FORUM SHOPPING THROUGH THE FEDERAL RULES OF EVIDENCE

INTRODUCTION

In federal cases presenting state law questions, how should federal courts treat state substantive rules of evidence? State substantive rules of evidence refers to evidentiary rules legislated outside the state's normal rules of evidence. Such rules are usually referred to as "bound up" in state substantive policy and include rules dealing with, *inter alia*, introduction of medical screening panel decisions, use of seat belts, and evidence of alcohol consumption to show intoxication. These substantive rules can work to either admit or exclude these forms of evidence in various actions in state court.

The federal court system is faced with a tension in this respect: on one hand, federal courts must uniformly apply the Federal Rules of Evidence in diversity cases.[1] The opposing tension is that these federal courts must also apply state law as to the rules of decision on non-federal question issues.[2] This tension comes to the fore in cases where state rules of exclusion are in play. Juxtaposing the Federal Rules of Evidence with these

1. *See* FED. R. EVID. 1101(b).
2. Rules of Decision Act, 28 U.S.C. § 1652 (2000).

state "evidence" rules, must federal courts blithely disregard all such rules in favor of the federal mandate?

At first blush, the answer appears to be most certainly affirmative.[3] But the simple categorization of state rules of exclusion as rules of evidence *per se* belies their substantive character, a character that is classically within the province of state decision-making power, even in federal court. Application of the Federal Rules of Evidence as a trump card against these statutes presents litigants the opportunity to choose ex ante which court will inherently provide a better forum in which to make their claims. Interestingly, this is the situation that the *Erie* doctrine[4] sought to protect, yet the federal courts are decidedly split on the result when the competing values of uniformity in evidentiary law and state tort policy collide.

Consider the following hypothetical that perhaps demonstrates the problem: *Anystate*, in its desire to protect local corporations, enacts legislation intending to hinder potential consumer plaintiffs' products liability actions. In addition to creating a negligence regime, *Anystate* adds another line of defense for corporations embroiled in litigation: no safety study conducted during the research and development phase of the product may be introduced as evidence to show that the company was negligent in its manufacture of the product or could have made it safer in any way.[5] The purpose of the provision is to provide a further layer of protection for companies in an effort to lure manufacturing facilities and lucrative jobs to the state.

In the first few cases, *Company X* is successful in defending suits in *Anystate* state court for the negligent manufacture of its widgets. The company (and the *Anystate* state legislators) credit much of the success to the recently passed rule of exclusion. A few months later, however, a multi-million dollar suit is filled by a resident of *Nostate*, who brings the suit in *Anystate* federal district court under diversity jurisdiction.[6] During trial, the plaintiff seeks to introduce evidence that, prior to the release of the widget in the market, *Company X* conducted a study that revealed some potential problems. The defendants are confident that without this evidence the plaintiff will have no case, and this evidence would routinely be excluded in state court under the rule of exclusion. The plaintiffs, however,

3. The rules themselves, *see supra* note 1, as well as the Supremacy Clause, U.S. CONST. art. VI, cl. 2, would seem to indicate this result on the face of the problem. However, as will be demonstrated, this may not be the case under Supreme Court jurisprudence and the nature of these rules of "evidence."

4. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 76–77 (1938).

5. Such a rule is distinguished from FED. R. EVID. 407 which bars any evidence of subsequent remedial measures. The federal rule excludes measures taken after an injury, but the *Anystate* policy would exclude *any* safety study conducted during the development of the product—a very broad exclusion.

6. *See* 28 U.S.C. § 1332 (2000).

argue that under Federal Rule of Evidence 402 this evidence should be allowed since all relevant evidence is admissible,[7] and the evidence is relevant to show prior knowledge of a problem.[8]

The inherent contradiction should be obvious at first glance. In state court, *Company X* will almost certainly get the result that it (and the state) wants by virtue of the state's rule of exclusion, at least on cases that would fail as a matter of law without this safety study evidence. However, in the *same state* but in federal court, *Company X* will almost surely lose (under the same assumptions) if the safety study evidence comes in at trial. Such a result would effectively eliminate any competitive advantage that was sought by corporations locating in *Anystate*. Under a formalistic argument, the federal court would feel compelled to apply the Federal Rules of Evidence, enacted by Congress and applicable to all evidentiary questions in federal court. Yet, the statute was passed in *Anystate*'s sovereign legislature not as part of its codified rules of evidence, but as a key component of its initiative to protect manufacturing companies from crippling product liability. This result favors out-of-state litigants in a way that violates *Company X*'s justified expectations and *Anystate*'s attempt at business development. What is *Anystate* to do? Presumably, the initiative will eventually fail as *Anystate* will not be able to promise more protection for its businesses, and the legislature must develop new (potentially less efficient) efforts to lure business.

Consider another example from a different perspective—the state of *South Hampton* joins a nationwide movement towards protecting plaintiffs through exclusion of prior medical history evidence in pharmaceutical liability trials. The rationale is part of a scheme where the state provides punitive damages against pharmaceutical tortfeasors, longer statutes of limitations, and strict liability for drug manufacturers. Since causation is a key element of the cause of action, eliminating the disclosure of prior medical history of the plaintiffs will be potentially crippling to any pharmaceutical defense. Assume that, with *South Hampton* and its neighbor *North Hampton* joining the Union, forty-five of the fifty-two states in the country adopt similar statutory evidentiary exclusions.

Pharma-Safe is worried that it might have to stop carrying on business in *South Hampton* and these other pro-plaintiff jurisdictions because of potential crippling liability. *Pharma-Safe*'s counsel, however, devises an ingenious plan: if the federal courts apply a formalistic interpretation of

7. FED. R. EVID. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

8. FED. R. EVID. 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

the Federal Rules of Evidence in diversity cases, this prior medical evidence can presumably come in under Rule 402 because prior medical history is very likely relevant to the question of causation. Knowing that this type of evidence is almost always at issue, *Pharma-Safe* can determine, ex ante, which forum will provide a more favorable venue for any case against it. Therefore, counsel advises *Pharma-Safe* to reincorporate under the laws of *North Hampton*, one of the seven states that does not have the newfangled strict liability regime and evidentiary exclusions.[9] Under this plan, it seems that *Pharma-Safe* could not only escape an evidentiary exclusion in *North Hampton* state courts in cases brought by state residents, but it could also escape the exclusion in *South Hampton* and every other state with similar policies by simply establishing diversity jurisdiction and removing cases in those states to federal court. Thus, *Pharma-Safe* has essentially escaped crippling liability in any suit *nationwide* even though a vast majority of the states thought that such liability would be appropriate. Again, the state substantive policies of *South Hampton* and similar states are to a large extent thwarted by federal formalism, and the federal courts have essentially adopted a pro-defense substantive tort law under the guise of regulating procedure.

This Note will consider the federal courts' approach to state evidentiary rules of exclusion in the context of litigation brought under diversity or supplemental jurisdiction. Specifically, the Federal Rules of Evidence purport to govern all cases in federal courts,[10] and there is no debate over the validity of such scope. However, when considering relevance rules (FRE 401, 402, and 403),[11] some courts are faced with the dilemma that certain states have developed exclusions for evidence that might be otherwise admissible in federal court. As illustrated already, the interplay between the state and federal rules could create different outcomes in the

9. This scenario assumes that diversity jurisdiction can be established by *Pharma-Safe*. Under 28 U.S.C. § 1332(c)(1) (2000), a corporation's domicile is its principal place of business. *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960), establishes that the test for determining principal place of business is based on activity of the corporation, not on where its policy-making functions are based. This hypothetical assumes that all other activity in various states is equal, essentially requiring the court to look to *Pharma-Safe*'s *North Hampton* corporate headquarters to establish diversity against a *South Hampton*-domiciled plaintiff.

10. FED. R. EVID. 101 (Scope) ("These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101."); FED. R. EVID. 1101(b) ("These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.").

11. FED. R. EVID. 401 (Definition of "Relevant Evidence"); FED. R. EVID. 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible); FED. R. EVID. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

systems' courts within the same state. To protect the justified expectations of litigants in these states, the federal courts should have a uniform approach to confronting these state rules of exclusion, but to this point there has been no consistent application among the various federal courts of either system's rule.

This Note will argue that where there is apparent conflict between the Federal Rules of Evidence relevancy rules and state substantive rules of evidence (exclusion or admission provisions), the state rule should apply in federal court when state law is generally applicable. Part I will consider the problem that presently exists when federal courts are confronted with the potential application of conflicting rules. The application of state law in federal court presents a unique problem, especially when courts must consider the distinct nature of evidentiary rules. Part II will specifically look at cases where circuit courts of appeal have dealt with the application of state statutes controlling evidence used to show intoxication and the admission of seatbelt usage as evidence. Next, in Part III, this Note will consider why applying the state rule of exclusion is a valid solution under an *Erie* analysis of the problem and as a function of what Congress intended when it passed the Federal Rules of Evidence. Finally, the Note will conclude by attempting to offer a solution that federal courts find palatable—one that values the rule of law, federalism, and the efficiency of the federal court system.

One final comment must be added, however, before continuing to the substance of the problem. On a basic level, there is some debate as to whether *Erie* concerns even apply to the Federal Rules of Evidence.[12] Yet, a myriad of state substantive policies, though evidentiary in name or application, still apply in diversity or supplemental jurisdiction cases despite the uniform Federal Rules.[13] Lower federal courts have often used an *Erie* analysis to consider the application of other state evidentiary rules of exclusion. It is the purpose of this Note to affirm that line of analysis and to argue that such analysis points to including state evidentiary rules of exclusion in the category of state policies that are substantive in nature and are applied in the face of the Federal Rules of Evidence.

12. *See infra* Part III; *see also* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS: ERIE DOCTRINE § 4512 (2d ed. 1996).

13. *See* WRIGHT, MILLER & COOPER, *supra* note 12 (noting that the parol evidence rule, the collateral source rule, the Statute of Frauds, agency law, prejudicial evidence rules and others are all more appropriately part of state substantive policy—despite their evidentiary exclusion effects—and apply in cases governed by state substantive law).

I. THE SEEDS OF JUXTAPOSITION

A. Application of State Law in Federal Courts

The laws of the states supply the rules of decision in federal court in cases where state law applies.[14] The Supreme Court, in its landmark decision of *Erie Railroad Co. v. Tompkins*, broadly proclaimed that there is "no federal general common law," ending a century of Supreme Court acquiescence to such power by federal courts.[15] With the case in New York federal court under diversity jurisdiction, the argument between the parties was what standard of care should be applied to a New York railroad for injuries to a Pennsylvania citizen incurred in Pennsylvania while walking along the railroad's right of way at night. The defendant railroad argued that Pennsylvania law should govern and would require it to only exercise the duty of care owed to a trespasser. The plaintiff argued, rather, that under the rule of *Swift v. Tyson*, because no Pennsylvania statute declared the duty of care owed, the court should fashion a remedy under its federal common law powers.[16] The Court held that state tort law should govern the dispute, case law constituted the applicable law in the present case, and state case law must be a relevant decisional basis in all diversity cases.[17]

Referring to the concept of "substantive rules of common law" mentioned in Justice Brandeis's majority opinion,[18] Justice Reed noted in passing that the Court's decision surely did not affect Congress's power to enact procedural rules for the federal courts.[19] The issue thus framed, the

14. Rules of Decision Act, 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

15. *See Erie*, 304 U.S. at 78. For the notion that federal courts had the power to declare "federal general common law" in the century before *Erie*, see, for example, *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

16. *Erie*, 304 U.S. at 70.

17. *Id.* at 78 ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

18. *See id.*

19. *Id.* at 91–92 (Reed, J., concurring) (noting that from the Court's decision in *Wayman v. Southard*, 23 U.S. 1 (1825), congressional power to dictate procedural rules for the federal courts has been unquestioned). As is noted in Part III.A, Justice Reed's opinion only framed the problem faced by the Court going forward. Later cases would determine the scope of the substance-procedure distinction. This line of cases is discussed in more detail in Part III.

