Procedure, Substance, and *Erie*

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Using the Supreme Court's *Shady Grove*[1] decision as its foil, this Article examines the nature of procedure, procedure's relationship to substance, and the *Erie* questions that arise when the procedural rules that federal and state courts use to adjudicate state-law claims vary. I conclude that the result in *Shady Grove* was correct—that a federal court should adopt the federal class-action rule even though New York's procedural code would have barred a New York state court from proceeding with the same case on a class-wide basis. I come to this result, however, not for the reasons offered either in Justice Scalia's plurality opinion or in Justice Stevens' concurrence.[2]

The Article's point of departure is the one matter on which Justice Scalia, Justice Stevens, and Justice Ginsburg, who authored

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

2. Justice Stevens joined parts of Justice Scalia's opinion, thus creating a majority for some aspects of *Shady Grove*. On the exact points of agreement and departure between the plurality and the concurrence, as well as their differences from the dissent, see *infra* notes 11–13, 91, 97–100 and accompanying text.

the dissent, agreed: procedural rules affect the outcomes of lawsuits.[3] The outcome-affecting consequences of procedural rules frame the *Erie*/Rules Enabling Act problem with which courts have wrestled since *Erie*. *Erie* itself commanded that federal courts apply state substantive law, rather than "federal general common law," to claims that lie within diversity jurisdiction.[4] The hard question, of which *Shady Grove* is the most recent iteration, is the extent to which *Erie*'s penumbra—as well as the similar requirement of the Rules Enabling Act that no Federal Rule of Civil Procedure ("Federal Rule") "abridge, enlarge or modify any substantive right"[5]—commands the same result with respect to procedural rules. For, even if a federal court applies the same substantive law that a state court would apply, the outcome-influencing potential of procedural rules means that a federal court applying federal procedural rules to a state-law claim might arrive at an outcome different from that of a state court applying the relevant state's procedural rules to the same claim.

The Court has not walked a straight line in resolving this problem; with nearly every case, the Court seems to correct course or careen in a different direction.[6] The Court has, however, settled on an analytical structure, which was delineated in *Hanna v. Plumer*[7] and

3. *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) ("The test is not whether the rule affects a litigant's substantive rights; most procedural rules do."); *id.* at 1455, 1459 n.18 (Stevens, J., concurring in part and in the judgment); *id.* at 1471–72 n.13 (Ginsburg, J., dissenting).

4. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The *Erie* rule has also applied to state-law claims brought into federal court by means of supplemental jurisdiction. *See, e.g.*, Crowe v. Wiltel Commc'ns Sys., 103 F.3d 897, 899 (9th Cir. 1996) (holding that Nevada law applied in a defamation claim being heard under supplemental jurisdiction). For the sake of simplicity, however, I refer to the application of the *Erie* doctrine only in diversity cases.

5. 28 U.S.C. § 2072(b) (2006). Scholars have often noted a curious juxtaposition of events: The Rules Enabling Act, originally enacted in 1934, *see* Act of June 19, 1934, Pub. L. No. 73–415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–77 (2006)), resulted in the Supreme Court's promulgation of the Federal Rules of Civil Procedure on December 20, 1937, *see* Order of December 20, 1937, 302 U.S. 783 (1937), about four months before *Erie* was decided. Justice Brandeis, who authored *Erie*, was the only Justice who did "not approve of the adoption of the Rules." 302 U.S. at 783.

6. For instance, the Court's last Rules Enabling Act/"procedural *Erie*" case before *Shady Grove* was *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), in which Justice Ginsburg wrote the majority opinion and Justice Scalia dissented—both stating views that they essentially replicated in *Shady Grove*. The major cases before *Gasperini* reflect comparable zigs and zags. The litany of the Rules Enabling Act/"procedural *Erie*" cases that first-year law students can recite—*Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525 (1958); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); and *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991)—is enough to prove the point.

7. 380 U.S. 460 (1965).

refined in John Hart Ely's exegesis of *Hanna*.[8] This analysis cleaves the choice-of-procedural-law question into two halves—a Rules Enabling Act branch and a "procedural *Erie*" (or Rules of Decision Act) branch. Under the first branch, federal courts can almost always apply a Federal Rule that is promulgated under the Rules Enabling Act;[9] under the second branch, a federal court must apply the relevant state's procedural rule when no Federal Rule addresses the situation and differences in federal and state procedural rules might induce forum shopping or lead to "inequitable administration of the laws."[10]

General agreement on this analytical structure has not translated into agreement on results. As *Shady Grove* shows, the initial "characterization question"—whether a case falls on the Enabling Act or the *Erie* side of the line—can lack a clear answer.[11]

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8. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

9. *See Hanna*, 380 U.S. at 471 (stating that a federal court can refuse to apply a Federal Rule of Civil Procedure only when "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions").

10. *Id.* at 468, 470.

11. In the Rules Enabling Act/"procedural *Erie*" context, the critical first question is whether a Federal Rule of Civil Procedure "is sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749–50. When there is a "direct collision" between a Federal Rule and a state rule, then the Rules Enabling Act analysis comes into play; but if there is no conflict, then the "procedural *Erie*" analysis comes into play. *See Hanna*, 380 U.S. at 470–72. Once that issue is resolved, then there is the second-level characterization question: in Enabling Act cases, whether the Federal Rule is a rule of "procedure," *see* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442–44 (2010); and in "procedural *Erie*" cases, whether the federal rule "would invite forum-shopping and yield markedly disparate litigation outcomes," *see id.* at 1461 (Ginsburg, J., dissenting).

Characterization problems are common in choice-of-law analysis. One of the most difficult characterization issues in horizontal (i.e., state-to-state) choice-of-law analysis is whether an issue is "substantive" or "procedural." If it is substantive, then constitutional and doctrinal rules constrain a forum court's ability to choose its own law. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985) (discussing full-faith-and-credit and due process constraints); Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 109–17 (1989) (discussing various choice-of-law methodologies that might lead a forum court to choose another jurisdiction's substantive law). On the other hand, forum courts are generally free as a constitutional matter to choose their own procedural rules to resolve a dispute. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); Home Ins. Co. v. Dick, 281 U.S. 397, 406 (1930) (stating in dicta that "matters which relate only to the remedy are unquestionably governed by the lex fori"). As a choice-of-law matter, they usually do so. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); *but see id.* §§ 125, 133–34 (describing circumstances in which a forum court might use non-forum procedural law). Because a court's ability to choose the law it wishes can therefore hinge on its characterization of the rule as either "substantive" or "procedural," courts have sometimes been accused of manipulating the characterization issue to get the law they desire. *See id.* § 122 cmt. b (noting courts' tendency to follow precedent when characterizing an issue as substantive or procedural without taking full account of the reasons why earlier cases

Justice Scalia's opinion characterized the case as a Rules Enabling Act matter,[12] while Justice Ginsburg's dissent characterized the case as an *Erie* matter.[13]

Hanna's analysis has also found detractors. Justice Harlan's concurrence in *Hanna* eloquently rejects *Hanna*'s bifurcated approach, arguing that Enabling Act and "procedural *Erie*" issues have a common core and a common solution.[14] In *Shady Grove*, Justice Stevens, who supplied the critical fifth vote to reverse, similarly reflected dissatisfaction with the Enabling Act half of the *Hanna* analysis in his concurrence, and sought a middle ground that bridged the chasm between the Enabling Act and "procedural *Erie*" branches.[15]

It is far too early to sing a requiem for *Hanna*. But *Shady Grove* exposes the ease of manipulating *Hanna*'s framework,[16] the contested nature of the framework itself, and the Court's ever veering course in applying the framework in real-world contexts. In other words, *Shady Grove*'s fractured opinions suggest the need to reconsider the problem from the ground up.

This Article posits a principle that explains the results in the Court's seemingly meandering Enabling Act and "procedural *Erie*" cases. In brief, if we assume a world in which processing a state-law claim from filing through settlement or judgment is costless and outcome-neutral, the claim has an expected value at the time of its hypothetical filing in a state court. This value is a product of the probability of recovery and the amount of the remedy if liability is

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characterized an issue as such); *id.* § 122 cmt. c (noting the constitutional constraints on characterizing a "substantive" issue as "procedural").

12. *Shady Grove*, 130 S. Ct. at 1437–42. Because Justice Stevens joined this portion of Justice Scalia's opinion, there is majority support for this proposition. *Id.* at 1448.

13. *Id.* at 1465–69.

14. *See Hanna*, 380 U.S. at 474–78 (Harlan, J., concurring). According to Justice Harlan:

> [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. If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

Id. at 475 (footnote omitted).

15. *See Shady Grove*, 130 S. Ct. at 1455 (Stevens, J., concurring in part and in the judgment) (stating that the Enabling Act analysis requires a federal court to consider whether a Federal Rule of Civil Procedure is "sufficiently intertwined with a state right or remedy" that it affects substantive rights).

16. The manipulability of *Hanna*'s two-branch analysis was also noted in Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 751 (1974) (responding critically to Ely, *supra* note 8). Professor Ely responded to Professor Chayes in John Hart Ely, *The Necklace*, 87 HARV. L. REV. 753, 753 (1974).

found.[17] What a federal court *cannot* do—whether its choice involves a Federal Rule or a common-law procedural rule[18]—is to choose a rule that affects this expected value. What a federal court *can* do is to choose its own rules to transmute the claim from this expected value to its actual value—even when those rules differ from the rules that a state court would use to process the claim, and even when those rules result in a recovery different from the recovery that the plaintiff(s) would have enjoyed in state court.

Part I begins by eschewing the rights-based or efficiency-based arguments that dominate modern discussions about procedure. Instead, it examines what legal process does as a functional matter: it turns a thing of uncertain value (a legal claim) into a thing of certain value (a settlement or judgment). In the course of rendering the uncertain into the certain, rules of procedure inevitably change the value of substantive entitlements and claims—a fact that drives the need to separate those state-created rules that federal courts must adopt from those that they need not adopt.

Part II then examines the range of tests that might be, or have been, used to determine when federal courts must apply a state-created rule in the *Erie* context. It shows that the tests the Court itself has used to address parts of this issue focus insufficiently on—and are sometimes willfully blind to—the consequences that rules of legal process have for the outcomes of lawsuits. The Court's handling of Enabling Act/"procedural *Erie*" issues has been unstable because it has been unwilling to decide head-on which consequences a federal court must replicate and which it can ignore.

Although there is no correct answer to this question, Part III assumes that both *Erie* and the Rules Enabling Act/"procedural *Erie*" cases that have flowed from *Erie* are "right" in the sense that they remain good law and reflect the Court's present view about the proper allocation of rulemaking authority between the state and federal systems. It then asks whether any single principle explains the circumstances in which a federal court must replicate, insofar as legal

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17. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.4, at 598 (7th ed. 2007) ("The plaintiff's net expected gain from litigating is the judgment if he wins discounted by his estimate of the probability that he will win, minus his litigation costs."); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 57 (1982) (discussing how risk-neutral parties make valuations based on expected value, "discounting possible outcomes by their probabilities"). In Hand Formula terms, the expected value of a claim is the $P \times L$ half of the $P \times L < B$ equation for determining negligence. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (setting out Judge Hand's classic negligence formula).

18. I use the phrase "common-law procedural rule" to refer to the rule that a federal court would apply to a comparable non-diversity claim when no Federal Rule addresses the situation.

rules can do so, a state court's outcome by applying the same rules that a state court would use, and the circumstances in which a federal court is free to ignore that outcome and apply its own rules to decide a state-law claim. Part III shows that the principle described above reconciles all the cases. It further argues that this principle can be justified normatively.

I. PROCEDURE AND CHANGE

For centuries the Anglo-American tradition thoroughly integrated and interwove rules of "procedure" (understood to be the rules by which courts or other adjudicatory bodies[19] resolve legal disputes) and rules of "substance" (understood to be the rules to which citizens were supposed to conform their conduct outside of the courtroom). As Sir Henry Maine aptly stated, "[s]o great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . . ."[20] Eventually the concepts of "procedure" and "substance" split apart.[21] By the nineteenth century, as Oliver Wendell Holmes explained in *The Common Law,* "the ancient forms of action ha[d] disappeared," allowing "the substantive law [to be] approached [without regard to] the categories of the forms of action."[22] By the twentieth century, procedure fell to a subservient role in legal thought, sometimes being described as "the handmaid of justice" or as "adjective law."[23]

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19. For simplicity, I refer only to courts and courtroom procedure in the remainder of this article. But the argument is not so limited, and extends to other adjudicatory bodies (such as administrative agencies) and the procedures that they use to resolve disputes.

20. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (London, John Murray 1883); *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 59 (2d ed. 1981) ("There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought.").

21. Some scholars date the rise of the distinction between procedure and substance to the late eighteenth century, tracing the dichotomy to Jeremy Bentham's 1782 work *Of Laws in General*. *E.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 804–05 (2010); D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions*,*"* 30 UCLA L. REV. 189, 191 (1982).

22. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 53–54 (A.B.A. Publ'g 2009) (1881); *id.* at 1 (noting the distinction between "the substance of the law" and "its form and machinery").

23. *See In re* Coles, [1907] 1 K.B. 1 at 4 (Eng.) (stating that "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress"); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (quoting *In re Coles*, but pointing out that confining rules of procedure to "handmaid" status is difficult in practice); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617 (1908) (claiming that lawyers "lose sight of the end of procedure, they make scientific procedure an end of itself, and

Today procedure is conceived of as a set of doctrines (pleading, joinder, jurisdiction, and the like) used during adjudication, rather than a concept that permeates all aspects of law. Procedural scholarship conceives of procedure as a distinct field of inquiry, akin to substantive fields, that is responsive to policies and arguments that are either consequentialist (i.e., as a means of enforcing substantive rights with as little friction as possible), deontological (i.e., as a means of ensuring that individuals' rights in fair process are respected), or both.[24]

I begin by considering legal process not in historical terms nor in terms of first principles, but in terms of what it does.

A. Procedure as Process

In thinking functionally about legal process, the word "process" is itself significant. "Process" implies change or evolution from one state to another; a process "passes on to the future a construction made from the materials of the past."[25] In particular, substantive legal entitlements are in the process of changing from what they were in the past to what they will be in the future. In an individual lawsuit, a legal claim evolves as well. When a party brings a claim of entitlement into the legal system, the claim is, to use an old-fashioned term, "inchoate."[26] When it leaves the legal system, it is "choate"—it has been changed from something of uncertain value to something given a definite value by a judgment, settlement, or voluntary dismissal.[27] In other words, when the claim is introduced into the system, it has an expected value;[28] when it leaves the system, it has an actual value.

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thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them").

