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**Erie and Court Access**

Allan R. Stein†

* INTRODUCTION *

"It looks like we'll be doing a lot of business in Texas," my brother predicted. The Supreme Court of Texas had just held that forum non conveniens¹ had been abolished by a 1913 statute providing that a large class of foreign and out-of-state personal injury claims "may be brought in the courts of this state."² If a defendant is subject to personal jurisdiction in Texas, the Texas courts are now without authority to dismiss the claim, regardless of its lack of connection with the state.

My brother, a litigator at a Washington, D.C. law firm, was somewhat ambivalent. On the one hand, after *Alfaro* his corporate clients doing business in Texas would be subjected to Texas litigation for virtually any personal injury claims arising in or outside of the United States,³ and Texas juries are not

† Associate Professor, Rutgers Law School-Camden. I would like to thank Jack Balkin, Lea Brilmayer, Stephen Burbank, Roger Clark, Roger Dennis, Jay Feinman, David Frankford, Steve Friedell, Nina Gussack, Peter Hay, Aviva Orenstein, Martin Redish, Patrick Ryan, Linda Silberman, and Robert Williams for their helpful comments and suggestions. Research assistance was provided by D. Matthew Jameson, Joseph O'Malley, Gregory Puff, Mary Stevens, and Jean Warrick. An earlier version of this paper was presented to the AALS Conflict of Laws Workshop, held in Washington, D.C. in July 1988.

¹. Forum non conveniens is the discretionary power of a court to dismiss when the court determines that there is a more suitable alternative forum in another judicial system. See generally Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Stein, *Forum Non Conveniens and the Redundancy of Court Access Doctrine*, 153 U. PA. L. REV. 781 (1985).


(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

1. a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

2. the action is begun in this state within the time provided by the laws of this state for beginning the action; and

3. in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens. . . .

The Texas high court held that the language "may be enforced" constituted a legislative abrogation of the forum non conveniens doctrine.

³. One potentially important limitation on the impact of *Alfaro* is the meaning of the requirement that the plaintiff's home country have "equal treaty rights with the United States on behalf of its citizens." *TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(3)* (Vernon 1986). There is no legislative history on the meaning of that phrase. The United States does have treaties with numerous countries guaranteeing free access to American courts, although most were entered into well after enactment of the Texas statute. See, e.g., Treaty
known for their pro-defendant sympathies. On the other hand, the fajitas are terrific.

However, the actual burden of Alfaro on out-of-state defendants will turn on a question not addressed by the Texas court, but one that must be foremost in the minds of the federal bar there: To what extent are the federal courts sitting in Texas bound by the state statute abrogating forum non conveniens? If the courts follow the lead of virtually every relevant precedent, they will hold that control of the federal docket is a matter of federal law, and that federal courts are therefore free to issue forum non conveniens dismissals. The battle ground will then shift to attempts to defeat removal. If, instead, the federal


This issue was raised in connection with a 1988 Texas state court proceeding brought on behalf of victims of the Bhopal chemical disaster. Soni v. Union Carbide Corp., No. B0121, slip op. at 140 (Jefferson County, Tex. Dist. Ct. Oct. 17, 1988). Unlike Costa Rica, India has no treaty with the United States expressly guaranteeing access to courts. In Soni, the plaintiff asserted that since the common law tradition was to entertain transient causes of action brought by foreigners, the equal treaty rights provision should only permit forum non conveniens dismissals against citizens of common law countries where a treaty expressly barred court access. See Plaintiffs' Response to Defendant's Motion to Dismiss the Complaint on Grounds of Forum Non Conveniens at 13-14, Soni v. Union Carbide Corp., No. B0121 (Jefferson County, Tex. Dist. Ct. Oct. 17, 1988). The court granted the defendant's forum non conveniens motion without stating whether or not its decision was based on the equal treaty right provision or on an interpretation of the open-courts statute at odds with Alfaro.

4. See, e.g., Pennzoil v. Texaco, 481 U.S. 1 (1987) (precluding federal injunction against enforcement of $11.1 billion state court verdict). Justice Gonzales of the Texas Supreme Court cited in his Alfaro dissent a report in the Houston Post of a Texas attorney who solicited lawsuits with the promise that victims of a Scottish oil rig accident "had a good chance of trying their cases in Texas where awards would be much higher than elsewhere." Alfaro, 786 S.W.2d at 690 & n.2 (Gonzalez, J., dissenting). See generally Note, Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno, 6 FORDHAM INT'L L.J. 577, 590-91 (1973). As Costa Rica, the Alfaro plaintiffs' home country, had such a treaty, the Texas court did not need to construe the phrase.


6. See, e.g., Nolan v. Boeing Co., 919 F.2d 1058, 1068 n.11 (5th Cir. 1990), cert. denied, 111 S. Ct. 1587 (1991); In Re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987), cert. denied, 486 U.S. 1054 (1988), vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez, 109 S. Ct. 1928 (1989); Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985); Jeha, 751 F. Supp. at 125; see also 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, at 293-94 (2d ed. 1986) ("Although the Supreme Court has repeatedly found that it did not need to decide whether state notions of forum non conveniens were binding on a federal court in a diversity action, it seems quite clear that they ought not to be and that these are matters of the administration of the federal courts, not rules of decision, so that state rules cannot be controlling."). But see Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945) (district court should have dismissed action pursuant to New York internal corporate affairs doctrine). The Supreme Court has expressly reserved the Erie question each time it has addressed the operation of forum non conveniens in the federal system. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 & n.13 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

7. The fercity of the battle over removal of claims filed in states without forum non conveniens is demonstrated by Nolan, 919 F.2d 1058. The plaintiffs there filed in Louisiana state court notwithstanding the lack of significant forum connections with any of the parties or the controversy, an air crash in England. Louisiana is one of several states to have substantially limited the use of forum non conveniens. Plaintiffs
courts are persuaded by this Article, my brother may well get his fill of Tex-Mex cuisine.

No problem has confounded both procedure scholars and courts more than the issue of how access to the federal courts ought to be affected by state court-access practice. Eight Supreme Court decisions have grappled with different aspects of the problem, and reference to the issue appears to be obligatory in any 

By “court access,” I refer to the doctrines that affect only the venue of litigation. The issue is whether to entertain the case in a particular court, and the decision is, at least formally, without prejudice to litigation of the claim elsewhere. Thus “court access” implicates aspects of personal jurisdiction, capacity, statutory venue, forum non conveniens, transfer, and some types of statute of limitations rulings. Problems in choosing between state and federal

appointed nondiverse administrators for the sole purpose of preventing removal, which would have guaranteed trial in Louisiana. Defendants ingeniously countered by impleading a third-party corporation owned by the French government. The French defendant was then permitted to remove the entire case pursuant to 28 U.S.C. § 1441(d) (1988), a special removal provision available only to sovereign defendants. The federal court proceeded to dismiss on forum non conveniens grounds, holding that state forum non conveniens law was inapplicable to federal practice. 919 F.2d at 1061-68.


9. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Unless otherwise stated, reference to “Erie” or the “Erie doctrine” herein refers generically to the problem of choosing between federal or state law in the federal courts. As discussed below, that law encompasses numerous post-Erie cases as well as several statutory texts, notably the Rules of Decision Act. 28 U.S.C. § 1652 (1988); see infra notes 27-60 and accompanying text.

10. See FED. R. CIV. P. 41(b) (treating dismissals for lack of jurisdiction, improper service, and venue as judgments not “on the merits”); see also Parsons v. Chesapeake & O.R.R., 375 U.S. 71 (1963) (state court forum non conveniens dismissal does not require transfer from district court sitting in state); Mizokami Bros. v. Mobay Chem. Corp., 660 F.2d 712 (8th Cir. 1981) (District of Arizona forum non conveniens dismissal of identical case does not preclude assertion of jurisdiction by Western District of Missouri); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 (1969) (judgments not on the merits recognized only as to issues actually decided).

11. The effect of a statute of limitations dismissal on maintenance of the claim elsewhere is not entirely clear. The general rule seems to be that dismissal will bar litigation “in the same judicial system” but not in “a different system of courts,” unless the second forum would apply the same statute of limitations applied in the first proceeding. See 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 6, § 4441, at 366; RESTATEMENT (SECOND) OF JUDGMENTS § 19(f) (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 comment b (1969).

The application of that rule in diversity is awkward, particularly when both proceedings are federal. See C. WRIGHT, A. MILLER & E. COOPER, supra note 6, § 4472. In one sense the claims have been brought “in the same judicial system,” the predicate for preclusion. However, a federal dismissal on the merits of claims cognizable in state court would appear inconsistent with the basic obligation to apply state substantive law. Nonetheless, most courts seem to hold that the res judicata effect of a federal dismissal in federal court is a matter of federal law, and do not allow relitigation of claims dismissed on statute of limitations grounds. See, e.g., Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc., 870 F.2d 1044 (5th Cir. 1989); PRC Harris, Inc. v. Boeing Co., 545 F. Supp. 438 (S.D.N.Y. 1982), rev'd on other grounds, 700 F.2d 894 (2d Cir. 1983). But see Atkins v. Schmutz Mfg. Co., 435 F.2d 327 (4th Cir. 1970) (while holding that tolling
court-access law arise when application of federal law is not expressly authorized by statute.

I contend here that courts have misperceived the *Erie* implications of court-access problems. Virtually no federal court has considered itself bound by state doctrines providing greater court access than would be granted by federal law, and federal respect for restrictive state court-access provisions is erratic. This is, I suggest, a consequence of both judicial misunderstanding of the nature of the obligation to apply state law and of the function of court-access doctrines.

Court-access issues are a class of problems distinct both from "substantive" rulings "on the merits," such as res judicata or failure to state a claim, and from technical, "procedural" rulings without prejudice to refiling in the same court, such as pleading or service deficiencies. Changes in venue may affect choice of law, the identity and relative sympathy of the court, and the relative burden and expense of the litigation. Court-access decisions thus can have enormous impact on the litigants even though they may not necessarily affect the underlying claim.

This hybrid nature of the rulings helps to explain why federal courts have had such a hard time resolving court-access questions. Existing *Erie* doctrine—the set of legal principles that has evolved to resolve the choice between applying state or federal law in federal court—is dominated by considerations of litigant equality. The rough focus of the inquiry is whether a federal court's deviation from state law would bestow significant "substantive" advantages on a litigant as compared to how that litigant would fare in the state courts. If so, federal nonconformity with state practice is said to create unacceptable inequities. Thus, the court-access problem is in part a problem of evaluating the potential impact of the court-access ruling on the underlying claim. In the Court's parlance, is venue—the location and identity of the judicial authority—sufficiently "outcome determinative" to fall within the prohibited category

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5. Hanna v. Plumer, 380 U.S. 460 (1965) (sole test of obligation to apply state law is whether federal rule would make important difference to character or result of litigation so as to constitute discrimination against citizens of forum or induce forum shopping).
of "substantive" federal common law? The common-sense answer would seem to be, who knows? Case law reflects this indeterminacy. Indeed, in a single case, the Supreme Court suggested that the outcome-determinative impact of the identity of trier of fact militates in favor of federal conformity while at the same time questioning whether there was even "a strong possibility" that outcome would be affected.

But there is an additional dimension to court-access problems that seems to send the doctrine into a recursive loop. That dimension is that the underlying federal jurisdiction is itself a court-access doctrine. If invocation of federal jurisdiction means anything, it is that the litigants will not have access to state courts, and will have access to the federal courts. Therefore, the requirement that federal litigants have access "equal" to that afforded state litigants is nonsensical. The federal courts can mimic state courts in many ways, but the one thing they cannot do is provide or deny access to the same tribunal. The presence of federal jurisdiction divests the state of control over access to its courts. There is no way to provide absolute parity.

This dilemma is replicated in the courts' inability to discern the outcome-determinative impact of court-access decisions. If diverting the case to a different forum affects outcome, and affecting outcome is wrong, then there is no way that the federal court can do the right thing since whether or not the court diverts the case to another forum, it has already diverted it from the state forum. The court must thus choose between concluding that choice of forum is never outcome determinative, in which case the raison d'être of federal jurisdiction is called into question, and finding that choice of forum is out-

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15. Id. at 468. The restrictions on the development of federal common law in Erie, as well as its progeny, all focus on the relatively narrow issue of whether federal common law may be developed as an incidence of federal jurisdiction alone. In that context, the more that a judicial decision affects substantive rights and does not merely regulate judicial procedure, the more suspect it becomes. However, Erie did not purport to limit the development of federal common law based on a federal substantive interest outside of Article III. While the limits on that "substantive" common law are not without controversy, most scholars concede far greater power for federal courts to develop true substantive common law than common law justified solely by the existence of federal jurisdiction. See, e.g., Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881 (1986); Weinberg, Federal Common Law, 83 NW. U.L. REV. 805 (1989). But see Burbank, supra note 11, at 755-62; Redish, Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective, 83 NW. U.L. REV. 761 (1989) (both arguing for application of Rules of Decision Act to substantive common law).

16. See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) ("were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow state practice [of trying certain issues before a judge rather than jury]"); id. at 539 (no reason to suppose that nonconformity with state practice affects outcome with certainty or "even a strong possibility").

17. There are, of course, two dimensions to the diversion of litigation: geographic and sovereign. Federal adjudication, per se, diverts the litigation from the control of the state sovereign, but can maintain, to a large extent, geographic conformity with state practice (the principal exception being where the federal district court is not located in close proximity to the state trial court). Accordingly, any attempt by the federal courts to provide parity with state court-access policy necessarily forecloses conformity with the sovereign dimension of the state rule. True parity is attainable only if the state access rule is designed to ensure a particular geographic venue without regard to the sovereign dimension.

18. Presumably, the primary purpose of federal jurisdiction is to "affect outcome" in some sense. If state courts were thought to reach the same result as federal courts, there would be little reason to have
come determinative, thereby rendering any parity between state and federal court illusory.

This dilemma leads to two additional problems. The first is definitional. Assuming the importance of treating state and federal litigants equally, how is that objective best realized given the impossibility of absolute equality? If a state court would not entertain jurisdiction and sends the case to a different forum, are federal litigants, already in a different forum, treated "equally" by being diverted to yet another forum? Is it "equal" to transfer the case to a different district in the same federal judicial system when the parallel state court-access practice subjects litigants to a different state's judicial authority?

The second problem concerns the propriety of attempting to maintain access equality altogether. Does conformity with state access requirements so undermine the essence of federal jurisdiction as to justify abandonment of the equality ideal? A state practice that closes the federal door seems to frustrate the underlying jurisdictional mandate. But here too is a paradox: nonconformity with state court-access policy also undermines the federal jurisdictional purpose. Federal nonconformity destroys concurrent state and federal jurisdiction. If federal courts deviate from state court-access policy, there will be only one forum in that state, either state or federal, where the action may be maintained. In that case, the purpose of federal jurisdiction in diversity, maintenance of an unbiased alternative forum, drops out.

It is my suggestion in this Article that the dilemmas generated by court-access issues are not an inherent consequence of the problem, but of the solution. These dilemmas are, I suggest, largely attributable to two fundamental mistakes that have traditionally been made in thinking about Erie problems. The

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3. See Ziady v. Curley, 396 F.2d 873, 875 (4th Cir. 1968) ("One of the principal purposes of diversity jurisdiction was to give a citizen of one state access to an unbiased court to protect him from parochialism if he was forced into litigation in another state in which he was a stranger and of which his opponent was a citizen."). In cases in which the state courts would deny access, there would appear to be little justification for a federal diversity adjudication if the only purpose of diversity jurisdiction is to avoid subjecting the litigants to a potentially biased state forum. Conversely, where the state courts provide access, a federal denial of access can relegate the litigants to the state courts. In such cases, a plaintiff wanting to litigate in that state will file in state court to avoid a dismissal or transfer in federal court. In that event, in-state defendants will lack the power to remove. See 28 U.S.C. § 1441(b) (1988) (civil actions not based on federal question jurisdiction removable only if no defendant is citizen of the forum state).
first is a mistaken belief that litigant equality is a meaningful value that should be advanced by creating state and federal parity. Whatever deference is appropriately paid by the federal courts to the states pursuant to the *Erie* doctrine arises from the demands of federalism. Equality is a side effect, and not a terribly meaningful one at that. Abandonment of equality as the driving force behind *Erie* problems jettisons outcome determination, one of the major sources of the doctrinal incoherence.

Second, the appropriate allocation of authority in a federal union cannot be made by reference to the substance-procedure distinction. To the extent that respect for state autonomy is important to preserve through federal judicial conformity with state law, that autonomy is just as easily undermined by independent federal procedure as it is by independent federal substantive law. The appropriate inquiry, I suggest, is not how state law is categorized, but whether the policies driving the state law are undermined by federal nonconformity. To the extent that we deem it appropriate for federal courts to respect regulatory preferences in the context of "substantive" rules, it would seem incumbent on a federal court to consider whether a given state access rule implicates a comparable value that will be frustrated by federal departure from that rule. The federalism principle underlying the *Erie* doctrine ought to engender as much respect for state preferences about the private, social, and political costs of litigation as it does for state preferences about the private, social, and political costs of substantive liability.

This is not to say that all court-access rules equally implicate state prerogatives protected by *Erie*, or that there cannot be a paramount federal interest in regulating court access in specific cases. However, a more sophisticated analysis than has been employed to date is necessary to distinguish between the different varieties of court-access problems, and to recognize the consequences of those problems for the federal system.

If *Erie* problems are reconceptualized as problems of federalism rather than as problems of equality, court-access issues are quickly demystified. While the resolution of these issues remains a complex matter, they no longer appear insoluble.

## I. THE LEGAL FRAMEWORK

The task of reconstructing *Erie* doctrine to resolve court-access problems has been greatly aided by the insights of three articles, authored respectively by Professor John Ely, who demonstrated that the *Erie* doctrine is in fact three

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22. As discussed below, by "federalism" I mean federal respect for the sovereign prerogatives of the state governments and the avoidance of undue federal usurpation of those prerogatives.

separate doctrines;\textsuperscript{24} Westen and Lehman, who, in contrast, demonstrated that most \textit{Erie} problems are fundamentally similar questions about congressional intent;\textsuperscript{25} and Redish and Phillips, who demonstrated the failure of prior approaches to recognize the centrality of federalism to the Rules of Decision Act.\textsuperscript{26} Despite the fact that all of these scholars disagree with one another in some fundamental ways, a coherent integration of their insights is nevertheless possible and provides an essential starting point for a proper resolution of any \textit{Erie} question.

A. \textbf{Critique of the Substance-Procedure Dichotomy in Current \textit{Erie} Doctrine}

As Professor Ely persuasively demonstrated, the \textit{Erie} doctrine is a product of three separate doctrines, and some form of the substance-procedure dichotomy is central to each.\textsuperscript{27} First, there is some constitutional obligation to apply

\begin{footnotesize}

The use of the substance-procedure dichotomy to distinguish between "foreign" substantive law that should be followed and the forum's "procedural" law, which always controls, has its origin in conflicts of laws methodology. Gelfand \& Abrams, \textit{Putting Erie on the Right Track}, 49 U. PITT. L. REV. 937, 962 (1988); Hill, \textit{The Erie Doctrine and the Constitution} (pt. 2), 53 NW. U.L. REV. 541, 574-79 (1958). \textit{See generally} Risinger, "Substance" and "Procedure" Revisited, 30 UCLA L. REV. 189 (1982). It may be that my critique of the dichotomy in the \textit{Erie} context has some relevance to the interstate use of the doctrine. However, even if the dichotomy has some validity as a conflicts device, its use in the \textit{Erie} context is distinguishable.

Ideally, when one state applies the law of another state, it would apply not only the "substantive law" but the procedural law as well, since procedural laws may advance the foreign sovereign's policy interests as directly as its substantive law. However, procedural conformity in the interstate context is impractical since it calls upon the forum to reconstitute itself as whatever foreign tribunal provides the substantive law. The forum may not only lack the expertise and resources to mimic the particular practice in question, but such conformity would be highly disruptive of the court's adopted practice. In Professor Hill's terms, the substance-procedure dichotomy in interstate conflicts represents an imperfect balance between respect for the other sovereign and disruption of the forum's own practice. \textit{See generally} Hill, \textit{supra}.

That balance may come out differently in the \textit{Erie} context. Obviously, federal conformity to the forum-state practice presents far fewer practical difficulties since federal trial courts develop an intimate expertise with the forum's law in general. \textit{See} Gelfand \& Abrams, \textit{supra}, at 963. Moreover, interstate procedural conformity would arguably undermine the forum's jurisdictional claim over the case in a way not relevant to the \textit{Erie} context. When a state has accepted jurisdiction over a foreign claim, it asserts its sovereign interest in resolving the controversy, notwithstanding its application of foreign law. \textit{See} Stein, \textit{Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction}, 65 TEX. L. REV. 689, 745-47 (1987). The territorial contacts with the forum that predicate the assertion of jurisdiction give the forum the authority to resolve the controversy in its courts, with its judicial authority and practice. \textit{Id}. Its assertion of jurisdiction, to some extent, purposefully excludes the foreign sovereign's control over the litigation. To the extent that foreign prerogatives are respected it is only because of "comity." Even when foreign law is applied, the forum state is still vindicating a regulatory interest in the underlying claim. Indeed, when that regulatory interest is completely absent, the forum's constitutional authority to adjudicate may be in question. \textit{See infra} note 182.

The federal sovereign's claim to the adjudication of the lawsuit versus the state's is different. It is in no sense a territorial hegemony. Its purpose in accepting jurisdiction is to exclude state control in a much
state law in the absence of federal power under the Constitution. When applied in this context, the substance-procedure dichotomy defines the kinds of residual authority under Article III and the necessary and proper clause to make procedural law incident to the establishment of the federal courts. There are, in addition, two statutory restrictions on the power of the federal courts to make federal law. The Rules of Decision Act directs the federal courts, unless otherwise authorized, to defer to state law "in cases where it applies." In this context the substance-procedure dichotomy has been used as a shorthand for respecting the regulatory prerogatives of the states and for avoiding inequitable treatment of litigants. Finally, the Rules Enabling Act restricts the authority of the Supreme Court to promulgate Rules of Civil Procedure that "abridge, enlarge, or modify" substantive rights. The substance-procedure dichotomy in this context defines the scope of the Court's rulemaking authority.

The level of deference to state law demanded by Erie will vary according to the source of the conflicting federal law. While there is some disagreement, it appears that where a federal law is authorized either by statute or constitutional authority other than Article III, little or no deference to state law

more limited sense, and its duty to apply state law is not optional. The federal "sovereign" interest, at least in diversity, is satisfied by eliminating potential local bias. It has no other regulatory interest as federal sovereign in the underlying claim. Consistent with that limited interest, the federal courts are under a legislative mandate in the Rules of Decision Act to minimize their disruption of state regulatory prerogatives. See, e.g., Ely, supra note 13, at 696; Field, supra note 15, at 952. Others have asserted that there is a core or enclave of state authority protected by the Constitution. See, e.g., Gelfand & Abrams, supra note 27.