Of course, the substance–procedure question can vary between contexts. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 726–27 (1988). While examining the distinction in the context of the Full Faith and Credit Clause, Justice Scalia wrote for the Court: "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Id.* at 726. This Note considers the distinction within the *Erie* context—which law to apply when a federal

Court was to begin a long course of potentially irreconcilable decisions in this vein of substance versus procedure, starting with the Court's decision in 1945 to uphold a state statute of limitations in the face of a potentially conflicting federal statute in *Guaranty Trust Co. v. York*.[20]

The Court's line of cases detailing this substance–procedure distinction will be discussed later, but *Erie* and its progeny frame the general issue facing federal courts when assessing the potential application of a state substantive rule of exclusion in issues governed by state law. Generally, in matters of procedure (or, matters that are not clearly substantive), the Court has developed a multi-faceted test to determine which rule to apply.[21] As applied to the Rules of Civil Procedure, the Supreme Court has posited that the Rules have a presumption of constitutionality and must be applied in federal diversity actions when there is a direct conflict between the official federal rule and a state rule.[22] No Supreme Court case has dealt with the application of a Federal Rule of Evidence against a potentially conflicting state rule, so federal courts have looked to the *Erie* line of cases to make this distinction. Rules of Civil Procedure provide an appropriate analogy to the Federal Rules of Evidence, which, like their civil procedure brethren, supply the evidentiary standard in all cases in federal court.[23] There are key differences between the two sets of rules, though, and while the *Erie* decisions relating to Rules of Civil Procedure offer a starting point, because of the unique nature of evidence rules (and specifically rules requiring admission or exclusion of evidence), federal courts are met with some difficult interpretive questions that should be unique to the Federal Rules of Evidence.

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court has jurisdiction over state substantive claims through either diversity or supplemental jurisdiction.

Justice Scalia, contrasting the purposes of the Full Faith and Credit Clause, went on to describe *Erie*'s purpose:

> In the context of our *Erie* jurisprudence, that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.

Id. at 726–27 (citation omitted). These purposes of *Erie*, as will be demonstrated, drive the substance–procedure distinction.

20. 326 U.S. 99, 110 (1945). For a more thorough discussion of *York*, see *infra* notes 122–25 and accompanying text.

21. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996); Hanna v. Plumer, 380 U.S. 460, 467 (1965); *see also infra* Part III.

22. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5–6 (1987). A valid exercise of Congress's rulemaking authority under the Constitution and the Rules Enabling Act makes a Federal Rule of Civil Procedure a validly enacted rule.

23. *See* FED. R. EVID. 101, 1101(a)–(b); FED. R. CIV. P. 1.

B. The Nature of Evidence Rules

It has been suggested that there are three kinds of evidence rules.[24] First, there are rules that are clearly procedural and intended to encourage efficiency in the courts and accuracy in fact-finding.[25] These, as clearly procedural, are within the realm of proper federal application in diversity cases.[26] Second, there are state evidentiary rules that are for the express purpose of furthering state policy, independent of any other substantive law in the state.[27] Privileges are most consistently seen in this category of evidence rule.[28] Finally, there are rules that "in form only regulate evidence" but really are very closely connected to substantive rights: examples include parol evidence, presumptions, and statutes of limitations.[29] Typically, these applications have fallen to state rules in diversity cases.[30] It is in this area that the subtle distinction created by state statutory rules of exclusion or admission embedded in substantive purposes have proven to be much more difficult for federal courts to reconcile with the Federal Rules of Evidence.

FRE 402 offers fertile ground for contradiction against these types of quasi-procedural, quasi-substantive rules that have cropped up in various states' substantive policies. Issues of relevancy addressed by FRE 401–403, when applied in cases where state law provides the rule of decision, necessarily must involve state law.[31] The federal court, even in applying Federal Rules of Evidence, must look to the state law of decision to determine if the evidence offered is properly related to the elements of proof of the cause of action;[32] this is a basic foundation of evidence law in general and the Federal Rules of Evidence in particular.[33] So, at base, each relevancy determination must necessarily include a decision about the interplay between state law and its relationship to the federal evidence law, including what actually constitutes the state substantive law (as opposed to

24. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 93, at 665–67 (5th ed. 1994).
25. *See id.*; *see also* FED. R. EVID. 102.
26. *See* WRIGHT, *supra* note 24, § 93, at 665.
27. *Id.* § 93, at 667.
28. *Id.*
29. *Id.* § 93, at 665–66; *see also* WRIGHT, MILLER & COOPER, *supra* note 12, § 4512, at 422–23 ("[T]here is a varied collection of state law rules that, because their application results in the exclusion of evidence, sometimes are considered rules of evidence, but in fact serve substantive state policies and are characterized more properly as rules of substantive law within the meaning of the *Erie* doctrine. . . . Properly construed, the Federal Rules of Evidence do not affect or alter these 'substantive rules of evidence,' which are enforced in federal court.").
30. WRIGHT, *supra* note 24, § 93, at 665–66.
31. *See* Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 374–75 (1977).
32. *See id.* at 374.
33. *Cf.* FED. R. EVID. 401 advisory committee's notes ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."). Such a determination naturally depends on the substantive law.

state procedural law) that must be followed.[34] Such a complex interplay, it has been argued, is "inherent in the application of state law in federal courts."[35]

Conway v. Chemical Leaman Tank Lines, Inc.[36] was one of the first major cases for lower federal courts to consider the application of the Federal Rules of Evidence as opposed to a conflicting state rule in a diversity case. Though more modern cases will follow in this discussion, the *Conway* decisions offer a good framework of the problem where federal courts in diversity must start with issues of relevancy, and this is where various commentators start to consider the issue.[37] The suit involved a wrongful death action brought by a widow who had subsequently remarried. The central question of the case centered on whether evidence of this subsequent marriage was admissible in federal court under diversity jurisdiction.[38] Retroactive application of a Texas statute, passed after the trial court ruling, allowing for such evidence to be introduced was the real crux of the discussion. The court found that this statute should be applied retroactively to admit the remarriage evidence.[39]

Noting that the newly enacted Federal Rules of Evidence would apply in a trial on remand (they were enacted trial and appeal), and in evaluating their application, the court stated that under FRE 402, "The admissibility of evidence, including the particular kind of evidence involved in this case, is now governed by the Rules rather than by state law."[40] Therefore, the court reasoned, if it was error for the court to exclude the evidence at trial, it must be shown to be error under the Federal Rules. Under its broad standard of admissibility, the court found that the Federal Rules allowed this evidence as "background."[41] However, because a common law rule still required the exclusion of marital evidence in the mitigation of damages, the evidence was completely excluded at trial and the Fifth Circuit's charge was to determine if this too was reversible error.[42] As for the mitigation of damages, the court noted that questions of damages are state law and, accordingly, applied *Erie* to limit the introduction of the evidence to background information only.[43] In sum, the Federal Rules were found to

34. The dichotomy between substance and procedure, where evidence rules fall in that paradigm and what must be applied in federal courts' evidentiary determinations, will be discussed *infra* Part III.A.

35. Wellborn, *supra* note 31, at 376.

36. 525 F.2d 927 (5th Cir. 1976), *reh'g granted*, 540 F.2d 837 (5th Cir. 1976).

37. *See, e.g.*, WRIGHT, *supra* note 24, § 93, at 666; Wellborn, *supra* note 31, at 377.

38. *Conway*, 525 F.2d at 930.

39. *Id.* at 929.

40. *Id.* at 930.

41. *Id.*

42. *Id.* at 929. The trial court and the Fifth Circuit relied on *Richardson v. Holmes*, 525 S.W.2d 293, 298 (Tex. App. 1975), as establishing this common law rule in Texas.

43. *Conway*, 525 F.2d at 930.

govern broad questions of admissibility, but some state policies (here, damages) were mandated even in federal court under an *Erie* analysis.

On application for rehearing, the Fifth Circuit held that the reversible error found in the original decision applied to all plaintiffs in the case.[44] However, perhaps more notable, the court framed the issue presented by differing rules in state and federal court. Were state courts to follow the Texas statute allowing admission of evidence (and bound to find exclusion of such evidence as reversible error), it would be "unfortunate indeed for [a federal court] to reach a conclusion having the effect of creating an alternate forum in which beneficiaries of the Texas wrongful death statutory scheme could proceed, . . . [whereby] the federal forum can only be far more attractive."[45] Such a concern compelled the court to follow, to the letter, the substantive statutory policy of the state—there was no room for a divergent application of the statute in federal and state courts. The court never mentioned a broad application of FRE 402 or a balancing test under FRE 403. Rather, the court viewed the Texas exclusionary statute as:

> [O]ne of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in Texas should accord it the same treatment as state courts in order to give full effect to Texas' substantive policy. . . . Such a course of action evidences clearly that the legislators considered the amendment a matter of significance and one necessary to substantive policy in an area peculiarly within their control. As such, [the statute] represents more than a mere rule of evidence; it is a declaration of policy . . . .[46]

Though rules termed evidence had tended to fall outside the ambit of *Erie*, the court noted that in similar situations, "federal courts have long recognized an exception to the inapplicability of *Erie* to evidentiary questions" and such inapplicability should not be followed to rules evidentiary in name only.[47] Because the state law claim and the "method of establishing it are so intertwined," courts must follow such a rule of the state whether *Erie* technically applies or not.[48]

The implications of these two decisions in *Conway* are telling of the problem facing federal courts in diversity. If the original decision were to stand, then in the Fifth Circuit, evidence of a widow's remarriage would

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44. Conway v. Chem. Leaman Tank Lines, Inc., 540 F.2d 837, 837–38 (5th Cir. 1976).
45. *Id.* at 838.
46. *Id.* at 838–39.
47. *Id.* at 839 (citing 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2405, at 326–27 (1st ed. 1971)).
48. *Conway*, 540 F.2d at 839 (quoting E. L. Cheeney Co. v. Gates, 346 F.2d 197, 206 (5th Cir. 1965)).

always be admissible as background evidence, even if a state had not adopted such a policy. Texas had case law that provided a narrow exclusion limited to damages, a broad substantive issue of state law. What, though, of a state that more broadly excluded the evidence of remarriage for any purpose? In this situation, the court's first application would likely overrule such a policy based on its broad view of FRE 402, and the Federal Rules would affect different states' policies in different ways in the circuit.[49] Such a rule, Wright argues, "under the guise of a housekeeping rule on relevancy would be a severe blow to the values of federalism."[50] Texas's decision that remarriage evidence should be relevant in most situations—but not in damages—is just the type of substantive policy that should be furthered by the state and maintained by federal courts. The court's decision on rehearing averted any problems by properly viewing Texas's exclusion rule not in terms of an area that was untouchable by federal courts (damages), but as an admission–exclusion policy "bound up" in the state's substantive rules for establishing wrongful death claims. The rule employed by Texas and the court—to ensure fairness of the process by mitigating misrepresentations of the plaintiff's loss of consortium while limiting any effect on damages awarded—was essentially procedural in form, but it was part of a substantive policy to protect plaintiff recovery and outcome-determinative in the sense that different applications could produce different results, even when evaluated ex ante.[51]

So, state rules that regulate evidence in form, but serve some higher substantive purpose, fall in a twilight zone of application in federal courts when met with the relevance rules within the Federal Rules of Evidence. *Conway* demonstrates not only the difficulty in dealing with these rules, but the inherent dichotomy caused when these state rules are neglected. Surely a federal purpose must trump those rules of evidence that are purely procedural or that may potentially arise as an evidentiary issue in any case. Rules that have obvious application in a suit ex ante and can create disparate results that are predictable at the front-end of litigation, however, are often part of the substantive policy of the state and should be applied indiscriminately in state and federal courts.

49. *See* Wellborn, *supra* note 31, at 383 & n.53 (noting that because evidence of remarriage is inadmissible for any purpose in most jurisdictions and simply broadly applying the federal rule of relevancy allows the evidence to come in, a rule based on the first *Conway* decision would substantively affect litigants' decisions of court selection and would lead to disparate results).