24. *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919, 933, 939 (1999) (discussing principles under which procedural rulemaking should be done). The word "friction" is something of a dodge, for there are two distinct camps for those who see law in instrumental terms. One is a rights-based camp, which believes that procedural rules should enforce the underlying substantive legal rights as strongly as possible; the other is an efficiency-based camp, which believes that procedural rules should enforce substantive legal rights at the lowest social cost possible. *Id.* at 919, 933. *See generally* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 228 (2004) (discussing philosophical and economic understandings of procedure).

25. NICHOLAS RESCHER, PROCESS PHILOSOPHY: A SURVEY OF BASIC ISSUES 22 (2000). In the quoted passage, Professor Rescher was speaking specifically of natural processes, but other processes act in the same way.

26. A legal right is "inchoate" when it "has not fully developed, matured, or vested." BLACK'S LAW DICTIONARY 830 (9th ed. 2009).

27. A "choate" claim is "[c]omplete in and of itself," or a claim "[h]aving ripened or become perfected." *Id.* at 275.

28. *See supra* note 17 and accompanying text.

Likewise, when a case commences, a legal entitlement has a certain strength; when the lawsuit ends, that entitlement has changed—either by being made stronger through its reaffirmation on the facts the case presents, or being made weaker by its undermining or modification in light of these facts. Between the lawsuit's filing and its end, the value of the claim and the strength of the entitlement are constantly changing as new information flows into the case.[29]

When a plaintiff files a claim, a myriad of possible processes might lead the court, the lawyers, and the parties to assign the claim its final value (using a dart board, a Ouija board, a coin flip, etc.). But courts, lawyers, and parties use a limited number of processes to resolve legal claims; in the U.S. system, the process is usually composed of one or more subprocesses, such as pleading, discovery, dispositive motions, trial, and appeal. By choosing one particular process over others, the resolution of claims is channeled away from outcomes that might have been imaginable under some processes and channeled toward other outcomes.[30]

In this functional view, rules of procedure are not themselves the process that evaluates entitlements and values the claims that implicate them; the process is the set of actions (filing and answering the complaint, taking depositions, writing motions) that move the case from its beginning to its end. Rules of procedure represent the process of evaluating entitlements and valuing the claims that implicate them, in the same way that a script represents the process of performing a play or a score of music represents the process of playing a song.[31]

To be sure, the procedures that the court, the lawyers, and the parties follow do not by themselves determine a claim's value or its fluctuations in value over the course of the litigation. Some of the factors that establish this value precede the submission of the claim for adjudication; particularly important are the strength of the entitlement that was allegedly violated (that is, the "substantive law"),[32] as well as the quality and quantity of the evidence that is available to prove the entitlement and even the expectations of the

29. For an excellent demonstration of this idea from a real-options analysis, see Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1269 (2006).

30. *See* RESCHER, *supra* note 25, at 22 ("Each such process envisions some sector of the future and canalizes it into regions of possibility more restrained in range than would otherwise, in theory, be available.").

31. *Id.* at 24–25.

32. This effect of an entitlement on a claim's value can be strong if the entitlement is a well-accepted principle, or it can be weaker if the claim is novel, requires an extension of an existing entitlement, or requires a reversal of an existing entitlement.

process that is likely to be used to resolve the claim. Other factors that establish the claim's value develop between the time of the claim's submission for adjudication and its denouement. Aside from the process that is used to transmute the claim into something of fixed value, these factors include the quality of legal representation,[33] the ways in which the evidence unfolds (for example, the seemingly unflappable witness who blurts out a devastating concession, or the smoking-gun document that unexpectedly emerges from the bottom of a file cabinet), the parties' financial capacity to litigate, and their risk preferences for avoiding the publicity, burdens, or result of a trial.

B. How Process Changes Entitlements and Values

Even though the process that guides a claim from an inchoate to a choate state is only one influence—and in most cases not the principal influence—in establishing the strength of an entitlement or the value of a claim, it is hardly insignificant. Procedure invariably changes entitlements and the values of the claims that implicate them for one (or more) of four reasons. The first reason is the costliness of procedure. The cost of processing a claim affects the initial decision to sue by affecting the expected value of a claim at the commencement of litigation;[34] and as a case proceeds through litigation, the prospect of incurring further costs to process the claim affects both the parties' decision whether to settle or continue to trial and the amount of any settlement.[35] Moreover, the sunk costs that a party has already incurred in processing a claim affect the value of the claim for the parties moving forward from that point.[36] In addition, some procedures allow the parties to achieve economies of scale; others do not.[37] And, in their decisions to use or forgo certain available

33. I assume that the parties are represented by lawyers, but the lack of such representation for one or both sides also has an evident effect on the outcome.

34. The expected value of a claim is determined by multiplying the probability of recovery by the expected recovery and then subtracting the costs of the process. Shavell, *supra* note 17, at 56. Two types of costs are associated with procedure: the direct cost of litigating the claim (attorneys' fees, expert-witness fees, filing fees, and so on) and the cost of erroneous decisions. POSNER, *supra* note 17, § 21.1–.2, .10.

35. *Id.* § 21.4.

36. For one discussion of how sunk costs can affect the value of a claim, see Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 113–14 (1990) (arguing that sunk costs may deter settlement after unsuccessful summary judgment motions).

37. Classic examples of rules designed to achieve economies of scale are the rules of claim joinder, party joinder, and consolidation. *See* FED. R. CIV. P. 18–24, 42(a). Such rules do not inevitably yield economies of scale; they can so complicate a case that they impose greater costs than their savings, or can lead to unfair results. *See, e.g.*, Malcolm v. Nat'l Gypsum Co., 995 F.2d

procedures, courts, lawyers, and parties must constantly balance the procedures' enhancement of accuracy against their cost.[38] However this balance is struck under a given procedural system or in a given case, the cost of the chosen procedures affects the value of a claim decided under those rules.

Second, the process chosen to resolve claims affects entitlements and a claim's value by altering the probability of recovery on a claim. For instance, a process that permits broad discovery allows a party with limited knowledge to access evidence within an opponent's possession.[39] If the evidence damages the opponent, the probability of prevailing goes up; if it supports the opponent, the probability of prevailing declines.[40] A procedural system without broad discovery yields a different probability of recovery, and therefore a different value for a claim and a less fertile set of facts out of which to craft legal entitlements. Likewise, a system with motions to dismiss[41] and defendants' motions for summary judgment[42] can provide information on the probability of recovery, reducing the probability to zero if the motion is successful but enhancing the probability of recovery once the motion is hurdled.[43] A system of liberal party joinder can enhance the possibility of a plaintiff's verdict;[44] while a system

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346, 354 (2d Cir. 1993) (reversing a jury award in the trial of forty-eight consolidated cases because the confluence of parties and variables led to jury confusion). In some systems, such as the common-law system, joinder rules were severely restricted, making such economies almost impossible to realize. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 9.2 (5th ed. 2001). Of course, in one sense, this was precisely what was at stake in *Shady Grove*: whether the plaintiffs could use Rule 23 to achieve the economies of scale from bringing 10,000 similar claims in one lawsuit. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1459 n.18 (2010) (Stevens, J., concurring in part and in the judgment).

38. *See* POSNER, *supra* note 17, § 21.1 (noting that the economic objective of a procedural system is to minimize the sum of the cost of an erroneous judgment and the cost of operating the system).

39. For the broad discovery rules used in federal court, see FED. R. CIV. P. 26–37, 45.

40. *See* POSNER, *supra* note 17, § 21.5, at 602 (noting that pretrial discovery can increase the likelihood of settlement if a defendant learns that the plaintiff's case is stronger than the defendant originally estimated). For information regarding the way in which the possibility of discovering damaging information can induce a plaintiff to invest in a lawsuit with a negative expected value, see Grundfest & Huang, *supra* note 29, at 1277 (using option theory to explain that a lawsuit with a negative expected value is equivalent to an out-of-the-money call option that a plaintiff will rationally pursue so as long as the price of the option is low enough and its volatility is high enough).

41. For the available motions to dismiss in federal court, see FED. R. CIV. P. 12(b)(1)–(7).

42. FED. R. CIV. P. 56.

43. For an analysis demonstrating that a denial of a defendant's motion for summary judgment can decrease the plaintiff's willingness to settle, see Issacharoff & Loewenstein, *supra* note 36, at 102–03.

44. *See, e.g.*, Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive*

that bifurcates liability from remedy can enhance the probability of a defense verdict.[45] More generally, the accuracy-enhancing or accuracy-distorting use to which every rule of procedure is put in a given case affects the probability of recovery.[46]

Third, procedure affects the nature and structure of legal entitlements (that is, the substantive law) directly. To explain, let me provide three examples drawn from the "procedural" law of joinder. First, rules of preclusion, which are usually said to be substantive,[47] have expanded in scope as a result of expansion in the joinder rules.[48]

Processing of Evidence, 85 J. APPLIED PSYCHOL. 909, 916–17 (2000) [hereinafter Horowitz & Bordens, *Consolidation*] (reporting experimental data showing that the likelihood of plaintiffs' recovery increases as more plaintiffs are joined); Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 225–26 (1988) [hereinafter Horowitz & Bordens, *Aggregation*] (reporting experimental data showing that aggregation of weak claims increases the probability of recovery).

45. *See*, *e.g.*, Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1617 (1963) (reporting statistics showing that defense verdicts increase when the issue of liability is bifurcated and tried before damages).

46. The distortions in accuracy created by some procedural rules (for instance, rules that make privileged from discovery certain relevant information) can be analyzed as an error cost, *see* POSNER, *supra* note 17, § 21.1 (explaining the costs of an erroneous judgment), or as a factor affecting the probability of recovery, *see* Shavell, *supra* note 17, at 56 (noting that the expected value of a claim is the product of the likelihood of obtaining recovery and the amount of recovery). Wherever it is accounted for, the point is the same: the accuracy-enhancing or accuracy-distorting effect of procedural rules affects a claim's value. For instance, in one sense, *Shady Grove* was a debate about whether Rule 23 enhanced the accuracy of the result by making a meritorious but independently unviable claim economically feasible, *see* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1458–59 (2010) (Stevens, J., concurring in part and in the judgment) (implying the need to permit class action litigation when an aggrieved party did not have the economic incentive to pursue a claim), or whether it distorted the accurate outcome of a nearly, or perhaps entirely, valueless claim, *see id.* at 1460 (Ginsburg, J., dissenting) (noting that the use of Rule 23 "transform[s] a $500 case into a $5,000,000 award"); *id.* at 1465 n.3 ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims.").

47. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (noting that if Rule 41 mandated a claim-preclusive effect for claims arising under state law, then Rule 41 "would arguably violate . . . the Rules Enabling Act" by modifying a substantive right). The drafters of the original Federal Rules regarded preclusion rules as substantive, and therefore beyond the terms of the Rules Enabling Act's delegation of rulemaking power. *See* Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 634 & n.49 (1985) (noting the drafters deleted from an amendment to Rule 14 a sentence regarding preclusive effects of judgment because it would have been substantive); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1164 n.637 (1982) [hereinafter Burbank, *The Rules Enabling Act*] (noting multiple instances in which the Advisory Committee acknowledged that preclusive effects of judgment are substantive).

48. *See* RESTATEMENT (SECOND) OF JUDGMENTS intro., at 6 (1982) (noting the "complementary relationship between the law of procedure and the law of res judicata"); *id.* at 6–10 (describing how the expansion of joinder from common-law pleading to the Federal Rules changed the scope of claim and issue preclusion).

Second, legislation that adopts several liability—an even more clearly substantive rule—typically reduces the plaintiff's damages by the percentage of fault attributable to nonparties.[49] Such a rule is fair principally because modern joinder rules permit the addition of all potential tortfeasors in one case;[50] if a plaintiff chooses not to effect the joinder of a tortfeasor, the argument goes, it is not unfair for the plaintiff, rather than the other tortfeasors, to bear that portion of the loss. Finally, the doctrine of market-share liability is fair principally because (and is imaginable only in a world in which) most plaintiffs and most defendants can be joined in a single suit.[51] My point here is not to argue that expansive preclusion, several liability, or market-share liability are correct as a matter of law or policy.[52] Rather, it is to point out that substantive law—and important changes to that law—emerge against a procedural backdrop that is often taken for granted, but without which the substantive law could not work as intended and would not be structured as it is.

Procedure's shaping of substance extends beyond providing this backdrop. For instance, the interplay between substance and procedure shows up in the legislative arena. The shape of substantive legislation vitally depends on the process through which the legislation is enacted (unicameral versus bicameral, majority versus

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49. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 12–2506(A)–(B) (2003) (detailing Arizona's liability apportionment scheme, which allocates damages based on percentage of fault); Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1305 (1997) (noting that the "majority of states with a pure or modified form of several liability that have addressed the issue allow evidence of nonparty fault generally to be introduced into the distribution calculus"); *id.* at 1305 n.72 (listing the statutes and cases supporting this assertion).

50. *See*, *e.g.*, FED. R. CIV. P. 20(a)(2) (permitting joinder of defendants if any right to relief, including tort relief, is asserted against them jointly, severally, or in the alternative).

51. *See*, *e.g.*, 28 U.S.C. § 1407 (2006) (providing for multi-district transfer); FED. R. CIV. P. 20(a)(1), 20(a)(2), 23 (detailing rules for permissive joinder of plaintiffs, permissive joinder of defendants, and class actions). For instance, the first case to adopt market-share liability, *Sindell v. Abbott Laboratories*, 607 P.2d 924, 925 (Cal. 1980), involved a class of plaintiffs injured by DES joining as defendants about ninety percent of the going concerns that had manufactured DES. When virtually every plaintiff and every defendant is brought into the case, and when the product sold is fungible (i.e., posing identical risk), then the idea of dividing liability according to market share is arguably justified. Even those cases that departed from *Sindell* and permitted a single plaintiff to sue a single DES manufacturer used as one of the rationales the ability of the sued manufacturer to use the procedural device of impleader to add additional manufacturers. Collins v. Eli Lilly Co., 342 N.W.2d 37, 51 (Wis. 1984). For the federal impleader rule, see FED. R. CIV. P. 14.