29. There are, of course, many other sources of federal lawmakersing authority in the Constitution. It is in the absence of those other sources of authority that a federal court must rely on its residual power to make law defining the form of the judicial authority contemplated by Article III. It is only when federal law, either statutory or common, is based solely on Article III that choice of federal or state law problems arise. Cf. Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 VA. L. REV. 1305, 1320-22 (1985) (questioning authority of Congress to promulgate Federal Arbitration Act solely as exercise of Article III power). When federal law is based on some other constitutional authority, the supremacy clause obviates any differences between state and federal law by preempting inconsistent state law, even in state courts. Field, supra note 15, at 956; Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 404 (1964).


32. 28 U.S.C. § 2072(b) (1988). The Rules Enabling Act also implicitly uses the substance and procedure categories in two other contexts: only rules of "practice and procedure" are authorized by the first sentence of the Act, and the "supercession" provision of the Act makes "such rules" preemptive of any conflicting law. Id.

33. The policies advanced by the dichotomy here are less clear. While the limitation has been traditionally assumed to advance the same kind of federalism concerns driving the Rules of Decision Act, recent scholarship suggests that the limitation in the Rules Enabling Act represents a separation of powers concern. Congress did not want the court assuming "legislative" authority under the guise of its rulemaking power, and expressed this concern by limiting the Court's "substantive" rulemaking authority. See Burbank, The Rules Enabling Act of 1934, 130 U. PA. L. REV. 1015 (1982); Carrington, supra note 27, at 607 (Rules of Civil Procedure that create "rights bearing on behavior external to the court" would undermine separation of powers principle that courts should make law only in context of deciding cases and controversies).

34. See, e.g., Gelfand & Abrams, supra note 27.
is required. After some vacillation, the Supreme Court now seems persuaded that there are few or no "enclaves" of state regulatory prerogative immune from federal regulation.\textsuperscript{35} Congress can create or authorize judicial creation of substantive or procedural law displacing contrary state law provided that the law is within the scope of the legislative powers enumerated in the federal Constitution, and it does not conflict with any other constitutional restriction.

Most court-access provisions would seem to fall easily within congressional power to create federal courts and regulate their jurisdiction pursuant to Article III and the necessary and proper clause.\textsuperscript{36} Accordingly, where there has been congressional authorization, implicit or explicit, for the federal court-access practice, it is probably constitutional.

Federal Rules of Civil Procedure that displace other substantive laws, state or federal, are more problematic given the restriction of the Rules Enabling Act.\textsuperscript{37} While recent scholarship, particularly Professor Stephen Burbank's,\textsuperscript{38} has urged greater scrutiny of the Rules, the courts appear satisfied with any Rule of Civil Procedure that is "arguably procedural" even if it affects a substantive right.\textsuperscript{39} Any possible frustration of congressional intent behind the Enabling Act restriction is mitigated by implicit congressional ratification of all new Rules, which do not take effect until at least seven months after being sent to Congress.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{36} Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988). ("The constitutional authority of Congress to enact section 1404(a) is not subject to serious question.").
\item \textsuperscript{37} 28 U.S.C. § 2072(b) (1988) provides in relevant part: "Such rules shall not abridge, enlarge or modify any substantive right."
\item \textsuperscript{38} Burbank, \textit{supra} note 33.
\item \textsuperscript{40} See Burlington N.R.R. v. Woods, 480 U.S. at 6:
\begin{quote}
The study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints.
\end{quote}
\textit{See also} 28 U.S.C. § 2074 (1988), which provides in relevant part:
\begin{quote}
(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.
\end{quote}
A 1985 amendment to the statute, H.R. 3550, replaced the prior 90-day "layover" period with a new seven-month provision specifically to ensure that Congress would have adequate opportunity to intervene and to bring the "layover" period for Rules of Civil Procedure into conformity with other rules. H.R. REP. No. 99-422, 99th Cong., 1st Sess. 1, 26-27 (1985).
Court access is not, by and large, affected by the Rules. To the extent that the Rules affect access to federal courts, they principally control issues of how or when a litigant may assert a claim, or who the proper person is to bring the claim. The Rules do not have much impact on where a claim may be brought. The principal exception is Rule 4(f), which limits the reach of a federal court's process to the territorial limits of the state, or beyond the state only as provided by state or other federal law. The validity of that limit has been upheld on the rather specious ground that the Rule only affects the manner of service, not the jurisdiction of the court. In fact, the Rule seems to be the principal obstacle to expansion of federal personal jurisdiction beyond state assertions of jurisdiction.

The most problematic conflicts between federal and state court-access provisions arise in the context of federal common law access doctrines, which are subject to the mandate in the Rules of Decision Act to apply state law unless otherwise authorized. By "common law," I refer not only to doctrines such as forum non conveniens that are made out of whole judicial cloth but any judicial decision resulting in a conflict with state law where the disregard of the state provision is not clearly authorized by federal statute. In this sense, application of numerous statutory court-access rules, such as those governing transfer or venue are, at least in part, subject to the Rules of Decision.

41. FED. R. CIV. P. 4(a).
42. FED. R. CIV. P. 15(c).
43. FED. R. CIV. P. 17(b).
44. There are no express jurisdictional provisions in the Rules. Rule 4(e), which governs service of process, provides that the court should follow state procedures for out-of-state process. Both the venue and transfer provisions are statutory, 28 U.S.C. §§ 1391, 1404, 1406 (1988), and are not addressed by the Rules, except in reference to how any such objections should be raised. Accordingly, the primary conflict between the Federal Rules and state practice is in regard to how one invokes the judicial process, not whether that process is available.
45. But see proposed amendments to FED. R. CIV. P. 4(k)(2), which would create nationwide personal jurisdiction for federal question cases in which the defendant is not subject to general jurisdiction in any state; PROPOSED AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE, Rule 4(k)(2), transmitted by the Judicial Conference of the United States to the Supreme Court of the United States on Nov. 19, 1990, reprinted in WEST'S FEDERAL RULES OF CIVIL PROCEDURE (1991-92 Educational ed.), at 23 [hereinafter PROPOSED AMENDMENT]. See generally Note, Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4, 64 N.Y.U. L. REV. 1117 (1989) (discussing implications of earlier draft of amendment providing nationwide service of process in all federal question cases). The only provisions of the current Rule 4 that provide a potentially greater jurisdictional reach than that available in state court are for service on an impleaded or necessary party, on whom service may be made within 100 miles of the federal court regardless of the party's amenability to state jurisdiction. FED. R. CIV. P. 4(f).
47. See Omni Capital Int'l v. Rudolph Wolff & Co., 484 U.S. 97 (1987) (foreclosing service of process on defendant in Commodity Exchange Act action where Act did not so provide and defendant was beyond reach of state process).
48. See generally Stein, supra note 1, at 795-822 (tracing modern development of forum non conveniens doctrine).
49. See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (Rule 3 provision that action commences upon filing of complaint does not control issue of whether action filed within statute of limitations period). But see Westen & Lehman, supra note 25 (arguing that all common law adjudication is in some sense implicitly authorized by legislature since legislature always has option of legislatively overruling adjudication).
Act's directive.\textsuperscript{50} Indeed, I will attempt to show that questions about congressional intent to incorporate or displace state law in federal statutes are of the same genre of question faced in testing the validity of a wholly common law doctrine and are susceptible to the same analytical resolution.\textsuperscript{51} In both cases, I suggest that the appropriate inquiry is discerning congressional intent. In the absence of more specific guidance, that intent should be presumed to favor results that minimize friction between the state and federal governments, unless the vindication of some important federal interest requires otherwise.

B. Current Doctrine's Resolution of Common Law Rules

The standards governing conflicts between federal common law and state law were set out in dicta in Hanna v. Plumer.\textsuperscript{52} While Hanna has been applauded for bringing some coherence to the Erie doctrine,\textsuperscript{53} it has in fact obscured as many issues as it has clarified. Its effect on court-access issues has been particularly debilitating. Hanna assumed that litigant equality was Erie's central objective.\textsuperscript{54} The

\textsuperscript{50} See, e.g., 28 U.S.C. § 1392 (1988) (referring to but providing no definition of civil actions of "a local nature"). Both courts and commentators have tended to view the problem of whether state law should be used to fill a "gap" in a federal statutory scheme as a fundamentally different question from whether federal "common law" may be created. See DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 160-61 n.13 (1983) (Rules of Decision Act does not require application of state statute of limitations to federal statutory cause of action); Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797, 802-04 (1957). Application of state law to fill in the "interstices" of federal statutes is said to be a form of "incorporation" whereby Congress implicitly chose to define federal law by reference to state law, but could have just as easily created different federal law on the issue. Id. at 799-800. On the other hand, state law is said to "apply of its own force" in the absence of a federal statutory scheme. Id.

As persuasively demonstrated by Westen & Lehman, however, this is a false dichotomy. See Westen & Lehman, supra note 25. To the extent that Congress could constitutionally displace much of state law, its failure to do so represents a choice comparable to incorporation of state law in federal statutory schemes. Id. at 316, 357. Accord Burbank, supra note 11, at 762; Field, supra note 15. The Rules of Decision Act, in this sense, represents a congressional directive to the federal courts not to displace state law unless otherwise directed, implicitly or explicitly, by Congress. That directive has as much application to filling in gaps in statutes or rules as it does to creating freestanding common law. DelCostello, 462 U.S. at 172-74 (Stevens, J., dissenting); Burbank, supra note 11, at 759-60; Burbank, Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law, 63 NOTRE DAME L. REV. 693, 703-04 (1988). The only difference is that in a statutory context, the courts may have more data from which to discern a specific congressional preference. See DelCostello, 462 U.S. at 174-75 (O'Connor, J., dissenting).

\textsuperscript{51} See Westen & Lehman, supra note 25, at 333-36; Burbank, supra note 11, at 755-62; Field, supra note 15, at 893-94. But see Redish, supra note 15, at 792-99 (arguing that there is fundamental distinction between process of interpretation in statutory construction and creation in common law adjudication).

\textsuperscript{52} 380 U.S. 460 (1965). The state rule on service of process was, in fact, found to be in direct conflict with Fed. R. Civ. P. 4, which the Court found to be controlling. The Court, however, stated that the case would have come out the same way even if a Federal Rule of Civil Procedure had not authorized the mode of service. 380 U.S. at 467-69; see M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 220 n.71 (2d ed. 1990) (describing Hanna discussion of Rules of Decision Act as dictum).

\textsuperscript{53} See Ely, supra note 13, at 699.

\textsuperscript{54} M. REDISH, supra note 52, at 225:

Hanna represented a significant shift in approach for deciding Rules of Decision Act cases—one away from the system-oriented analysis employed in Byrd toward a return to a litigant-oriented view of Erie and the statute. The goal of Erie, implied the Hanna Court, was not to maintain a
mere fact of diversity of citizenship should not result in a different allocation of rights between the parties than would exist in the absence of federal jurisdiction. This objective was reflected in the “twin aims” of Erie: avoidance of forum shopping and the “inequitable administration of the law.” As several commentators have noted, when so viewed, the “twin aims” collapse into a single concern for equality: forum shopping results from and contributes to different treatment of litigants on the basis of their citizenship.

Hanna attempted to address this concern for litigant equality by modifying the “outcome-determinative” test first articulated in Guaranty Trust Co. v. York. According to that test, while some differences between state and federal practice are acceptable, it is inequitable for the outcome of the lawsuit to be affected by federal jurisdiction. The Hanna Court’s problem with the York test was that it was overinclusive. Hanna noted that all differences between state and federal practice can affect outcome if the litigants fail to conform to the prescribed federal practice. If federal law requires the use of blue paper in motions, and state law permits white, application of federal law to the user of white paper will be “outcome determinative.” However, outcome differences resulting from the conscious disregard of federal practice are not inequitable since the disobedient party had the opportunity to comply with the federal rule and avoid dismissal. Thus, concluded Hanna, the only differences between state and federal practice outlawed by Erie were those differences that would affect outcome independent of how the parties conducted the litigation.

While such an approach has an appealing simplicity to it, it is a poor vehicle for implementing the Rules of Decision Act, and is especially problematic when applied to court-access problems. There are three deficiencies in Hanna that render a principled application of the doctrine difficult.

First, as the court-access cases demonstrate, it is hard to know how a given rule will affect outcome. Equally cogent arguments have been made that the

balance within the federal system but rather to protect citizens from the dangers of forum shopping and the inequitable administration of the law.

55. Hanna, 380 U.S. at 468.
56. E.g., M. Redish, supra note 52, at 225 (“While the Court identified these two Erie policies as distinct, it seems clear that its focus reduces to a single concern: fairness to the litigants.”). But see Walker v. Armco Steel Corp., 446 U.S. at 753 (deviation from state rule that defendant must be served within statute of limitations period would not necessarily induce forum shopping, but would represent “inequitable administration of the law”).
58. 380 U.S. at 469.
59. Id.
identity of the trier of fact is and is not outcome determinative. Some courts have reasoned that court-access issues simply decide where a case will be heard. In this sense, court-access rules are not any more outcome determinative than moving a case from state to federal court. It seems just as obvious to other courts that the identity of the trier of fact will inevitably affect the ultimate disposition of the case. Still other decisions have taken the relatively formalistic view that since a federal court-access provision can result in a dismissal of an action that would not be dismissed in state court, the question is absolutely outcome determinative as defined by Hanna.

Second, even if it were possible to identify outcome-determinative rules, outcome determination, even as modified by Hanna, is a poor test of whether federal and state litigants are accorded equal rights. Non-outcome-determinative differences between state and federal practice could be considered just as inequitable as outcome-determinative differences. Any difference between rights afforded in a federal court and a state court could be considered the "inequitable administration of the laws." For example, it could be considered just as inequitable to subject a federal litigant in an inconvenient forum to greater litigation expenses as it is to subject her to greater liability.

The real question is not whether all litigants are treated equally, but rather what kind of differences are justified. Outcome determination offers a tautological answer.

61. See supra note 16.
62. See, e.g., Szantay v. Beech Aircraft Corp., 349 F.2d 60, 66 n.13 (1965) ("The federal jurisdictional and venue statutes do not affect the rules of decision by which the parties' rights will be adjudicated; they only determine the forum.").
63. See, e.g., Ryd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) ("It may well be that in the instant personal injury case the outcome would be substantially affected by whether the issue . . . is decided by a judge or a jury."); Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1955) ("If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.").
64. In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1157 (1987): If Louisiana courts refuse to dismiss on forum non conveniens grounds, and if that doctrine does not apply to a Louisiana cause of action in a federal diversity court, there will be a tremendous disparity of result between trials in the two court systems. One case will proceed to judgment and the other will be dismissed to a foreign land. The court, however, went on to find a paramount federal interest in deviating from state forum non conveniens practice. See infra note 172 and accompanying text.

I characterize the approach as "formalist" insofar as it ignores that the "dismissal" is in substance, if not form, simply a device to move the case to a different forum, albeit a foreign one. While a given forum non conveniens dismissal might be seen as "outcome determinative" because of the relative disadvantages imposed by the foreign forum or its choice of law, it is unduly formalistic to treat forum non conveniens dismissals per se as any more outcome determinative than transfers pursuant to 28 U.S.C. § 1404(a). But see Robertson, Forum Non Conveniens in America and England: "A Rather Fantastic Fiction," 103 LAW Q. REV. 398, 418-20 (1987) (showing that vast majority of claims dismissed from U.S. courts are never pursued in foreign alternative forums).

65. Similarly, viewed from a "forum shopping" perspective, rules permitting greater discovery, more convenient venue, or less formal pleading have as much potential to draw litigants into a federal court as rules about standards of care. The very fact that the rule in question is being contested suggests that it matters to the parties. All things being equal, a litigant will be drawn to the forum with the favorable rule.
Finally, *Hanna* understates the values underlying the *Erie* doctrine. As Justice Harlan noted at the time, the Court's focus on forum shopping and equality exclusively ignores a central concern of *Erie*: the appropriate allocation of sovereign authority between the state and federal governments. It was Congress's apparent desire in the Rules of Decision Act that the operation of the federal courts not unduly interfere with the regulatory prerogatives of the states. The Court's focus on litigant equality ignores this federalism concern.

66. 380 U.S. at 474 (Harlan, J., concurring).
67. The most forceful critique of *Hanna*'s narrow concern for litigant rights rather than for the proper allocation of authority in the federal system is Professor Redish's. See M. REDISH, supra note 52, at 225-46; Redish & Phillips, *supra* note 13.

In the recent decision in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), the Court, in dictum, made explicit its view that *Erie* was based solely on equality and not federalism concerns. *Wortman* held that a state may apply its own longer statute of limitations to a claim even when the state would be constitutionally prohibited from applying its own substantive law. The Court distinguished the fact that statutes of limitation are considered substantive in the *Erie* context by reasoning that the full faith and credit limitations on interstate conflicts were designed to allocate sovereign authority among the states, while *Erie* simply guaranteed equal outcomes in federal and state courts:

*Guaranty Trust* itself rejects the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws. 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. 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. . . . The purpose of the substance-procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity but to delimit spheres of state legislative competence. How different the two purposes (and hence the appropriate meanings) are is suggested by this: It is never the case under *Erie* that either federal or state law—if the two differ—can properly be applied to a particular issue, . . . but since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another . . . .

*Wortman*, 486 U.S. at 726-27 (citation omitted).

68. See Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1241-50, 1263-67 (1985) (describing generally Anti-Federalists' apprehension that federal common law would obliterate states' rights, and concluding specifically that Rules of Decision Act mirrored constitutional allocation of general lawmaking authority to states); Redish, *supra* note 15, at 792. Legislative history of the Rules of Decision Act is notoriously thin. Most scholarly attention has been directed to the *Swift v. Tyson* issue of whether the reference to "state law" in the act included state common law. See Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); Redish, *supra* note 15, at 791. The primary authority on the Act generally is Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923), which Justice Brandeis relied on heavily in the *Erie* decision. Unfortunately, Warren's analysis of the Rules of Decision Act (included as section 34 of the Judiciary Act) is largely surmise. The only historical datum he discovered was an apparent first draft of the section that explicitly included both state statutory and common law as controlling authority in federal judicial proceedings. Warren concluded that the final version's use of the general term "state law" must therefore include both statutory and common law, a direct challenge to the holding of *Swift v. Tyson*. Id. at 86.

Warren was apparently the first proponent of the theory that the Rules of Decision Act was designed to prevent unequal treatment of litigants based on their citizenship. *Id.* at 84-85. Indeed, Justice Brandeis' elliptical observation in *Erie* that the Act was designed to prevent "grave discrimination by non-citizens against citizens," 304 U.S. at 74, is taken almost verbatim from Warren's article. Warren, *supra*, at 125-26 ("Diverse citizenship . . . instead of preventing a discrimination *against* a non-citizen, results [after *Swift*] in discrimination *in their favor and against* the citizen.") (emphasis in original). Warren's only support for this interpretation of the Act was that the purpose of diversity jurisdiction was to prevent local bias; the Rules of Decision Act must therefore be read consistently with this objective. *Swift's* disregard of state
Whether or not outcome might be affected, the state may have a stake in the manner in which the litigation is conducted. For example, a state may want to vest certain parties with a convenient venue; to maintain the confidentiality of certain information; to limit the expense of litigation; to give its juries authority to assess the liability of certain parties; or even to reap the economic benefits of opening its courts to a large volume of litigation. Outcome determination offers no way to test the federal court’s obligation to vindicate these interests. The modified outcome-determination test of *Hanna* thus tends to obscure rather than clarify the real issues at stake in a choice between federal common law and state law.

However, reliance on the substance-procedure dichotomy is not limited to scholars who take an equality-oriented approach to *Erie*. Even commentators concerned about *Erie*’s federalism component, and who are thus critical of *Hanna*’s preoccupation with forum shopping and litigant equality, have tended to distinguish between substantive and procedural rules as a way of identifying state regulatory prerogatives. The state is said to have an interest in substantive rules that govern “primary conduct” outside of litigation, but less of an

common law frustrated this objective by bending over backwards for the noncitizen. Warren offered no explanation of why *Swift* gave any advantage to the noncitizen over the citizen, both of whom could select the federal forum if it were to their advantage. While some scholars have asserted that Justice Brandeis’ use of the phrase “discrimination against citizens” refers to the advantage that noncitizens have over citizens in removal, see, e.g., Ely, *supra* note 13, at 712, it appears that Warren’s use of the phrase was simply an attempt to pen a catchy symmetry.

Warren’s conclusion that the Rules of Decision Act was drafted to insure litigant equality should not be read to mean that the drafters were more concerned about litigant equality than federalism. The broader theme of Warren’s study is that federalism was the pervasive issue throughout the drafting of the entire Judicial Act. Warren cites at length an Anti-Federalist newspaper to illustrate:

> By far the most weighty and conclusive objection against the new Constitution in its present form is that it will necessarily and speedily produce a consolidated or national government; by superseding and annihilating in its operation, the several State governments, which from the nature of things would in so extended a territory be an iron handed despotism . . . . subversive of all liberty . . . . The legislative power vested in Congress is so unlimited in its nature . . . . The judicial powers vested in Congress are also so various and extensive that by legal ingenuity they may be extended to every case, and thus absorb the State Judicialies. . . .

Warren, *supra*, at 125-26 (quoting from *Centinel Revived*, Independent Gazetteer (Phil.), Aug. 29, 1789); cf. Redish, *supra* note 15, at 792 (“When viewed in this historical light, the underlying legislative purpose intended to be served by the Rules of Decision Act, originally enacted by the very first Congress, becomes relatively clear. In enacting that legislation, Congress was attempting to preserve the political values of federalism by curbing the one branch of the federal government most feared as a threat to state power.”).

69. Even Professor Redish, who otherwise rejects *Hanna*’s analysis, cites as state laws most worthy of federal deference those “rules . . . designed to provide behavioral guides for state citizens or to attain substantive state policy goals.” M. REDISH, *supra* note 52, at 240. He fails, however, to provide any definition of “substantive.” See also Burbank, *supra* note 33, at 1128, 1183 (suggesting effect on “out-of-court conduct” as test of “substantive right” for purposes of the Rules Enabling Act).

While recently repudiating his earlier suggestion that the Rules of Decision Act provided relatively little guidance in choosing between state and federal law, Professor Redish adheres to his earlier conclusion that nonconformity with state substantive law generates greater friction with state autonomy than nonconformity with state procedural law. Indeed, he now concludes that “federal courts are not constrained by the Act in [procedural] matters,” and construes the phrase “rule of decision” to refer only to substantive matters “extending completely beyond the four walls of the federal courthouse.” Redish, *supra* note 15, at 787 & n.104; see also Lundgren v. McDaniel, 814 F.2d 600, 605 (11th Cir. 1987) (procedural laws are not rules of decision).
interest in procedural, litigation-oriented rules that simply prescribe how a remedy will be provided.  