50. WRIGHT, *supra* note 24, § 93, at 667.

51. *See* Wellborn, *supra* note 31, at 416.

II. CURRENT APPROACHES OF THE FEDERAL COURTS

Perhaps surprisingly, there is little uniform application among the circuit courts of appeals of either the state or federal rule in this area.[52] Circuits have taken different approaches in analyzing the problem and have come to various conclusions. Some circuits have even shifted direction in mid-course.[53]

State substantive rules of admission or exclusion can take many forms: introduction of medical malpractice screening panel findings,[54] exclusion of private internal investigations,[55] exclusion of evidence of the impact of income taxes on awards of damages,[56] or exclusion of recordings unlawfully obtained.[57] The following subparts will provide a quick glimpse of two other types of state exclusionary rules where federal courts have wrestled to determine their application: evidence of alcohol consumption to show intoxication, and seatbelt use. These cases offer a snapshot of the breadth of the problem at hand.[58]

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52. *See* Hottle v. Beech Aircraft Corp., 47 F.3d 106, 109 (4th Cir. 1995) (noting this fact).

53. *See, e.g.*, *infra* note 90 and accompanying text (discussing Tenth Circuit policy).

54. *See, e.g.*, Wray v. Gregory, 61 F.3d 1414, 1417 (9th Cir. 1995) (state law applies to exclude medical malpractice screening panel evidence); Daigle v. Me. Med. Ctr., Inc., 14 F.3d 684, 689–90 (1st Cir. 1994) (*Erie* mandates that state substantive rules of evidence must be applied in federal court); Feinstein v. Mass. Gen. Hosp., 643 F.2d 880, 888 (1st Cir. 1981) (state rule applies); DiAntonio v. Northampton-Accomack Mem'l Hosp., 628 F.2d 287, 290 (4th Cir. 1980) (state rule of admission applies).

55. *See, e.g.*, *Beech Aircraft*, 47 F.3d at 110 (state substantive law must be applied); Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932–33 (10th Cir. 1984) (state law applies).

56. *See, e.g.*, Coy v. Simpson Marine Safety Equip., Inc., 787 F.2d 19, 26–27 (1st Cir. 1986) (state rule should apply).

57. *See, e.g.*, Glinski v. Chicago, No. 99 C 3063, 2002 WL 113884, at *5–7 (N.D. Ill. 2002) (state exclusion law under Illinois Eavesdropping Act should apply to state law claim in federal court).

58. For example, at least thirty-four states and the District of Columbia have some state substantive rule regarding the exclusion of seat belt evidence at trial. Of these, twenty-nine states (and the District of Columbia) have a complete bar. *See, e.g.*, Coker v. Ryder Truck Lines, 249 So. 2d 810, 814 (Ala. 1971); Britton v. Doehring, 242 So. 2d 666, 671 (Ala. 1970) (Alabama); ARK. CODE ANN. § 27-37-703 (2008) (Arkansas) (allowing some admission of evidence if products liability suit not related to failure of the seatbelt (in which the defendant must bear the burden), and through *in camera* hearings at the discretion of the judge); CONN. GEN. STAT. § 14-100a(c)(3) (2006) (Connecticut) ("Failure to wear a seat safety belt shall not be considered as contributory negligence nor shall such failure be admissible evidence in any civil action."); McCord v. Green, 362 A.2d 720, 725 (D.C. 1976) (District of Columbia); GA. CODE ANN. § 40-8-76.1(d) (2007) (Georgia); Quick v. Crane, 727 P.2d 1187, 1208 (Idaho 1986); Hansen v. Howard O. Miller, Inc., 460 P.2d 739, 743 (Idaho 1969) (Idaho); 625 ILL. COMP. STAT. 5/12-603.1(c) (2002) (Illinois); State v. Ingram, 427 N.E.2d 444, 448 (Ind. 1981) (Indiana) (finding that evidence of failure to wear a seatbelt could not be used to reduce damages because Indiana had no mandatory seat belt use statute); IOWA CODE § 321.445(4) (1997) (Iowa) (limits evidence to a certain level of mitigation of damages); Rollins v. Dep't of Transp., 711 P.2d 1330, 1332 (Kan. 1985) ("We have consistently held that evidence of the nonuse of seat belts is inadmissible in a negligence action."); Taplin v. Clark, 626 P.2d 1198, 1201–02 (Kan. Ct. App. 1981) (Kansas) ("[U]nder the Kansas system of comparative negligence, it is not proper for a jury to consider as a negligence factor to reduce liability and damages the failure of a passenger to use an available seat belt."); LA. REV. STAT. ANN. § 32:295.1(E) (2002) (Louisiana); MINN. STAT. § 169.685, subd. 4 (2006) (Minnesota); D. W. Boutwell Butane Co. v. Smith, 244 So. 2d 11, 12 (Miss. 1971) (Mississippi) (finding that failure to use a seatbelt is not negligence per se); MONT. CODE ANN.

A. Use of Alcohol Consumption Evidence to Show Intoxication

In *McInnis v. A.M.F., Inc.*,[59] the First Circuit held that a Rhode Island common law rule, which forbade a trial court from admitting evidence of drinking (instead of actual intoxication evidence) to establish negligence, was not a substantive rule and therefore could not be applied over the federal relevancy rules in federal court.[60] The plaintiff brought a products liability claim against a motorcycle manufacturer for injuries arising out of an accident that caused her leg to be amputated. At trial, the district court

§ 61-13-106 (2006) (Montana); Jeep Corp. v. Murray, 708 P.2d 297, 301 (Nev. 1985) (Nevada) (affirming district court decision to exclude evidence of seat belt nonuse "[w]hether the evidence was relevant or not" and calling nonuse a "relatively insignificant aspect of the accident"); N.H. REV. STAT. ANN. § 265:107-a(IV) (2004) (New Hampshire); N.M. STAT. § 66-7-373(A) (2007) (New Mexico); Miller v. Miller, 160 S.E.2d 65, 71 (N.C. 1968) (North Carolina); OHIO REV. CODE ANN. § 4513.263(F) (West 2008) (Ohio); Fields v. Volkswagen of Am., Inc., 555 P.2d 48, 62 (Okla. 1976) (Oklahoma) ("[E]vidence of the failure to use seat belts is not admissible to establish a defense of contributory negligence or to be considered in mitigation of damages."); 75 PA. CONS. STAT. § 4581(e) (2006) (Pennsylvania) (stating that no violation or alleged violation of mandatory seat belt laws can be used as evidence in a civil action); Swajian v. Gen. Motors Corp., 559 A.2d 1041, 1046–47 (R.I. 1989) (Rhode Island) ("Having found no statutory or common-law duty to wear a safety belt, there can be no comparative negligence based upon plaintiff's failure to buckle up. General Motors has failed to clear the first hurdle of the negligence calculus, and therefore, all evidence relating to safety-belt use or nonuse is irrelevant and inadmissable on the issues of comparative fault and proximate cause. . . . We recognize the safety-belt defense for what it is worth—a manifestation of public policy."); Keaton v. Pearson, 358 S.E.2d 141, 141 (S.C. 1987) (South Carolina); S.D. CODIFIED LAWS § 32-38-4 (2002) (South Dakota); TENN. CODE ANN. § 55-9-604 (2004) (Tennessee); UTAH CODE ANN. § 41-6a-1806 (2005) (Utah); VA. CODE ANN. § 46.2-1094(D) (2005) (Virginia); WASH. REV. CODE § 46.61.688(6) (2001) (Washington); W. VA. CODE § 17C-15-49(d) (2005) (West Virginia) (stating that no violation or alleged violation of mandatory seat belt laws can be used as evidence in a civil action); WYO. STAT. ANN. § 31-5-1402(f) (2007) (Wyoming).

At least five states have statutes that limit the scope for which seat belt evidence may be presented. *See, e.g.*, FLA. STAT. § 316.614(10) (2006) (Florida) (evidence of nonuse cannot be used to establish negligence per se or be used to mitigate damages, but may be considered as evidence of comparative negligence); NEB. REV. STAT. §60-6, 273 (2004) (Nebraska) (evidence of nonuse not admissible to show liability or causation, but can be admitted to mitigate damages, up to five percent); Waterson v. Gen. Motors Corp., 544 A.2d 357, 370 (N.J. 1988) (New Jersey) (espousing N.J. tort policy of failure to wear a seat belt can show comparative negligence but not negligence per se: "Thus, in a negligence case, a plaintiff's failure to wear a seat belt would be admissible as evidence of some negligence although not negligence *per se.*"); N.Y. VEH. & TRAF. LAW § 1229-c(8) (McKinney 2008) (New York) (evidence is inadmissible to show liability, but evidence of nonuse can be used to mitigate damages); OR. REV. STAT. § 31.760(1) (2003) (Oregon) ("In an action brought to recover damages for personal injuries arising out of a motor vehicle accident, evidence of the nonuse of a safety belt or harness may be admitted only to mitigate the injured party's damages. The mitigation shall not exceed five percent of the amount to which the injured party would otherwise be entitled.").

However, a minority of states still have no exclusions for seatbelt evidence. *See, e.g.*, Hutchins v. Schwartz, 724 P.2d 1194, 1199 (Alaska 1986) (Alaska) ("We conclude that the failure to wear a seat belt is relevant evidence for the purpose of damage reduction."); ARIZ. REV. STAT. ANN. § 12-2505(A) (2003) (made applicable by Law v. Superior Court In and For Maricopa County, 755 P.2d 1135 (Ariz. 1988)) (Arizona); COLO. REV. STAT. § 42-4-237(7) (2004) (Colorado); 1994 Me. Legis. Serv. Ch. 683 (West) (repealing ME. REV. STAT. ANN. tit. 29-A, § 2081(5) (1993) (Maine); MICH. COMP. LAWS § 257.710e(7) (2001) (Michigan); 2003 Tex. Sess. Law Serv. Ch. 204 (West) (repealing TEX. TRANSP. CODE ANN. § 545.4413(g) (Vernon 2003)) (Texas).

59. 765 F.2d 240 (1st Cir. 1985).

60. *Id.* at 244.

allowed the defendant to introduce evidence—as part of a contributory negligence theory—that the plaintiff admitted to hospital staff to drinking three beers earlier in the day. The plaintiff argued that a state common law rule precluded the introduction of such evidence without further evidence of intoxication.[61]

The Court of Appeals reasoned that "federal rules purporting to govern procedural matters, which are duly passed by Congress, shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure."[62] The court found that Congress expressly intended the Federal Rules to apply in such a case, a conclusion reinforced by Congress's provision for state rules to apply in other contexts such as FRE 501 but not for state substantive rules.[63] Any conflict with the common law exclusion rule was obviated under the *Hanna v. Plumer*[64] test, by which the court looked only to whether FRE 403 could be classified as a procedural rule, a proposition that the court found "too obvious to warrant discussion."[65] The plaintiff argued for an *Erie* exception that the court rejected; rather, under *Erie*, the rule could only be classified as "strictly a rule of admissibility—one which could not rationally affect private ordering or encourage forum shopping," not subject to application when in conflict with FRE 403.[66]

The First Circuit extended this position in *Fitzgerald v. Expressway Sewerage Construction, Inc.*[67] by looking to see if the Federal Rules "are malleable enough" to cover the issue of relevance of particular evidence.[68] Though the court applied the state collateral source rule to damages at issue in the case, the court held that the remaining evidentiary questions were governed by FRE 401–403.[69]

This approach seems reasoned, but to declare that these substantive rules cannot encourage forum shopping seems inapposite. Ex ante the *McInnis* defendant had to know that federal court would be an inherently more favorable forum, not in the sense that diversity jurisdiction eliminates any local bias, but because of the likelihood of introducing evidence damaging to the plaintiff's case. In early investigations, defense counsel could take witness statements from hospital staff that would at least create a possibility that the plaintiff had been drinking that day. So before dis-

61. *Id.* (citing Handy v. Geary, 252 A.2d 435 (R.I. 1969)).
62. *McInnis*, 765 F.2d at 244.
63. *Id.* at 245 (citing FED. R. EVID. 1101(b)).
64. 380 U.S. 460 (1965).
65. *McInnis*, 765 F.2d at 245.
66. *Id.* at 246.
67. 177 F.3d 71 (1st Cir. 1999).
68. *Id.* at 74. Interestingly, the Supreme Court has not advocated "malleable" rules that could be used to find direct conflicts. Rather, the Court has eschewed potential direct conflicts between state and federal rules. *See infra* Part III.B.
69. *Fitzgerald,* 177 F.3d at 74.

covery even begins in earnest, the defendant has won a major battle simply by removing from a court that will not allow this evidence as part of state policy to a forum that welcomes the evidence under a broad, "malleable" balancing test. Litigants achieving divergent results on the same facts in different fora a block away is quintessential forum shopping.