52. *Compare* Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 551 (Wis. 2005) (extending "risk contribution theory," similar to market share liability, to claims against lead-paint manufacturers), *with* Skipworth v. Lead Indus. Ass'n, 690 A.2d 169, 172 (Pa. 1997) (rejecting market share liability for lead-paint manufacturers), *and* State v. Henley, 787 N.W.2d 350, 368 n.29 (Wis. 2010) (noting in dicta *Gramling*'s possible unconstitutionality).

supermajority, veto versus no veto).[53] Nor has the role of procedure in defining substantive entitlements escaped the attention of Congress, which sometimes blunts substantive liability by imposing procedural hurdles. Recent examples are the toughened pleading and class-action requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA")[54] and the heightened pleading requirements of the Y2K Act.[55] Although the lack of widespread computer failures rendered the Y2K Act unnecessary in hindsight, the PSLRA has (whether for good or ill) reduced the amount of securities-fraud litigation, and thus the liability of sellers of securities.[56] And Congress accomplished this goal without changing a single word of substantive securities law.[57]

Fourth, the chosen procedures help to shape the value of substantive claims by affecting the amount of the recovery. A system that allows broad discovery might lead to the uncovering of information that allows a litigant to pursue a new theory of recovery or defense, or might permit a party to seek recovery of a form of damages (perhaps punitive damages) unimagined at the time that the litigation commenced. When joined with a liberal system of amending the initial pleadings, such a procedural approach can change the ex ante expectation of the proper amount of recovery; conversely, a system without broad discovery or a policy of liberal amendment will likely lead to a different level of recovery.[58] A system in which

53. *See*, *e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001) (describing how "federal lawmaking procedures" such as bicameralism and supermajority voting advance constitutional concerns for the separation of powers and federalism).

54. Private Litigation Securities Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified at 15 U.S.C. § 78u–4 (2006)).

55. Y2K Act, Pub. L. No. 106–37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601–17 (2006)).

56. *See* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 622 (2007) (demonstrating empirically that the PSLRA has had "important negative impacts on nonnuisance litigation," especially in small-value cases).

57. In the well-known words of Rep. John D. Dingell:

> Most people look at the procedure as being something that's just kind of amorphous and you don't have to worry much about it. The procedure is of exquisite importance. . . . I'll let you write the substance on a statute and you let me write the procedure, and I'll screw you every time.

Regulatory Reform Act: Hearing on H.R. 2327 Before the H. Subcomm. on Admin. Law & Governmental Relations, 98th Cong. 312 (1983).

58. Systems of procedure can have different views on the liberality of amendment. As a general matter, the modern American view is to permit liberal amendment. *See* FED. R. CIV. P. 15(a)(2) (permitting amendments "when justice so requires"). *But see* FED. R. CIV. P. 16(b)(3)(A), (4) (requiring "good cause" to permit an amendment after the deadline for amendments has passed). Common-law pleading, on the other hand, did not permit amendments that shifted the legal theory the plaintiff was pursuing. *See* JAMES ET AL., *supra* note 37, § 1.4 ("The inquiry was

plaintiffs have a liberal opportunity to join together or otherwise consolidate their claims similarly can affect the value of each individual plaintiff's claim.[59]

Although in theory two different systems of procedure might result in the same outcome for a given claim,[60] the procedures that resolve legal claims are generally not fungible: courts, lawyers, and parties that apply different sets of procedures will affect the value of a claim in different ways. A process that provides no opportunities for depositions or limited opportunities for the discovery of documents (and thus no opportunity to fix a witness's testimony before trial or find the incriminating document in the file cabinet) likely guides a claim toward an outcome different from the one achieved in a system with liberal discovery. A process that imposes heavy costs on one or all parties, or that induces the decisionmaker to render predictably different judgments in comparison to the judgments that would be rendered under other processes, also affects the outcome.[61] A process in which discovery precedes pleading will not invariably lead to the same outcome as a process in which pleading precedes discovery.[62] Indeed, if the processes by which courts established the value of a claim were fungible and transitive, then the debate in a case such as *Shady Grove*—whether to use the class-action process or not—would

not whether plaintiff should recover under the law of the land, but whether plaintiff had proved a case . . . in whatever form the action had been brought.").

59. *See*, *e.g.*, Horowitz & Bordens, *Consolidation*, *supra* note 44, at 916 (reporting experimental data showing that the average award decreases when more than four plaintiffs are joined); Horowitz & Bordens, *Aggregation*, *supra* note 44, at 226 (reporting experimental data showing that aggregation of weak claims with strong claims can suppress the value of strong claims).

60. *See* RESCHER, *supra* note 25, at 19 (noting that the sameness of the outcome does not define the process).

61. For literature either modeling or experimentally demonstrating the effects of different procedural devices on the outcomes of cases, see, for example, Horowitz & Bordens, *Consolidation*, *supra* note 44, at 909 (describing experimental results in which different joinder patterns affected case outcomes); Issacharoff & Loewenstein, *supra* note 36, at 123 (modeling summary judgment outcomes based on mathematical analysis); Zeisel & Callahan, *supra* note 45, at 1607–08 (analyzing outcomes in actual unitary and bifurcated trials).

62. *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (establishing a pleading standard designed "to avoid the potentially enormous expense of discovery"), *with id.* at 586 (Stevens, J., dissenting) (stating that "fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence"). *See also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940–41 (2009) (affirming the general applicability of *Twombly*'s approach in federal cases); Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 503–05 (2010) (arguing that federal judges should typically permit some discovery before ruling on a motion to dismiss a claim); Rebecca Love Kourlis, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 274–77 (2010) (discussing states in which pre-suit discovery ameliorates heightened-pleading requirements).

be an academic one, of no practical consequence, and hardly worth litigating all the way to the Supreme Court.[63]

Thus, a legal claim is like an untethered buoy bobbing in an ocean. Its value constantly fluctuates up and down as a result of numerous influences—including the procedures that the court and parties use to resolve the claim—until it comes to rest at its final value (as defined by a settlement, judgment, or voluntary dismissal). This process of changing and ultimately establishing and valuing the parties' substantive entitlements has ripple effects that extend into the future, as the rejection or reaffirmation of a particular legal entitlement, as well as the establishment of a definite value for that entitlement, helps to create the expected value for similar subsequent claims.

C. The Inevitability of Change

But, one might object, even if the use of *some* or *many* rules of procedure affects substantive entitlements or a claim's value, that fact does not prove that *all* rules of procedure intrinsically shape substantive entitlements or affect the value of substantive claims. Take, for instance, the most quintessentially procedural of all rules—the requirement that pleadings and motions be filed on 8½" x 11" paper.[64] Surely this rule is too trivial to act as a force that changes the substance of the parties' entitlements or the values of their claims.

But I do indeed claim that the use of *every* "procedural" rule changes entitlements and values of claims, and the "file on 8½" x 11" paper" rule provides an excellent vehicle for clarifying the nature of the claim. Imagine the following procedural rule: every court filing must be placed on special 8½" x 16" paper with gold-gilt edges. Such paper costs, perhaps, $5 per page.[65] It is not difficult to see the effect

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63. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (noting in a horizontal choice-of-law context that "[t]here can be no [constitutional] injury in applying [the law of one state] if it is not in conflict with that of any other jurisdiction connected with this suit").

64. *See, e.g.*, N.D. CAL. CIV. R. 3–4(c)(1) (delineating the paper size requirements for filing with the court).

65. This hypothetical is hardly fanciful. In English equity practice, masters made significant fees by charging the parties exorbitant prices for the copies of legal documents that they were required to have. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 426–27, 441–42 (1922) (detailing how court officials behaved opportunistically in generating revenues from myriad procedural fees). The quality of justice suffered as a result. *See id.* at 442 (noting "a consensus of evidence throughout the eighteenth century that it was better to sacrifice just claims rather than embark upon a suit in equity"). Likewise, the Stamp Act of 1765, whose passage was one of the events precipitating the American Revolution, mandated a tax on the paper used for most filings in court. *See* Stamp Act, 1765, 5 Geo. 3, c. 12 (Eng.) (requiring a tax of "one shilling and six pence" on "every Skin or Piece of Vellum or Parchment, or Sheet or Piece of

that such a rule would have on the substantive law. It would discourage the filing of claims other than those brought by the wealthy, and it would be a means by which wealthy plaintiffs could impose their will on less well-off defendants. The types of claims that the wealthy would bring would likely skew the substantive law away from "person in the street" sensibilities; for instance, if only well-to-do parties can sue or be sued, a court is less likely to develop a robust doctrine of unconscionability or other rules for consumer protection.

It is true that, in choosing between an 8½" x 11" rule rather than an 8½" x 14" rule, the outcome-affecting consequences are very slight. The same can be said of many other procedural choices.[66] But that fact does not defeat the argument. First, to appreciate the effect of procedural rules on substantive entitlements, it is sometimes necessary to abstract from the fine-grain detail of a rule. Choosing between 8½" x 11" and 8½" x 14" paper for filings has virtually no effect on a claim's value, but choosing between the use of widely available paper and the use of paper that would be too costly for ordinary litigants to obtain has an important effect. Second, even though procedural rules invariably affect the value of substantive claims, the degree of the change that different rules effect varies among rules. Given that different rules impose different costs and affect the probability or amount of recovery in different ways, some rules have only a modest effect on the value of a claim or the shape of a substantive entitlement; others have a great effect. A filing rule has *some* effect on the value of a claim; however negligible, the effect is greater than zero. Therefore, unless a rule of procedure is completely inefficacious but absolutely costless—a combination unlikely to exist in the real world—every rule used in adjudication affects the value of the claim on which it operates and also exercises a prospective effect on the expected values of future claims.

Paper, on which shall be ingrossed, written, or printed, any Petition, Bill, Answer, Claim, Plea, Replication, Rejoinder, Demurrer, or other Pleading in any Court of Chancery or Equity," as well as taxes ranging from three pence to ten shillings for papers used for other court filings), *repealed by* 6 Geo. 3, c. 11 (1766).

66. *Compare* Holster v. Gatco, Inc., 130 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring) (noting that even "a state rule limiting the length of the complaint, for example, or specifying the color and size of the paper" can affect the outcome when the federal rule is different), *with* Holster v. Gatco, Inc., 618 F.3d 214, 217 (2d Cir. 2010) (Calabresi, J.) (noting that federal courts should not be required to follow "trivial state court rules" even when a statute generally requires a federal court to apply state rules).

D. Theoretical Commitments Behind "Procedure as the Agency of Change"

Seeing legal procedure as the method guiding lawyers, parties, and the court as inchoate claims are channeled into claims of certain value might seem a generic, unobjectionable, and even banal description. But the idea of "procedure as change" is quite radical, for it makes substantive law impossible to understand apart from the procedure that defines it and that constantly adjusts its value. Its radical nature can be shown by means of an age-old philosophical debate. The notion that change is a fundamental aspect of existence—equal to or more fundamental than the substance on which it works—dates to Heraclitus.[67] Reduced to its simplest expression, Heraclitus's view was that "all things flow."[68] Perhaps the most vivid—and certainly the most quoted—statement of his position is that "you cannot go into the same water twice."[69] The scope of Heraclitus's commitment to change is debatable,[70] but Plato and Aristotle read him for all he might be worth. Plato grudgingly adopted his view that change was an invariable condition of the sensible world; he therefore posited the existence of Forms, or unchanging ideals of which real objects were but imperfect instantiations, to create the permanence necessary for philosophical reflection.[71] Aristotle went further, holding that Heraclitus's theory of flux was internally self-contradictory and

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67. For an analysis of Heraclitus's thought, see Daniel W. Graham, *Heraclitus*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008), *available at* http://plato.stanford.edu/entries/heraclitus. Heraclitus's principal work is the cryptic and mystical *On Nature* (ca. 500 B.C.E.), which survives only through fragmentary epigrams quoted in the works of later philosophers. *Id.* § 1.

68. This description of Heraclitus's position belongs to Socrates. *See* PLATO, *Cratylus*, *in* THE COLLECTED WORKS OF PLATO 421, 438 (Edith Hamilton & Huntington Cairns eds., Benjamin Jowett trans., 1961) (describing Socrates' analysis of Heraclitus's position that all things are in motion and nothing is at rest); *see also id.* at 474 (describing Heraclitus's view that "everything is in a state of transition and there is nothing abiding").

69. This is the version that Plato gives in *Cratylus*. *See id.* at 439 (stating that "you cannot go into the same water twice"). Other variants also exist. The variant that seems truest to Heraclitus's syntax and structure is "on those stepping into rivers staying the same other and other waters flow." *See* Graham, *supra* note 67, § 3.1 (discussing the different variations of Heraclitus's views found in ancient works).

70. On a narrow reading, Heraclitus appears to argue that, because things are ever changing, they are never knowable (or at least are knowable only by the few in possession of *logos*)—a profoundly skeptical position. On a broader reading, he links change and continuity—that only by constant change is permanence of matter possible. *See* Graham, *supra* note 67, §§ 3.1, 5 ("It is that some things stay the same by changing.").

71. Plato developed aspects of his Theory of Forms in a number of works, including *The Republic*. *See* Hugh Lawson-Tancred, *Introduction*, *in* ARISTOTLE, METAPHYSICS xi, xviii (Hugh Lawson-Tancred trans., Penguin Books 1998).

arguing that being, rather than becoming, was the defining characteristic of existence.[72]

In the Western tradition, Aristotle's view—the primacy of being over becoming, of substance over process—won handily.[73] The fall of procedure to a second-order consideration in legal thought[74] mirrors the subordination of change to substance in philosophical thought.[75]

Accepting the idea of procedure as the agency by which the substance of entitlements changes does not require the overthrow of the Western philosophical tradition.[76] It does not require that a person see procedure as "more important" or even "as important" as substance. Nor does it require a person to believe that procedure and substance are the same, that procedure is inherently substantive, or that substance is inherently procedural;[77] on the contrary, there is an

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72. *See* ARISTOTLE, *supra* note 71, at 81 (stating that "in the case of things that are, the primary object is *substance*" and that "the fundamental duty of philosophers . . . *is to gain possession of the principles and causes of substances*").

73. *See* ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 45 (1929) (discussing "the evil produced by the Aristotelian 'primary substance' "); *see also* RESCHER, *supra* note 25, at 4 ("[I]t does not stretch matters unduly to say that the Aristotelean view of the primacy of substance and its ramifications . . . have proved to be decisive for much of Western philosophy."). *But see* NICHOLAS RESCHER, PROCESS METAPHYSICS 10–12 (1996) (discussing ways in which Aristotle drew on process ideas). For a short treatment of the meaning of "substance" in the works of Aristotle and other Western philosophers, see Howard Robinson, *Substance*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2009), *available at* http://plato.stanford.edu/entries/substance.

Eastern philosophical traditions have generally accorded the idea of change a higher place in philosophical thought. *See, e.g.*, Chung-ying Cheng, *The Origins of Chinese Philosophy*, *in* COMPANION ENCYCLOPEDIA OF ASIAN PHILOSOPHY 493, 501–06 (Brian Carr & Indira Mahalingan eds., 1997) (discussing centrality of change and process in Chinese philosophy); JOHN M. KOLLER, ORIENTAL PHILOSOPHIES 157–65 (2d ed. 1985) (discussing the importance of the idea of becoming in Buddhist philosophy); AMARTYA SEN, THE IDEA OF JUSTICE 208–21 (2009) (discussing the process-oriented and consequence-sensitive nature of *nyaya* in Hindi philosophy).

