

# Notes

## The Law Applied in Diversity Cases: The Rules of Decision Act and the *Erie* Doctrine

Article III of the Constitution provides that the judicial power of the United States “shall extend . . . to Controversies . . . between Citizens of different States . . . .” Congress vested the power to decide diversity cases in the federal courts at their creation in 1789, and has never withdrawn it. The judicial power includes the power of a court to determine, within constitutional and statutory limits, what law applies in deciding disputes.<sup>1</sup>

Article III does not provide explicit direction for determining what body of law is the appropriate source of rules to decide the questions presented in diversity cases. And assuming for the present that both state law and federal law will supply at least some rules to be applied in diversity cases, Article III does not on its face suggest a constitutional principle to distinguish those matters for which the rule should be drawn from state law from those in which some other law may be followed. But if the analysis in this Note is correct, a federal court will need such a constitutional principle only at an advanced stage of its inquiry about what body of law to apply to any particular issue in a diversity case. The Note argues that in far more cases than courts or commentators have thought, the directions provided by Congress in the Rules of Decision Act determine the law to be applied in diversity cases without reaching any constitutional question; and also that in cases where a constitutional question does arise, a straightforward

1. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 786 (2d ed. 1973).

American constitutions, both state and federal, place the power over the structure of the judicial process largely in the legislative body. As a result, rulemaking by courts in both state and federal systems, has been understood to require legislative authorization, and the product of judicial rulemaking has been subject to legislative review and revision. See, e.g., 28 U.S.C. §§ 2071 (authority of federal courts to prescribe general rules for the conduct of their business), 2072 (authority of the Supreme Court to provide rules of civil procedures), 2075 (1970) (authority of Supreme Court to provide bankruptcy rules); 18 U.S.C. §§ 3771, 3772 (1970) (authority of federal courts to provide rules for procedure in criminal cases).

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modification of principles already latent within the case law following *Erie Railroad v. Tompkins*<sup>2</sup> offers a solution.

### I. The Rules of Decision Act

In the Judiciary Act of 1789 the First Congress created lower federal courts and authorized them to exercise the judicial power in diversity cases.<sup>3</sup> Section 34 of the Act, more often referred to as the Rules of Decision Act, directed the new federal courts to refer to state law for rules to decide the issues in cases at common law, except where the Constitution, a federal statute, or a treaty of the United States provided a federal rule. This instruction, generalized to include all civil actions, continues in force to the present day:

The 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>4</sup>

The Rules of Decision Act expressly directs federal courts to use the laws of the states as rules for deciding cases. Courts and commentators in recent years have supposed that the Act only directs the use of substantive state law.<sup>5</sup> But the language of the Rules of Decision Act, and judicial interpretations of the Act for almost 150 years, establish that its construction and operation are independent of any classification of laws as “substantive” or “procedural.”

The basic instruction of the Rules of Decision Act is that “[t]he laws of the several states . . . shall be regarded as rules of decision . . . .” The Act focuses on “the laws,” not *some* of the laws, and directs that all such laws be used by the federal courts in deciding questions in disputes before them. The words “shall be regarded as rules of decision” do not identify a particular subset of state laws, *e.g.*, substantive law, but instead describe the way in which federal courts are to use all state law to decide cases. Had the First Congress intended in this section to instruct the federal courts to follow only a class of state substantive provisions—identified by the use of the words “rules of decision” as a term of art—it expressed its intent with remarkable

2. 304 U.S. 64 (1938).

3. Ch. XX, §§ 3, 11, 1 Stat. 73 (codified at 28 U.S.C. § 1332 (1970)).

4. 28 U.S.C. § 1652 (1970).

5. See 1A MOORE'S FEDERAL PRACTICE ¶¶ 0.312, 0.313, 0.314 (2d ed. 1974); W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 8 (1960); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 714 (1974); pp. 685-89 *infra*.

awkwardness. One would have expected some such provision as: "The rules of decision of the several states shall be the governing law in cases where they apply."

From its basic instruction to the federal court to use state law to decide cases, the Congress made an exception for questions (or entire disputes) for which the Constitution or a federal statute supplies a rule for the court's use. The plan of the Act is clear: where no provision in the Constitution or federal statutes governs, the court must use rules drawn from state law. In cases where the Rules of Decision Act applies (principally diversity cases), the lawmaking of the federal courts is restricted to that which is incidental to the application of the Constitution and Acts of Congress.<sup>6</sup>

The courts followed the plain language and simple plan of the Rules of Decision Act for nearly a century and a half, applying it without any classification of various state laws as substantive or procedural. If a state law applied to a question before the court, and if no federal statute or constitutional rule displaced it, then the Rules of Decision Act was held to compel the application of the state rule. In *M'Cluny v. Silliman*,<sup>7</sup> for example, the Supreme Court held that state statutes of limitations were made applicable by the Rules of Decision Act, absent any applicable federal statute.

6. When a federal statute explicitly delegates lawmaking authority to the federal courts, the courts may disregard state law and fashion their own rules, without departing from the plan of the Rules of Decision Act. An example is the Rules Enabling Act, 28 U.S.C. § 2072 (1970), authorizing the Supreme Court to formulate Federal Rules of Civil Procedure.

What Judge Friendly has termed the "specialized federal common law" (Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407-10 (1964)) has grown up generally under categories of federal jurisdiction other than diversity jurisdiction—*e.g.*, in federal question jurisdiction, where federal statutes impliedly delegate the formulation of law to the courts (*Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957)), or in cases to which the United States is a party, so that its presence is thought to validate departure from state law to create a federal common law (*Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943)). Even in diversity cases, federal issues may arise in one of the ways thought to authorize creation of federal common law, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964) (federal common law governs treatment by federal courts of foreign acts of state, because the question is "intrinsicly federal," given the responsibility of the national government for conducting foreign affairs).

The emphasis in the Rules of Decision Act on "Acts of Congress" may indicate that federal courts should hesitate to displace applicable state law with common law federal rules; but see Justice Story's argument that the phrase "where they apply" in the Rules of Decision Act makes the Act inapplicable when issues of federal concern arise. *United States v. Hoar*, 26 F. Cas. 329 (No. 15,373) (C.C.D. Mass. 1821). The question is beyond the scope of this Note. In cases arising under the diversity jurisdiction, where no issue of a federal nature enters by way of defense, there can be no pretext for the creation of federal common law rules.

7. 28 U.S. (3 Pet.) 270 (1830).

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[Under the Rules of Decision Act, the] limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts.<sup>8</sup>

State rules of evidence received the same treatment. In *M'Niel v. Holbrook*,<sup>9</sup> the plaintiff sued on promissory notes. The defendant insisted that the federal trial court should have applied the general rule requiring proof of handwriting of endorsements. But the Supreme Court found that a Georgia statute expressly repealed the requirement, and upheld the circuit court in following the state law. Of the Rules of Decision Act itself, the Court said:

The object of the law of congress was to make the rules of decisions in the courts of the United States, the same with those of the states; taking care to preserve the rights of the United States by the exceptions contained in the same section.<sup>10</sup>

The Court maintained this course with regard to the Rules of Decision Act in *Swift v. Tyson*,<sup>11</sup> making no mention of a distinction between "substantive" and "procedural" law. The Court in *Swift* did restrict the meaning of the term "laws of the several states" in the Act by holding it to include only "state law strictly local," which included two elements: state statutes and "rights and titles to things having a permanent locality."<sup>12</sup> But for all state laws so defined, the Court did not question their applicability under the Rules of Decision Act (in the absence of federal constitutional or statutory law).

In cases after *Swift v. Tyson*, without regard to whether the state law in question was "substantive" or "procedural," the Court held that if a state law was applicable, and if no federal law displaced it under the terms of the exceptions clause, then the Rules of Decision Act directed application of the state law. In *Taylor v. Benham*,<sup>13</sup> an ad-

8. *Id.* at 277.

9. 37 U.S. (12 Pet.) 84 (1838).

10. *Id.* at 89-90. The "exceptions contained in the same section" were important in *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492 (1829). In that case, the defendants claimed that the Rules of Decision Act made the occupant claimant law of Ohio applicable to the ejectment suit. The Ohio law provided that an occupying claimant should not be evicted without being compensated for lasting improvements made by him, and directed the court to appoint commissioners to value such improvements. *Id.* at 525. Chief Justice Marshall, writing for the Court, put the case within the exceptions clause of the Act, because the use of commissioners was inconsistent with the requirements of the Seventh Amendment. *Id.* at 525-26.

