
Vertical Power

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*Many legal scholars and federal judges — including Justices Ginsburg and Scalia — have implicitly assumed that a state can extend its procedural law solely to federal courts within its borders. To date, however, no one has identified this assumption, much less defended it. Drawing upon an example discussed by Chief Justice Marshall in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), I argue that such vertical power does not exist. Not only do states lack a legitimate interest in extending their law vertically, a state’s assertion of vertical power would improperly discriminate against federal courts. If state law applies beyond the state court system, it must do so on the basis of a criterion that can be satisfied by sister state as well as federal courts. This requirement, which I call the principle of coordinancy, has important consequences, not merely for *Erie* cases, but for any situation in which the federal government seeks to identify legitimate state interests in the activities of federal courts.*

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INTRODUCTION

The question is simple — so simple that it is remarkable that it has received no academic treatment. Can a state legitimately extend its law to the procedure of federal courts within its borders? Consider title 12, section 1101.1(B)(3) of the Oklahoma Statutes, which requires a losing plaintiff in a contract action who previously refused an offer of settlement to pay the defendant’s attorney’s fees.¹ Can Oklahoma officials extend section 1101.1(B)(3) to contract actions filed in federal court in Oklahoma?

Almost 200 years ago, Chief Justice Marshall gave a negative answer in *Wayman v. Southard*. That states lack such power over federal procedure, he argued, is “one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused.”² Marshall asks us to imagine a state law that has the “direct and sole purpose of regulating proceedings in the courts of the Union.”³ An example would be an Oklahoma statute like section 1101.1(B)(3), except purporting to apply, not to Oklahoma state courts, but to federal courts within the state. “No gentleman,” he claimed, “will be so extravagant as to maintain the efficacy of such an act.”⁴ But, he continued, “[i]t seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by the state legislatures by an act professing to regulate the proceedings of the state courts.”⁵ Oklahoma officials cannot start with section 1101.1(B)(3), which applies to Oklahoma state courts, and extend it to federal courts in the state. “It is a general rule,” he argued, “that what cannot be done directly from defect of power cannot be done indirectly.”⁶

I think Marshall was right. States lack vertical power over federal procedure: they cannot extend their procedural law solely to federal courts (in particular, federal courts within their borders). But the conclusion is hardly so obvious that it needs no defense. As we shall see, many federal courts and legal scholars assume states have the very vertical power Marshall rejected.⁷ For example, in her dissent in *Shady*

¹ OKLA. STAT. tit. 12, § 1101.1(B)(3) (2014); see *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1278 (10th Cir. 2011).

² *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 49 (1825).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 49-50.

⁶ *Id.* at 50.

⁷ See *infra* Part II.

Grove Orthopedic Associates, Justice Ginsburg suggested that section 901(b) of the New York Civil Practice Law, which prohibits claims for statutory damages from being brought as class actions, might have been intended by New York officials to apply not merely to New York state courts but also to, and only to, federal courts in the state.⁸ Although Justices Scalia and Stevens disagreed with her interpretation of New York law,⁹ they expressed no skepticism about her interpretation of New York power. Nor is the matter as simple as embracing Marshall's opinion in *Wayman*, for in the end he does not merely claim that states lack vertical power over federal procedure — he mistakenly concludes they have no power over federal procedure at all.

In this Article, I will defend the principle that states lack vertical power over federal procedure. For reasons that will become clear later, I will call this the “principle of coordinancy.” I begin by defining the principle's scope.¹⁰ Unlike Marshall, I do not claim that states have no power over federal procedure. For example, Oklahoma officials are free to bind section 1101.1(B)(3) up into Oklahoma contract actions, thereby extending the rule to all courts — federal and sister state — that entertain such actions.¹¹ What I deny is that they have the power to extend their law to federal courts alone, and particularly to federal courts within the state's borders.

Two other clarifications are important to appreciate the principle of coordinancy's scope. First, it denies that states have an *original* vertical power over federal procedure.¹² It does not deny that they can be delegated such a power by federal law. Second, the principle denies that states have *any* original vertical power over federal procedure.¹³ They lack such power even in the absence of competing federal law.¹⁴

After clarifying the principle's scope, I then show its importance by describing how often federal courts and legal scholars have implicitly rejected it.¹⁵ Because this Article is the first to identify the question of vertical power, it is easy to think that the question is marginal or insignificant. To show its importance, I describe a large number of cases

⁸ *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 453-58 (2010) (Ginsburg, J., dissenting); see *infra* Part II.B.1.

⁹ *Shady Grove*, 559 U.S. at 431-36 (Stevens, J., concurring in part and concurring in judgment); *id.* at 398-406 (majority opinion).

¹⁰ *Infra* Part I.

¹¹ See *infra* Part I.A.3.

¹² See *infra* Part I.B.

¹³ See *infra* Part I.C.

¹⁴ *Id.*

¹⁵ *Infra* Part II.

in which the assumption that states have vertical power plays a crucial role. (A reader who agrees with me about the question's importance could safely skip this part.)

I next offer my defense of the principle of coordinancy.¹⁶ In particular, I argue that states lack a legitimate interest in extending their law vertically and that any assertion of vertical power would improperly discriminate against federal courts. I end by describing the important consequences the principle has, not merely for *Erie* cases, but for any situation in which the federal government seeks to identify legitimate state interests in the activities of federal courts.¹⁷

I. THE PRINCIPLE

The principle I will defend in this Article is that states lack vertical power over federal procedure.¹⁸ In this Part, I will spend some time clarifying the principle's scope.

¹⁶ *Infra* Part III.

¹⁷ *Infra* Conclusion.

¹⁸ Any law review article seeking to identify the scope of procedure usually begins with two warnings. The first is that the distinction between substance and procedure can vary given the context within which it occurs. Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 815 (2010); see also Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945). The second is that the distinction is difficult or impossible to draw. Kurt M. Saunders, *Playing the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 692 (1987) (describing concepts of substance and procedure as "amorphous" at best); Edwin W. Stockmeyer, Note, *Challenging the Plausibility Standard Under the Rules Enabling Act*, 97 MINN. L. REV. 2379, 2399 (2013); see also Joseph P. Bauer, *Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 948 (2011) ("[T]he boundary between substance and procedure is both imprecise and varying depending on the context in which the question is posed."). These difficulties are generally tied to the problem of identifying laws as substantive or procedural, where the designation has certain important consequences, particularly for choice of law. But it is not my goal to distinguish between laws that are substantive or procedural. By speaking of federal "procedure," I simply seek to identify an area of regulatory concern and to ask about the scope of states' lawmaking power in that area.

As I will use the term here, "federal procedure" is the activity of people — judges, parties, lawyers, witnesses, and the like — in connection with actions that are filed in federal court. It includes the usual activities covered in a first-year course on civil procedure: filing, service, pleading, dismissals (for jurisdiction, failure to state a claim, lack of timeliness, and failure to satisfy a condition for suit), joinder, certification of class actions, disclosure and discovery, summary judgment, the presentation of evidence at trial, appeal, and the enforcement of judgments. My question is the extent to which all these activities can be regulated by the states — in particular, whether a state can regulate such activity vertically, by extending its law only to federal courts within its borders.

A. *Vertical v. Coordinate Power*

The principle I will defend is inspired by the example that Marshall offered in *Wayman*, in which a state attempted to regulate federal procedure vertically. But if one looks to the entirety of Marshall's opinion in *Wayman*, one finds him expressing a much stronger position. States do not merely lack vertical power over federal procedure; they lack *any* power over federal procedure.¹⁹ In adopting this position, Marshall was in keeping with the prevailing view at the time, and well after, under which a sovereign — federal, state, or foreign — has exclusive authority over the procedure of its own courts, even when they entertain actions under another sovereign's law.²⁰

I will begin by spelling out Marshall's position that federal power over federal procedure is exclusive.²¹ I will then describe how federal courts eventually abandoned this position in favor of the view that the federal government and the states have concurrent power over federal procedure.²² Finally, I will distinguish states' concurrent power over federal procedure from the vertical power at issue in this Article.²³

1. Exclusive Power

Wayman concerned a Kentucky statute governing the execution of judgments.²⁴ The statute required the judgment creditor to accept in

Although my focus will be on federal procedure, not the distinction between substantive and procedural laws, I will occasionally describe a jurisdiction's law as "procedural," meaning that the law is intended by those who created it to apply in the jurisdiction's courts regardless of the cause of action under which the plaintiff sues. See *infra* Part III.C. Thus New York's statute of limitations for tort would be "procedural" in this sense if it applies to all tort actions brought in New York state courts, including those under the law of sister states.

¹⁹ See *infra* Part I.A.1; see also Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 838-39 (2008); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 977 n.167 (2001).

²⁰ *Dixon's Ex'rs v. Ramsay's Ex'rs*, 7 U.S. (3 Cranch) 319, 324 (1806) ("No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."); see also JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 556 (Boston, Hilliard, Gray, & Co. 1834) ("It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place, where the action is instituted . . ."); Bellia, *supra* note 19, at 976-83. But see *infra* Part II.C.

²¹ See *infra* Part I.A.1.

²² See *infra* Part I.A.2.

²³ See *infra* Part I.A.3.

²⁴ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 50 (1825).

payment notes of the Bank of Kentucky or of the Bank of the Commonwealth of Kentucky (both of which were considerably devalued) or a replevin bond for the debt, payable in two years.²⁵ In *Lapsley v. Brashears*, the Court of Appeals of Kentucky had struck down the statute as an impairment of contracts, in violation of the United States and Kentucky Constitutions.²⁶ But demand for relief for debtors in the wake of the Panic of 1819 was so great that an alternative highest court of appeals was created by the state legislature.²⁷ Because the “Old Court” refused to recognize the validity of the “New Court,” at the time that *Wayman* was decided, there were two highest courts of appeals in Kentucky with different views about the statute’s constitutionality.²⁸

Sidestepping the Contract Clause issue, Marshall concluded that the statute did not apply to a federal court’s execution of a federal judgment.²⁹ As he framed the question, the Court’s choice was between two possibilities: exclusive state or exclusive federal regulatory authority. If the plaintiff was correct, federal law “must govern the officer in all his proceedings upon executions [of federal judgments].”³⁰ If the defendants were correct, “the state legislatures retain complete authority over [the execution of such judgments].”³¹ Marshall did not appear to consider the possibility of concurrent authority, such as a system in which state law governs of its own force unless preempted by federal law.

Marshall’s position was probably influenced by the prevailing conception of the lawmaking power of territorially-defined sovereigns as exclusive within their borders. As he put it in *Schooner Exchange v. McFaddon*: “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”³² Only the sovereign has legislative authority over activities that occur within its borders, including the activities of its own courts.

²⁵ 1 C.S. MOREHEAD & MASON BROWN, *An Act to Regulate Endorsements on Executions: Approved December 25, 1820*, in A DIGEST OF THE STATUTE LAWS OF KENTUCKY 629, 629-30 (1834).

²⁶ *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 47, 56-57 (1823).

²⁷ John C. Doolan, *The Old Court-New Court Controversy*, 11 GREEN BAG 177, 180-82 (1899).

²⁸ Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 301-03 (2010).

²⁹ *Wayman*, 23 U.S. (10 Wheat.) at 50.

