go to trial are governed purely by state law. As explained *infra* notes 406–08 and accompanying text, the presence of federal substantive law may give federal courts greater leeway to develop federal procedural standards. *See also, e.g.*, FED. R. EVID. 302 advisory committee’s note (“*Erie* . . . does not apply to a federal claim or issue, even though jurisdiction is based on diversity.”); Rothberg v. Rosenbloom, 808 F.2d 252, 259 (3d Cir. 1986) (Seitz, J., concurring) (“[T]he doctrine of *Erie Railroad v. Tompkins* is not applicable to defenses raised under federal law.” (citation omitted)). Finally, language in the *Celotex* decision arguably *supports* the idea that state law evidentiary sufficiency standards are relevant for deciding whether enough evidence exists to avoid summary judgment. *See Celotex*, 477 U.S. at 327 (noting that the lower court’s “superior knowledge of local law” made it “better suited” to determine whether the plaintiff’s evidence was sufficient to avoid summary judgment).

196 Miller, *supra* note 195, at 984.

197 *See id.* at 1021–24 (describing the federal courts’ attitude toward summary judgment prior to the 1986 summary judgment trilogy); *see also* Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 472–73 (1962) (reversing summary-judgment grant because the record does not clearly indicate “what the truth is” and lacks “conclusive evidence supporting the [defendants’] theory”).

198 *See* Issacharoff & Loewenstein, *supra* note 195, at 76–84 (discussing the impact of *Celotex*); Steinman, *supra* note 2, at 109–13 (same).

199 *See* Issacharoff & Loewenstein, *supra* note 195, at 84–87 (discussing the impact of *Anderson* and *Matsushita*); Miller, *supra* note 195, at 1041, 1057–62, 1068, 1114–17 (same). Some have argued that the federal courts’ increased willingness to find that the plaintiff’s evidence creates “no genuine issue,” FED. R. CIV. P. 56(c), amounts to improper judicial factfinding. Miller, *supra* note 195, at 1082–93; *see also* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 162–70 (1988); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 161–63 (2007).

A second important shift occurred in the mid-1990s, when federal courts began to change their attitudes toward class actions. After the 1966 amendments to Rule 23, federal courts were viewed as hospitable to class action litigation.<sup>200</sup> This was so even in controversial areas like mass tort litigation, where classwide proceedings on common issues concerning the defendant's conduct (e.g., liability, certain affirmative defenses, the propriety of punitive damages) would typically need to be followed by individualized proceedings for issues unique to each plaintiff (e.g., causation, comparative negligence, compensatory damages).<sup>201</sup> More recent decisions, however, have cast doubt on whether federal courts will permit such class actions.<sup>202</sup> In refusing to certify, federal courts have fixated on several problems, including: the fact that choice of law rules (which federal courts must borrow from the state in which the federal court sits)<sup>203</sup> may lead to different states' substantive laws applying to different class members;<sup>204</sup> the fact that individualized issues such as causation and damages will remain even after issues common to the entire class are adjudicated;<sup>205</sup> the fact that class certification would place inordinate

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200 See Morrison, *supra* note 12, at 1528.

201 See, e.g., Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (affirming certification of a class of plaintiffs with asbestos-related personal injuries); see also Landers, *supra* note 167, at 862 & n.68 (“[I]t has repeatedly been held that common questions predominate, notwithstanding individual questions on reliance, deception, or damages.”).

202 See Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *In re* Am. Med. Sys., 75 F.3d 1069 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995); see also Marcus, *supra* note 8, at 1304 (noting “a measurable change in federal class action case law since *Rhone-Poulenc*, *Castano*, and *Georgine*”).

203 See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495–96 (1941).

204 See *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002), *aff'd*, 333 F.3d 763 (7th Cir. 2003); Castano, 84 F.3d at 741–42; *Am. Med. Sys.*, 75 F.3d at 1085; *Rhone-Poulenc*, 51 F.3d at 1302; see also Issacharoff, *supra* note 17, at 1860 (noting that the “compatibility or incompatibility of varying state laws became the fault line in the battles over class certification”); Linda S. Mullenix, *GRIDLAW: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651, 656–59 (2006) (making similar observation); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1728 (2006) (same).

205 See *Bridgestone/Firestone*, 288 F.3d at 1018–20; *Georgine*, 83 F.3d at 628–30; *Castano*, 84 F.3d at 744–45; *Am. Med. Sys.*, 75 F.3d at 1080–81; *Rhone-Poulenc*, 51 F.3d at 1302–04. Many decisions raising this concern arise in the context of Rule 23(b)(3), which requires that common issues “predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). But the presence of individualized issues has also led federal courts to refuse class certification in injunction-only class



pressure on the defendants to settle;<sup>206</sup> and the fact that class certification could prevent certain legal theories from “maturing” through individual lawsuits.<sup>207</sup> Until the last decade or so, these concerns would not have been fatal to class certification in federal court.<sup>208</sup>

Another important change in federal procedural practice occurred with the Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>209</sup> Prior to that decision, it was the near-universal understanding that federal courts must assess the sufficiency of a plaintiff’s complaint without regard to whether the plaintiff had or would uncover evidence to support her allegations.<sup>210</sup> Rather, the complaint must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>211</sup> Doing so would allow the plaintiff to avoid dismissal and to use the federal discovery process to obtain evidence to support its allegations.<sup>212</sup> In *Twombly*, however, the Supreme Court dismissed an antitrust claim for failure to adequately allege the existence of an “agreement” between providers of telecommunications services.<sup>213</sup> Although the complaint alleged that such an agreement existed,<sup>214</sup> the Court found that the complaint lacked sufficient “factual allegations” that would render the existence of such an agreement “plausible.”<sup>215</sup> It was irrelevant,

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actions under Rule 23(b)(2). *See, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142–43 (3d Cir. 1998).

206 *See Bridgestone/Firestone*, 288 F.3d at 1015–16; *Castano*, 84 F.3d at 746; *Rhone-Poulenc*, 51 F.3d at 1298–99.

207 *See Castano*, 84 F.3d at 748–49; *Rhone-Poulenc*, 51 F.3d at 1299–1300.

208 *See supra* notes 200–02 and accompanying text.

209 127 S. Ct. 1955 (2007).

210 *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (“[The federal] pleading standard [is] without regard to whether a claim will succeed on the merits. ‘Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.’” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”).

211 *Conley*, 355 U.S. at 47.

212 *Swierkiewicz*, 534 U.S. at 512 (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”); *Conley*, 355 U.S. at 47 (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery . . .”).

213 *See Twombly*, 127 S. Ct. at 1961.

214 *See id.* at 1962–63 (quoting plaintiffs’ complaint).

215 *Id.* at 1965–66; *see also id.* at 1965 (“Factual allegations must be enough to raise a right to relief above the speculative level . . .”); *id.* (requiring the complaint to contain “facts that are suggestive enough to render a . . . conspiracy plausible”); *id.* at 1974 (“Because the plaintiffs here have not nudged their claims across the line from

according to the Court, that dismissal at the pleadings phase would prevent the plaintiffs from using discovery to uncover the factual and evidentiary information needed to prove their claims.<sup>216</sup> The Court's suggestion that a plaintiff must allege—prior to discovery—factual details that would make its allegations “plausible” potentially works a substantial change to the pleading standards that had traditionally applied in federal court.<sup>217</sup>

The developments of the last two decades with respect to these important aspects of civil procedure have created disparities between federal and state practice.<sup>218</sup> The conventional wisdom is that the law

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conceivable to plausible, their complaint must be dismissed.”). In the course of articulating this plausibility requirement, *Twombly* put into “retirement” the influential language from *Conley v. Gibson* that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 1968–69 (quoting *Conley*, 355 U.S. at 45–46).

216 *Id.* at 1966–67 & n.6.

217 See *supra* notes 210–13 and accompanying text. Because *Bell Atlantic Corp. v. Twombly* has been on the books for just over a year, its full impact has yet to be determined. See Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008) (conducting an empirical study of post-*Twombly* lower court rulings); see also, e.g., *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007) (“Significant ‘uncertainty as to the intended scope of the Court’s decision [in *Twombly*]’ persists, however, particularly regarding its reach beyond the antitrust context.” (alteration in original) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), cert. granted sub nom. *Ashcroft v. Hasty*, 128 S. Ct. 2931 (2008))). Some commentators have argued that *Twombly* should be confined either to antitrust cases or to cases where the plaintiff has pled itself out of court by indicating an intention to rely on a theory that is legally insufficient. See, e.g., *Ides*, *supra* note 11, at 631–32. The scope of *Twombly* is further complicated by the Supreme Court’s issuance of a *per curiam* opinion just two weeks later that suggested a return to a more liberal approach to pleading. See *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (*per curiam*). Future guidance may come from the Court’s grant of certiorari in *Ashcroft v. Iqbal*, which reviews a Second Circuit’s decision that, even in light of *Twombly*, the plaintiff had adequately pled a *Bivens* action against cabinet-level and other high-ranking federal officials. See *Iqbal*, 490 F.3d at 155–59 (discussing the impact of *Twombly* on pleading standards); Petition for Writ of Certiorari, *Ashcroft*, No. 07-1015 (Feb. 6, 2008). It cannot be doubted, however, that *Twombly* has the potential to reshape federal pleading standards in the same pro-defendant way that developments in the 1980s and 1990s reshaped summary judgment and class certification standards. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) (describing *Twombly* as “a startling move by the U.S. Supreme Court” by which “the seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a ‘plausible’ picture of liability”).

218 It is irrelevant, of course, that state court approaches to these issues are often established by judicial decisions rather than by state statutes or other positive law. See

in many state courts (compared to their federal court brethren) makes it harder for a defendant to obtain summary judgment against a plaintiff,<sup>219</sup> either by placing higher burdens on defendants seeking summary judgment<sup>220</sup> or by setting lower thresholds for what a plaintiff must do in response to a summary judgment motion.<sup>221</sup> The prevailing view is also that some states' class certification standards make it easier for plaintiffs to certify class actions in state court than in federal court.<sup>222</sup> Some states' civil procedure rules explicitly place less-

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Rowe, *supra* note 2, at 982 n.76 (noting that the *Erie* decision itself “abolish[ed] [the] distinction, for purposes of applicability of state law in federal court, between state statutory and common law”). Examples of state court decisions on these procedural issues appear *infra* at notes 220–21, 223–25.

219 See Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform,”* 39 AKRON L. REV. 909, 926 & n.70 (2006); Lind, *supra* note 18, at 769–71; Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 418–19 (1992) (describing survey data indicating that availability of summary judgment is a strong reason for defense counsel to prefer federal court).

220 See, e.g., *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994) (“Indiana’s summary judgment procedure abruptly diverges from federal summary judgment practice. Under the federal rule, the party seeking summary judgment is not required to negate an opponent’s claim. . . . Indiana does not adhere to *Celotex* and the federal methodology.”); *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (distinguishing Kentucky summary judgment practice from “the new federal summary judgment standards” imposed by *Celotex*); *Orvis v. Johnson*, 177 P.3d 600, 603–04 (Utah 2008) (distinguishing *Celotex* because “Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party’s case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact”).

221 The *Steelvest* Court, for example, distinguished “the federal summary judgment standard” from Kentucky’s standard, stating:

Under the Kentucky standard, . . . the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy. Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.

807 S.W.2d at 482 (citation omitted); see also *Parker v. Haller*, 751 P.2d 372, 376–77 (Wyo. 1988) (distinguishing the U.S. Supreme Court’s view in *Anderson v. Liberty Lobby* that “if the [resisting party’s] evidence is merely colorable or is not significantly probative, summary judgment may be granted,” and holding that “[w]e decline the invitation to weigh evidence submitted in support of and in opposition to a motion for summary judgment and continue to follow our standard of review that summary judgment is improper if there is a dispute as to a material fact”).

222 See Sue-Yun Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. CIN. L. REV. 105, 113–15 (2007); Burbank, *supra* note 8, at 1523; Miller, *supra* note 219, at 391 n.101; Morrison, *supra* note 12, at 1528. For a particularly stark example of a state that has opted for more lenient class-certification

onerous requirements on class actions than Federal Rule 23.<sup>223</sup> Other states have civil procedure rules identical to Federal Rule 23 but construe those rules to be more tolerant of class actions.<sup>224</sup> Finally,

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standards than those that prevail in federal court, see *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003). This decision held that “[a]ny question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification,” *id.* at 65, and criticized the lower court’s reliance on federal class-certification decisions:

“[A] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling.” Our reasoning for this rule is to avoid having our legal analysis of our *Rules* “amount to nothing more than Pavlovian responses to federal decisional law.”

*Id.* at 61 (quoting *Brooks v. Isinghood*, 584 S.E.2d 531, 531 (W. Va. 2003)).

223 South Carolina, for example, does not require a class action to satisfy any of the requirements imposed by Federal Rule 23(b). See S.C. R. Civ. P. 23; *Littlefield v. S.C. Forestry Comm’n*, 523 S.E.2d 781, 784 (S.C. 1999) (“Our state class action rule differs significantly from its federal counterpart. The drafters of [South Carolina’s] Rule 23 . . . intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B) . . . . By omitting the additional requirements [South Carolina’s Rule 23] . . . endorses a more expansive view of class action availability than its federal counterpart.”). The same goes for Iowa and North Dakota (which have adopted the Uniform Class Action Act); they do require that a class action will permit the fair and efficient adjudication of the controversy, but unlike Federal Rule 23(b), they do not require a separate inquiry into whether a class action is *superior* to individual adjudication. See *IOWA R. CIV. P. 1.261–1.263*; *N.D. R. CIV. P. 23*. State class certification rules are not always better for plaintiffs, however. See, e.g., *N.Y. C.P.L.R. 901(b)* (Consol. 2008) (forbidding class actions in cases seeking recovery of certain penalties and minimum recoveries imposed by statute).

224 In particular, some states construe their rules to allow class certification even though issues unique to each class member might require individualized proceedings following any class wide determination. See, e.g., *Lenders Title Co. v. Chandler*, 186 S.W.3d 695, 702 (Ark. 2004) (“[T]he mere fact that individual issues and defenses may be raised regarding the recovery of individual members cannot defeat class certification where there are common questions concerning the defendant’s alleged wrongdoing that must be resolved for all class members.”); *id.* at 704 (“The fact that there may be individual issues regarding damages does not defeat the trial court’s finding that a class action is the superior method for addressing the predominant, threshold issues that are common to the entire class.”); *BNL Equity Corp. v. Pearson*, 10 S.W.3d 838, 844 (Ark. 2000) (“The appellants raise the spectre that with the potential for individual suits splintering on issues like investor knowledge, trial of the class action could unravel and turn into a procedural nightmare. We will not speculate on this eventuality. We simply hold that at this stage there is a common issue related to the appellants’ conduct and liability that predominates over individual questions and renders a class action the superior method for litigating the matter. . . . [E]ven if the trial court eventually decides that individual claims have to splinter in bifurcated proceedings, resolution of the issue of wrongful conduct common to all class members can achieve real efficiency as a starting point.”); *Ind. Bus. Coll. v. Hollowell*, 818 N.E.2d 943, 951 (Ind. Ct. App. 2004) (“There may be some differences among class

although the full impact of *Bell Atlantic Corp. v. Twombly* on federal pleading standards remains to be seen, that decision has the potential

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members as to whether they received certain materials and when they received them; as to whether they were able to find employment and if so, how and in what area. Nevertheless, there are substantial common facts here: each class member graduated from IBC's Medical Coding program after incurring considerable expense in order to attain that graduation and having done so relying upon misrepresentations by IBC as to the program. Therefore, the trial court's conclusion that common questions of law and fact . . . predominate in this action is not an abuse of discretion." (alteration in original) (internal quotation marks omitted)); *Barnett v. Wal-Mart Stores, Inc.*, No. 55491-3-I, 2006 WL 1846531, at \*2 (Wash. Ct. App. July 3, 2006) ("Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation.'" (alteration and omission in original) (quoting *Brown v. Brown*, 492 P.2d 581, 586 (Wash. Ct. App. 1971))); *id.* at \*7 ("The fact that some individual determinations must be made does not make this case unmanageable as a class action. 'The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs.' '[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule.'" (alteration in original) (footnote omitted) (quoting 1 ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 3:12, at 315 (4th ed. 2002), then *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 280 F.3d 124, 148 (2d Cir. 2001))); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 63 P.3d 198, 204 (Wash. Ct. App. 2003) ("The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being 'whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.'" (quoting 1 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 4.01, at 4-4 (3d ed. 1992))); *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 72 ("The predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. Rather, '[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.'" (alteration in original) (citation omitted) (quoting 2 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 4:25, at 169-73 (4th ed. 2002))); *id.* at 75 ("While the management of any complex class action is likely to present a challenge, there is a myriad of management devices available to the circuit court under Rule 23. But forcing numerous plaintiffs to litigate the alleged misconduct of the defendants in hundreds or thousands of repeated individual trials, especially where a plaintiff's individual damages may be relatively small, runs counter to the very purpose of a class action: 'It must also be remembered that manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of Rule 23, including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities.'" (quoting 2 CONTE & NEWBERG, *supra*, § 4:32, at 277-78)).

to create real inconsistencies between state and federal pleading standards.<sup>225</sup> These differences beg a fundamental *Erie* question—are federal courts free to apply their distinctive approaches to summary judgment, class certification, and pleading? Or must they instead follow state law on these issues, just as *Erie* required them to follow state law on the standard of care that Erie Railroad owed to Mr. Tompkins?