74. *See supra* notes 19–23 and accompanying text (detailing historical differentiation between substance and procedure).

75. I am not arguing that the subordination of legal procedure to legal substance is dictated by the triumph of substance over process in the Western philosophical tradition. The substances that form the basis of metaphysical reflection are objects in the real world, not abstract ideas such as rules of law. But I am suggesting that the inattention to process and change in the dominant Western tradition made it easy, once legal process and legal substance were disaggregated, to downplay a body of ideas (procedure) that focuses on how changes in other ideas (substance) occur.

76. On the other hand, familiarity with process philosophy is useful for comprehending the idea of "procedure as change." For a helpful overview, see RESCHER, *supra* note 25. The modern standard of process philosophy, renowned both for its creativity and for its impenetrability, is Alfred North Whitehead's *Process and Reality*. WHITEHEAD, *supra* note 73.

77. For arguments along these lines, see Main, *supra* note 21.

evident difference between the process by which a thing is created or changed and the thing itself.[78]

On the other hand, seeing procedure as the agent of change requires more than acknowledging that the use of procedural rules affects the outcomes of lawsuits; many judges and scholars already do that.[79] It requires embracing the idea that acting on, and changing, the substance of legal claims is an integral part of procedure's nature, not simply one of its unavoidable and unfortunate side effects. It requires focusing on the flux in law and in individual legal claims over time—and not focusing solely on the substantive entitlements of a given moment or on the outcomes of cases. It requires seeing substantive law as inextricably linked to, and only partially comprehensible apart from, the process that acts on it. Anyone who has argued for a change in a substantive entitlement, for a new foundation for an existing entitlement, or for a particular judgment or settlement engages in the process of changing the law. We take for granted, and so we usually skip over as a conscious matter, the capacity of entitlements and the value of claims to change. But change—in other words, process—is everywhere in law.

More can be said about the idea of procedure as the agency of change;[80] this Article is designed principally to adumbrate the idea, and then to see whether it holds any promise as a way of resolving seemingly intractable *Erie* problems. It is to this latter task that I now turn.

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78. *See* RESCHER, *supra* note 25, at 25 ("[A] process is certainly not to be identified with its usual product.").

79. *See supra* note 3 and accompanying text; *see also* Main, *supra* note 21, at 801, 818–22 ("[O]nly the broadest summary of this literature is necessary to remind that procedural means can achieve substantive ends . . . ."); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472–73 (1985) (book review) (arguing that the idea of "neutral procedure" does not exist). On some of the ways in which this change occurs, see *supra* notes 34–59 and accompanying text.

80. For instance, a critical question for "procedure as the agency of change" is the role of consequentialist, deontological, and other arguments about the content of procedural rules. *See supra* note 24 and accompanying text. "Procedure as a change agent" does not obviate such arguments, but it does affect them. First, by their nature, processes are teleologically driven; they strive to achieve some goal with the greatest economy and efficiency possible. *See* RESCHER, *supra* note 25, at 46–47 ("[P]ragmatists and [process philosophers] alike prioritize a concern for effectiveness and efficiency in the context of teleological processes."). Second, the idea of a necessary content to procedural law seems inconsistent with the idea of procedure as change, for procedural rules are as much subject to change as substantive rules are. Thus, seeing procedure in consequentialist rather than deontological terms is the better view. But recognizing that procedure is teleologically ordered says nothing about what sorts of change are desirable, or what sorts of processes are most effective in achieving these ends. From a process perspective, there remains a great deal of room to argue for the adoption of different procedural rules.

II. VIEWING *ERIE* PROBLEMS THROUGH A PROCESS LENS

Understanding procedure as the agency by which substantive law and the value of substantive claims change seemingly poses difficulties in the *Erie* context. *Erie* requires federal courts to apply state substantive law in diversity cases. If the nature of procedure is to change the content and value of substantive entitlements, then it seems that a federal court should adopt exactly the same procedures that are used in state courts so that, at least insofar as procedural rules determine the value of substantive claims,[81] the values that a state court and a federal court would achieve are equivalent.

Although a reasonable approach, this logic is hardly airtight. *Erie* requires that the same substantive *doctrine* be applied in federal court; it does not require the same substantive *outcome* or *value* be achieved in federal court. This distinction between *doctrine* and *value* has been the source of the conundrum in the *Erie* context. Virtually no one disputes the idea that federal courts should apply the relevant state's substantive doctrine to resolve a claim within the courts' diversity jurisdiction.[82] But substantive doctrine is only one component that determines a claim's value. The hard question is whether a federal court must also replicate, to the extent that it can, other features that create a claim's value in state court—in particular, whether it must apply the state court's rules of procedure, which change a claim's value between its filing and its termination.

Two opposing answers to this conundrum would be "Always" and "Never." Over the course of the seventy years in which it has dealt with this problem, however, the Supreme Court has eschewed both of these simplistic answers.[83] Instead, it has assayed three distinct approaches, all of which, in one way or another, require federal courts to distinguish "substantive" rules (when federal courts must apply the relevant state's rule) from "procedural" rules (when federal courts apply their own rule). The first approach—the "formalist" approach—regards a rule as "procedural" when it "really regulates procedure,—

81. Factors other than procedural rules also determine a claim's value. *See supra* notes 32–33 and accompanying text.

82. *See* THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 599 (2d ed. 2008) ("It is universally accepted that, in the absence of controlling federal law, a federal court will apply the relevant state's *substantive* law.").

83. After a trilogy of cases in 1949—*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)—it seemed that the Court was moving toward a rule always applying state rules of procedure in diversity cases. But the Court shifted course in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), and after *Hanna v. Plumer*, 380 U.S. 460 (1965), it has kept its distance from the "Always" answer.

the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[84] The second approach is the "balance of interests" approach: a rule is "procedural" when a federal court's policy interest in applying a federal rule outweighs the relevant state's policy interest in having its rule applied.[85] Third, the Court has adopted several variants of an "outcome-determinative" approach, in which the extent of the effect of a federal rule either on the outcome of the case or on stated policies determines whether a rule is "procedural."[86]

At present, the Court uses all three approaches, depending on the issue at stake. For cases invoking a Federal Rule of Civil Procedure (and therefore the Rules Enabling Act), the Court has adopted the formalist approach; as long as a Federal Rule "really regulates procedure," and as long as its effects on the outcome of the lawsuit are merely "incidental,"[87] a federal court must apply the

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84. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). For further discussion of this approach, see *infra* notes 87–88, 92–94, 97–104 and accompanying text.

85. The case usually cited for the "balance of interests" approach is *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), although *Byrd* has an alternate possible holding and is ambiguous enough that it is not clear that the Court adopted a balancing approach. *See also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–39 (1996) (arguably adopting *Byrd*'s balancing approach); *id.* at 437 (holding that "the principal state and federal interests can be accommodated"). For a strong endorsement of the balancing approach, see MARTIN H. REDISH, FEDERAL JURISDICTION 233–46 (2d ed. 1990). Such a balancing approach is common in non-*Erie* choice-of-law situations. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1281–99 (1999) (arguing that interest analysis should be relevant in determining "procedural *Erie*" questions).

86. The seminal case proposing an outcome-determinative test is *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). *Guaranty Trust* seemed to adopt an ex ante approach to outcome determination: a federal court must adopt a state rule if, when the lawsuit commences, use of a federal rather than a state rule can be expected to yield a difference in outcome. *See id.* at 109 ("In essence, the intent of [*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."). In its 1949 trilogy, the Court seemed to switch to an ex post approach to outcome determination: a federal court must adopt a state rule when a difference in the state and federal rule does in fact lead to a different outcome, even though that difference might not have been expected when the case commenced. *See supra* note 83 and accompanying text. Finally, the Court changed to a policy-focused approach to outcome determination: a federal court must apply a state rule only when failing to do so would frustrate designated policy objectives. This policy-focused approach, which was developed as dicta in *Hanna v. Plumer*, 380 U.S. 460, 466–69 (1965), is further discussed *infra* notes 95, 105–07 and accompanying text.

87. The first case mentioning "incidental effects" is *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946). *See also* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 552 (1991) (upholding Rule 11 even though it had an "incidental" effect on substantive rights); Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987) (upholding Federal Rule of Appellate Procedure 38; stating that "Rules which incidentally affect litigants' substantive rights

Federal Rule.[88] For cases not invoking a Federal Rule of Civil Procedure but involving a common-law procedural rule,[89] the Court usually uses a policy-focused outcome-determinative approach: a federal court must use a state rule of procedure when using a federal rule would frustrate the "twin aims of *Erie*" (discouraging forum shopping and avoiding inequities in outcome between state and federal courts).[90] But the "balance of interests" approach holds sway when a state rule impinges on the jury-trial guarantee and reexamination limitation of the Seventh Amendment.[91]

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do not violate [the Rules Enabling act] if reasonably necessary to maintain the integrity of that system of rules"); *Hanna*, 380 U.S. at 465 (citing *Mississippi Publishing*'s "incidental effects" language). By adding an "incidental effects" coda to the formalist test, the Court moved slightly from a purely formalist approach and added a bit of an effects approach. Thus far, however, the Court has never used the "incidental effects" language to invalidate a Federal Rule that met the formalist "really regulates procedure" definition.

88. In *Shady Grove*, Justice Stevens defected slightly from this approach and proposed a different test for the Rules Enabling Act analysis. *See infra* note 97.

In addition, the formalist test requires a Federal Rule to be constitutional. *Hanna*, 380 U.S. at 470–71. The Court has never invalidated a Federal Rule on constitutional grounds; in any event, the requirement of constitutionality applies to every rule of procedure that a federal court may permissibly adopt under any test, not just under the formalist test.

89. Although most cases involve either Federal Rules of Civil Procedure or federal common-law rules of procedure, sometimes a federal statute dictates the relevant procedure that a federal court must follow. In these cases, the federal statute controls as long as Congress was within its powers in passing the statute. *See* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 (1988). The same is true if a rule of federal substantive common law dictates the outcome. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).

90. The "twin aims" approach was first suggested in dicta in *Hanna*. 380 U.S. at 468. It has been applied to the Court's holdings in other cases. *See Gasperini*, 518 U.S. at 430; Walker v. Armco Steel Corp., 446 U.S. 740, 752–53 (1980) (requiring application of a state rule of procedure when the policy of avoiding inequity was implicated, even though the policy of discouraging forum shopping was not). Because forum shopping is likely principally when parties expect different outcomes ex ante, and because inequities arise principally when outcomes in state and federal court differ ex post, the "twin aims" policy-focused approach has a strong relationship to both the ex ante outcome-determinative and the ex post outcome-determinative approaches discussed *supra* note 86.

91. *See Gasperini*, 518 U.S. at 431–39 (reexamination clause); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535–40 (1958) (jury trial guarantee). *Gasperini* does not adopt the "balance of interests" methodology explicitly, but its attempt to accommodate the state's interest in obtaining a judicial check on jury decisionmaking with the federal interest in having the check performed by the trial judge, in conjunction with its reliance on *Byrd*, runs a parallel course. Some scholars argue that a "balance of interests" approach either explains the *Erie* line of cases or should be adopted as the relevant principle. *See* REDISH, *supra* note 85, at 211–46; Bauer, *supra* note 85, at 1286–90. *But see* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 987 (1998) ("[A]nyone who in (at least) the last ten or so years had thought—or worse, taught—that *Byrd* was the dominant approach . . . had not been paying close attention to the Court's recent decisions.").

In her *Shady Grove* dissent, Justice Ginsburg argued that the balance of federal and state interests is also relevant at the first step of the *Erie* analysis—determining whether a Federal Rule of Civil Procedure was broad enough to cover a case. Shady Grove Orthopedic Assocs., P.A.

The Rules Enabling Act portion of the Court's analysis can be criticized for its circularity (saying, in essence, that "a rule is procedural when it regulates procedure") and for giving short shrift to the second section of the Rules Enabling Act, which demands that any rule of "practice and procedure"[92] not "abridge, enlarge or modify any substantive right."[93] Be that as it may, when a case falls under the Rules Enabling Act analysis, federal courts can almost automatically apply a Federal Rule, regardless of the effect that the rule would have on the outcome of the case.[94] The "twin aims" analysis operates differently; under it, a federal court must often adopt the state rule because using a differing federal rule can frustrate one or both of *Erie*'s twin policy aims.[95] Therefore, because the Rules Enabling Act test is much more likely to lead to application of the federal procedural rule, the critical first question in any case is whether a Federal Rule of Civil Procedure covers the situation.[96] The plurality, concurrence, and dissent in *Shady Grove* reflect the Court's recent fracturing on the answer to that question, as well as some fracturing on the continuing vitality of the formalist analysis under the Rules Enabling Act.[97]

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v. Allstate Ins. Co., 130 S. Ct. 1431, 1461–64 (2010) (Ginsburg, J., dissenting); *see supra* note 11 and accompanying text (discussing this first step). The four-vote dissent further claimed that Justice Stevens agreed, thus forging a majority of the Court for this approach. *Shady Grove*, 130 S. Ct. at 1463 n.2. In any event, sensitivity to federal and state interests at this stage of the analysis is different from balancing state and federal interests to determine which system's procedural rules should apply.

92. 28 U.S.C. § 2072(a) (2006).

93. *Id.* § 2072(b). These criticisms have often been made in the academic literature. For one famous iteration of the arguments, see Ely, *supra* note 8, at 718–40. At the time that Professor Ely wrote, there was no section 2072(b); rather, its present language, in slightly modified form, was contained in the second sentence of section 2072. For the then-extant text, see Act of June 19, 1934, Pub. L. No. 73–415, 48 Stat. 1064 (current version at 28 U.S.C. §§ 2071–77 (2006)).

94. *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (noting that "we have rejected every statutory challenge to a Federal Rule that has come before us").

95. *See*, *e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (applying Oklahoma statute regarding the commencement of a lawsuit in federal diversity suit to avoid "inequitable administration" of law); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532 (1949) (applying Kansas statute of limitations so that parties invoking diversity jurisdiction would not "gain advantages over those confined to state courts"); Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 110 (1945) (applying New York statute of limitations for similar reasons).

96. *See supra* notes 11, 91 and accompanying text.