³⁰ Technically, Marshall spoke of this option as the common law, as modified by federal law, governing federal procedure. *Id.* at 21. But the fact remains that he rejected the possibility of concurrent state and federal regulatory authority.

³¹ *Id.*

³² *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

In keeping with this theory, only one sovereign had legislative authority even over transactions that straddled borders. Under the common law of choice of law recognized by state and federal courts in the nineteenth and early twentieth centuries, regulatory authority over such transactions rested exclusively in the sovereign within whose territory a particular triggering event took place. For example, under the principle of *lex loci delicti*, the sovereign in whose territory the harm occurred had the exclusive power to determine the legal status of a potentially tortious act, even when the act causing the harm occurred outside the sovereign's borders.³³ Insofar as Marshall, like others at the time, adopted this choice-of-law approach,³⁴ he too saw the division of lawmaking power between sovereigns — including the states — as exclusive.

This theory of exclusive authority extended even to adjudicative authority over a defendant. Under the traditional view of personal jurisdiction (read into the Fourteenth Amendment Due Process Clause in *Pennoyer v. Neff*³⁵), only the sovereign where a person was then located had the power to initiate in personam adjudicative authority over her.³⁶ To be sure, having acquired personal jurisdiction by proper service of process on the defendant within its borders, the sovereign retained the power to enter a binding judgment against her even when she was no longer present.³⁷ Thus, a person served in two states in connection with two lawsuits would find herself subject to overlapping adjudicative authority. But the power to *initiate* adjudicative authority at a particular time was possessed by one sovereign alone. Even the sovereign where the defendant was domiciled was unable to initiate such authority if she was outside its borders.³⁸

³³ Alabama G.S.R. Co. v. Carroll, 11 So. 803, 805-07 (Ala. 1892) (applying Mississippi law to determine applicability of fellow-servant rule to wrongdoing of corporation's employee in Alabama because harm from wrongdoing occurred in Mississippi); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

³⁴ Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 890 (1824).

³⁵ 95 U.S. 714, 733 (1877).

³⁶ Picquet v. Swan, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828). For a discussion of the history of tag jurisdiction, see *Burnham v. Superior Court*, 495 U.S. 604, 610-15 (1990).

³⁷ See, e.g., *Potter v. Allin*, 2 Root 63, 67 (Conn. 1793) (noting that jurisdiction over foreigners is possible "where their persons or properties had been attached and holden"); *Barrell v. Benjamin*, 15 Mass. (15 Tyng) 354, 357-58 (1819) (noting jurisdiction over foreigner is possible on the basis of transient presence in the state).

³⁸ Domicile without in-state service was not recognized in the common law as a method of in personam jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29 cmt. c (1971). It was ultimately upheld as a source of in personam jurisdiction in *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940).

Unlike a territorially defined sovereign, however, the federal government was assigned legislative authority by subject matter. Thus, the question of whether its authority was exclusive or concurrent with the states was more difficult.³⁹ But even here, Marshall was attracted to exclusivity. For example, in *Gibbons v. Ogden*, he saw “great force” in the argument that Congress had exclusive lawmaking power over interstate commerce.⁴⁰ Thus, we should not be surprised that he thought the federal government had exclusive lawmaking authority over the procedure of federal courts. Just as he saw interstate commerce as subject to exclusive federal authority, even when the specific act of interstate commerce that was regulated occurred within a state’s borders, he also saw the procedure of federal courts as subject to exclusive federal regulatory authority, even when the federal court was located within a state.

2. Concurrent Power

But over time, exclusivity of authority was abandoned in each of the areas I have described above. Concerning Congress’s power under the Commerce Clause, federal courts acknowledged concurrent federal and state authority very early. In *Cooley v. Board of Wardens*, the Supreme Court concluded that the Commerce Clause prohibited only state law that governed a national matter or burdened interstate commerce directly.⁴¹ In other areas, state regulation of interstate commerce was permissible, unless preempted by federal law.⁴² With the Supreme Court’s expansion of the scope of federal power under the Commerce Clause during the New Deal, the area where the states and the federal government share regulatory authority over commerce has expanded

³⁹ See generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 187-201* (2010) (discussing the historical origins of concurrent jurisdiction).

⁴⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824). Marshall declined to decide *Gibbons* on that ground, however.

⁴¹ *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319, 325 (1851).

⁴² *Id.*

even further.⁴³ Only in a small area does the dormant Commerce Clause give the federal government exclusive regulatory authority.⁴⁴

At roughly the same time as the New Deal Commerce Clause decisions, the Supreme Court began to view multiple states as having concurrent regulatory authority over matters not preempted by federal law. The Court had flirted with imposing an exclusive division of regulatory authority upon the states, by reading traditional choice-of-law principles, like *lex loci delicti*, into the Full Faith and Credit or Due Process Clauses.⁴⁵ But it abandoned the effort. Two or more states, it ultimately concluded, can have the power to extend their law to a single transaction. For example, a state can extend its tort law to a transaction even if the harm occurred outside its borders.⁴⁶

Also around the time of the New Deal Commerce Clause decisions, the Supreme Court embraced a theory of concurrent personal jurisdiction. More than one state can assert adjudicative power over a defendant at any moment. A defendant not served within the forum state can still be subject to in personam jurisdiction, provided that he has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁴⁷

That courts also abandoned a theory of exclusive regulatory authority over procedure is less recognized.⁴⁸ But even in the nineteenth century, courts began to acknowledge that a sister state might bind up with its transitory cause of action certain rules — such as time limits or burdens of proof — that would otherwise be governed by the law of the forum.⁴⁹ In such cases, the forum respected sister state law. Granted, the Supreme Court has never determined whether such respect is the

⁴³ *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942); *United States v. Darby*, 312 U.S. 100, 112-13 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-31 (1937). A classic account of the move from exclusivity to concurrence is Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 494-96 (1933); see also Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 38 (2004).

⁴⁴ *E.g.*, *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 108 (1994).

⁴⁵ *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918) (reading into Due Process Clause the rule that the law of the state where the contract was entered into determines validity and scope of a contract).

⁴⁶ *E.g.*, *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 500 (1939).

⁴⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴⁸ Indeed, it is often still said that federal power over the procedure of federal courts is exclusive. Barrett, *supra* note 19, at 838-39; Bellia, *supra* note 19, at 977 n.167.

⁴⁹ *Davis v. Mills*, 194 U.S. 451, 454 (1904); *The Harrisburg*, 119 U.S. 199, 214 (1886); *Boyd v. Clark*, 8 F. 849, 850 (C.C.E.D. Mich. 1881); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 603-605 (1934).

forum's constitutional duty.⁵⁰ But, for our purposes, it is enough that the sister state was thought to have regulatory power over the forum's procedure, even if this power had to yield to competing forum law.

A similar, but even more pronounced, phenomenon occurred in reverse-*Erie* cases, in which state courts entertain actions under federal law. Here, the Supreme Court has not shied away from extending federal rules to the procedure of state courts. It has held, for example, that a state court entertaining a federal cause of action must use the federal rule concerning burdens of proof,⁵¹ limitations on actions,⁵² pleading standards,⁵³ and the appropriate finder of fact.⁵⁴

Given that a state can regulate the procedure of sister state courts and the federal government can regulate the procedure of state courts, it should follow that states can regulate the procedure of federal courts. And the Supreme Court came to just such a conclusion in *Byrd v. Blue Ridge Rural Electric Cooperative*. That case concerned a federal court in South Carolina entertaining a South Carolina negligence action.⁵⁵ The Court was faced with the choice between two rules: a South Carolina rule that gave to the judge the power to decide the factual question of whether the plaintiff was covered by South Carolina's workers' compensation statute or a federal common law rule that gave the matter to the jury.⁵⁶

⁵⁰ The closest the Supreme Court has come to answering this question is *Sun Oil v. Wortman*, 486 U.S. 717 (1988). But *Sun Oil* told us only that the court had the power to apply its statute of limitations in the *absence* of competing sister state law, for in his opinion in *Sun Oil* Justice Scalia noted that the sister states at issue did not *want* their statutes of limitations to follow their causes of action into other court systems. *Id.* at 729 n.3. The Supreme Court has held that a state court may prefer its shorter procedural statute of limitations over a sister state's applicable limitations period. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525-27 (1953). In this scenario, however, the dismissal usually allows the plaintiff to sue again in another forum. RESTATEMENT (SECOND) OF JUDGMENTS § 19(f) (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmt. b (1971). It is arguable, therefore, that the application of the forum's procedural law does not really conflict with sister state law. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.2B (6th ed. 2010).

⁵¹ *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512 (1915).

⁵² *Atl. Coast Line R.R. Co. v. Burnette*, 239 U.S. 199, 202 (1915).

⁵³ *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 295-96 (1949).

⁵⁴ *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952). For a discussion of reverse-*Erie* cases, see Bellia, *supra* note 19, at 959-63, 976-85, Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 2 (2006), and Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1909-17 (2013).

⁵⁵ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 526 (1958).

⁵⁶ *Id.* at 533-40.

Although he ultimately argued that the federal rule should be used, Justice Brennan noted that if the South Carolina rule were a part of the South Carolina cause of action upon which the plaintiff sued, the federal court would be constitutionally obligated to apply it. *Erie R. Co. v. Tompkins*, he argued, puts a duty on federal courts sitting in diversity to “respect the definition of state-created rights and obligations by the state courts,” including state rules “bound up with these rights and obligations.”⁵⁷ Thus, Brennan recognized that South Carolina has the power to regulate the procedure of federal courts, although he did not think that this power was exercised in the case at hand.⁵⁸

Notice that it does not matter whether Brennan was right that *Erie* constitutionally obligates federal courts to yield to state power over federal procedure. Even if federal courts can create federal procedural common law that displaces state rules that are bound up with state causes of action, the fact remains that in the absence of federal preemption, state law can govern federal procedure of its own force.

Nor can one argue a state’s power to regulate federal procedure is confined to cases in which a rule is bound up with the state’s cause of action. It is commonly accepted that a state can have a legitimate interest in regulating a procedural matter in a sister state court, even when that court is entertaining an action under forum (or a third state’s) law. Assume, for example, that two Texans get into an accident in Texas. Their dispute is adjudicated by a Texas state court. Oklahoma’s attorney-client privilege can legitimately apply if the relevant communications took place in Oklahoma or if the attorney-client relationship was centered in that state.⁵⁹ To be sure, the Texas court probably has the constitutional power to prefer its own privilege law, and some states exercise this power.⁶⁰ But in the absence of conflicting forum law, sister state law can govern forum procedure of its own force.

The same state power to regulate the procedure of sister state courts extends to the procedure of federal courts. Federal courts commonly

⁵⁷ *Id.* at 535.

⁵⁸ *Id.* at 535-36.

⁵⁹ *E.g.*, *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971). What is more, state courts apply sister state law without suggesting that sister states have this regulatory power only because it is delegated to them by the forum state.

⁶⁰ *E.g.*, *Sterling Fin. Mgmt., LP, v. UBS Painewebber, Inc.*, 336 Ill. App. 3d 442, 452-55 (2002), *abrogated by* *Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 10 N.E.3d 902 (Ill. 2014); *State v. Lipham*, 910 A.2d 388, 390-91 (Me. 2006).

use state privilege law,⁶¹ thereby treating federal procedure as subject to concurrent state and federal regulatory authority.⁶²

To sum up, it is clear that states have some power to extend their law to the procedure of federal courts. Granted, this power must have limits. It is possible that a state cannot legitimately regulate the page length of briefs in federal court, even in the absence of competing federal law. But for our purposes, it is enough to know that a non-trivial area of federal procedure is subject to concurrent state and federal regulatory authority.