*B. Do the Federal Rules “Guide” Summary Judgment, Class Certification, and Pleading Standards?*

The first step in applying the *Erie* doctrine is to determine whether federal positive law (typically a Federal Rule of Civil Procedure) provides a particular federal standard.<sup>226</sup> Many aspects of federal court procedure that plaintiffs often seek to avoid are not dictated by the text of the Federal Rules. Rather, the Rules use generalized language that is virtually devoid of meaningful content. It has been the judicial gloss on those Rules—not the Rules themselves—that has led to the pro-defendant summary judgment standards that have held sway since the 1986 trilogy, the demanding pleading standard recently suggested by *Bell Atlantic Corp. v. Twombly*, and the federal courts’ current hostility toward class actions. There is, therefore, a surprisingly strong argument that a federal court’s choice between

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<sup>225</sup> Prior to *Twombly*, many state courts used a traditional, *Conley*-based notice pleading standard that is not as strict as the plausibility-pleading standard suggested by *Twombly*. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1978 & n.5 (2007) (Stevens, J., dissenting) (noting that “26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears ‘beyond doubt’ that ‘no set of facts’ in support of the claim would entitle the plaintiff to relief” and citing cases); see also John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 315 n.172 (2001) (citing state cases); Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 701 n.146 (2002) (citing state rules of procedure). State courts have continued to use such liberal pleading standards even after *Twombly*, see, e.g., *Warren v. Medlantic Health Group, Inc.*, 936 A.2d 733, 742 (D.C. 2007); *Champagne v. Thurston County*, 178 P.3d 936, 945 (Wash. 2008), and some state courts have stated explicitly that *Twombly* would not cause them to change their states’ pleading standards. See, e.g., *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1157–58 (Colo. Ct. App. 2008); *McCurry v. Chevy Chase Bank, F.S.B.*, 193 P.3d 155, 157 (Wash. Ct. App. 2008); *Highmark W. Va., Inc. v. Jamie*, 655 S.E.2d 509, 513 n.4 (W. Va. 2007); see also *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1087–91 (Vt. 2008) (relying on longstanding state law pleading precedent despite dissent’s invocation of *Twombly*).

<sup>226</sup> See *supra* notes 105–32 and accompanying text.

state and federal law on these issues should be treated as an unguided one.

The most recent Supreme Court decision on this issue is *Gasperini v. Center for the Humanities*. The question in *Gasperini* was whether New York law governed the standard for determining whether a federal jury's damage award was so excessive as to require a new trial.<sup>227</sup> Federal Rule 59 empowers federal district courts to order a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court,"<sup>228</sup> and federal courts had read this Rule to authorize new trials where a damage award was so excessive as to "shock the conscience."<sup>229</sup> *Gasperini* held that the Federal Rules themselves did not impose the shock-the-conscience standard that had long applied in federal court: "Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York."<sup>230</sup> Accordingly, *Gasperini* rejected the idea that Rule 59 created "a federal standard for new trial motions in direct collision with, and leaving no room for the operation of, a state law like [New York's]."<sup>231</sup>

The Federal Rules' role for new-trial motions is remarkably similar to their role for pleading, summary judgment, and class certification standards. In all of these contexts, the Federal Rules condition a particular procedure on a vague standard that is described in very general language. The reasoning of *Gasperini* indicates that these generalized standards for pleading, summary judgment, and class certification "must be governed by *some law*."<sup>232</sup> And where the claim for

227 *Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 418–19 (1996).

228 FED. R. CIV. P. 59(a)(1)(A).

229 *Gasperini*, 518 U.S. at 429–30 & n.10.

230 *Id.* at 437 n.22. *Gasperini* further noted that in deciding whether the Federal Rules foreclose the application of state law, "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." *Id.* at 427 n.7.

231 *Id.* at 437 n.22 (internal quotation marks omitted).

232 *Id.* Cases where the Supreme Court has found a Federal Rule to be dispositive are quite different in this regard. For example, the Rule at issue in *Sibbach* unquestionably authorized the court to order a party to submit to a physical or mental examination, *see Sibbach v. Wilson & Co.*, 312 U.S. 1, 8 (1941) (quoting the then-current version of FED. R. CIV. P. 35); the Rule at issue in *Hanna* unquestionably authorized service of process on someone who resides at the defendant's home, *see Hanna v. Plumer*, 380 U.S. 460, 461 (1965) (quoting the then-current version of FED. R. CIV. P. 4(d)); and the Rule at issue in *Business Guides* unquestionably authorized sanctions against a party who signs a pleading or other paper without conducting a reasonable inquiry, *see Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 541–42 (1991) (quoting the then-current version of FED. R. CIV. P. 11).

relief arises under state law, *Gasperini* instructs that state law may dictate the precise contours of that standard. This is so even where federal courts have developed their own interpretation of the generalized standard set forth in the Rules, as federal courts had done with the shock-the-conscience test for excessive verdicts. This logic suggests that the federal judiciary's gloss on the Federal Rules' generalized language for pleading, summary judgment, and class certification is, for *Erie* purposes, procedural common law that is not mandated by the Rules themselves.<sup>233</sup>

Consider federal summary judgment practice. Rule 56 authorizes summary judgment upon a "show[ing] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."<sup>234</sup> But the language of Rule 56 does not dictate a particular approach to determining how a party "show[s]" that no genuine issue of material fact exists, nor does it specify any particular approach to gauging whether evidence is sufficient to create a "genuine issue" as to any given fact. *Gasperini*, therefore, indicates that the standards a federal court should use to evaluate whether a moving defendant has made the requisite "show[ing]" and whether a plaintiff's evidence is sufficient to create a "genuine issue" are not dictated by the Rules themselves. If so, whether state or federal law governs these matters should be viewed as an unguided *Erie* choice.<sup>235</sup>

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233 *Gasperini's* line between an unguided and guided *Erie* choice parallels the line between "construction" and "interpretation" of a legal text. As Professor Larry Solum articulates this distinction in the constitutional law context, *constitutional interpretation* is "the enterprise of discerning the semantic content of the constitution," and *constitutional construction* is "the activity of further specifying constitutional rules when the original public meaning of the text is vague (or underdeterminate for some other reason)." Lawrence B. Solum, *Semantic Originalism* 20 (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. The federal judiciary's current approaches to summary judgment, pleading, and class certification do not stem from "discerning the semantic content" of the Federal Rules; rather, these approaches are judicial constructions that "further specify [ ]" the procedural standards in situations where the "meaning of the [Federal Rules'] text is vague." See *id.*

234 FED. R. CIV. P. 56(c).

235 A few decisions have held that Rule 56 controls summary judgment standards in federal court and, thus, rejected the argument that state summary judgment standards should apply. See *Reinke v. O'Connell*, 790 F.2d 850, 850-51 (11th Cir. 1986); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 459 (6th Cir. 1983). These decisions predate *Gasperini* and therefore do not explicitly consider the argument presented here. It is also worth noting that even if one accepts this Article's contention that the general burdens on summary judgment movants and nonmovants present unguided *Erie* choices, other aspects of Rule 56 might not. See, e.g., *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 981-82 (C.D. Cal. 1999) (holding that the provision in



Federal pleading standards are similar in this regard. The Rules require that a plaintiff's complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief";<sup>236</sup> the Rules then authorize dismissal of a lawsuit where the complaint "fail[s] to state a claim upon which relief can be granted."<sup>237</sup> *Gasperini* again indicates that the standard a federal court should use to evaluate whether a plaintiff has made the necessary "short and plain statement" is not dictated by the Rules themselves. Accordingly, the applicability of state law pleading standards should be treated as an unguided *Erie* choice, even if federal courts (as the Supreme Court arguably did in *Twombly*) develop particular approaches to pleading within the rubric of the Federal Rules.<sup>238</sup>

Finally, class certification may also present an unguided *Erie* choice. Many of today's most controversial class actions arise under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>239</sup> In the last decade or so, federal courts have applied these requirements to create significant if not insurmountable barriers to certain kinds of class actions.<sup>240</sup> But whether common issues "predominate" and

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California's "anti-SLAPP statute" allowing pre-discovery motions to dismiss for lack of sufficient evidence conflicted with Rule 56(f)'s provision that summary judgment rulings be postponed until there has been adequate opportunity for discovery).

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

237 FED. R. CIV. P. 12(b)(6).

238 Prior to *Twombly*, federal courts were occasionally called upon to consider whether they must adhere to state law pleading requirements that were *more* rigorous than the federal standards that prevailed at the time. Although federal courts often found that higher state law pleading standards were in direct conflict with Federal Rule 8, *e.g.*, *Tu v. UCSD Med. Ctr.*, 201 F. Supp. 2d 1126, 1130 (S.D. Cal. 2002), the typical rationale was that "Rule 8(a) requires *only* . . . a short and plain statement of the claim," *id.* (emphasis added) (internal quotation marks omitted). Thus, there is a strong argument that a state-law heightened pleading standard directly flouts Rule 8(a)'s "short and plain statement" threshold. By contrast, *Twombly*'s decision to require "further factual enhancement," *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007), is not explicitly mandated by Rule 8(a)(2). It would be ironic indeed if state pleading standards that are fully consistent with the pre-*Twombly* federal approach to Rule 8 are today found to be in direct conflict with that very same Rule.

239 FED. R. CIV. P. 23(b)(3).

240 See *supra* notes 202–08 and accompanying text; see also Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76, 1479 n.17 (2005) (noting that "Rule 23(b)(3) is the reef upon which most class certification efforts flounder" and arguing that federal courts have "transformed [Rule] 23(b)(3)'s 'superiority' requirement into a mandate of perfection").

whether a class action is “superior” to individual lawsuits are hardly scientific inquiries.<sup>241</sup> Although Rule 23 identifies a number of factors to be considered in this regard,<sup>242</sup> they hardly resolve the difficult questions of when Rule 23(b)(3) class actions are appropriate. Thus the logic of *Gasperini* indicates that the choice between federal law (essentially the “common law” of Rule 23 as developed by federal courts) and state law (which in some cases may be more favorable to class certification) should be viewed as an unguided *Erie* choice.<sup>243</sup>

It is telling that for all three of these issues—summary judgment, pleading, and class certification—the federal courts had previously

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241 The same could be said for Rule 23’s requirement that class counsel and the class representative “fairly and adequately” represent the interests of the class. FED. R. CIV. P. 23(a)(4), (g)(4). Recently federal courts have used this provision to prevent class certification, *see, e.g.*, *Georgine v. Amchem Prods.*, 83 F.3d 610, 630–31 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), but it is far from clear that the Rules’ requirements of fairness and adequacy mandate such a strict approach.

242 *See* FED. R. CIV. P. 23(b)(3)(A)–(D).

243 This argument would seem to be strongest where state law imposes predominance and superiority requirements (just like Federal Rule 23(b)(3)) but applies these requirements more leniently than federal courts. *See supra* note 224 (providing examples of such states). That scenario precisely parallels that in *Gasperini*; just as Rule 59 does not dictate a particular method of measuring excessiveness, Rule 23(b)(3) does not dictate a particular method of measuring predominance or superiority. The argument that class certification presents an unguided *Erie* choice is potentially less persuasive where a state’s civil procedure rules do not require *any* inquiry into whether common issues predominate or whether a class action is superior to individual adjudication. *See supra* note 223 (describing the civil procedure rules in South Carolina, Iowa, and North Dakota). Rule 23(b)(3) does, after all, require that class actions in that category must satisfy *some* threshold of predominance and superiority. But even in this context, it might be argued that there is no direct collision between Rule 23(b)(3) and state rules that allow class actions without formal showings of predominance or superiority. Such state rules might be viewed as that state’s determination that class actions are per se superior to individual adjudications when other class action prerequisites are satisfied. Indeed, numerous federal court decisions have held that state law *prohibitions* on certain kinds of class actions do not conflict with Federal Rule 23; such state laws therefore foreclose federal court class actions even if unhindered application of Rule 23 might determine that class certification is appropriate. *See, e.g.*, *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 668–71 (S.D. Miss. 2007); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 289–92 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 284–85 (D. Mass. 2004). Some such decisions explicitly recognize that *Gasperini* supports the argument that Federal Rule 23 should not be read to override state class action law. *See, e.g.*, *Leider*, 387 F. Supp. 2d at 290–91 (stating that “more recent Supreme Court precedent compel[ed]” the application of New York class action law and that “[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies” (omission in original) (quoting *Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996))).

construed the exact same language in the Rules in a more plaintiff-friendly way. Prior to the 1986 summary judgment trilogy, federal courts approached summary judgment with much more skepticism, placing greater burdens on defendants seeking summary judgment and taking a more sympathetic view toward when the plaintiff's evidence was sufficient to justify a trial.<sup>244</sup> Prior to *Twombly*, the Federal Rules were read to require a court to accept the truth of the plaintiff's allegations, without regard to whether the plaintiff could allege, prior to discovery, "further factual enhancement" that would render the allegations plausible.<sup>245</sup> And during the 1970s and 1980s, federal courts interpreted the same text in Rule 23(b)(3) to allow precisely the kind of large-scale class actions that federal courts routinely reject today.<sup>246</sup> The history of these issues underscores the fact that the federal courts' current approaches are not dictated by the Rules themselves. Rather, federal courts are applying their own procedural common law, which *Gasperini* indicates must be treated as presenting an unguided *Erie* choice between state and federal law.<sup>247</sup>

C. *The Rules Enabling Act: Does Federal Court Practice Abridge  
"Substantive Rights"?*

If federal courts reject the arguments in the preceding subpart and view the current federal standards for summary judgment, class certification, and pleading as compelled by the Federal Rules of Civil Procedure (i.e., as a "guided" *Erie* choice), the key question becomes whether those Federal Rules comply with the Rules Enabling Act. There are strong arguments that, at least in certain situations, current federal approaches to these issues impermissibly "abridge, enlarge or

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244 See *supra* notes 195–98 and accompanying text.

245 See *supra* notes 210–12 and accompanying text.

246 See *supra* notes 200–02 and accompanying text.

247 The Supreme Court has not yet had occasion to consider the broader implications of *Gasperini* on issues (like summary judgment, pleading, and class certification) that the Federal Rules speak to in only the most general terms. The scholarly commentary on *Gasperini*'s consequences for distinguishing guided from unguided *Erie* choices has been mixed. Professor Rich Freer wrote that *Gasperini* "appears to embrace a new general policy" on this issue and applauded the fact that *Gasperini* required "a heightened sensitivity to potential impact on state policy." Freer, *supra* note 3, at 1642–43. Benjamin King criticized *Gasperini* precisely because it failed to treat Rule 59 as imposing a federal standard, and feared that *Gasperini* did indeed support a general proposition that "[t]he Federal Rules, when not explicit, would serve as mere empty containers waiting to be filled by state procedural rules." King, *supra* note 159, at 189. Professor Tom Rowe was skeptical that *Gasperini* would be extended beyond the Rule 59 situation, although he cautioned that "confident prophecy would be rash." Rowe, *supra* note 2, at 994 n.126.

modify . . . substantive right[s]”<sup>248</sup> created by state law.<sup>249</sup> For the reasons that follow, these ostensibly procedural issues can impact substantive rights in ways that are more than merely “incidental.”<sup>250</sup>

Consider first summary judgment and pleading standards. At the very least, the substantive-rights provision prevents Federal Rules from modifying standards governing the parties’ “primary activity,”<sup>251</sup> such as the standard of care that Erie Railroad owed to Mr. Tompkins.<sup>252</sup>

248 28 U.S.C. § 2072(b) (2006).

249 As explained *supra* notes 168–90 and accompanying text, the Supreme Court has yet to provide concrete guidance on what qualify as “substantive rights” or what would constitute impermissible “abridg[ing], enlarg[ing] or modify[ing]” of those rights. § 2072(b). This question has plagued the Rules Enabling Act from its infancy, *see* Burbank, *supra* note 167, at 1133–35 & n.530 (describing the original advisory committee’s struggle with this issue), and commentators have made a number of valuable attempts to shed light on the substantive-rights provision. *See, e.g., id.* at 1113–14, 1128 (arguing that the Rules Enabling Act prohibits Federal Rules with a “predictable and identifiable effect” on substantive rights or that “approximate the substantive law in their effect on person or property,” including Rules that dictate “the ability to use property or to enjoy personal freedom” in that they “affect out-of-court conduct, or as it is sometimes called . . . ‘private primary activity’” (quoting *Hanna v. Plumer*, 380 U.S. 460, 477 (1965) (Harlan, J., concurring))); Carrington, *supra* note 171, at 308 (describing a test attributable to Walter Wheeler Cook that would permit only those Federal Rules that are “sufficiently broad to evoke no organized political attention of a group of litigants or *prospective* litigants who (reasonably) claim to be specially and adversely affected by the rule”); Ely, *supra* note 2, at 725 (defining the term “substantive right” as “a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process”); Ides, *supra* note 3, at 82 (“[A] rule promulgated pursuant to the REA may not abridge, enlarge or modify legal principles designed to regulate primary human activity.”); Landers, *supra* note 167, at 856–57 (arguing that the Rules Enabling Act prohibits Federal Rules on “matters which are the subject of widespread public controversy, as differentiated from controversy solely among lawyers”). It is beyond the scope of this Article to endorse any particular approach to the Rules Enabling Act’s substantive-rights provision, although the arguments presented in this subpart are obviously more likely to succeed if courts read the Rules Enabling Act to protect a broader swath of state law generated interests. It surely cannot be said that the arguments below are flatly foreclosed by the Supreme Court’s Rules Enabling Act precedent, especially in light of more recent Supreme Court decisions that appear receptive to a broader interpretation of the substantive-rights provision. *See supra* notes 182–88 and accompanying text (discussing *Gasperini*, *Ortiz*, and *Semtek*).