Compare the Third Circuit's approach in *Greiner v. Volkswagenwerk Aktiengeselleschaft*[70] and *Rovegno v. Geppert Bros, Inc.*[71] *Greiner* provided an early decision on the application of *Erie* to the Federal Rules of Evidence, where a passenger who was rendered a paraplegic in an automobile accident sued the auto maker for negligent manufacture. Evidence was admitted at trial showing that the driver of the car had been drinking earlier in the day. On appeal, the plaintiff argued that Pennsylvania case law precluded the introduction of such evidence. The appellate court disagreed, but not because the state law did not apply.[72] Rather, the court boldly asserted that "*Erie* . . . compels us to follow the law of Pennsylvania."[73]

In *Rovegno*, the court held that the district court's exclusion of alcohol consumption evidence under Pennsylvania law was not abuse of discretion.[74] The plaintiff filed on behalf of the deceased who was killed when a truck owned by the defendant struck his vehicle and caused it to overturn. After the accident, the deceased's blood alcohol level was measured to be over the legal limit. The court applied state exclusion law as required by *Greiner* and only applied FRE 403 by analogy to determine whether the district court appropriately weighed the potentially prejudicial evidence in excluding it.[75]

Key to the difference between the First and Third Circuits' applications of state rules of exclusion is their view of the substantive nature of the state rule and the deference that should be afforded to a broad Federal Rule of Evidence. Interestingly, both circuits looked to the *Erie* line of cases and FRE 403 to justify diverging results. While the First Circuit focused on the nature of the federal rule to then exclude the state rule, the Third Circuit presumptively looked to the state rule and then determined whether the federal rule of admission was broad enough to override the state law's application. This approach more correctly balances the state interests at stake in a state law cause of action that necessarily must consider the scope of the action under state law.

70. 540 F.2d 85 (3d Cir. 1976).
71. 677 F.2d 327 (3d Cir. 1982).
72. *Greiner*, 540 F.2d at 89. The evidence was admissible based on other state law that allowed admission of evidence of drinking if accompanied by other evidence sufficient to infer intoxication. *Id.*
73. *Id.*
74. *Rovegno*, 677 F.2d at 328.
75. *Id.* at 329.

B. Seatbelt Evidence Statutes

The Third Circuit used the same standard to approach a potential conflict between FRE 402 and a state rule excluding evidence of seatbelt use. In *Dillinger v. Caterpillar, Inc.*,[76] the plaintiff brought a products liability suit against a construction vehicle manufacturer. While the plaintiff was driving the vehicle, the transmission failed, causing the truck's engine stall. The vehicle rolled down the steep highway, eventually coming to rest at the bottom of an embankment. The plaintiff was injured when he went through the windshield on impact. As a defense to the action, the defendant asserted that the injuries were caused by, among other factors, the plaintiff's failure to wear his seatbelt.

The case jury entered a verdict in favor of the defendant, largely based on the plaintiff's failure to wear a seatbelt. On appeal, the plaintiff argued that, based on Pennsylvania law, the court should not have allowed evidence of plaintiff's failure to wear the restraint.[77] The Third Circuit, applying this general rule excluding evidence of contributory negligence, and Pennsylvania case law specifically excluding seat belt use or nonuse as evidence,[78] reversed the district court's admission of the evidence.[79] No federal rule of evidence was cited in opposition to this conclusion; rather, the court merely reasoned that state law applied in the case and the admission of such evidence would be excluded in the state court system.[80] Then-Judge Samuel Alito, though dissenting in the outcome, agreed that evidence of seatbelt nonuse should have been excluded.[81] Judge Alito noted that a Pennsylvania statute, and not merely state common law, precluded the evidence.[82] The Eighth Circuit came to essentially the same result in

76. 959 F.2d 430 (3rd Cir. 1992).

77. *Id.* at 432. Pennsylvania had adopted § 402A of the Restatement (Second) of Torts as its products liability law, adopting a strict liability regime; accordingly, the Pennsylvania Supreme Court had consistently refused to allow defendants to introduce any evidence of contributory negligence on the part of the plaintiff that might defeat a claim. *Id.* at 435.

78. *Id.* at 438 (citing Vizzini v. Ford Motor Co., 569 F.2d 754, 767–68 (3rd Cir. 1977)). The court noted that "we stated that *McCown v. International Harvester Co.* [342 A.2d 381 (Pa. 1975)] constituted evidence that the Pennsylvania Supreme Court would reject evidence concerning the non-usage of a seat belt, both as to causation and to mitigation of damages." *Id.*

79. *Id.* at 440.

80. *See id.* at 438. The court did cite *Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85 (3d Cir. 1976) (cited *supra* note 70) for the other issue in the case, whether evidence of the driver's allegedly negligent conduct could be introduced. *Dillinger*, 959 F.2d at 441. *Greiner* noted the necessity of following Pennsylvania law in an evidentiary decision, even in the face of potentially conflicting federal rules of evidence. *See supra* note 70 and accompanying text.

81. *Dillinger*, 959 F.2d at 448 (Alito, J., dissenting). Judge Alito dissented in the result because he believed that the evidentiary errors in the case were harmless. *Id.* at 449.

82. *Dillinger*, 959 F.2d at 449 n.1 (Alito, J., dissenting) ("[T]his language, at the very least, expresses a strong state public policy against admission of such evidence. . . . [T]he legislature plainly wanted to preclude admission of seat belt nonuse." (citing 75 PA. CONS. STAT. ANN. § 4581(e) (West 2006))).

Potts v. Benjamin,[83] as did the Seventh Circuit in *Barron v. Ford Motor Co. of Canada Ltd.*[84]

The Tenth Circuit used different analytical tools to reach an opposite result in *Sims v. Great American Life Insurance Co.*,[85] an Oklahoma breach of contract action against a life insurance provider. The estate of a deceased policyholder brought suit against the defendant when payment of a claim was denied on the basis that the policyholder's death was not accidental. The defendant insurance company sought to argue, *inter alia*, that the deceased's failure to wear his seatbelt, in contravention of his usual habit, indicated a suicidal intent.[86] The trial court excluded the evidence. At trial, the jury awarded compensatory and punitive damages to the plaintiff, but the defendant appealed on the theory that this key seatbelt evidence was improperly excluded under the federal rules.[87] Most significantly, the defendant specifically argued that the Oklahoma statute precluding the introduction of seatbelt nonuse evidence should have been trumped by the Federal Rules of Evidence.[88] Finding the state statute inapplicable in the face of the federal rules, the court agreed with the defense and held the evidence of seat belt nonuse should have been admitted at trial, though it ultimately held the exclusion harmless.[89]

Though the *Sims* decision is important in the context of seatbelt nonuse evidence, it may be more important for its thorough analysis of the interplay between a state exclusionary rule and the Federal Rules.[90] The court

83. 882 F.2d 1320, 1324 (8th Cir. 1989) ("A statute modifying the content of state tort law doctrines of contributory and comparative negligence seems to us to be a classic example of the type of substantive rule of law binding upon a federal court in a diversity case.").

84. 965 F.2d 195, 199 (7th Cir. 1992) ("A pure rule of evidence, like a pure rule of procedure, is concerned solely with accuracy and economy in litigation and should therefore be tailored to the capacities and circumstances of the particular judicial system, here the federal one; while a substantive rule is concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court. . . . The nonuse of seatbelts is so widespread that the North Carolina courts, bearing in mind that the law rarely requires a person to exercise more than average care, refuse to pronounce that nonuse unreasonable. Therefore, as a matter of state substantive law, evidence that the plaintiff had failed to fasten his seatbelt would be irrelevant to show that his damages should be cut down as a penalty for unreasonable behavior, and irrelevant evidence is not admissible under the federal rules of evidence." (citation omitted)).

85. 469 F.3d 870 (10th Cir. 2006).

86. *Id.* at 875.

87. The district court excluded the evidence of seatbelt nonuse by applying the standard from *Romine v. Parman*, 831 F.2d 944 (10th Cir. 1987) to note that although evidence in diversity cases is governed by the Federal Rules of Evidence, when the "evidentiary question is so dependent on state substantive policy, state law must be applied." *Sims*, 469 F.3d at 884 (quoting district court).

88. *Sims*, 469 F.3d at 876–77.

89. *Id.* at 886–87.

90. The decision is also significant for its apparent reversal of prior precedent. In *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 932 (10th Cir. 1984), the court expressed the view, related to FRE 407, that exclusion of evidence is governed by state policy. More broadly, the *Moe* court stated that state exclusion laws may be applied over official federal rules: "We respectfully disagree with the trial court's conclusion that the admissibility of evidence in diversity actions is governed exclusively by federal law—that is, the Federal Rules of Evidence." *Id.* at 931. The *Sims* court

began with the proposition that *Erie* does not govern the application of the Federal Rules of Evidence in diversity cases.[91] This result, the court stated, is mandated by both the Supreme Court's decision in *Hanna v. Plumer* and Congress's role in enacting the Federal Rules.[92] Rather, the court found the appropriate test for the applicability of the Federal Rules of Evidence in this context to be that formed in *Stewart Organization, Inc. v. Ricoh Corp*.[93] Under this approach, the role of the court is to first look to the federal rule; if it is arguably procedural, then a conflicting state rule is inapplicable.[94]

Despite announcing this seemingly bright-line approach, the court proceeded to another analysis prong out of respect for federalism.[95] This prong of the analysis centered on notions of federalism embodied in the specific federal rule, here FRE 401. FRE 401 incorporates state substantive policy in its admissibility definition, the court stated, because the evidence must be factually relevant to the claim or defense (grounded in state law), and it must be properly provable in the case.[96] Thus, "[w]here a state law excludes certain evidence in order to effect substantive policy considerations, *Rule 401* acts to exclude the evidence since the proposition for which the evidence is submitted is not properly provable and, therefore, irrelevant to the claim."[97] Therefore, the court would look to the *Erie* substance–procedure dichotomy—though *Erie* is not controlling—to determine that under Rule 401 a fact is relevant "only if substantive state policy so allows."[98]

Interestingly, the court found Oklahoma's Mandatory Seat Belt Act[99] to be a substantive rule, but not for the question addressed by the case.[100]

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avoided this analysis on the theory that the statements were simply dicta because the *Moe* court ruled that any error resulting from the non-application of the state rule was harmless. *Sims*, 469 F.3d at 880.

91. *Sims*, 469 F.3d at 874.

92. *Id.* at 877. The court cited *Hanna* for the proposition that *Erie* is not applicable to the Federal Rules of Civil Procedure, and that *Erie*'s broad substantive–procedural dichotomy is limited to federal common law. *Id.* Thus, the fact that the Federal Rules of Evidence were enacted as an act of Congress, the *Erie* analysis, along with the Rules Enabling Act and the Rules of Decision Act, are not controlling, the court argued. *Id.* at 877–79.

93. *Id.* at 877–78 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (establishing a two-part test for the applicability of a federal statute in a diversity case)). *But see infra* Part III.B and accompanying text (challenging such an application of *Stewart* in the context of the Federal Rules of Evidence).

94. *Sims*, 469 F.3d at 879.