3. Vertical Power

So, Marshall was wrong. Federal power over federal procedure is not exclusive. Given this fact, how can Marshall's opinion in *Wayman* offer us any guidance?

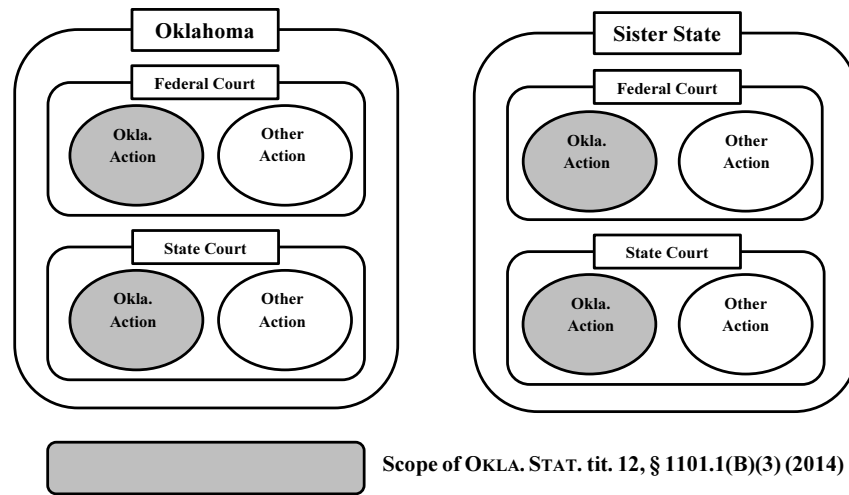
Let us return to the example of attempted state regulation of federal procedure that Marshall envisioned in *Wayman*. In his example, state officials did not seek to regulate the procedure of federal courts by binding up a rule into the state's cause of action, for in such a case the state's rule would have extended to all court systems — federal and sister state — that entertained the action.⁶³ An example would be Oklahoma officials binding up section 1101.1(B)(3) into contract actions under Oklahoma law. As represented in Figure 1, the scope of section 1101.1(B)(3) would extend to all cases in which the plaintiff sues under Oklahoma contract law, whether the case is before an Oklahoma state court, a federal court in Oklahoma, or a federal or state court in a sister state.

⁶¹ E.g., FED. R. EVID. 501; see H.R. REP. NO. 93-650, at 3, 9 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 ("The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason."). Notice that state law is applied without the suggestion that states have this power only because it is delegated to them by federal law.

⁶² Indeed, it is clear that states have concurrent lawmaking power in precisely the area where Marshall claimed federal power was exclusive, namely the execution of a federal judgment by a federal court. See *infra* Part III.C. Federal courts currently use state law concerning such enforcement. FED. R. CIV. P. 69(a). Nor can this be understood as the incorporation of state law into federal law. An independent suit to collect a federal judgment is a state law action that lacks federal subject matter jurisdiction, unless the parties are diverse. *Metcalf v. Watertown*, 128 U.S. 586, 587-88 (1888).

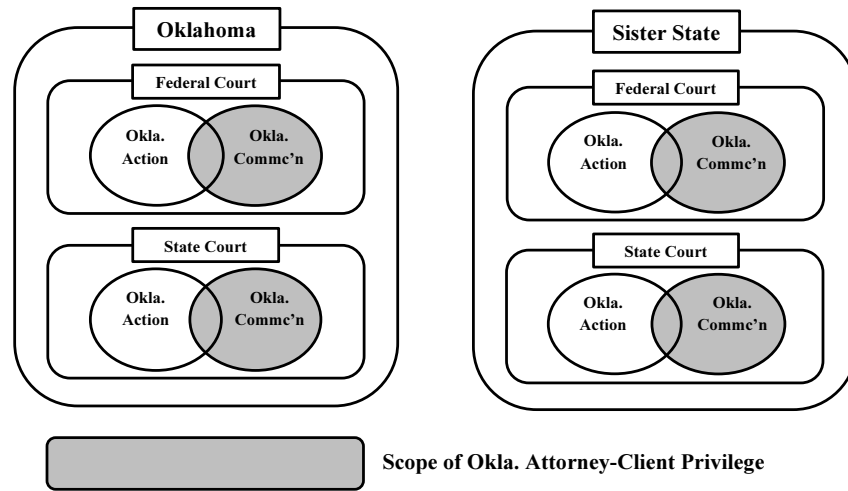
⁶³ See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 49-50 (1825).

Figure 1



Nor did Marshall imagine a state's officials identifying a matter of interest independent of the state's cause of action and extending a state law to all court systems, whether federal or sister state, in which the matter arises. An example would be Oklahoma officials extending their law on the attorney-client privilege to all cases involving communications between an attorney and client in Oklahoma, as represented in Figure 2.

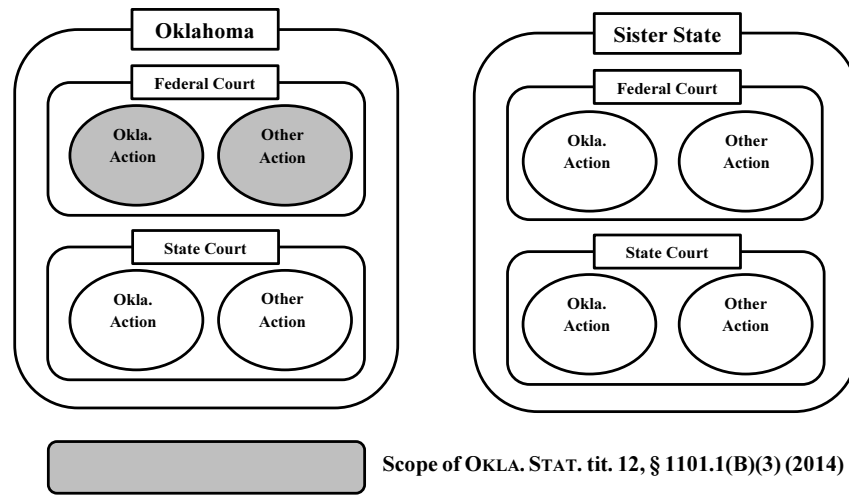
Figure 2



In both of these examples, Oklahoma's regulation of the procedure of other court systems is *coordinate* — it extends to any court system, whether federal or sister state, in which the source of Oklahoma's regulatory interest can be found. But Marshall imagined a state's officials extending their law *solely to federal courts*.⁶⁴ This would occur if Oklahoma officials imposed the rule in section 1101.1(B)(3) on all contract actions brought in federal court within the state (Figure 3).

⁶⁴ *Id.*

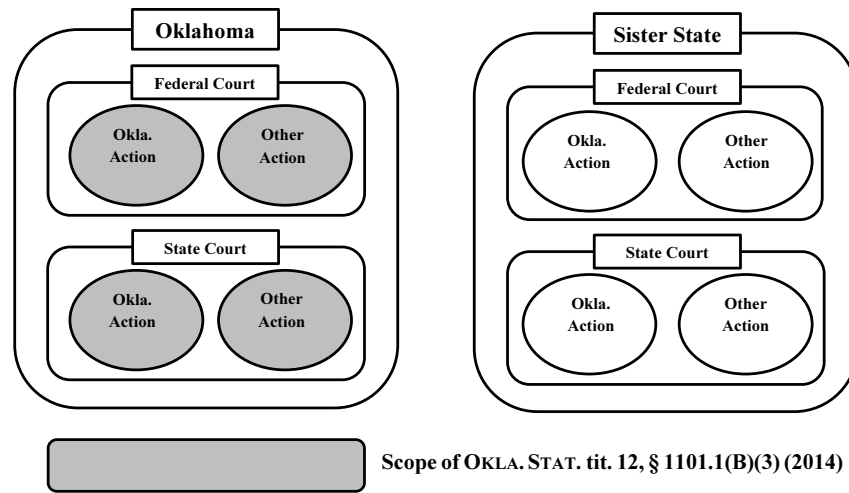
Figure 3



Although Marshall was wrong about the scope of state power over federal procedure, I think he was right that the particular example of state regulation of federal procedure he envisioned in *Wayman* was impermissible. And I also think he was right that it is impermissible for state officials to attempt such regulation indirectly, by taking laws that apply to their own courts and extending them to federal courts within the state. Oklahoma officials cannot effectuate the regulations illustrated in Figure 3 indirectly, by taking section 1101.1(B)(3) — which, we can assume, applies to all contract actions in Oklahoma state court, even when brought under the law of another sovereign⁶⁵ — and extending it to all federal courts in Oklahoma (Figure 4).

⁶⁵ But see *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1119 n.4 (10th Cir. 1999).

Figure 4



The fact that states have concurrent authority over federal procedure does not mean that they have the *vertical* power envisioned in Marshall's example in *Wayman*. I will call the principle that states lack such vertical power the "principle of coordinancy."

To repeat, the principle of coordinancy denies that states can legitimately extend their law vertically to federal courts within their borders. Oklahoma can claim power over federal procedure only on the basis of an interest that would justify coordinate extension of its law — extension that would include courts in sister states in which Oklahoma's interest is present and that would exclude cases before federal courts within Oklahoma in which Oklahoma's interest is absent.

B. *Original v. Delegated Power*

But the principle of coordinancy needs further clarification. The principle denies that states have an *original* vertical power over the procedure of federal courts. It does not deny that federal law might delegate such vertical power to a state.⁶⁶ Consider Rule 4(e) of the

⁶⁶ In this Article, I assume that there is a meaningful distinction between state law applying to federal procedure of its own force and state standards applying to federal procedure because the state has been delegated power by federal law. Under the principle, state law cannot apply vertically to federal procedure of its own force, but it can apply vertically if the state is exercising delegated federal power. Some courts and legal scholars have questioned the distinction. *See, e.g., O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 85 (1994) (stating that the difference between applying

Federal Rules of Civil Procedure, under which service on an individual in a suit in federal district court is adequate if it is in accordance with the law of the state where the district court is located.⁶⁷ Because of this rule, a state has the power to make a method of service permissible in federal courts within its borders. But it has this power only because federal law references forum state law.⁶⁸

Although, as we have seen, Marshall's position is that federal power over procedure is exclusive, in *Wayman* he also made it clear that this exclusivity of federal power does not necessarily entail its non-delegability. What he rejected was "an *original inherent* power in the state legislatures, *independent of any act of Congress*, to control the modes of proceeding in suits depending in the courts of the United States."⁶⁹ At the time, the Process Act of 1792 directed federal courts to adopt the "forms of writs and execution . . . and modes of process" of the forum state.⁷⁰ To the extent that the Act was read as delegating to states regulatory power over federal courts within their borders, such power was compatible with the exclusivity of federal power over federal procedure to which Marshall was committed.

state law of its own force and adopting it as the federal rule of decision "is of only theoretical interest"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 n.3 (1988) (noting that, at least in the case at issue, "the distinction between displacement of state law and displacement of federal law's incorporation of state law" does not "make[] a practical difference"); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 961 (1980) (claiming that the distinction is "metaphysical"). In general, however, this is in circumstances in which both are conceded to be permissible. Even in such cases, the distinction is meaningful. See Michael Steven Green, *Erie's International Effect*, 107 NW. U. L. REV. 1485, 1500 (2013). But when, as is the case here, state law cannot apply of its force and the only way that that state standard can be used is through delegation, the distinction is unquestionably a meaningful one.