250 *Bus. Guides, Inc. v. Chromatic Commc’ns Enters.*, 498 U.S. 533, 552 (1991).

251 *Hanna*, 380 U.S. at 474–75 (Harlan, J., concurring) (arguing that because “there should not be two conflicting systems of law controlling the primary activity of citizens . . . , *Erie* commands that it be the state law governing primary private activity which prevails”).

252 *See* Freer, *supra* note 3, at 1648 (“[T]here is no question that the duty of care the railroad owed poor Harry Tompkins in *Erie* is a matter of pure substance. Likewise, elements of a claim or defense are undoubtedly substantive.”).

At first glance, summary judgment and pleading seem to involve *secondary*, litigation activity—what the party says (or fails to say) in its complaint, or what the party produces (or fails to produce) in the context of a summary judgment motion. In many cases, however, a party's ability to comply with a particular pleading or summary judgment standard is a function of the factual and evidentiary material generated by the primary activity at issue. To adjudicate a dispute, after all, the *content* of the relevant primary activity must be established in a judicial proceeding. A litigant's ability to enforce standards governing primary activity is only as robust as the evidence he or she can use to prove what happened.

When a court applies a summary judgment standard under which it declares the evidentiary material generated by the parties' primary conduct to be inadequate as a matter of law, it is in a very real sense dictating the legal consequences of the primary conduct itself and, therefore, modifying substantive rights. Consider the variety of primary-activity regulations that hinge on the defendant's intent or state of mind. To make out a state law consumer fraud claim, a plaintiff might have to prove that the defendant acted with scienter, that is, knowledge that its statements about its product were false.<sup>253</sup> In an employment discrimination case a plaintiff may have to prove that the defendant's decision was based on race, gender, or some other impermissible factor.<sup>254</sup> Frequently, the defendant's primary conduct will not generate smoking gun evidence of the defendant's state of mind. Thus plaintiffs often must rely on indirect evidence. In a consumer fraud case, a plaintiff may point to contemporaneous information contradicting the defendant's representations, even if there is no direct evidence that the defendant knew about that information at the time. In an employment discrimination case, a plaintiff may point to evidence undermining the defendant's purported justification for its employment decision, even if there is no direct evidence that the real motivation was unlawful discrimination. A state court may look at the plaintiff's indirect evidence and find it sufficient to sustain a jury verdict in plaintiff's favor. But a federal court, applying the more stringent federal approach to summary judgment, might find the indirect evidence legally insufficient.<sup>255</sup> The evidence a plaintiff can use to

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253 See, e.g., *State v. Shaw*, 847 S.W.2d 768, 776 (Mo. 1993) (applying MO. ANN. STAT. § 407.020 (West 1992)).

254 See, e.g., *Stephenson v. Hotel Employees & Rest. Employees Union Local 100*, 844 N.E.2d 1155, 1158 (N.Y. 2006) (applying N.Y. EXEC. LAW § 296 (McKinney 2002)).

255 See, e.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993)

prove its case, however, is ultimately a function of the defendant's primary conduct. If a state court would allow that evidence to sustain a jury verdict in the plaintiff's favor, but a federal court would mandate judgment as a matter of law against the plaintiff, there is a stark contrast in the ability of plaintiffs to enforce their state law substantive rights.<sup>256</sup>

This argument about the substantive implications of summary judgment standards parallels a similar argument that has been made in the long-running debate about the role of *Erie* when a defendant seeks judgment as a matter of law at trial (formerly known as directed verdict or judgment notwithstanding the verdict). There is a sharp divide on this issue,<sup>257</sup> but several courts and commentators have rea-

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(describing how the trilogy has led to expanded use of summary judgment against employment discrimination plaintiffs); Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 366–72 (2007) (describing how federal courts' use of the *McDonnell Douglas* framework disadvantages plaintiffs suing under state employment discrimination laws).

256 To illustrate the close relationship between evidentiary sufficiency and pure substantive law, consider the facts of *Erie* itself. Pennsylvania law allowed recovery only for wanton or willful negligence and the district court had improperly used a federal ordinary negligence standard. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70 (1938). Suppose that the district court had accepted Pennsylvania's wanton or willful negligence standard but held that evidence of ordinary negligence would be sufficient for a jury to *infer* wanton or willful negligence. This arguably could have been equally destructive of Pennsylvania's substantive scheme.

257 Compare, e.g., *Preferred RX, Inc. v. Am. Prescription Plan, Inc.*, 46 F.3d 535, 543 (6th Cir. 1995) ("We look to New York law's standard for reviewing a motion for judgment as a matter of law or judgment notwithstanding the verdict."), with *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 335 (7th Cir. 1994) ("[F]ederal law defines the standard for evaluating the sufficiency of the evidence."). Dicta in the Supreme Court's *Byrd* decision indicated that state law governs this issue, but later decisions suggest that the question remains open. Compare *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 n.15 (1958) ("[T]he federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established."), with *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 444–45 (1959) ("Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied." (citations omitted)). Although the Court apparently hoped to resolve the question in *Mercer v. Theriot*, 377 U.S. 152 (1964), it ultimately dodged the issue by concluding that "[t]he evidence was sufficient under any standard which might be appropriate—state or federal." *Id.* at 156; see also *id.* (Harlan, J., dissenting) ("Certiorari was granted in this case because it appeared that the question was presented whether a state or federal standard determines the sufficiency of the evidence to sup-

soned that for state law claims, state law governs whether the evidence presented at trial is sufficient to sustain a jury verdict for the plaintiff. As Professor Ed Cooper explained: “Problems of jury freedom with respect to drawing inferences from the evidence and applying the law to the facts . . . should almost invariably be referred to state standards. . . . [D]irected verdict standards are too intimately bound up with clearly ‘substantive’ state concerns to be ignored.”<sup>258</sup> Indeed, evidentiary sufficiency standards are more than just a method of allocating decisionmaking authority between the judge and jury.<sup>259</sup> As Judge Posner explained: “[A] rule determining how much evidence of liability a plaintiff must put in to defeat the defendant’s motion for a directed verdict can be viewed as part of the definition of the plaintiff’s substantive rights under state law rather than as a rule merely of

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port a jury verdict in cases in the district courts where jurisdiction is based on diversity of citizenship.”). See generally 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2525, at 419–33 (3d ed. 2008) (providing cases and commentary discussing whether “in a diversity of citizenship case . . . the sufficiency of the evidence to raise an issue for the jury [is] measured by a federal test or by a state test”).

258 Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 976 (1971). Not all aspects of summary judgment practice involve evidentiary sufficiency. For example, a state may impose higher burdens on defendants seeking summary judgment but impose an evidentiary sufficiency standard on plaintiffs that is similar to the federal standard. In that situation, it could be argued that the difference in summary judgment practice does not abridge substantive rights because the ultimate quantum of evidence the plaintiff will need to prove its case is unaffected; in other words, the plaintiff may forestall pretrial summary judgment only to have judgment entered as a matter of law at trial. Cf. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1091 (9th Cir. 2001) (stating that under Oregon’s approach to employment discrimination claims a plaintiff might survive summary judgment but lose on a judgment notwithstanding the verdict if an identical record is presented at trial). On the other hand, Professors Issacharoff and Loewenstein have demonstrated that the burden on defendants moving for summary judgment can have real consequences for the expected value of a plaintiff’s claim, see Issacharoff & Loewenstein, *supra* note 195, at 75 (arguing that the *Celotex* approach “fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants” and “results in a wealth transfer from plaintiffs as a class to defendants as a class”). This observation might support an argument that a difference between state and federal law on the defendant’s summary judgment burden also violates the Rules Enabling Act.

259 See *Mayer*, 29 F.3d at 333 (“Whether the trier of fact is a jury, a judge, or a magistrate judge . . . is a subject for the forum’s own law.”); Childress, *supra* note 195, at 319 (“[R]eview for sufficiency . . . by definition specifies the relationship between a judge and jury: that’s *all* that it is about.”).

jury control.”<sup>260</sup> The choice between state and federal law in the context of at-trial motions for judgment as a matter of law has yet to be definitively resolved, of course.<sup>261</sup> But the debate over that issue reveals that it is hardly without precedent to view evidentiary sufficiency standards as having real consequences on substantive rights.<sup>262</sup>

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260 *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983). Courts and commentators who take the opposite view had relied on pre-*Gasperini* decisions such as *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), which some had read to allow federal courts to use federal standards for determining whether a jury award is so excessive as to warrant a new trial. See *Mayer*, 29 F.3d at 334; Childress, *supra* note 195, at 310. *Gasperini v. Center for the Humanities, Inc.*, of course, makes clear that state law governs the excessive-verdict standard, see 518 U.S. 415, 429–30 (1996), so this analogy would seem to support the application of state law standards to evidentiary sufficiency. Moreover, there is a strong argument that the amount of evidence needed to support a verdict on liability is even more of a substantive issue than the amount needed to sustain a verdict of a particular amount. This was precisely Judge Posner’s observation in *Abernathy*:

“[A] rule determining how much evidence of liability a plaintiff must put in to defeat the defendant’s motion for a directed verdict can be viewed as part of the definition of the plaintiff’s substantive rights under state law rather than as a rule merely of jury control; it goes to liability, not just to amount of damages, and it determines the defendant’s right to judgment and not just to a new trial.”

*Abernathy*, 704 F.2d at 971.

261 See Childress, *supra* note 195, at 279–89 (noting that “the disarray continues” on this issue within and among the federal circuits).

262 It should be noted that some of the arguments in favor of state law evidentiary sufficiency standards (*e.g.*, *Abernathy*, 704 F.2d at 971; Cooper, *supra* note 258, at 976) do not explicitly consider whether federal court disregard of state standards would violate the Rules Enabling Act. This is not surprising, because these arguments predate the 1991 Amendment to Federal Rule 50. That amendment provided that judgment as a matter of law (JMOL) is available at trial if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1); see also Rowe, *supra* note 2, at 1012 n.197. (“Federal Rule 50(a) allows a federal court to direct a verdict against a party when there is no sufficient evidentiary basis for a reasonable jury to find for the party on an issue essential to the party’s defense or claim.” (internal quotation marks omitted)). Until 1991, Rule 50 did not provide any standard for at-trial JMOL motions, so there would have been no need to examine at-trial evidentiary sufficiency standards in the rubric of a guided *Erie* choice and, hence, no need to consider the Rules Enabling Act’s substantive-rights provision. Compare Cooper, *supra* note 258, at 983 n.238 (arguing in 1971 that “the mandate of [*Hanna*] that controlling effect must be given to any applicable federal rule” was irrelevant because “Rule 50 . . . provides only for the procedure by which motions must be made”), with FED. R. CIV. P. 50(a) advisory committee’s note, 1991 amend. (stating that the 1991 Amendment to Rule 50 “articulates the standard for the granting of a motion for judgment as a matter of law” and noting that the reasonable-jury standard “was not expressed in the former rule, but was articulated in



To the extent summary judgment hinges on questions of evidentiary sufficiency, different federal standards might also abridge substantive rights when applied to state law claims.

Pleading standards might have a similar effect on substantive rights. Pleading requirements like the one the Supreme Court endorsed in *Twombly* can make a case effectively unprovable by requiring dismissal before there has been any opportunity to conduct even limited discovery. Where the primary activity that is the basis for a lawsuit is likely to create a situation where the plaintiffs do not have access to the factual information needed to comply with such pleading standards, those standards effectively foreclose a plaintiff's ability to enforce its substantive rights. Again, claims that hinge on the defendant's state of mind are instructive. In many instances, the primary conduct that is the basis for the lawsuit generates a situation where factual details relevant to the defendant's state of mind are purely in the hands of the defendant. If a state follows a more traditional notice-pleading approach, the state court plaintiff can survive the pleadings phase by alleging generally that the requisite state of mind exists, and then use discovery to unearth the evidence needed to prove it. But a federal court following the lead of *Bell Atlantic Corp. v. Twombly* might dismiss the complaint at the pleadings phase without any opportunity to uncover the facts and evidence needed to enforce state law substantive rights.<sup>263</sup>

The Supreme Court has recognized the effect that pleading standards can have on substantive rights, albeit in a slightly different con-

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long-standing case law"). The 1991 Amendment means that today, there is a much stronger argument that Rule 50 creates a guided *Erie* choice for at-trial JMOL motions. See Childress, *supra* note 195, at 312–13. It could be argued, however, that what is "reasonable" for purposes of an at-trial JMOL motion is no less vague than what is "excessive" for purposes of a new-trial motion; if so, *Gasperini* might likewise support an argument that the evidentiary sufficiency standard for at-trial JMOL motions presents an unguided *Erie* choice. See King, *supra* note 159, at 191 ("[B]ecause *Gasperini* allowed state law to flesh out the meaning of Rule 59, a similar argument could be made that state law should qualify the 'reasonable jury' standard embodied in Rule 50(a)."). But see Rowe, *supra* note 2, at 1012 n.197 (calling it "doubtful that . . . amended Rule 50 is seriously vulnerable to such undermining"). In any event, some courts have continued to adhere to state evidentiary sufficiency standards even after the 1991 Amendment to Rule 50. See, e.g., Preferred RX, Inc. v. Am. Prescription Plan, Inc., 46 F.3d 535, 543 (6th Cir. 1995) ("We look to New York law's standard for reviewing a motion for judgment as a matter of law or judgment notwithstanding the verdict.").

263 See, e.g., *Jewett v. IDT Corp.*, Civ. Action No. 04-1454 (SRC), 2007 WL 2688932, at \*3 (D.N.J. Sep. 11, 2007) (relying on *Twombly* to dismiss a complaint because "the factual allegations . . . do not plausibly suggest . . . [unlawful discrimination]").

text. In *Brown v. Western Railway of Alabama*,<sup>264</sup> the Court considered a “reverse-*Erie*”<sup>265</sup> challenge to Georgia’s imposition of its strict pleading rules on plaintiffs who file negligence claims under the Federal Employers’ Liability Act in Georgia state courts. Mr. Brown was a railroad worker who alleged in his complaint that he was injured when “he stepped on a large clinker lying beside the tracks” and that his injuries were “directly and proximately caused in whole or in part by the negligence of the defendant.”<sup>266</sup> The Georgia Court of Appeals upheld the dismissal of the complaint for failing to provide information suggesting that the employer’s negligence was, in fact, to blame.<sup>267</sup> The U.S. Supreme Court reversed, holding that “[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.”<sup>268</sup> The same logic would support an argument that, for purposes of the Rules Enabling Act, strict *federal* rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by *state* laws.<sup>269</sup>

Class certification standards may also have a severe impact on substantive rights. This is a particular concern with so-called negative value class actions (ones where the costs of individual lawsuits outweigh the prospective individual payoff), which have long been recognized as particularly appropriate for class certification.<sup>270</sup> Precisely

264 338 U.S. 294 (1949).

265 Clermont, *supra* note 3, at 2 (noting “a doctrine called reverse-*Erie* (or occasionally by academics ‘converse-*Erie*’ or ‘inverse-*Erie*’”). This doctrine addresses “under what circumstances a state court enforcing substantive federal law is required to employ federal procedures in the adjudication of the federal claims.” Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 611 (2001); *cf.* Clermont, *supra* note 3, at 7 (noting that “the classic reverse-*Erie* cases” involve a state court’s choice between state and federal procedural law but arguing that the reverse-*Erie* doctrine has “wider application”).

266 *Brown*, 338 U.S. at 297.

267 *Id.* at 295 (“The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence.” (quoting *Brown v. W. Ry. of Ala.*, 49 S.E.2d 833, 835 (Ga. Ct. App. 1948))).

268 *Id.* at 298; *see also id.* at 298–99 (“Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” (quoting *Davis v. Wechsler*, 263 U.S. 22, 24 (1923))).

269 *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 201 (2004) (“If the pleading burden is raised enough, the effect may be to change the substance of the law. A claim that cannot be successfully pled is, in one sense, no claim at all.”); *id.* at 206 (“Strict pleading rules may assure potential defendants that they can engage in certain conduct with the confidence that claims against them based on such conduct will be dismissed at an early (and relatively low-cost) stage of litigation.”).

270 *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (stating that “the rationale for [class certification] is most compelling” in cases where

because such claims are not economically viable when brought individually, to deny class treatment is tantamount to completely abrogating liability in cases where individual damages are fairly small.<sup>271</sup>

Even in cases where individual litigation is feasible, the impact of class certification on the enforcement of substantive rights may be so significant as to violate the Rules Enabling Act. Successful certification of a class creates important advantages for plaintiffs. By spreading the costs of pursuing a case among the entire class, per-plaintiff litigation expenditures in a class action are less than if each plaintiff pursued individual lawsuits.<sup>272</sup> Class certification can also put more pressure on the defendant to settle a case rather than risk the large aggregate damages that might result from a loss at trial.<sup>273</sup> In addition, social science research indicates that aggregated claims are more likely to be successful on the merits, although in some situations per-person damage awards might be lower than in individual litigation.<sup>274</sup> Thus, the check a victorious plaintiff ultimately receives, or whether a plaintiff receives any check at all, may vary significantly depending on whether she proceeds as an individual litigant or as part of a class action. Recent Supreme Court decisions such as *Gasperini* and *Ortiz* reveal that such effects on damage awards may impermissibly interfere with “substantive rights” for purposes of the Rules Enabling Act.<sup>275</sup>

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“individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 162–64 (2006).