11. 41 U.S. (16 Pet.) 1 (1842).

12. *Id.* at 18-19.

13. 46 U.S. (5 How.) 233 (1847).

administrator *de bonis non* objected to his joinder to a suit which had been prosecuted originally against his predecessor. An Alabama statute provided for such joinder. The Supreme Court held that "it is clear, that under a statute of Alabama, which must, by the thirty-fourth section of the Judiciary Act, govern this case, the objection cannot be sustained."<sup>14</sup> On a related question the Court later held that, where a state law allowed the administrator to prosecute a suit for injuries to a plaintiff deceased, the mode of bringing in the administrator was governed by state law, "except so far as Congress has regulated the subject."<sup>15</sup> In *Camden & Suburban Railway v. Stetson*,<sup>16</sup> the defendant railroad argued that the federal district court should have followed a New Jersey statute which authorized the court to order a physical examination of the plaintiff. The Court held that absent any federal statute on the matter, the Rules of Decision Act required the federal court to apply the state law.<sup>17</sup>

The Court made a general comment on the scope of state laws falling within the application of the Rules of Decision Act in *Steamboat Co. v. Chase*:<sup>18</sup>

State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts . . . State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts.<sup>19</sup>

Here is the starkest possible evidence that "rules of decision" were not held to exclude rules of practice and procedure, and that § 34 means what it says: except where an Act of Congress otherwise requires,

14. *Id.* at 261.

15. *Martin v. Baltimore & O.R.R.*, 151 U.S. 673, 693 (1894).

In *Wright v. Bales*, 67 U.S. (2 Black) 535 (1863), the United States circuit court in Ohio followed a rule of court in refusing to allow Wright to testify because he was a party to the suit. The Supreme Court reversed the judgment for Bales, holding that under an Ohio law made obligatory on the circuit court by the Rules of Decision Act, Wright was competent to testify. And in *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 603 (1862), the Court confirmed the treatment of state statutes of limitation under the Rules of Decision Act (*see* p. 680 *supra*):

The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789.

16. 177 U.S. 172 (1900).

17. *Id.* at 174-75.

18. 83 U.S. (16 Wall.) 522 (1873).

19. *Id.* at 534.

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decide the cases to which this Act applies according to state law.<sup>20</sup>

The Court recognized that cases where a federal constitutional or statutory rule did apply, however, fell within the exceptions clause of the Rules of Decision Act, and that the Act by its terms did not require application of state law. An Illinois statute governing the competency of witnesses, for example, would have been applicable in the absence of a federal statute, but a federal statute “otherwise provide[d].”<sup>21</sup> In *Ex parte Fish*,<sup>22</sup> the Court said that though a New York statute governing examinations of parties before trial would apply absent a federal statute, “the act of 1789 . . . made an exception when it was ‘otherwise provided by the Constitution, treaties, or statutes of the United States,’ ” so that the federal statute on the subject would be followed under the Rules of Decision Act.<sup>23</sup>

The one exception to the Court’s clear and consistent position prior to 1938 was its first construction of the Rules of Decision Act in *Wayman v. Southard*.<sup>24</sup> In that case, Chief Justice Marshall seemed to suggest that only some state laws are “rules of decision” and that the Rules of Decision Act only requires the application of this subset of state laws; the argument parallels the modern one that the Act only compels the application of *substantive* state laws. In *Wayman*, the Court had to decide what law should govern executions of judgments of a federal court sitting in Kentucky. The Process Act then in force made the laws of Kentucky as they existed in 1789 the rules for executions in suits at common law in the federal courts,<sup>25</sup> apparently making Kentucky law as of 1789 controlling. But the Kentucky law had been changed prior to 1825, and it was argued that the Rules of Decision Act directed application of the more recent of the two Kentucky laws.

Marshall held that the Process Act did extend to the subject of executions of judgments.<sup>26</sup> This finding should have led Marshall directly to the conclusion that the matter was covered by a statute of the United States, that it therefore fell within the exceptions clause of the Rules of Decision Act, and that accordingly the Rules of Decision Act by its express terms did not instruct the application of the more recent

20. In the light of *Swift*, the only question for the Court was whether there was any state “law” (that is, statutes) on point.

The exceptions clause of the Rules of Decision Act also includes the Constitution and treaties. See p. 679 *supra*.

21. *Potter v. National Bank*, 102 U.S. 163, 165 (1880).

22. 113 U.S. 713 (1885).

23. *Id.* at 720.

24. 23 U.S. (10 Wheat.) 1 (1825).

25. Act of May 8, 1792, 1 Stat. 275, 276.

26. 23 U.S. (10 Wheat.) at 31-32.

Kentucky law.<sup>27</sup> But Marshall reached the conclusion that the Process Act controlled only after construing the Rules of Decision Act as inapplicable to rules on executions of judgments. The Rules of Decision Act, he said, only directs the use of state laws which are rules of decision, that is, rules which guide in the formation of the court's judgment.<sup>28</sup> The rules governing execution of judgments only become important after judgment, and therefore, he concluded, are outside the terms of the Act.<sup>29</sup>

To use the *Wayman* construction of the Rules of Decision Act, state law must be classified as either within or outside the category of rules of decision.<sup>30</sup> But this classification scheme cannot be maintained, for any rule of law may at some time become a rule which is used by the court to determine the rights of the parties to a dispute. The Rules of Decision Act guides the federal courts to the rule with which to decide questions which must be resolved in the course of a lawsuit. These questions may arise under any state law, for a litigant may claim that his adversary's failure to comply with any particular state law entitles the complaining litigant to a judgment. A failure to comply with rules of evidence, for example, may be the grounds for a claim for judgment.<sup>31</sup> Marshall himself recognized as much in *Wayman*.<sup>32</sup> But if he had simply made use of the exceptions clause of the Rules of Decision Act, he would not have been forced to protect against this eventuality by attempting an impossible distinction between what is or is not a rule of decision.<sup>33</sup>

27. In *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492 (1829), Marshall did follow this reasoning in bringing a case governed by the constitutional rule of the Seventh Amendment within the exceptions clause of the Rules of Decision Act. See note 10 *supra*.

28. 23 U.S. (10 Wheat.) at 24.

29. *Id.* at 24-25. Marshall's conclusion was limited to rules dealing with the execution of judgments: "The 34th section, then, has no application to the practice of the Court, or to the conduct of its officer, in the service of an execution." *Id.* at 26.

30. The modern parallel of the *Wayman* construction classifies state laws as either substantive or procedural. TAN 35-57 *infra*.

31. See, e.g., *M'Neil v. Holbrook*, 37 U.S. (12 Pet.) 84 (1838).

32. He wrote, concerning rules governing the execution of judgments:

It is true, that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the Court by a regular suit, there would be a trial at common law; and it may be said, that the case provided for by the section would then occur, and that the law of the State would furnish the rule for its decision.

23 U.S. (10 Wheat.) at 25. Marshall thought that in the event of such a suit, the Rules of Decision Act would still not apply, because its application would subject the officers of the federal court to inconsistent regulations of their actions—the Process Act to guide the actual performance of their duties, and the Rules of Decision Act by which that performance would later be measured. *Id.*

33. See p. 694 *infra*.

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The construction of the Rules of Decision Act in *Wayman* suffers from a second defect. If the Rules of Decision Act applies only to the category of state laws classified as “rules of decision,” and if, for an issue in the residual category, no federal law provides a rule for the court to use in reaching a decision, the federal court is left without any instruction about where to find such a rule. Marshall did not face the problem in *Wayman*, because the Process Act did control the question. But absent a federal rule, is the federal court set free to pursue “the better view” on the question?<sup>34</sup> One would like to have asked the Chief Justice what rule would have controlled, in the absence of the Process Act, and why.

The language of the Act, and the holdings of the Supreme Court prior to 1938, give no importance to any distinction between substantive and procedural rules of state law. But in that year, the Court decided *Erie Railroad v. Tompkins*.<sup>35</sup> The *Erie* Court corrected the *Swift v. Tyson* construction of the term “laws of the several states” in the Rules of Decision Act, holding that the term included all state law, decisional as well as statutory, general as well as local.<sup>36</sup> Justice Brandeis, writing for the Court, suggested that the new construction of the Act was constitutionally compelled.<sup>37</sup> He continued:

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>38</sup>

With this the Supreme Court injected the substantive-procedural distinction<sup>39</sup> into its reading of the Rules of Decision Act; it is important to clarify, so far as possible, Brandeis’s exact meaning.