95. *See id.* at 880–81 ("We recognize, of course, that a federal court's apparently unchecked ability to apply the Federal Rules of Evidence without any regard for state substantive policy creates considerable tension with notions of federalism. But this tension is overstated. Congress did not give federal courts unbridled discretion to preempt state substantive law on all arguably procedural matters.").

96. *Id.*; *see also supra* note 31 and accompanying text (describing the state law elements inherent in a relevancy analysis in substantive state law questions).

97. *Sims*, 469 F.3d at 881.

98. *Id.* at 882–83.

99. OKLA. STAT. tit. 47, § 12-420 (2007).

The defendant sought to introduce the seatbelt nonuse evidence for the purpose of proof of the driver's suicidal intent, not to penalize the driver by limiting his right to recovery in a civil case.[101] Accordingly, the court held Oklahoma's Mandatory Seat Belt Act inapplicable in the case and that the Act could not serve to preclude evidence of the driver's seatbelt nonuse.[102]

The *Sims* court analysis is quite unique both in its thoroughness and its substantive nature. The court seemed to have a difficult time resolving the inherent substantive policy behind the Oklahoma Mandatory Seat Belt Act. Its conclusion that the Act was enacted to prevent influence on negligence actions and not to be used as a bar to the admission of evidence for the purpose of showing subjective intent is rather disingenuous. Concededly, the court was correct that the relevancy analysis necessarily must include some consideration of state substantive law. For the court then to look to *Erie* for this distinction and concurrently hold that *Erie* is inapplicable to the Federal Rules of Evidence does not make sense. To further hold that the state exclusionary law is only substantive for some purposes makes even less sense. The court admittedly took a defensible position on a difficult issue, but this analysis seems too contrived to be the acceptable resolution of the issue. On a broader level, the court seems to be straddling the line of the debate, taking the federal rule as the baseline. The Federal Rules of Evidence control, and FRE 401 includes reference to state substantive law, at least to the extent of determining what is relevant to a claim or defense, but not in the case of substantive rules of evidence. Other courts' equally muddled analyses have helped to create much of the confusion in the circuits.

III. JUSTIFICATION FOR APPLICATION OF STATE RULES

Erie has evolved into two distinct analytical approaches: an *Erie* analysis and a *Hanna* analysis. The *Hanna* analysis contemplates the Rules Enabling Act and establishes that if there is an official federal rule in play that directly conflicts with the state law, then the federal court must apply the federal rule so long as it is "arguably procedural."[103] For either judge-made federal rules or situations where there is no *direct conflict* between an official federal rule and a state rule, the *Erie* analysis expects the court to look to the *Byrd* balancing test—whether applying the federal rule will

100. *Sims*, 469 F.3d at 884–85 ("[Section] 12-420 reflects substantive state policy to the extent that drivers and passengers, while required by law to wear their seat belts, should not be penalized, through connotations of fault, beyond a small statutory fine.").
101. *Id.* at 885.
102. *Id.* at 886.
103. *See* Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

lead to forum shopping and inequitable administration of the laws, and then if respecting the state's interest would "disrupt the federal system."[104]

Thus, there are several lines of attack for a litigant to argue for the application of a state exclusionary rule in diversity. First, a party could argue that there is no direct conflict between FRE 401–403 and the state exclusionary rule of evidence because the state rule is one of substance and not procedure. Under this line of attack, the *Hanna* rule would presumably not apply because the Federal Rules of Evidence were enacted to address accuracy and not some substantive policy.[105] Instead, *Erie* would apply. Under the *Erie* line of analysis, the federal court must apply the state rule if it is sufficiently "bound up"[106] in the substantive policies of the state or "was announced as an integral part of the special relationship created by the statute" at issue substantively in the case.[107] The Rules of Decision Act and *Erie* would mandate such a result.[108] Further, implicit in *Erie* is the policy argument that Congress has no business limiting the application of state substantive tort policy in diversity cases, even if that was the intended purpose of the Federal Rules. Applying its Article III power indiscriminately in this way is contrary to notions of federalism, established precedent, and comity concerns, and potentially creates the vast problems of forum shopping that *Erie* sought to prevent.

Second, the legislative history of the Federal Rules of Evidence indicates that Congress did not intend to deprive the states of the application of their substantive rules of evidence in diversity cases. Though the Federal Rules single out some state policies for application in issues governed by state law, these should not be viewed as the extent of Congress's federalism concerns. Congress's silence in areas of substantive evidentiary rules is not indicative of its desire to preclude their application altogether. Rather, federalism concerns permeate the legislative history of the Federal

104. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 463 (1996) (citing Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958)).

105. *See infra* Part III.A; *see also* FED. R. EVID. 102, Purpose and Construction ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). One argument by the litigant here would be that, while the purpose of the federal rules is to promote the ascertainment of truth, the purpose of the state rule is some substantive policy. *See* Part I.B, at note 28.

106. *Byrd*, 356 U.S. at 535.

107. *Id.* at 536.

108. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984) (noting that under *Erie*, federal courts are "*constitutionally* obligated to decide diversity cases in accordance with the rules of decision prescribed by state law . . . [though] the obligation is limited to matters of substantive law"). Some courts have argued that the Rules of Decision Act and *Erie* itself may not apply to the Federal Rules of Evidence because the rules were enacted as a congressional act, not by the Supreme Court under the authority of the Rules Enabling Act. *See, e.g.*, Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 878–79 (10th Cir. 2006); WRIGHT, MILLER, & COOPER, *supra* note 12, § 4512. This argument will be considered as part of the question of the applicability of *Erie*. *See infra* Part III.B.

Rules of Evidence and should lead to application of the state rules consistent with this approach.

A. Substance vs. Procedure

It has been suggested that there are three objectives of evidence law: accuracy in fact-finding, minimizing the costs of error-avoidance, and an equitable apportionment of the risk of potential error.[109] These objectives tend to make evidentiary law within the realm of procedure. However, there are other substantive policies that evidence law can pursue.[110] In fact, substantive law is "bizarre" if it does not consider evidentiary principles as part of the substantive policy and standard.[111] Often these evidentiary rules associated with the substantive law could be substituted with some other economic inducement or mechanism such as raising or lowering the potential liability limits for products liability.[112] However, state lawmakers may decide that the most politically expedient course of action in tort reform, for example, is to bar the introduction of evidence instead of otherwise raising or lowering the substantive economic liability of corporations. In this way, the evidentiary nature of exclusionary rules cannot be decoupled from their substantive foundations without forfeiting their vitality. The difficulty of evidence rules in reaching this distinction is that evidentiary rules cannot stand alone; instead, they must serve to complement and facilitate the substantive law.[113]

From the beginning, *Erie* has been about the distinction between substance and procedure: state substantive rules would apply the rules of decision in federal courts except where the Constitution or laws of Congress applied.[114] Before *Erie*, the Supreme Court noted that, "Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."[115] Really, the juxtaposition between substance and procedure was only set forth in Justice Reed's concurring opinion in *Erie*, where he wrote

109. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 9 (2005).

110. *See* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1797–98 (1994).

111. STEIN, *supra* note 109, at 8 ("It would be bizarre if any substantive law that requires enforcement through adjudication were crafted in isolation from fact-finding costs and other adjudicative expenses. A substantive law policy would never be sound if it were to ignore anticipated enforcement expenses that include the costs of both fact-finding errors and their avoidance. Mechanisms reducing these costs can therefore often be found in the substantive law.").

112. *Id.* at 28.

113. *Id.* at 10–11.

114. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general' . . . .").

115. Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941). In *Sibbach*, the Court first defined procedure: "The test must be whether a rule 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. That the rules in question are such is admitted." *Id.* at 14.

with such foresight that "[t]he line between procedural and substantive law is hazy but no one doubts federal power over procedure."[116] Indeed, some have gone so far as to say that the distinction is "inherently unresolvable,"[117] or that the line between the two "is an idealization."[118] Justice Reed's words would spark decades of case law and scholarship on the meaning of *Erie*'s central holding, and equally voluminous writings on where to draw the line of demarcation between these two worlds.

One approach to the distinction that has been suggested is a nominalist approach in which a rule is procedural merely because it is called "procedural."[119] Though this approach is formalistic and circular at best, this is the approach often used by federal courts, which routinely designate rules as either substantive or procedural without sufficient (or sometimes any) explanation. [120] The inherent problem with such an approach is found exactly in Justice Reed's statements and has been borne out by the *Erie* case law.[121]

However, in the *Erie* line of cases itself, the Court has developed different paradigms of analysis for the distinction. In *Guaranty Trust Co. v. York*,[122] the Court considered whether a New York statute of limitations should apply to bar an action in diversity. Justice Frankfurter considered the substance–procedure dichotomy only to point out that the meaning of the terms can vary based on context;[123] rather, the Court fashioned an outcome-determinative approach where state rules that "significantly affect the result of a litigation" are applied.[124] Professor Solum classifies this test as "outcome determinative ex post from the point of view of the termination of the litigation."[125]

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

117. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997).

118. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 213 (2004).

119. *See id.* at 194 n.25 (2004) (criticizing the approach, Solum calls this method "institutionist formalism"); *see also* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1101–02 (1989) ("*Erie* ended the federal reign, but gave birth, probably by accident, to a jurisprudence of labels that has since haunted the federal courts. . . . Although these terms are chameleon-like, in early cases they did serve a purpose: whatever 'substantive' means, it clearly encompasses the standard of tort liability to an invitee, which was at issue in *Erie*. The ensuing fifty years, however, have demonstrated the difficulty of distinguishing substance from procedure in less clear-cut cases.").

120. *Cf.* Solum, *supra* note 118, at 194.

121. *See id.* at 195 n.31 and accompanying text.

122. Guar. Trust Co. v. York, 326 U.S. 99 (1945).

123. *See id.* at 108 ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best . . . .") (citation omitted); *see also* Solum, *supra* note 118, at 196.

124. *York*, 326 U.S. at 109.

125. Solum, *supra* note 118, at 197.

The *York* test broke down for several reasons, mainly highlighted in *Hanna*: essentially any rule can be outcome-determinative from the viewpoint of the end of the suit.[126] *Hanna*'s response was only after the Court's attempt in *Byrd v. Blue Ridge Electric Cooperative, Inc.* to determine if the state rule was sufficiently "bound up" in substance as to merit its application.[127] Though the "bound up" distinction still has some traction in modern jurisprudence,[128] the Court has not applied this as a true test of when to apply a state rule in the face of a direct conflict.[129]

With regard to the broader substance–procedure distinction, though, *Hanna* suggested a new approach that Professor Solum calls "outcome determinative ex ante from the point of view of the initiation of the action."[130] The Court fashioned a test that sought to apply rules that would significantly affect the plaintiff's choice of forum in the first place.[131] Solum criticizes this test for four reasons, first noting that the test alone cannot be sufficient to define substance and procedure.[132]

Significantly, the criticism of the *Hanna* approach is that it fails to consider that some state rules can serve both substantive and procedural purposes.[133] Indeed, the categories are not mutually exclusive.[134] Justice Harlan noted this oversimplification in his *Hanna* concurrence and instead suggested that the rules be judged by their effects on primary conduct.[135] Despite criticisms of Justice Harlan's approach,[136] his test has been in-

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

127. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958). In *Byrd*, the Court held that determinations of fact—such as whether the defendant was the plaintiff's employer—are to be decided by a jury in federal court without reference to state procedure that would allow judges to make such a determination. *Id.* at 538.

128. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 (1996).

129. Indeed, the Court implicitly rejected this test in *Hanna*. Justice Harlan (concurring in *Hanna*) seems to have preferred the "bound up in substance" distinction to the rule fashioned in *Hanna* given his view that the substantive nature of New Jersey's attorney's fees rule (to prohibit "strike suits") should have caused it to defeat any potential direct conflict with Rule 23 in *Cohen* (though he thought no conflict existed). *Hanna*, 380 U.S. at 477 (Harlan, J., concurring). Modern decisions have not gone as far as Justice Harlan would have wanted in applying state rules "bound up" in substantive policy in the face of a direct conflict with a validly enacted federal rule.