271 See Burbank, *supra* note 8, at 1531 (noting that the costs of an “altered stance [by federal courts] toward negative-value class actions would be incurred by the states, which would be largely denied the ability to pursue a different vision of justice in their courts through the class action”); see also Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1928 (2006) (arguing that it is “difficult to conclude” that “the advent of the small claims (negative value) class action did not ‘alter substantive law’” (quoting Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1877 (2006))).

272 See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1305 (2002).

273 See *Rhone-Poulenc*, 51 F.3d at 1298 (noting the enormous liability that would result from an adverse judgment in a class action and stating that the defendants “may not wish to roll these dice” and therefore “will be under intense pressure to settle”).

274 See, e.g., Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 671–72 (2001); Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors’ Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. APPLIED PSYCHOL. 909, 916 (2000).

275 See *supra* notes 184–88 and accompanying text.

*Ortiz* is particularly instructive. There, the Court indicated that it would violate the substantive-rights provision to read Rule 23 as permitting a massive class action with no opportunity for class members to opt out, on the theory that the different recoveries resulting from such a class action were in “tension” with the “rights of individual tort victims at law.”<sup>276</sup> Suppose, however, that a state court *would* certify a class action in a situation like *Ortiz* and, therefore, award relief on a classwide basis in a manner different from individual lawsuits. In that situation, the logic of *Ortiz* indicates that it would violate the substantive-rights provision for federal courts to *refuse* to certify a class action.<sup>277</sup>

For these reasons, federal practice on summary judgment, pleading, and class certification may be subject to challenge even if they are deemed to be dictated by the Federal Rules of Civil Procedure themselves.<sup>278</sup> Although they are ostensibly procedural issues, their impact

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276 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (refusing to certify an enormous asbestos class action and noting the danger that class certification might violate the Rules Enabling Act).

277 Indeed, the Supreme Court has specifically recognized Rule 23’s class action standards as an example of how “this Court’s rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.” *Mistretta v. United States*, 488 U.S. 361, 392 (1989). For early scholarly argument that the decision to allow or prevent a class action can abridge or enlarge substantive rights, *see Landers, supra* note 167, at 887 (“[T]he class action has an important remedial aspect which ought to be regarded as an element of the substantive law.”); Edward J. Ross, *Rule 23(b) Class Actions—A Matter of “Practice and Procedure” or “Substantive Right”?*, 27 EMORY L.J. 247, 249–52 (1978). Particularly telling is the 1978 decision by the Judicial Conference of the United States that future amendments to Rule 23 should be made by Congress rather than by the rulemaking process. *See Burbank, supra* note 167, at 1195 n.775. This decision was motivated in part by the belief that the “mandate under the Rules Enabling Act did not have enough breadth to enable it to proceed effectively.” Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 684 (1979) (footnote omitted). A similar recognition occurred in 2001, when the Advisory Committee refrained from amending Rule 23 to address the problem of overlapping class actions “in light of the constraints on rulemaking under the Rules Enabling Act.” Lee H. Rosenthal, *Back in the Court’s Court*, 74 UMKC L. REV. 687, 698–99 (2006).

278 The arguments presented in this subpart do not hinge on whether state courts or legislatures specifically intended for state practice on class certification, summary judgment, or pleading to have a substantive effect. The Supreme Court has never held that such intent is necessary to establish a violation of the Rules Enabling Act’s substantive-rights provision. *See Burbank, supra* note 167, at 1191 (arguing that a Federal Rule’s compliance with the Rules Enabling Act’s substantive-rights provision should not “depend upon a particularistic and after-the-fact inquiry into policies animating competing legal prescriptions”). If a particular state’s approaches to class cer-

on state law substantive rights may violate the Rules Enabling Act, especially given the Supreme Court's recent invocation of the Act's substantive-rights provision as a more robust check on federal lawmaking.<sup>279</sup>

D. An "Unguided" Choice: Does Federal Court Practice Offend *Erie*'s Twin Aims?

If class certification, summary judgment, and pleading standards are treated as presenting unguided *Erie* choices (as suggested in subpart B), there is an even stronger argument that federal courts should follow state law on these issues. For more than forty years, the Supreme Court has instructed that unguided *Erie* choices be made with reference to *Erie*'s "twin aims," namely, "discouragement of forum-shopping and avoidance of inequitable administration of the laws."<sup>280</sup> The current perception is that federal courts and some state courts administer very different brands of justice when it comes to civil litigation. This is especially so with respect to critical procedural issues such as summary judgment and class certification.<sup>281</sup> This disparity will likely increase if federal courts read last Term's *Bell Atlantic Corp. v. Twombly* decision to erect considerable barriers to plaintiffs at the pleadings stage.<sup>282</sup> All of this contributes to the conventional wisdom that plaintiffs fare better in state court and defendants fare better in federal court. Empirical data comparing win-rates and recoveries in state and federal court support this notion.<sup>283</sup>

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tification, summary judgment, or pleading *can* be directly linked to substantive considerations, *see, e.g., In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 75–76 (W. Va. 2003) (noting that West Virginia's approach to class certification is motivated in part by the need to "deter[ ] illegal activities" and that one "purpose of a class action" is to make relief viable when "a plaintiff's individual damages may be relatively small"), then there would seem to be an even stronger argument that a contrary federal approach would violate the Rules Enabling Act. *See Ely, supra* note 2, at 726–28 (arguing that the Rules Enabling Act's substantive-rights provision prohibits using a Federal Rule to override a state rule for which the state's "legislature or other rulemaker" had at least one substantive "goal[ ] in mind"); Rowe, *supra* note 2, at 979 n.64 ("The Supreme Court seems to regard the purposes apparently animating a law as relevant in deciding on whether it should be regarded as substantive or procedural.").

279 *See supra* notes 182–90 and accompanying text.

280 *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)); *see supra* notes 133–51 and accompanying text.

281 *See supra* notes 219–25 and accompanying text.

282 *See supra* note 225.

283 *See Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 596 (1998) (noting a very low percentage of plaintiff win rates in removed cases

Not surprisingly, the current situation invites precisely the kind of forum shopping that *Erie* is supposed to forbid—plaintiffs craft lawsuits with an eye toward keeping them in state court, and defendants strive mightily to justify removal of such lawsuits to federal court.<sup>284</sup> Studies confirm that among the major reasons for such strategic maneuvering are federal court approaches to summary judgment<sup>285</sup> and class certification.<sup>286</sup> There is every reason to believe that *Twombly*'s take on federal pleading standards will be one more reason for defendants to prefer (and plaintiffs to fear) federal court.

The points made in the preceding subpart are instructive on this issue. Successful certification of a class creates important advantages for plaintiffs in terms of cost-spreading, increasing pressure on defendants to settle, and even increasing the likelihood of establishing liability.<sup>287</sup> Class certification can also make viable claims for which the costs of individual litigation would be prohibitively expensive.<sup>288</sup> Summary judgment standards can foreclose—as a matter of law—claims that otherwise might be successful,<sup>289</sup> as well as lowering the ex ante expected value of a plaintiff's claim and changing what Professors Issacharoff and Loewenstein called the “balance of power” between plaintiffs and defendants.<sup>290</sup> And pleading standards, as *Bell*

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and a significantly higher plaintiff win rate in cases adjudicated originally in federal courts); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 638–40 (2006) (describing higher median recoveries and attorneys fees in state court class actions than in federal court class actions).

284 Clermont & Eisenberg, *supra* note 283, at 599 (noting that “differences in procedural law” might lead “the plaintiff to prefer state court”).

285 See Miller, *supra* note 219, at 418–19 (describing survey data indicating that availability of summary judgment is a very strong reason for defense counsel preferring federal court). As explained *supra* notes 220–21, state law may impose higher burdens on defendants seeking summary judgment, or require less of plaintiffs in order to avoid summary judgment.

286 See DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS* 66 (2000); Morrison, *supra* note 12, at 1528; Martha Neil, *New Route for Class Actions: Proposals Raise Questions About Whether Giving Federal Courts More Power Over Cases Will Cure the System's Ills*, A.B.A. J., July 2003, at 48, 50. As explained *supra* notes 222–24, some states' class certification standards make it considerably easier for plaintiffs to certify class actions.

287 See *supra* notes 272–74 and accompanying text.

288 See *supra* notes 270–71 and accompanying text.

289 See *supra* notes 253–56 and accompanying text.

290 Issacharoff & Loewenstein, *supra* note 195, at 75; see also *supra* note 258 (explaining the professors' view that the *Celotex* approach changes this “balance of power”). Federal courts have recognized that the robustness of procedural opportunities for testing a plaintiff's claim before trial can implicate *Erie*'s twin aims. See, e.g., *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (holding that the need to avoid forum shopping and inequitable administration of

*Atlantic Corp. v. Twombly* amply demonstrates, can ring the death knell for claims where the relevant evidence and factual details are in the hands (or minds) of the defendant and can only be realistically obtained through *some* (even if limited) discovery.<sup>291</sup> Even if courts disagree with the argument that imposing federal standards on these ostensibly procedural issues violates the Rules Enabling Act by abridging state law substantive rights, it is much harder to deny that the practical consequences of the different standards encourage state-federal forum shopping in violation of *Erie*'s twin aims.<sup>292</sup>

Finally (and somewhat ironically), CAFA's enactment potentially strengthens the argument that procedural differences between state and federal court violate *Erie*'s twin aims. The very rationale for CAFA was a concern that procedural differences between state and federal courts with respect to class certification led to forum shopping.<sup>293</sup> Congress' expansion of federal jurisdiction<sup>294</sup> was designed to let defendants—who tend to fare better in federal court—win those

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laws requires federal courts to apply California's Anti-SLAPP statute, which provides defendants "an additional, unique weapon" for "test[ing] the opponent's claims before trial").

291 See *supra* notes 263–69 and accompanying text; see also *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1540 (10th Cir. 1996) (holding that it would violate *Erie*'s twin aims if federal courts refused to apply a Colorado law that required dismissal of professional negligence claims at the pleadings phase unless the plaintiff provided certification that an expert had reviewed the claim and found it to have "substantial justification").

292 Courts could only proceed to this issue, of course, if they agree with the argument presented in Part III.B that class certification, summary judgment, and pleading standards present unguided *Erie* choices.

293 See, e.g., S. REP. NO. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (expressing concern about "state courts whose judges have reputations for readily certifying classes").

294 CAFA's jurisdictional and removal provisions are codified at 28 U.S.C. §§ 1332(d), 1453 (2006). See generally Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 287–98 (2006) (providing a summary of CAFA's jurisdictional and removal provisions). CAFA expanded federal jurisdiction to include class actions (or "mass actions" involving one hundred or more plaintiffs) with an aggregate amount in controversy in excess of five million dollars, as long as there is "minimal diversity" between plaintiffs and defendants (i.e., at least one plaintiff or class member must be a citizen of a state different from at least one defendant). 28 U.S.C. § 1332(d)(2), (6), (11). It also allowed removal of class actions to federal court despite the presence of an in-state defendant and without the consent of all defendants. § 1453(b).

forum shopping battles.<sup>295</sup> But expanding federal jurisdiction does not eliminate the *Erie* problem; it is federal jurisdiction, after all, that creates the potential for an *Erie* problem. CAFA's legislative history explicitly states that the *Erie* doctrine would apply in cases subject to CAFA jurisdiction,<sup>296</sup> and nothing in the text of CAFA indicates otherwise.<sup>297</sup>

It is also worth considering how an unguided *Erie* choice on these issues might fare under the sort of interest-balancing test that the Supreme Court first used fifty years ago in *Byrd*.<sup>298</sup> After ignoring *Byrd* for most of the twentieth century, the Court recently cited it for the idea that state-federal choice of law determinations must preserve "essential characteristics" of the federal system.<sup>299</sup> As explained earlier, it is questionable whether, standing alone, a federal court's belief that a particular aspect of federal procedure is an "essential characteristic" of the federal system justifies disregarding state law.<sup>300</sup> But even if one accepts this proposition, it would be very difficult to characterize current federal approaches to summary judgment, class certification, or pleading as "essential characteristics" of the federal system. Not long ago, after all, federal courts followed a more plaintiff-friendly approach on all of these issues.<sup>301</sup> The federal courts' recent conversions on these matters stand in stark contrast to *Byrd*'s notion that the right to a jury trial—which has been enshrined for centu-

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295 See Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 390–91 & n.233 (2006); Burbank, *supra* note 8, at 1530; Issacharoff, *supra* note 17, at 1862; Morrison, *supra* note 12, at 1524.

296 See S. REP. NO. 109-14, at 49 ("[T]he Act does not change the application of the Erie Doctrine.").

297 See Burbank, *supra* note 8, at 1529 ("CAFA does not purport to change *Erie* jurisprudence."). Indeed, federal courts have continued to apply the *Erie* doctrine in CAFA cases. See, e.g., *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 248–49 (5th Cir. 2008); *In re Auto. Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549–50 (E.D. Pa. 2007); see also Burbank, *supra* note 8, at 1483 n.178 (describing federal courts' "unwillingness to interpret CAFA silently to overrule long-standing precedent" (citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005))). But see Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed By Congress?*, 156 U. PA. L. REV. 1629, 1629 (2008) ("The enactment of the Class Action Fairness Act of 2005 (CAFA) is a congressional pronouncement implying that the *Erie* Doctrine is seriously erroneous." (footnote omitted)); Sherry, *supra* note 3, at 2139–41 ("[I]f we share the concerns that prompted Congress to adopt CAFA, we must reject *Erie*.").

298 See *supra* notes 79–88 and accompanying text.

299 See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436–37 (1996).

300 See *supra* Part II.B.2.

301 See *supra* notes 195–217 and accompanying text.



ries—qualifies as an “essential characteristic” of the federal system.<sup>302</sup> It is unlikely, therefore, that the logic of *Byrd* would bless federal practice on summary judgment, class certification, and pleading.<sup>303</sup> In the final analysis, federal approaches to these procedural issues are significant obstacles to “the twin aims of the *Erie* rule,”<sup>304</sup> because they encourage forum shopping and lead to inequitable administration of laws.

### E. *Erie’s Consequences for the Conventional Wisdom*

As explained in the preceding subparts, the *Erie* doctrine supports a surprisingly straightforward argument that the conventional wisdom about the basic rules of judicial federalism is wrong. Contrary to what litigants have long assumed, being in federal court does not necessarily mean being subject to federal approaches to summary

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302 If anything, current federal approaches to pleading and summary judgment standards are deeply in tension with the “essential characteristic” of the right to a jury trial. See Thomas, *supra* note 199, at 145–60 (arguing that federal summary judgment violates the Seventh Amendment); Thomas, *supra* note 11, at 19 (arguing that federal pleading standards after *Bell Atlantic Corp. v. Twombly* violate the Seventh Amendment). Some, however, have suggested that *Byrd’s* recognition of a federal interest in “‘distribut[ing] trial functions between the judge and the jury’” implies that federal evidentiary sufficiency standards are required even for claims and defenses arising under state law. Childress, *supra* note 195, at 318 (quoting *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958)). But this view is hard to square with *Gasperini’s* command that state law governs excessiveness review of jury awards. See *Gasperini*, 518 U.S. at 427–31. It also conflicts with the *Byrd* opinion itself, which contained dicta that “the federal court should follow *the state rule* defining the evidence sufficient to raise a jury question whether the state-created right was established.” *Byrd*, 356 U.S. at 540 n.15 (emphasis added). Although *Byrd* recognized a strong federal interest in issues that are “under the influence—if not the command—of the Seventh Amendment,” *id.* at 537 (footnote omitted), there is a fundamental difference between federal standards that *empower* the jury and those that *disempower* the jury (as federal approaches to summary judgment and pleading threaten to do). As Professor Cooper explained:

[A]ny conclusion that current federal standards are so blessed by constitutional commandment cannot rest in history, but must rest in the proud confidence of truth newly discovered. Little more can be safely drawn from the constitution than the general principle that judicial intrusion must not go so far as to negate the essential functions of the jury.

Cooper, *supra* note 258, at 977.

303 See also Rowe, *supra* note 2, at 1011 (arguing that “there should be few, if any” federal interests that would be “sufficiently weighty” to displace the result of a twin-aims analysis).

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

judgment, pleading, and class certification.<sup>305</sup> Rather, *Erie* may require that federal courts adopt the practices of state courts.