In *Erie*, Brandeis and the Court rejected the “general common law” which had developed under *Swift v. Tyson*. As a matter of constitutional law, Brandeis argued, Congress has no lawmaking authority over a class of state substantive issues, so that lawmaking by the federal

34. For a discussion of such a situation in *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939), see p. 688 *infra*.

35. 304 U.S. 64 (1938).

36. *Id.* at 77-78.

37. *Id.*

38. *Id.* at 78.

39. Justice Brandeis mentioned only “substantive rules”; Justice Reed, concurring, wrote that “no one doubts federal power over procedure.” *Id.* at 92.

courts on such matters must also be beyond the constitutional authority of the federal government. And if that is so, the Rules of Decision Act must surely require application of state substantive law, for in that area there can be no other law than state law. But Brandeis said nothing at all about the applicability of the Rules of Decision Act *within* the area of federal legislative authority, and certainly did not exclude it from application there in the absence of federal statutes. *Erie* reconfirms the applicability of the Act to all state substantive law, correcting the error of *Swift v. Tyson*, but is also consistent with the applicability of the Act to state procedural law.<sup>40</sup>

The silence of *Erie* on that point, however, has led to the view that the Rules of Decision Act coincides exactly with the constitutional limitation on federal lawmaking authority expressed by the *Erie* Court in terms of the substantive law-procedural law dichotomy. If there is such a coincidence, it follows that the Rules of Decision Act does not apply to matters of procedural law. *Sibbach v. Wilson & Co.*<sup>41</sup> strengthened the association of the Rules of Decision Act with substantive state law, though in that case the substantive-procedural distinction entered not as an expression of a constitutional doctrine, but as a set of terms involved in the construction of a federal statute (the Rules Enabling Act of 1934<sup>42</sup>) and a state choice of laws rule.

Mrs. Sibbach sued in Illinois federal court for injuries sustained in Indiana. The defendant insisted that Sibbach submit to a physical examination before trial, but she refused. The rules of three different jurisdictions had a possible bearing on her duty to submit to a physical examination; both Indiana law and Federal Rule of Civil Procedure 35 required her to allow the examination, but Illinois law did not. The Court reasoned, doubtless in the light of *Erie*, that if the matter were one of substantive law, then the Rules of Decision Act would compel the application of the Indiana rule.<sup>43</sup> To avoid that result, Sibbach admitted that the rule was procedural; this meant that either

40. Indeed, Justice Brandeis restated the law clearly in the sentence, not often remarked upon, which introduced the passage quoted above: "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."

41. 312 U.S. 1 (1941).

42. 28 U.S.C. § 2072 (1970).

43. "[I]f the right to be exempt from such an order is one of substantive law, the Rules of Decision Act required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose . . ." 312 U.S. at 10-11 (footnote omitted). The Rules of Decision Act would have directed the application of the Illinois conflicts rule, which in turn would have directed application of the substantive law of the state where the cause of action arose (Indiana).

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Rule 35 or the Illinois rule would govern.<sup>44</sup> To avoid the application of Rule 35, Sibbach then argued that the rule, though procedural, affected substantive rights, and so lay beyond the authority granted in the Rules Enabling Act.<sup>45</sup> If the Court had accepted her argument, then no federal statute would have governed the matter, the Rules of Decision Act would have directed application of the Illinois conflicts rule, and Sibbach's characterization of the rule on examinations as "procedural" would have led to the application of the Illinois rule on the subject—just the result she sought.

The Court rejected Sibbach's argument and held Rule 35 applicable. It made use of the distinction between substantive and procedural laws to decide what would happen if the Rules of Decision Act made the Illinois choice of laws rule applicable, and then to decide whether the case was covered by the Rules Enabling Act and so fell within the exceptions clause of the Rules of Decision Act. But the underlying premise of Sibbach's argument and the Court's analysis was that the Rules of Decision Act did apply to both substantive and procedural state law, for only if it did, and only if the matter were procedural but beyond the scope of federal statute, could Sibbach have had the protection of the Illinois rule.<sup>46</sup>

Neither *Erie* nor *Sibbach*, then, necessarily limited the Rules of Decision Act to operate on "substantive" state law; each is consistent with the long accepted understanding in prior cases that the "laws of the several states," in the Act, included both substantive and procedural law. But in each case, the applicability of state law under the

44. *Id.* at 11. The Illinois rule would apply if, in the absence of an applicable federal statute, the Rules of Decision Act made the Illinois conflicts rule determinative. The state's choice of law rule would direct application of the procedural law of the forum.

45. *Id.* The Rules Enabling Act of 1934 provides:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

Such rules shall not abridge, enlarge or modify any substantive right . . . .

28 U.S.C. § 2072 (1970).

On the problems with construing the ambiguous language of the Enabling Act, see p. 704 *infra*.

46. The Court's acceptance of that premise is evident from its discussion of the *Stetson* case. *Camden & S. Ry. v. Stetson*, 177 U.S. 172 (1900). In *Stetson*, the New Jersey statute authorizing the court to order physical examinations was held to control under the Rules of Decision Act. The *Sibbach* Court noted that the Act applied in *Stetson* even though "the entire discussion goes upon the assumption that the matter is procedural." 312 U.S. at 12-13. The classification of the issue as substantive or procedural in *Sibbach* was important for the choice of which state law would apply (under the prevailing doctrines of conflicts of state laws, Indiana law would control if the issue were substantive and Illinois law if it were procedural, see notes 43, 44 *supra*), and for the construction of the Enabling Act (did the Federal Rule impinge on "substantive" rights, within the meaning of the Act?), but not for the operation of the Rules of Decision Act.

Rules of Decision Act turned on a finding that the issue in question was substantive or affected substantial rights. The result has been the erroneous view that the Act is *only* applicable to substantive state law. Proceeding under this misunderstanding, the Court has missed numerous opportunities for straightforward applications of the Rules of Decision Act, applications which would have decided the cases without any attention to the constitutional problem of federal authority raised in *Erie* and summarized in the substantive-procedural distinction.

In *Cities Service Oil Co. v. Dunlap*,<sup>47</sup> for example, the issue was the burden of proof on bona fide purchasers of land. Texas law put the burden on the one who attacked the validity of the title; the federal district court in Texas took notice of this rule, but applied instead "a different and better one" of its own devising.<sup>48</sup> It justified this result, over the titleholder's reliance on *Erie*, by concluding that the rule was "a matter of practice or procedure and not a matter of substantive law."<sup>49</sup> The Supreme Court should have settled the case by holding simply that in the absence of federal legislation, the Rules of Decision Act compelled application of state law. Instead, the Court acted as if *Erie* had restricted the applicability of the Rules of Decision Act to matters of substantive law, and ordered the application of the state rule only after finding that it bore on a matter "related to a substantial right."<sup>50</sup>

A Delaware federal district court had shunned the Delaware choice of laws rule in favor of another view in *Stentor Electric Manufacturing Co. v. Klaxon Co.*<sup>51</sup> In the absence of a federal law on the subject, the Supreme Court need never have reached the question of the federal government's constitutional authority to make such a rule. The Rules of Decision Act directed the application of state law. But Justice Reed moved directly to the constitutional question, relying on *Erie* for the holding that the Constitution put a choice of laws rule beyond the authority of the federal government.<sup>52</sup>

In *Palmer v. Hoffman*,<sup>53</sup> Palmer, the defendant in a personal injury suit, challenged the court's charge to the jury that the burden of establishing contributory negligence lay with the defendant. Hoffman

47. 308 U.S. 208 (1939).

48. *Id.* at 211 (characterizing the decision of the court of appeals, 101 F.2d 314, 315-16 (5th Cir. 1939)).

49. 101 F.2d 314, 316 (5th Cir. 1939), *cited in* 308 U.S. 208 (1939).

50. 308 U.S. at 212.

51. 115 F.2d 268, 276 (3d Cir. 1940), *rev'd*, 313 U.S. 487 (1941).

52. 313 U.S. at 496-97.

53. 318 U.S. 109 (1943).