130. Solum, *supra* note 118, at 198.

131. *Hanna*, 380 U.S. at 469.

132. *See* Solum, *supra* note 118, at 199–201.

133. *Id.* at 199–200 (specifically noting that if the categories are not blurred, then the second sentence of the Rules Enabling Act—"[s]uch rules shall not abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b))—is redundant); *see also Hanna*, 380 U.S. at 471 (citing *York* for the idea that the meaning of these distinctions can change with the context).

134. *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 287 (1989); *see also* WRIGHT, MILLER & COOPER, *supra* note 12, § 4512 (noting that quasi-substantive and quasi-procedural rules are often found by the Court).

135. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

136. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 666 (5th ed. 2003) (arguing that the idea of substance is not so much whether the state rule affects people's conduct, but where the state rule "embodies a significant state policy with respect to primary conduct and its effects").

fluential.[137] Professor Solum has attempted to use Justice Harlan's approach to create an elaborate "thought experiment" which he terms "acoustic separation" of substance and procedure.[138] In such a world, he argues, the distinction would be clear because the public would only know of substantive rules, and only those in the legal world would know the rules of procedure.[139]

Though Solum suggests that his theory is not for practical application,[140] it is useful to evaluate state evidentiary exclusionary rules through his grid of acoustic separation and see where they fall. Of the three relevant legal codes that Solum identifies—the Code of Conduct (conduct rules addressed to citizens), the Code of Decision (rules which are not known by the public but attach legal consequences to violations of the Code of Conduct), and the Code of Adjudication (rules governing the dispute resolution process)[141]—state evidentiary rules of exclusion seem to fall into the Code of Decision. Rules in the Code of Decision obviously have a procedural context (because they regulate conduct in litigation and, in Solum's world of acoustic separation, are not known to the outside world), but they serve a significant substantive purpose in regulating the rights and duties under the Code of Conduct.[142]

Under this formulation, state substantive admission or exclusion rules must come under the Code of Decision.[143] Though procedural in nature, the purpose of the rules is to affect primary rights and duties found in primary law, much like statutes of limitations that have routinely been found to fall into the realm of substance.[144] For instance, *Anystate*'s rule excluding prior safety tests from litigation was clearly designed to affect litigation and the introduction of evidence; yet, it was equally designed to encourage *Company X* and others to test their equipment before production without fear of liability later arising from those test results. Thus, the rule has effects on both the primary conduct of *Company X* and on the enforcement of who should bear the cost of tort liability.

State substantive rules apply only in limited situations and are outcome determinative in the sense that their application can be evaluated ex ante. Rules within the Code of Adjudication, conversely, broadly govern the

137. *See* Solum, *supra* note 118, at 204 & n.56 (noting Judge Posner's similar approach in *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995)).
138. Solum, *supra* note 118, at 206–14.
139. *Id.* at 207.
140. *See id.* at 214.
141. *Id.* at 210–11.
142. *See id.* at 212 n.72.
143. *Cf.* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1797–1803 (1994) (noting that even rules hoping to promote accuracy have some substantive purposes).
144. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949); Guar. Trust Co. v. York, 326 U.S. 99, 110 (1945).

procedural function of the courts for any case. Solum rightly characterizes the Code of Decision as substantive rules.[145] In the end, however, these state substantive rules fall into a muddy state of either "substantive procedure"[146] or "procedural substance,"[147] and there is no real way to decide which to apply in a diversity case based on these distinctions.[148] Therefore, the procedural aspects of the rules bring them within the ambit of the *Erie* analysis.

B. Erie*'s Application to the Federal Rules of Evidence*

Perhaps the best starting point from which to consider the validity of the Federal Rules of Evidence in the face of a potentially conflicting state rule of exclusion is through the lens of the effect of state rules on the Federal Rules of Civil Procedure.[149] Indeed, this is the only real framework from the perspective of validly enacted federal rules of procedure because the Supreme Court has never addressed potential conflicts with the Federal Rules of Evidence. For rules of civil procedure, the Court has developed a multi-faceted test.[150] First, the rules must be enacted under a valid source of power.[151] The Federal Rules of Civil Procedure are presumptively valid and must be applied in the event of a direct conflict with a state rule.[152] Rules indisputably procedural clearly fit the validly enacted paradigm and "are *a priori* constitutional."[153] The Court has also found that those rules that could rationally be classified as either procedural or substantive also satisfy the validly enacted standard.[154]

In the situation at issue in this Note, however, where there is a conflict between a validly enacted federal rule and an analogous state rule, the court must first determine if there is a "direct" conflict between the two rules.[155] This question often centers on whether "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the

145. Solum, *supra* note 118, at 212.
146. *See id.* at 215–20.
147. *See id.* at 221–22.
148. *See id.* at 225 ("The upshot of our investigation is not a deconstruction of the distinction between substance and procedure. Instead, the thought experiment yields a precise analytic tool for appreciating procedural forms and functions and allows us to appreciate the ineliminable and inherent entanglement of substance and procedure. . . . [T]he real work of procedure is to provide particular action-guiding legal norms.").
149. *Cf.* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) (analogizing the *Hanna* analysis of the Federal Rules of Civil Procedure to the Federal Rules of Appellate Procedure).
150. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); Hanna v. Plumer, 380 U.S. 460 (1965).
151. *See Hanna*, 380 U.S. at 471; Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941).
152. *Burlington N. R.R. Co.*, 480 U.S. at 6.
153. *Id.* at 5.
154. *Hanna*, 380 U.S. at 472.
155. *See id.*

enforcement of state law."[156] Thus, a party could appropriately argue that though two rules seem to govern the same area of law, there is no *direct* conflict because of the breadth of application. The Court has applied a general presumption against broad interpretations of federal rules[157] and has refused to find conflicts in several situations.[158]

If the rule conflict does not fit within the situation contemplated in *Hanna*, the Court held in *Gasperini v. Center for Humanities, Inc.* that the application would proceed to an *Erie* analysis of the problem.[159] This prong of the analysis requires that the court look to the *Byrd* balancing test and *Hanna*'s interpretation of *Erie*'s aims: to eliminate forum shopping and inequitable administration of the law.[160] In *Gasperini*, the Court found no direct conflict between the New York standard of appellate review for the size of jury verdicts and Federal Rule of Civil Procedure 59(a), and proceeded to this *Erie* analysis.[161] Further, the litigant could argue that the rules do not directly conflict because the state law serves a substantive purpose and the federal rule maintains a procedural function only.

1. Absence of a Direct Conflict

The Court has placed an emphasis in its jurisprudence on downplaying direct conflicts between potentially applicable Federal Rules of Civil Procedure and applicable state laws.[162] Beginning with *Hanna*, the Court has reflected a need to interpret any federal statutes in play in conjunction with competing interests of the state in mind.[163] Though Justice Scalia dissented

156. *Id.* at 470. Note that this "breadth" argument does not necessarily lead the Court to a narrowing construction of the federal rules. Rather, "[t]he Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies." Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

157. *See* Part III.B.1.

158. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980) (failing to find a direct conflict between a state statute of limitations and FED. R. CIV. P. 3); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (applying a state statute of limitations over FED. R. CIV. P. 3 because there was no conflict between the two); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949) (finding that a state statute requiring attorney's fees in losing actions was not in conflict with FED. R CIV. P. 23).

159. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426–31 (1996).

160. *Id.*

161. *Id.* at 430–31.

162. *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, 1014 (1998) (noting this emphasis in *Gasperini*).

163. *See* FALLON, MELTZER & SHAPIRO, *supra* note 136, at 670 ("The majority in Hanna recognized, however, that federal rules and federal statutes must be interpreted by the courts applying them, and that the process of interpretation can and should reflect an awareness of legitimate state interests."); *see also* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.").

in *Gasperini* mainly on the issue of a direct conflict between the New York policy and FRCP 59(a),[164] the majority noted *Hanna*'s interpretive trend of avoiding direct conflicts to find that there was no direct conflict.[165] Justice Scalia himself failed to find a conflict between California state preclusion law and FRCP 41(b) in *Semtek International Inc. v. Lockheed Martin Corp*.[166] Though the Court in *Semtek* applied federal common law to the preclusion issue in the case (adopting the law of the state in which the district court sits, in the process), Justice Scalia took great lengths to distinguish the direct conflict between the two rules.[167]

In numerous situations, the Court has avoided finding direct conflicts between federal and state rules. The Court specifically found in *Walker v. Armco Steel Corp*. that both a state statute of limitations and FRCP 3 could co-exist without finding a direct conflict.[168] The plaintiff filed a complaint in Oklahoma federal district court three days before the lapse of Oklahoma's two-year statute of limitations. Process was not served on the defendant, however, until after the expiration of the limitations period. The parties disagreed over when a suit commences; under Oklahoma law, a suit does not commence for limitations purposes until service of the summons, but the plaintiff argued that FRCP 3 indicates that a suit commences once a complaint is filed in federal court.[169] Of note, a statute of limitations period is not explicit in FRCP 3;[170] rather, the plaintiff tried to argue that because the rule sets when a lawsuit begins, this should provide the applicable rule for when the statute is tolled. The Court refused to find that Rule 3 could be applied so broadly as to override the state's interest in establishing a statute of limitations for these actions.[171] In so holding, the Court expressly relied on the reasoning of *Ragan v. Merchants Transfer & Warehouse Co.*, a case with virtually the same set of facts.[172]

Outside of the statutes of limitations context, the Court explicitly noted in *Cohen v. Beneficial Industrial Loan Corp*.[173] that there was no direct conflict between FRCP 23[174] and a New Jersey statute that required plaintiffs in derivative actions who owned small stock interests to pay for attorneys' fees in the event of a failed action.[175] In numerous other instances,

164. *Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting).
165. *See Gasperini*, 518 U.S. at 438 n.22.
166. 531 U.S. 497 (2001).
167. *Id.* at 501–06; *see also* FALLON, MELTZER & SHAPIRO, *supra* note 136, at 671 (describing the Court's efforts to distinguish a direct conflict between the two rules).
168. *Walker*, 446 U.S. at 752.
169. *Id.* at 742–43.
170. *See* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").
171. *Walker*, 446 U.S. at 752–53.
172. *Id.* at 748 (citing Ragan v. Merchants Trans. & Warehouse Co., 337 U.S. 530 (1949)).
173. 337 U.S. 541 (1949).
174. Now FED. R. CIV. P. 23.1.
175. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949).

the Court has applied the state rule without specifically noting the absence of a direct conflict.[176]

The direct conflict test is not without teeth. The Court has found direct conflicts between official federal rules and state rules on several occasions. *Hanna* itself was premised on this result: Massachusetts's state service of process rule could not bar suit when the defendant was properly served under FRCP 4.[177] The Court noted that the two rules serve the same purposes and could not both be applied.[178] In *Burlington Northern Railroad Co. v. Woods*,[179] an Alabama rule requiring a losing defendant to pay a ten percent penalty if losing again on appeal was held not to apply in federal court because of a direct conflict with Federal Rule of Appellate Procedure 38.[180] The Court determined that FRAP 38 could be classified as procedural and found that its grant of discretionary power to judges to sanction frivolous appeals could not be reconciled with Alabama's mandatory rule.[181]

Another approach that federal courts could adopt is avoidance of finding a direct conflict between FRE 402 and state evidentiary rules of exclusion by looking to FRE 403 as an inherent limiting provision in the rules.[182] Courts could interpret potential disparate state results as a FRE 403 "unfairly prejudicial" matter and apply the more narrow state rule. This would avoid the arbitrary direct conflict test and would follow the plain interpretation of the law.[183] The inherent difficulty here, though, is that the trial court has broad discretion in fashioning its FRE 403 analysis.[184] Such discretion could continue to create disparate results among the federal and state courts within a jurisdiction. Courts that have considered

176. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

177. Hanna v. Plumer, 380 U.S. 460, 473–74 (1965).

178. *Id.* at 470.

179. 480 U.S. 1 (1987).