There are several possible rationales for such a distinction. None is very persuasive. First is the claim that maintaining uniform rules governing primary conduct is critical to reducing uncertainty in the law, and that since procedural rules do not implicate that concern, federal courts are free to develop independent procedural law. Professor Ely, however, has persuasively refuted this rationale, demonstrating that most differences between “primary conduct” rules do not in fact produce debilitating uncertainty. Most competing rules of conduct are not mutually exclusive. If, for example, a state liability rule requires merely the exercise of reasonable care and the federal courts assessed liability for failure to exercise extraordinary care, a defendant could ex ante avoid liability in both forums by exercising extraordinary care. Uncertainty can be eliminated in most cases simply by complying with the more stringent standard of conduct. Accordingly, the different treatment accorded substantive and procedural laws cannot be justified by a substantially differential impact on predictability.

Moreover, to the extent that reducing uncertainty is the objective of the substance-procedure distinction, the utility of that distinction is substantially impaired by the potential, and largely unknowable, impact of judicial procedure on primary conduct. People may structure their nonlitigation conduct in reliance on a given set of state judicial procedures, and federal procedural nonconformity can disrupt that planning. In particular, a potential defendant may avoid having jurisdictional contacts with a state that imposes onerous procedural burdens in favor of more hospitable locales. For instance, if a state insulates nonresident corporations from litigation over out-of-state claims in its courts by forsaking “general jurisdiction,” a corporation may for that reason decide to build a plant there. However, if federal courts do not follow the state jurisdiction rule, the corporation cannot accurately assess the risk of coming into the state. Accordingly, both premises of the certainty argument are flawed: uniformity between state and federal substantive law is often not necessary to avoid uncertainty, and variations between state and federal procedural law may in some cases produce uncertainty.

70. See Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (citing H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1st ed. 1953)); cf. Carrington, supra note 27, at 610 (statutes of limitations should be considered “substantive” to the extent that they have effects “outside the courthouse and have no bearing on the quality or accuracy of judicial proceedings”).

71. Hanna, 380 U.S. at 474 (Harlan, J., concurring) (“Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.”).

72. Ely, supra note 13, at 710-11.

73. Id. at 711.

Second, it might be argued that the state has no legitimate interest in how remedies are distributed outside of its courts as long as substantive rights are respected. As the above examples demonstrate, however, a federal departure from a state "procedural" rule may well frustrate the policy underlying the state rule. If a state decides to cut back on discovery because it inflicts unjustifiable costs on witnesses and parties, federal expansion of discovery frustrates that policy whether or not it affects party behavior outside the courthouse.

Thus the explanation for why state procedural rules that do not affect primary conduct may be disregarded cannot simply be that the state does not care. The argument must be instead that Congress recognized a superior federal interest in providing independent, uniform procedural rules even where state policies may be frustrated, and therefore exempted these procedural rules from the command of the Rules of Decision Act. The problem with this argument is that it proves too much. If congressional interest in independent rules of procedure justifies disregard of state procedural policies, why does it not also justify disregard of state substantive policies? Few would assert that a federal interest in fair and uniform procedure would justify disregard of the state statute of limitations, or the state definition of the elements of a cause of action. The uniformity argument is no more persuasive as a justification for independent common law procedural rules.

This uniformity argument also ignores the historical context of the Rules of Decision Act. The Process Act of 1789, enacted concurrently with the Rules of Decision Act (RDA), required federal conformity with state practice. Conformity was maintained in one form or another until passage of the Rules Enabling Act in 1934. Thus the argument that uniformity in federal practice is somehow essential to the fair and efficient maintenance of the federal courts is contradicted by historical practice.

76. See Redish & Phillips, supra note 13, at 390.
77. The Process Act of 1789 provided:
That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.
80. See Burbank, Afterwords: A Response to Professor Hazard and a Comment on Marrese, 70 CORNELL L. REV. 659, 661 & n.18 (1985) (rejecting proposition that Rules of Decision Act incorporates substance-procedure distinction in light of historical federal conformity to state practice); accord, Hill, State
As with Hanna's focus on litigant equality, the "primary conduct" approach asks the wrong question. The question is not simply whether state preferences are implicated in state law, but rather which state preferences are to be respected by the federal courts. Again, the substance-procedure distinction offers a tautological answer.\footnote{1}

C. A Sounder Analytic Approach

As Redish and Phillips ably demonstrated, the closest the Supreme Court has come to getting it right was in Byrd v. Blue Ridge Electric Cooperative.\footnote{2}

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\footnote{1}{Procedural Law in Federal Nondiversity Litigation, 66 HARV. L. REV. 66, 86-87 (1955) (concluding that Rules of Decision Act was historically construed to make state procedural law applicable in federal court).}

\footnote{2}{356 U.S. 525 (1958); see Redish & Phillips, supra note 13, at 363-67. Redish & Phillips propose a balancing test similar to but distinct from the approach taken here. Ad hoc balancing is rejected in favor of a "refined balancing approach" pursuant to which the balance is guided by how the state and federal interests are classified. Id. at 387-96. They suggest that there are four classes of state interests, listed in decreasing order of importance: rules designed to achieve a "substantive" objective; rules for conducting trials that purposely bestow an advantage on one of the parties; rules for conducting trials that are designed to "do justice" by achieving an optimal adjudication; and "mere housekeeping" rules. These interests are to be weighed against the federal interest in a contrary rule, but there is only one category of federal interest capable of trumping a significant state interest: avoiding cost or inconvenience to the federal courts. Other federal objectives, such as uniformity, can be accommodated through other means, such as a new Rule of Civil Procedure. Redish & Phillips thus retain the fundamental distinction between "substantive" and "procedural" interests, while at the same time recognizing that "procedural" rules may advance "substantive" objectives. While I am generally in accord with their approach, especially in its focus on the federalism dimension of Erie problems, I have several criticisms of their classifications. First, although the substance-procedure categories are employed, no guidance is provided for how to distinguish between them—the same difficulty which has plagued all prior attempts to resolve Erie problems. The approach advocated in this Article attempts to circumvent that problem by simply identifying whether the state interest, whatever its category, is implicated by a contrary federal practice. The more the state interest is undermined, the greater is the federal deference that is called for. Second, even assuming a coherent distinction between substantive and procedural objectives is possible, no justification is offered by Redish & Phillips for why procedural objectives are less important than substantive ones. Why should it be categorically assumed that a policy designed to affect "primary conduct" is more important to the state than its decision to bestow a significant advantage on a litigant? For instance, if a state decided to eliminate discovery because its expense and potential for abuse was not considered justified by its value to litigation, why should that interest be considered any less weighty than a rule designed to encourage corporate registration? It may be that Redish & Phillips' categories are shorthand
for measuring the degree to which state interests are in fact implicated by a contrary federal practice. Thus, rules affecting primary conduct are always implicated, and rules designed to save the state judiciary money are rarely implicated. If so, their categories obscure rather than advance the inquiry. The better approach is to evaluate directly the pertinence of the state interest to federal practice.

83. Some have asserted that Byrd was implicitly overruled by Hanna. See, e.g., Ely, supra note 13, at 717 n.130; Little, Out of Woods and Into the Rules: The Relationship Between State Foreign Corporation Door-Closing Statutes and Federal Rule of Civil Procedure 17(b), 72 VA. L. REV. 767, 788-89 (1986). But see Redish & Phillips, supra note 13, at 370-72 (citing post-Hanna application of Byrd approach by lower federal courts).

84. See Redish & Phillips, supra note 13, at 364. The federalism assumptions of the Byrd Court, while never stated explicitly, are implicit in the structure and language of the opinion. Under a section headed "First," the Court considers whether the state rule is "bound up with [state-created] rights and obligations. ..." 356 U.S. at 535. This inquiry, the Court states, is necessitated by Erie's command that "federal courts in diversity cases must respect ... state-created rights and obligations." Id. The focus of that section is on whether the purposes behind the state rule would be impaired by federal deviation from that rule. "Equality" is not mentioned or alluded to in that discussion. It is only in the subsequent section headed "Second" that the court considers "uniform enforcement of the right" and outcome determination as "a broader policy" evinced by "cases following Erie." Id. at 536-37. It is thus clear that the first section's focus comes not out of an equality concern, but from a respect for state regulatory prerogatives.

While Byrd does ask some of the right questions, it is flawed. As Professor Ely cogently demonstrated, Byrd does fall victim to the "myth" that Erie was a single doctrine rather than the consequence of both constitutional and Rules of Decision Act limitations imposed on federal courts. Ely, supra note 13, at 717.


86. 356 U.S. at 536.
ture from state practice. In conflicts terminology, there was a "false conflict." 87

That should have settled the matter. Instead, the Court proceeded to balance state and federal policies in light of the possibly outcome-determinative impact of a decision to disregard state law. 88 The Court determined that whatever inequities flowed from the different treatment of litigants in state and federal court were justified by a strong federal policy in favor of jury trials, "under the influence—if not the command—of the Seventh Amendment." 89 The last phrase has subjected the decision to the apt criticism that if the question was controlled by the Seventh Amendment, it was not even subject to the command of the Rules of Decision Act to apply state law unless otherwise authorized by federal law. 90 Conversely, if the Seventh Amendment did not require a jury determination of plaintiff’s status, it cannot be said that there was a strong federal policy favoring a jury determination of the question. 91

The Byrd Court found it necessary to analyze the relative strength of the federal interest, notwithstanding the absence of a state interest, because it misperceived the nature of the equality guaranteed by Erie, or more specifically, by the Rules of Decision Act. 92 The Court was inappropriately troubled by the disparate treatment of litigants in a situation where the state did not care about the federal practice. 93

Once it is recognized that neither Congress nor the Constitution contemplated absolute symmetry between state and federal courts, the focus should shift from whether there is a difference or inequality to whether any perceived difference or inequality is justified. The theory of justification cannot be divorced from federalism, the central policy underlying the Rules of Decision Act. 94 The primary inquiry under the Rules of Decision Act ought to be whether there has been a usurpation of a state regulatory prerogative, 95 not whether all litigants were treated "equally." If a state has not attempted to "vest" a litigant with a right to a particular procedure, it is nonsense to view the federal departure from that procedure as unfair to the party. 96 As Brainard Currie discov-

87. Leathers, supra note 85, at 812.
89. Id. at 537.
90. Westen & Lehman, supra note 25, at 345-47.
91. Id.
92. As Redish & Phillips point out, the Court does not explicitly rely on the Rules of Decision Act. Redish & Phillips, supra note 13, at 362 n.36. However, it is the only possible source of authority in the decision: no Federal Rule of Civil Procedure was implicated, so the Rules Enabling Act was irrelevant; and there is no suggestion that the result was constitutionally compelled. Id.
93. For example, contrast the Fourth Circuit's approach in Atkins v. Schmutz Mfg., 435 F.2d 527 (4th Cir. 1970), cert. denied, 402 U.S. 932 (1971). The court there held that the state statute of limitations need not be applied where the purpose behind the statute, timely notification of defendant, was satisfied by the prior filing of a parallel proceeding in another federal district court.
94. See supra note 68.
95. Cf. Hill, supra note 18, at 574.
96. Id. at 554.
erred in the context of interstate conflicts, a party should not be heard to complain about the loss of a “right” if the state never intended to confer the right in the circumstances of the particular case. In this sense, Byrd, as well as all other “outcome-determination” approaches, appears to embrace a “vested rights” view of the world otherwise questioned by modern jurisprudence.

Consideration of the strength of the federal interest may be appropriate, but only after identifying a “true conflict”: a situation in which the state would want its law applied in federal court. Only then must a federal court justify its frustration of the state preference. However, the federal interest at that point must be more substantial than a generalized interest in the way in which federal courts are run. Recognition of such an interest would turn the command of the Rules of Decision Act into a nullity: “Apply state law unless you are accustomed to applying federal law in your courts.”

II. APPLICATION OF THE FRAMEWORK TO COURT-ACCESS PROBLEMS

The above critique suggests that a three-step analysis would help clarify the real issues presented by court-access problems. First, as Hanna suggested, the source of the federal court-access rule must be ascertained. Where there is clear and legitimate statutory authority for the rule, such as the venue or transfer provisions, the federal provision will apply. Congress clearly has the right to regulate access to the federal courts.

However, as discussed below, the courts must avoid abuse of this justification. Where a specific legislative intent to develop an independent rule cannot be identified, the mandate of the Rules of Decision Act should control: federal courts must avoid unnecessary interference with state governance. The courts must therefore ascertain whether or not state preferences would be affected by federal disregard of the relevant state rule. If state policy would not be affected, the federal court should be free to follow a different practice. If state policy would be affected, the state practice ought to be respected absent a specific federal interest in a contrary practice.

Such a federal interest must be based on a federal interest outside of Article III, or at least tied to the purpose behind the existence of federal jurisdiction. In diversity, federal courts may disregard parochial state bias toward their own

97. See B. Currie, Married Women's Contracts: A Study in Conflict-of-Law Method, in SELECTED ESSAYS, supra note 85, at 116-17 (a state's law should only apply when legislature intended to bestow right on the litigant). But see Gelfand & Abrams, supra note 27 (arguing that inequality should preclude application of federal law even when there is no federalism concern).

98. This insight was in fact the basis for the Byrd Court's conclusion in the first part of its Erie analysis that the state practice was not “bound up” in the rights and obligations that the state intended to confer upon the litigants. See supra notes 16, 18. The Court's later consideration of equality problems is thus particularly formalistic; the implication is that even though the state has not conferred any rights on the litigants, they are still somehow entitled to the same strategic opportunities that are made available to litigants in the state courts.

citizens. In federal question cases, federal courts may disregard state procedures that interfere with federal substantive rights.

The balance of this Article will articulate this three-step analysis more fully and attempt to apply it specifically to court-access problems.

A. Is There Statutory Authorization for the Federal Practice?

Since the seminal work of John Hart Ely in 1974, both courts and commentators have divided Erie problems into at least two categories, or tracks, corresponding to the restraints imposed by statute and the Constitution: federal statutes, restrained only by constitutional limits on federal power; and federal common law, additionally restrained by the Rules of Decision Act. Numerous scholars, including Professor Ely, have suggested an additional "spur": Federal Rules of Civil Procedure, restrained by the Rules Enabling Act restriction on the abridgement, enlargement, or modification of substantive rights. The multitrack approach, while technically sound, has tended to obscure the difficult federalism questions implicated by court-access problems in all three contexts.

Access to federal court is indeed controlled by all three types of law. Statutory regulations include transfer of an action pursuant to 28 U.S.C. § 1404(a), the federal venue provisions, some specialized personal jurisdiction provisions, and subject-matter jurisdiction. Common law restraints include forum non conveniens and standing, in particular the "prudential limitations." Pertinent Federal Rules of Civil Procedure include Rule 17 (capacity) and Rule 4 (service of process). There is obviously some analytic importance to the category of federal law at issue. No one doubts that federal statutes trump conflicting state law in all but the extraordinary case where the federal statute is unconstitutional. Not quite as conclusively, applicable Rules of

100. Ely, supra note 13.
108. See, e.g., Brown v. Pyle, 310 F.2d 95 (5th Cir. 1962) (federal venue statute prevails over state statute giving plaintiff right to maintain action in state).
Civil Procedure generally seem to displace conflicting state provisions.\footnote{109} To that extent, the source of federal law is dispositive of the Erie question.

However, the far more common and problematic issue is not whether federal statutes or rules take precedence over conflicting state law, but rather whether there is in fact a conflict between codified federal law and state law. While there may be an appropriate three-track analysis of Erie problems, there is enormous ambiguity in track assignment. Unless Congress has explicitly stated that a federal rule or statute displaces state law, a court must make an initial choice of law prior to applying the three-track analysis: does the federal provision accommodate or displace state law?\footnote{110}

The judicial task in deciding whether a federal statute displaces state law is, I suggest, virtually identical to the choice of whether to develop a purely common law federal provision. In both cases, the court must understand the relevant state and federal interests, as well as the policy behind the Rules of Decision Act. In both cases, the court must determine whether creation of an independent federal standard needlessly undermines state regulatory autonomy. If it does, sound statutory construction guided by the Rules of Decision Act suggests that Congress would not have approved of the unnecessary friction generated by federal nonconformity.\footnote{111}
1. Choosing the Right Track

That initial choice of law, or track assignment, has received relatively little judicial attention. In the Rules of Decision Act, Congress provided a rebuttable presumption that state law applies in federal court. In the absence of more express direction, it should be assumed that state law applies. The problem is in ascertaining how much express direction is required, and where it can be found. Unfortunately, the Supreme Court has attempted to divorce that inquiry from any coherent understanding of the Rules of Decision Act.

In Walker v. Armco Steel Corp., the Court recognized that the mere presence of an applicable statute or rule does not automatically displace all related state law. The issue there was whether Federal Rule of Civil Procedure 3 displaced a provision of state law requiring service of process to toll the statute of limitations. While Rule 3 provides that “a civil action is commenced by filing a complaint with the court,” it does not explicitly address the effect of filing on the statute of limitations. Thus, state law and the federal Rule were not mutually exclusive. The Court therefore declined to find that the Rule displaced state law. Such displacement would only be found, the Court stated, where there was “a direct collision” that was “unavoidable.”

Unfortunately, Walker provided little guidance for the lower courts struggling to determine whether the federal Rule is “sufficiently broad” to displace state law. Notwithstanding the Court’s disclaimer that it advocated a narrow construction of the Federal Rules, there is almost no analysis in the opinion that explains why the “commencement” of an action pursuant to the Rules does not toll the statute of limitations. While the Court noted that the Advisory Committee “thought the Rule might have [a tolling] effect,” the Court summarily concluded that the only function of Rule 3 was to “gover[n] the date from which various timing requirements of the Federal Rules begin to run.”

Taken literally, the “unavoidable, direct collision” standard articulated in and applied by Walker is unworkable. There are obviously situations where the legislature intends to displace conflicting state law, yet the express statutory language falls short of a “direct collision.” For instance, no one doubts that federal law defines when a claim “arises out of the same transaction” for

112. See generally Freer, supra note 101.
113. 446 U.S. 740 (1980).
114. Id. at 749 (quoting Hanna v. Plumer, 380 U.S. 460, 470 (1965)).
115. Id.
116. Id. at 750 n.9.
117. Id. at 750 n.10.
118. Id. at 751. But see West v. Connail, 481 U.S. 35, 39 (1987) (holding that Rule 3 provides tolling rule applicable to federal question case). For a critique of West and its inconsistency with Walker, see Burbank, supra note 50, at 702-04.
119. Cf. Burbank, supra note 11, at 773 (“In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules.”).
purposes of Rule 13(a) compulsory counterclaims. Yet there is no direct clash; state law could be consulted.

The rigidity of the Walker approach has led courts to apply unarticulated standards in making the track assignment. Two recent Supreme Court decisions suggest that the Court has abandoned the "direct collision" test, although it continues to pay lip service to it. In Burlington Northern Railroad v. Woods, a unanimous Court held that an Alabama statute imposing an automatic penalty on unsuccessful appellants had no application in federal court because Federal Rule of Appellate Procedure 38 authorizes the court of appeals to award damages for frivolous appeals.

If, as suggested by Walker, the standard is whether the federal and state provisions are capable of coexisting, the answer in Burlington is clearly yes, as the Court all but concedes. Both provisions could be applied without rendering either a nullity. State damages could be awarded in every unsuccessful appeal, and additional damages could be assessed for frivolous appeals at the discretion of the court of appeals. Rule 38 does not prohibit damages in nonfrivolous cases.

The Court's contrary conclusion that the discretion contemplated by the Rule would be unduly restricted by the Alabama statute is, again, conclusory. It is based solely on the theory that since the two provisions share the same purpose of deterring appeals, the federal provision must be preemptive of the state's. But the "same purpose" approach begs the question as much as the "direct collision" standard does. In only the most general sense did the two provisions have the same purpose: both deterred appeals. However, the Alabama rule deterred a wider class of appeals than the federal rule, which addressed only frivolous appeals. If there was a collision, it was with a more generalized federal policy of encouraging good faith appeals, not with the federal interest in deterring frivolous ones embodied in Rule 38. Yet, the Court made no effort to identify a basis for such a policy.

120. See 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1409-49 (2d ed. 1990) (federal law governs when claim arises out of same transaction or occurrence).


122. ALA. CODE § 12-22-72 (1986) provides in relevant part:

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court.

123. Rule 38 provides: "If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

124. "[A] federal court sitting in diversity could impose the mandatory penalty and likewise remain free to exercise its discretionary authority under Federal Rule 38." 480 U.S. at 7.

125. Id. ("[T]he purposes underlying the Rules are sufficiently co-extensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions.").

One leaves Burlington with the distinct impression that something else was going on. Perhaps the Court felt that Alabama had no business affecting the behavior of federal litigants, or that Alabama never contemplated application of its statute in the federal courts. These difficult issues dealing with the proper allocation of authority in the federal system are never explicitly addressed in the decision.

2. Stewart Organization v. Ricoh and the Impact of Track Assignment on Court Access

The Court’s recent resolution of Stewart Organization, Inc. v. Ricoh Corp. demonstrates how unreflective track assignment can be and underscores the need for a more sensitive understanding of relevant state and federal policies implicated by court-access rules in both statutory and common law contexts. In Stewart, the Court held that a case could be transferred under 28 U.S.C. § 1404(a) in furtherance of a forum selection clause in the parties’ contract notwithstanding the unenforceability of forum selection clauses under Alabama law. A contract between the parties to a commercial distribution agreement stipulated that any dispute “arising out of or connected to” the agreement would be litigated in Manhattan and governed by New York law. The plaintiff distributor sued the manufacturer for antitrust and contract violations in Alabama federal court.