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argued that Federal Rule of Civil Procedure 8(c) made contributory negligence an affirmative defense, so that the charge was correct under governing federal law.<sup>54</sup> The Court thought otherwise: "Rule 8(c) covers only the manner of pleading."<sup>55</sup> Absent any applicable federal law, the Court should then have followed state law under the Rules of Decision Act. Instead, to reach the same conclusion, the Court again explored the constitutional boundary of federal authority identified in *Erie*. "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases . . . must apply."<sup>56</sup> Whether a matter of local law or not, the fact was that there was no law other than the state law, and the Rules of Decision Act alone would have carried the Court to its conclusion.<sup>57</sup>

Even within the area of federal legislative authority, the Rules of Decision Act directs the application of state law when the federal authority has not been exercised.<sup>58</sup> In the absence of federal legislation, then, no constitutional questions about the limits of federal law-making authority need arise. But the assertion of congressional authority by legislation on a particular subject raises an issue on which the Rules of Decision Act has no voice. The Rules Enabling Act, for example, creates federal law on many subjects for which state law also provides rules.<sup>59</sup> The exceptions clause of the Rules of Decision Act clearly instructs the federal courts to apply the federal law, despite the parallel state law. But before it does so, the federal court must decide whether the federal law is within the constitutional authority of the Congress. Because Article III provides no explicit constitutional prin-

54. *Id.* at 117.

55. *Id.*

56. *Id.* (citation omitted).

57. Other examples abound. The Court established early on that the Rules of Decision Act compelled the application of state statutes of limitation, absent any congressional action on the subject. *See* *Leffingwell v. Warren*, 67 U.S. (2 Black) 599 (1862); note 15 *supra*. The question should have been settled on these simple grounds in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), making it unnecessary to consider whether a statute of limitations lay beyond the constitutional authority of the federal government.

*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), presents another example. The Court found that the matter covered by the New Jersey statute (the posting of a bond for expenses by plaintiff in a derivative suit against corporate officers) was outside the scope of Federal Rule of Civil Procedure 23. *Id.* at 556. With that proposition as a premise, it followed directly that the Rules of Decision Act compelled the application of the state law. Instead of following that simple track, the Court went on to find that the rule was "substantive," giving credence to the plaintiff's premise that if the rule were "procedural" the case would fall outside the Rules of Decision Act and the state rule would not apply.

58. In the language of the substantive-procedural analysis, the Act applies even to state laws on "procedural" issues.

59. For the text of the statute, see note 45 *supra*.

principle to draw the bounds of applicable federal law in diversity cases, the federal diversity courts must rely upon a more general constitutional theory to guide their use of the judicial power.

## II. A Constitutional Theory to Guide the Use of the Federal Judicial Power in Diversity Cases

### A. *A General Theory*

The grant of judicial power over cases in which the parties are of diverse citizenship must be seen as part of the complete plan of government established by the Constitution. The project of constituting the United States was a federalizing endeavor, creating a national government of specified, limited powers.<sup>60</sup> Article I of the Constitution details the subjects to be withdrawn from the exclusive legislative authority of the states; some of these it places within the lawmaking authority of the national government, either exclusively or concurrently with the states,<sup>61</sup> while others it simply prohibits to the states.<sup>62</sup> The extension of national judicial power to diversity cases in Article III is responsive not to problems with the content of state law (dealt with by Article I) but to possible unfairness in the application of state law by state courts to the claims of foreign litigants.<sup>63</sup> The constitutional and statutory authorization of diversity jurisdiction leaves unaltered the authority of the states to make the laws defining the legal rights of citizens in all matters except those committed to federal authority by Article I.

Justice Frankfurter's statement that a "federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State,"<sup>64</sup> does contain, therefore, a core of constitutional sense. Federal courts exercise diversity jurisdiction to insure impartial adjudication of claims

60. *But see* W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953); Friendly, *supra* note 6, at 392-94.

61. U.S. CONST. art. I, § 8.

62. *Id.* § 10.

63. This Note accepts as a premise the oft-repeated statement of the place of diversity jurisdiction in the constitutional structure. Chief Justice Marshall stated that diversity jurisdiction was meant to quiet fears that state courts would act unjustly in settling the claims of out-of-state litigants. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Citing the *Deveaux* case, Justice Frankfurter expressed the same idea in *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution . . . entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts . . .").

64. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

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by out-of-state litigants to legal rights created and defined by state law.<sup>65</sup> The main thrust of this general constitutional theory of diversity jurisdiction is clearly to direct the federal diversity courts to state law for rules determining the rights of parties in diversity cases. But a federal diversity court is not a state court, and as a consequence it cannot draw rules only from state law.

The Constitution itself provides some of the rules which a diversity court must follow. The litigant in the federal diversity court, for example, necessarily accepts the trial of his claims by a tribunal created by federal law under Articles I and III, and not by state law. He cannot object to the regulation of judicial personnel according to the rules in Article III, § 1. The diversity court must follow the Seventh Amendment rule on jury trials.<sup>66</sup> The existence of the federal courts as a judicial system independent of the state courts will also necessitate a small set of federal provisions to deal with questions which are unique to the federal judicial system, and so not covered by state law.<sup>67</sup> Rules governing the removal of cases from state courts to federal courts, for example, must be supplied by federal law. Given that the federal system of trial and appellate courts may differ from the structure of the states' judicial systems, federal statutes to define the course of appeals through the federal courts will be necessary. And because the number and duties of the personnel in each federal court may differ from those in the courts of the state, the Congress will need to provide rules for the internal administration of the federal diversity courts.

If the federal legislative power were exercised only within this limited area of matters unique to the federal judicial system, it would result in the least possible displacement of state law consistent with the existence of federal diversity courts. The diversity court would take its rules, even of process and procedure, from state law. It has been

65. "[T]he federal courts in diversity cases must respect the definition of state-created rights and obligations . . . ." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958).

66. In *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), the respondent argued that the federal diversity court should follow South Carolina law by committing the decision of a particular issue to the court rather than to the jury. The Court held that the federal court was bound to follow the command of the Seventh Amendment by committing the question to the jury. *Id.* at 537. Cases before *Byrd* (*Bank of Hamilton v. Dudley's Lessee*, 27 U.S. (2 Pet.) 492 (1829)) and after (*Simler v. Conner*, 372 U.S. 221 (1963)) confirm Judge Friendly's observation that the Court was unnecessarily "delicate" in expressing the opinion that the Seventh Amendment displaced contrary state law in diversity cases. Friendly, *supra* note 6, at 403 n.95.

67. The federal authority to provide this set of rules stems from the necessary and proper clause of Article I. Because these rules are essential to the existence of diversity courts as a functioning judicial system, the authority to provide the rules is well within the limits of the necessary and proper requirement.

widely agreed, however, that federal lawmaking authority, for diversity cases, extends across a broader range of subjects, loosely termed "procedural."<sup>68</sup> An assumption so long and deeply imbedded in the constitutional system cannot be readily disputed; the central question is not whether there is a broader federal legislative authority than the constitutional minimum just identified, but what its precise limits are. Unanimity on the federal authority to make laws of "procedure" for diversity cases has often shielded the basis of that authority from careful study, and so retarded the development of a constitutional theory that accounts for both why and how much federal legislative authority exists to enact rules for diversity cases.

### B. *State-Created Legal Rights*

Congress has authority to create federal diversity courts, and to make laws necessary and proper to that end.<sup>69</sup> That end has been stated generally as the creation of impartial courts to try claims to state-created legal rights. To know what range of federal lawmaking authority is necessary and proper to the creation of such diversity courts, though, requires that the constitutional end be further specified. One way of doing that is to formulate a precise definition of "state-created legal rights" which expresses the constitutional principles embodied in the more general statement of the constitutional end. Once that is done, the constitutional end will be served by drawing from state law the rules which are identified as elements in the definition of state-created legal rights; federal laws cannot displace such state rules, without departing from the constitutional plan.

Several principles have been suggested for identifying the rules to be considered part of state-created rights in diversity cases. Justice Brandeis, in *Erie*, identified the boundary of federal authority with the distinction between substantive and procedural law. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general' . . ." <sup>70</sup> The precise location of the boundary merited no further consideration in *Erie*, a personal injury case, because Congress had not (and probably

68. The Congress first exercised this federal authority when it enacted the Process Act, Act of Sept. 29, 1789, 1 Stat. 93, 94, and again in the Rules Enabling Act, 28 U.S.C. § 2072 (1970). The Court has repeatedly recognized this authority. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940); *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring) ("no one doubts federal power over procedure").