For the most part, one would expect this argument to benefit plaintiffs and to disadvantage corporate defendants. As explained above, the conventional wisdom for the last decade or so is that plaintiffs prefer state court procedural practice, while corporate defendants favor federal court approaches.<sup>306</sup> From a realpolitik standpoint, one might legitimately wonder how receptive the federal judiciary will be to these arguments; it is these same federal judges, after all, who have pushed federal procedural law in favor of corporate defendants.<sup>307</sup> As set forth above, however, the argument that federal courts may be required to follow state court practice on procedural issues

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305 Recently, some commentators have recognized the possibility that state law class certification standards may apply in federal court cases raising state law claims. Professor Jim Pfander writes: "One can certainly imagine an argument that the federal courts should decline to apply Rule 23 standards under CAFA in deference to state rules that point to a different decision about the propriety of aggregate litigation." James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1460 n.160 (2007); see also Daniel R. Karon, "How Do You Take Your Multi-State, Class-Action Litigation? One Lump or Two?" *Infusing State Class-Action Jurisprudence into Federal, Multi-State, Class-Certification Analyses in a "CAFA-Nated" World*, 46 SANTA CLARA L. REV. 567, 569 (2006) (arguing that "federal courts may draw upon state-law decisions . . . when deciding multi-state class certification under Federal Rule 23"); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 121 (1998) (calling Rule 23 "[p]otentially problematic" in terms of compliance with the Rules Enabling Act's substantive-rights provision).

306 See *supra* notes 281–96 and accompanying text. Ironically, the one area where this sort of *Erie* argument has been successful has been cases where state procedural practice was advantageous to *defendants*. A number of states forbid class certification for certain categories of claims, and several federal courts have determined that such state-law bans on class actions are binding on federal courts. See, e.g., *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 668–71 (S.D. Miss. 2007); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 289–92 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 284–85 (D. Mass. 2004). But see *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 285–86 (E.D. Pa. 2003) (refusing to apply state law prohibiting class actions); *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 503, 513–16 (S.D. Ind. 2001) (same), *rev'd in part on other grounds*, 288 F.3d 1012 (7th Cir. 2002). One federal court has recognized the potential *Erie* problem when state class certification standards are more lenient than federal standards, although it did not ultimately resolve the issue. See *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 307–08 (N.D. Ohio 2007) (noting that the *Erie* doctrine was in "tension" with the fact that "when faced with almost identical medical monitoring class certification motions, state courts are generally more amenable to granting certification than are federal courts").

307 See *supra* notes 195–217 and accompanying text. The Supreme Court under Chief Justice Roberts has quickly gained a strong pro-business reputation. See, e.g., *Robert Barnes & Carrie Johnson, Pro-Business Decision Hews to Pattern of Roberts Court*,

like summary judgment, class certification, and pleading does not depend on some radically expansive view of *Erie*. Rather, it flows from the straightforward application of the black letter *Erie* doctrine as it is currently understood, and it draws support from numerous decisions of the Rehnquist Court.<sup>308</sup>

Predicting judicial behavior is hardly a scientific endeavor, of course. And aspects of traditional “conservative” judicial philosophy pull in different directions on this issue. Conservative judges who are widely viewed as pro-business also profess a commitment to federalism and states’ rights.<sup>309</sup> Whether conservatives’ commitment to federalism will trump their pro-business leanings in the context of *Erie* remains to be seen.<sup>310</sup> But it is worth noting that in the Supreme Court’s first *Erie* decision of this century, Justice Scalia authored a majority decision insisting that federal courts defer to state law preclusion principles that favored plaintiffs.<sup>311</sup>

Moving from the predictive to the normative, the *Erie* argument presented in this Article (at least as applied to class certification) may achieve a more sensible balance between the competing views of class action litigation that inspire so much of the debate over CAFA. Some have expressed frustration that CAFA creates a federal court “black hole”<sup>312</sup> for class actions based on state law. Even if a state court is

WASH. POST MAG., June 22, 2007, at D1; Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38.

308 See *supra* notes 228–41, 276–79 and accompanying text (explaining how *Gasperini*, *Ortiz*, and other Rehnquist Court decisions support this Article’s argument).

309 See, e.g., Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11–13 (2003) (noting the federalism “revival” under the Rehnquist Court). But see Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at WK 1 (arguing that after the events of September 11, 2001, “the national mood changed” and “[t]he Supreme Court’s federalism revolution had been overtaken by events”).

310 Cf. A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J. L. & PUB. POL’Y 101, 105 (2007) (arguing that in *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress’ power to criminalize the possession of marijuana for medicinal purposes), the Supreme Court’s conservative members were “selectively neglectful” of their commitment to federalism “when confronted with a conspicuous clash with their social conservatism”).

311 See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–09 (2001) (reviving a plaintiff’s claim that might otherwise have been barred by *res judicata*). Justice Scalia’s judicial philosophy has also led to surprising results in the criminal context. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

312 Lind, *supra* note 18, at 775 (“The strategy of this legislation is to create a Catch-22, or a kind of black-hole singularity for state mass torts, especially mass tort class actions.”)

receptive to class actions, CAFA allows defendants to demand a federal court forum where, under federal class certification standards, the case will not be allowed to proceed as a class action.<sup>313</sup> One potential solution would push strongly against the federalization of major civil litigation—declaring CAFA unconstitutional and, thereby, ensuring that such class actions may proceed in state court.<sup>314</sup> Another proposal, however, would solve the problem by federalizing such litigation even further. Professor Suzanna Sherry has noted that CAFA’s potential death knell for nationwide class actions conflicts with CAFA’s “stated purpose of ‘assuring fair and prompt recoveries for class members with legitimate claims.’”<sup>315</sup> This conflict, she argues, justifies “interpreting CAFA to have overruled *Erie*” and, thereby, allowing the federal courts to develop “substantive common law in the context of nationwide class actions.”<sup>316</sup> This would facilitate class certification by eliminating disparities between class members whose claims might be governed by different state law standards.<sup>317</sup>

The argument presented in this Article provides a more modest solution. If federal courts are obligated to apply state court class certification standards, the black hole problem does not arise. The propriety of a class action will be measured by state law even if the case is removed to federal court. This approach would retain the traditional

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313 See, e.g., Burbank, *supra* note 271, at 1942–43 (noting that “the goal of CAFA’s proponents was to ensure that nationwide classes of the sort that some state courts had certified would not be certified at all” and that CAFA’s official “statement of findings and purposes” was “at best, window dressing”); Lind, *supra* note 18, at 775 (arguing that CAFA’s “goal is to abort class action certification” by allowing removal of state court class actions to federal court “through the device of minimal diversity” and “[o]nce there, they are subjected to the tender mercies of [federal class-certification standards]”); Sherry, *supra* note 3, at 2139 (noting that CAFA’s “practical effect . . . is to choke off almost all nationwide class actions”).

314 See *supra* note 18 and accompanying text.

315 Sherry, *supra* note 3, at 2139 (quoting CAFA § 2(b)(1), 28 U.S.C. § 1711 note (2006)).

316 *Id.* at 2139, 2141.

317 Similar in this regard is the proposal to liberate federal courts from the so-called *Klaxon* rule, which requires a federal court to follow the horizontal choice of law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). If federal courts are allowed to develop horizontal choice of law rules that would select the law of a single state for the entire class, that would facilitate class certification by eliminating disparities between class members whose claims might otherwise be governed by different state law standards. See, e.g., Issacharoff, *supra* note 17, at 1866 n.111 (recognizing that “‘applying to all claims the law of the state that was the center of defendant’s wrongful conduct’” would “‘facilitate[] certification of a national class action’” (quoting RUSSELL WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 57 (2005 Supp.))).

understanding that federal courts may not develop their own substantive law as to the parties' claims and defenses.<sup>318</sup> Yet it would still allow CAFA to accomplish one of its apparent objectives, which was to provide a way for class action defendants to avoid so-called "magnet state courts"—particular localities that, according to CAFA's drafters, adopt "the 'I never met a class action I didn't like' approach to class certification."<sup>319</sup> The *Erie* argument presented in this Article would not obligate federal courts to mimic the vagaries of particular state court judges, including those in the much-maligned magnet courts. When the *Erie* doctrine obligates federal courts to follow state law on an issue, it obligates them to follow the state's positive law (statutes, constitutions, etc.) and decisions of the state's highest court.<sup>320</sup> When these sources are indeterminate, federal courts must make a so-called "*Erie*-guess" about how the state's highest court would resolve the issue.<sup>321</sup> The behavior of lower state courts may be instructive, but it is not binding.<sup>322</sup> Thus, to borrow an example from CAFA's legislative history, what matters from an *Erie* standpoint is not how particular

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318 For the reasons explained in Part IV, a correct reading of *Erie* does not mean that federal common law on such quintessentially substantive issues is categorically forbidden; *Erie* does require, however, that such lawmaking be justified by more than the mere existence of federal jurisdiction under CAFA. See *infra* notes 446–51 and accompanying text.

319 S. REP. NO. 109-14, at 22 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 22; see also *id.* at 13–14 (noting the increase in class actions filed in state courts "with reputations as hotbeds for class action activity" and finding that "one reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal counterparts about applying the procedural requirements that govern class actions"). Less charitably, these state court jurisdictions are called "judicial hellholes." See Burbank, *supra* note 8, at 1522–23 & n.331 (quoting SAMANTHA COULOMBE, PUB. CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES" 6–8 (2005), <http://www.citizen.org/documents/OutlierReport.pdf>); Cabraser, *supra* note 240, at 1516 (quoting Marcia Coyle, *A Reform's Fate Rests in Federal Courts; Delays, Larger Classes to Come in Class Action Reform*, NAT'L L.J., Feb. 14, 2005, at 1).

320 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts must follow state law whether "declared by its Legislature in a statute or by its highest court in a decision").

321 See, e.g., ROWE, SHERRY & TIDMARSH, *supra* note 9, at 637; Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 135 & n.232 (2006).

322 See *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("[T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper' regard to relevant rulings of other courts of the State."). See generally 19 WRIGHT ET AL., *supra* note 78, § 4507, at 115–220 (providing cases and commentary regarding how courts "determin[e] the content of the state law that is to be applied").

judges in Madison County, Illinois would handle class certification,<sup>323</sup> but rather what the Illinois Supreme Court has held (or would likely hold) with respect to class certification.<sup>324</sup>

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As CAFA's expansion of federal jurisdiction places more high profile civil litigation in federal court, the role of *Erie* in moderating state and federal authority will be increasingly important. And the challenge that *Erie* poses to the conventional wisdom is likely to make *Erie* a critical battleground in the coming years. This compounds the need to revisit more fundamental questions about the theoretical and conceptual underpinnings of the *Erie* doctrine, and to confront some of the many puzzles that have plagued its first seventy years. It is to that topic that the next Part turns.

#### IV. WHAT IS THE *ERIE* DOCTRINE?

For the reasons explained in the preceding Part, the *Erie* doctrine provides a strong basis for challenging some basic assumptions about judicial federalism today. Yet profound uncertainties still exist about *Erie*'s source, its scope, and its relationship to other important issues relating to federalism and judicial power.<sup>325</sup> This Part describes five of *Erie*'s most vexing puzzles and proposes a new theory of *Erie* to resolve them. This Article's theory of *Erie* reconciles Justice Brandeis' reasoning with the *Erie* doctrine's modern incarnation and prevailing views on the federal judiciary's lawmaking power. It preserves—indeed strengthens—the arguments presented in Part III, while giving the *Erie* doctrine a more coherent foundation for confronting the challenges to come.

##### A. *Erie*'s Problems

###### 1. *Erie*'s Relationship to “Classic” Federal Common Law

One puzzle that has plagued the *Erie* doctrine is its relationship to the Supreme Court's acceptance of what Judge Friendly once called “the new federal common law”<sup>326</sup> and what today might be called

323 See S. REP. NO. 109-14, at 13 (mentioning Madison County, Illinois as a “magnet court[ ]”).

324 Indeed, some decisions by the Illinois Supreme Court have been quite rigorous in enforcing class certification standards. See *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 821–24 (Ill. 2005).

325 See *Perdue*, *supra* note 3, at 751 (“I have been teaching *Erie* for fifteen years and it does not seem to be getting any easier.” (footnote omitted)).

326 Friendly, *supra* note 3, at 383.

“classic federal common law”<sup>327</sup> or “substantive federal common law.”<sup>328</sup> These labels refer to judicially developed federal legal standards that unquestionably define litigants’ substantive rights and thereby override contrary state law.<sup>329</sup> One contemporary example of such judicial lawmaking is the government-contractor defense that the Supreme Court created in *Boyle v. United Technologies Corp.*<sup>330</sup> *Boyle* held that as a matter of federal common law, a government contractor who manufactures a product according to the government’s specifications is immune from state law tort liability for injuries resulting from product defects.<sup>331</sup> Other examples include federal common law rules to govern the effect of a foreign government’s act on property rights within its territory,<sup>332</sup> and the U.S. government’s obligation to pay on a government-issued check that was fraudulently transferred.<sup>333</sup> It is also a remarkable coincidence that the Supreme Court (per Justice Brandeis, no less) recognized federal court authority to make substantive, common law rules on the very same day it decided *Erie*.<sup>334</sup> In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,<sup>335</sup> Justice Brandeis declared that how water in an interstate stream should be apportioned between two states is a question of “‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”<sup>336</sup> Federal courts also use federal common law to fill substantive gaps in federal statutory schemes.<sup>337</sup>

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327 *Perdue*, *supra* note 3, at 753.

328 Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 816, 840 (2008).

329 For recent accounts of the areas in which the Supreme Court has endorsed substantive federal common law, see generally Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996) (discussing several areas for which federal common law exists), and Tidmarsh & Murray, *supra* note 29 (same).

330 487 U.S. 500 (1988).

331 *See id.* at 512–13.

332 *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 (1964).

333 *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943).

334 *See Clark*, *supra* note 329, at 1324; Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1074 (1967); Tidmarsh & Murray, *supra* note 29, at 597.

335 304 U.S. 92 (1938).

336 *Id.* at 109–10.

337 *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (“‘At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or “judicial legislation,” rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.’” (quoting 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, 800 (1957))); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677,

Such decisions are hard to square with *Erie*'s command that federal courts lack the power to "declare substantive rules of common law."<sup>338</sup> Not surprisingly, *Erie* is often ignored when federal courts make the kind of substantive federal common law that *Erie* purportedly forbade.<sup>339</sup> Conversely, decisions holding that the *Erie* doctrine requires federal courts to apply state law rarely address whether federal standards might be justified by the lawmaking authority federal courts exercise in cases like *Boyle*.<sup>340</sup> The failure to reconcile these two divergent lines of authority has been one of *Erie*'s persistent puzzles.<sup>341</sup>

## 2. *Erie*'s Relationship to Its Procedural Progeny

Another problem is the factual disconnect between the *Erie* decision itself and the cases that have come to constitute *Erie*'s doctrinal "progeny."<sup>342</sup> These cases—many of which are described in Part II—are principally about procedural federalism. They examine when a federal court is bound by a state procedural rule the same way it is

717 (1979) (implying a private cause of action for violating a federal statute even though Congress did not explicitly create one).

338 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

339 See *Perdue*, *supra* note 3, at 753 ("[T]he federal courts continue to create and apply classic federal common law and for the most part do so without reference to the standard *Erie* tests."). The Supreme Court's creation of a federal common law government contractor defense in *Boyle* came without a single citation to *Erie*, see *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–12 (1988), except of course by the dissenting Justices, *id.* at 516–17 (Brennan, J., dissenting).

340 See, e.g., *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). One functional difference between "procedural" federal common law (permitted when an unguided *Erie* choice points to federal law) and classic "substantive" federal common law (of the sort created in *Boyle*) is that the latter is binding on state courts whereas the former is not. See, e.g., *Barrett*, *supra* note 328, at 832 ("[P]rocedural common law, unlike substantive common law, is confined in its application to federal courts."). This distinction would make procedural federal common law less intrusive than substantive federal common law and, hence, less objectionable from a federalism standpoint. If the classic federal common law cases demonstrate the federal judiciary's willingness to override state substantive law in both federal and state court, it is hard to see why federalism concerns should pose a greater obstacle to procedural federal common law that would be binding only in federal court.

341 See *Perdue*, *supra* note 3, at 754 ("If we accept that classic federal common law exists and that the test applied in *Erie* cases does not apply to classic federal common law cases, the *Erie* doctrine becomes even more mysterious.").

342 For examples of scholars referring to these cases as *Erie*'s "progeny," see, for example, Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 719 (2006); Rowe, *supra* note 2, at 964.



bound (per *Erie* itself) by the state's rule for the standard of care in a tort case. Examples of such procedural issues include the kinds of discovery devices parties may use,<sup>343</sup> whether a judge or jury acts as the factfinder,<sup>344</sup> the methods by which process may be served,<sup>345</sup> the availability of sanctions for conduct during litigation,<sup>346</sup> the standard for granting a new trial,<sup>347</sup> and the preclusive effect of a pretrial dismissal.<sup>348</sup>

Identifying these cases as *Erie*'s progeny is conceptually problematic, because it gives *Erie* paternity over a set of cases that bear little resemblance to the *Erie* case itself. *Erie* had nothing to do with federal procedural lawmaking—it concerned the quintessentially substantive issue of the standard of care owed by the defendant in a tort case.<sup>349</sup> Nor did *Erie* purport to address the propriety of federal procedural lawmaking in the face of a contrary state rule.<sup>350</sup> As Professor Geoffrey Hazard recently put it, "*Erie v. Tompkins* is one thing; the *Erie* Doctrine is something else."<sup>351</sup> One could perhaps argue that *Erie* is a proper progenitor of the procedural federalism cases in that they all involve vertical choice of law problems (whether state or federal law applies to a particular issue). But if that is the only common genetic marker, it is not clear why *Erie* is especially significant. The Supreme Court has been examining vertical choice of law issues since the days of Chief Justice Marshall, long before *Erie* and even before *Swift*.<sup>352</sup>

### 3. The Paradox of *Erie*'s Choices

Another problem arises from the distinction that the contemporary *Erie* doctrine makes between guided and unguided *Erie*

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

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

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

346 *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533 (1991).