97. Fractures were already apparent before *Shady Grove*. *Gasperini*, which was the Court's last "procedural *Erie*" case before *Shady Grove*, was a 5-4 decision; most of *Shady Grove*'s dissenters were in the majority (including Justice Ginsburg, who wrote the opinion), with Justice Scalia writing the dissent. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996). But the fractures expanded in *Shady Grove*. Justice Scalia's plurality decision thought that Rule 23 covered the case; after applying the "really regulates procedure" test dictated by the Rules Enabling Act analysis, *see supra* note 84 and accompanying text, it upheld the use of the Rule 23. *Shady Grove*, 130 S. Ct. 1431 at 1442–44. Justice Stevens' concurrence agreed that Rule 23 covered the situation, *id.* at 1456–57, but argued for replacing the formalist test with a new test

Viewed from the perspective of "procedure as the agency of change," what is striking about the Court's approaches, as well as the present fractures in *Shady Grove*, is the pervasive unwillingness to address squarely the central feature of procedure: that the very essence of procedure is to change legal entitlements and the value of the legal claims that implicate these entitlements. This problem is particularly evident with the formalist approach. As Justice Scalia said in applying this approach in *Shady Grove*, the "consequence[s]" of applying Rule 23 are irrelevant even though the plaintiffs' claims in *Shady Grove* had no positive value—and would almost certainly never have been filed—in a New York state court.[98] He described the outcome-influencing effect of Rule 23, which gave the claims positive value and made the lawsuit viable, as merely "incidental."[99] Moreover, he stated that the substantive purpose of the class-action bar under New York state law, which was designed precisely to thwart the filing of class actions for small-scale claims such as Shady Grove's, "*makes no difference*" in the analysis.[100] The willful blindness of this approach to the claim-affecting nature of legal process does not make the result achieved by the *Shady Grove* plurality wrong, but an approach so blind to procedure's nature will not always find the best solution to the *Erie* conundrum: When should a federal court replicate the outcome that would be achieved in state court? The problem is especially acute because a clear cost of this approach is the deliberate sidestepping of

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that gave greater emphasis to the "abridge, enlarge or modify" language of § 2072(b): In addition to requiring that a Federal Rule "really regulate[ ] procedure," *id.* at 1452, Justice Stevens would have required that the Federal Rule not "displace a State's definition of its own rights or remedies," *id.* at 1449. Justice Ginsburg's dissent thought that Rule 23 was not broad enough to control the case, *id.* at 1465–69; applying the "procedural *Erie*" half of the analysis, the dissent then thought that the difference between the federal rule (presumably allowing a class action, although under what authority is unclear once Rule 23 was deemed insufficiently broad to apply) and the state rule (not allowing a class action) would induce forum shopping in favor of federal courts because "substantial variations between state and federal [money judgments] may be expected." *Id.* at 1469, 1471 (quoting *Gasperini*, 518 U.S. at 430) (alteration in original)). Thus, the dissent argued, the federal court needed to apply the New York rule.

Because it did not see the case as a Rules Enabling Act matter, Justice Ginsburg's dissent did not indicate whether it agreed with Justice Stevens' revised Rules Enabling Act analysis. *Cf. id.* at 1463 n.2 (stating points of agreement and disagreement between Justice Stevens and the dissent on other matters). Three of the four justices in the plurality (Chief Justice Roberts and Justices Scalia and Thomas) indicated their disagreement with Justice Stevens' approach to the Rules Enabling Act, *id.* at 1444–47; Justice Sotomayor did not join this portion of the opinion. Whether Justice Stevens' opinion signals a shift in the Rules Enabling Act analysis remains unclear at this time. *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010) (adopting Justice Stevens' approach because his opinion provided the "crucial fifth vote" in *Shady Grove*).

98. 130 S. Ct. at 1443.

99. *Id.* (internal quotation marks omitted).

100. *Id.* at 1444.

the Rule Enabling Act's "abridge, enlarge or modify" language. In doing so, the Rules Enabling Act analysis in practice approaches the "Never" answer that the Court has declined to adopt in theory, and thus fails to respect the separation-of-powers and federalism concerns that underlie both *Erie* and the Rules Enabling Act.

That said, the formalist approach has three positive aspects. First, the "really regulates procedure" definition acknowledges that procedure is indeed a process that operates on claims from their filing to their conclusion in court.[101] Second, the definition emphasizes the distinction between the process of enforcing entitlements and the output of that process. Put differently, even though procedure has "substantive" effects, it does not thereby become "substantive" law; substantive law "alter[s] the rights themselves, the available remedies, or the rules of decision by which the court adjudicate[s] either."[102] These two points may be obvious, but as I will explain, they are also important.[103]

Third, the formalist approach resolves, albeit unsatisfactorily, a fundamental interpretive issue under the Rules Enabling Act. If, as the "procedure as the agency of change" thesis holds, the use of *every* rule of procedure changes the strength of entitlements and the value of claims,[104] then all rules of procedure "abridge, enlarge or modify . . . substantive right[s]" in violation of § 2072(b). Thus, the Federal Rules that the Court can promulgate consistent with the Enabling Act are a null set. But Congress did not intend to pass a statute whose internal contradictions rendered it a nullity. Some account of the meaning of § 2072(b) must be given; and while it is easy to criticize the formalist "solution" (which would presumably strike down a Federal Rule only if its substantive effects were not "incidental"), its approach highlights the need to interpret the Rules Enabling Act in a way that gives meaning to § 2072(b) without gutting the rulemaking authority of § 2072(a).

This interpretive problem would also pose enormous problems for the outcome-determinative approach if the Court were to employ it in the Enabling Act context; but, as we have seen, this approach has

101. *Sibbach*'s definition bears re-emphasis: a Federal Rule is valid when it "really regulates procedure—the judicial *process* for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (emphasis added).

102. *Shady Grove*, 130 S. Ct. at 1443; *see also id.* at 1455 (Stevens, J., concurring in part and in the judgment) (describing "substantive rights" as those that "pertain to the scope of any state right or remedy at issue in the litigation" or, arguably, are "intertwined with a state right or remedy").

103. *See infra* notes 135–136 and accompanying text.

104. *See supra* note 65 and accompanying text.

been confined to the "procedural *Erie*" (or Rules of Decision Act) side of the analysis. Otherwise, the strengths and weaknesses of the outcome-determinative approach are essentially mirror images of the strengths and weaknesses of the formalist approach. By focusing on the effects of procedure, an outcome-determinative test acknowledges procedure's true nature. On the other hand, by seeing procedure solely in terms of the outcomes it produces, this approach confuses the *process* of creating something with *what* the process creates. Even though procedure changes substantive entitlements or values, process is never itself substantive.

The near inevitability that different processes will lead to different outcomes[105] poses another problem for the outcome-determinative approach. Because process inevitably changes substance, one can anticipate ex ante that differences in federal rules will lead to a different outcome than the state court would have achieved; and, except in the rare case in which different processes lead to an identical outcome, one can show ex post that the federal and state processes will lead to different outcomes. Unless the Court is willing to answer "Always" to the *Erie* conundrum (and it has never formally done so[106]), what is required to make the outcome-determinative approach work is some sort of threshold—a point below which variances in outcome, due to the use of the federal rule rather than the state rule, do not matter.

The Court's present "policy-focused" approach is one possible threshold; a federal court need not concern itself with variances so small that they are unlikely to impinge on stated policies (for example, forum shopping and inequity). Both of these policies imply some quantitative threshold at work; forum shopping is unlikely to occur, and inequity will not exist, unless the variance in outcome due to the use of a federal rather than a state rule is sufficiently large. We might derive this threshold from differences in absolute value (for example, variances in outcome exceeding $1,000), in percentage (for example, variances in outcome exceeding one percent of the value of the claim), or in some other quantitative measure (for example, variances in outcome that are "substantial" or "significant"[107]). None of these thresholds, however, has much to do with the nature of process itself.

105. *See supra* note 60 and accompanying text.

106. *See supra* note 83 and accompanying text.

107. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 (1996) (requiring the use of a state rule when " 'substantial variations between state and federal [money judgments]' may be expected") (quoting Hanna v. Plumer, 380 U.S. 460, 467–68 (1965)) (alteration in original); *id.* at 431 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.").

Because of its limited use, the "balance of interests" approach needs less consideration. Given both the non-outcome-related and the outcome-related interests of the federal and state governments in applying their own rules, an obvious criticism of the balancing approach is the difficulty in weighing incommensurable goods.[108] Moreover, by focusing on the way in which the use of a federal or a state procedural rule affects the *interests* of the federal and state governments, rather than the strength of entitlements and the value of claims, this approach removes itself by at least one level from the nature of process.

From the perspective of "procedure as the agency of change," the Court's present bifurcated approach to Rules Enabling Act/"procedural *Erie*" issues suffers from a final flaw: it is inelegant. As Justice Harlan recognized in *Hanna*,[109] "procedure" is a single thing—the process that resolves claims and legal entitlements. Nothing more, and nothing less. To have one definition of procedure for Rules Enabling Act purposes, and another for "procedural *Erie*" purposes, creates two definitions of a single concept—neither of them precisely correct.[110]

I understand that it is still fashionable to believe that, as Walter Wheeler Cook famously observed more than seventy-five years ago, "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all

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108. For this reason, and because of the ease with which government interests can be manipulated to ensure the application of forum law, interest analysis remains an unpopular method in the horizontal choice-of-law context when true conflicts exist. *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.20–.24 (4th ed. 2004) (analyzing each American state's choice-of-law approach and identifying only three jurisdictions—California, the District of Columbia, and New Jersey—that use interest analysis for tort claims and none that use it for contract claims); *id.* § 2.9 (discussing interest analysis and its benefits and difficulties); *see also* P.V. *ex rel.* T.V. v. Camp Jaycee, 962 A.2d 453, 460 (N.J. 2008) (rejecting interest analysis in tort cases); *cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 n.7 (2010) (Scalia, J.) (calling "[t]he search for state interests and policies that are 'important' . . . standardless"); Ely, *supra* note 8, at 709 (noting that *Byrd*, which is often seen as the case best exemplifying the "balance of interests" approach in the *Erie* line of cases, "exhibits a confusion that exceeds even that normally surrounding a balancing test").

109. *See supra* note 14 and accompanying text.

110. Of course, there is the difference in statutes; a court must interpret the Rules Enabling Act when a Federal Rule of Civil Procedure is involved, and it must interpret the Rules of Decision Act, 28 U.S.C. § 1652 (2006), when a federal common-law rule of procedure is involved. *See* Ely, *supra* note 8, at 698. The Rules of Decision Act nowhere mentions either the word "procedure" or the words "substance" or "substantive right," and the Rules Enabling Act never defines either "procedure" or "substantive right." Therefore, as long as the Court hews to the view that the Rules of Decision Act requires a federal court to apply only state "substantive" law, the two statutes operate over the same field and with the same concerns, so the argument for creating differing definitions to describe a single phenomenon of process is not evident.

the tenacity of original sin and must constantly be guarded against."[111] In particular, Professor Cook was arguing that the words "substance" and "procedure" shift meanings depending on the context of their use. Most present-day scholars and lawyers subscribe to this view.[112]

Perhaps it is time to revisit this old wisdom. As I said at the beginning of this Section, the *Erie* conundrum is that we always want federal courts to adopt state substantive law, and sometimes—but not always—we want federal courts to achieve, as nearly as rules can guarantee, the same substantive outcome as a state court would have achieved. When we want substantive *outcomes* to match up, making the substantive *law* match up isn't enough; because process affects outcome, we need the process to match up as well. When we don't believe that a federal court needs to obtain the same outcome as a state court would have obtained, we allow the federal court to adopt its own process. But the process that a federal court would adopt if left to its own devices is no less a process—no less procedural—in the former case than in the latter. Calling such a process "substantive" in the former case does not make it so; it is still a process, not an outcome—still procedure, not substance.

So the conundrum remains: Why and when do we want federal courts to replicate the outcome that a state court would have achieved? It is not obvious that this answer should differ in the Rules Enabling Act and "procedural *Erie*" contexts. I do not mean to say that the Court's present bifurcated approach is unintelligible or unreasonable. But it would be more elegant if we could find a single answer that explained the Court's intuitions about when a federal court must strive to achieve the outcome that a state court would have achieved, but that did not rely on circular definitions or the subterfuge of labeling rules of procedure as "substantive."

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111. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933).

112. For instance, Justice Frankfurter noted that "[n]either 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945); *see also* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."). For a comparable observation from another common-law system, see Matthews v. Ministry of Defence, [2003] UKHL 4 at [33], [2003] 1 A.C. 1163 (H.L.) 1179 (appeal taken from Eng.) (U.K.) (noting the fundamental distinction between procedure and substance, but acknowledging that it "is a slippery one"); *see also* 1 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 7–004 (Lawrence Collins ed., 14th ed. 2006) ("In drawing [the distinction between procedure and substance], regard should be had in each case to the purpose for which the distinction is being used and to the consequences of the decision in the instant context.").

III. A SINGLE PRINCIPLE FOR *ERIE* CASES

Most analysts argue that some of the cases in the *Erie* line are correct in their reasoning and result and the remainder are wrong in their reasoning, result, or both.[113] Because the reasoning in this group of cases has meandered, with later cases often making or emphasizing distinctions not apparent in the earlier cases,[114] it probably is impossible to deem each *Erie* case "correct" in its reasoning—at least if the measure of "correctness" is logical consistency across the entire line of cases. But, despite its meandering, the Court has never disavowed the result that it has reached in any of the Rules Enabling Act or "procedural *Erie*" cases.

That fact deserves more attention than it usually gets, and it forms the starting point for any attempt to state an adequate theory of the *Erie* line of cases. An adequate theory assumes that all of the Rules Enabling Act and "procedural *Erie*" cases are right in their result—even *Gasperini* and *Shady Grove*, which are in obvious tension due to the reversal in roles of Justices Scalia and Ginsburg, both of whom adhered in *Shady Grove* to their views in *Gasperini*.[115] The issue then becomes: On what *single* principle can all these results be descriptively and normatively justified?

A. Describing the Principle

The answer begins with the idea of "procedure as the agency of change"—that legal process takes a claim of a certain strength and

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113. For one article arguing the Court generally had handled everything about right, see Rowe, *supra* note 91, at 963–66. *But see id.* at 987, 1010–11 (critiquing the *Byrd* "balance of interest" approach). At the time of the article, *Shady Grove* had not yet been decided. In correspondence with me, Professor Rowe has suggested some disagreement with the majority/plurality opinion in *Shady Grove*.

114. On the changes to the outcome-determinative test from *Guaranty Trust* to *Ragan* to *Hanna*, see *supra* note 86 and accompanying text. On the change in analytical approach from *Gasperini* to *Shady Grove*, see *supra* note 97 and accompanying text. On the fractured views exhibited in *Shady Grove* itself, see 130 S. Ct. 1431 (2010).