⁶⁷ Service is also adequate if it is in accordance with the law of the state where service is effected. FED. R. CIV. P. 4(e).

⁶⁸ I will treat as equivalent federal power being delegated to a state and state law standards being dynamically incorporated into federal law. One might argue, however, that the two are distinct. To delegate is to establish a relationship of authorization to the delegatee, a relationship of which the delegatee is aware and can intentionally take advantage. Dynamic incorporation of a standard, in contrast, need not involve any awareness of the dynamic incorporation by the author of the incorporated standard. In many cases in which federal law references forum state law, there is arguably dynamic incorporation, not delegation. The federal government does not address the state and grant it power and the state generally does not create standards with the effect on federal law in mind.

⁶⁹ *Wayman*, 23 U.S. (10 Wheat.) at 49 (emphasis added).

⁷⁰ Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. This continued the practice of borrowing forum state procedure established in the Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93.

To be sure, Marshall had independent doubts about the capacity of Congress to delegate its power over federal procedure to the states.⁷¹ He concluded that the conformity to forum state law demanded by the Process Act had to be static, not dynamic: the Act obligated federal courts to use forum state law only as it existed in 1789, when the first Process Act was enacted.⁷² For this reason, the Kentucky statute at issue in *Wayman*, which was enacted after 1789, did not fall within the Conformity Act's scope.⁷³

Congress accepted this limitation on its power when it enacted the Process Acts of 1828 and 1842, by providing that the procedure in common law suits in federal courts should be the same as was "then" used in the forum state.⁷⁴ Dynamic conformity to forum state law was put in place only with the Conformity Act of 1872,⁷⁵ when scruples about delegation of congressional power had relaxed.⁷⁶

In light of this modern relaxed view about Congress's power to delegate its power to the states, sensitivity to the distinction between a state exercising an original and a delegated vertical power over federal procedure is especially important. The principle I defend here is solely that states lack an original vertical power. I do not deny that states might have vertical power when federal law delegates it to them.

C. No Power v. Defeasible Power

It is also important to distinguish two senses in which a state might lack an original vertical power to regulate the procedure of federal courts: it might utterly lack such power, even in the absence of conflicting federal law, or it might lack such power only when conflicting federal law exists.

Marshall made it clear in *Wayman* that he thought the forum state has *no* power to regulate the procedure of federal courts.⁷⁷ His point was not the weaker one that state power over federal procedure must yield

⁷¹ *Wayman*, 23 U.S. (10 Wheat.) at 47-48.

⁷² *Id.* at 21, 49-50.

⁷³ *Id.*

⁷⁴ Process Act of 1842, ch. 109, 5 Stat. 499, 499; Process Act of 1828, ch. 68, § 1, 4 Stat. 278, 278-80.

⁷⁵ Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.

⁷⁶ For a discussion, see Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 138-46 (2008). Another federal law that might be understood to have delegated to the states a vertical power over federal procedure is the Rules of Decision Act. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2013)). I discuss Marshall's interpretation of the Act in *infra* Part II.A.3.

⁷⁷ See *supra* Part I.A.1.

to conflicting federal law. Because he thought federal authority over federal procedure was exclusive, the existence of a conflicting federal rule was irrelevant to state power. Granted, there was a competing federal rule in *Wayman*. Federal courts had created their own methods of executing judgments, methods that were incompatible with the Kentucky statute.⁷⁸ But he would have considered state law inapplicable even if no such federal rule existed. In such a case, the exclusivity of federal regulatory authority, combined with the lack of any power to delegate lawmaking power to the states, would compel the federal government to create applicable law, on pain of leaving the matter subject to no regulation at all.

Of course, in this Article I do not adopt Marshall's position that federal regulatory authority over the procedure of federal courts is exclusive (or nondelegable). I deny only that states have vertical regulatory authority. But it is important to recognize that the principle of coordinancy is a *complete* prohibition on such vertical power, not merely a claim that vertical power must yield to competing federal law. Thus, if the only state regulation of federal procedure is vertical, the federal government will be compelled to create applicable federal law or delegate lawmaking power to the state. To do neither would mean creating an anarchistic situation in which there was no law on the matter.

II. WHY THE PRINCIPLE MATTERS

With the principle of coordinancy clarified, one might question whether it is a matter of importance. How often does the issue of vertical state power arise? In fact, it is a frequent, although hitherto unnoticed, factor when a federal court must choose whether federal or forum state rules govern a procedural matter.

A. *The Principle in "Relatively Unguided" Erie Cases*

One set of examples arise in so-called "relatively unguided" *Erie* choices,⁷⁹ in which a federal court entertaining a non-federal cause of action⁸⁰ attempts to determine whether it should use a federal *common law* rule of procedure uniform across all federal courts or the rule that

⁷⁸ This rule was created under the authority given to federal courts by the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 and the Judiciary Act of 1793, ch. 22, § 7, 1 Stat. 333, 335.

⁷⁹ *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

⁸⁰ For example, when sitting in diversity or supplemental jurisdiction.

would be used by a forum state court. I will begin by spelling out the considerations federal courts are required to take into account when making relatively unguided *Erie* choices. I will then identify the many examples in which federal courts or legal scholars discussing such cases have assumed that states have vertical power over federal procedure, contrary to the principle of coordinancy.

1. Making Relatively Unguided *Erie* Choices

Consider the following scenario (modeled after *Scottsdale Insurance Co. v. Tolliver*⁸¹). A federal court in Oklahoma sitting in diversity is entertaining an Oklahoma contract action. The plaintiff refuses an offer of settlement by the defendant. At trial, the defendant prevails. Under section 1101.1(B)(3), the defendant is entitled to attorney's fees from the plaintiff.⁸² There is no federal statute or Federal Rule of Civil Procedure governing the matter.⁸³ But under a federal common law rule used in federal question cases, each party bears his own attorney's fees, even if an offer of settlement is refused. Which rule should the federal court use?

One essential consideration in answering this question is whether using the federal common law rule would violate the twin aims of the *Erie* rule, that is, whether it would generate "forum shopping" and "the inequitable administration of the laws."⁸⁴ The forum-shopping test is reasonably clear. As the Court described it in *Hanna v. Plumer*, the question is whether the difference between the uniform federal common law rule being used in federal court and the state's rule being used in state court would influence plaintiffs' decisions about whether to sue in a federal or forum state court (or defendants' choice about whether to remove).⁸⁵ In the *Tolliver* case, the difference between the federal and the Oklahoma rule would likely encourage forum shopping,⁸⁶ so the first of the twin aims recommends that the federal court use the Oklahoma rule.

⁸¹ 636 F.3d 1273, 1275 (10th Cir. 2011). I have changed the facts slightly for simplicity's sake.

⁸² OKLA. STAT. tit. 12, § 1101.1(B)(3) (2014).

⁸³ In particular, Federal Rule of Civil Procedure 68 does not control the issue. See *Tolliver*, 636 F.3d at 1277-79.

⁸⁴ *Hanna*, 380 U.S. at 468. Although the Court flirted with a strictly outcome-determinative test in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), it abandoned such a test in *Hanna*.

⁸⁵ *Hanna*, 380 U.S. at 468.

⁸⁶ *Tolliver*, 636 F.3d at 1280.

The purpose of the second of the twin aims — avoiding the inequitable administration of the laws — is a bit murkier. The general idea, however, is that it is unfair for parties to be submitted to substantially different procedural rules solely due to “the accident of diversity of citizenship.”⁸⁷ The truth, however, is that when federal courts determine whether the second aim is implicated, they generally rely on the first. It is rare for a court to conclude that forum shopping is not a problem but inequity is, or vice versa.⁸⁸

The twin aims are not the only considerations in a relatively unguided *Erie* case. Even if the twin aims suggest using the forum state’s rule, using a uniform federal common law rule might still be appropriate, if, as the Court put it in *Byrd*, there are “countervailing” federal interests.⁸⁹ In *Byrd*, the Court held that the federal court should use a uniform federal common law rule, under which a jury would decide the factual question of whether the plaintiff’s action was covered by South Carolina’s workers’ compensation statute, instead of a South Carolina rule that gave the question to the judge. The reason was that “the federal policy favoring jury decisions of disputed fact questions” overrode the need for uniformity with South Carolina state courts.⁹⁰

It is essential in understanding the twin aims to recognize that they recommend using the forum state’s standard without regard to what the forum state’s officials would say about the scope of their rule. Consider *Guaranty Trust Co. v. York*, in which the Supreme Court held that a federal court in New York entertaining New York fraud actions should use New York’s limitations period for fraud, not a federal equity doctrine of laches.⁹¹ One searches in vain in Justice Frankfurter’s opinion in *York* for any suggestion that the New York limitations period

⁸⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Or, one might add, it is unfair for the parties to be submitted to substantially different rules due to any other contingent fact that would give their dispute federal jurisdiction, including supplemental jurisdiction and bankruptcy. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting); Green, *supra* note 54, at 1917-34.

⁸⁸ Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1652 (1998). A counter-example is *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980), which claimed that the inequity (but not forum-shopping) test was violated because the actual parties in the case did not engage in forum shopping. But the forum-shopping test is about whether the difference between procedural rules would in general lead to forum shopping, not whether it did in the particular case. See Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527, 548-49 (2003).

⁸⁹ *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

⁹⁰ *Id.* at 538.

⁹¹ *Guar. Trust Co. v. York*, 326 U.S. 99, 110, 119 (1945).

actually applies of its own force in federal court.⁹² The intention of New York officials was irrelevant. New York's limitations period was used in *York* because of *federal* interests in procedural uniformity.⁹³

Indeed, the twin aims can recommend that the forum state's rule be used even in the face of evidence that state officials do not care whether their rule is used by federal courts. For example, in *Woods v. Interstate Realty Co.*,⁹⁴ the Supreme Court held that a federal court sitting in diversity in Mississippi should abide by a Mississippi statute requiring non-Mississippi corporations doing business in the state to register before bringing a lawsuit "in any of the courts of this state."⁹⁵ Reviewing Mississippi state court decisions, the U.S. Court of Appeals for the Fifth Circuit had concluded that the phrase "courts of this state" referred only to Mississippi state courts, not federal courts.⁹⁶ But the Supreme Court held that the statute should be followed in federal court anyway.⁹⁷

Understood as the claim that the Mississippi statute applied of its own force in federal court, the Supreme Court's decision looks like a disturbing refusal, reminiscent of *Swift v. Tyson*,⁹⁸ to take Mississippi state courts to be the final arbiters of the scope of Mississippi law. This is how Justice Jackson, in his dissent, read the Court's decision. As he put it, "we seem to be doing the very thing we profess to avoid — that is, give the state law a different meaning in federal court than the state courts have given it."⁹⁹

But this misreads the Court's purpose. Rather than being concerned about state power, the Court was vindicating federal interests in procedural uniformity with forum state courts.¹⁰⁰ The Court was really choosing between two federal common law rules, each recommended

⁹² See *id.* at 108-09.

⁹³ Green, *supra* note 54, at 1887-1904.