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

348 *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

349 See Hazard, *supra* note 297, at 1631 ("[T]here was nothing in the decision concerning procedure or quasiprocedural rules."); Solum, *supra* note 269, at 193 ("The majority opinion in *Erie* . . . does not discuss procedure at all.").

350 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare *substantive* rules of common law . . . . And no clause in the Constitution purports to confer such a power upon the federal courts." (emphasis added)); *id.* at 92 (Reed, J., concurring) ("[N]o one doubts federal power over procedure.").

351 Hazard, *supra* note 297, at 1632.

352 See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (Marshall, C.J.) (addressing whether state or federal law should govern the execution of federal court civil judgments).

choices.<sup>353</sup> A guided *Erie* choice—one where the federal standard is set forth in positive federal law such as a Federal Rule of Civil Procedure—is supposed to be more favorable to federal lawmaking than an unguided *Erie* choice.<sup>354</sup> An unguided choice—one where the federal court is simply developing procedural common law—is supposed to be less tolerant of a federal standard that overrides state law.<sup>355</sup> The paradox is that a Federal Rule is invalid under the Rules Enabling Act if it abridges, enlarges, or modifies substantive rights.<sup>356</sup> Yet the classic federal common law cases (e.g., *Boyle*) teach that federal common law *can* directly override state law substantive rights.<sup>357</sup> This suggests that federal practice might be more likely to prevail over a contrary state rule if it is characterized as federal common law than if it is characterized as being compelled by a Federal Rule.

To resolve this paradox, some commentators argue that the Rules Enabling Act's substantive-rights provision applies to federal common law as well. As Peter Westen and Jeffrey Lehman argue, "[T]he [Rules Enabling Act's] statutory prohibition on rules that abridge 'substantive rights' must be deemed to apply to judge-made rules, too; otherwise, judges could do through common law adjudication what they cannot do through the carefully circumscribed and safeguarded mechanism used to create rules of civil procedure."<sup>358</sup> It is unclear, however, what the textual basis is for expanding the Rules Enabling Act beyond its own rulemaking process, or how this view can be recon-

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353 See *supra* notes 103–17 and accompanying text.

354 See Ely, *supra* note 2, at 716 n.126 (arguing that any "sensible" approach to unguided *Erie* choices must eliminate the "possibility . . . that even though a Federal Rule had been declared invalid under the second sentence of the Enabling Act for abridging substantive rights created by a given state rule, local federal courts could turn around and on their own motion impose the same federal rule in the teeth of the same state rule"); see also *id.* ("One of *Hanna's* main points was that the Rules of Decision Act is more protective of state prerogatives than the Enabling Act.").

355 See *supra* note 354.

356 28 U.S.C. § 2072(b) (2006); see also *supra* notes 165–70 and accompanying text (describing how the Rules Enabling Act's substantive-rights provision limits judicially created federal rules).

357 See *supra* notes 326–37 and accompanying text.

358 Westen & Lehman, *supra* note 3, at 365; see also Ely, *supra* note 2, at 716 n.126 ("[T]he theoretical possibility would exist that even though a Federal Rule had been declared invalid under the second sentence of the Enabling Act for abridging substantive rights created by a given state rule, local federal courts could turn around and on their own motion impose the same federal rule in the teeth of the same state rule."); Perdue, *supra* note 3, at 760 ("The Rules Enabling Act may constrain courts, even where they are not directly interpreting a Federal Rule of Civil Procedure but are instead creating a federal common law rule of 'practice and procedure.'").

ciled with the recognition that federal common law can, indeed, abridge substantive rights.<sup>359</sup>

#### 4. *Erie's* Relationship to Bases of Federal Jurisdiction

A fourth conceptual problem with the *Erie* doctrine is the oft-stated assumption that *Erie* governs only cases subject to federal diversity jurisdiction and, therefore, does not apply in federal question cases.<sup>360</sup> Admittedly, Justice Brandeis spent much of his *Erie* opinion decrying the vexatious consequences of the *Swift* doctrine in diversity cases.<sup>361</sup> But Justice Brandeis conceded that those consequences alone were not sufficient to overrule *Swift*. Rather, it was the “unconstitutionality of the course pursued” under *Swift* that compelled the decision in *Erie*.<sup>362</sup> And Brandeis’ description of *Swift’s* constitutional infirmity—focused as it was on a lack of judicial power to “declare substantive rules of common law”<sup>363</sup>—is not limited to diversity cases.<sup>364</sup>

The two statutes associated with the *Erie* doctrine also fit poorly with a singular focus on diversity cases. The Rules of Decision Act

359 See *supra* notes 326–37 and accompanying text.

360 See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (“Under the *Erie* doctrine, federal courts *sitting in diversity* apply state substantive law and federal procedural law.” (emphasis added)); *id.* at 434 (noting that “cases arising wholly under federal law” are “cases in which the *Erie* doctrine was not in play”); see also *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971) (distinguishing *Erie* on the basis that “[i]n federal-question cases, the law applied is federal law”); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 466–67 (1942) (Jackson, J., concurring) (“These recent cases, like *Swift v. Tyson* which evoked them, dealt only with the very special problems arising in diversity cases . . . . The Court has not extended the doctrine of *Erie R. Co. v. Tompkins* beyond diversity cases.” (footnote omitted)). But see *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 164 n.2 (1987) (Scalia, J., concurring) (describing “the view that *Erie* requires application of state law only in diversity cases as an ‘oft-encountered heresy’” (quoting Friendly, *supra* note 3, at 408 n.122)). The Supreme Court has stated that *Erie* would be relevant in a federal question case only “where Congress directly or impliedly directs the courts to look to state law to fill in details of federal law.” *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 161 n.13 (1983); see Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 OR. L. REV. 781 (1992) (discussing the role that state law plays in applying federal tax law).

361 See *supra* notes 55–61 and accompanying text.

362 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938); see also *supra* notes 63–65 and accompanying text (noting that Justice Brandeis stressed that *Swift’s* unconstitutionality was the basis for the *Erie* doctrine).

363 *Erie*, 304 U.S. at 78.

364 Indeed, that portion of the opinion does not refer at all to diversity jurisdiction. See *id.* at 77–80 (discussing why the *Swift* doctrine is unconstitutional).

commands federal courts to apply state law “in *civil actions* in the courts of the United States,”<sup>365</sup> not just diversity cases.<sup>366</sup> To be sure, the Act allows federal courts to deviate from “[t]he laws of the several states” where a federal statute or constitutional provision “otherwise require[s] or provide[s].”<sup>367</sup> But that hierarchy is compelled by the Supremacy Clause itself, which makes federal statutes and the U.S. Constitution “the supreme Law of the Land.”<sup>368</sup> And this caveat is arguably irrelevant for the unguided *Erie* choices to which the Rules of Decision Act potentially applies.<sup>369</sup> In that situation, by definition, there is *no* federal statute or constitutional provision that compels a particular federal standard.<sup>370</sup> The constraints of the Rules Enabling Act—the critical statute for guided *Erie* choices—are also not limited to diversity cases. The requirement that Federal Rules “shall not abridge, enlarge or modify any substantive right”<sup>371</sup> makes no distinction between substantive rights arising under state law or federal law, nor does this provision apply with any less force to federal question cases.<sup>372</sup>

## 5. *Erie*'s Source

A final, overarching problem that has plagued the *Erie* doctrine is the source of the doctrine itself. Justice Brandeis clearly based *Erie* on a principle of constitutional law: “Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.”<sup>373</sup> Brandeis’ constitutional logic has proven problem-

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365 28 U.S.C. § 1652 (2006) (emphasis added).

366 See Westen & Lehman, *supra* note 3, at 366–68.

367 28 U.S.C. § 1652.

368 U.S. CONST. art. VI.

369 See *supra* note 133 (describing the view that the Rules of Decision Act governs unguided *Erie* choices); see also *infra* notes 433–37 and accompanying text (describing the dispute over whether the Rules of Decision Act constrains federal judicial lawmaking).

370 See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); see also *supra* notes 133–35 and accompanying text (describing features of an unguided *Erie* choice).

371 28 U.S.C. § 2072(b) (2006).

372 See Ely, *supra* note 2, at 737 n.226 (“The Enabling Act, in limiting Federal Rules promulgated for civil actions, indicates no distinction between diversity and federal question cases.”); see also Burbank, *supra* note 167, at 1108–12 (rejecting the idea that the Rules Enabling Act’s substantive-rights provision “has its roots in federalism concerns”); *id.* at 1106 (“Nothing could be clearer from the pre-1934 history of the Rules Enabling Act that the procedure/substance dichotomy . . . was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.”).

373 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

atic, however. As an initial matter, few would doubt Congress' authority, under the Interstate Commerce Clause, to do exactly what the *Erie* decision says would be unconstitutional—prescribe the standard of care owed by interstate rail carriers to folks like Mr. Tompkins who walk beside railroad tracks serving interstate commerce.<sup>374</sup>

Returning to the core problem of judicial lawmaking, the view that *Erie* states a principle of constitutional law is hard to reconcile with the evolution of the *Erie* doctrine over the last seventy years. First, if the Constitution truly bars federal courts from “declar[ing] substantive rules of common law applicable in a State,”<sup>375</sup> how do federal courts claim authority to trump state law with federal common law like *Boyle's* government contractor defense?<sup>376</sup> Second, a constitutional view of *Erie* seems inconsistent with the fact that federal *statutes* can relax the *Erie* doctrine's requirements. The Rules Enabling Act, for example, allows federal courts to ignore state law in situations where the *Erie* doctrine might otherwise require federal courts to follow it.<sup>377</sup> And the idea that the *Erie* doctrine does not generally apply in federal question cases<sup>378</sup> indicates that Congress can evade *Erie* by enacting statutes sufficient to create federal question jurisdiction.

Third, Justice Brandeis failed to explain which clause in the Constitution the *Swift* doctrine violated.<sup>379</sup> Although Brandeis noted that *Swift* “rendered impossible equal protection of the law,”<sup>380</sup> it is doubtful that equal protection is *Erie's* constitutional underpinning. Brandeis' reference to “equal protection” does not appear in the portion of *Erie* discussing the unconstitutionality of *Swift*. Moreover, the Equal Protection Clause is found in the Fourteenth Amendment, which by its terms does not apply to branches of the federal government like federal courts.<sup>381</sup> Only decades after *Erie* did the Supreme Court hold that the Fifth Amendment's Due Process Clause imposed an equal protection obligation on the federal government.<sup>382</sup>

374 See, e.g., Merrill, *supra* note 3, at 14–15.

375 *Erie*, 304 U.S. at 78.

376 See *supra* notes 326–37 and accompanying text.

377 See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

378 See *supra* note 360 and accompanying text.

379 See Clark, *supra* note 3, at 1289 (“The constitutional rationale of *Erie* . . . has remained elusive for almost seventy years.”).

380 *Erie*, 304 U.S. at 75.

381 U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)).

382 See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); see also Clark, *supra* note 3, at 1299–1300 (“*Erie* simply used the phrase in its broader, non-constitutional sense.”); *id.* at 1299 nn.73–74 (providing sources discussing *Erie's* use of equal protection lan-

Some language Justice Brandeis used in his constitutional analysis indicates that the *Swift* doctrine ran afoul of the Tenth Amendment, which mandates that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.”<sup>383</sup> But the Tenth Amendment theory begs the question of why Article III of the Constitution does not “delegate” to the federal judiciary the authority to make federal common law by bestowing upon it “the judicial Power of the United States.”<sup>384</sup> Justice Brandeis’ *Erie* opinion provides no answer to this question.

Finally, the content of the *Erie* doctrine contributes to confusion over its precise source. Justice Brandeis’ discussion of *Erie*’s constitutional rule makes no mention of the “twin aims” that have become the focus of so-called unguided *Erie* choices.<sup>385</sup> Although other parts of the opinion refer to the problems of forum shopping and inequitable administration of laws,<sup>386</sup> Justice Brandeis’ reasoning indicates that those problems alone would not have been enough to depart from *Swift*. It was only “the unconstitutionality of the course pursued”<sup>387</sup> that led to the result in *Erie*. This unconstitutionality was based on a lack of federal judicial power, not concerns about forum shopping or inequitable administration of laws.<sup>388</sup> There is, therefore, an uncomfortable mismatch between *Erie*’s purported constitutional basis and the current framework for applying the *Erie* doctrine.

For these reasons, many commentators have argued that the *Erie* doctrine is grounded in federal statutory law, not the Constitution. In his influential article *The Irrepressible Myth of Erie*, John Hart Ely characterized *Erie* as a statutory decision based purely on the Rules of Decision Act’s command that federal courts must follow “[t]he laws of the several states”<sup>389</sup> unless federal positive law provides otherwise.<sup>390</sup>

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guage and the Supreme Court’s “development of Fifth Amendment equal protection jurisprudence”).

383 U.S. CONST. amend. X; *cf. Erie*, 304 U.S. at 80 (“[I]n applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”). Some commentators have argued that *Erie* is based on the Tenth Amendment. *See, e.g.*, George D. Brown, *Of Activism and Erie—The Implication Doctrine’s Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 621 (1984).

384 U.S. CONST. art. III, § 1; *see also* *United States v. Darby*, 312 U.S. 100, 123–24 (1941) (“Our conclusion is unaffected by the Tenth Amendment . . . . The amendment states but a truism that all is retained which has not been surrendered.”).

385 *See Erie*, 304 U.S. at 78–80.

386 *See id.* at 73–77.

387 *Id.* at 77–78.

388 *See id.* at 78–80.

389 28 U.S.C. § 1652 (2006).

Under *Swift*, federal courts had held that a state's judge-made common law did not qualify as "law[ ] of the several states"<sup>391</sup> for purposes of the Rules of Decision Act. Scholars like Ely argue that *Erie* did nothing more than redefine that phrase to include common law decisions of a state's highest court.<sup>392</sup>

This conception of *Erie* is unsatisfying for several reasons. Again, the *Erie* decision specifically stated that it would have retained *Swift's* interpretation of the Rules of Decision Act if not for the unconstitutionality of the *Swift* approach: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."<sup>393</sup> To read *Erie* as a mere shift in statutory interpretation disregards Justice Brandeis' reasoning. In addition, the statutory view of *Erie* fails to explain the post-*Erie* substantive federal common law cases discussed above. If the Rules of Decision Act compels federal courts to use the "laws of the several states" as "rules of decision," it would also seem to foreclose substantive federal common law like *Boyle's* government-contractor defense.<sup>394</sup> Perhaps the solution to this problem lies in the Act's last five words, which qualifies that federal courts must heed "laws of the several states" only "in cases where they apply."<sup>395</sup> But *Erie* contains no discussion of what these five words mean. If this phrase had been the conceptual underpin-

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390 Ely, *supra* note 2, at 718; *see also, e.g.*, MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 154 n.7 (1991) (questioning the continued validity of *Erie's* constitutional underpinnings in light of the Supreme Court's broad construction of federal power in recent years); Dudley & Rutherglen, *supra* note 342, at 713 (identifying the Rules of Decision Act as the foundation of the *Erie* doctrine); Green, *supra* note 2, at 3 ("Erie's majority specified several constitutional reasons for its result, but the Court's [constitutional] analysis cannot bear scrutiny."); Redish & Phillips, *supra* note 3, at 357-60 (arguing *Erie* analysis has its primary basis in statutory law, namely the Rules Enabling Act and the Rules of Decision Act); Allan D. Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 254 (1963) (suggesting *Erie's* constitutional language was "not necessary for the decision of the case").

391 28 U.S.C. § 1652.

392 *See, e.g.*, Ely, *supra* note 2, at 704.

393 *Erie*, 304 U.S. at 77-78 (footnote omitted).

394 *See supra* notes 326-37 and accompanying text.

395 28 U.S.C. § 1652; *see also* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 162 (1987) (Scalia, J., concurring) (noting that the Rules of Decision Act "directs federal courts to follow state laws only 'in cases where they apply'" (quoting 28 U.S.C. § 1652)); Weinberg, *supra* note 3, at 816 ("The Rules of Decision Act says that state law shall furnish the rules of decision in federal civil actions, in cases in which they apply. But what about cases in which they do not apply?" (footnote omitted)).

ning of *Erie*, one would have expected Justice Brandeis to incorporate it into his analysis.<sup>396</sup>

### B. *Erie's Constitutional Core and the Two Tiers of Federal Judicial Lawmaking*

This subpart proposes a new theory of *Erie* that resolves the problems and incoherencies described above, and lays the groundwork for the central role that *Erie* will play as the twenty-first century battles over judicial federalism unfold. This theory recognizes *Erie* as the lynchpin of a two-tier framework for choosing between state and federal law. The core of *Erie* is a constitutional principle that prohibits certain kinds of federal judicial lawmaking and is directly traceable to the *Erie* decision itself. Two judicially developed choice of law systems operate on either side of *Erie's* constitutional limit on federal lawmaking.