The district court declined to transfer the case to New York under section 1404(a) on the ground that choice of forum clauses were unenforceable as against public policy in Alabama. The court of appeals reversed en banc, and the Supreme Court affirmed the court of appeals decision in an eight-to-one decision written by Justice Marshall. The majority reasoned that since transfer was controlled by federal statute, the circumstances in which transfer was appropriate were wholly a matter of federal law. In contrast, Justice Scalia’s dissent concluded that the federal

128. Id. at 24.
129. Id.
130. Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987).
131. Justice Scalia dissented. Justice Kennedy wrote a concurrence joined by Justice O’Connor. The case was remanded so that the district court could evaluate the propriety of transfer in light of the forum selection clause, a factor the lower court had refused to consider because of the Alabama rule. See 487 U.S. at 32. On remand, transfer was again denied. Stewart Org., Inc. v. Ricoh Corp., 696 F. Supp 583 (N.D. Ala. 1988); see note 139 infra.
132. The Court left unresolved an issue that has divided the lower courts: whether federal common law governs the enforceability of forum selection clauses absent the statutory authority of section 1404(a). A minority of lower courts addressing the issue appear to follow state law on the enforceability of choice of forum provisions when raised by way of a motion to dismiss rather than a motion to transfer. Compare General Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986) (following state law) with Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509 (9th Cir. 1988) and Kline v. Kawasaki Am. Corp., 498 F. Supp. 868 (D. Minn. 1980) (both applying federal law). The viability of that distinction in the wake of Stewart is unclear. See Instrumentation Assoc. v. Madsen Elec., 859 F.2d 4, 7 (3d Cir. 1988) (citing
The transfer right was circumscribed by state law since the enforceability of forum selection clauses was not expressly addressed by statute, and a contrary result would induce forum shopping.\(^{133}\) Neither opinion, however, asked the right question: Did Congress intend section 1404(a) to operate within the environment of state law, or, in other words, does section 1404(a) incorporate or displace state law?\(^{134}\)

Justice Marshall concluded that there was a displacement, but his explanation is unconvincing. His principal rationale was that section 1404(a) decisions require an “individualized, case-by-case consideration of convenience and fairness.”\(^{135}\) The judicial discretion contemplated by the statute, he reasoned, would be unduly restricted by compliance with the “single factor” approach of the state rule:

Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command. Its application would impoverish the flexible and multifaceted analysis that Congress intended to govern motions to transfer within the federal system. The forum-selection clause, which represents the parties’ agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a).\(^{136}\)

But this begs the question; on its face, section 1404(a) no more displaces state law than Rule 12(b)(6) defines a cause of action.\(^{137}\) Congress did not say how

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\(^{133}\) 487 U.S. at 39-40 (Scalia, J., dissenting).

\(^{134}\) Cf. Freer, supra note 101, at 1105 (appropriate inquiry is discerning existence of congressional mandate to displace state law). Justice Marshall came closest to the appropriate inquiry, framing the issue as whether “state and federal rules ‘can exist side by side . . . each controlling its own intended sphere of coverage without conflict.’” Stewart, 487 U.S. at 31 (quoting Walker v. Arco Steel Corp., 446 U.S. 740, 752 (1980)). His opinion appears to pull back from the “direct collision” standard discussed in Hanna and Walker:

Our cases at times have referred to the question at this stage of the analysis as an inquiry into whether there is a “direct collision” between state and federal law. . . . Logic indicates, however, and a careful reading of the relevant passages confirms, that this 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.

Stewart, 487 U.S. at 26 n.4 (citations omitted).

\(^{135}\) Id. at 30 (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)).

\(^{136}\) Id. at 32.

\(^{137}\) FED. R. CIV. P. 12(b)(6) provides that the court may dismiss a claim for plaintiff’s “failure to state a claim.” It is well understood that, at most, the Rule enforces a federal standard of pleading, not a federal definition of the underlying claim. 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356, at 294 (2d ed. 1990). The mere fact that the word “claim” is used in the Rule does not mean that the Rule’s framers thereby contemplated the development of a federal definition. The rule, in context, obviously contemplates incorporation of existing substantive law. Justice Marshall’s statement that forum selection clauses should receive “the consideration for which Congress provided in § 1404” thus begs the

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*Martin Marietta* with approval.
much consideration should be given to forum selection clauses. The Court could either develop an independent approach or incorporate state law on that issue. Nor does incorporation reduce the inquiry to "a single concern." The petitioner's argument was not that all transfers from Alabama federal court are foreclosed by the state statute, but only that a transfer otherwise justified principally by the forum selection clause should be limited by the unenforceability of such clauses under state law. In that respect, the state non-enforcement of such clauses operates no more as a "single factor" rule than the federal enforcement of such clauses pursuant to the statute. In short, it is possible for the federal statute and state policy to coexist.

In this, as in most cases, the incorporation problem cannot be resolved simply by looking at the face of the statute. What is required is an understanding of why conformity with state practice is important, and how conformity in any given case would affect the purpose behind the statute in question. Marshall's consideration of those issues in Stewart is perfunctory. Absent from his opinion is any discussion of the legislative history or purpose behind section 1404(a) (other than the above-quoted language). Having placed the case on the statutory track, Marshall expressly found the impact of the state court-access policy irrelevant. He thereby failed to recognize the relevance of those policies to the issue of whether the case belonged on the statutory track to begin with.

Such recognition would have led the Court to two related inquiries, both ultimately supportive of the result in Stewart: (1) whether the legislative history

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138. Justice Marshall seemed to confuse the argument for incorporation as an argument for supremacy of state law over federal: Not the least of the problems with the dissent's analysis is that it makes the applicability of a federal statute depend on the content of state law. . . . If a state cannot preempt a district court's consideration of a forum-selection clause by holding that the clause is automatically enforceable, it makes no sense for it to be able to do so by holding the clause automatically void.

139. On the facts of the case, the argument for transfer in the absence of a forum selection clause was exceedingly weak. Indeed, the district court in Stewart, on remand following the Supreme Court's decision, held that it would not enforce the forum selection clause in light of the absence of significant connections with New York: the case concerned the conduct of petitioner in Alabama; witnesses were located in both Alabama and New Jersey; no relevant conduct occurred; no documents were available; and important witnesses were unavailable in New York. 696 F. Supp. 583, 588-91 (N.D. Ala. 1988).

140. See Stewart, 487 U.S. at 35 (Scalia, J., dissenting).

141. Id.

142. Id. at 30 n.9 ("Our determination that § 1404(a) governs the parties' dispute notwithstanding any contrary Alabama policy makes it unnecessary to address the contours of state law.").

143. See id. at 26 ("A District Court's decision whether to apply a federal statute such as § 1404(a) in a diversity action, however, involves a considerably less intricate analysis than that which governs the 'relatively unguided Erie choice.' ") (footnote omitted).
of section 1404(a) sheds any light on whether that provision was intended to
displace state law on choice of forum clauses; and (2) if not, whether noncon-
formity with state law on that issue generates unnecessary friction with the
state. Both inquiries employ modes of statutory construction. The second treats
the Rules of Decision Act as a canon of construction consistent with its federal-
ism objective: Assume federal law does not displace state law where it would
matter to the state, unless justified by a federal purpose.

a. The Legislative History of Section 1404(a)

Section 1404(a) was passed in 1948, only one year after the federal adoption
of forum non conveniens and well before the adoption of that doctrine by many
states.144 It is therefore unlikely that Congress thought transfer was in any
way dependent upon the permissibility of transfer or dismissal under state law.
Such state practice, even where available, was only analogous to the federal
intrasystem adjustment of venue since transfer does not constitute a dismissal,
the forum non conveniens remedy. The distinction between a forum non con-
veniens dismissal from state court and transfer from federal court widened after
Van Dusen v. Barrack,145 which dictated that the transferor law applies in the
transferee forum, a result that is unachievable in state forum non conveniens
practice.146 Accordingly, even if Congress wanted to maintain symmetry
between state and federal practice, a good argument could be made that transfer
pursuant to section 1404(a), in a circumstance where forum non conveniens
dismissal from state court would not be available, does not represent an asym-
metry.

Moreover, it is unlikely that Congress gave any consideration at all to
conformity with state law. Section 1404(a) was passed along with numerous
revisions to the U.S. Judicial Code, including (ironically) the expansion of
corporate venue in section 1391. The statute’s principal objective appeared to
be the reversal of Baltimore & Ohio Railroad v. Kepner,147 which held that
statutory venue represented an indefeasible statutory privilege for plaintiffs.148
In the wake of that decision, there was a felt need to curtail ambulance-chasing
by urban attorneys who exploited liberal federal venue provisions to concentrate
certain classes of cases, particularly FELA claims, in the venues where they
practiced.149 Thus, the statute was seen as a federal solution to a federal prob-

146. As the more convenient forum is not within the same judicial system as the dismissing court, it
is in no way bound by that court’s choice of law.
147. 314 U.S. 44 (1941).
149. See Stein, supra note 1, at 806-07.
lem. To the extent that forum selection clauses advance the same objective of limiting unilateral forum shopping and channel cases into a forum agreeable to both parties, it is unlikely that Congress would disapprove of their enforcement simply because of a different state policy.

However, it would be fair to conclude that Congress did not specifically contemplate the impact of the section 1404(a) on forum selection clauses, a fairly recent innovation. There is little reported use of forum selection clauses prior to 1965, when Pennsylvania broke from the traditional view that such clauses constituted an impermissible "private ouster" of the court's jurisdiction. As the Court pointed out in *The Bremen v. Zapata Off-Shore Co.*, such clauses were historically disfavored, and it was not until that 1972 decision that their enforcement was endorsed by the federal courts.

In sum, a historical inquiry into the background and purpose of section 1404(a) would suggest, although not conclusively, that Congress did not contemplate federal conformity with state practice.

b. **Effect of Federal Nonconformity on Alabama's Regulatory Purpose**

Given the inconclusiveness of the specific legislative history behind section 1404(a), the federal nonconformity with the Alabama rule could have been further supported by analysis of the impact of federal practice on the policies driving the state rule. Because these policies apparently would not be affected by federal nonconformity, the Rules of Decision Act would not mandate application of state law.

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150. See Van Dusen v. Barrack, 376 U.S. 612, 636 (1964) ("[T]he history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts."). To counter this implication, Justice Scalia contrasted the explicit displacement of state law in the Federal Arbitration Act with the silence of section 1404(a) on the issue:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part hereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

*Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. at 36 (Scalia, J., dissenting) (quoting 9 U.S.C. § 2 (1988)). He thus argued that Congress knows how to displace state law when it so intends.

There is, however, good reason for the explicit displacement of the Federal Arbitration Act not pertinent to section 1404(a): the Federal Arbitration Act displaces state law in state court as well as federal court. See generally Hirshman, *supra* note 29. There is no way Congress could have done that without making it explicit. In contrast, Congress may well have assumed that its regulation of federal venue in section 1404(a) would have been understood to create an independent federal standard.


152. 407 U.S. 1, 9-10 (1972).

153. Cf. Boyd v. Grand Trunk W.R.R. Co., 338 U.S. 263, 266 (1949) (refusing to enforce contract limiting venue in FELA action to place of employee's residence on ground that enforcement would frustrate "substantial" right to sue in all places provided for in venue statute).
The principal Alabama judicial decision setting out the policy against forum selection clauses emphasizes that private parties should not be able to constrict the jurisdiction of the state's courts.\textsuperscript{154} Enforcement of the forum selection clause here would not be in derogation of Alabama's judicial authority. (It is not even in derogation of federal judicial authority, since the federal court is retaining jurisdiction, and simply adjusting venue). Thus, as in \textit{Byrd}, the state rule would seem to be bound up in concerns about the administration of its own courts, rather than in conferring privileges upon the litigants or achieving some other regulatory objective relevant to federal practice.\textsuperscript{155} In choice of law parlance, there is a "false conflict." No value of federalism would be sacrificed here by federal nonconformity with state practice.

The significance of grounding the Rules of Decision Act mandate in the principle of federalism rather than litigant equality is vividly demonstrated by Justice Scalia's dissent in \textit{Stewart}. Scalia's argument that the question is controlled by the Rules of Decision Act's general directive to respect state law in the absence of contrary instructions misapprehends both the nature of that imperative and the policies implicated by this particular court-access rule.

Justice Scalia argued that the majority was sanctioning precisely the kind of general federal common law condemned by Justice Brandeis in \textit{Erie}. Because section 1404(a) does not expressly address the validity of forum selection clauses,\textsuperscript{156} Justice Scalia reasoned, the command of the Rules of Decision Act applies. He thus brought the case within the purview of the "twin aims" test of \textit{Hanna}: the state rule against forum selection clauses must be followed since federal recognition of the clause would encourage forum shopping and result in the inequitable administration of laws.\textsuperscript{157}

Scalia defined inequity solely in terms of litigant equality: federal nonconformity with state practice is condemned because it results in a different distribution of important rights than would be enjoyed in a state court.\textsuperscript{158} Impor---

\textsuperscript{154.} Redwing Carriers, Inc. v. Foster, 382 So.2d 554, 556 (Ala. 1980) ("We consider contract provisions which attempt to limit the jurisdiction of the courts of this state to be invalid and unenforceable as being contrary to public policy. Parties may not confer jurisdiction by consent, nor may they limit the jurisdiction of a court by consent.").

\textsuperscript{155.} The state policy is not without ambiguity. One aspect of the state rule does suggest that federal transfer undermines its objective: choice of forum clauses are unenforceable only insofar as they stipulate a forum outside of the state. \textit{Id.} at 555 (acknowledging enforceability of venue selection agreements). While that qualification is consistent with the objective of preventing private diminishment of the state's judicial authority and thus irrelevant to federal practice, it may also suggest an interest in local resolution of the controversy affected by federal transfer. See \textit{infra} notes 175-90 and accompanying text for discussion of such a territorial interest.

\textsuperscript{156.} Scalia emphasized that all conditions warranting transfer explicitly mentioned by the statute refer to prospective facts: how the chosen venue will affect the convenience of the parties and witnesses. Forum selection clauses are retrospective, requiring evaluation of the parties' intent and bargaining position. Forum selection clauses thus implicate matters extrinsic to the litigation, and are presumably more intrusive into matters traditionally regulated by the states. \textit{Stewart}, 487 U.S. at 34 (Scalia, J., dissenting).

\textsuperscript{157.} \textit{Id.} at 38.

\textsuperscript{158.} \textit{Id.} at 39:

The best explanation of what constitutes inequitable administration of the laws is that found in \textit{Erie} itself; allowing an unfair discrimination between noncitizen and citizens of the forum state
tance is measured solely in reference to impact on the parties. Absent from Scalia's opinion is any consideration of the significance of the practice to the state.

As discussed above,\textsuperscript{159} however, such an attempt to define equality without reference to some external standard by which to evaluate the permissibility of differences between state and federal practice is an impossible task,\textsuperscript{160} and one that reduces the federalism policies driving the \textit{Erie} doctrine to a pointless mechanical exercise. There are many asymmetries between state and federal practice, and there is no indication that Congress would condemn a given asymmetry to which the state is indifferent simply because it affects the parties.\textsuperscript{161} Such an approach gives a windfall to the pro-conformity litigant in the sense that she is given rights that neither the state nor federal legislatures intended to confer.

The above analysis of \textit{Stewart} provides three insights critical to a proper analysis of the \textit{Erie} implications of court-access rules. First, \textit{Stewart} demonstrates that federalism is relevant even when the federal practice is arguably authorized by federal statute. Federalism guides the determination of whether the statute in fact should be construed to displace state law. Second, \textit{Stewart} illustrates the folly of categorization. Depending on the nature of both the federal and state interests, federal nonconformity with state court-access practice may or may not generate unjustified friction. Categorizing the practice as substantive or procedural does not advance the inquiry into whether friction is generated. Third, \textit{Stewart} illustrates the significance of treating the Rules of Decision Act mandate as a function of federalism rather than of litigant equality. The state may be wholly indifferent to federal nonconformity with certain

\begin{itemize}
\item \textsuperscript{159} See supra notes 92-98 and accompanying text.
\item \textsuperscript{160} \textit{Westen, The Empty Idea of Equality}, 95 HARV. L. REV. 537 (1982) (asserting that "equality" as abstract proposition is legally useless as it requires prior understanding of which persons and treatments are alike).
\item \textsuperscript{161} Even taken on its own terms, Justice Scalia's argument is flawed on the facts of \textit{Stewart}. Assuming for the sake of argument that the Rules of Decision Act requires an identity of rights distributed in state and federal court, there was no deviation from that standard here since petitioner's case could not have been brought in state court as pleaded. Plaintiff \textit{chose} the federal forum, presumably because federal courts have exclusive jurisdiction over antitrust claims. 15 U.S.C. § 15 (1988); \textit{see also} Freeman v. Bee Machine Co., 319 U.S. 448, 451 (1943). Plaintiff's antitrust claims would not have been cognizable in state court. There was no "inequitable administration" of the laws since there was no other Alabama forum with jurisdiction over the case as pleaded. Similarly, there was no danger of forum shopping since there was only one forum in which to shop. Accordingly, the rights affected were not in any way determined by the citizenship of the parties.
\item Assuming for the sake of argument that federal courts are constrained by \textit{Erie} in federal question as well as diversity cases, such a constraint would seem to be without purpose where the federal courts have exclusive jurisdiction over a case, and no "forum shopping" is possible. \textit{Cf. Westen \\& Lehman, supra} note 25, at 381 ("[T]his antidiscrimination value (and the outcome-determinative rule it supports) is not relevant to patent cases, because the exclusiveness of federal jurisdiction precludes any possibility of discrimination.").
\end{itemize}
state practices. If the state is indifferent, there is no reason to believe that Congress would have outlawed federal nonconformity simply because the litigants are treated differently.

These three insights suggest that resolution of court-access problems can be aided significantly by analysis of the various state interests driving court-access rules and of the federal interests in an independent practice.

B. Are the Policies Driving State Court-Access Rules Affected by Federal Practice?

For any state practice there are three possible kinds of legislative purpose relevant to the *Erie* problem, two of which are threatened by federal disregard of the practice.

First, the state rule may represent a decision not to spend state resources on a given problem. The state courts may have shorter hours, or, as in *Byrd*, may bypass jury determination of certain questions because judicial resolution is more economical or practical. This is the only kind of state policy not undermined by federal practice. If the federal courts want to expend their resources, the state ought to be indifferent.162

Second, the state may be attempting to achieve a regulatory objective external to the lawsuit. For example, it may want to encourage trust relationships by bestowing evidentiary privileges, to achieve repose by imposing a statute of limitations, or to deter wrongful conduct by conditioning court access on a foreign corporation's registration with the secretary of state. It is generally conceded that federal courts should not unduly frustrate these external regulatory objectives.163

Third, the state may be attempting to achieve a regulatory objective intrinsic to the lawsuit. It may want to make pleading more conclusory, provide more or less discovery, assert local control over the resolution of the litigation, or vest venue in a location convenient to a litigant. It may be balancing the interests of the parties, or simply deciding how to achieve an optimal adjudication. While these litigation-related interests have generally been ignored in the *Erie* context, there is no principled reason that they are less worthy of federal deference than external regulatory objectives.

As modern conflict of laws doctrine has painfully demonstrated, discerning the nature of the actual policies driving a given rule can be hazardous.164 The state legislature will rarely specifically evaluate whether it wanted federal

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162. Where state policy attempts to limit use of state resources to the taxpayers who have paid for those resources, federal nonconformity with that practice is irrelevant to the underlying policy to the extent that federal courts are not funded exclusively by the forum state, and the out-of-state litigant may well be part of the federal taxpayer base. The validity of pro-citizen court-access policies to avoid free-rider problems is further considered below. *See infra* notes 207-08 and accompanying text.


practice to conform. Attempts to divine legislative intent can appear to be purely fictitious.\textsuperscript{165} However, there are two distinctions between state-federal conflicts and state-state conflicts that render the task more manageable in the former.

First, in state-federal conflicts there is less need to speculate about whether the state intended its policy to protect federal litigants. In an interstate context, interest analysis has been criticized as requiring an almost metaphysical determination of whether the state intended to extend its law to extraterritorial transactions.\textsuperscript{166} In the \textit{Erie} context, on the other hand, the policy objectives protected by federal deference are all matters of legitimate domestic concern to the state. Whether or not federal practice was specifically contemplated by the state lawmaker, undesirable friction is generated when state policies are undermined by federal nonconformity. In fact, the federal court is not called upon to divine that specific state intent at all; it is not the state’s choice of law that is being vindicated, but its internal regulatory objective. The federal court’s determination of state legislative intent is the common judicial task of figuring out \textit{which} legitimate regulatory objective was intended by the lawmaker, not whether the lawmaker intended its law to apply to this specific transaction. It is the difference between asking whether a law is designed to save money or promote safety, as opposed to asking whether a state wanted to promote safety for persons or transactions outside its territory.

Second, the Rules of Decision Act provides a presumption in favor of state law that is absent in the interstate context. It may well be difficult or impossible to ascertain whether a state practice of, for instance, limiting discovery is designed to make litigation less expensive for the court or for the litigants. The latter would be frustrated by a contrary federal practice; the former would not. Given the Rules of Decision Act’s directive to avoid infringement of state regulatory prerogatives, however, it is incumbent on anyone urging a common law departure from state practice to demonstrate the absence of a state interest.

Two fairly straightforward questions provide an appropriate focus for examining the policies driving court-access rules: (1) In a situation where a lawsuit could be brought in several places, why would a state want to hear a case the federal court would not otherwise retain; and (2) why would the state \textit{not} want to hear a case that the federal court would otherwise retain? Despite the relative simplicity of the questions, the answers are fairly complex.

1. \textit{Open-Door Policies}

It is remarkable that virtually no federal court has considered itself bound by state rules that provide greater access to state courts than the federal courts


\textsuperscript{166} See id. at 400-01.
have provided. In contrast, state door-closing rules have received some respect from the federal courts, including a number of Supreme Court decisions mandating conformity. It is hard to account for this disparity. Intuitively, it would seem that the state decision to retain and expend resources on a case has as much or more pertinence to federal practice than a state decision to dismiss and save resources; in the latter case, the state might truly be indifferent if the federal government wants to “waste” its resources. It nevertheless appears that the federal courts can more easily recognize “substantive” state interests compromised by federal nonconformity with door-closing rules than with door-opening rules.

Conflict with open-door policies arises principally in two contexts: transfers pursuant to section 1404(a), as in Stewart, and forum non conveniens dismissals in states that have limited or abrogated the forum non conveniens doctrine. In virtually all of the cases where the Erie implications are addressed explicitly, consideration of relevant state policies is avoided by the courts’ conclusion that limiting access to federal courts is one of the “inherent powers” of the court. For instance, in In Re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, the court chose to ignore Louisiana’s restriction on forum non conveniens dismissals because of a paramount federal interest in “self-management”:

Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve the “essential character” of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our fact-finding processes must outweigh considerations of uniformity. ... Hanna gives us good reason to hold that federal courts have inherent powers under Article III to displace state laws on matters involving their basic competence as courts. ... We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity.

167. The closest the Supreme Court has ever come to enforcing such an open-door rule was in Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). In that pre-Hanna decision, the Court held that a Vermont federal district court sitting in diversity must enforce the state rule against enforcing arbitration clauses. The district court was thus forced to adjudicate an action it would have otherwise dismissed. Bernhardt, however, falls short of representing a true “open-door” paradigm. The state policy against arbitration was found to be substantive, and thus binding on the federal courts, not due to any state interest in providing a Vermont forum but because of a state policy favoring judicial resolution over proceedings before arbitration panels. Id. at 203-04. The state interest recognized by the court thus had more to do with the mode of proceeding rather than its location.

168. See cases cited infra note 237.


170. See infra note 191.

171. 821 F.2d 1147 (5th Cir. 1987).