Of course, the Court has tried to bring all of the cases within one house. *Hanna* was a herculean effort to reconcile all of the prior cases and to create logical consistency out of a patchwork of results and reasons. But *Hanna* was unable to fashion a single principle and broke the analysis into two parts. Even then, Professor Ely argued that one of the pre-*Hanna* cases, *Sibbach v. Wilson & Co.*, was wrong in reasoning and possibly in result in light of *Hanna*. Ely, *supra* note 8, at 733–38.

115. In dissent, Justice Ginsburg argued that the outcome in *Shady Grove* could not be reconciled with the approach taken or outcome reached in *Gasperini*. *Shady Grove*, 130 S. Ct. at 1464, 1468, 1469, 1471–72. Justice Scalia cited *Gasperini* only once, and only in response to a quotation that the dissent had pulled from the case—a deafening silence that suggests he too found it either difficult or undesirable to square the cases. *Id.* at 1441 n.7.

value at the time that it enters the litigation system, changes the claim and its underlying legal entitlement by means of the processes applied in litigation, and ultimately arrives at a final value. If we focus on the claim at the moment the plaintiff presents it in court, we can assign it a specific value, determined by multiplying the probability of recovery by the amount of the recovery, and then subtracting the expected costs of litigation. If P represents the probability of recovery, L the amount of recovery, and C the costs of procedure, then the net ex ante value of the claim (V) is determined by the formula $V = (P \times L) - C$.[116]

As we have seen, the process that a court applies from the point of filing onward then changes the value of P, L, or C.[117] If we ignore the operation of these rules, we back the costs (C) and some of the influences on P and L out of the equation. We can now focus on the remaining inputs into P and L, which together define the pre-filing value (or substance) of the claim in a world in which the procedure employed is costless and has no influence on substantive outcomes.[118] In this world, the probability of recovery (P) depends on influences such as the strength of the legal entitlement on which the claim is based,[119] the facts known at the time of filing,[120] the burden of proof,[121]

116. *See supra* notes 17, 34. The amount $P \times L$ is the average of the sum of all the possible outcomes for the case, from the lowest amount ($0 in most situations) to the highest possible award permitted under the law of remedies, weighted by the probability of achieving each outcome. I assume risk neutrality.

117. *See supra* notes 34–59 and accompanying text. It is also possible that the same process might affect more than one of these variables. *See* Horowitz & Bordens, *Aggregation*, *supra* note 44, at 225–28 (discussing how aggregation can affect both the probability of recovery and the amount of recovery).

118. This assumption draws on the Coase Theorem, which posits that, in the absence of transaction costs, any legal rule is allocatively efficient. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Transaction costs include litigation costs and the costs of error. *See supra* note 34 and accompanying text. If we include within the meaning of "error" the difference in value achieved when a federal court employs its own rules to process a state-law claim rather than the rules a state court would have employed to process the same claim, then we can define the value of a claim at the moment of its filing as its expected value in the absence of transaction costs.

119. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938) (holding that, in a diversity case, a federal court must apply the state's substantive law regarding the elements of a claim); *see also* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (stating in dicta that, in a diversity case, a federal court must apply the state's law regarding the contributory-negligence defense); *cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (declining in a diversity case to read Rule 41 as stating a rule of claim preclusion due to arguable Rules Enabling Act issues that would arise). In order to determine the strength of the entitlement and defenses, a court must know which state's substantive law is applicable. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–98 (1941) (holding that, in a diversity case, a federal court must apply the same choice-of-law rule as a state court in the forum state would have applied).

and other limitations on the ability of a party to file a claim or present a defense (such as statutes of limitations,[122] compliance with notice provisions[123] and other pre-filing requirements,[124] the capacity to sue or be sued,[125] and the like). The recovery (L) depends on the law and facts establishing rights or defenses, as well as the remedies that are available when a violation of a right occurs; it is limited to the maximum amount supportable under the remedial law.[126]

Once we establish these inputs into $P \times L$ in this hypothetical world of costless and outcome-neutral procedure, the court's process for resolving the claim takes over and changes this ex ante expected value. If the case proceeds in federal court, the court must now establish a method of serving a defendant, even though that method might lead to a different value for the claim than the method chosen in state court.[127] A federal court must determine which facts the

120. *See Semtek*, 531 U.S. at 503 (suggesting that, in a diversity case, a Federal Rule creating a rule of preclusion, presumably including a rule of issue preclusion, would "abridge, enlarge or modify" a "substantive right" in violation of the Rules Enabling Act).

121. *See* Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212–13 (1939) (holding that a federal court in a diversity case must apply the relevant state's burden of proof on matters relating to substantive claims); *Palmer*, 318 U.S. at 117 (same with respect to defenses).

122. *See* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 109–11 (1946) (holding that, in a diversity case, a federal court should apply the relevant state's statute of limitations rather than the federal equitable doctrine of laches). The applicability of the statute of limitations may hinge on contingencies that have not come to pass when the complaint is filed. *See* Walker v. Armco Steel Corp., 446 U.S. 749, 751–53 (1980) (requiring a federal court in a diversity case to apply a state rule that does not toll the statute of limitations until service, rather than the federal rule tolling the statute on the filing of the complaint); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532–34 (1949) (same). For further discussion of *Ragan* and *Walker*, see *infra* note 142 and accompanying text.

123. *See, e.g.*, FED. R. CIV. P. 23.1(b)(3)(A) (requiring a party bringing a shareholders' derivative action to plead any pre-filing efforts "to obtain the desired action" from the board of directors or others).

124. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 544–45 (1949) (describing a New Jersey statute requiring a shareholder to post a bond before proceeding with a derivative suit). For further discussion, see *infra* notes 143–45 and accompanying text.

125. *See* Woods v. Interstate Realty Co., 337 U.S. 535, 536 n.1 (1949) (describing a Mississippi statute that required a corporation to be licensed to do business in the state before it could bring suit in a state court).

126. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426–31 (1996) (requiring a federal court in a diversity case to adopt the state's more restrictive "deviates materially" standard rather than the federal "shock the conscience" standard for establishing the maximum permissible recovery on a state-law claim); *id.* at 428–29 (suggesting that a federal court must also adopt a state-law cap on damages).

127. *See* Hanna v. Plumer, 380 U.S. 460, 465–70 (1965) (permitting a federal court in a diversity case to use a method of service different from the method used in state court); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 441–46 (1946) (permitting a federal court in a diversity case to use a method of service that would bring a defendant before a district court other than the district encompassing the geographical area in which service occurred). For further discussion of *Hanna*, see *infra* note 142 and accompanying text.

lawyers can permissibly obtain in proof of the claims or defenses, even if the proofs that the lawyers could obtain in state court might have led a state court to evaluate the entitlement or value the claim differently.[128] A federal court must determine the identity of the factfinder, even though a state court's differing allocation of factfinding responsibility might result in a different outcome.[129] The same is true with respect to the allocation of post-trial responsibility among trial and appellate judges,[130] as well as the mechanics of appeal.[131] Likewise, a federal court must regulate the behavior of the lawyers and parties involved in processing the claim, even though the degree of regulation might vary from that in state court.[132] In all these ways, a federal court, the lawyers, and the parties take the claim's ex ante expected value and continually create a new claim value with the application of subprocesses (pleading, discovery, trial, appeal, and so on) until the claim reaches a final value.

We can therefore synthesize an operative principle that determines which rules a federal court must adopt in a diversity case:

> In a diversity case, in the absence of a federal statute or constitutional provision requiring a different result, a federal court must use its own rules to process a claim, except that it must apply any rule that a state court sitting in that district would apply if (a) the state court's rule would yield an ex ante expected value for the claim different from the ex ante expected value that the federal court's rule would yield, and (b) the federal court's rule does not describe a part of the post-filing process by which the court, the lawyers, or the parties change the ex ante expected value into its final value.[133]

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128. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 10–16 (1941) (requiring a party in a diversity case to submit to a Rule 35 examination, even though such examinations were not permitted under the state's rules of discovery).

129. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 533–40 (1958) (requiring that a jury in a diversity case determine a factual issue, even though the issue would be determined by a judge in state court).

130. *See Gasperini*, 518 U.S. at 431–39 (holding that a federal court in a diversity case can allocate post-trial review of an allegedly excessive verdict to the trial judge, even though a state court would allocate this responsibility to an appellate judge).

131. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 4–8 (1987) (holding that a federal court in a diversity case need not follow a state court's requirements with respect to posting a bond on appeal). For further discussion, see *infra* notes 144–45 and accompanying text.

132. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 551–54 (1991) (holding that Rule 11 did not "abridge, enlarge or modify any substantive right," even though Rule 11 overlaps in its coverage with state-law claims for malicious prosecution).

133. "Ex ante expected value" is a shorthand that refers to the net value of a claim ($(P \times L) - C$), measured at the time of filing. *See supra* note 116 and accompanying text. As Kevin Clermont has helpfully pointed out, I could write the principle more simply by deleting part (a). I retain

An equivalent statement of the principle is this: a federal court must apply the rule of a state court if and only if the rule affects either the probability (*P*) or the amount (*L*) of recovery in a world in which the post-filing process for resolving a claim is costless and outcome-neutral.

This principle incorporates the strengths of both the formalist and the outcome-determinative approaches. First, it avoids the inelegance of using two definitions for "procedure."[134] A single principle determines the choice of rule, regardless of whether the state rule conflicts with a Federal Rule of Civil Procedure or a federal common-law procedural rule. Second, it recognizes that the substance of a claim at any given instant is distinct from the process that acts on the claim during the course of litigation; it does not confuse the results that a process yields (substance) with the process itself.[135] Third, it acknowledges, albeit with an important clarifying amendment, the Court's basic intuitions that "rights and remedies" are for state courts to determine, but that the "process" to enforce and resolve these rights and remedies is for the federal court to determine.[136] The clarifying amendment, of course, is that a federal procedural rule is invalid if it changes the "ex ante expected value of the rights and remedies"—in other words, the rule must leave intact not only rights and remedies, but also the rules of limitation (statutes of limitations, capacity to sue, and the like) that affect the probability of recovery. It is this ex ante expected value (probability multiplied by recovery), and the inputs into this expected value, that no Federal Rule of Civil Procedure can change and remain faithful to the command of the Rules Enabling Act. It is exactly the same value—rather than the "twin aims of *Erie*"—that federal common-law rules must not disturb in order to remain faithful to *Erie*, the Rules of Decision Act, and the "procedural *Erie*" line of cases.

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part (a) because it emphasizes the meaning of "substance" (i.e., "ex ante expected value") that is critical for reconciling the Court's cases. It also emphasizes the need for a "true conflict" between the state and federal rules. If both rules would yield the same net value for the claim at the time of its filing, then the federal rule has no effect on any substantive right and the federal court may permissibly apply its own rule.

134. *See supra* notes 109–110 and accompanying text.

135. This was one of the strengths of the formalist view and a weakness of the outcome-determinative view. *See supra* note 102 and accompanying text; *supra* text preceding note 105.

136. Again, this was a strength of the formalist approach. *See supra* note 102 and accompanying text. For a comparable distinction in the outcome-determinative context, see *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109–10 (1945) (permitting federal courts to apply their own rules regarding "the manner and the means by which a right to recover . . . is enforced," but requiring that state law be adopted in diversity cases when the law "bears on a State-created right" or "intimately affect[s] recovery or non-recovery").

Fourth, this principle does not shun the reality, which the Court has repeatedly acknowledged,[137] that process invariably changes the real-world strength and value of rights and remedies.[138] Instead, while acknowledging (indeed, embracing) this fact, it can still cabin off changes that matter for *Erie* purposes from those that do not.

Finally, this principle provides a solution to the interpretive dilemma of the Rules Enabling Act, without employing the blinders of the formalist approach.[139] Given that using any rule of procedure affects legal entitlements and the substantive value of claims, the interpretive problem of the Rules Enabling Act is to give some effect to the "abridge, enlarge or modify any substantive right" language without wiping out every procedural rule that might be promulgated under it. The principle's solution is simple: the "substantive right" that counts for the purpose of the Enabling Act is the ex ante expected value that the parties bring into the case. While more technical and precise than we might assay in ordinary conversation, this definition accords perfectly with the usual meaning of "substantive right": an entitlement measured without regard to the ways in which the judicial process affects the entitlement. The only "twist" that the principle adopts is to tie the measurement of the right to a specific point in time: the time at which the case is filed. No Federal Rule can "abridge, enlarge or modify" the rules that would determine the strength or value of this "substantive right" in a state court. But if a Federal Rule affects the value of an entitlement or a claim in other ways, it passes muster under the Rules Enabling Act.

Thus, the principle interprets § 2072(a) and § 2072(b) in a way that gives both provisions meaning. Section 2072(a) ensures that the rule describes a process (or part of a process) that courts, lawyers, and parties use to resolve claims. Section 2072(b) ensures that this rule of process does not "abridge, enlarge or modify"—in other words, change—a claim's ex ante expected value in a world of costless and outcome-neutral process.

At the same time, the principle explains why the Court has never invalidated a Federal Rule of Civil Procedure, but it has invalidated some federal common-law procedural rules. At present,

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137. *See supra* notes 3, 86, 98 and accompanying text; *see also* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants.").

138. Acknowledging this reality is one of the strengths of the outcome-determinative approach. *See supra* text preceding note 105.

139. Recognizing the need to solve the interpretive dilemma of the Rules Enabling Act was a strength of the formalist approach, but the solution itself was not. *See supra* note 104 and accompanying text.

the Federal Rules describe only the *process* by which a claim is resolved; they change the *post-filing* values of the entitlements and claims in dispute, but no Rule—at least not yet—has ever affected the expected value that the claim carries into the litigation. Moreover, the completeness with which the Federal Rules of Civil Procedure describe the post-filing process leaves little room for federal procedural common law in the post-filing process. Hence, it is not surprising that most of the common-law procedural rules that the Court has considered—for instance, the use of laches rather than a statute of limitations in *Guaranty Trust*—have not concerned the process by which a claim is resolved *after* it enters the litigation system (an area well covered by the Federal Rules), but instead have shaped the value of the claim *before* it enters the system.[140] As *Erie* shows, these latter rules must give way to differing state rules. Although the Federal Rules have thus far stayed away from stating rules of this type, someday a Federal Rule might veer into forbidden territory.[141] Therefore, both provisions of the Rules Enabling Act remain important.

It is important to handle carefully the distinction between rules that affect ex ante expected value and rules that describe the process of resolving the claim. Making the distinction is not a matter of determining when the rule is applied or becomes fixed; for every

140. The exceptions are the use of a jury rather than a judge as factfinder in *Byrd*, and the use of a trial judge rather than an appellate judge as the reviewer of damage awards in *Gasperini*. Both federal common-law rules affected only the post-filing value of the claims at stake, not their pre-filing value in a world of costless procedure. (Recall that error cost, which arguably occurs when a federal court assigns a different factfinder or judge than the state court would, is a type of transaction cost. *See supra* note 34.) And in both cases, the Supreme Court allowed the federal court to use its own rule.