#### 1. *Erie's* Constitutional Core

The constitutional principle that Justice Brandeis invoked but failed to articulate is this: federal judicial lawmaking cannot override substantive rights where such lawmaking has only an *adjudicative* rationale. If the sole basis for federal judicial lawmaking is that federal courts may adjudicate a particular dispute, such lawmaking cannot dictate the substantive rights that are the basis for the adjudication. This constitutional principle explains not only the result Justice Brandeis reached in *Erie*, but also the reasoning he used to get there. The “fallacy underlying the rule declared in *Swift v. Tyson*”<sup>397</sup> was the idea that the mere existence of *jurisdiction* included the power to impose judicially created federal law standards in derogation of state law substantive rights.<sup>398</sup> *Erie's* progeny, which concern the propriety of fed-

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396 If the contemporary *Erie* doctrine is simply an attempt to interpret and apply that five-word caveat, it is unclear why the *Erie* decision—which makes no mention of that phrase—gets the naming credit rather than older decisions that explicitly confront it. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 25 (1825) (“[B]y the words of the section, the laws of the State furnish a rule of decision for those cases only ‘where they *apply*’; and the question arises, do they *apply* to such a case?”).

397 *Erie*, 304 U.S. at 79.

398 See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . . .”); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (“This principle [that a jurisdictional grant alone does justify federal common law] follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law.”); *Field*,



eral procedural lawmaking, implicate the other side of this constitutional coin—the mere authority to develop *procedures* for adjudicating disputes is not a sufficient basis for the federal judiciary to impose federal substantive law.<sup>399</sup>

This constitutional theory of *Erie* reconciles Justice Brandeis' command that *Swift* was “an unconstitutional assumption of powers by courts of the United States”<sup>400</sup> with the Supreme Court's acceptance of unquestionably substantive judicial lawmaking in the contemporary federal common law cases.<sup>401</sup> In the latter situation, the Supreme Court bases substantive lawmaking on justifications that are not simply adjudicative. In creating a federal common law government-contractor defense, for example, the Supreme Court noted “the Federal Gov-

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*supra* note 3, at 922–23 (arguing that *Erie* “clearly rejects the proposition that a court can make federal common law simply because it has jurisdiction”); Tidmarsh & Murray, *supra* note 29, at 621–23 (criticizing the idea that the power to create federal common law can be implied from the existence of jurisdiction).

399 On this score, current doctrine gives Congress greater authority than this Article's constitutional theory would allow the federal judiciary. In *Hanna*, the Court explained that

the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

*Hanna v. Plumer*, 380 U.S. 460, 472 (1965). This language suggests that Congress could impose federal substantive law based on its mere authority to regulate the process of federal court adjudication; as Professor Ely has noted, Congress could impose a substantive “no-fault system” for all diversity-jurisdiction accident cases on the “procedural” theory that “keeping accident cases out of federal courts will clear their dockets so that they can do juster justice in other cases.” Ely, *supra* note 2, at 706 n.77. It could certainly be argued that this view of congressional authority goes too far. Just a few years before *Hanna*'s dicta declared such broad congressional power, the Court spoke in much more skeptical terms. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Court narrowly construed the Federal Arbitration Act out of concern that “arbitration touched on substantive rights, which *Erie R. Co. v. Tompkins* held [must be] governed by local law.” *Id.* at 202. Furthermore, recent Supreme Court decisions suggest that federalism concerns may compel a narrower view of Congress' authority under the Necessary and Proper Clause. See *Printz v. United States*, 521 U.S. 898, 918–22 (1997); *New York v. United States*, 505 U.S. 144, 156–57 (1992). These decisions may warrant reconsideration of the idea that Congress' power to regulate the business of the federal courts—standing alone—permits potentially sweeping changes in substantive law.

400 *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)).

401 See *supra* notes 326–37 and accompanying text.

ernment's interest in the procurement of equipment"<sup>402</sup> and the fact that "imposition of liability on Government contractors will directly affect the terms of Government contracts."<sup>403</sup> In creating the federal common law rule that federal courts must give effect to acts of a foreign government defining private property rights within its territory, the Court emphasized that this issue was "intrinsically federal" due to the need "for uniformity in this country's dealings with foreign nations."<sup>404</sup> Thus, the Supreme Court ties the propriety of substantive lawmaking by the federal judiciary to the presence of "uniquely federal interests."<sup>405</sup> Such interests are more than merely adjudicative or procedural and, therefore, the theory proposed in this Article is consistent with the Supreme Court's federal common law jurisprudence.

This Article's theory also solves the riddle of why the *Erie* doctrine is largely absent from federal question cases.<sup>406</sup> In general, Congress' choice to enact substantive legislation in a particular area creates a federal interest that is more than merely adjudicative and that, therefore, justifies federal lawmaking on related issues left unanswered by the relevant statute.<sup>407</sup> Finally, this Article's theory resolves the paradox that a Federal Rule promulgated pursuant to the Rules Enabling

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402 *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988).

403 *Id.* at 507.

404 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 & n.25 (1964).

405 *E.g.*, *Boyle*, 487 U.S. at 504. I do not pretend that the uniquely federal interest requirement can be mechanically applied, or that it tightly constrains judicial discretion to determine when such interests do or do not exist. *See Tidmarsh & Murray, supra* note 29, at 620 (noting that the uniquely federal interests test is a "conclusion[ ] rather than a method[ ] of analysis"). For better or worse, however, this is the test that the Supreme Court has endorsed in the context of "classic" federal common law cases. *See, e.g.*, *Boyle*, 487 U.S. at 504. The constitutional principle proposed in this Article could accommodate a range of views on what federal interests are in fact sufficient constitutional grounds for federal judicial lawmaking. In any event, as explained *infra* notes 428–32 and accompanying text, federal courts might adhere to state law for nonconstitutional reasons even if the presence of a uniquely federal interest would make substantive judicial lawmaking constitutionally permissible.

406 *See supra* note 360 and accompanying text.

407 This observation bolsters the argument that the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (described *supra* notes 209–17 and accompanying text) is limited to the kind of antitrust claims presented in that case. *See supra* note 217. To read *Twombly* as stating a general principle of federal procedural law, under which plaintiffs in all kinds of cases must provide greater factual detail to get past the pleadings phase, could interfere with substantive rights. *See supra* notes 263–69 and accompanying text. Antitrust law, however, is governed by notoriously vague federal statutes, which means that federal courts play a role in defining the substantive rights themselves. *Twombly*, therefore, can sensibly be read as reflecting the Supreme Court's view of substantive antitrust law, in which case *Twombly's* rule for antitrust pleading would not directly apply to other kinds of claims.

Act might be more vulnerable to challenge than an identical rule that is imposed as a matter of federal procedural common law.<sup>408</sup> The constitutional principle that this Article proposes eliminates this disparity. Just as a Federal Rule may not “abridge, enlarge or modify any substantive right,”<sup>409</sup> a federal common law rule may not interfere with substantive rights where its sole justification is the federal courts’ authority to make procedures for resolving cases before them.<sup>410</sup>

Properly understood, then, *Erie* does not stand for the simple rule of thumb that everyone learns—that a federal court must apply state substantive law and federal procedural law. Rather, *Erie* scrutinizes the relationship between the impact of the federal rule on substantive rights and the justification for that federal rule. A judicially created federal rule that imposes or overrides substantive rights requires a justification other than the mere authority to assert federal court jurisdiction<sup>411</sup> or to regulate federal court procedure. It requires an interest that is uniquely federal.

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408 See *supra* Part IV.A.3.

409 28 U.S.C. § 2072(b) (2006); see also *supra* notes 165–70 and accompanying text (discussing how judicially created federal rules must comply with the Rules Enabling Act).

410 Because *Erie*’s constitutional restriction on judicial lawmaking mirrors the substantive-rights limitation in the Rules Enabling Act, this constitutional principle suffers from the same uncertainty about precisely what substantive rights are protected. See *supra* note 249. At a minimum, such substantive rights would include those that govern the “primary activity” of parties. *Hanna v. Plumer*, 380 U.S. 460, 474–75 (1965) (Harlan, J., concurring) (“[T]here should not be two conflicting systems of law controlling the primary activity of citizens.”).

411 Although the Supreme Court has clearly stated that the existence of jurisdiction alone cannot justify substantive federal common law, see *supra* note 398, it has occasionally used language that suggests otherwise. In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), for example, it stated: “We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.” *Id.* at 95–96. But such dicta misrepresents the actual basis for federal common law in the maritime area; in fact, such federal common law is grounded in precisely the kind of uniquely federal interest that justifies substantive federal common law in other areas. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (describing the need to prevent state law from “interfer[ing] with the proper harmony and uniformity of [general maritime law] in its international and interstate relations”). There have also been situations where a congressional grant of jurisdiction is read (often in conjunction with legislative history) as manifesting congressional intent to delegate to the federal courts the power to develop federal common law. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (“Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations . . . .”); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450–57 (1957) (agreeing with the view that the Labor Management Rela-

Although this theory of *Erie* articulates a coherent principle that resolves several of *Erie*'s thorniest puzzles, a key question remains: on which clause in the Constitution is this principle based? Article III is a potential candidate.<sup>412</sup> Article III empowers the federal courts not to exercise an open-ended "judicial power," but rather to exercise "[t]he judicial power of the United States."<sup>413</sup> Arguably, then, any judicial power exercised pursuant to Article III must bear some connection to the United States as a federal entity.<sup>414</sup> The constitutional principle

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tions Act "is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements" (footnote omitted)). This is analytically distinct, however, from claiming that the existence of jurisdiction by itself vests authority to create federal common law. In any event, these situations tend to occur in areas where a uniquely federal interest arguably exists anyway. *Sosa* involved civil actions invoking violations of international law. See 542 U.S. at 729–31 & nn.18–19; cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 & n.25 (1964) (noting that "matters of international significance" such as "[t]he problems surrounding the act of state doctrine" are "intrinsically federal"). And *Lincoln Mills* involved labor law matters that were already the subject of considerable substantive federal legislation. See 353 U.S. at 456–57 ("The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy."); see also *supra* notes 406–07 and accompanying text (describing how federal legislation in a particular area can create a uniquely federal interest that is more than merely adjudicative).

412 My goal in proposing Article III is a modest one—to provide a textually plausible, structurally coherent constitutional basis for the holding and logic of the *Erie* decision and the subsequent evolution of federal judicial power. A comprehensive assessment of Article III's suitability would require a thorough analysis of constitutional history that is beyond the scope of this Article.

413 U.S. CONST. art. III, § 1 (emphasis added).

414 The Constitution's vesting of judicial power differs in this regard from its vesting of legislative and executive power. While Article I and Article II indeed confine the legislative and executive powers to certain enumerated areas (just as Article III confines the judicial power to jurisdiction over certain categories of cases), only Article III's vesting language could be read to suggest that the power *itself* must be of an explicitly federal quality. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added)). Article I, by contrast, gives Congress power to act *beyond* its explicitly enumerated powers by providing that "Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. Making Article III the basis for *Erie*'s constitutional limits on federal judicial authority, therefore, allows the possibility that Congress possesses greater lawmaking authority than the federal judiciary. See *supra* note 399 (describing how this Article's theory would give the federal judiciary less lawmaking authority than Congress has under prevailing doctrine).

underlying *Erie* requires precisely such a connection. Put simply, “[t]he judicial power of the United States”<sup>415</sup> gives federal courts the power to impose their own substantive law (and thereby override state substantive law) only when justified by an interest unique to “the United States.”<sup>416</sup> *Erie*’s constitutional core—as proposed in this Article—flows from this understanding of Article III. Standing alone, neither jurisdictional authority (the sole basis for *Swift*’s federal common law) nor procedural authority generates the kind of *uniquely* federal interest required to impose federal substantive law under Article III.<sup>417</sup>

Admittedly, Justice Brandeis’ *Erie* opinion does not explicitly indicate that Article III plays this role. But to the extent that *Erie*’s constitutional reasoning channeled the Tenth Amendment,<sup>418</sup> it must have

415 U.S. CONST. art. III, § 1.

416 *Id.* (emphasis added). Subject to this restriction, Article III’s judicial power would include the power to determine the legal principles (including procedural ones) that govern in cases being adjudicated by the federal courts. The net result is that federal courts have greater leeway to generate law of a purely procedural nature than to generate law that impacts substantive rights. It is sensible, however, that the required relationship between the “judicial power” to make law and “the United States” as a federal entity, *see supra* notes 413–15 and accompanying text, fluctuates to bring the justification and impact of such lawmaking into alignment. *See also infra* note 423 & fig. 1 (illustrating the relationship between the justification for and the impact of federal judicial lawmaking). The federal judiciary’s authority to make law that does *not* impact substantive rights (e.g., pure procedural law) is justified by the mere existence of congressionally-authorized and constitutionally-permissible jurisdiction. But the federal judiciary’s authority to make law that does impact substantive rights requires a uniquely *federal* interest. This view of Article III would thus provide the constitutional basis for both substantive and procedural federal common law. As Professor Amy Barrett wrote recently: “While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked.” Barrett, *supra* note 328, at 815.

417 Even where a uniquely federal interest does exist, the federal judiciary must still adhere to legal principles dictated by federal positive law (e.g., the Constitution or Acts of Congress). *See* U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”); 19 WRIGHT ET AL., *supra* note 78, § 4514, at 454–53 (“Congress can override this post-*Erie* federal common law. . . . Usually, federal common law is exercised only when Congress has not spoken to an issue. But when and if Congress does speak to the issue, its statement prevails over the then-existing federal common law.”). Some commentators have suggested, however, that certain areas of federal-court procedure are insulated from congressional interference altogether. *See* Barrett, *supra* note 328, at 833–35.

418 *See supra* note 383 and accompanying text.

been the case that Article III did *not* grant federal courts the broad substantive lawmaking power claimed under *Swift*. The theory proposed in this Article would provide the necessary prerequisite to a Tenth Amendment understanding of *Erie*.<sup>419</sup> Because Article III does not “delegate[ ]” to the federal government substantive judicial lawmaking power (absent a uniquely federal interest), the authority to engage in such lawmaking is “reserved to the States.”<sup>420</sup>

## 2. Sub-*Erie* and Super-*Erie* Choices

While *Erie*'s constitutional core places an outer limit on federal judicial lawmaking, it does not by itself resolve all state-federal choice of law questions. Orbiting *Erie* are two distinct choice of law frameworks—“sub-*Erie*” and “super-*Erie*.” In the sub-*Erie* category, the issue at stake does not threaten substantive rights. Accordingly, federal judicial lawmaking would not violate *Erie*'s core constitutional principle, which only prevents federal judicial lawmaking that overrides substantive rights. Some of the cases in *Erie*'s progeny fit in this category, simply because they do not interfere with truly substantive

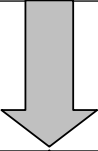
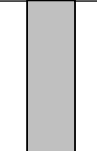
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419 See *supra* notes 383–84 and accompanying text.

420 U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . .”). Justice Brandeis’ opinion also indicated that the Constitution denies Congress *legislative* authority “to declare substantive rules of common law applicable in a State.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There may indeed be a legislative counterpart to the “fallacy” of *Swift*, namely, that Congress lacks authority “to declare substantive rules of common law applicable in a State” *solely* on the basis that federal courts might adjudicate claims concerning those substantive areas of law. *Id.* Put another way, such power is *not* “necessary and proper for carrying into Execution” the Constitution’s provision for a federal court system. U.S. CONST. Art. I, § 8, cl. 18; *cf.* *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (holding that the creation of “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)” does provide congressional power to regulate federal court *procedure*); *supra* note 399 (describing the argument that a mere interest in regulating federal court procedure should not be a sufficient constitutional basis for Congress imposing federal substantive law). One can accept this argument without also depriving Congress of its ample authority to make substantive law pursuant to other enumerated powers (e.g., the commerce clause). See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 15–22 (2005) (upholding Congress’ commerce-clause authority to regulate purely intrastate growers and users of marijuana for medical purposes). Accordingly, it is possible to accept a constitutional theory of *Erie* that is consistent with broad congressional authority. *But cf.*, e.g., PURCELL, *supra* note 3, at 203 (describing Justice Frankfurter’s concern that the constitutional basis of Brandeis’ *Erie* opinion would leave Congress too weak); see also REDISH, *supra* note 390, at 154–55 n.7 (“[I]n light of the Supreme Court’s extremely broad construction of federal [legislative] constitutional power, it might be argued that today *Erie*’s constitutional component is no longer good law.” (citation omitted)).

state law rights.<sup>421</sup> Thus, they fly below the scrutiny of *Erie*'s constitutional limit on judicial authority. In the super-*Erie* category, a justification for federal lawmaking exists that is not merely adjudicative. Federal judicial lawmaking in this realm also would not run afoul of *Erie*'s constitutional principle, which limits only federal lawmaking that is based on a purely adjudicative interest. The contemporary federal common law cases<sup>422</sup> fall in this category. The following chart illustrates these concepts:

FIGURE 1<sup>423</sup>

| <i>Justification</i>  |   |   | <i>Impact</i>   |  |
|---|---|---|-----------------|--|
|  | Uniquely Federal Interest                         | <b><u>Super-<i>Erie</i> Choice:</u></b><br>Contemporary "federal common law" problems                             | Substantive     |  |
|   | Procedural or Adjudicative (Not Uniquely Federal) | <b><u>Erie:</u></b> Adjudicative justification is constitutionally insufficient for substantive federal lawmaking | Substantive     |  |
|   | Procedural or Adjudicative (Not Uniquely Federal) | <b><u>Sub-<i>Erie</i> Choice:</u></b><br>Procedural choice-of-law problems  | Not Substantive |  |
| <i>Justification</i>  |   |   | <i>Impact</i>   |  |

421 A good example would be *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), which held that, despite *Erie*, federal law governed the imposition of sanctions for improper attorney conduct. See *supra* notes 144–48 and accompanying text. Such sanctions do not relate to the parties' primary activity; they depend purely on "how the parties conduct themselves during the litigation." *Chambers*, 501 U.S. at 53; cf. *supra* notes 251–70 and accompanying text (explaining how summary judgment and pleading standards can override substantive rights even though they appear to concern purely litigation-related activity).