172. Id. at 1158.
created by applying federal forum non conveniens in diversity cases.\textsuperscript{173}

No explanation is offered for why the federal interest in court access is more pressing than is the federal interest in any other "procedural" rule, but a sufficient number of courts have fudged the issue with the "innate power" rationale to generate a respectable body of precedent.\textsuperscript{174}

Had the courts considered the federalism implications of nonconformity with open-door policies, they would have discovered a wide range of state interests driving the open-door rules. Most of those interests are undermined by federal nonconformity. This suggests that something has gone wrong in the cases, or at the very least that greater scrutiny of the "inherent power" rationale is warranted.

\textit{a. Territorial Policies: Regulatory Interest in the Underlying Dispute}

The most obvious reason a state might want to retain a case subject to dismissal in the federal courts is that it perceives some regulatory stake in the underlying dispute. Either some events giving rise to the suit threaten the well-being of persons within the state’s borders, or the state wants to hold one of its citizens accountable for her actions outside the state.\textsuperscript{175}

Federal insensitivity to such interests may be attributable to two related premises, both of which are flawed. First, it is often said that any state regulatory interest is adequately vindicated by application of the state’s law by another court.\textsuperscript{176} This is a particularly dispositive premise in the transfer context, where application of the choice of law of the transferor state is guaranteed by Van Dusen v. Barrack.\textsuperscript{177} The state is perceived as indifferent to transfer as long as its law (or choice thereof) is applied. Second, it might appear that whatever state interest exists in resolving a dispute in state court is irrelevant.

\textsuperscript{173} Id. at 1158-59 (quoting Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969) (en banc); accord 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 6, § 3828, at 293-94; see also Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 320 (5th Cir. 1987) (implying in dictum that federal court in Texas may issue forum non conveniens dismissal and is not bound by Texas open-courts statute), rev’d on other grounds, 486 U.S. 140 (1988).

\textsuperscript{174} See, e.g., Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 536 (4th Cir. 1970) ("Adoption of state court procedures by federal courts . . . may be feasible, but it may also be in conflict with the fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures, the legitimate interest of a federal forum, qua forum."), cert. denied, 402 U.S. 932 (1971). It should be noted that the inherent powers rationale preceded Erie: even under the Conformity Acts, exceptions were carved out for judicial administration. McDonald v. Pless, 238 U.S. 264, 266 (1915) (courts have innate power to adopt and enforce their own self-preserving rules).

\textsuperscript{175} The state’s interest in providing a forum for its own citizens, or in altruistically providing justice to the world, will be considered separately below. See infra notes 199-203, 206-14 and accompanying text. Neither of those interests is based in the state’s interest in the dispute itself.


\textsuperscript{177} 376 U.S. 612 (1964).
to whether the dispute should be resolved in federal court; the state has been divested of its adjudicatory prerogative by the creation of federal jurisdiction. Whether the federal court transfers the case or not, the state will not be able to exercise its sovereign prerogative. Court-access issues thereby appear distinct from choice of law questions since the federal court may still vindicate the state's legislative jurisdiction even though it has divested the state of its judicial jurisdiction.

These arguments are undercut in situations where choice of law would be affected by the court-access decision. Such a case would seem likely to arise in states that have declined to follow the Supreme Court's holding in Piper Aircraft Co. v. Reyno—that forum non conveniens is not precluded where dismissal would result in less favorable choice of law for plaintiff. Some California courts, for instance, have expressly declined to follow Piper Aircraft, and do foreclose dismissals that would affect choice of law, at least where plaintiff is a citizen of California. A federal court sitting in California that was tempted to apply Piper Aircraft could not rationalize its decision by viewing California as indifferent to the decision. California's stake in the federal court's retention of jurisdiction is virtually identical to its interest in having its choice of law applied, a state preference with which the Supreme Court has clearly mandated federal conformity. In both the choice of law and choice of forum contexts, California has the identical interest in the enforcement of rights recognized under California law.

However, even where choice of law is unaffected by a federal dismissal, the suggestion that application of the state's choice of law exhausts the state's interest misapprehends the nature of the federal courts and the state's territorial interest in asserting judicial jurisdiction. The governmental authority exercised by a court in asserting its jurisdiction is not simply an abstract act of sovereign authority. The court brings to the community the authority and responsibility for resolving the controversy and establishing legal norms. That interest is vindicated even where some other state's law would be selected. Indeed, in cases where a state has no legitimate regulatory interest in the defendant or underlying dispute, asserting jurisdiction may be constitutionally problemat-

179. See generally Stein, supra note 1.
As the Supreme Court stated in *Gulf Oil Corp. v. Gilbert*, "[t]here is a local interest in resolving localized controversies decided at home." That local interest is not simply curiosity; it is an interest in local governance. Both the judge and jury act as representatives of the community in vindicating the community's interest in the dispute.

This is a familiar theme because it is also the backbone of federalism. Federalism seeks a balance between the economic, military, and social advantages of a national government and the political advantage of local governance. That balance is reflected in the structure of the federal courts. While federal courts are ultimately answerable to the federal government, they are also, in important respects, part of the state community. Virtually no federal district covers more than a single state. Federal judges are inevitably selected from the local bar, and federal juries are drawn from the state population. The personal jurisdiction of the federal courts is, by and large, restricted to the personal jurisdiction of the state courts.

Of course Congress could change all that by creating a single national district court, or some variation thereon, but it has not done so. It is clear that the

182. See Stein, *supra* note 27, at 699 (arguing that sufficiency of minimum contacts should be measured by degree of state regulatory interest implicated by defendant's conduct). *But see* Burnham v. Superior Court, 110 S. Ct. 2105 (1990) (rejecting constitutional attack on transient jurisdiction where jurisdiction was justified solely on basis of defendant's temporary presence in state). Ironically, in a case upholding jurisdiction in which there was no forum regulatory interest in the defendant or his conduct, the *Burnham* Court went out of its way to question the legitimacy of assertions of general jurisdiction over individual, as opposed to corporate, defendants. *Id.* at 2110 & n.1. For a thorough consideration of the implications of the *Burnham* decision on the law of personal jurisdiction, see Symposium on *Burnham v. Superior Court*, 21 RUTGERS L.J. (forthcoming 1991).

185. Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341. As demonstrated by Professor Rapaczynski, the benefits of local governance are both instrumental and intrinsic. Instrumentally, local government may be more responsive and accessible to individuals or groups who could not make their voices heard in a national arena dominated by well-organized and well-financed forces. *Id.* at 380-91. Local governance offers an additional, intrinsic advantage over a purely national polity: it provides greater space for citizen participation in government decision-making. *Id.* at 395-405.

While adjudication of lawsuits is not typically thought of as a vehicle for participatory democracy, the benefits of local governance are realized by appropriate jurisdiction decisions. While the community may not directly dictate the disposition of a lawsuit, its values and preferences are reflected in the make-up of the jury and the selection of the judge, who is also typically drawn from the community.

186. See generally 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3505. Conformity of the federal judicial districts to state borders has been maintained since the creation of the inferior federal courts in the Judiciary Act of 1789. *Id.* The sole exception is the District of Wyoming, which includes portions of Yellowstone National Park located within Montana and Idaho. *See* 28 U.S.C. § 131 (1988).
188. 28 U.S.C. § 1865(b)(1) (1988) requires that all jurors be residents of the district for at least one year.
189. *FED. R. CIV. P.* 4(e) limits long-arm service to the circumstances in which it would be available in state court, unless otherwise authorized by federal rule or statute. There are some specialized federal jurisdictional provisions, but the norm is compliance with state territorial limits. *See infra* notes 265-68 and accompanying text.
state-bound structure of the district courts is not accidental; it is itself an accommodation to the principle of federalism.

Accordingly, when a federal court makes a decision to assert its judicial authority it advances the territorial authority of the state community, if not formally the state government. Conversely, a federal dismissal or transfer of jurisdiction may frustrate that interest. Indeed, from this perspective, the state interest in retaining jurisdiction is equally frustrated by a federal transfer to another federal court, or a federal forum non conveniens dismissal in favor of a foreign forum. The only difference is that a transfer marginally maintains the principle of self-governance since the state community is, in some highly diluted sense, part of the national community. Dismissal in favor of a foreign forum entirely divests the community of control over the litigation.

By the same token, however, state decisions to assert jurisdiction that are not rooted in legitimate territorial regulatory interests should command less federal obedience. Suppose, for example, that state X were to hold that no case involving a dispute in state Y would be dismissed from its courts. It could hardly be maintained that federal conformity with such a rule, even if constitutionally applied in state X courts, would advance the interests of federalism. Federal deference to the state’s regulatory autonomy implies an important territorial limitation: the state’s regulatory prerogative will only be respected when the state is acting within its legitimate sphere of territorial authority. That limitation, in turn, suggests that two common state interests advanced by open-door rules may be distinguished from core territorial interests: altruistic policies and revenue-generating policies.

b. Extraterritorial Policies: The Texas Problem

Several states have completely eliminated discretionary dismissal of certain actions on the ground of forum non conveniens. As discussed above, the Supreme Court of Texas recently held that forum non conveniens there is precluded by a Texas statute guaranteeing that personal injury actions arising

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190. See Hill, supra note 18, at 553-54 (obligation to apply forum law should be limited to cases where forum has contacts with the controversy).

outside of Texas "may be enforced in the courts of this state."192 As long as Texas has personal jurisdiction over the defendant, its courts will adjudicate the controversy, regardless of its connection (or lack thereof) with the state.

Not surprisingly, "[t]ransnational tort litigation is increasing in the states that have not chosen to follow the federal forum non conveniens doctrine."193 Does federal nonconformity with those policies undermine legitimate state preferences?

The answer, I think, depends on why those states have taken that position. Legislative history on the Texas statute is incredibly thin.194 There are, however, several possible accounts.195

(1) Regulatory Interests in Defendants

To say that Texas has no connection to the offshore suits overstates the matter. The statute is not implicated unless there is jurisdiction over the defendants. The fact that the claims arose outside the state means that, in most cases, there must be "general jurisdiction" over the defendants, i.e., the defendants must have maintained "pervasive and systematic contacts" with Texas such that Texas can legitimately claim an interest in regulating their conduct, even outside the state.196

If that is the interest advanced by the open-courts provision, it is hard to conclude that federal nonconformity does not undermine that policy. If Texas wants to hold its citizens, or functional equivalent thereof,197 accountable to the Texas community, a federal forum non conveniens dismissal frustrates that

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192. Alfaro, 786 S.W.2d 674. The statute, TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986), is set out supra note 2.
193. Robertson & Speck, supra note 191, at 952.
194. The Alfaro court cites no direct legislative history on the 1913 Act. Its holding is based solely on a linguistic analysis of the provision. Indeed, Justice Hightower in concurrence, acknowledges the benefits of forum non conveniens but claims to be constrained by the statutory wording. 786 S.W.2d at 679 (Hightower, J., concurring).
195. Justice Gonzalez, in dissent, asserts that the history of the provision demonstrates that it has nothing to do with forum non conveniens, a doctrine which came into common usage well after the passage of the Act. Id. at 692 (Gonzalez, J., dissenting). Rather, he asserts, the Act was passed to guarantee Texas citizens injured in Mexico a right to proceed in Texas court without risk of being dismissed under the "dissimilarity doctrine," a conflict of laws rule that mandated dismissal when the controlling law was so different from forum law that it could not be easily or accurately applied. Id. See generally Note, The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico—A Modern Evaluation, 55 TEX. L. REV. 1281 (1977).
196. Justice Doggett, in a lengthy concurrence, focused on a series of policy-based justifications for the rule, most of which are considered infra (see notes 196-236 and accompanying text). 786 S.W.2d at 680-89 (Doggett, J., concurring). He does not appear to be making the claim that these policies were in fact the legislative objective behind the statute.
197. See Alfaro, 786 S.W.2d at 685 (Doggett, J., concurring) ("[T]he personal jurisdiction-due process analysis will ensure that Texas has a sufficient interest in each case entertained in our state's courts.").
Indeed, there will probably be diversity jurisdiction in many cases that fall within the statute. This regulatory interest is directly undermined when the action is removed to federal court and subsequently dismissed.

There are, however, alternative explanations of the statute that are less worthy of federal deference.

(2) **Altruistic Interests**

Perhaps the most common-sense explanation of the broad open-door policy is that Texas wants to spread its judicial wisdom to the world. Jurisdiction over the defendant is simply a way of achieving that goal.

It is unclear whether federal retention of these cases would in fact advance that policy; to the extent that the rule reflects a confidence in the state judicial machinery, federal adjudication would not spread Texas judicial wisdom.

However, even if federal practice is pertinent to the state policy, there is reason to discount that policy. Such "altruistic interests" have traditionally been considered of questionable legitimacy in the conflicts context, and should not command federal deference in the *Erie* context. As discussed above, the federal obligation to respect state regulatory prerogatives is necessarily limited by some territorial restriction on the definition of the state's regulatory interests. The state's desire to spread its judicial wisdom to the world is tantamount to an interest in expanding its boundaries. The sensitivity to state regulatory prerogatives required by the Rules of Decision Act does not mandate federal deference to such extraterritorial interests.

Moreover, as discussed below, paramount federal interests may justify federal disregard of state practices that interfere with interstate federalism or foreign relations.

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198. Justice Doggett's concurrence attempted to find a more direct territorial interest under the "what goes around comes around" principle: because of the global nature of the economy, any offshore misconduct by a Texas domiciliary had the potential to harm Texas residents. On the facts of *Alfaro*, he suggests a Texas interest in preventing the use of dangerous pesticides that could return to the state in the form of tainted Costa Rican fruit. 786 S.W.2d at 689 (Doggett, J., concurring).

199. *See id.* at 688 (Doggett, J., concurring) ("The abolition of forum non conveniens will further important public policy considerations by providing a check on the conduct of multinational corporations"); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145 (1987) ("Texas has constituted itself [as] the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else.").


201. *See supra* note 190 and accompanying text.

202. Whether or not the state is permitted to promote nonterritorial interests in state courts is a different question. State practice in state court will be restrained only by the limits of the due process, full faith and credit, and equal protection clauses. The issue of whether a state should be restrained from its own unconstitutional treatment of a litigant is distinct from whether Congress wants the federal courts to respect a state regulatory prerogative.

203. *See infra* notes 315-24 and accompanying text.
(3) Revenue-Generating Interests

Another possible explanation of broad open-door policies is that they serve as revenue-generating measures for the state. Texas lawyers, among others, stand to benefit from a rule that draws out-of-state judicial business into the state. Such interests, while not extraterritorial in the same sense as altruistic interests, demand little federal deference for similar reasons.

In the case of a revenue-generating measure, the “regulatory choice” that the state has made is not in fact an internal preference for one domestic policy over another. The state is simply trying to attract business from another state to its own. The only regulatory “choice” that the state has made is whether or not to subsidize that business by underwriting the cost of the judiciary, and it has no business directing the federal government similarly to subsidize the state’s economy. The state is without competence to “choose” to enrich its own bar at the expense of out-of-state lawyers. Like the altruistic interest, this is not a domestic policy matter. The state objective of enriching the bar may be frustrated if federal court access is denied, but the federal government has not interfered with state prerogatives as to how to regulate activity within its territory. The federal government could hardly be charged with stepping on state toes when it has simply declined to use federal resources to channel clients into the state.

(4) Resident-Benefiting Policies

Unlike the Texas approach of opening the courts to the world (for certain types of cases), several states have limited their open-access approach to

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204. See Brilmayer, Legitimate Interests in Multistate Problems: As Between State and Federal Law, 79 MICH. L. REV. 1315, 1330 (1981) ("Each state has a prima facie right to regulated domestic contacts—persons, property, or events affiliated with the state—but a state generally has no business regulating circumstances connected only with other states.").

205. The Supreme Court’s recent decision in Ferens v. John Deere Co., 110 S. Ct. 1274 (1990), questioned the importance of such revenue-generating interests in holding that the law of the transferor state should be applied to plaintiff-initiated transfers pursuant to 28 U.S.C. § 1404(a). According to the Court, a contrary choice of law rule would induce states to develop pro-plaintiff rules, such as extended statutes of limitations, to lure judicial business to the state. The Ferens rule forces a state to provide “take-out” law:

Applying the transferee law, by contrast, might create opportunities for forum shopping in an indirect way. The advantage to Mississippi’s personal injury lawyers that resulted from the state’s then applicable 6-year statute of limitations has not escaped us; Mississippi’s long limitation period no doubt drew plaintiffs to the state. Although Sun Oil held that the federal courts have little interest in a state’s decision to create a long statute of limitations or to apply its statute of limitations to claims governed by foreign law, we should recognize the consequences of our interpretation of § 1404(a). Applying the transferee law, to the extent that it discourages plaintiff-initiated transfers, might give states incentives to enact similar laws to bring in out-of-state business that would not be moved at the instance of the plaintiff.

Ferens, 110 S. Ct. at 1282.
residents or citizens. These rules foreclose jurisdictional dismissals against resident plaintiffs while permitting them against nonresident plaintiffs.

Consider the following hypothetical: Plaintiff, a resident of Colorado travels to Montreal for vacation, where she ingests soup containing botulin manufactured by the Acme Soup Company. Plaintiff is hospitalized in Montreal, where she eventually recuperates. When plaintiff returns to Colorado she files suit against Acme in Colorado state court. All relevant proof is located in Montreal. Acme is a multinational corporation with systematic and pervasive contacts in every state. Since plaintiff is a citizen of Colorado, the court will accept jurisdiction; if she were not, the case would be dismissed on the ground of forum non conveniens. To what extent must the federal courts in Colorado respect the open-door rule when the defendant seeks to remove the case to federal court?

Unlike the citizenship-neutral open-access rule, which could be interpreted as vindicating the state’s regulatory interest in the conduct of defendants, the state has made clear here that its interest is only in protecting its resident plaintiff. While such discrimination may appear problematic under either the equal protection or privileges and immunities clauses of the Constitution, the Supreme Court sanctioned such state practices in Douglas v. New York, New Haven & Hartford Railroad. The Douglas Court found the discrimination permissible largely because of a free-rider problem: out-of-state plaintiffs who did not contribute to the tax base should not have the same right to that resource as in-staters who paid for the courts.

Because forum residents are not the primary source of the federal court’s funding, they have no greater privilege of federal court access than out-of-state litigants. The state ought to be indifferent about the extent to which the federal courts provide equal access to all litigants.

Of course, the state is not indifferent to the extent that the pro-resident rule represents an attempt to confer a relative advantage on resident plaintiffs. If the


207. 279 U.S. 377 (1929).

208. Id. at 387 (“There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.”). But see Gergen, supra note 200, at 929:

[Notwithstanding free-rider justifications] states may not deny out-of-staters access to services that are essential to the functioning of markets (roads, public markets, and police protection, for example). In the case of these services, our interest in facilitating the operation of states as goods-creating entities is outweighed by our interest in promoting interstate commerce. Courts should come within this exception. To bar out-of-staters from the courts of states when they seek relief on claims arising from business transacted with citizens or within the state would discourage interstate commerce.
state wants its plaintiff to be able to sue at home, the federal court frustrates that preference by making her sue elsewhere. Stripped of the free-rider justification by removal to federal court, does that pro-resident preference deserve federal respect?

If the privileges and immunities clause means anything, it is that states cannot simply prefer their own citizens to citizens of other states. But, argues the state, its rule does not represent such a naked preference, even without the free-rider justification. Rather, a “citizenship-neutral” principle of venue is advanced: all plaintiffs should be able to sue at home. Indeed, the federal venue statute embodied that principle prior to its 1990 amendment. Thus, the resident plaintiff is favored not because she is a citizen of the state, but because she is suing at home.

To what extent is that state preference different from the state’s “selfish” desire to enrich the local bar? Is there a legitimate internal regulatory interest advanced by the “sue-at-home” rule? The answer, I think, is a cautious yes. At heart, the rule is pro-plaintiff, not pro-resident. While it may operate to the disadvantage of nonresident plaintiffs, the major impact of the rule is on defendants. The state has chosen to vest the plaintiff with more control over the venue of the suit than the defendant. The plaintiff can always have her rights adjudicated at home; the defendant cannot. That pro-plaintiff bias is


210. See Gergen, supra note 200, at 920 n.180 (state access policy based in belief that “all people should be able to look to their states for protection” does not constitute unconstitutional “naked preference”). Such a distinction illuminates a particularly confusing discussion in Justice Holmes’ opinion in Douglas. The New York statute in question was construed to authorize discretionary dismissals of actions brought by nonresidents, but not those brought by residents. 279 U.S. at 386. Concluding that the statute only discriminated on the basis of residency, and not citizenship, the Court condoned the discrimination: “A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence.” Id. at 387; see also Simson, supra note 209 (criticizing distinction as formalistic).

While the Court’s distinction may appear artificial, it is directly relevant to the issue of whether the state rule is based on considerations other than a naked preference for its citizens, i.e., the principle that all plaintiffs should be able to sue at home. The only time the statute would be applied differently to New York citizens versus New York residents is in the case of a nonresident citizen. In such a case, the nonresident citizen would be put on the same footing as any other nonresident, and would be denied access. 279 U.S. at 386-87. Accordingly, the state would not provide a forum if plaintiff was not suing, and thus maintains the neutral justification.


212. The same principle is the basis for the holding of Piper Aircraft v. Reyno that a foreign plaintiff’s choice of an American forum is entitled to less deference than an American plaintiff’s choice: “When the home forum has been chosen, it is reasonable to assume that this choice is convenient.” 454 U.S. 235, 255-56 (1981).

213. My caution is a consequence of the significant possibility that the state rule is not really driven by citizenship-neutral considerations at all. Rather, the state crafted the rule to benefit its own citizens. Cf. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 MICH. L. REV. 1091 (1986) (discriminatory impact of legislation on out-of-staters creates presumption of discriminatory intent).
precisely the kind of preference respected in the context of "substantive rights." It is not significantly different, for instance, from a rule establishing a presumption of substantive liability. While pro-plaintiff biases may or may not be misguided as a matter of policy, they are the kind of regulatory preferences allocated to the states by longstanding principles of American federalism.

It may be that a federal interest in international relations justifies federal nonconformity with the pro-resident plaintiff rule when there is a foreign alternative forum. Such a justification will be examined in Part II.C.2. The federal interest in maintaining an unbiased forum underlying diversity jurisdiction probably does not, however, apply here. While the state rule on its face discriminates against the defendant, who, in the case of removal, will always be a noncitizen, the state preference does not represent a bias against nonresident defendants. The state rule would apply with equal force if the defendant were a citizen of the state; the resident defendant could not affect a change of venue even if all relevant evidence and events occurred elsewhere. The defendant is thus disadvantaged not because he is a noncitizen, but because he is a defendant. Accordingly, the federal diversity interest in avoiding local bias against either litigant is irrelevant.