⁹⁴ 337 U.S. 535 (1949).

⁹⁵ See *id.* at 536 & n.1; see also Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 357-58 (1980).

⁹⁶ *Interstate Realty Co. v. Woods*, 168 F.2d 701, 704-05 (5th Cir. 1948).

⁹⁷ *Woods*, 337 U.S. at 537-38.

⁹⁸ 41 U.S. (16 Pet.) 1, 18-19 (1842).

⁹⁹ *Woods*, 337 U.S. at 539 (Jackson, J., dissenting).

¹⁰⁰ *Id.* at 538 (majority opinion) ("The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts."); see also *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."). For a discussion of these federal interests, see Green, *supra* note 54, at 1887-1904.

by federal interests — one that is uniform across federal courts and one that incorporates forum state law.¹⁰¹

Justice Scalia offered just such a reading of the twin aims in *Semtek International Inc. v. Lockheed Martin Corp.*¹⁰² Because Scalia assumed (probably wrongly¹⁰³) that the preclusive effect of the dismissal of a California state law action by a federal court in California is a matter of exclusive federal regulatory authority,¹⁰⁴ California's interests were irrelevant. Nevertheless, he concluded that the federal court should adopt "as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."¹⁰⁵ Thus, California standards were incorporated into a federal common law rule.

But to say that the twin aims are not about respect for state regulatory interests does not mean that such interests are irrelevant. As we have seen, *Byrd*'s bound-up test offers a place in the relatively unguided *Erie* analysis for state lawmaking power.¹⁰⁶ Before addressing vertical uniformity and countervailing federal interests in *Byrd*, Justice Brennan noted that a threshold question was whether the state rule was part of the cause of action upon which the plaintiff sued.¹⁰⁷ If it was, he argued, the federal court was constitutionally obligated to apply the rule.¹⁰⁸ *Erie R. Co. v. Tompkins* puts a duty on federal courts sitting in diversity to "respect the definition of state-created rights and obligations by the state courts," including state rules "bound up with these rights and obligations."¹⁰⁹

Notice that the state power over federal procedure identified in *Byrd*'s bound-up test satisfies the principle of coordinancy. The question is

¹⁰¹ Green, *supra* note 54, at 1887-1904.

¹⁰² 531 U.S. 497, 508-09 (2001).

¹⁰³ See Rochelle Cooper Dreyfuss & Linda J. Silberman, *Interjurisdictional Implications of the Entire Controversy Doctrine*, 28 RUTGERS L.J. 123, 139-52 (1996); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 1003-04 (1998).

¹⁰⁴ *Semtek*, 531 U.S. at 509.

¹⁰⁵ *Id.*

¹⁰⁶ Although the Court has not mentioned the *Byrd* bound-up test by name since, it clearly relies upon the notion that state rules bound up with state causes of action should be respected by federal courts entertaining such actions. See *infra* Part II.A. Furthermore, the *Byrd* test has been mentioned by name by lower federal courts. E.g., *All Plaintiffs v. All Defendants*, 645 F.3d 329, 336 (5th Cir. 2011); *Bos. Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 21 (1st Cir. 2008).

¹⁰⁷ *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

whether the state's rule is part of the cause of action upon which the plaintiff sues. So understood, the state's rule would extend coordinately to any court, including a sister-state court, that entertained the state's cause of action. And the state's rule would not extend to actions under sister state law brought in federal courts within the state.

An example of a federal court relying on *Byrd*'s bound-up test is *Scottsdale Insurance Co. v. Tolliver*.¹¹⁰ As we have seen, the question in *Tolliver* was whether a federal court in Oklahoma entertaining an Oklahoma breach of contract action should use one of two rules. The first was a uniform federal common law rule, according to which each party bears his own attorney's fees. The second was a rule drawn from Oklahoma law, under which the defendant is entitled to attorney's fees from a losing plaintiff who refused an offer of settlement.¹¹¹ In *Tolliver*, the federal court did not merely appeal to the twin aims as a reason for using the Oklahoma rule.¹¹² It also suggested that the Oklahoma rule was bound up with the Oklahoma contract action upon which the plaintiff sued. So interpreted, the rule should follow Oklahoma contract actions into federal and state courts in sister states and should not apply to sister state contract actions brought in federal or state court in Oklahoma.¹¹³

When a federal court entertains a cause of action under forum state law, the twin aims and *Byrd*'s bound-up test point to the same state's law. But when the plaintiff sues under sister state law, they can point in different directions. Assume a federal court in New York entertains a Pennsylvania cause of action. The *Byrd* test would recommend respect for Pennsylvania rules that are bound up with the action, whereas the twin aims would recommend uniformity with New York state courts.

¹¹⁰ 636 F.3d 1273 (10th Cir. 2011).

¹¹¹ OKLA. STAT. tit. 12, § 1101.1(B)(3) (2014).

¹¹² *Tolliver*, 636 F.3d at 1278-82.

¹¹³ For example, the court mentioned, as relevant to its decision, *Boyd Rosene & Associates, Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1119 n.4 (10th Cir. 1999), in which another attorney's fee provision of the statute was *not* applied by a federal court sitting in diversity in Oklahoma to a *Kansas* cause of action because the provision was considered to be bound up with Oklahoma contract actions. *Boyd* made it clear that the statute would not merely be inapplicable in Oklahoma courts to causes of action under sister state law, but also applicable in sister state courts entertaining Oklahoma contract actions. See *Boyd*, 174 F.3d at 1124-25 (criticizing *Smithco Eng'g, Inc. v. Int'l Fabricators, Inc.*, 775 P.2d 1011, 1017-19 (Wyo. 1989)). In *Smithco*, the Wyoming Supreme Court considered the Oklahoma statute inapplicable to an Oklahoma contract action brought in Wyoming state court. See *Smithco*, 775 P.2d at 1017-19.

To the extent that New York state courts preferred their own rule over Pennsylvania's, the *Byrd* test and the twin aims would conflict.¹¹⁴

But even when *Byrd*'s bound-up test and the twin aims both point to the forum state's standard, they remain independent reasons for the standard to be used. The twin aims can recommend that forum state rules be borrowed, even if there is no evidence that the state is interested in its rule applying outside of its own court system. And if the federal court is uncertain about whether the difference between federal and forum state procedure would lead to forum shopping and litigant inequity, the appeal to state interests can be crucial in recommending the forum state rule over uniform federal procedural common law.

An example of the latter scenario is *Gasperini v. Center for Humanities, Inc.*¹¹⁵ *Gasperini* concerned two relatively unguided *Erie* questions. The first, which concerns us here, was about the standard that a federal district court in New York hearing an action under New York law should use for determining whether the damages awarded by the jury were excessive.¹¹⁶ Should it use New York's standard, under which the trial court looks to whether the award "deviates materially from what would be reasonable compensation"?¹¹⁷ Or should it use the more generous federal common law standard, under which the award should be overturned by the trial court only if it was "so excessive as to shock the judicial conscience"?¹¹⁸

Justices Ginsburg and Stevens argued that New York's materially-deviates standard was akin to a cap on damages.¹¹⁹ Significantly, caps on damages are commonly thought to be bound up with a state's causes of action, following them into other court systems.¹²⁰ It is not surprising, therefore, that Ginsburg and Stevens concluded that the standard should be used by the district court.¹²¹ In contrast, Scalia, who argued that New York's standard was not bound up with the cause of action, concluded that under a relatively unguided *Erie* analysis the

¹¹⁴ Green, *supra* note 54, at 1881-87.

¹¹⁵ 518 U.S. 415, 427 n.7 (1996).

¹¹⁶ The second concerned the standard of review that should be used by a federal court of appeals for reviewing the district court's decision. *Id.* at 437-39.

¹¹⁷ N.Y. C.P.L.R. 5501(c) (McKINNEY 1995) (explaining how, although referring to appeals, the standard had been read by New York state courts to apply to trial courts).

¹¹⁸ *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 & n.7 (2d Cir. 1993) (internal quotation marks omitted); *see also* *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir. 1988) (applying federal standard in FELA case).

¹¹⁹ *Gasperini*, 518 U.S. at 428-29; *id.* at 439-40 (Stevens, J., dissenting).

¹²⁰ *Id.* at 428-29 (majority opinion); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 412 cmt. a (1934).

¹²¹ *Gasperini*, 518 U.S. at 438-39; *id.* at 439-40 (Stevens, J., dissenting).

district court should use the federal standard.¹²² In coming to different conclusions about how the relatively unguided *Erie* analysis should turn out, the Justices' differing views about New York's interests clearly played a role.

2. Federal Courts Rejecting the Principle

As we have seen, *Byrd's* bound-up test satisfies the principle of coordinancy. Given this fact, how is the principle relevant to how relatively unguided *Erie* choices are decided? The principle is implicated when federal courts assume that forum state officials intend their rule to apply in federal court even though its scope is not limited by a locus of forum state interest that would extend it to sister state courts. The forum state rule is instead "procedural" in the sense that it applies to all relevant actions over which the state's courts have jurisdiction. And yet, it is argued, the rule with the same "procedural" scope extends to federal courts within the state.

The clearest example is *Cohen v. Beneficial Industrial Loan Corp.*¹²³ *Cohen* involved a federal court in New Jersey entertaining a shareholder derivative action brought by a New York domiciliary on behalf of a Delaware corporation against the corporation's officers and directors.¹²⁴ The question facing the Court was whether the federal court should use a New Jersey statute requiring the plaintiff to post a bond as security for the defendant's attorney's fees if the action was unsuccessful.¹²⁵ No one suggested that the New Jersey statute would have applied had the case been litigated in sister state courts. It is unlikely that the statute was bound up with New Jersey derivative actions. The statute applied to "any action instituted or maintained in the right of any domestic or foreign corporation by the holder."¹²⁶ Since a derivative action maintained in the right of a foreign corporation would likely be under foreign law, the statute, by its own terms, applied in New Jersey courts to derivative actions under foreign (including sister-state) law. Granted, the statute could have created two rules: one applicable in New Jersey state courts to all derivative actions, even those under sister state law (Rule 1), and one bound up with New Jersey derivative actions that followed them into

¹²² *Id.* at 463-68 (Scalia, J., dissenting). Scalia ultimately argued that the relatively unguided *Erie* analysis was irrelevant to the case, however, because the matter was governed by Federal Rule of Civil Procedure 59. *Id.* at 468.

¹²³ 337 U.S. 541, 557 (1949).