422 See *supra* notes 326–37 and accompanying text.

423 The arrows on the chart highlight the constitutional problem addressed by *Erie*'s constitutional core, namely, the middle-row mismatch between the justification for federal lawmaking and the impact of that federal lawmaking. An adjudicative rationale is a constitutionally insufficient basis for federal lawmaking that overrides substantive rights. See *supra* notes 397–405 and accompanying text. In the super-*Erie* and sub-*Erie* areas, on the other hand, the justification and impact are aligned. In the

Identifying an issue as falling in the sub-*Erie* or super-*Erie* category determines *how* the choice between state and federal law will be made. In the sub-*Erie* category, a federal court adjudicating a state law claim must examine how the choice between state and federal procedural law would impact the “twin aims” of discouraging forum shopping and inequitable administration of laws.<sup>424</sup> Recognizing the twin-aims test as the sub-*Erie* choice of law framework explains the odd relationship between *Erie* itself and the subsequent decisions that have shaped the *Erie* doctrine.<sup>425</sup> Cases that ultimately hinge on the twin-aims test are still properly viewed as *Erie*’s progeny, because a federal court cannot logically proceed to this nonconstitutional choice of law framework unless it first assures itself that adopting a federal law standard would not override truly substantive rights. Viewing the twin-aims test as logically related to, but not mandated by, *Erie*’s constitutional core also comports better with the *Erie* decision itself; again, Justice Brandeis’ constitutional analysis makes no reference to the policies underlying these twin aims.<sup>426</sup> Finally, this approach explains why no inquiry into *Erie*’s twin aims is necessary for “guided” *Erie* choices, such as when a Federal Rule of Civil Procedure dictates a particular federal standard. In that situation, federal positive law itself selects the governing standard. If that Federal Rule does not override substantive rights, then it passes muster under both the Rules Enabling Act and *Erie*’s constitutional core.<sup>427</sup>

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super-*Erie* category, a substantive impact is potentially justified by a uniquely federal interest. In the sub-*Erie* category, the propriety of federal procedural lawmaking is bolstered by the fact that it does not override existing substantive rights.

424 See *supra* notes 133–35 and accompanying text. When courts and commentators state that *Erie* does not apply to claims arising under federal law, see *supra* notes 191, 360, they are correct in the sense that the *twin-aims* test applies only to claims arising under state law. In cases arising under federal law, the sub-constitutional twin-aims test does not restrict federal courts’ constitutional authority to develop procedural rules for cases pending in federal court. See *supra* note 416.

425 See *supra* notes 342–52 and accompanying text.

426 See *supra* notes 385–88 and accompanying text.

427 The Rules Enabling Act may continue to present thorny issues in federal question cases, however. For claims arising under federal law, federal courts wield considerable substantive and procedural lawmaking authority. See *supra* notes 406–08, 424 and accompanying text. From a constitutional standpoint, therefore, it may not matter if the federal judiciary’s procedural common law impacts federal substantive rights that the federal judiciary itself defines. See *supra* note 407 (discussing how *Twombly*’s pleading standard might be permissible only in antitrust cases for which the federal judiciary itself defines the substantive law). But the same logic does not necessarily work for the Rules Enabling Act, which forbids Federal Rules that abridge, enlarge, or modify *any* “substantive right.” 28 U.S.C. § 2072(b) (2006). Professor Steve Burbank makes a compelling argument that even for federal law claims, the Rules Enabling Act



Federal courts must also choose between state and federal law in the super-*Erie* realm. One example is the incorporation of state law into federal common law. On a number of occasions, the Supreme Court has declared that although federal common law governs a particular issue, state law would provide the “federally prescribed rule of decision.”<sup>428</sup> The Supreme Court has indicated that incorporation of state law into federal common law is appropriate unless a “significant conflict exists between an identifiable federal policy or interest and the [operation] of state law,”<sup>429</sup> or there is a “need for a nationally uniform body of law.”<sup>430</sup> As a practical matter, however, there is no meaningful difference between (1) incorporating state law into federal common law, and (2) choosing state law to begin with. Courts engage in this doctrinal construct because they conflate two distinct issues—whether federal lawmaking is permissible, and whether federal law should be selected over state law. Those are precisely the issues that this Article’s framework disentangles. The presence of a uniquely federal interest means federal judicial lawmaking is constitutionally permissible (i.e., in the super-*Erie* category), but a choice between state and federal law remains. If state law would significantly conflict with an identifiable federal policy or interest, or if there is a need for a nationally uniform body of law, then the federal court should make the super-*Erie* choice in favor of federal law. Otherwise, it should choose state law. This more straightforward analysis, which

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forbids Federal Rulemaking on issues like limitations law and preclusion law, even if federal *common law* on such issues would be appropriate for federal law claims. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 772–75 (1986); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700–07 (1988).

428 *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity” but “adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits”); see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) (holding that “federal courts should incorporate *state* law into federal common law” to fill “a gap in the federal securities laws”).

429 *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (alteration in original) (internal quotation marks omitted) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); see also *Semtek*, 531 U.S. at 509 (examining whether a particular state law “is incompatible with federal interests”).

430 *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); see also *Semtek*, 531 U.S. at 508 (noting that there was “no need for a uniform federal rule”).

is consistent with traditional choice of law approaches,<sup>431</sup> avoids the conceptually strained idea that federal courts are adopting state law as a “federally prescribed rule of decision.”<sup>432</sup>

This Article’s framework is neutral on the extent to which the Rules of Decision Act constrains (or should constrain) choices between state and federal law. The Rules of Decision Act’s role in such matters is a hotly contested issue. For many prominent commentators, the Rules of Decision Act is the source of current doctrine for making so-called “unguided” *Erie* choices.<sup>433</sup> Others insist that the Rules of Decision Act also constrains substantive federal common law (and much more so than the Supreme Court’s current approach acknowledges).<sup>434</sup> Some scholars, however, contend that the Rules of Decision Act is irrelevant to a federal court’s choice between state and federal law. They argue that the Rules of Decision Act’s phrase “laws of the several states” was not meant to mandate adherence to the law of any particular state to the exclusion of common-law rules developed by federal courts.<sup>435</sup> Others contend that the Rules of Decision Act is essentially devoid of meaningful content, because by its own terms the “laws of the several states” are binding only “in cases where they apply.”<sup>436</sup> These latter views suggest that it might be sensible to

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431 Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (including among factors relevant to conflict of laws analysis “uniformity of result” and “the relative interests of [other] states in the determination of the particular issue”).

432 *Semtek*, 531 U.S. at 508.

433 See, e.g., Ely, *supra* note 2, at 707–17; Freer, *supra* note 3, at 1637 (“[I]f there is no federal constitutional or legislative directive on point, the vertical choice of law decision is made under the Rules of Decision Act . . .”).

434 See REDISH, *supra* note 390, at 30–31, 37 (arguing that the Rules of Decision Act renders “all federal ‘common law’ . . . illegitimate” but recognizing that legitimate “interpretation” of federal statutes would include federal judicial lawmaking authority to “decid[e] a legal question that, though not explicitly covered by the text, must be resolved, one way or another, before the statute may be applied to a specific set of facts to which the text concededly applies”).

435 See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 106–08 (1993) (“[T]he [Rules of Decision Act’s] reference to ‘the laws of the Several States’ could not have meant the law of any individual state, but must have been a generic reference to American, as opposed to British, common law.”); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514–15 (1984) (arguing that the Rules of Decision Act did not forbid federal courts from making common-law rules because “general common law . . . did not come within the scope either of [the Rules of Decision Act] or of the *lex loci* principle from which the [Rules of Decision Act] was derived”); *accord* Sherry, *supra* note 3, at 2137–38.

436 28 U.S.C. § 1652 (2006); see *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 162 (1987) (Scalia, J., concurring) (noting that the Rules of Decision Act

set the Rules of Decision Act aside and acknowledge that the prevailing methods for choosing between federal and state law have been developed by the federal judiciary itself. Indeed, this would follow in the long tradition of judge-made horizontal choice of law rules.<sup>437</sup> The sub-*Erie* and super-*Erie* frameworks proposed in this Article, however, could be adopted either as purely judicial creations or as reformulations of principles attributable to the RDA.

C. *What the New Theory of Erie Means for the Future of  
Judicial Federalism*

This subpart briefly reflects on how this Article's theory impacts the scholarly debate, which has reached a fever-pitch following CAFA, about judicial federalism and civil litigation. At the outset, it must be stressed that this theory does not undermine the argument presented in Part III, namely, that the *Erie* doctrine may require federal courts to follow state-court practice on important aspects of civil procedure. That argument is based on the contemporary, black letter understanding of the *Erie* doctrine, and this Article's broader recasting of *Erie* places the current framework on more solid theoretical footing.

If anything, this Article's *Erie* theory bolsters the earlier arguments about summary judgment, class certification, and pleading, because it reveals that the Constitution itself prohibits federal judicial interference with substantive rights for purely procedural reasons.<sup>438</sup> The desirability (as a matter of procedural policy) of certain standards for summary judgment, class certification, or pleading does not qualify as the sort of "uniquely federal interest" that would justify such

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"directs federal courts to follow state laws only 'in cases where they apply,' which federal courts would be required to do even in the absence of the Act"); Rowe, *supra* note 2, at 985 n.85 ("The great generality of the Act's 'in cases where they apply' phrasing . . . gives little if any guidance as to when they *should* apply, leaving just how to make the 'relatively unguided *Erie* choice' up to judicial interpretation . . . ." (citation omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))); Weinberg, *supra* note 3, at 816 ("The Rules of Decision Act says that state law shall furnish the rules of decision in federal civil actions, in cases in which they apply. But what about cases in which they do not apply?"). For cases involving state procedural law, it might also be argued that the Rules of Decision Act is irrelevant because mere procedural rules do not qualify as "rules of decision." See REDISH, *supra* note 390, at 157–58 n.28 ("The phrase 'rules of decision' is an operative textual term, and, though it is not the only conceivable construction, it is quite reasonable to construe that phrase to apply only to purely substantive matters.").

437 See Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 951 (1977) ("The bulk of American conflicts law in the choice-of-law area is and always has been judge-made law.").

438 See *supra* notes 397–405 and accompanying text.

substantive lawmaking by federal courts.<sup>439</sup> Even if federal approaches to these issues do not override state law substantive rights, this Article's theory is consistent with the current *Erie* doctrine's sub-constitutional concerns about forum shopping and inequitable administration of laws. As explained above, these twin aims of *Erie* support greater federal court deference to state court practice on important aspects of civil procedure.<sup>440</sup>

That said, this Article's theory of *Erie* is flexible enough for the current ground rules to evolve. It might even evolve in the direction of greater lawmaking authority for the federal judiciary, as some commentators have urged.<sup>441</sup> Some, for example, have challenged the so-called *Klaxon* rule, which requires federal courts to follow the horizontal choice of law rules of the state in which it sits.<sup>442</sup> These commentators argue that federal courts should develop federal rules for choosing which of several states' laws must apply to particular issues.<sup>443</sup> This Article's theory would treat horizontal choice of law issues as sub-*Erie* choices. The decision to follow a particular state's law does not override existing substantive rights; it simply selects which of several sets of state law substantive rights will govern the dispute at hand. Thus, under this Article's theory, the *Klaxon* approach is not constitutionally compelled, a view confirmed by the reasoning of *Klaxon* itself.<sup>444</sup> Although *Klaxon* makes this sub-*Erie* choice in

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439 Indeed, federal courts have not asserted that any uniquely federal interest justifies their approaches to summary judgment, class certification, or pleading. Rather, federal courts typically justify them on policy grounds. See, e.g., *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (asserting various policy rationales for greater scrutiny of complaints, including the high cost of discovery proceedings and the concern that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986) (arguing that greater scrutiny of plaintiff's evidence at the summary judgment phase is needed in order to "isolate and dispose of factually unsupported claims or defenses"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (using mandamus to decertify a class action because class certification would present manageability problems and place too much pressure on defendants to settle, and because the case was not one "where the rationale for [a class action] is most compelling").

440 See *supra* notes 280–95 and accompanying text.

441 See *supra* notes 15–17 and accompanying text.

442 See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495–96 (1941).

443 See *supra* note 17.

444 See *Klaxon*, 313 U.S. at 496 (mentioning the need to avoid "disturb[ing] equal administration of justice in coordinate state and federal courts sitting side by side" but not suggesting that the Constitution requires federal courts to follow their home states' horizontal choice-of-law rules).

favor of state law, the federal judiciary might change course on this issue without exceeding its constitutional lawmaking authority.

Others have argued that after CAFA, federal courts should have authority to develop federal common law rules on unquestionably substantive aspects of tort law, such as the elements of claims and defenses in product liability or consumer fraud actions.<sup>445</sup> These commentators argue that such lawmaking by federal courts would be appropriate for so-called “national market” cases, that is, cases involving “conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination.”<sup>446</sup> Such proposals seem to pose a direct challenge to *Erie* itself, which seventy years ago held that federal courts lacked common law authority to hold the Erie Railroad Company to a standard of care distinct from that imposed by state tort law. But as described above, the last seventy years have also recognized the federal judiciary’s power to make quintessentially substantive common law when justified by a “uniquely federal interest.”<sup>447</sup> It is not implausible to argue that the interest in ensuring uniform standards for nationally marketed goods,<sup>448</sup> or the interest in avoiding “state interference with national markets,”<sup>449</sup> meets this standard. Although federal courts have yet to endorse such federal common lawmaking authority, it is potentially consistent with the constitutional theory of *Erie* that this Article proposes, as well as with Supreme Court jurisprudence that ties the propriety of substantive lawmaking by the federal judiciary to the presence of a uniquely federal interest.

At the end of the day, the theory of *Erie* proposed in this Article is not an absolutist one that makes certain areas wholly off limits to federal judicial lawmaking. Rather, it simply demands that such federal judicial lawmaking be justified by sufficient *reasons*. The constitutional fallacy of *Swift* was that it allowed federal judicial lawmaking based purely on the fact that the federal court had diversity jurisdic-

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445 See *supra* note 15.

446 Sherry, *supra* note 3, at 2136 & n.8 (quoting Issacharoff, *supra* note 17, at 1842); see also Issacharoff & Sharkey, *supra* note 15, at 1415–20 (“The likely effect of CAFA will then be to allow a body of national law to develop that corresponds to the demands of an undifferentiated market in which products are manufactured and sent to consumers across a distributional chain of ever-expanding geographic reach.”).

447 E.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); see *supra* notes 329–37 and accompanying text.

448 See Issacharoff & Sharkey, *supra* note 15, at 1385 (“Because most products are mass produced and mass distributed, without any clear sense of where in the national market they might end up, the need for federal uniformity would seem especially pressing.”).

449 Sherry, *supra* note 3, at 2138.

tion over a particular case. This Article's theory suggests that it would be similarly fallacious for federal courts to claim the power to make substantive rules of federal common law based solely on CAFA's expansion of federal jurisdiction. But the Constitution might well allow such judicial lawmaking based on the uniquely federal need to ensure uniform standards for nationally marketed goods or to avoid state interference with national markets.<sup>450</sup> While such lawmaking would extend federal judicial authority into areas that have previously been left to state law, it would not require "[o]verruling *Erie*."<sup>451</sup> It would simply recognize *Erie*'s proper role in the constitutional framework that governs federal judicial lawmaking. While *Erie* indeed denies federal courts untrammelled power to make substantive law for any case within their jurisdiction, it does not foreclose such lawmaking when justified by uniquely federal interests.

#### CONCLUSION

For all these reasons, the *Erie* doctrine may have quite a bit to say about judicial federalism in the twenty-first century. As recent developments in federal jurisdiction place more civil litigation into federal court, the scope of *Erie* is likely to become a key battleground. *Erie*'s seventieth anniversary is thus a critical moment to reconsider the *Erie* doctrine and to confront these contemporary challenges. The results may be surprising. Indeed, a straightforward application of the black letter *Erie* doctrine indicates that federal courts may have to abandon their typically pro-defendant approaches to several key procedural issues in favor of state law standards. In the short-term, therefore, *Erie* provides a potent response to recent developments like CAFA that have shifted the balance of judicial federalism in favor of federal courts and federal law. But much remains to be resolved, and a correct understanding of *Erie* would potentially permit even further federalization of our civil-litigation system.

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450 Ironically, a similar argument might support federal common law on the duty of care that interstate train operators would owe a modern-day Mr. Tompkins. The decision in *Erie* did not consider whether a uniquely federal interest in interstate rail travel would justify substantive federal common law. It addressed only the power federal courts claimed for themselves in *Swift*, that is, the power to declare substantive common law rules solely because they had jurisdiction over a case implicating that substantive area.

451 Sherry, *supra* note 3, at 2135.