69. Congress has authority to create federal courts to exercise nine distinct heads of jurisdiction, set out in Article III. Its provision for each, in the creation of the judicial system, must be consistent with the nature of each. It is important to begin, then, with the premise of congressional authority to create federal *diversity* courts.

70. 304 U.S. at 78 (1938).

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could not have) passed any law which purported to define a standard of care for the railroad. But the terms substantive and procedural would not have served the Court well had further analysis been required, for they only restate the object of the inquiry, and give no guidance as to how the diversity court should decide which rules are “substantive”—that is, outside the scope of federal authority—and which are not.<sup>71</sup>

In *Guaranty Trust Co. v. York*,<sup>72</sup> the Court posed for itself<sup>73</sup> the question whether federal authority extended to the creation of statutes of limitations, or whether the Constitution required application of state statutes. Justice Frankfurter saw that the classification of rules as substantive or procedural would not answer the question about the scope of federal authority in diversity cases.<sup>74</sup> Instead, he sought to formulate, in light of the relevant constitutional standards, a principle which would distinguish rules defining “State-created legal right[s]” from those concerning “merely the manner and the means by which a right to recover, as recognized by the State, is enforced.”<sup>75</sup> His principle—the well-known outcome determinative test—was stated as follows:

[Is a state law] 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 controlling in an action upon the same claim by the same parties in a State court?

. . . [T]he intent of that decision [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.<sup>76</sup>

Critics of Frankfurter’s outcome determinative test have argued that the test, by its terms, requires application of all state laws.<sup>77</sup> It is

71. See p. 701 *infra*.

72. 326 U.S. 99 (1945).

73. The Court need not have reached this question, for the case should have been settled under the Rules of Decision Act. See note 57 *supra*.

74. Matters of “substance” and matters of “procedure” are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, “substance” and “procedure” are the same key-words to very different problems. Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best

. . . .  
326 U.S. at 108 (1945).

75. *Id.* at 108-09.

76. *Id.* at 109.

77. *E.g.*, *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

true that from the perspective of the litigant at the time of final judgment, or on appeal, a rule on any subject may become outcome determinative,<sup>78</sup> at least in a limited sense of the term.<sup>79</sup> But Frankfurter never intended his test to have such a sweeping result. In *York*, he recognized that "the forms and modes of enforcing the right may at times, naturally enough, vary" between state courts and federal diversity courts.<sup>80</sup> In *Cohen v. Beneficial Industrial Loan Corp.*,<sup>81</sup> he joined in a dissent which confirmed federal authority to make rules governing derivative suits, and called for application of the federal rule rather than a state law on the subject. Still, the critics are correct insofar as they point out that Frankfurter never specified a perspective other than that of the litigant from which he meant his test to be applied; while one knows he did not mean to deny all federal legislative authority in diversity cases, one cannot know just how much he meant to allow.

Justice Harlan, concurring in *Hanna v. Plumer*,<sup>82</sup> also saw that the boundaries of federal authority to make laws for diversity cases cannot be plotted by any classification of rules as "substantive" or "procedural," and that the project requires careful attention to the principles underlying the distribution of power between state and federal governments.<sup>83</sup> For matters not within federal authority, rules defining

78. For example, in *Hanna v. Plumer*, 380 U.S. 460 (1965), service of process had been made in compliance with Federal Rule of Civil Procedure 4(d)(1), but not in compliance with the Massachusetts rule on the subject. The Court considered the possible application of the outcome determinative test to the question of the federal authority to replace the state rule with a federal rule, *id.* at 468:

The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is "outcome-determinative."

The *Hanna* Court rejected Frankfurter's test, but failed to formulate a more helpful approach to the problem of the constitutional limit of federal authority in diversity cases. On the course which the Court did take, see p. 701 *infra*.

79. A variation in any applicable rule will alter the outcome at the immediate stage of litigation, but may not alter the final outcome. In *Hanna*, for example, application of the Massachusetts rule would have terminated the suit and invalidated the plaintiff's judgment, but, if the statutory limitation period had not expired, the plaintiff might have carried another suit to judgment, being careful to comply with the Massachusetts rule. Similarly, an appellate court's choice between two rules on burden of proof may determine whether the judgment below is affirmed or remanded for reconsideration in light of a different rule than that first applied by the trial court. But if the cause is remanded, the final outcome may still be the same as that which would have resulted from the application of the first rule by the trial court. This ambiguity in Frankfurter's test arises from the uncertain scope of his term "the litigation." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

80. *Id.* at 108.

81. 337 U.S. 541, 557 (1949).

82. 380 U.S. 460, 474 (1965).

83. *Id.* at 474-76.

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legal rights must be drawn from state law. To discover just which state rules that meant, Harlan proposed this standard:

[T]he proper line of approach in determining whether to apply a state or a federal rule, whether “substantive” or “procedural,” is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.<sup>84</sup>

Harlan’s test shifts the focus from the use of rules in the courtroom to their use as guides for “primary decisions respecting human conduct” outside of the courthouse. By this move, he defines a vantage point from which legal rules may be divided into two groups, those affecting human conduct outside of the context of a lawsuit, and those which shape the conduct of a lawsuit. Leaving the former group exclusively to the states, as Harlan saw, inheres in the constitutional allocation of sovereign power between state and federal governments. And federal authority over the latter is necessary and proper to provide for the structure of diversity courts.

The application of Justice Harlan’s standard, however, is not without problems. “[P]rimary decisions respecting human conduct” may be made without any attention to laws, state or federal. Or they may be made with careful attention to rules which also guide the conduct of a lawsuit, *e.g.*, the rules of discovery. What is called for is a more detailed and precise description of the vantage point from which Harlan distinguished rules which are part of the state-created legal rights to be applied by diversity courts from those rules which structure the process for trying claims to such rights in the diversity court.

The thrust of Harlan’s proposed test is clear enough. For most people most of the time, and in the common manner of speaking, legal rights exist independently of resort to judicial proceedings. Most people affirm the legal rules as a set of standards to be voluntarily complied with both in their actions and in making claims on others and acknowledging the claims of others.<sup>85</sup> Harlan’s test seeks to give

84. *Id.* at 475 (footnote omitted).

85. This view of legal rights is the result of people taking what Professor H.L.A. Hart called the internal view of legal rules. This internal view is marked by a “critical reflective attitude to certain patterns of behavior as a common standard,” which makes it possible for legal rules to create claims with meaning and effect on conduct independent of the judicial process. H.L.A. HART, *THE CONCEPT OF LAW* 56 (1961).

What the external point of view . . . cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after

effect to the perception that state law, as it defines rights understood from this common viewpoint, is not to be disregarded by the diversity court. Though the rules which structure and regulate the judicial process are still important elements of the legal system, they are ancillary to the body of rules which define legal rights, that is, which define the claims which people make on one another and recognize as valid.<sup>86</sup> Accepting this view of which legal rules are part of the definition of legal rights, it is clear that some set of federal laws structuring and regulating the judicial process are consistent with the constitutional end of providing federal courts to try claims to rights defined by state law.

If a federal diversity court accepts Harlan's identification of the constitutional principles to be accommodated in identifying the limit of federal authority in diversity jurisdiction, then it should use the view of legal rules and rights just described to decide whether any particular federal law, for example, a rule on the manner of service of process, is beyond the constitutional authority of the federal government in diversity suits.<sup>87</sup>

To do this, the court should hypothesize a situation in which the parties *X* and *Y* have committed themselves to the recognition of legal rights and duties without resort to the judicial process. To succeed in structuring their legal relationship through claims directly made and admitted between themselves, *X* and *Y* will have to be in agreement about the facts of the events which have occurred between them, so the court must also assume such an agreement on some version of the facts, either *X*'s or *Y*'s. (Of course the parties may be in court just because they cannot agree about the facts of the transactions between them; by constructing this hypothetical situation, the court is not avoiding the necessity of resolving any dispute over facts. It is only using the construct to determine which rules of *state* law it is bound to apply to the facts it finds.) Having taken *X* and *Y* out of the context of the judicial process and placed them in the situation just con-

another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules.

*Id.* at 88; see *id.* at 79-88, 212-13.