141. On several occasions, the Court has read a Federal Rule of Civil Procedure narrowly to avoid an arguable clash with the Rules Enabling Act. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (declining to read Rule 41 as stating a rule of claim preclusion); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (noting that "[t]he Rules Enabling Act underscores the need for caution" in interpreting Rule 23); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (same). As I have suggested, the Court's concern for adopting Federal Rules that create rules of preclusion is well-founded; such rules affect the pre-filing value of claims. *See supra* notes 119–20 and accompanying text. On the other hand, as I indicate momentarily, the Court's concern for Rules Enabling Act violations in the Rule 23 context is misplaced, because a broader or narrower view of a class action's scope affects only the claims' post-filing value. *See infra* notes 151–52 and accompanying text.

Aside from running afoul of either § 2072(a) or § 2072(b) as a facial matter, a Federal Rule might also violate the Rules Enabling Act as applied in a particular case. *See* Douglas v. NCNB Tex. Nat'l Bank, 979 F.2d 1128, 1129–31 (5th Cir. 1992) (refusing to apply the compulsory-counterclaim rule of Federal Rule 13(a) when the defendant had a right under state law to seek a non-judicial remedy). Because *Douglas* involved a rule of preclusion, its as-applied rejection of the compulsory-counterclaim rule seems appropriate. I thank Tom Rowe for pointing out the possibility of as-applied challenges to Federal Rules.

rule—whether a rule of substantive doctrine or a rule that requires briefs to be filed on 8½" x 11" paper—is applied only after the filing of a claim, and every rule is contingent on facts and developments that arise during the litigation process. What is critical is that the federal rule not change the contingency that triggers a rule affecting the probability of recovery (*P*) or amount of recovery (*L*) in a world of costless and outcome-neutral procedure.

Take *Ragan*, *Walker*, and *Hanna* as examples.[142] In the first two cases the statutes of limitations, which were tolled only when the defendant was served, had not yet run when the cases were filed. Statutes of limitations affect the probability of recovery (*P*) even in a world of costless and outcome-neutral post-filing procedure. Whether the statutes of limitations would in fact cut off the plaintiffs' claims in *Ragan* and *Walker* depended on a contingency yet to occur at the time of filing: whether service was made before the expiration of the statute. The effect of the "tolling at service" contingency on the ex ante expected value of the claim could be stated in probabilistic terms (for instance, in *Ragan* there was, say, a five percent chance that service would not occur in time and the statute would terminate the lawsuit). By reducing the probability that the statute of limitations would terminate the plaintiffs' claims to zero, the differing federal rule—tolling when the complaint was filed—changed this probability impermissibly. The federal rule thus fell within the terms of part (a) of the principle. Because statutes of limitations do not describe a part of the process by which claims are resolved, the federal rule also fell within the terms of part (b) of the principle. The lesson of *Ragan* and *Walker* is that federal courts cannot adopt rules altering those post-filing contingencies that affect the ex ante expected value of claims in a world of costless and outcome-neutral procedure.

Hanna is a different case. The state rule—in-hand service on executors of estates—also involved a post-filing contingency (whether or not the executor received in-hand service). The federal rule—permitting service by means other than in-hand service—changed the contingency. But the federal rule on service described a part of the *post-filing* process for resolving the claim; put differently, if we assume a world of costless *and outcome-neutral* post-filing procedure for resolving claims, either rule of service would by definition have led to the same outcome. Thus, the federal rule of service fell outside of part (b). *Hanna* correctly permitted the federal rule on service to control.

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142. Walker v. Armco Steel Corp., 446 U.S. 749 (1980); Hanna v. Plumer, 380 U.S. 460 (1965); Ragan v. Merchs. Transfer & Warehouse, 337 U.S. 530 (1949).

The same analysis also explains the puzzling difference between *Cohen*[143] and *Burlington Northern*.[144] In *Cohen*, a federal court was required to apply the state court's rule requiring the posting of a bond when litigation commenced, even though no Federal Rule of Civil Procedure required such a bond. In *Burlington Northern*, a federal court was not required to apply the state court's rule requiring the losing party to post an appeal bond when the Federal Rules of Appellate Procedure were equally silent on the need for such a bond. The bond requirement in *Cohen* affected the ex ante probability of recovery (for the lack of a bond resulted in dismissal, while the procurement of the bond left open the possibility of recovery);[145] in addition, because the bond needed to be procured when litigation commenced, it was not part of the *post-filing* process for resolving the claim. Thus, the state-court rule requiring a bond met both part (a) and part (b) of the principle, and the federal court was required to adopt the state-court bond requirement. On the other hand, the bond requirement in *Burlington Northern* failed part (b), for the federal rule eschewing an appeal bond was part of the *post-filing* process for resolving the claim. Thus, the federal court was free to select its own rule.

B. Applying the Principle to Shady Grove

We can further understand this principle by seeing how it operates in the Court's most recent case, *Shady Grove*. The plaintiff in *Shady Grove* alleged that the defendant violated New York law in failing to process its $500 claim in a timely fashion.[146] Because the claim was so small, it presented a classic "negative-value" situation: it would have cost more than the claim was worth to bring it as a separate action. One of the points of Rule 23, which allows a class representative to bring claims on behalf of similarly situated individuals, is to overcome the negative-value problem; by aggregating claims, the class members achieve economies of scale that make the claims worth bringing.[147] Thus, by filing a class action in federal court,

143. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

144. Burlington N. R.R. v. Woods, 480 U.S. 1 (1980).

145. In a costless procedural world, such a bond requirement would be pointless, since its purpose is to hold the defendant harmless from litigation costs in the event that the plaintiff loses. But the pointlessness of the rule is irrelevant; the only relevant issue is whether noncompliance with the rule would affect the ex ante probability of recovery.

146. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436–37 (2010).

147. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that " '[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries

the plaintiff hoped to turn an economically unviable claim into a viable one. The problem, of course, was a New York rule that forbade the use of class actions in cases seeking a penalty,[148] which the plaintiff's claim did.[149] Obviously, the choice between the federal and the New York rule was critical: without class aggregation, the expense of litigation made the claim cost-prohibitive to prosecute, and would have likely forced the plaintiff to drop the case. With class aggregation, however, the case could proceed.

So is the federal court permitted to use Rule 23 to resolve the claim, or is it required to use the state rule barring class actions? Applying the principle described above, we begin by asking whether Rule 23 is a "rule used to process a claim." It obviously is; Rule 23 describes a process that a court can use to help move the case from its expected value to its final value.

Next, we move on to parts (a) and (b), which together examine the effect of Rule 23 on the ex ante expected value of the plaintiffs' claims in a costless and outcome-neutral procedural world. For present purposes we can assume that, like Shady Grove, each class member had a $500 claim; the exact amounts are not relevant. We can also assume that, like Shady Grove, each class member had a fifty percent chance of success; again, the exact number does not matter in this case. These assumptions yield an ex ante value, at the time of filing, of $250 for each plaintiff's claim of untimely payment.

With this number fixed, we turn to Rule 23, the procedural rule at stake, to see if it affects this ex ante value in a costless and outcome-neutral world. The answer is that it does not. In the first place, Rule 23 does not affect or change the law requiring timely payment. Nor does it change the burden of proof, alter any legal

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do not provide the incentive for any individual to bring a solo action prosecuting his or her rights' ") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); *see also Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting) (noting that using Rule 23 can "transform a $500 case into a $5,000,000 award"); Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (noting that "[t]he most compelling rationale for finding superiority in a class action [is] the existence of a negative-value suit . . . ."). For a classic article on large-scale, small-stakes litigation and the agency-cost problems they pose, see generally Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

148. N.Y. C.P.L.R. 901(b) (MCKINNEY 2006) provides in full:

> Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

149. *Shady Grove*, 130 S. Ct. at 1437. Somewhat more precisely, the district court held that the claim, which sought to collect statutory interest, was in effect a claim seeking a penalty. The Supreme Court did not challenge this characterization. *Id.*

limitations on the plaintiffs' ability to bring a suit (for example, the statute of limitations), or change the remedies available. In a world in which the process for resolving claims was costless and outcome-neutral, applying Rule 23 affects neither the ex ante probability of the plaintiffs' success nor the ex ante value of the recovery that they are entitled to receive.

Without a doubt—and this was the entire reason the defendant fought so hard to keep Rule 23 from being employed—using Rule 23 changed the value of the plaintiffs' claims in the real world, in which procedure is neither costless nor outcome-neutral; the case went from one worth nothing (because the costs of litigation exceeded the gross expected recovery of $250), to one with a positive value.[150] The reasons for this change in value were the reduction in per-plaintiff costs (that is, economies of scale) and, possibly, the increase in the probability of recovery that class aggregation created.[151] But, as the "procedure as the agency of change" theory holds, changes in value inevitably occur in the post-filing processing of a claim. With class actions, the extent of the change can be dramatic (in *Shady Grove*, the claims went from worthless to worthwhile); and a change of this extent might tempt some to characterize such a rule as "substantive." But the size of the change in value is irrelevant.

The relevant issue is whether the changes in value affected the ex ante expected value of the plaintiffs' claims or their legal entitlement in a world of costless and outcome-neutral procedure. Rather, the admittedly dramatic changes in value that Rule 23 caused in *Shady Grove* resulted from the costliness of procedure in the real world. That type of change does not require a federal court to use a state rule. Put differently, Rule 23 fits within part (a) of the principle (it affects the probability of recovery (P) and the cost of bringing a case (C), thus affecting the ex ante expected value). But Rule 23 does not fit within part (b) of the principle, for the changes to probability and cost that it caused in *Shady Grove* arose from the operation of a rule that

150. It seems evident that the class action yielded a positive value for the plaintiff; otherwise the plaintiff would not have brought the claim. It is not as clear whether the case had a positive value for all the members of the class, but other provisions of Rule 23, especially the typicality and adequacy-of-representation requirements of Rules 23(a)(3) and 23(a)(4) should, at a minimum, ensure that the class members are in no worse position than they would have been had they not been brought into the class. *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009).

151. Class actions can change the probability of recovery in various ways. For instance, some experimental data suggest that the aggregation of related claims can make a factfinder more willing to assign a greater degree of responsibility to that defendant. *See* Horowitz & Bordens, *Aggregation*, *supra* note 44, at 225–26. In addition, the greater amount of potential recovery might well attract a better lawyer to the case. *See* Tidmarsh, *supra* note 150, at 1150.

described the post-filing process for resolving the class members' claims.

In short, the federal courts were not required to apply New York's rule barring class actions, and the result in *Shady Grove* was right—albeit not for the reasons given in the case. Justice Stevens came closest to the mark when he tried to find a way to give the second half of the Rules Enabling Act (§ 2072(b)) some meaning. As he stated unconvincingly, class actions are no different from lower filing fees or more generous deadlines for briefs; these rules might also induce a party to file a case in, or remove a case to, federal court, and while "[t]here is of course a difference of degree between those examples and class certification, [there is] not a difference of kind."[152] But Justice Stevens failed to articulate a good basis for distinguishing rules different in degree from those different in kind. He assayed that the distinguishing principle was that none of these rules was a "damages proscription,"[153] and he then went further afield by suggesting that such differences in degree would matter if the case were decided under the "twin aims" analysis rather than the Rules Enabling Act analysis.[154]

Justice Stevens was only partially correct. A "damages proscription" helps to shape the ex ante value of a claim in a costless and outcome-neutral procedural world; therefore, Justice Stevens was correct to assert that a federal court in a diversity case must apply such a state-law proscription. But limiting the distinction just to damages proscriptions was inadequate. Inputs other than damages proscriptions also affect a claim's ex ante expected value. Likewise, Justice Stevens was right to assert that Rule 23 was different in degree but not kind. The relevant difference in kind, however, is whether a rule affects the probability, amount, or costliness of recovery in the process of resolving the claim (as Rule 23 does) or independently of the process of resolution (as a statute of limitations does). Justice Stevens' argument also failed to recognize that the same distinction applies regardless of whether the case was a Rules Enabling Act case or a "twin aims" case.

Justice Scalia, in his plurality opinion, missed the mark by a somewhat wider margin; he overemphasized the circular "really regulates procedure" definition, without attempting to find any room for § 2072(b) to do the independent work it should do. And Justice

152. *Shady Grove*, 130 S. Ct. at 1459 & n.18 (Stevens, J., concurring in part and in the judgment).

153. *Id.* at 1459 (internal quotation marks omitted).

154. *Id.*

Ginsburg had it completely wrong in her dissent, even though she had the result completely right in *Gasperini*. The results in *Gasperini* and *Shady Grove* are not inconsistent. It was simply a matter of finding the right principle to reconcile the cases.

Indeed, one advantage of the principle I have posited is that it makes the initial dispute between Justice Ginsburg's dissent and Justice Scalia's majority opinion[155] disappear: characterizing the dispute as either a Rules Enabling Act or a "procedural *Erie*" dispute[156] is, for all practical purposes, irrelevant when both halves of the analysis apply the same principle and generate the same answer.

C. A Test Case

One of the questions left open by the result in *Shady Grove* was whether New York, which wished to discourage the use of class actions in cases involving statutory penalties,[157] has any means to make federal courts respect its policy. Here is one possibility: enact a statute that caps the damages available in a class action at some level (whether a flat amount or a percentage of either the harm caused or the defendant's assets).[158] Such a statute would act in much the way that the post-filing contingencies in *Ragan* and *Walker* did.[159] In *Ragan* and *Walker*, the post-filing contingency affected the probability of recovery (P); here, such a statute would affect the amount of recovery (L). In both situations, the statutes affect the ex ante expected value of the claim even in a costless and outcome-neutral procedural world.

In other words, although the hypothetical New York statute uses a rule of process (the class action) as its post-filing trigger for the damages-limiting contingency, the statute limiting damages is not itself a rule "describing a part of the post-filing process" for resolving the claim. It is a rule describing the value (or substance) of the claim

155. On this point Justice Stevens joined Justice Scalia's opinion, thus forging a majority.

156. *See supra* notes 11, 96–97 and accompanying text.

157. For discussions of New York's policy, see *Shady Grove*, 130 S. Ct. at 1440–41; *id.* at 1464–65 (Ginsburg, J., dissenting).