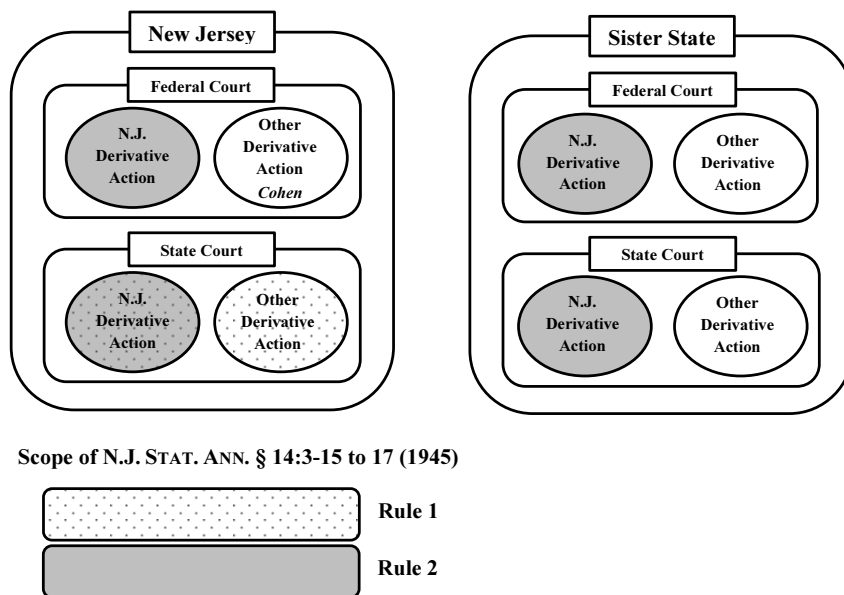
¹²⁴ *Id.* at 543.

¹²⁵ N.J. STAT. ANN. § 14:3-15 to 17 (West 1945); *Cohen*, 337 U.S. at 554.

¹²⁶ N.J. STAT. ANN. § 14:3-15.

sister state and federal courts (Rule 2). Even so, the statute could not have been bound up with the plaintiff's cause of action in *Cohen* since that action was probably under Delaware, not New Jersey, law (Figure 5).¹²⁷

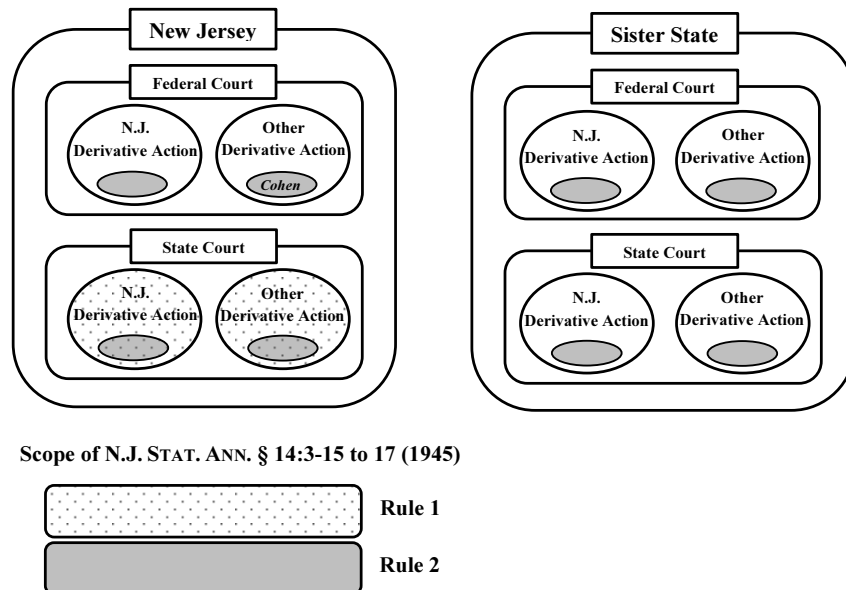
Figure 5



The only way that the New Jersey statute could have extended to the federal court in *Cohen* in a manner that was compatible with the principle of coordinancy is if the second rule was tied to some other locus of New Jersey interest in connection with derivative actions, such as the New Jersey domicile of a defendant, that was present in the *Cohen* case (Figure 6).

¹²⁷ *Cohen*, 337 U.S. at 554; *Cohen v. Beneficial Indus. Loan Corp.*, 7 F.R.D. 352, 356-57 (D.N.J. 1947).

Figure 6

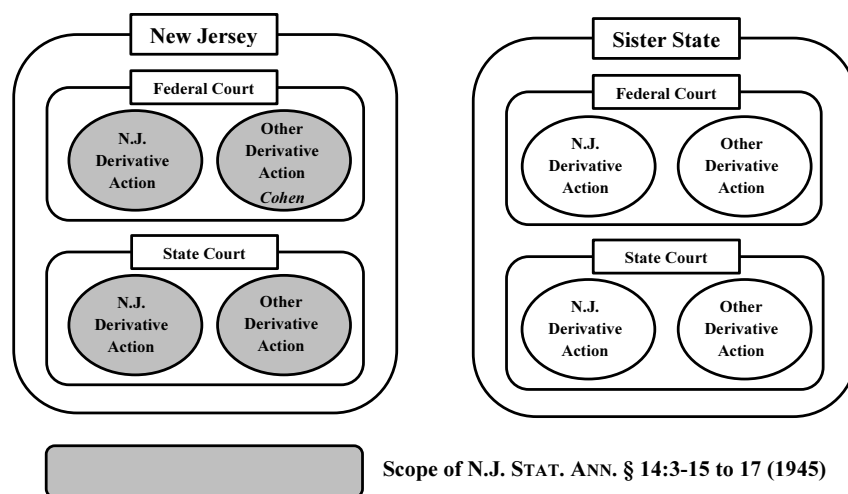


But there was no evidence for such an extraordinary reading, and no one ever suggested it.

Although the Supreme Court could have justified its decision in *Cohen* based on federal interests in procedural uniformity with forum state courts (subsequently described in *Hanna* as the twin aims), it nevertheless concluded that the statute was “substantive,” in the sense of creating “a new liability where none existed before.”¹²⁸ Although this liability did not extend to sister state courts, it extended to federal courts in New Jersey (Figure 7). This amounts to a rejection of the principle of coordinancy.

¹²⁸ *Cohen*, 337 U.S. at 555.

Figure 7



Cohen is probably the most unambiguous example of a federal court rejecting the principle in a relatively unguided *Erie* case. But there are many others. In each, a federal court points to state interests (instead of, or in addition to, the twin aims) as a reason for a forum state rule to be used in federal court in the state, without reading the scope of the rule as tied to a locus of forum state interest that would justify its application in sister state courts.

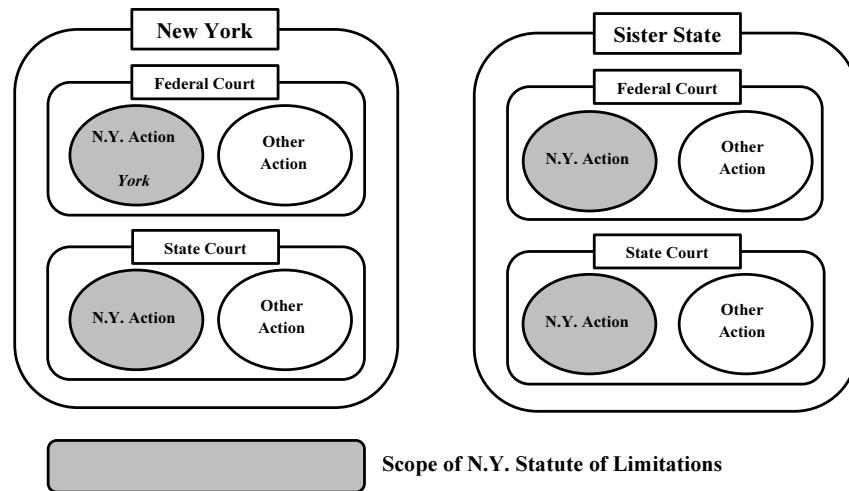
One example is Judge Posner's discussion of statutes of limitations in diversity cases in *Hemmings v. Barian*:

When a federal court borrows a state statute of limitations for use in connection with a federal statute that does not have its own statute of limitations, the court is not applying state law; it is applying federal law. It looks to state law for guidance . . . The analysis would, however, be different if [we were sitting in] diversity rather than federal question . . . For purposes of the *Erie* doctrine the statute of limitations is substantive rather than procedural, and the federal court therefore applies state law — it doesn't just borrow it [citing *Guaranty Trust v. York*].¹²⁹

If New York's statute of limitations applied of its own force in *York*, the principle would have been violated. It is true that the statute might have been bound up with the New York fraud actions such that it followed them into other court systems, including sister state courts (Figure 8).

¹²⁹ *Hemmings v. Barian*, 822 F.2d 688, 689-90 (7th Cir. 1987).

Figure 8



But in his opinion in *York*, Justice Frankfurter disclaimed such an interpretation of the statute. He took great pains to argue that the characterization of New York's statute of limitations as substantive or procedural for choice-of-law purposes — that is, as applicable or inapplicable in sister state courts — was irrelevant to the question faced by the Court.¹³⁰ Furthermore, the evidence from New York state courts was against interpreting the statute as bound up with New York actions, for the statute had been applied by New York state courts to actions under the laws of other sovereigns.¹³¹

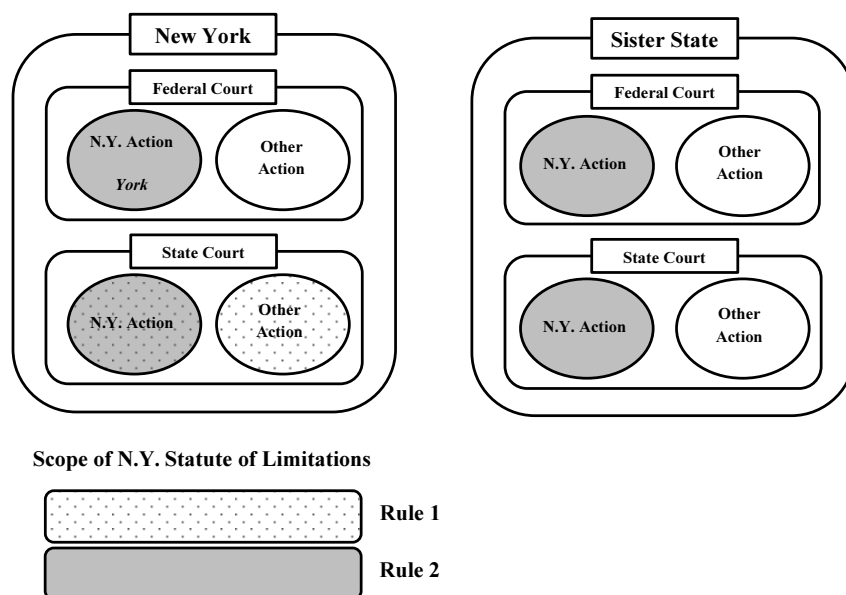
Once again, it is possible that New York's statute created two limitations periods: one meant to apply only in New York state courts, even to fraud actions under other sovereigns' laws (Rule 1), and one tied to New York fraud actions and so meant to follow them into other court systems (Rule 2) (Figure 9).¹³²

¹³⁰ *Guar. Trust Co. v. York*, 326 U.S. 99, 108-09 (1945).

¹³¹ *Leonor v. Ingenio Porvenir C. por A.*, 34 N.Y.S.2d 705, 717-78 (N.Y. Sup. Ct. 1942) (applying section 48 to action under law of Dominican Republic); *Hifler v. Calmac Oil & Gas Corp.*, 10 N.Y.S.2d 531, 544 (N.Y. Sup. Ct. 1939) (applying section 53 to action under Pennsylvania law); *see also* *Anglo Cal. Nat'l Bank of S.F. v. Klein*, 296 N.Y.S. 191, 202 (N.Y. Sup. Ct. 1936) (describing section 48 as procedural).

¹³² *Drinan v. A.J. Lindemann & Hoverson Co.*, 238 F.2d 72, 75-76 (7th Cir. 1956); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 397 cmt. b (1934); 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 605.1 (1935); GEORGE WILFRED STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 144-45, 149 n.65 (3d ed. 1963).