(5) Policies Against Private Control over Venue

As seen in Stewart, a state may compel its courts to accept jurisdiction notwithstanding a prior agreement between the litigants to resolve the dispute in some other forum. A number of states thus refuse or make it difficult to enforce contractual choice of forum provisions. Such rules are in direct conflict with the federal common law rule, first developed in the admiralty context, that forum selection clauses are to be treated as presumptively val-

214. That, of course, leaves open the question of whether the different treatment of similarly situated nonresident plaintiffs is unduly discriminatory. Unless it can be established that the rule is unconstitutionally discriminatory such that it could not be constitutionally applied in state court, there is little justification for federal nonconformity based in the diversity policy of avoiding parochial bias. The federal diversity policy protects equality between the plaintiff and defendant. It does not purport to address the broader issue of equality between different classes of litigants.

215. The converse issue of whether a forum selection clause is enforceable to create jurisdiction where it would not otherwise exist also raises Erie problems, and is considered below in connection with state door-closing provisions. See infra notes 237-307 and accompanying text.

Some federal courts have started to extend that rule to diversity cases generally. While *Stewart* authorized the federal courts to ignore state law that refused to enforce forum selection clauses in the context of a section 1404(a) transfer, the case does not resolve whether state law must be followed in the absence of section 1404(a). Thus, an open *Erie* question remains in cases where the contractually stipulated forum is outside of the federal system, or where a defendant moves to dismiss for improper venue rather than to transfer to the contractually stipulated forum.

To the extent that such state rules merely represent the application of broader open-door policies, the above analysis provides appropriate guidance for federal conformity; if a state *always* asserts jurisdiction and will not dismiss even when the parties have agreed to litigate elsewhere, the argument for federal dismissal is no stronger than in a case without a choice of forum clause. If significant state territorial interests are implicated by the case, a federal court has no business frustrating those interests simply because it wants to honor the contractual expectations of the parties. The state has already struck the balance in favor of its territorial policies by rejecting the contractual exception to its


218. *Jones v. Weibrecht*, 901 F.2d 17 (2d Cir. 1990); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514-15 (9th Cir. 1988); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1069 (11th Cir. 1987) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988). The Third Circuit is apparently alone in concluding explicitly that the enforceability of forum selection clauses is a matter of state law. General Eng’g Corp. v. Martin Marietta Alumina, 783 F.2d 352 (3d Cir. 1986) (applying Virgin Island law to forum selection clause signed by two Virgin Island residents); see also *Instrumentation Assoc. v. Madsen*, 859 F.2d 4, 7 (3d Cir. 1988) (citing *Martin Marietta* with approval, but characterizing issue as an open question in diversity); *Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (stating in dictum that “consideration should be given to the public policy of Missouri forbidding forum selection clauses”).

219. See, e.g., *Instrumentation Assoc.*, 859 F.2d at 7 (stating in dictum that state law governs enforceability of clause stipulating Canadian forum); *Manetti-Farrow*, 858 F.2d at 509 (enforcing contractual selection of Italian forum, holding that federal venue statutes justify application of a uniform federal rule on enforceability of forum selection clauses in diversity).

220. *Martin Marietta*, 783 F.2d at 352; *Farmland*, 806 F.2d at 849. Such motions to dismiss have been entertained pursuant to FED. R. CIV. P. 12(b)(3) as well as 12(b)(6). The propriety of a 12(b)(3) motion to enforce a choice of forum clause is questionable; the statutory venue requirements have in fact been satisfied. The motion is therefore more analogous to a motion to dismiss for forum non conveniens, normally considered independent of 12(b)(3). This in turn raises the broader question of whether forum non conveniens can be raised in cases covered by section 1404(a). The majority of courts have held that section 1404(a) preempts a forum non conveniens motion where the alternative forum is within the federal system, but the Supreme Court has not addressed the question. See *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 (5th Cir. 1983); *Collins v. Am. Auto. Ins. Co.*, 230 F.2d 416 (2d Cir.), *cert. denied*, 352 U.S. 802 (1956). See generally *Note, supra note 20; Annotation, Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After Enactment of 28 U.S.C. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. FED. 352 (1972).

The Supreme Court recently upheld dismissal (as opposed to transfer) of a personal injury claim filed in Washington rather than the contractually stipulated Florida forum. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991). However, since the claim was in admiralty, there was no question that federal law governed the enforceability of the forum selection clause pursuant to *Zapata*. See *id.* at 1525 ("[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize.").
open-door policy. It is difficult to identify any legitimate basis for federal rejection of that balance, at least in the absence of congressional authoriza-
tion.21

Similarly, if the state nonenforcement policy is driven by the state’s interest in protecting its choice of law, it is hard to see how a federal court could justify its disregard of that policy. As discussed above in the forum non conveniens context,22 one reason a state may wish to retain control over the litigation is to ensure that its law will be applied. Just as a state’s decision whether to enforce a contractual choice of law provision clearly commands federal conformity,23 its nonenforcement of forum selection clauses to achieve the same objective warrants no less respect.

Where the conflict between state and federal law is specifically over the value of choice of forum clauses, the question is more complicated. As with the other open-door rules, a careful evaluation of the policies animating that rule is critical to the issue of federal conformity. The two common explanations for nonenforcement of choice of forum clauses have radically different 

Erie implications.

Where, as was apparently the case in Stewart, the state rule is based on a policy of not allowing private litigants to "oust" the court of its authority, federal nonconformity with the state rule would not affect that policy. As discussed above, federal jurisdiction has already divested the state court of its authority.

On the other hand, to the extent that a state rule against choice of forum clauses reflects a judgment about the relative rights of the litigants, federal practice can undermine that policy. Specifically, if the state has made a judgment that choice of forum clauses typically are not freely bargained for and thus do not represent the true consent of the parties, federal enforcement of the clause would directly frustrate that policy.224

221. As discussed above, supra notes 144-53 and accompanying text, a credible case can be made that section 1404(a) does represent such authorization. Accordingly, federal transfers in the face of state nonenforcement policies raise fewer problems than forum non conveniens dismissals in the face of those same policies.

222. See supra note 181 and accompanying text; see also Freer, supra note 101, at 1136 (choice of forum clauses are primarily choice of law tools).

223. The obligation of federal courts to follow state law on the enforceability of choice of law clauses appears to be universally recognized. See, e.g., Yeldell v. Tutt, 913 F.2d 533, 543 (8th Cir. 1990); Equifax Servs., Inc. v. Hitz, 905 F.2d 1335, 1360 (10th Cir. 1990); Interfirst Bank Clifton v. Fernandez, 853 F.2d 292, 294 (5th Cir. 1988); Tele-Save Merchandising Co. v. Consumers Distrib. Co., 814 F.2d 1120, 1122 (6th Cir. 1987); T & S Brass Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098, 1102 (4th Cir. 1986).

224. It might be argued that federal enforcement of forum selection clauses would only frustrate state policy where the litigants did not in fact freely bargain for the clause. A state rule based in concerns about contractual volition can, in some sense, be seen as a question of administrative convenience not necessarily affected by federal nonconformity. To the extent that the state rule is driven by concerns about whether choice of forum clauses are freely bargained for, the rule represents a categorical judgment that a sufficient percentage of such clauses are not freely bargained for as to cast doubt on their use generally. By making that categorical judgment rather than adjudicating the volition issue in each case, the state has freed the court and litigants from the time and expense of proving volition. If the federal courts choose to spend their own resources ascertaining volition in every case, the state policy has been substantially accommodated as long
The resolution by the lower courts of the *Erie* implications of forum selection clauses outside of the section 1404(a) context reflects the same question-begging evidenced in *Stewart*. The most egregious example is the Ninth Circuit's 1988 decision in *Manetti-Farrow, Inc. v. Gucci America, Inc.* In that post-*Stewart* case, the parties had entered into a provision selecting Florence, Italy as the exclusive forum for disputes regarding "interpretation or fulfillment" of their exclusive dealership agreement. When defendants attempted to terminate the dealership and assign distribution to their wholly owned subsidiary, plaintiff filed suit against the parent, subsidiary, and managing officers in the Northern District of California, alleging a variety of breach of contract and tortious interference claims. The district court granted defendant's motion to dismiss on the basis of the forum selection clause and the court of appeals affirmed. The court held that forum selection clauses were presumptively valid under the *Zapata* standards, and should generally be enforced in diversity proceedings.

While recognizing that *Stewart* was limited to the section 1404(a) context, and that *Zapata* had been developed as an admiralty rule, the court nonetheless held that the enforceability of forum selection clauses in diversity had been federalized by a generalized federal interest in venue. Those federal interests "significantly outweigh the state interests." Quoting the court of appeals decision in *Stewart*, the court concluded that the federal venue statute "makes clear that Congress considered this a question appropriately governed by federal legal standards.

as non-bargained-for clauses are not enforced. Cf. Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970) (federal tolling rule may be developed where state interest in enforcing statute of limitations was accommodated by initiation of parallel proceeding in different jurisdiction within statutory period), *cert. denied*, 401 U.S. 932 (1971).

However, it would be wrong to conclude that the federal courts could fully accommodate state policy by making a case-by-case determination of volition. The state policy is still compromised to the extent that the state intended to relieve the party resisting enforcement of the clause of the litigation expense, delay, or effort of disproving volition. Moreover, the absence of certainty about the enforceability of forum selection clauses generates a potential for coercion. A party who has entered into even a purely boilerplate forum selection agreement could not be certain that the clause would not be enforced absent federal conformity to the state rule. She accordingly might be coerced into an adverse settlement rather than risk litigating in the contractually selected forum. Alleviation of that kind of coercion would seem a legitimate state regulatory prerogative warranting respect by the federal courts.

225. 858 F.2d 509 (9th Cir. 1988).
226. Id. at 511.
227. Id. at 512 & n.2.
228. Id. at 512.
229. Id. at 513. Other than the quoted language, there is no discussion of what those state interests are.
230. Id. There is no consideration of any legislative history on the question. The venue statute, 28 U.S.C. § 1391 (1988), on its face does no more than stipulate where federal civil actions may be brought. There is, of course, no reference to forum selection clauses.

The court also cites the Eleventh Circuit's reliance in *Stewart* on the provision of *FED. R. CIV. P. 12(b)(3)* as further evidence that venue questions should be governed by a federal standard. *Manetti-Farrow*, 858 F.2d at 513. Such an argument obliterates any obligation to apply state law. The same logic would presumably lead a court to conclude that the provision of *FED. R. CIV. P. 12(b)(6)* to dismiss for failure to state a claim authorizes the development of a federal common law standard for the legal sufficiency of
Of course, the only relevant congressional act was a venue statute that gave plaintiff a right to bring suit in the Northern District of California. The court relied on that statute as an unequivocal congressional directive to develop a federal common law rule giving presumptive validity to private agreements that displace statutory venue. The court did not even consider whether or not the state rule on forum selection clauses was in direct collision with federal policy, the predicate established by *Walker v. Armco Steel Corp.* for finding a statutory displacement of state law.

Not only does the opinion thus undermine the "direct collision" standard, but its purported balance between state and federal interests places a lead thumb on the federal side of the scales. There is no consideration in the opinion of what the relevant state interests are, and the only federal interest identified is the claim that "if venue were to be governed by the law of the state in which the forum court sat, the federal venue statute would be nugatory." But on the contrary, if anything makes the federal venue statute "nugatory" it is the enforcement of private venue agreements that displace statutory venue, not state doctrines that might ignore such private agreements.

The *Erie* issue in *Manetti-Farrow* is raised in an exceedingly odd context. The court engaged in an extended discussion of whether state or federal law controls the enforceability of the forum selection clause without even stating whether state law was different from federal law or identifying which law—Californian or Italian—would control the issue if state law applied. In fact, California seems to have adopted the federal standards for enforcing forum selection clauses. The court nevertheless found it important to establish that federal law applied.

It appears that the real purpose of establishing that federal law applied was to preclude plaintiff's parol evidence that the forum selection clause did not cover the claims raised in its complaint: "*Manetti-Farrow* sought to introduce parol evidence to show that it did not intend the forum selection clause to apply to tort claims. *Traditional contract law* provides that extrinsic evidence is inadmissible to interpret an unambiguous contract." What the court fails to mention, however, is that California law would have allowed the introduction of extrinsic evidence on this issue, in conflict with the

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231. California law in fact seems to be in accordance with the *Zapata* standards. See infra note 234 and accompanying text.

232. 858 F.2d at 513 (quoting Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc), aff'd on other grounds, 487 U.S. 22 (1988)).

233. While it would seem that California law should govern the issue, the contract included a choice of law clause which stipulated that the contract was to be interpreted in accordance with Italian law. Accordingly, it is possible that California would have looked to Italian law to determine the enforceability of the forum selection clause.


235. 838 F.2d at 514 (emphasis added).
"traditional contract law" applied by the court. In shades of 
Swift v. Tyson,
the court thus federalized not only the enforceability of forum selection clauses, but the ancillary question of whether the forum selection clause constitutes the actual agreement of the parties. On this choice of law question, the court attempts neither to balance the relevant state and federal interests nor to identify pertinent statutory authority. Presumably the existence of the federal venue statute would have again been relied on as conclusive statutory authority.

As fundamentally flawed as the post-
Stewart opinions are, the lower courts are doing little more than carrying 
Stewart to its logical conclusion. If section 1404(a) can be summarily held to federalize the enforceability of forum selection clauses, finding comparable authorization in section 1391 is not a radical extension. The lower courts' failure to consider the nature of competing state interests mirrors the Supreme Court's adjudication in 
Stewart.

2. Closed-Door Policies: The Mirror Images of Open-Door Policies

As discussed earlier, state limitations on court access have received far more respect from the federal courts than have state guarantees of court access. The Supreme Court has closed the federal door to litigants who are not "qualified" to sue in a state's courts, and federal conformity to the jurisdictional reach of the state courts under state long-arm statutes is mandated in the absence of contrary statutory authority, even in cases involving federal questions.

A number of factors seem to have contributed to this greater conformity. First, the courts have had an easier time discerning "substantive" objectives to door-closing statutes in the sense of advancing a purpose external to the lawsuit. For example, the state may be encouraging registration of foreign corporations by barring unregistered corporations from the courts, or it may be encouraging foreign corporations to do business in the state by limiting the jurisdiction of the state courts over them to matters arising within the state.

236. The California parol evidence rule, which allows even unambiguous contracts to be defeated by conflicting extrinsic evidence, had been roundly criticized, although followed, by the Ninth Circuit earlier in the year. Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 568-69 (9th Cir. 1988). The 
Manetti-Farrow court's failure to acknowledge its departure from California law could not have been an oversight. It cited 
Trident Center in its opinion, and was careful to characterize its statement of the parol evidence rule as "traditional contract law" rather than California law.


239. FED. R. CIV. P. 4(e); see also Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).


Even when such a "substantive" policy is not apparent from the face of state statutes, federal courts have conformed to state jurisdictional limits to avoid the mere possibility that a substantive objective may be frustrated. As Judge Friendly stated in his classic defense of jurisdictional conformity in *Arrowsmith v. United Press International*:

State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation, they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself, to disregard the balance thus struck by the states.\footnote{243}

Conversely, the federal courts have found less federal interest in expanding the jurisdictional limits of the federal courts than in limiting the volume of cases on the federal docket.\footnote{244} The courts have concluded that it is beyond their power to issue process \textit{without} statutory authorization, unless service of process is authorized under state law.\footnote{245} Such conformity is apparently contemplated by the Federal Rules of Civil Procedure, which the courts have taken both as authorization to assert jurisdiction and as a restraint on federal common law supplements to state service provisions.\footnote{246}

It is my suggestion that the courts have got it backwards. While there are situations in which expansive federal jurisdiction would undermine state policies driving jurisdictional restrictions, there is far less likelihood of that in the closed-door context than in the open-door context. It is more likely that a state will be indifferent to federal adjudication of cases not otherwise heard in the state courts than to federal dismissal of cases that would have been adjudicated in the state courts.

\footnote{243. 320 F.2d 219, 226 (2d Cir. 1963).}
\footnote{244. The federal interest in creating and maintaining federal courts apparently implies no independent jurisdictional reach, even though it is thought to authorize on forum non conveniens grounds disregard of not only state open-door policy but also federal venue provisions. \textit{Compare} Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97 (1987) (courts may not issue process outside of statutory authority or Rules of Civil Procedure) \textit{with In re Air Crash Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1158 (5th Cir. 1987) (federal interest in controlling docket justifies disregard of state open-door policy).}
\footnote{245. \textit{Omni Capital}, 484 U.S. at 98; see also cases cited infra note 247.}
\footnote{246. Sprow v. Hartford Ins. Co., 594 F.2d 412, 416 (5th Cir. 1979) (authorizing jurisdiction pursuant to 100-mile "bulge" provision of Rule 4(f) regardless of whether state could assert jurisdiction over defendant).
\footnote{247. See, e.g., Max Daetweiler Corp. v. R. Meyer, 762 F.2d 290, 295 (3d Cir. 1985) (rejecting "national contacts" approach to foreign defendant on grounds that federal courts are constrained by limits of state jurisdiction pursuant to Rule 4(e)), \textit{cert. denied}, 474 U.S. 980 (1985); \textit{ accord} Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977).}
Similarly, if the mere creation of an independent federal judicial authority implies the discretionary power to decline jurisdiction, it must certainly imply the independent power to assert personal jurisdiction. It ought to be easier, not harder, to create federal common law where the state would be indifferent.

The following section accordingly considers how state policies driving state decisions to close their forums are affected by a federal choice to provide a forum. Not surprisingly, most of the state policies driving open-door rules have mirror images in the policies that drive closed-door rules. Some, but not all, of these closed-door policies have different *Erie* implications than their open-door counterparts.

a. Comity Mirrors Territoriality

Where a state's decision to assert jurisdiction may represent a decision to vindicate the state's regulatory interest in the underlying dispute, the state's decision to decline jurisdiction may represent the conclusion that other sovereigns have a greater stake in the adjudication. Jurisdiction is declined both because the state perceives insufficient interest to justify the expenditure of state resources, and out of respect for the other sovereign's regulatory prerogatives. Such a judgment may be reflected in state statutes that impose greater limits on the courts' territorial reach than would be imposed by the federal constitution. On a case-by-case basis, the state may make comity the explicit basis for a forum non conveniens dismissal.

Federal nonconformity with those practices generates far less friction than nonconformity with the open-door counterparts. The expenditure of federal

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248. The Court in *Omni Capital* noted that it was beyond the power of a common law court to authorize service of process "outside its district." In a footnote, however, the Court concedes that such limitations may have been more a consequence of the constitutional limits on extraterritorial jurisdiction prevailing at the time rather than on any inherent requirement that there be statutory authority for service of process. 484 U.S. at 108 n.10. Judge Clark's famous decision in *Jaf tex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 516 (2d Cir. 1960), recognized a federal interest in asserting jurisdiction pursuant to a federal standard. That position was subsequently overruled in *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963). See supra note 243 and accompanying text.


251. See cases cited in note 249 *supra*.
resources on a matter that the state does not care about does not, for the most part, undermine the state interest in conserving resources.\(^{252}\)

The state interest in maintaining comity with the alternative forum state is more complicated. Reconsideration of the soup hypothetical, slightly modified, illustrates the issue. Suppose that when plaintiff returns home and files suit for her injuries abroad, defendant moves for a forum non conveniens dismissal. The state court grants the motion on the ground that a Montreal court can more appropriately evaluate the standard of care of defendants acting in Montreal. Plaintiff's brother, who suffered the identical injury in Montreal, subsequently files suit in federal court. Should the federal court be free to retain jurisdiction?\(^{253}\)

If the courts wanted consistency with conflicts doctrine, the answer would seem to be that a state's preference that another sovereign authority control the lawsuit must be respected by the federal courts. In *Klaxon v. Stentor Electric Manufacturing Corp.*,\(^{254}\) the Supreme Court held that the *Erie* obligation to apply state law includes the obligation to apply the state's choice of law. The rule has been extended to cases where the state would not choose its own law.\(^{255}\)

*Klaxon* is a fairly easy rule to justify if equality of outcome is the principal objective of the *Erie* choice. Plaintiff can win in state court and lose in federal court:

The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting

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\(^{252}\) See Parsons v. Chesapeake & O. Ry., 375 U.S. 71, 73 (1963) (noting that differences in docket congestion between state and federal court reduced relevance of a state forum non conveniens dismissal to decision whether to transfer case pursuant to section 1404(a)). The citizenry is, however, burdened with jury duty in both cases.

\(^{253}\) Note that this hypothetical implicates *Erie* concerns in an unconventional context: the formal state and federal forum non conveniens doctrine may well be identical. The question implicated is whether the federal courts ought to be bound by the state's application of law to the particular facts of this case. The case law found in this context suggests little obligation to follow a state adjudication. See Parsons, 375 U.S. at 75 (state forum non conveniens dismissal "can never serve to divest federal district judge of the discretionary power vested in him by Congress to rule upon motion to transfer under § 1404(a)").

The converse question, whether a state may proceed in the face of a federal dismissal, was raised, but not conclusively resolved, in Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988). The Court there vacated an injunction issued against a state court by a federal court that had previously dismissed the identical case on forum non conveniens grounds. The court of appeals upheld the injunction on the ground that, at least in admiralty, federal forum non conveniens law preempted contrary state law. Exxon Corp. v. Chick Kam Choo, 817 F.2d 307 (5th Cir. 1987). Without deciding the preemption question, the Supreme Court held that since the initial federal forum non conveniens dismissal did not specifically consider whether a proceeding in the state court would be appropriate, the court's subsequent injunction was not authorized under the relitigation exception to the Anti-Injunction Act. For a thorough discussion and analysis of Chick Kam Choo, see Robertson & Speck, supra note 191, at 953-74.

\(^{254}\) 313 U.S. 487 (1941).

side by side. Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based.256

Even if the rationale of *Klaxon* is sound,257 however, it is difficult to extend to choice of forum cases. The outcome impact of court-access decisions is far more difficult to determine than the outcome impact of conflict of laws choices.258 Moreover, if a governmental interest approach to *Erie* problems is followed, *Klaxon* makes little sense when applied to cases where the forum state would not apply its own law,259 and even less sense when applied to the state’s preference that the case be tried in another forum. The state presumably has little interest in *not* applying its law or in *not* adjudicating the controversy.

In the choice of law context, it could be argued that the state’s choice of another state’s law is fundamentally a process by which the state incorporates a foreign law as its own.260 It thus maintains an interest in resolving the controversy according to whatever rules are fairly applied to the parties. Federal nonconformity with that choice frustrates the state’s vision of fairness to the parties.261 The state’s interest in not retaining jurisdiction is more difficult to frame as an affirmative interest in the disposition of the lawsuit, particularly when it is the consequence of the state’s explicit conclusion that it has an insufficient interest in the lawsuit to justify retaining jurisdiction.