158. Such a statute would not be unprecedented. For instance, the Federal Debt Collection Practices Act provides that, when consumers bring individual suits for illegal debt-collection practices, they can obtain their actual damages, as well as "such additional damages as the court may allow, but not exceeding $1,000." 15 U.S.C. § 1692k(a)(2)(A) (2006). When consumers' claims are brought as a class action, however, the Act allows named class representatives to obtain the same relief as plaintiffs who filed individually, *id.* § 1692k(a)(2)(B)(i), but limited the recovery of class members to an amount "not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector," *id.* § 1692k(a)(2)(B)(i).

159. *See supra* note 142 and accompanying text.

under different contingencies. Therefore, the damages-limiting rule meets the conditions in both part (a) and part (b) of the principle (it affects the ex ante expected value of recovery and does not describe the *process* for valuing claims), and a federal court must apply it.

In her dissent, Justice Ginsburg argued that, for *Erie* purposes, a statute imposing a cap on damages awardable in a class action was no different from the statute in *Shady Grove* itself, in which class actions could not be used to recover an available penalty.[160] But there is an evident difference between the two—the difference between a rule that establishes the substantive value of a claim and a rule that describes the process by which the substantive value is determined.

D. Justifying the Principle Normatively

Any principle that adequately describes a body of law in apparent disarray contains its own justification. Aside from its adequacy, however, the principle I have described has numerous advantages over present doctrine. First, it avoids a difficult, and (as *Shady Grove* shows) increasingly fractious, characterization question.[161] Second, in its application, the principle relies on intuitions from the Hand Formula and the Coase Theorem;[162] but, as the application of the principle to *Shady Grove* shows, exact calculations of the kind that often defeat economic analysis in real-world settings are unnecessary.[163] Thus, the principle is easy to apply—far easier, and with less room for disagreement, than the *Hanna* framework, which the Court continues to struggle to apply.

Most substantially, the principle guarantees that federal courts have the ability to apply their own rules to process claims, as long as they are indeed rules of *process*. The interest of federal courts in using their own procedural rules is patent; uniformity, simplicity, and efficiency all argue for the use of a single set of familiar procedures.[164]

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160. *See Shady Grove*, 130 S. Ct. at 1466–67 (Ginsburg, J., dissenting).

161. *See supra* notes 11, 96–97 and accompanying text.

162. *See supra* notes 17, 116, 118 and accompanying text.

163. *See supra* text following note 149; *see also* McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987) (Posner, J.) ("[T]he [Hand] formula has greater analytic than operational significance. Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with the precision that is possible, in principle at least, in measuring the other side of the equation—the cost or burden of precaution.").

164. *Cf.* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971) (recognizing the forum's interest in the application of its own procedural law).

On the other hand, the federal courts' interest in applying their own rules to influence the value of state-law claims before these claims enter the litigation system is considerably less.[165] Thus, the principle locates the source of rulemaking in the system that has the greater interest in having its rule applied.

But these evident advantages are insufficient if the principle undercuts *Erie* and its procedural progeny. *Erie* "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts."[166] *Erie*, the Rules of Decision Act, and the Rules Enabling Act also reflect an allocation of power among branches of the federal government, especially with regard to the propriety of common-law rulemaking.[167] The question is whether the principle that I have posited adequately respects these concerns.

In fact, the principle respects these concerns at least as well as the framework descended from *Hanna*. For the reasons that I have described, the principle does an excellent job—better than the present "really regulates procedure" analysis created in *Sibbach* and employed by the plurality in *Shady Grove*—of respecting the text of the Rules Enabling Act, while still honoring the strong presumption that the rulemaking authority Congress delegated to the Supreme Court has been properly exercised. To be clear, I do not contend that the principle conforms perfectly to congressional intent. After all, the principle draws inspiration from process philosophy, the Hand Formula, and the Coase Theorem, the former of which was probably not in Congress's contemplation when it passed the Rules Enabling Act in 1934 and the latter two of which had not been postulated until 1947 and 1960, respectively. But the principle does recapture, albeit in a rather technical formulation, the basic intuition about the difference between "procedure" and "substantive rights."[168] It conforms to the results of the Rules Enabling Act cases.[169] And it does so in a way that gives each provision of § 2072 meaning.[170]

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165. For the classic arguments against a federal interest in creating rules that affect the value of a state-law claim, see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945).

166. *Guaranty Trust*, 326 U.S. at 109.

167. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 3 (2000) (explaining that *Erie*'s "vital concern lay in broader ideas about judicial lawmaking and separation of powers"); Burbank, *The Rules Enabling Act*, *supra* note 47, at 1113–15 (explaining the fundamental importance of "directing attention to allocation of powers").

168. *See supra* note 139–41 and accompanying text.

169. *See supra* notes 127–28, 131–132 and accompanying text.

170. *See*, *e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted); Searight v.

Moreover, the principle respects the concerns for federalism that underlie *Erie*. As Justice Frankfurter said, "the intent of [*Erie*] was to insure that, in [diversity cases], 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."[171] As recast and softened by Chief Justice Warren, the aims of *Erie*, at least in the procedural arena, were "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[172] On first blush, it appears that the principle I have posited does not result in "substantially the same" outcomes when a case is filed in federal rather than state court. On the contrary, it frankly acknowledges that procedure affects litigation outcomes, and does not appear to eliminate incentives to forum shop or avoid differential results.

But the principle is more respectful of states' interests than it initially appears. To begin—and this is a point of some significance—it does not change the result in a single case in which the Court held that *Erie* required a federal court to use a state-court rule.[173] Second, it is important to recall exactly what types of federal common-law procedural rules survive the operation of the principle. Any federal common-law rules that affect the ex ante expected value of a state-law claim fail unless they describe the post-filing process for resolving the claim. The completeness of the Federal Rules of Civil Procedure in describing a system of procedure means that federal courts have little room to create procedural common law that passes through this filter.[174]

Most of the federal common-law rules that might pass through this filter are likely to be of minor consequence to the litigation. Perhaps, for instance, a federal court has its own rule requiring motions to be filed on 8½" x 11" paper, but the state court requires motions to be filed on 8½" x 14" paper. The federal rule describes part of the process for resolving the claim; it does not affect the ex ante expected value of a state-law claim in a costless and outcome-neutral procedural world. Hence, under the principle, the federal court is free

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Stokes, 44 U.S. (3 How.) 151, 161 (1845) ("Every word of a statute must receive a meaning, unless the court are compelled to consider some words synonymous.").

171. *Guaranty Trust*, 326 U.S. at 109.

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

173. Specifically, the principle explains—and accepts as correct—*Erie* itself, as well as the following "procedural *Erie*" cases in which the Court required federal courts to apply an arguably procedural state-court rule: *Cities Service*, *Palmer*, *Guaranty Trust*, *Ragan*, *Woods*, *Cohen*, *Walker*, and *Gasperini*. *See supra* notes 119–126, 142–144 and accompanying text.

174. *See supra* text preceding note 140.

to apply its own rule rather than the state court's differing rule.[175] But there is no great affront to federalism in permitting the use of the federal rule in this case. As *Guaranty Trust* said, a federal court can use its own rules of procedure, rather than the differing state-court rules, as long as the outcome in federal court is "substantially"—not identically, but substantially—the same as it would have been in a state court that adopted the state-court rule.[176] Justice Ginsburg emphasized the same point in *Shady Grove*, arguing that there is no need to adopt a state court's procedural rule unless the variation "is indeed 'substantial.' "[177] Thus, adopting the federal "file on 8½" x 11" paper" rule would not run afoul of the twin aims of *Erie*; it is unlikely to induce a significant amount of forum shopping, and deciding a case by means of a "file on 8½" x 11" paper" rule rather than a "file on 8½" x 14" paper" rule leads to no inequity.

I have, of course, focused on a "procedural" rule—the 8½" x 11" filing requirement—and the objection could be made that other federal common-law "procedural" rules would affect outcomes more substantially. Undoubtedly that is true, but it is important to recall that the Supreme Court has permitted federal courts to employ their own rules in at least two such instances: permitting juries rather than judges to determine certain facts in *Byrd*, and permitting trial judges rather than appellate judges to make excessive-damages determinations in *Gasperini*. The principle that I have espoused explains these decisions and generalizes from them. The principle is not arguing for a rebalancing of federalism; it is justifying the balance the Court has already struck.

In striking a proper balance,[178] it is important to recall that one of the main points of diversity jurisdiction is to provide a forum free of local bias.[179] Because procedure affects outcomes, a state can advance

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175. If such a rule is required by the local rules of a federal district court, the rule arguably falls within the ambit of Rule 83(a), which allows federal district courts to promulgate local rules "consistent with" federal statutes and the Federal Rules of Civil Procedure. As such, the rule also arguably falls within the Rules Enabling Act analysis, rather than the federal procedural common-law analysis. For sake of the argument, however, I am willing to assume that such a rule cannot be justified under a Rules Enabling Act analysis.

176. 326 U.S. at 109.

177. 130 S. Ct. 1431, 1471 (2010) (Ginsburg, J. dissenting). The word "substantial" had appeared in both Justice Ginsburg's opinion in *Gasperini*, *see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 (1996), and in *Hanna*, *see* 380 U.S. at 467.

178. *See Gasperini*, 518 U.S. at 437 (noting the desirability of accommodating "the principal state and federal interests").

179. *See* THE FEDERALIST NO. 80 (Alexander Hamilton) ("The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself."); *see also* Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (noting that "the constitution itself . . . views with such indulgence the possible fears and

its parochial interests through procedural means every bit as much as it can through substantive ones. When a federal court eschews a process that is responsive to such parochial interests, it helps to attain the even-handed justice for which diversity jurisdiction was intended. Moreover, diversity jurisdiction helps to prevent capture of the state courts by local interests and spurs innovation in legal rules by creating competition.[180] To the extent that the process federal courts use to resolve disputes is better or more efficient, allowing federal courts to use their own process for state-law claims can force the states to consider improvements to their processes—which is an advantage of any principle that gives federal courts the freedom to apply their own rules of procedure.[181]

In carving out this freedom, the principle I have described cuts a clear line. Rules that affect the gross pre-litigation value of a claim are for the states to determine. Rules that affect only the processing of this claim are for the court that processes the claim to determine—even though the use of these rules affects the claim's value.[182]

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apprehensions of suitors, that it has established national tribunals for the decision of controversies . . . between citizens of different states").

180. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

181. *Cf.* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (arguing that the existence of multiple common-law courts in England fostered competition for legal business, resulting in numerous innovations in the common law). Indeed, after the enactment of the Federal Rules of Civil Procedure, many state courts adopted the Federal Rules nearly *in toto*, and the basic vision of the Federal Rules—liberal pleading, broad discovery, generous joinder, and so on—has exercised an influence even on those states that did not adopt the Rules. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1367 (1986) (analyzing states that adopted the Federal Rules or its philosophy regarding pleading, as well as states that did not). *But see* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 383–84 (2003) (describing more divergence between federal and state practices in recent years).

182. In some sense, this result is a mirror image of another aspect of federalism: the independent-and-adequate-state-ground rule, in which the issue is whether a state procedural rule can act as a barrier to the Supreme Court's review of federal substantive claims that the state court declined to decide for a procedural reason. In that context, the Court balances the interest of the state court in applying its own procedural rules against the federal interest in resolving the federal substantive question at stake. Although the doctrine has fluctuated over the years, the Court has generally recognized the importance of state courts applying their own procedural rules to determine claims, and does not generally ignore those procedural rules even if the consequence is frustration of the Court's ability to review the substantive federal question. *See* Beard v. Kindler, 130 S. Ct. 612, 618 (2009) (holding that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review"); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 496–518 (6th ed. 2009) (discussing the independent-and-adequate-state-ground doctrine in the procedural context). Although the analogy is not perfect, the converse proposition here is that federal courts have an interest in applying, and therefore should be allowed to apply, their own process to adjudicate claims based on state law.

At the same time, some modesty about this principle is necessary. I do not argue that the principle is normatively better than any of a number of other principles that could determine the role of state-court rules in federal-court adjudication. Depending on the vision of federalism that a government wishes to advance, better approaches might be either to have federal courts adopt each and every rule a state court would adopt (a strong federalism) or adopt none of the rules that a state court would adopt (a weak federalism). Moreover, as I have said, there is an important distinction between substantive doctrine and substantive outcomes.[183] Granting that *Erie* is correct, so that our vision of federalism requires federal courts to adopt state substantive doctrine in diversity cases, we must still decide whether and to what extent federal courts must arrive at the same substantive outcome as their state counterparts. There is no necessarily correct answer to this question.

What this principle does is to assume that the Court's decisions answering this question are correct—that collectively the cases reflect the type of federalism that we wish our government to achieve. Accepting that vision, it is possible to state a single principle to explain *Erie* and its seemingly disparate progeny. It is also possible to provide a coherent argument why this principle is a good one. But it is impossible to stretch the principle or the justification further.

CONCLUSION

To return to the beginning, adjudication is a process—a process that evaluates the strength of legal entitlements and values the claims that assert them. In the course of the process, the strength of the entitlement and the value of the claim ebb and flow, until they reach their final values at the case's end. This process, however, is distinct from the outcomes that the process produces (that is, the substantive law and the specific values of claims asserted under this law). The notion that procedure is substantive, or substance procedural, is wrong. So is the notion that the meanings of procedure and substance change with the context.[184] That idea is perhaps our principal error, and on that error we constructed a framework that treated issues under the Rules Enabling Act and issues under the Rules of Decision Act as distinct matters.

In fact, the line between process and substance is not difficult to discern. Nor is the line between those cases in which the Court has

183. *See supra* text following note 81.

184. *See supra* notes 111–112 and accompanying text.

required federal courts sitting in diversity to apply state-court rules and those cases in which federal courts can apply their own rules. A single principle—apply state-court rules only when they affect the ex ante expected value of a claim in a costless and outcome-neutral procedural world—provides the answer in the *Erie* context.

In multiple contexts, of which the *Erie* situation is only one, an important question is whether a forum court should apply only the substantive law of the jurisdiction that is the source of the claim, or whether the forum court must achieve, to the extent that rules can do so, the same outcome as a court in the jurisdiction that supplies the substantive law.[185] It is not necessarily true that the principle used in the *Erie* context should apply in other contexts. In searching for the correct principle in each context, however, we cannot hide behind the bromide that the meanings of procedure and substance vary with the context. They don't.

185. For instance, in the horizontal choice-of-law context, a forum court sometimes applies the substantive law of another state; but a separate issue is whether the forum court must also apply the procedural law of the state that supplies the substantive law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 122–44 (1971) (listing situations in which a state court should and should not apply its own rules to process a claim). Likewise, in the reverse-*Erie* context, a state forum court might need to apply federal substantive law; but a separate issue is whether the forum court must apply the procedural law that a federal court would apply. *See* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (stating that "the right to trial by jury is too substantial a part of the rights accorded by the [Federal Employers' Liability Act] to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used").