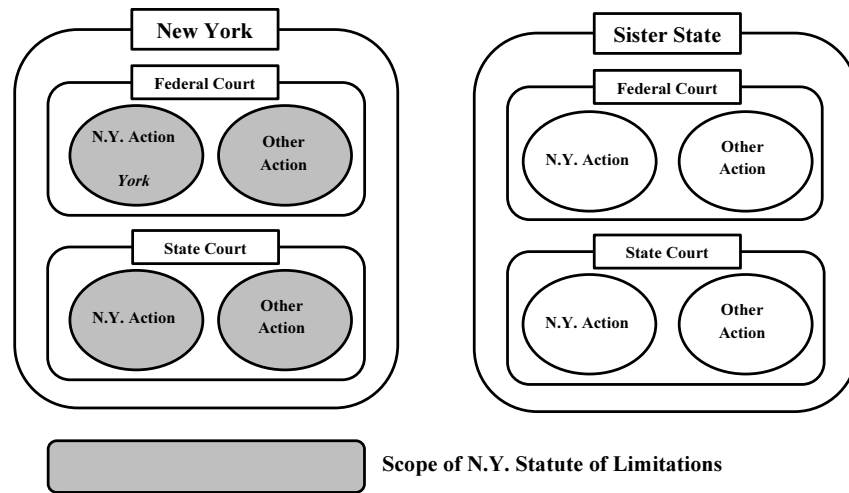
Figure 9



But Posner offers no arguments for such a reading and there is no evidence in the Supreme Court's opinion in *York* or in New York state court decisions in favor of it. What is more, there are many cases in which federal courts, citing *York*, have used the forum state's statute of limitations when entertaining causes of action under sister state law.¹³³ Posner does not exclude such cases, so he must think that they are also examples of forum state law applying of its own force in federal court. Posner, therefore, must think that New York claimed vertical regulatory power over federal courts in *York*, in violation of the principle of coordinancy (Figure 10).

¹³³ E.g., *Flowers v. Carville*, 310 F.3d 1118, 1123 (9th Cir. 2002); *MedCap Corp. v. Betsy Johnson Health Care Sys., Inc.*, 16 F. App'x 180, 182 (4th Cir. 2001); *Ferens v. Deere & Co.*, 862 F.2d 31, 34 (3d Cir. 1988) (stating that under *York*, a federal court in Mississippi should apply Mississippi's statute of limitations for an action under Pennsylvania law); *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1360 (D.C. Cir. 1982); *Morson v. Kreindler & Kreindler, LLP*, 814 F. Supp. 2d 220, 225 (E.D.N.Y. 2011); *Nat'l R.R. Passenger Corp. v. Lexington Ins. Co.*, 357 F. Supp. 2d 287, 292 (D.D.C. 2005).

Figure 10



Another example of a federal court rejecting the principle in a relatively unguided *Erie* case is *Chamberlain v. Giampapa*.¹³⁴ In *Chamberlain*, the U.S. Court of Appeals for the Third Circuit held that a federal court in New Jersey entertaining a medical malpractice action under New Jersey law was obligated to use a New Jersey affidavit of merit statute, which required the plaintiff to file an affidavit from an expert assuring that there is support for the malpractice claim.¹³⁵ One ground for this conclusion was the twin aims. If federal courts did not require affidavits, plaintiffs with malpractice actions would favor federal over state court.¹³⁶ But the court also mentioned New Jersey's substantive interest in "early dismissal of meritless lawsuits."¹³⁷ It was doubtful that New Jersey's interest was tied to New Jersey medical malpractice actions. New Jersey state courts had held that the statute applies to malpractice actions under sister state law brought in state court in New Jersey.¹³⁸ If New Jersey's interests in early dismissal of meritless lawsuits did not extend to sister state courts entertaining New Jersey malpractice actions but did extend to federal courts in New Jersey

¹³⁴ 210 F.3d 154, 158-59 (3d Cir. 2000).

¹³⁵ *Id.* at 158-61.

¹³⁶ *Id.* at 161.

¹³⁷ *Id.*

¹³⁸ *Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP*, 3 A.3d 518, 532-33 (N.J. Super. Ct. App. Div. 2010) (applying statute despite recognizing that New Jersey malpractice law may not apply).

(even when entertaining malpractice actions under the law of states other than New Jersey), the principle of coordinancy must be violated.¹³⁹

Finally, there are opinions whose authors, although not rejecting the principle, would be compelled to do so when faced with further evidence from state court decisions. An example is *Gasperini v. Center for Humanities, Inc.*¹⁴⁰ As we have seen, one issue in *Gasperini* was whether a federal district court in New York entertaining a New York cause of action should use a New York rule, under which the damages awarded by a jury are excessive if they “deviate[] materially from what would be reasonable compensation,” or a federal common law rule, under which a damages award should be overturned only if it “was so excessive that it ‘shocked the conscience of the court.’”¹⁴¹ Justices Ginsburg and Stevens treated the New York rule as akin to a cap on damages, which is commonly considered to be bound up with a state’s cause of action, following it into sister state courts.¹⁴² If so, the New York regulatory interests to which Ginsburg and Stevens appealed did not violate the principle.

But there was evidence against New York’s standard being bound up with the plaintiff’s cause of action.¹⁴³ New York state courts had applied

¹³⁹ Another example is *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). In *Walker*, the Supreme Court held that a federal court sitting in diversity in Oklahoma should use an Oklahoma rule specifying that a statute of limitations is tolled upon service on the defendant, rather than the federal common law rule that it is tolled upon filing of the summons and complaint. The federal rule was held to be a matter of federal common law rather than governed by Federal Rule of Civil Procedure 3, because the Federal Rule and the state rule did not directly conflict. *Id.* at 752. Although the Court appealed to the twin aims in favor of its conclusion, it also considered Oklahoma’s interests, including the “substantive decision by that State” in favor of “actual service on, and accordingly actual notice by, the defendant.” *Id.* at 751. In so doing, it suggested that Oklahoma had the power to extend its rule to federal court. Since the plaintiff’s cause of action arose in Oklahoma, and thus he was probably suing under Oklahoma law in federal court, Oklahoma could have extended its tolling rule to the federal court in a manner that was compatible with the principle of coordinancy, by binding the rule up with the plaintiff’s Oklahoma cause of action. But statutes of limitations are generally understood as procedural under Oklahoma law. See *Estate of Speake*, 743 P.2d 648, 652 (Okla. 1987). Thus, it is unlikely that the tolling rule was understood by Oklahoma officials as bound up with the plaintiff’s Oklahoma action, such that it followed the action into sister state courts. Accordingly, for Oklahoma law to have regulated federal procedure of its own force in the *Walker* case, as the Court suggests, the principle would have had to have been violated.

¹⁴⁰ 518 U.S. 415 (1996).

¹⁴¹ *Id.* at 422-25 (internal quotation marks omitted).

¹⁴² *Id.* at 428-29; *id.* at 439-40 (Stevens, J., dissenting).

¹⁴³ The legislative history on the matter, which was emphasized by Ginsburg and

the New York standard to causes of action under the law of other sovereigns, a fact that was not merely ignored in the opinions in *Gasperini* but that has also not (to my knowledge) been discussed in the extensive literature on the case. Although I was not able to find a case in which New York state courts applied (or refused to apply) the New York standard to *sister state* actions, they have used their standard, rather than the federal shocks-the-conscience standard, when entertaining federal causes of actions, such as the Federal Employers Liability Act and the Jones Act.¹⁴⁴ If New York's standard were bound up with New York causes of action, it would not apply to actions under federal law.

Again, it is possible that New York might have two standards: one applicable to all actions in New York state courts and one intended to follow New York causes of action into sister state and federal courts. But this is incompatible with cases in which federal courts sitting in New York, citing *Gasperini*, have used the New York standard for causes of action not under New York law.¹⁴⁵ To the extent that the New York standard genuinely applies in federal courts of its own force in such cases, New York must be vertically regulating the procedure of federal courts, in violation of the principle of coordinancy.

Stevens, was compatible with either reading. *Id.* at 422-25 (majority opinion) (discussing legislative history); *id.* at 439-40 (Stevens, J., dissenting) (same). For Justice Scalia's alternative reading on the basis of the same evidence, see *id.* at 464-65 (Scalia, J., dissenting) (reading the provision as not akin to a cap on damages).

¹⁴⁴ See, e.g., *Sneddon v. CSX Transp.*, 848 N.Y.S.2d 502, 503-04 (App. Div. 2007) (applying New York standard to a FELA action); *Hardial v. City of New York*, 600 N.Y.S.2d 15, 15-16 (App. Div. 1993) (applying New York standard to a Jones Act action); *Eschberger v. Consol. Rail Corp.*, 572 N.Y.S.2d 539, 540 (App. Div. 1991) (same). To be sure, some New York state courts have applied the federal shocks-the-conscience standard to FELA and Jones Act actions. See, e.g., *Brown v. Reinauer Transp. Cos.*, 886 N.Y.S.2d 769, 776 (App. Div. 2009) (applying federal standard to a Jones Act action); *Hotaling v. CSX Transp.*, 773 N.Y.S.2d 755, 761 (App. Div. 2004) (applying federal standard to a FELA action). This disagreement does not appear to have been recognized by New York state courts. But these courts may have applied the federal standard, not because they thought the New York standard was inapplicable to federal causes of action, but because they thought that the federal shocks-the-conscience standard was intended by federal authorities to follow federal causes of action into state court. Faced with a conflict between New York and federal law, they would have been forced to apply federal law. The difference of opinion among New York state courts on FELA and Jones Act cases is probably driven, therefore, solely by differing views concerning whether the federal standard is bound up with federal causes of action (a matter about which the Supreme Court has given no guidance).

¹⁴⁵ *Cantu v. Flanigan*, 705 F. Supp. 2d 220, 225-26 (E.D.N.Y. 2010) (applying New York standard to an action under Mexican law).

3. Theoretical Rejections of the Principle

The appeal to vertical state power in relatively unguided *Erie* choices is even more pronounced among legal academics, some of whom recommend an abandonment of the twin aims entirely. For example, Allan Stein has argued that in the absence of forum state regulatory interests there is no reason for a federal court to use standards from forum state law:

The primary inquiry . . . ought to be whether there has been a usurpation of a state regulatory prerogative, 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.¹⁴⁶

Without federal interests in uniformity of procedure between federal and forum state courts, the only reason a federal court has to use the forum state’s rules is the forum state’s regulatory interests.¹⁴⁷ And if these interests are directed only at federal courts within the state, the principle of coordinancy would be violated.

Another piece of evidence that many, perhaps even most, *Erie* scholars and federal courts implicitly reject the principle is that such a rejection follows logically from the combination of two theses to which they are generally committed.

The first thesis concerns the Rules of Decision Act (“RDA”), which states that “[t]he laws of the several states, except where the Constitution, or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”¹⁴⁸ According to the first thesis, the RDA merely instructs federal

¹⁴⁶ Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1955 (1991); see also *id.* at 1941. Richard Freer has made the same point: “If applying state law would not advance a state policy, there is no reason for the federal court to do so, even if failing to do so would be outcome determinative.” Freer, *supra* note 88, at 1650.