180. *Id.* at 8. FED. R. APP. P. 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

181. *Id.* at 7.

182. This approach is similar to that pursued by the First Circuit in *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985), cited and discussed *supra* notes 59–66 and accompanying text, used to exclude application of the state law. The Third Circuit referenced Rule 403 in *Rovegno v. Geppert Bros.*, 677 F.2d 327 (3d Cir. 1982), cited and discussed *supra* notes 71, 74–75 and accompanying text, as a means of evaluating whether the selected state exclusionary rule would be overly prejudicial. The Court found that Rule 403 did not preclude application of the Pennsylvania rule of exclusion. *Rovegno*, 677 F.2d at 329.

183. In the Advisory Committee Notes to Rule 403, one of the reasons cited for exclusion is "unfair prejudice," which is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 56 F.R.D. 183, 218. Would state policy excluding evidence for unfair prejudice not satisfy this standard?

184. *See* FED. R. EVID. 403 advisory committee's note (noting that Rule 403 requires judges to employ a balancing test). Balancing tests are inherently quite discretionary. *See* Symposium, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 752 (2002) (noting the broad discretion granted to judges in evidentiary rulings).

state policy as part of a FRE 403 balancing test have not paid much deference to the state policy.

As applied to the hypotheticals offered, this balancing approach would seem to solve the problem in favor of the state policy and would create harmonious decisions in the two jurisdictions. Consider *Anystate*'s rule excluding safety studies as evidence in negligence actions. Even if the federal court could not square this rule with the FRE 402 standard of admissibility, the application of FRE 403 could provide an out. Realizing that application of the state rule in *Anystate* courts would substantially improve a corporation's chances of a successful defense, the federal court should also recognize that the non-application of the state rule in the federal context will have an equally substantial impact in the opposite direction. If federal courts truly do value the uniformity of judgments between the federal and state fora within a particular state, then the prejudicial effect of non-application of the *Anystate* rule seems obvious. The federal court would simply add the state exclusionary rule to its balancing calculus that it must already apply under FRE 403 to all other evidence offered. This would create no undue burden in knowledge or application of law on the court because the rule of decision in such a case would already be provided by state law. However, as has been noted, federal courts would still have substantial discretion in applying a broad view of FRE 403 and ignoring the state policy. It is unclear if this application of the FRE 403 balancing test—in practice—would bring any more clarity than exists at present. It seems that decisional uniformity instead would be better achieved by following the *Erie* conflict analysis previously discussed.

2. Constitutional Limits from Erie

One of the main purposes of *Erie* was to prevent vastly different results between federal and state decisions decided under state law.[185] This was clearly seen from the beginning of the doctrine, starting with the Court's approach in *York*.[186] In holding that the New York statute of limitations must be applied to bar the litigants' suit to recover against stock notes, the Court stated that:

> When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that pur-

185. *See* Hanna v. Plumer, 380 U.S. 460, 467 (1965).
186. *See* Guar. Trust Co. v. York, 326 U.S. 99 (1945).

> pose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State *nor can it substantially affect the enforcement of the right as given by the State*.
>
> . . . .
>
> And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.[187]

Surely these statements are applicable to a state statute of limitations that positively bars recovery after a certain time period. However, such reasoning ought to also plainly apply to evidentiary rules that would substantially affect the outcome of litigation in the two fora. Admittedly, the Court has essentially abandoned the *York* outcome-determination test as a broad analytical framework creating the sole method of procedural conflicts determinations.[188] The reasoning of the *York* Court still stands applicable, though, that "[a]s to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."[189] In its most recent opinion on the *Erie* doctrine, Justice Ginsburg reasoned in exactly this way to find that federal courts should not allow for a disproportionate recovery from that which would be permitted in state court.[190]

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187. *Id.* at 108–09, 112 (emphasis added). *But see* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537–38 (1958) ("The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. . . . Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.") (citations omitted). It is important to note, however, that the outcome-determination test from *York* was one prong of the *Byrd* analysis and that the overriding interest in *Byrd* was that application of the Seventh Amendment should trump a conflicting state rule.

188. *See Hanna*, 380 U.S. at 466–67 ("'Outcome-determination' analysis was never intended to serve as a talisman.") (citing *Byrd*, 356 U.S. at 537); *see also id.* at 468 n.9 ("*Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.").

189. *York*, 326 U.S. at 110.

190. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430–31 ("Just as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." (quoting Ragan v. Merchants Trans. & Ware-

Indeed, uniformity of outcome is not the only policy sought to be furthered in *Erie*. The *Byrd* test and other possible formulations of an *Erie* outcome have propounded a balancing test of the various state and federal interests.[191] Decisions from the Court are replete with observations that the result in *Erie* was founded on principles of federalism. Justice Harlan "always regarded [*Erie*] as one of the modern cornerstones of our federalism."[192] The *York* Court did not limit *Erie* to distinctions of substance versus procedure; rather, it saw the decision as "express[ing] a policy that touches vitally the proper distribution of judicial power between State and federal courts."[193] Justice Brennan's dissent in *Boyle v. United Technologies Corp*. acknowledged that "*Erie* was deeply rooted in notions of federalism."[194] Justice Scalia reinforced the "federalism principle of *Erie*" in *Semtek* by arguing that significant differences in outcomes in various fora would lead to forum shopping.[195]

Some commentators have argued that these federalism concerns are largely misplaced in any *Erie* analysis, at least as a function of what was intended by the Rules Enabling Act.[196] Nonetheless, federalism undertones permeate the *Erie* analysis and should be considered as a major driving force of the Court's decision-making policy in determining whether to apply state or federal rules in areas where the two at least arguably do not directly conflict.

3. The Importance of Congressional Action

As has previously been noted, the Federal Rules of Evidence were enacted not by the Supreme Court under its Rules Enabling Act power, but as an act of Congress.[197] There are several important implications of this reality. First, some courts have argued that the Federal Rules are the equivalent of congressional statutes rather than "rules" as contemplated under the Enabling Act. Second, if the Rules operate as a legislative enactment, then they are subject to the tools of statutory interpretation, which would look to the relevant legislative history of the rules.

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house Co., 337 U.S. 530, 533–34 (1949))).

191. *See, e.g.*, *Byrd*, 356 U.S. 525; Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 384–400 (1977).

192. *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

193. *York*, 326 U.S. at 109.

194. Boyle v. United Techs. Corp., 487 U.S. 500, 517 (1988) (Brennan, J., dissenting). Admittedly, *Boyle* was a case implicating *Erie*'s statements on federal common law; nonetheless, Justice Brennan's assessment of *Erie*'s underpinnings is applicable in this context as well.

195. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (referencing the *Hanna* idea that federalism is part of *Erie*'s twin-aims).

196. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1187–90 (1982) (arguing that the Supreme Court's reliance on federalism principles in the *Erie* line of cases is not necessarily consistent with the original intent of the drafters of the Rules Enabling Act).

197. Pub. L. No. 93-595, 88 Stat. 1926 (1975).

It has been argued that the Federal Rules of Civil Procedure are not sufficiently analogous for comparison with the Federal Rules of Evidence, for the evidence rules were enacted not by the Supreme Court under the auspices of the Rules Enabling Act, but instead as an act of Congress.[198] Accordingly, these courts suggest that the *Hanna–Erie* line of analysis (and its focus on direct conflicts) does not apply; rather, the argument proceeds, federal courts should instead look to the test from *Stewart Organization, Inc. v. Ricoh Corp.*[199] to determine the application of a federal statute—such as the Federal Rules of Evidence—in diversity cases.[200]

Stewart involved a dispute between an Alabama corporation and a New Jersey manufacturer of copy machines. The parties' dealership agreement contained a forum selection clause that required that any dispute be heard in a New York court. The Alabama corporation nonetheless filed suit in an Alabama federal district court. When the manufacturer tried to transfer the case under 28 U.S.C. § 1404(a),[201] the district court denied the transfer because Alabama law did not look favorably upon forum selection clauses.[202] Applying the Alabama state law, then, the court ruled that the forum selection clause had no validity in Alabama and thus precluded the transfer of the case to New York. The Eleventh Circuit reversed the district court and the Supreme Court affirmed the Eleventh Circuit.[203] Eschewing an *Erie* analysis, the Court instead applied a two-part test for determining when to apply a federal statute in a diversity case. First, the court must ask whether the federal statute is "sufficiently broad to control the issue before the Court."[204] Next, the court must determine "whether the statute represents a valid exercise of Congress' authority under the Constitution."[205] The Court gave short shrift to the *Hanna* and *Walker* formulation of a "direct conflict," stating:

> [T]his language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the "direct collision" language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute. . . . It would make no sense for the supremacy of

198. *See, e.g.*, Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 879 (10th Cir. 2006). The Federal Rules of Evidence were directly enacted by Congress under Pub. L. No. 93-595, 88 Stat. 1926 (1975).
199. 487 U.S. 22 (1988).
200. *See* Sims, 469 F.3d at 877–79.
201. 28 U.S.C. § 1404(a) (2000) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").
202. *Stewart*, 487 U.S. at 24.
203. *Id.* at 25.
204. *Id.* at 26 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980)).
205. *Id.* at 27.

> federal law to wane precisely because there is no state law directly on point.[206]

Justice Scalia offered in dissent that an *Erie* analysis should come into play to prevent a general "housekeeping" measure from interfering with state contract law.[207] In his view, when a federal statute or rule is not on point or is in direct conflict with the state rule, then uniformity of the claims is the goal of the court.[208] As for the breadth of the rule in question, Justice Scalia argued that "in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."[209]

The *Stewart* decision is unique in that the Court found a direct conflict between a federal venue statute and state contract law dealing with forum selection clauses.[210] Though Justice Scalia's view seems correct in that the Court stretches to find a direct conflict between the two rules, under the *Erie* and *Byrd* balancing factors, the Court may have a point that the federal rule should control.[211] Generally, the Court's reasoning in *Stewart* seemed to rest on Congress's intent in enacting the statute.[212] If the federal venue statute was enacted to allow litigants the right to transfer any case (regardless of state laws governing forum selection clauses that could effectively trump federal policy), then this is a very valid and strong federal interest issued directly by Congress.

However, in the context of state evidentiary exclusionary rules, this *Stewart* analysis should be inapplicable. The balancing inherent in *Stewart* would have affected the federal right to transfer any case. This statute is unique because it affects *access* to the federal courts, not necessarily what happens there.[213] State exclusionary rules—though they do serve important state substantive purposes—have their effects limited to the specific litigation at hand. More directly, if Justice Scalia's view won out in *Stewart* (and no attempt is made here to assess the rightness of such a result, other than the Court's error in finding a direct conflict), any state could propound forum selection clause policy that would essentially eliminate the

206. *Id.* at 26 n.4 (citation omitted).
207. *Id.* at 37 (Scalia, J., dissenting).
208. *Id.*
209. *Id.* at 37–38.
210. *Id.* at 31 (majority opinion).
211. *But see* Freer, *supra* note 119, at 1136 (1989) (arguing that the Supreme Court has paid too little attention to state interests in cases such as *Stewart* dealing with state forum selection clause rules).
212. *Stewart*, 487 U.S. at 27 ("If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter . . . .").
213. *See* Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1938 (1991).

vitality of the transfer statute completely. The application of state evidentiary exclusionary rules, however, would simply narrow the scope of FRE 402 in *certain cases*. Instead of having broad application to *all* relevant evidence, if every state enacted a provision precluding the introduction of prior safety studies as evidence, for example, only safety studies would be exempted from the otherwise valid federal rule of relevance.

It is plain that in the context of *Stewart*, Congress "intended to reach the issue before the district court"[214]—namely the right of a litigant to transfer an action to any other court where the case may have been brought. However, it is altogether less clear that Congress's intent in enacting FRE 402 was to allow all relevant evidence without regard for any state substantive evidentiary provision notwithstanding.