86. *Id.* at 212-13.

87. Though this view of legal rights gives effect to Justice Harlan's perception of the relevant constitutional principles, it includes a broader range of state rules among the rules which must be drawn from state law than does Harlan's standard. The view developed here focuses on people who are using the laws of the state as standards for conduct *and* as rules defining claims about proper conduct which they make and admit directly between themselves. It leaves to the states authority over all those rules, but only those rules, which define the claims that these persons make or could make directly upon one another.

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structed, the court then asks what rules of state law the parties so situated would use to determine the validity of their claims on one another. These are the rules which the parties would have used to structure their rights and duties in their "primary conduct," *i.e.*, conduct using legal rules as binding standards, but independent of the use of the judicial process. In diversity cases, those rules must be considered part of the state-created legal rights, and applied even in the face of conflicting federal statutes. With respect to the example of the rule on service of process, the court must ask itself whether, under the two assumptions of the test set out here, such a rule would have been a necessary part of *X*'s claim on *Y* if, on the day *X* filed his complaint, he had instead stated his claim directly to *Y*. Quite clearly, the rule on service of process is not an element in the state law definition of *X*'s legal right, and application of a federal law on the subject is consistent with the constitutional purpose of diversity jurisdiction. Congress may direct federal courts to refer to state law for rules which would be within federal authority (as it has in the Rules of Decision Act), but the legislative authority to provide in some way for these rules lies with the national government.<sup>88</sup>

This approach readily disposes of some of the questions which have vexed the federal diversity courts. If *X* and *Y* accept the law of Delaware as the controlling standard for measuring the validity of the claim *X* makes directly on *Y*, and if the claim arises from a transaction which took place in New York and Delaware, the Delaware choice of laws rule is essential to *X*'s statement of his claim to *Y*. *X* must begin with the Delaware choice of laws rule, for it assembles, from Delaware and New York laws, the single set of rules which Delaware has made the measure of the rights and duties of *X* and *Y*. It is, then, an essential part of the state-created legal rights at issue in any litigation over the claim, and must be applied by the federal diversity court.<sup>89</sup>

88. Some federal diversity courts have suggested that, when federal laws conflict with applicable state laws, the federal court should use an interest analysis in order to choose which rule to apply. In one sense, the respective interests of state and national governments *are* being balanced—that of the state in creating and defining legal rights, and that of the national government in providing courts for the fair and efficient trial of claims to such state-created rights. But any balancing to be done is already contained in the constitutional theory set forth here. The federal court should not engage in additional "balancing" of interests based on its evaluation of the relative importance of the policies served by the state and federal rules. For examples of such unwarranted balancing, see, *e.g.*, *Avondale Shipyards, Inc. v. Propulsion Sys., Inc.*, 53 F.R.D. 341 (E.D. La. 1971); *Power City Communications, Inc. v. Calaveras Tel. Co.*, 280 F. Supp. 808 (E.D. Cal. 1968).

89. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the Supreme Court reversed the court of appeals on constitutional grounds for ignoring the Delaware law and applying a federal rule formulated by the court. Absent a federal statute, the Rules

Or if, as in *Woods v. Interstate Realty Co.*,<sup>90</sup> a foreign corporation claims on a contract under state law, but that law provides that unregistered foreign corporations (of which the claimant is one) can make no claims under state law, then the so-called door-closing statute is an element in the full statement of the corporation's claim—in this case, an element which invalidates the claim.

In contrast, the state rule at the center of attention in *Ragan v. Merchants Transfer & Warehouse Co.*<sup>91</sup> was not an element in the definition of the state-created right under the theory of diversity jurisdiction set out here. In *Ragan*, the plaintiff filed the complaint before the statute of limitations ran, but process was not served until after the time had expired. The plaintiff argued that Federal Rule of Civil Procedure 3 should govern,<sup>92</sup> but the Court held controlling the Kansas law which tolled the statute of limitations only upon service of process.<sup>93</sup> If the Court had reconstructed the situation between Ragan and Merchants Transfer outside the context of judicial proceedings—assuming them to have voluntarily affirmed their rights and duties as defined by state law and to have agreed to the facts of the transaction between them to which the state law would be applied—it would have seen that the Kansas law had no place in the definition of Ragan's right. If, under those assumptions, Ragan had presented his claim directly to Merchants Transfer, the rule defining what formal step in the judicial process tolled the statute of limitation would have been of no importance in determining the validity of Ragan's claim. If Ragan made his claim more than two years after the accident, Merchants Transfer could reply that the life of his claim (defined by the statute of limitations) had expired. But in the process of "private adjudication" of rights and duties which has been hypothesized, only the date when Ragan makes his claim to Merchants Transfer is important in determining whether the claim is made while still timely. Rules governing whether the claim is timely made if resort is had to "public adjudication" (the judicial process) do not enter into the assessment of the validity of the claim.<sup>94</sup>

of Decision Act directed application of the state law. P. 688 *supra*. But it is also true that federal legislation of a choice of law rule for diversity courts would be invalid under the constitutional theory set out in this Note.

90. 337 U.S. 535 (1949).

91. 337 U.S. 530 (1949).

92. FED. R. CIV. P. 3 provides: "A civil action is commenced by filing a complaint with the court."

93. 337 U.S. at 533.

94. Justice Harlan thought that *Ragan* was overruled by *Hanna v. Plumer*, 380 U.S. 460, 474, 476-77 (1965) (Harlan, J., concurring), a result which he approved. The analysis developed in this Note supports Harlan's conclusion and the position of those circuits

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To take a final example, in *Cohen v. Beneficial Industrial Loan Corp.*,<sup>95</sup> the Court held that a New Jersey federal court was bound to apply a New Jersey statute which required plaintiffs in a shareholders' derivative suit to give security for costs before the lawsuit could proceed. The Court required application of the New Jersey rule because the statute created a "substantive liability" and was accordingly not "a mere procedural device."<sup>96</sup> But the rule would have had no role in the statement of the corporation's claim against its officers or the shareholders' claim against the corporation under the test proposed here; given the postulated agreement on the facts and the affirmation of state law as the standard of rights and duties which the parties would voluntarily recognize, the occasion for seeking and giving security for litigation costs would never have arisen.<sup>97</sup>

The rule suggested here would have produced the same result in *Guaranty Trust Co. v. York*<sup>98</sup> as that reached by the Court. A state statute of limitation, considered in its primary aspect as a statute of repose, determines the duration of X's claim on Y. After the expiration of the claim, Y has no obligation to X under the legal rules which they use to structure their relationship. Such a test would also have served the Court well in *Hanna v. Plumer*,<sup>99</sup> in which service of process was made in compliance with Federal Rule of Civil Procedure 4 (d)(1) but not with the Massachusetts rule on the subject. Rules about the manner of service of process would have been seen to have nothing to do with a statement of Hanna's claim against Plumer, except from the perspective of final judgment, and therefore to be no part of the state-created legal rights to be enforced by the diversity court. The Court in *Hanna* went beyond this holding to establish a strong (if not conclusive) presumption in favor of the validity of all of the Federal Rules of Civil Procedure, in the event of conflicts with state rules.<sup>100</sup> While

which since *Hanna* have regarded *Ragan* as no longer good law. 1 MOORE'S MANUAL § 4.06 (rev. 1975).

95. 337 U.S. 541 (1949).

96. *Id.* at 555-56.

97. The Court also said that Federal Rule of Civil Procedure 23 did not cover the subject of plaintiffs' bonds in derivative suits. *Id.* at 556. Under the Rules of Decision Act, this finding should have led the Court to apply state law without further ado. See note 57 *supra*. But if, as Justice Douglas reasoned in his dissent, 337 U.S. at 557, Rule 23 does displace the state law, then the federal law would be within the constitutional authority of the federal government, contrary to the result which follows from the Court's classification of the matter as "substantive."

98. 326 U.S. 99 (1945).

99. 380 U.S. 460 (1965).

100. When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their *prima facie* judgment

it may be that none of the Rules is outside federal authority,<sup>101</sup> the constitutionality of each of the Rules should be tested as the question arises.<sup>102</sup>

that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

*Id.* at 471. *See, e.g.,* *Palmer v. Ford Motor Co.*, 498 F.2d 952, 955 (10th Cir. 1974) ("Finally, there is the question of whether one of the Federal Rules of Civil Procedure controls the situation. If so, federal district courts cannot disregard the federal rules. *Hanna v. Plumer*, 380 U.S. at 471 . . .")