To the extent that the state’s sole interest in not retaining jurisdiction is courtesy to a more interested state, no apparent internal regulatory preference would be frustrated by federal nonconformity. Even if the more “interested” forum would be offended by federal retention of jurisdiction, it would not be attributable to any act of the forum state; the federal courts would take the heat. Accordingly, while state door-closing preferences based in comity may, in some sense, be considered “substantive,” federal conformity is not warranted.

b. *Selfish Policies Mirror Altruistic Policies*

While open-door rules may be driven by extraterritorial preferences, closed-door policies may represent just the opposite: a selfish unwillingness to expend resources on claims brought by out-of-state litigants or regarding actions arising

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256. 313 U.S. at 496.
258. See *Jaffex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 513 (2d Cir. 1960).
259. See Hill, supra note 18, at 435-56.
Whether or not the state's unwillingness to spend resources on such claims is appropriate, the state ought to be indifferent to the expenditure of federal resources on the problem. (A possible exception may be the federal jury duty imposed on the state's citizenry.)

A hypothetical demonstrates the point. Suppose a New York citizen is injured by a product manufactured by a California corporation. The California defendant has no constitutionally significant contacts with New York. It does, however, maintain continuous and systematic contacts with New Jersey, where it has some manufacturing facilities. Assume New Jersey’s jurisdictional statute limits jurisdiction over the foreign corporation to claims arising in New Jersey, or brought by New Jersey residents, a preference the Supreme Court has upheld as constitutional.6 The federal court sitting in New Jersey concludes that it is more appropriate for the defendant to defend the suit in New Jersey than to make the plaintiff travel to California. The only reason New Jersey has limited its jurisdiction, the court determines, is that it did not want to spend its resources on the out-of-state plaintiff. Why should the federal court be constrained by the state’s selfish policy? No New Jersey interest is undermined, and the federal interest of providing an adjudication without parochial bias is advanced by nonconformity. New Jersey is not required to expend any resources. The federal court makes its jurisdictional decision without the distortion created by the forum state’s bias for its own plaintiffs.264

The short, but unsatisfying, response of most courts is that the Federal Rules of Civil Procedure require conformity.265 Pursuant to Rule 4(f), federal service of process is restricted to the territorial limits of the state unless authorized by federal statute or rule. Service outside of the state is authorized by Rule 4(e) "under the circumstances and in the manner prescribed" by state long-arm statutes, or pursuant to any specialized federal jurisdictional provision.266 The Supreme Court has recently held that it would be inappropriate for the courts

263. See supra notes 207-08 and accompanying text.
264. Note, however, that the parochial bias reflected in the state rule is not one that favors an in-state party in this case. As a closed-door policy against out-of-state plaintiffs, the rule favors in-state plaintiffs in relation to out-of-state plaintiffs. It does not benefit any in-state party at the expense of an out-of-state party in the same case; both litigants in the hypothetical are noncitizens. Thus, as in the case of the "plaintiff may sue at home rule," the case for federal nonconformity based solely in a federal interest in providing a neutral forum in not very compelling.
265. See cases cited supra note 247.
266. FED. R. CIV. P. 4(e) provides in relevant part:
Whenever a statute of the United States or an order of court thereunder provides for service of a summons... upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides... for service of a summons... upon a party not an inhabitant of or found within the state... service may... be made under the circumstances and in the manner prescribed in the statute or rule.
to supplement the service of process authorized by Rule 4 on the ground that it is a matter best left to Congress. Absent some reason that Congress might disapprove of nonconformity, the Court's approach seems unduly rigid.

However, several other reasons for federal conformity with state service of process provisions have also been advanced. None is persuasive. First, it has been suggested that the exercise of expansive personal jurisdiction by the federal courts is intrusive on the adjudicatory rights not of the forum state, but of the sister states that would otherwise assert jurisdiction over the case. In the above hypothetical, the argument would be that California would object even if New Jersey would not.

Such an argument appears pertinent only to the issue of whether it is fair to adjudicate the case in New Jersey under state or federal standards; it does not explain why federal conformity to the state-imposed restriction is necessary. The federal court can account for California's adjudicatory interest in the dispute independent of whether New Jersey wanted to assert jurisdiction. Put in other terms, California's legitimate interest in adjudicating the dispute is not affected by whether or not New Jersey wants to hear the case.

A second possible justification for conformity is that subjecting the defendant to greater jurisdiction than is imposed by the state long-arm statute would be an unfair surprise, and would create unacceptable uncertainty. However, while that may be true for the first defendant subjected to federal jurisdiction, subsequent defendants considering contact with the forum state would be on notice of the federal standard. If necessary, the first defendant could be exempted from the operation of the rule, which the court could announce for the benefit of future litigants.

Finally, as pointed out by Judge Friendly in the Arrowsmith case, federal nonconformity with state service of process provisions would create troubling

268. But see Whitten, Separation of Power Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4, 40 Me. L. Rev. 41 (1988). Professor Whitten asserts that expansion of the rule to permit nationwide service of process in federal question cases would violate the Rules Enabling Act restraint on the creation of substantive rights. Cf. Burbank, supra note 33, at 1172-73 n.673 (questioning validity of Rule 4 even insofar as it authorizes use of state long-arm service). Such a rule, Professor Whitten contends, would infringe on Congress's legislative prerogative, the basis for the Enabling Act limitation. He would presumably similarly see a separation of powers problem in the issuance of common law process that exceeded present limits. Other than noting that Congress knows how to create a jurisdictional provision when it wants to, Professor Whitten does not explain why Congress would in fact care whether the courts asserted more expansive personal jurisdiction. For a discussion of an indirect source of friction with the states generated by expansive federal jurisdiction, see infra note 280.
270. See Ely, supra note 13, at 711 (no debilitating uncertainty generated where parties can conform conduct to a more demanding standard).
inequities between cases filed in federal court and cases removed there.\(^{272}\) Plaintiffs, in effect, would have a greater right to get into a particular federal court than defendants.\(^{273}\)

While it is true that nonconformity would give the federal court greater territorial reach in cases brought to it by plaintiffs than by defendants, that difference should not matter to either party. Defendant’s objective on removal is simply to get the case into federal court, not to summon parties to the proceeding; defendant has no need for any greater federal jurisdiction than was exercised by the state court. Neither plaintiff nor defendant is apt to complain that plaintiff could have taken advantage of even broader jurisdiction by filing in federal court initially. If defendant disapproves of plaintiff’s choice of forum, transfer is available under section 1404(a).

A particularly unreflective extension of this equality concern was the basis for the Eleventh Circuit’s recent decision in *Alexander Proudfoot Co. v. Thayer.*\(^{274}\) The court there refused to recognize a consent to jurisdiction clause in the defendant’s contract because the state courts would not enforce the provision. In a highly formalistic analysis, the court reasoned that its enforcement of the provision would induce forum shopping and create unreasonable inequities:

The first concern, forum shopping, requires the court to ask whether applying the state 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.” ... A diverse plaintiff suing a defendant without any contacts in the forum state, but who has signed a conferral of personal jurisdiction clause, may file suit in federal or state court. A federal court would enforce the conferral of personal jurisdiction clause under federal law, and the action would proceed. The plaintiff suing the same defendant in state court would face dismissal for lack of personal jurisdiction, the contractual clause notwithstanding. This difference in outcomes indicates that a plaintiff with a choice of forum would file in federal court to escape the effect of the state law. Accordingly, the application of federal judge-made law would disserve the first aim of *Erie.*

The court also must consider the related second aim of *Erie*, the avoidance of the inequitable administration of the laws. To analyze the second aim, the court asks whether the state law is “so important to the litigation that failure to enforce it would unfairly discriminate against citizens of the forum state.” ... The validity of a clause conferring personal jurisdiction is one of great importance to the litigation. When a defendant without any contacts in Florida is sued in Florida, an action

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\(^{273}\) The removing defendant could only remove to the federal court sitting in a state that asserted jurisdiction; the plaintiff who filed initially in federal court could take advantage of broader federal jurisdiction provisions.

\(^{274}\) 877 F.2d 912 (11th Cir. 1989).
brought in state court would be dismissed for lack of jurisdiction despite the conferral of jurisdiction clause. Conversely, the same action brought in federal court could proceed to judgment because of the contractual agreement to in personam jurisdiction. The citizens of the forum state are unfairly discriminated against in this situation because an action that would be barred in state court can proceed to judgment in federal court "solely because of the fortuity that there is diversity of citizenship between the litigants."\textsuperscript{275}

While this admittedly has a nice ring to it, neither of the court's concerns—forum shopping or discrimination—stand up to even cursory scrutiny. The court's reasoning illustrates the conceptual weakness of a pure equality analysis of court-access problems.

Forum shopping is a problem only when a plaintiff has greater ability than a defendant to select the forum and thus to manipulate the applicable law.\textsuperscript{276} Where, as in \textit{Thayer}, either party can opt for the federal forum, federal nonconformity with state law does not generate inequalities between plaintiff and defendant. The nonconformity may still be objectionable because it frustrates a state policy, but to find it objectionable solely because it "induces forum shopping" begs the question.

The court's "discrimination" concern is equally perplexing. The court found it imperative not to assert jurisdiction over a Missouri defendant in order to protect Florida citizens from discrimination. Presumably the class protected by the court's ruling consisted of Florida citizens other than plaintiff, who was perfectly content to be so victimized. However, Florida defendants could hardly feel put upon by a federal rule that subjects out-of-state residents to Florida jurisdiction.

That leaves only other Florida plaintiffs as the beneficiaries of the court's position, but not all Florida plaintiffs. The court can only be concerned for Florida plaintiffs who are suing Florida defendants since Florida plaintiffs suing foreign defendants would benefit from federal nonconformity. But the protected class is even narrower than that since Florida citizens suing other Florida citizens would normally have no need to enforce a consent to Florida jurisdiction clause. Florida defendants are presumably subject to jurisdiction in Florida in the absence of any contractual provision.

That leaves only Florida plaintiffs suing out-of-state defendants who have signed consent to jurisdiction provisions as well as Florida defendants. Plaintiff in that situation needs to get into federal court to enforce the consent provision against the out-of-state defendants, but the presence of the Florida defendants destroys diversity. The inequity presumably arises from the fact that a non-Florida plaintiff could bring the claim in a Florida federal forum, while the

\textsuperscript{275} \textit{Id.} at 918-19 (emphasis added).
\textsuperscript{276} See \textit{Hill}, supra note 18, at 564-65; \textit{Stein}, supra note 1, at 826-27 & n.199.
Florida resident is relegated to suing the out-of-state defendant in another state. It is hard to see how that Florida plaintiff is better off by denying access to the Florida forum to similarly situated noncitizens. She could hardly feel like the victim of anti-Florida animus; Florida plaintiffs would be the primary beneficiaries if consent to jurisdiction provisions were enforced. She would be unable to share the benefit not because she is a citizen of Florida, but because she is suing another citizen of Florida. In fact, she would probably welcome the federal enforcement of consent to jurisdiction clauses since it would give her the option of pursuing her claim against the Florida defendant in a separate proceeding, thereby restoring diversity and her access to a Florida federal forum.

There are, then, no Florida citizens who could have objected to federal enforcement of the provision on equality grounds. If assertion of federal jurisdiction was problematic, it was because of the right that Florida attempted to bestow on the nonresident by refusing to enforce consent to jurisdiction provisions. If anyone would have been injured by federal nonconformity, it was the out-of-state defendant. Casting the problem as one of equality obscures the real issue: would the policy animating the Florida doctrine have been undermined by federal nonconformity?

Given the Supreme Court’s apparent position that federal common law may be used only to abridge, but not to enlarge, federal personal jurisdiction, an anomaly is generated by the different techniques a state might employ to give effect to its “disinterested” policy. If the state, as in the New Jersey hypothetical, structures its long-arm statute to restrict service of process to cases brought by residents, or to claims arising in the jurisdiction, Rule 4(e) of the Federal Rules of Civil Procedure mandates conformity with the state practice even when the state would be indifferent to federal nonconformity. Thus, in most cases involving out-of-state defendants, the federal courts are powerless to assert greater personal jurisdiction than their state counterparts.

Alternatively, if the state extends its formal jurisdiction over those same cases, but consistently dismisses them either through the doctrine of forum non conveniens, or through a separate “door-closing” statute, the federal court can hear the case, the formal provision of jurisdiction in the state long-arm statute circumvents the conformity required by the Federal Rules. That anomaly may suggest that the conformity required by Rule 4 exceeds the demands of federalism.

278. See Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), in which the Court ultimately rejected application of the door-closing statute on the basis of paramount federal interests. See infra notes 286-96 and accompanying text.
279. Szantay, 349 F.2d 60.
280. Even though it may thus appear that the conformity required by the Federal Rules exceeds the requirements of rational federalism, Rule 4 conformity does prevent an indirect type of state-federal friction
c. Liability-Insulating Policies Mirror Liability-Assessment Policies

Perhaps the best reason for federal conformity with restrictive state jurisdictional provisions is that there may be other policies animating the state rule which would be undermined by federal nonconformity. Just as a state may, through an open-door provision, want to subject resident defendants to greater jurisdiction than the federal courts would otherwise deem appropriate, the state may want to insulate defendants from jurisdictional exposure by closing its courts to certain classes of cases. In particular, the state may want to encourage out-of-state corporations to do business in the state by protecting them from burdensome litigation arising from activities outside the state.

The Supreme Court recognized in *Angel v. Bullington* that state provisions withdrawing jurisdiction from the state courts in order to insulate the defendant from a specific type of liability—deficiency judgments on loans secured by real estate—were binding on the federal courts:

It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina state courts but not the federal court sitting in North Carolina. . . . North Carolina construed the statute expressive of state policy and spoke only of the jurisdiction of the state courts because it was concerned only with the state courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other states to secure such deficiency judgments against North Carolinians. . . . The essence of diversity jurisdiction is that a federal court enforces state law and state policy. . . . North Carolina would hardly allow defeat of a state-wide policy through

not relevant in the forum non conveniens context. Friction may be generated by any difference between state and federal practice that makes the federal courts a more desirable forum than the state alternative. Just as the federal courts have enlarged their subject-matter jurisdiction through pendent jurisdiction to avoid making federal courts less desirable than the state alternative, the federal courts should be sensitive to nonconforming practices that make the federal courts more desirable for reasons other than the courts' jurisdictional rationale—avoidance of bias or vindication of federal rights. The problem is not forum shopping in the *Hanna* sense of creating outcome differences, but rather diverting too much business from the state courts. See Burbank, supra note 33, at 1173 & n.673 (“From the point of view of federalism values, the regulation of the territorial jurisdiction of the federal courts can affect, as the regulation of subject-matter jurisdiction affects, the allocation of business between the federal and state courts.”).

In most cases, federal provision of greater court access will not divert cases from the state courts. Where the state completely denies court access because it is disinterested, it can hardly view a federal adjudication as in derogation of the state's judicial authority. A federal adjudication would not have the effect of diverting a case that the state would otherwise hear.

However, federal exercise of broad personal jurisdiction could have that effect in some multiparty cases. Suppose a plaintiff from state A sues defendant 1 from state A and defendant 2 from state B for a claim arising in B. State A's long-arm statute would authorize service on defendant 1 but not defendant 2. If plaintiff could pursue his claims against both defendants 1 and 2 in federal court, plaintiff may choose to file in federal rather than state court simply because it offers a more attractive remedy. The availability of broad federal personal jurisdiction would thus divert some business from the state courts.

281. See supra notes 196-98 and accompanying text.  
occasional suits in a federal court. What is more important, diversity jurisdiction must follow state law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.38

While the jurisdictional restriction in Angel was targeted at a specific type of liability, there is no good reason why the logic of the decision should not apply to more generalized attempts to insulate defendants from liability by restricting the scope of the court’s jurisdiction to purely domestic disputes.284 Why should a state rule that limits litigation expense be treated any differently from one that limits substantive liability?285

Given the prevailing judicial view that the federal courts are generally constrained by Rule 4 from serving process unauthorized by state statute, a state can successfully implement that policy, at least for the benefit of out-of-state defendants, simply by failing to authorize service. Accordingly, there is little

283. Id. The Court did not reach the serious issue of whether North Carolina’s refusal to enforce fully a Virginia judgment was in violation of the full faith and credit clause. The plaintiff had initially sought the deficiency judgment in North Carolina state court. That court dismissed for lack of jurisdiction over deficiency judgments. Rather than appeal, the plaintiff initiated a second proceeding in federal court, the subject of the Supreme Court appeal. The Court held that plaintiff was barred by res judicata from seeking relief in the federal proceeding. Id. at 189-90.

284. Closely analogous to this type of closed-door policy are state rules that prohibit a state from exercising jurisdiction over a case that calls for the court to interfere in the “internal affairs” of a foreign corporation. While the rule, a precursor to the modern forum non conveniens doctrine, appears to have its origin in the antiquated notion that a corporation only existed as such in its state of incorporation, see Stein, supra note 1, at 809, a few states still adhere to it. See, e.g., Moore v. NAACP, 425 Pa. 204, 229 A.2d 477 (1967); Hanover Affiliates v. Pamrex Corp., 236 N.Y.S.2d 94 (N.Y. Sup. Ct. 1963). The modern rationales seem to be a concern for not subjecting corporate officials to inconsistent standards of conduct, protecting the interests of absent parties, and not involving the court in continued supervision of the activities of an out-of-state business. See Burton v. Exxon Corp., 536 F. Supp. 617, 626 (S.D.N.Y. 1982). Federal practice would seem to have pertinence to at least the first two of those state policies.

In federal doctrine, as well as in most states, the rule seems to have been absorbed into broader forum non conveniens principles. See id.; Lapides v. Doner, 248 F. Supp. 883, 890 (E.D. Mich. 1965); Amatuzio v. Amatuzio, 410 N.W.2d 871, 874-75 (Minn. 1987); Lonergan v. Crucible Steel Co., 37 Ill.2d 599, 560-08, 229 N.E.2d 536, 539-40 (1967). Accordingly, most potential Erie problems can still arise when other forum non conveniens factors militating against dismissal would, in the court’s view, outweigh the problem of interfering with the internal affairs of a foreign corporation. The lower courts have split over whether such state rules must be respected in such cases. Compare Poe v. Marquette Cement Mfg. Co., 376 F. Supp. 1054, 1058 (D. Md. 1974) and Lapides, 248 F. Supp. at 887 (state rule is “local rule of forum-non-conveniens” which need not be followed) with Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945) and Genetti v. Victory Markets, Inc., 362 F. Supp 124 (M.D. Pa. 1973) (state rule must be followed).

285. Cf. Allstate Ins. Co. v. Charneski, 286 F.2d 238, 244 (7th Cir. 1960) (enforcing state rule against entertaining declaratory judgment actions brought by insurance companies to test insurance obligations on ground that purpose of state rule—consolidating all related proceedings in single tort action—would be frustrated by assertion of federal jurisdiction, and not justified by any countervailing interest in asserting jurisdiction). While there is some unfortunate equality dicta in the opinion, id. at 243, the Charneski court’s use of a policy-based analysis to resolve the court-access issue is quite consistent with the approach advocated herein.
case law testing the applicability to the federal courts of state jurisdictional restraints imposed in furtherance of a jurisdictional liability-insulating policy.

One notable exception is the Fourth Circuit's failure to enforce such a statute in *Szantay v. Beech Aircraft Corp.* Service of process was authorized by state statute, but another statute limited the courts' jurisdiction over out-of-state corporations sued by nonresidents for claims arising outside the state. The court disregarded the liability-insulating policy on three grounds. First, it was unclear from the legislative history whether that was in fact the policy behind the rule. Second, the court was concerned that the South Carolina rule would preclude enforcement to out-of-state judgments in South Carolina in frustration of the full faith and credit clause. Third, the court found a paramount federal interest in providing equal treatment to nonresidents, a policy supported by diversity jurisdiction.

On the first ground, it is unclear why the burden should have been on the plaintiff to establish that the state policies were undermined by federal nonconformity. If anything, it would seem incumbent on the party urging federal nonconformity to show that state policies are not implicated.

The second ground was really dictum, since the plaintiff was not enforcing an out-of-state judgment. The court could easily have carved out an exception for enforcement cases on the ground that once the underlying claim is reduced to judgment, the remaining claim for enforcement really does arise in the state, and therefore falls within the reach of the statute.

The equality argument is the most troubling one, since it does appear that conformity with the state statute locks the federal court into parochial favoritism for local over out-of-state plaintiffs. However, given the fact that federal nonconformity is not necessary to avoid parochial bias for one party over another party in the same lawsuit, the core justification for diversity, the equality argument is not a compelling justification for undermining the state regulatory policy. Moreover, as discussed above, the "parochial bias" of the

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286. 349 F.2d 60 (4th Cir. 1965).
287. *Id.* at 62.
288. *Id.* at 62-63.
289. The Supreme Court of South Carolina subsequently made clear that the purpose of the door-closing statute was to relieve the state of the burden of adjudicating matters in which it had little interest, as well as to encourage out-of-state corporations to do business in the state without fear of being sued there for matters unconnected with their business in the state. *See Rosenthal v. Unarco Indus.*, 278 S.C. 420, 297 S.E.2d 638 (1982).
290. 349 F.2d at 65-66.
291. *Id.* at 65.
292. A similar logic supports excepting enforcement actions from *Shaffer v. Heitners's* restriction on quasi-in-rem proceedings unrelated to the controversy. *See* 433 U.S. 186, 208-09 (1977) (attachment is unconstitutional jurisdictional basis where property unrelated to plaintiff's claim). Once there is an underlying judgment, property attached to satisfy the judgment is the subject matter of the enforcement action. *See id.* at 210-11 n.36 (once judgment properly entered, there is "no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter").
The statute is consistent with a rational and citizenship-neutral principle that plaintiffs should be able to sue at home.\textsuperscript{293}

The Fourth Circuit has apparently retreated from \textit{Szantay}. In \textit{Proctor & Schwartz, Inc. v. Rollins},\textsuperscript{294} the court, in a brief opinion, enforced the South Carolina door-closing statute against a Georgia resident, distinguishing \textit{Szantay} on the ground that South Carolina was the only possible forum in that case.\textsuperscript{295} Although the statute of limitations had run everywhere else in \textit{Proctor & Schwartz}, the plaintiff could previously have brought a timely action elsewhere. The court therefore found no "countervailing consideration favoring the exercise of federal jurisdiction" in light of the door-closing statute.\textsuperscript{296}

d. \textit{Litigant-Detriment Policies Mirror Litigant-Benefit Policies}

While open-door provisions may guarantee access to resident plaintiffs to benefit those plaintiffs, closed-door provisions may operate intentionally to disadvantage certain classes of litigants: as an inducement for a desired action, the state denies a party access to its courts unless it engages in that activity. The \textit{Erie} resolution of this kind of rule is very similar to the liability-insulating rules considered above. The state policy driving the access rule is directly undermined by federal nonconformity, and no federal interest justifies that effect.\textsuperscript{297}

The paradigm is \textit{Woods v. Interstate Realty Co.},\textsuperscript{298} in which the Supreme Court held that a federal court could not entertain a claim brought by an out-of-state corporation barred from bringing suit in the state courts because of its failure to "qualify" as doing business in the state.\textsuperscript{299} \textit{Woods} was decided purely on litigant equality grounds: "Where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the state in favor

\begin{itemize}
  \item \textsuperscript{293} \textit{See supra} notes 210-212 and accompanying text.
  \item \textsuperscript{294} 634 F.2d 738 (4th Cir. 1980).
  \item \textsuperscript{295} \textit{Id.} at 740; \textit{accord} Bumgarder v. Keene Corp., 593 F.2d 572 (4th Cir. 1979).
  \item \textsuperscript{296} 634 F.2d at 740.
  \item \textsuperscript{297} The federal interest in preventing interference with interstate commerce is independently implemented by commerce clause restraints on business-qualification statutes that affect interstate transactions. Notwithstanding the holding of \textit{Woods v. Interstate Realty}, 337 U.S. 535 (1949) that federal courts must respect state business-qualification rules, the Supreme Court has held that such rules may only be applied in both state and federal court to "purely intrastate transactions." Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974) (holding Mississippi business-qualification rule violative of commerce clause where underlying transaction was in interstate commerce). Thus, while \textit{Woods} still illustrates "substantive" implications of court-access rules, the practical impact of the case has been dramatically reduced. \textit{But see} Lawson Products v. Tifco Indus., 660 F. Supp. 892 (M.D. Fla. 1987); McCollum Aviation, Inc. v. CIM Assocs., 438 F. Supp. 245, 248 (S.D. Fla. 1977) (applying Florida door-closing statute to intrastate transactions).
  \item \textsuperscript{298} 337 U.S. 535 (1949).
  \item \textsuperscript{299} Some qualification statutes are actually framed in terms of denying the nonqualifying corporation the substantive right to enforce contracts entered into in the state. \textit{See}, e.g., \textit{ALA. CODE} \textsection 10-2A-247 (1980). In such cases, the obligation to respect the state law is clear. \textit{See} \textit{Aim Leasing Corp. v. Helicopter Medical Evacuation}, 687 F.2d 354 (11th Cir. 1982) (interpreting Alabama qualification statute to allow suit).
\end{itemize}
of those authorized to invoke the diversity jurisdiction of the federal courts." The same result is reached, however, under a policy analysis. The purpose of the state rule was to prevent out-of-state corporations from not registering with the state. Federal disregard of that limitation would undermine that policy to the extent that corporations would risk not registering since they could always avail themselves of a federal forum.