Furthermore, a *Stewart* argument is hard to sell given the amendment process of the Federal Rules of Evidence. Since their inception through an act of Congress, the Rules are amended not by further legislation, but through normal Rules Enabling Act procedure.[215] Numerous rules have been amended.[216] Though, admittedly, FRE 402 is not one of these rules that has been subsequently amended (and thus is still in the original form passed by Congress), is it justifiable that federal courts should apply some federal rules strictly as acts of Congress and allow others to be questioned through an *Erie* analysis simply because they have been amended through Rules Enabling Act authority?[217] This analysis seems more burdensome for the federal court in that the court must look to each rule and determine which portions were enacted by Congress and which portions were amended outside of congressional authority in order to apply different tests to each. How would a court analyze potential substantive problems if the language was amended, leaving the rule substantively intact, yet technically enacted through the Rules Enabling Act power of the Supreme Court?

In this respect, the *Stewart* approach is simply form over substance. Technically, Congress cannot enact rules that infringe on the substantive rules of decision of the states in areas where state law should govern.[218] If

214. *Stewart*, 487 U.S. at 27.

215. *See* Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 878 n.2 (10th Cir. 2006) (noting that official congressional action is not required for amendments to the Federal Rules of Evidence after 1975, implicating a Rule Enabling Act analysis to all amended rules); Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking"*, 53 HASTINGS L.J. 843, 871 (2002) (questioning the means by which amended rules that potentially affect state substantive policy should be judged).

216. Scallen, *supra* note 215, at 855.

217. This seems to be the argument of the Tenth Circuit in *Sims*. *See Sims*, 469 F.3d at 881 n.6 (applying *Stewart* to Rule 401 because it is an unamended rule, and therefore, functions as an act of Congress).

218. *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) ("[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.") (citing *Erie*). *But see* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74

the congressional grant of power to regulate under the Rules of Decision Act is coextensive with the authority granted to the Supreme Court in the Rules Enabling Act,[219] then the *Stewart* argument fails immediately.[220]

Putting those issues to the side momentarily, amended FRE 412 of the Federal Rules of Evidence offers a useful example. When originally enacted, the "rape shield" applied only in criminal cases.[221] When the Advisory Committee sought to amend the rule to incorporate the rape shield into civil cases as well,[222] the Supreme Court refused to submit the change to Congress on the grounds that substantive rights would be affected.[223] Congress responded by simply including the Advisory Committee's draft as part of the Violent Crime Bill.[224] So Congress's action was effectual to the end of validly amending the rules, but should this distinction between congressional and court action so fundamentally affect the analysis of a rule as substantive or procedural? There is no rationale that would establish the FRE 412 amendment (or other federal rules) as less an invasion of state power through the use of procedure simply because it was enacted by Congress.

Others argue that congressional enactment should lead to a consideration of the legislative history of the passage of the federal rules as a matter of statutory construction.[225] This history does not yield any explicit statements about state interests as a part of the relevancy rules. That Congress failed to mention state interests in the relevance rules and did explicitly assert state rule application in other contexts, though, should not preclude

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NOTRE DAME L. REV. 47, 76–77 (1998) (interpreting the *Hanna* Court to say that Congress has broad authority to enact substantive law in diversity cases, provided that the law "also has some procedural implication"). The *Hanna* Court went on to say that in a system of dual sovereignty (and in light of the Necessary and Proper Clause), Congress must be afforded the power to set forth rules of procedure, which may include the overlap of some substantive rights. *Hanna*, 380 U.S. at 472. However, there is no clear power of Congress to abrogate state substantive law through rules of procedure. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.").

219. *See* Kelleher, *supra* note 218, at 77, 79; Margaret G. Stewart, *Political Federalism and Congressional Truth-Telling*, 42 CATH. U. L. REV. 511, 532–33 (1993) ("Although Congress may clearly weigh competing procedural policies as it sees fit under its power to create inferior federal courts, the limitation Congress has imposed on the Supreme Court's rulemaking power—that procedural and evidentiary rules must not displace substantive law—should be imposed on Congress as well if Congress lacks the authority to create the substantive law it displaces.") (footnote omitted).

220. In such a case, the act of Congress would be invalid. It is conceded, however, that no rule of procedure has ever been found to be unconstitutional. Scallen, *supra* note 215, at 872.

221. *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046 (1978).

222. *See* FED. R. EVID. 412(a), (b)(2), advisory committee's note (1994).

223. Scallen, *supra* note 215, at 873.

224. *Id.*; *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L No. 103-322, § 40141(b), 108 Stat. 1796, 1919 (1994).

225. *See* Edward W. Cleary, *Introduction* to FEDERAL RULES OF EVIDENCE: 2006–2007, at i, iii (2006).

a consideration of Congress's broad purpose in reformulating the federal rules after their promulgation by the Supreme Court.[226]

The history of the Rules is somewhat strained. On November 20, 1972, the Supreme Court approved a version of evidentiary rules and sent them to Congress, to be enacted unless vetoed.[227] On March 30, 1973, Congress suspended the application of the Rules.[228] Both houses debated the rules, submitted different drafts, and eventually passed a joint bill of the Rules that was signed into law on January 2, 1975, by the President.[229] Chief among the concerns raised by Congress was the substantive nature of evidentiary rules, and their infringement on the states' ability to enact substantive law in particular.[230]

Congress's usurpation of the rules proposed by the Court centered much on its desire to protect state interests that would be implicated by unique federal rules.[231] This concern is reflected no clearer than in Congress's express rejection of the proposed privilege rules in favor of FRE 501,[232] which expressly protects state privilege rules in cases decided under state law.[233] In particular, Congress wanted to protect those privileges that already existed at common law through the laws of the states.[234]

This same rationale seems to be present in Congress's modification of FRE 601 governing competency of witnesses. The original rule was to provide: "Every person is competent to be a witness except as otherwise provided in these rules."[235] Congress, however, sought to protect compe-

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226. For a compelling argument that, based on this history, the purpose of the Rules Enabling Act should serve as an interpretive tool for the Federal Rules (even as an act of Congress), see Wellborn, *supra* note 31, at 397–402. *Cf.* WRIGHT, *supra* note 24, § 93; John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 740 (1974) (noting that the Rules Enabling Act has no interpretive function as to the Federal Rules of Evidence). It is important to note that Wellborn does not argue that the Rules Enabling Act *must* apply, only that it *should* based on the legislative history of Congress's actions.

227. PAUL F. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 1 (Supp. 1975).

228. *Id.* at 4–5.

229. *Id.* at 5–9. For a more extensive history on the Rules, see 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE xxii–xxvi (Joseph P. McLaughlin ed., 2d ed. 2008).

230. *See* William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 FED. B.J. 225, 228 (1973).

231. *See* Wellborn, *supra* note 31, at 401 (arguing that "in enacting the Rules Congress sought to assure a minimum of tampering with state substantive rights," a purpose that is seen through looking at "the ontogeny of the Rules").

232. FED. R. EVID. 501 provides, in pertinent part: "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

233. *See* H. COMM. OF JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075. In the House Report, specific reference is made to *Erie* situations, where the House stated that state privilege rules apply. *Id.* at 7082.

234. *Id.* at 7082–83.

235. *Id.* at 7083; ROTHSTEIN, *supra* note 229, at 9.

tency statutes that had been previously enacted by states and "represent State policy which should not be overturned in the absence of a compelling federal interest."[236] Apparently, a uniform rule of witness competency for all federal courts was not a compelling enough federal interest to displace these rules, which the Advisory Committee even noted had virtually all but ceased, save state Dead Man's Acts.[237]

If Congress sought to protect these state interests that had arguably nearly ceased to exist, there seems little left to impute onto FRE 401–403 in terms of Congressional intent to protect principles of federalism and the substantive interests of the states. The inherent nature of rules of relevancy—that any piece of evidence offered must look to the substantive law to find its relevance moorings—makes it curious that neither FRE 401 nor 402 mention state substantive law. FRE 402 does, however, expressly limit the application of "[a]ll relevant evidence is admissible" by providing exceptions from various substantive law.[238] The Advisory Committee Notes further provide that relevant evidence may be excluded based on "constitutional considerations."[239] In cases where the governing substantive law is that of the state, a relevant "constitutional consideration" would be principles of comity and federalism embodied by *Erie*. If FRE 402 is limited by the substantive law, then state substantive law should limit its application in the situations where state law governs.[240] Accordingly, courts should give much deference to state substantive rules of exclusion in any analysis of relevance and should apply these rules, even in the face of a broad federal rule of inclusion.

CONCLUSION

Competing principles of federalism and the supremacy of federal rulemaking authority combine to form an antinomy in the United States' form of government that the law must hold in tension. Likewise is this age-old juxtapositional notion of substance and procedure that often creates a dis-

236. ROTHSTEIN, *supra* note 229, at 9.

237. *See* FED. R. EVID. 601 advisory committee's notes. Finally, the Rules also specifically contemplate *Erie* and state law concerns in the effect of presumptions in civil actions where state law is the rule of decision. FED. R. EVID. 302; *see also* FED. R. EVID. 302 advisory committee's notes.

238. FED. R. EVID. 402. The substantive law provided as the exceptions to the rule that all relevant evidence is admissible are "the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court."

239. FED. R. EVID. 402 advisory committee's notes. The Committee notes: "The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence." *Id.*

240. *Cf.* United States v. Jacobs, 547 F.2d 772, 777 (2d Cir. 1976) (criticizing the government's "*extreme* position that by Rule 402 . . . relevant evidence is to be excluded solely in those cases where exclusion is required 'by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority'" (quoting FED. R. EVID. 402)) (emphasis added).

tinction frequently without merits within courts' decisional framework. The lines blur together to form an amorphous doctrine of simply "what feels like" procedure or substance.

If notions of federalism and the power of the states to craft substantive law are to be valued, federal courts must apply state substantive rules of admission and exclusion in cases where state law supplies the rule of decision. Notwithstanding arguments that the typical panoply of interpretive tools mandating this result—the Rules of Decision Act, the Rules Enabling Act, and *Erie Railroad Co. v. Tompkins*—are inapplicable because of the Federal Rules of Evidence's mode of enactment, federal courts should reject formalistic distinctions and apply state substantive policy.

This end can be furthered in two ways. Potentially the least disruptive route, the courts could look to FRE 403 and add state substantive policy as part of its balancing test. Discretion of the courts in applying the balancing test has proved problematic in terms of formulating consistent results. Rather than give state policy mere lip-service as part of the discretionary test, though, courts should look to potential disparate decisions in the state and federal court systems to weigh heavily in favor of applying the state rule.

Perhaps the more sweeping approach, however, involves federal courts' application of the law with an eye towards the practical effects of ignoring state substantive rules of admission and exclusion. Weighing these effects in lieu of attention to arbitrary distinctions of substance and procedure would further harmonize these competing values. When faced with a potential conflict between a state and federal rule, lower courts should look to the Supreme Court's desire to avoid potential conflicts by either narrowing the federal rule (within its plain definition) or by finding two distinct spheres of application of the two rules. Once a direct conflict is avoided, the court's analytical road should be rather simple: if the state rule was enacted within a broader policy-driven framework or has substantive impacts on state policy—and the twin-aims of *Erie* are undermined without its application—then the court should apply the state rule of exclusion. As demonstrated, this is not a difficult analysis or one that is overly burdensome on a court that is already considering state law for its rule of decision. Such a result is consistent with the twin-aims of *Erie* because it expressly curtails the inequitable results of differing state and federal court judgments and would discourage forum shopping to circumvent state rules of exclusion. Furthermore, it upholds the constitutional value of federalism by championing state policy.

The efficacy of these various approaches is still an unknown. What is known, though, is that forum shopping is alive and well in the current system whereby federal courts can ignore state substantive rules of evidence. To value federalism and give true credence to the twin-aims of the *Erie* doctrine—disincentivizing litigants' opportunistic behavior of choosing an inherently more favorable forum ex ante based on court nuances—

federal courts must understand state substantive rules of admission or exclusion, dispense with arbitrary definitional distinctions, and apply these rules in cases where they would plainly apply in state court.

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