101. The Federal Rules contain rules governing service of process, pleading, motions, and orders; depositions and discovery; trials; forms of judgments, remedies, and appeals; and administration of the district courts. Without a detailed analysis of each rule, no final conclusion about its constitutionality could be justified.

The rule governing joinder of parties, for example, might conflict with state rules which are elements of the state-created rights that diversity courts are bound to apply. If *A* makes a claim directly to *X* for a sum of money which *X* owes (to someone) under an insurance policy issued by *X*, and if *X* knows that *B* may also claim the money, then the rule which allows *X* to refuse to recognize any claim until all of the claimants participate in the adjustment is an essential element in *X*'s response to *A*'s claim.

In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), the Court corrected the misconstruction by the court of appeals of Federal Rule of Civil Procedure 19, governing joinder of parties. There was, so far as the Court's opinion reveals, no state law inconsistent with Rule 19. Indeed, given the widespread trend towards joinder rules emphasizing the pragmatic discretion of the courts in deciding joinder questions, such inconsistency will be increasingly unlikely. But should such inconsistency occur, federal diversity courts should be prepared to consider the constitutionality of Rule 19.

In *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974), the court refused to apply Federal Rule of Civil Procedure 15(c) (governing the relation back of amendments to the pleadings) in the face of a conflicting state rule. The plaintiff, injured on business premises, brought a diversity suit against the owners of record of the business. Discovering only after the limitation on such actions had expired that the named defendants had sold the business before the accident, the plaintiff sought to substitute the true owners for the named defendants by amending her complaint. The district court held that Rule 15(c) barred the amendment because the substituted defendants had had no notice of the claim before the expiration of the limitation. The court of appeals reversed, concluding that a Massachusetts statute governing the amendment of pleadings gave the plaintiff a right to substitute defendants by amendment even though the limitation period had run, *id.* at 41, 44, and should be applied instead of Rule 15(c). Whether the Massachusetts statute gives the plaintiff an "absolute right" to bring in the new defendants, *id.* at 41, or only vests discretion in the court to allow such amendments where just, 50 N.Y.U. L. REV. 952, 959-60 (1975), the rule is not an element in the state-created right to be enforced in diversity cases. Just as the Kansas rule involved in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), p. 698 *supra*, its effect is limited to the process of public adjudication. If the plaintiff claims directly against the prior owners of the business, and is directed by them to the present owners, then there is no occasion for invoking a rule which governs amendments to formal pleadings to avoid inequities due to pleading rules, timing of discovery, and other elements in the litigation process.

It is clear that not all rules adopted pursuant to the Enabling Act should enjoy the benefit of a favorable presumption, even within the reasoning of *Hanna*. District court rules, under Rule 83, have never been exposed to the scrutiny of the Court, the Congress, or the Rules Committee that is said to give rise to the presumption.

102. Justice Harlan, concurring in *Hanna*, criticized the majority for shielding the Federal Rules from careful scrutiny in future cases. 380 U.S. at 475-76.

The proposed Federal Rules of Evidence brought to prominence the difficult problem of the treatment of state evidentiary privileges in diversity suits. So long as Congress does not legislate rules inconsistent with state laws, of course, no constitutional question arises. But whether federal authority extends to the creation of federal rules of privilege

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### III. "Substantive" and "Procedural" Law in the Jurisprudence of Diversity Jurisdiction

*Hanna* produced no clear test for the constitutionality of asserted federal lawmaking authority in diversity cases, because the opinion expressed its conclusions in the unilluminating terminology of "substantive" and "procedural" which pervades thinking and writing about diversity jurisdiction.<sup>103</sup> The Rules Enabling Act uses these terms to set the limits of the federal authority which it delegates to the Supreme Court.<sup>104</sup> The Court itself in *Erie* introduced the use of this terminology to the discussion of diversity jurisdiction. The words are convenient labels to distinguish those matters within federal authority in diversity cases ("procedural") from those matters left to state regulation ("substantive"). But courts often press the terms into use, not as labels, but as tools of analysis with which to attack the constitutional question of federal authority.

The use of the terms "procedural" and "substantive" suggests that there are essential and identifiable characteristics of legal rules, ac-

applicable in diversity cases is a hard question. Justice Frankfurter's test would sweep these rules into the realm of state law which the federal court is bound to follow, for the rules do indeed "significantly affect the result of the litigation." See p. 693 *supra*. But the result under Justice Harlan's principle, p. 695 *supra*, is far from clear. For example, a wife's right to withhold information respecting her husband's negligence is not likely to make her oblivious to her husband's carelessness, or to make him less careful, and so cannot be said to affect the "primary" conduct of the husband or the wife.

Acknowledging the difficulty of the problem, the following analysis is suggested. The rules of privilege are used by one party to shield information from another; they are important to legal rights only after the lawsuit actually begins. If one party has detailed knowledge of the events upon which the other bases a claim, and both recognize existing legal rules as the measure of mutual obligation, the party with detailed knowledge may still recognize any obligation it validly owes. In the example of a suit by an injured party against the husband, the wife (and her husband) may guard their information about the accident but pay the claim if, under existing legal rules, they ought to do so. The privilege rule becomes important only when the injured party attempts to impose the obligation in court, where the wife's special knowledge must become public knowledge if the claim is to be proved. For diversity purposes, then, the rules of privilege would seem to be no part of the definition of legal rights, but rather parts of the structure for trying claims to such rights in judicial proceedings and thus within congressional authority to regulate. For a different analysis leading to the same conclusion, see Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 19-27 (1974) (arguing that under *Hanna* federal rules of evidentiary privilege are "procedural" for purposes of *Erie*).

103. But the opinion in *Erie*, which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense . . . , surely neither said nor implied that measures like Rule 4(d)(1) are unconstitutional. For 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.

380 U.S. at 472.

104. 28 U.S.C. § 2072 (1970). For the relevant text of the Act, see note 45 *supra*.

ording to which every rule may be placed into one of two groups.<sup>105</sup> If this were so, a rule once properly classified would be fixed for all subsequent cases. Hence a court in diversity jurisdiction would need only to consult past classifications of a challenged rule (or classify the rule *de novo*) to determine whether it were substantive or procedural and, consequently, where authority for its creation lay.<sup>106</sup>

This idea of a single sharp division between matters "substantive" and matters "procedural" cannot survive an examination of the actual results of past classifications to which the terms have been attached. The courts, in solving various problems, have repeatedly divided laws into two groups, labeling one group substantive and one procedural.

105. The *Hanna* opinion is sensitive to the fact that the "line between 'substance' and 'procedure' shifts as the legal context changes." 380 U.S. at 471. The difficulty, however, is that the use of the terms often leads to the supposition of a single conceptual dichotomy.

106. The reasoning of the court of appeals in *Angel v. Bullington*, 150 F.2d 679 (4th Cir. 1945), *rev'd in part on other grounds*, 330 U.S. 183 (1947), presents a striking example of this use of prior classifications of a rule as "substantive" or "procedural" to solve a problem before the court. *Bullington*, a Virginia resident, sold land in Virginia to Angel, a North Carolina resident, for notes secured by the land. After a default, *Bullington* compelled the sale of the land, then sued Angel in North Carolina state court for a deficiency. The North Carolina supreme court decided that the North Carolina statute barring deficiency judgments applied to contracts made outside of North Carolina but sued upon in the state. In the terminology used by North Carolina courts to describe matters of state law, the term "procedural" was used to label rules of the forum state which were applied even to suits which arose from transactions outside of the state, and so the North Carolina court labeled the statute "procedural." 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941).

*Bullington* then brought the same suit in the federal district court in North Carolina, and obtained a deficiency judgment. In affirming the judgment on appeal, the court of appeals upheld federal authority to replace the state rule on the basis of the classification of the rule as "procedural" by the state court. 150 F.2d at 680. The Supreme Court reversed, 330 U.S. 183 (1947), as it should have done under the analysis developed here. No federal statute provided a rule on the availability of deficiency judgments, so that the Rules of Decision Act compelled application of the North Carolina law (through the mediation of the North Carolina choice of laws rule). *See* p. 688 *supra*. Had there been such a federal statute, it would have been unconstitutional. If one imagines *Bullington* making his claim directly to Angel for a deficiency, Angel would point to the North Carolina law denying effect to claims for deficiencies to justify his denial of any duty to pay the amount claimed by *Bullington*. Hence the rule is clearly part of the state-created right to be respected by diversity courts.