The Woods rule is somewhat complicated by Rule 17 of the Federal Rules of Civil Procedure, which directs the court to the law of the state of domicile or incorporation when determining the capacity of a party to sue or be sued. While Rule 17 is arguably in conflict with door-closing statutes, there is, in the words of Walker v. Armco Steel Corp., no "direct collision"; the two rules are capable of coexisting. As noted by Wright, Miller & Kane, the Rule can be viewed as a threshold requirement for maintaining suit, but business-qualification requirements must also be respected. Accordingly, no party lacking corporate capacity under the law of its state of incorporation may maintain suit, but "[p]laintiff cannot seek relief in a federal court if the doors of the forum state's courts are closed; the fact that plaintiff would have capacity under Rule 17(b) is not sufficient." Such a reconciliation makes sense in terms of the respective policy objectives of the rule and business-qualification provisions. The overall objective of Rule 17 is not to channel the case into one forum rather than another, but to determine the appropriate party to maintain an action. It thus provides rules for a variety of situations where the identity of the appropriate jural person is ambiguous: real-party-in-interest cases, parties suing in a representative capacity, suits by infants or incompetents, and suits involving corporate entities. Each

300. 337 U.S. at 538.
301. See McCollum Aviation, 438 F. Supp. at 248 (characterizing as substantive Florida requirement that corporations must qualify to do business in state before using Florida courts since requirement has "nonlitigative purpose of encouraging corporate qualification for the benefit of the state's citizenry").
302. The rule provides, in relevant part: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ." FED. R. CIV. P. 17(b).
303. See FED. R. CIV. P. 17(b); Kennedy, Federal Civil Rule 17(b) and (c): Qualifying to Litigate in Federal Court, 43 NOTRE DAME L. REV. 273, 281-82 (1968); Little, supra note 83, at 792-795. Professor Little cites the legislative history of the Rule in an attempt to establish that the intent of the drafters was to overrule Woods. While provocative, her evidence is far from conclusive. The Advisory Committee notes to the rule do not mention Woods or door-closing statutes at all. The notes do, however, include a reference to David Lupton's Sons Co. v. Automobile Club, 225 U.S. 489 (1912), in a "see specifically" cite on the issue of corporate capacity. That case, overruled by Woods, held that state business-qualification rules could not divest a federal court of jurisdiction over a nonqualifying corporation's claim. The notes also include reference to a law review article by Judge Clark arguing for a uniform rule on capacity. FED. R. CIV. P. 17(b) advisory committee's notes.
304. Following the Woods decision in 1949, the rule was amended substantively in 1966, and again in 1987 to make it gender neutral. See 6A C. WRIGHT, A. MILLER & M. KANE, supra note 120, § 1541, at 324-27. At no time was the Woods problem mentioned. One would certainly expect some clarification or reference to Woods if the intent of the drafters was inconsistent with that decision.
305. 6A C. WRIGHT, A. MILLER & M. KANE, supra note 120, § 1561, at 450 (citations omitted).
situation shares a common characteristic: the people affected by the litigation may lack authority to enforce the right in the judicial system. Viewed in this context, corporate capacity in the Rule 17 sense is a measure of whether or not the named party is a cognizable jural person: I will not be heard to sue as the Joe Smith corporation if there is no such legally cognizable entity.

However, even if a party is a legally cognizable entity, the law of the forum may impose various disabilities on that party for a variety of reasons: the state may withdraw statute of limitations defenses from corporations who were absent from the state, impose strict liability on certain classes of manufacturers, or strip tax-evading businesses of the right to maintain suit. While the latter could be characterized in a broad sense as an issue of capacity, it could equally be seen as a rule of substantive liability or jurisdiction.

C. Federal Interests that Justify the Frustration of State Policy

In the event that the purpose behind the state practice would be frustrated by a contrary federal practice, the federal practice must be justified by a paramount federal interest.


307. While the analysis of door-closing rules above focuses primarily on how territorial interests of the state are implicated by court-access practice, the analysis also sheds light on court-access policies normally considered under the rubric of "subject-matter" jurisdiction. Where rules of personal jurisdiction, venue, or forum non conveniens affect the allocation of authority between different sovereigns, rules of standing, subject-matter jurisdiction, and arbitration assume some body within the state has the authority to adjudicate the controversy. The issue is not whether the matter will be adjudicated within the state but rather who can assert the legal claims, or which authority within the state should resolve the matter. There appears to be some acceptance of conformity with state practice in this area. See Alexander, State Medical Malpractice Screening Panels in Federal Diversity Actions, 21 ARIZ. L. REV. 959 (1979).

While such rules are somewhat beyond the scope of this Article, it should be noted that they are susceptible to a similar analysis. For instance, suppose a state standing rule vests third parties with the right to enforce a state-created obligation. Imposition of federal standing limitations on either a diversity action or on a Supreme Court appeal of some federal issue raised in the case may be inappropriate; the state policy driving its standing rule will be undermined, and no federal interest may require nonconformity. See ASARCO, Inc. v. Kadish, 109 S. Ct. 2037 (1989) (permitting Supreme Court review of state proceeding that would have been dismissed for lack of standing in federal district court).

While it might seem that the standing of federal litigants is exclusively a matter of federal law, federal law of third-party standing could have the effect of obliterating the objective of the state right. See Diamond v. Charles, 476 U.S. 54, 65 n.17 (1986) ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing.") (dictum). Moreover, the policies driving federal standing doctrine may or may not have any application to the state claim. To the extent that federal rules against third-party standing are based on separation of powers concerns, see Allen v. Wright, 468 U.S. 737, 761 & n.26 (1984), the federal judiciary would not be infringing on any congressional power by hearing the case; any legislative prerogative in this case belongs to the state legislature which has already entrusted the judiciary with the resolution of the problem. Similar federal concerns about litigant autonomy would seem to be irrelevant where the state has created the underlying right.

The example demonstrates the danger of treating the availability of a federal adjudication as a matter of exclusive federal concern. Even where the issue can be classified as one involving the "subject-matter" jurisdiction of the court, the effect of federal practice on state policy can be extremely relevant.
1. **Housekeeping Justifications**

The federal interest in “regulating practice and procedure” in the federal courts has been inappropriately relied upon as a paramount interest.\(^{308}\) Carried to its logical extreme, such an interest undermines any obligation to apply state law, substantive or procedural. Virtually any law applied in a court could be deemed relevant to the “practice and procedure” in that court. Once it is acknowledged that the creation of federal jurisdiction does not per se authorize the creation of federal law,\(^{309}\) federal displacement of the state preference cannot be justified by the practice and procedure rationale.\(^{310}\)

Closely related to the practice and procedure rationale are claims that the federal courts have the authority to develop independent rules to maintain uniformity of practice in the federal system,\(^{311}\) and to deviate from rules that implicate the expenditure of federal resources.\(^{312}\)

As Redish & Phillips have noted, the uniformity justification is relatively weak in light of the Court’s and Congress’s ability to achieve uniformity on any given question by amending the Federal Rules of Civil Procedure or passing a statute.\(^{313}\)

The expense rationale ought to be equally suspect, particularly in the jurisdictional context. Most state laws enforced in federal courts implicate the expenditure of federal resources. A federal court would hardly be justified in refusing to apply a state “market-share liability” standard in a products case because it would make the litigation more complex and costly. A court’s refusal to recognize an open-door provision in cases where the underlying state policy

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308. *See supra* notes 171-174 and accompanying text; *see also* Monarch Ins. Co. v. Spach, 281 F.2d 401, 407 (5th Cir. 1960) (noting “the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause”).


310. *See Redish & Phillips,* *supra* note 13, at 390:
   [An independent system of administering justice rationale] might be thought to prove too much; its logic would authorize federal court rejection of purely substantive state standards where, in the federal court’s opinion, to apply them would cause an injustice. . . . [A] federal diversity court has no more authority to reject state procedure it deems unjust than it has to reject state substantive law for the same reason. . . .


312. Redish & Phillips, *supra* note 13, at 392:
   Consonant with the policies underlying *Erie* and the Rules of Decision Act, there is only one federal concern that should ever be allowed to outbalance a truly significant competing state interest—that of avoiding the cost or inconvenience to the federal courts that would accompany the application of a state procedural rule.

313. Id. at 390-91. Moreover, the strength of the interest is questionable. The principal advantage of uniform practice rules is that it makes appellate supervision easier. The trial courts would be presumably indifferent to whether they followed state rather than federal practice as long as it was clear which one applied to any given issue. The bar would presumably benefit from conformity with state jurisdictional practice, except in cases of interstate practices. The courts lived with diverse practice rules for almost 150 years under the Conformity Acts. *See supra* notes 78-80 and accompanying text; *see also* authorities cited *supra* note 79 for contention that there is no uniformity in federal practice.
would be undermined should be equally proscribed. Constitutional limits on the
jurisdictional reach of state rules provide more than sufficient protection against
"handcuffing" the federal courts with wildly excessive case loads.\footnote{314}

2. Substantive Federal Justifications

Two other types of federal interests may, however, provide appropriate
authority for federal nonconformity: federal law outside of Article III, and
practices that implement the purpose of federal jurisdiction under Article III.

As Westen & Lehman have demonstrated, any time a federal interest outside
of Article III justifies the creation of federal common law, the Rules of Deci-
sion Act command is inapplicable.\footnote{315} Indeed, in such cases state law will be
displaced in state as well as federal court.\footnote{316} An extended consideration of
non-Article III common law is beyond the scope of this Article. It does not,
for the most part, affect court access. One non-Article III federal interest does,
however, provide a potential basis for the development of a federal court-access
rule: the federal interest in international relations. That interest has justified the
displacement of state substantive liability pursuant to the act-of-state doc-
trine.\footnote{317}

The federal interest in international relations may also justify the creation
of a federal common law of jurisdiction or forum non conveniens in cases
where the jurisdictional choice is affected by the court's assessment of the
strength of a foreign sovereign's interest in the underlying controversy.\footnote{318}
Questions about international comity are, in effect, questions of foreign affairs
that should be subject to a uniform, federal policy. The state of New York
should not be the arbiter of whether a foreign government would or would not
be offended by assertion of jurisdiction by New York courts. As the Supreme
Court stated in U.S. v. Belmont, "in respect of our foreign relations generally,
state lines disappear. As to such purposes the state of New York does not
exist."\footnote{319}

\footnote{314. But see Redish & Phillips, supra note 13, at 393. Redish & Phillips explain that the justification
for deviation from state practice on the basis of expense is derived from the federalism principle that "one
sovereign in enforcing rights created by another need not follow rules that would unduly burden the
performance of its essential functions." Id. It would be hard to imagine that level of impact created by the
jurisdictional conformity advocated herein.}

\footnote{315. See Westen & Lehman, supra note 25, at 370.}

\footnote{316. Cf. Friendly, supra note 29. But see Field, supra note 15, at 964 (citing Henry v. Mississippi, 379
U.S. 443 (1965), as example of federal common law displacing state law only in federal court).}


\footnote{318. See Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 317 (5th Cir. 1987), rev'd on other grounds,
486 U.S. 140 (1988) ("[A]s in other areas of federal preemption, state law is preempted by maritime law
if it affects international or interstate relations."). For a detailed critique of the court of appeals' preemption
analysis, see Robertson & Speck, supra note 191, at 958-74. Specifically in reference to the foreign affairs
justifications, Robertson & Speck note the existence of other doctrines that protect that interest where
appropriate, and express skepticism about whether foreign affairs are ever truly implicated by private-party
adjudication.}

\footnote{319. 301 U.S. 324, 331 (1937).}
The foreign relations power probably does not justify the wholesale federalization of all international forum non conveniens law. Where the jurisdictional decision turns on issues such as the location of proof and the convenience of the parties, there is little need for a uniform federal approach. Federal displacement of state law is appropriate only in cases where the court-access issue turns on the question of the appropriate allocation of judicial authority between the forum and a foreign government.\textsuperscript{320}

3. Jurisdictional Interests

The more problematic issue is determining when the displacement is authorized by federal jurisdiction alone. If there were no differences between state and federal courts, creation of the federal courts would have been a wasteful gesture. Accordingly, it is appropriate for a federal court to develop an independent practice when that practice would advance the purposes underlying the existence of federal jurisdiction.

a. Diversity Justifications

In diversity, this would authorize federal disregard of state bias favoring its own citizens as it is reflected in state law. In the court-access context, that means that state court-access rules that discriminate against nonresidents need not be respected by the federal courts.\textsuperscript{321} Two forms of bias are relevant. The “strong” form is when a state practice bestows an advantage on the local party at the expense of the out-of-state party in the same lawsuit. That type of bias would seem to be at the core of the rationale for diversity jurisdiction.

The closest any court-access practice comes to creating such an illegitimate preference occurs when the local party’s choice of forum is entitled to greater

\textsuperscript{320} A good example is provided by the “British pill” litigation. See generally Stein, supra note 1, at 837–40. In that litigation, a large number of individual personal injury cases were brought by British residents against various American oral contraceptive manufacturers in numerous state and federal courts throughout the country. The plaintiffs alleged injury from the omission of package warnings that were included in the U.S. labeling. A number of state and federal courts held that, as a matter of comity, it would be inappropriate for U.S. courts to prescribe labeling requirements for pharmaceuticals distributed in the United Kingdom, particularly in view of the fact that the British government already pervasively regulated that activity. See Harrison v. Wyeth Laboratories, 510 F. Supp. 1, 4 (E.D. Pa. 1980), aff’d mem., 676 F.2d 685 (3d Cir. 1982); Purser v. American Home Prods. Corp., No. 80 Civ. 710 (S.D.N.Y. Jan. 30, 1981). The New York State Appellate Division, while ultimately dismissing the actions filed there, expressly noted that the federal adjudication was “not in any way critical to our decision.” Bewers v. American Home Prods. Corp., 99 A.D.2d 949, 950, 472 N.Y.S.2d 637, 639, aff’d, 64 N.Y.2d 630, 474 N.E.2d 247, 485 N.Y.S.2d 39 (1984). In those circumstances, the federal adjudication should have been dispositive. Where the federal courts found the existence of a paramount British interest in the litigation, the state should not have been allowed to deviate from that judgment.

\textsuperscript{321} The question of the constitutionality of such discrimination by the state courts themselves is beyond the scope of this Article. A pertinent distinction may well be found in the funding of the state versus the federal courts: as the forum resident contributes disproportionately to funding of the state, but not federal, courts, she may well be entitled to preferential access to her own state courts.
The Yale Law Journal

respect than the out-of-state party’s choice. As discussed above, however, state rules that operate to the disadvantage of out-of-state litigants may in fact be the consequence of a citizenship-neutral state preference, such as “plaintiffs should always be entitled to sue at home.” Federal nonconformity might nevertheless be justified on the basis of the appearance of bias, given the difficulty of distinguishing naked home-court preferences from citizenship-neutral judgments that have the effect of disadvantaging the outsider.

State rules operating to the disadvantage of the local litigant should generally be enforced by the federal courts. For instance, there is no federal diversity interest in disregarding a state rule precluding dismissal of suits brought against local defendants.

A “weak” form of interstate bias is reflected in state rules that operate to the relative disadvantage of a party as compared to similarly situated litigants in other lawsuits, i.e., rules that favor domestic plaintiffs over out-of-state plaintiffs, or domestic defendants over out-of-state defendants. An example might be a long-arm statute that asserts jurisdiction over out-of-state claims only for the benefit of resident plaintiffs. If such a limitation is in fact the product of a naked preference, the “victim” is not the defendant, who would certainly not benefit if the statute subjected other defendants to greater jurisdiction, but rather other similarly situated, nonresident plaintiffs.

Such bias does not directly implicate the core federal interest in diversity jurisdiction, which by its very terms focuses on the relationship between plaintiffs and defendants. This weaker form of discrimination may, however, justify some nonconformity. While the state may be justified in favoring its own taxpayers in the allocation of state resources, the federal courts have a broader constituency. There is a legitimate federal interest in allocating federal resources without regard to state citizenship. This weaker form of interest should not justify the disregard of state access rules where state policy would thereby be undermined, however.

b. Federal Question Justifications

The congressional mandate to respect state law in the Rules of Decision Act does not differentiate on its face between diversity and federal question jurisdiction. That undifferentiated deference is appropriate only to the extent that federal nonconformity in federal question cases can as effectively undermine state regulatory preferences as nonconformity in diversity cases.

322. See Redish & Phillips, supra note 13, at 376 (class-based inequality should not be Erie problem.)
323. See, e.g., IOWA CODE ANN. § 617.3 (West Supp. 1990) (limiting long-arm jurisdiction against foreign corporation to use by Iowa plaintiffs).
324. See supra note 208.
325. But see Redish & Phillips, supra note 13, at 392 & n.190 (“[I]f a state did devise procedural rules that varied depending on whether the litigant was in-state or not, there would be a powerful justification, based on the purposes of the diversity jurisdiction . . . for declining to follow the state rule.”).
It is clear that the calculus of state and federal interests is quite different in federal question cases. Several examples illustrate the point. Open-door rules designed to ensure application of the forum law are unaffected by federal nonconformity since the same federal law will apply in every federal forum. Closed-door rules designed to encourage out-of-state corporations to register with the forum state are largely unaffected by providing unregistered corporations with a federal forum to vindicate their federal claims since those parties will still be sufficiently disabled from vindicating their nonfederal rights to give them an adequate incentive to register. State preferences for plaintiffs over defendants would seem to be irrelevant to plaintiffs asserting federal rights.

Other state interests remain affected. A state regulatory interest in subjecting a local defendant to the judgment of the community seems as relevant in federal question as in diversity cases. State distrust of choice of forum clauses would seem as pertinent to antitrust claims as breach of contract claims.

Obviously, the other major difference in federal question cases is the heightened federal interest in vindicating the underlying claim. The federal court has a jurisdictional justification for nonconformity with any state practice that unduly burdens the assertion of federal rights; the availability of a forum with special sensitivity to federal rights is the central reason for federal question jurisdiction. Thus, an independent federal practice may be justified even when the underlying state policy might be affected by federal nonconformity.

For instance, a federal court might legitimately assert federal question jurisdiction over a nonresident defendant even though the state may have a legitimate interest in insulating a defendant from jurisdictional exposure for out-of-state acts. The federal decision is inevitably a balancing process, in which conformity will turn on the degree to which the federal right has been burdened by the state procedure as against the strength of the state’s interest in maintaining federal conformity.

It is noteworthy in this regard that a proposed amendment to Rule 4 would not require conformity to state long-arm process in federal question cases in which the defendant is not subject to general jurisdiction in any state, as well as authorize service of process to the limits of the Constitution or other federal law in such cases.

In cases of exclusive federal jurisdiction, the obligation to respect state preferences should be minimal. The state has already been divested of the


329. See Westen & Lehman, supra note 25, at 378-81.
ability to advance any procedural or substantive policy by the creation of exclusive federal jurisdiction. In terms of the balancing process described above, it could be said that exclusive federal jurisdiction represents a congressional thumb on the federal side of the scale. It can be assumed that Congress did not want to subject the resolution of the federal right to the vagaries of state procedures.

CONCLUSION

The confusion courts and commentators have faced in resolving the Erie implications of state rules regulating court access are attributable to two mistakes: a misunderstanding of the centrality of federalism to the Rules of Decision Act, and a misunderstanding of the nature of court-access rules.

In treating Erie problems as questions of maintaining litigant equality, the courts have obscured the more meaningful issue of determining whether litigant inequalities are appropriate. Federalism theory provides a useful method for determining when federal deviation from state practice is justified. The results of that methodology directly advance the purposes underlying the congressional directive to apply state law in the Rules of Decision Act—the avoidance of unnecessary friction with state regulatory prerogatives.

Once Erie problems are recast as attempts to discern the impact of federal practice on state regulatory policies, it becomes clear that the substance-procedure distinction traditionally employed in this context fails to identify accurately which laws require federal conformity. Court-access rules in particular have traditionally been resolved on the erroneous basis that they constitute procedural matters outside of the Erie mandate.

Court-access rules may represent precisely the type of state regulatory preferences deserving of federal respect. Some federal deviation from state access rules may be appropriate in given cases, either because the state policies are not affected by federal practice or because there is a paramount federal interest in providing different access. However, a more sophisticated analysis than has been employed in the past is required to differentiate between the varieties of court-access rules and their different implications for the federal system.

330. Note that the same result is reached through an “equality” approach since there is no difference between the rights asserted in the state and federal courts.