A more recent example of the misuse of the labels "substantive" and "procedural" is *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968). In holding that Federal Rule of Civil Procedure 3 and not the New York rule defined the commencement of the suit for the purpose of applying the New York statute of limitations, the Second Circuit relied in part on the classification of the rule as "procedural" by New York state courts in other contexts.

An indication that application of the federal rule will not result in the alteration of substantive rights under New York law is New York's own approach to its definition of commencement as a procedural rule. Thus, New York has followed its definition where it has applied another state's statute of limitations . . . and where it has applied a federal statute of limitations with respect to a federally created cause of action. . . . New York itself does not consider its rule either to abridge or enlarge a cause of action.

*Id.* at 606 (citations omitted).

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But the results of these classifications have not been consistent; the same rules have been termed “procedural” in one setting but “substantive” in another.<sup>107</sup> The line separating “substantive” and “procedural” law has varied, not because the courts have made mistakes, but because, in each problem area, a set of considerations appropriate to the particular context has determined at what point the line was drawn to divide legal rules into two groups.<sup>108</sup> The results of the line-drawing have been summarized in expressions about substantive and procedural law. The fact that a single pair of terms has been used without obvious logical distress to label the results of a diverse series of classification projects indicates that over a broad range of legal rules, the results of these different classifications have coincided. But this should not obscure the role of the terms substantive and procedural as conclusory labels, or the need to begin each project of classification by identifying the principles appropriate to the line-drawing to be done in the particular context.

In diversity jurisdiction, these principles are supplied in the first place by the constitutional theory of diversity jurisdiction. When a federal statute claims to displace a state law, the federal court must decide if the state law that the federal law would displace is among the state-created legal rights to be enforced by diversity courts. Once that analysis is completed, it is innocuous to use “substantive” and “procedural” to label the result. But to suppose that the constitutional analysis can be conducted without confusion in terms of a supposed distinction between substantive and procedural law entails a logical circle: the conceptual distinction which is taken to define the constitutional division of authority in diversity jurisdiction is itself precisely defined only by the constitutional theory which identifies that division.

The use of these terms in the Rules Enabling Act makes it difficult

107. For example, in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1940), both Sibbach and the Court were aware of the shifting meaning of “substantive” and “procedural.” Sibbach argued that the rule on physical examinations should be considered “substantive” for the purpose of applying the Rules Enabling Act, but “procedural” for the purpose of applying the Illinois choice of laws rule. See p. 687 *supra*.

108. Walter Wheeler Cook made this point when he wrote, with respect to conflicts of state laws:

As the present writer sees it, much of the difficulty arises from the failure on the part of both judges and text writers to state the problem accurately. Nearly every discussion seems to proceed on the tacit assumption that the supposed “line” between the two categories [substantive and procedural] has some kind of objective existence, so to speak, and that the object is to find out . . . “on which side of the line a set of facts falls.” This way of stating the problem . . . divert[s] our attention from the fact that we are thinking about the case precisely because there is no “line” already in “existence” which can be “discovered” by analysis alone.

Cook, “*Substance*” and “*Procedure*” in the Conflict of Laws, 42 YALE L.J. 333, 335 (1933).

to know what Congress intended the Act to do. Congress authorized the Supreme Court to make rules governing "practice and procedure," but provided that such rules should not alter "substantive rights."<sup>109</sup> Did Congress mean to delegate its full constitutional authority, adding the proviso only to remind the Court that some topics considered matters of "procedure" for other purposes might be matters of "substantive right," that is, beyond federal authority? Or did it mean to delegate only a portion of the lawmaking authority? The Enabling Act, passed in 1934, was an instruction directed to a Court still operating under the regime of *Swift v. Tyson*. Under the doctrine which took its name from that case, the federal diversity courts could depart from state law on subjects beyond the constitutional authority of Congress to regulate for the states, if those subjects involved nonstatutory "general law."<sup>110</sup> Thus, either the proviso in the Enabling Act was a truism (if by "substantive rights" it meant only the right not to be subject to an unconstitutional exercise of power by the courts) or it implied a limitation of the Court's rulemaking power to something less than the full area of "general law." The rejection of *Swift* in *Erie* (on constitutional grounds) changed the terms of the problem. Under the analysis of this Note, the "substantive rights" which the proviso shields from the Court's rulemaking are now nearly identical to the state-created legal rights which federal courts are constitutionally bound to enforce in diversity cases. The Court, post *Erie*, should therefore regard the Enabling Act as a full delegation of federal constitutional authority. The only relevant question in assessing the validity of a rule is whether it is within federal constitutional power.<sup>111</sup>

109. 28 U.S.C. § 2072 (1970).

110. See p. 681 *supra*.

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

Professor Ely has contended for a very different construction of the Enabling Act. Ely, *supra* note 5, at 718-27. This construction builds upon his view that federal authority to adopt "procedural" rules for diversity cases is far more expansive than the *Erie* doctrine admits.

The Constitution's reference to a diversity of citizenship jurisdiction had been intended as . . . a grant of power to provide courts for diversity cases and to prescribe the rules of practice and procedure by which they would manage their business, but not to go on and provide them, or let them provide themselves, with rules that could not fairly be characterized as procedural.

*Id.* at 703-04. "[A federal statute], even as applied to diversity cases, would be in peril of unconstitutionality only if it were so plainly nonprocedural as to fall outside Congress' undoubted power to formulate procedure for federal courts . . ." *Id.* at 705. The Rules Enabling Act, in Professor Ely's view, draws a more restrictive limit on federal authority than does the Constitution. *Id.* at 718-19. The Act authorizes creation of procedural rules, but adds an additional qualification—the rules are not to infringe "substantive" rights. The Act is responsive, on Ely's view, to the perception that procedural rules may infringe substantive rights, that is, that rules may be both "substantive"

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In choosing the laws to decide diversity cases, the federal courts are directed by the Rules of Decision Act to look first to state law for applicable rules; if there is no conflicting federal law, then state law must be followed. If there are applicable congressional enactments, the Act provides that such federal laws be followed without regard to the displacement of state law which results. But when a federal statute appears to make such a displacement, the federal court must go on to decide whether there is constitutional justification for the claimed federal authority. In making this determination the federal courts should give full effect to the state-created legal rights which diversity courts are meant to enforce.

and "procedural"; only procedural rules which do not infringe substantive rights are valid under the Act.

This Note takes the position that the constitutional end of diversity jurisdiction defines a narrower scope of federal authority to make rules for diversity cases. Once that end is specified, even some rules which may "fairly be described as procedural" are seen to be beyond the constitutional limit on federal authority in diversity jurisdiction. For example, considering *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), Professor Ely indicates that a federal rule supplanting state law would have been constitutional, but invalid under the Rules Enabling Act. Ely, *supra* at 727-29. But the constitutional analysis presented in this Note yields the conclusion that such a federal rule is constitutionally impermissible. See p. 698 *supra*.

The Note does not adopt what Professor Ely calls an "enclave theory of the Constitution," *id.* at 701-03, but identifies a limit on federal authority inherent in the very grant of diversity jurisdiction. This view draws the post-*Erie* constitutional limits of federal authority into (near) coincidence with the limit imposed by the enclave model of the Enabling Act proposed by Professor Ely. A federal rule is thus subjected to a similar test in Professor Ely's system (is a rule created for a purpose unrelated to the fairness or efficiency of the litigation process?, *id.* at 725) and in the system proposed here (is a rule constitutive of a state-created right?), though in Professor Ely's system the standard is statutory, and in the system proposed here, it is constitutional.

Despite this similarity in the test applied, the rules which Professor Ely identifies as having nonprocedural purposes, and hence which are protected by the Enabling Act from displacement by federal rules, are not always the same rules identified by this Note as parts of state-created rights, protected by the Constitution from federal displacement. In considering *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), for example, Professor Ely indicates that a federal rule supplanting the state rule requiring plaintiffs in derivative suits to post bond would have been invalid under the Enabling Act. Ely, *supra* at 728-29. But this Note concludes that such a rule is no part of the state-created legal right entitled to enforcement in the diversity court. P. 699 *supra*.