¹⁴⁷ Stein’s position is complicated by the fact that he rejects the meaningfulness of the distinction between state law applying of its own force in federal court and state law being incorporated into federal law. Stein, *supra* note 146, at 1945-46 & n.50. Thus, he would be equally happy to describe cases in which the forum state’s rule is used as an example of federal law incorporating state law standards. But the fact remains that he considers state interests vertically directed to federal courts within the state’s borders to be legitimate, and thus relevant for determining whether the forum state’s rule should be incorporated into federal law. This is contrary to the principle of coordinancy. For further discussion of Stein’s approach, see *infra* Part III.C.

¹⁴⁸ 28 U.S.C. § 1652 (2013). When the Act was amended in 1948, “trials at common

courts to use state law that already applies of its own force to federal courts.

Marshall himself adopted this interpretation of the RDA in *Wayman*.¹⁴⁹ If it were read as referring to state laws that did not apply of their own force in federal court, the RDA would amount to a delegation to the states of lawmaking power over federal procedure. And given Marshall's worries about such delegation, the RDA, like the Process Act, would have to be read as only statically incorporating forum state law.¹⁵⁰ But Marshall argued that the RDA directed federal courts to use only applicable state law, that is, law that already applied to federal court of its own force.¹⁵¹ For this reason, federal procedure was beyond the RDA's scope, since, as we have seen, he considered federal authority over federal procedure to be exclusive.¹⁵² It is for this reason that he concluded that the RDA was irrelevant to the Kentucky statute at issue in *Wayman*.¹⁵³ Since the Kentucky statute could not *apply* to the procedure of federal courts, it was beyond the RDA's scope.¹⁵⁴

Marshall's interpretation of the RDA was not only shared by others at the time,¹⁵⁵ it was also adopted in *Erie*¹⁵⁶ and remains the predominant view today.¹⁵⁷ Of course, states are now understood as sharing

law" was changed to "civil actions" to make it clear that the Act applied to actions at equity. *Compare* Act of June 25, 1948, ch. 646, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (1958)) (discussing "rules of decision in *civil actions*" (emphasis added)), *with* Judiciary Act of 1789, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1958)) (discussing "rules of decision in *trials at common law*" (emphasis added)).

¹⁴⁹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 25 (1825) ("But, by the words of the section, the laws of the State furnish a rule of decision for those cases only 'where they apply[]' and the question arises do they apply to such a case?"). As Justice Marshall put it in *Bank of Hamilton v. Dudley's Lessee*, "The laws of the states . . . would be . . . regarded [as rules of decision in the courts of the United States] independent of that special enactment." 27 U.S. (2 Pet.) 492, 525-26 (1829).

¹⁵⁰ *See supra* Part I.B.

¹⁵¹ *Wayman*, 23 U.S. (10 Wheat.) at 48-49.

¹⁵² *See supra* Part I.A.1.

¹⁵³ *Wayman*, 23 U.S. (10 Wheat.) at 49-50.

¹⁵⁴ *See Bank of the U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 54 (1825) (noting that the Rules of Decision Act "has no application to the practice of the [federal] Courts, or in any manner calls upon them to pursue the various changes which may take place from time to time in the State Courts, with respect to their processes, and modes of proceeding under them").

¹⁵⁵ *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831) (noting that the RDA is "no more than a declaration of what the law would have been without it").

¹⁵⁶ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938); *see also* *Mason v. United States*, 260 U.S. 545, 559 (1923).

¹⁵⁷ *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 162 (1987)

lawmaking authority over federal procedure with the federal government.¹⁵⁸ Thus, there is no longer any impediment to extending the RDA to issues of federal procedure. If Oklahoma binds section 1101.1(B)(3) up into Oklahoma contract actions, we can understand a federal court entertaining an Oklahoma contract action to be required under the RDA to use section 1101.1(B)(3).¹⁵⁹ But the RDA is still generally read as referring only to state laws that would have applied in federal court of their own force in the RDA's absence.

The problem is that virtually all federal courts and legal scholars, following John Hart Ely, accept a *second* thesis, which is that the *twin aims* follow from the RDA.¹⁶⁰ And anyone accepting these two theses must reject the principle of coordinancy. The twin aims are solely about uniformity with a forum state court.¹⁶¹ If this uniformity is due to the fact that forum state law actually applies in federal court of its own

(Scalia, J., concurring) (noting that the Rules of Decision Act “directs federal courts to follow state laws only ‘in cases where they apply,’ which federal courts would be required to do even in the absence of the Act”); *Jutzi-Johnson v. United States*, 263 F.3d 753, 759-60 (7th Cir. 2001); Sergio J. Campos, *Erie as a Law of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1590 (2012); Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1024-31 (1953). The Supreme Court is not always consistent on this matter, however. For example, in her opinion in *Agency Holding*, Justice O'Connor, on the one hand, pointed to the tradition of federal courts *borrowing* the forum state statute of limitations for federal statutes and, on the other hand, characterized this use of forum state law as required under the RDA. *Agency Holding*, 483 U.S. at 147.

¹⁵⁸ See *supra* Part I.A.2.

¹⁵⁹ I assume here a reading of the RDA as instructing federal courts to use state law. In fact, under the most historically sensitive reading, the RDA puts no duty upon a federal court to favor state law over federal common law. As Walter Ritz has put this reading, the RDA — by referring generally to “the laws of the several states” — is simply a “direction to the national courts to apply American law, as distinguished from English law.” WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 148 (Wythe Holt & L.H. LaRue eds., 1990); see also Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 106-08 (1993); Suzanna Sherry, *Overruling Erie: Nationwide Class Actions and National Common Law*, 156 U. PA. L. REV. 2135, 2137-38 (2008). The RDA makes it clear, post revolution, that American rather than English law should be used in federal courts. But it says nothing about the division of common lawmaking power between federal and state courts.

¹⁶⁰ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38-39 (1988) (Scalia, J., dissenting); *In re Air Crash Disaster near Chi.*, 803 F.2d 304, 314 (7th Cir. 1986); *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 914 (9th Cir. 1985); *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880, 889 (1st Cir. 1981); *Stoner v. Presbyterian Univ. Hosp.*, 609 F.2d 109, 111 (3d Cir. 1979); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 722-23 (1974).

¹⁶¹ See *supra* Part II.A.1.

force, states must have vertical power over federal procedure. Whenever the twin aims recommend that a federal court use forum state law, forum state law must extend vertically to federal court.¹⁶²

To be sure, not everyone accepts both theses. Some accept the second but reject the first. They think that the twin aims are derived from the RDA, but deny that the RDA only commands federal courts to use state law that would apply of its own force in the RDA's absence. For them, the RDA can recommend that certain state rules be incorporated into federal law.¹⁶³ So understood, the twin aims could be derived from the RDA without the principle being violated. The RDA would amount to a delegation of vertical power over federal procedure to the states.¹⁶⁴

B. *The Principle and Federal Rules of Civil Procedure*

So far, I have concentrated on the principle of coordinancy being rejected in relatively unguided *Erie* cases, in which federal courts entertaining non-federal causes of action choose between a uniform federal *common law* rule and the rule used by a forum state court. Let us now move on to rejections of the principle when federal courts

¹⁶² Of course, sometimes the twin aims will tell a federal court to use sister state law. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494-97 (1941). For example, a federal court in New York should use Pennsylvania law if that follows from New York choice-of-law rules. In such a case it would appear that Pennsylvania rather than New York law is what is applying in federal court of its own force. But New York is still engaging in vertical regulation of the federal court's procedure. The twin aims recommended uniformity with New York's choice-of-law rules. Given the two theses, one must conclude that New York's choice-of-law rules apply in federal court in New York of their own force.

¹⁶³ Dorf, *supra* note 76, at 125-26; Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 76-90 (1955) [hereinafter *State Procedural Law*]; Westen & Lehman, *supra* note 95, at 315-16, 356-59.

¹⁶⁴ Although such a reading avoids conflict with the principle, the notion that the twin aims have their source in the RDA suffers from many other problems. See, e.g., Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 985 n.85 (1998) ("The great generality of the Act's 'in cases where they apply' phrasing . . . gives little if any guidance as to when they should apply, leaving just how to make the 'relatively unguided *Erie* choice' up to judicial interpretation . . ."); Peter Westen, *After "Life for Erie" — A Reply*, 78 MICH. L. REV. 971, 982-89 (1980) (discussing problems with view that source of limitation on judge-made procedural rules in diversity cases is the RDA); Westen & Lehman, *supra* note 95, at 365-73 (same). As I have argued elsewhere, it is more plausible to identify the source of the twin aims in the policies animating the diversity statute. Green, *supra* note 54, at 1891-1904. I also explain why the twin aims apply when federal courts get jurisdiction of non-federal actions in non-diversity cases, such as supplemental jurisdiction or bankruptcy, in terms of the purposes of the applicable jurisdictional statute. *Id.* at 1917-34.

choose between the forum state's rule and a Federal Rule of Civil Procedure. My first example is *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*¹⁶⁵

1. *Shady Grove*

The issue in *Shady Grove* was whether section 901(b) of the New York Civil Practice Law, which prohibits claims for statutory damages or penalties from being brought as a class action, should be used by a federal court in New York when considering the certification of a class in which the plaintiffs' actions for statutory damages are under New York law.¹⁶⁶ The alternative was using Rule 23 of the Federal Rules of Civil Procedure, which includes no equivalent limitation.¹⁶⁷

Because the case concerned a Federal Rule, the twin aims were irrelevant. The fact that federal courts' using Rule 23 and forum state courts' using section 901(b) would generate vertical forum shopping did not give the federal court in *Shady Grove* a reason to use section 901(b).¹⁶⁸ Instead, the issue was whether Rule 23 was invalid under the Rules Enabling Act.¹⁶⁹ In the Act, Congress delegated its power to regulate the procedure of federal district courts to the Supreme Court,¹⁷⁰ with the restriction specified in 28 U.S.C. § 2072(b) that Federal Rules "shall not abridge, enlarge or modify any substantive right."¹⁷¹ The main question in *Shady Grove* was the scope of the substantive right limitation.¹⁷²

Following *Sibbach v. Wilson*,¹⁷³ Justice Scalia read section 2072(b) as demanding only that a Federal Rule "really regulate[] procedure — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for

¹⁶⁵ 559 U.S. 393 (2010).

¹⁶⁶ *Id.* at 396-98.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 415; *id.* at 456 (Stevens, J., concurring).

¹⁶⁹ *Id.* at 406-10 (majority opinion).

¹⁷⁰ 28 U.S.C. § 2072(a) (2013).

¹⁷¹ *Id.* § 2072(b). Another restriction is that the Court was given the power to promulgate only "general rules of practice and procedure" for the district courts. It is probable that this language withholds some of the congressional regulatory power, because Congress is presumably empowered to regulate procedure in the lower federal courts through rules that are *non-general* (that is, specific to the particular case). For a possible example of such a statute, see Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

¹⁷² *Shady Grove*, 559 U.S. at 406-10.

¹⁷³ 312 U.S. 1, 14 (1941).

disregard or infraction of them.”¹⁷⁴ So understood, the substantive right limitation did not significantly restrict the power that Congress delegated to the Supreme Court.¹⁷⁵ Scalia concluded that since Rule 23 satisfied the substantive right limitation, it applied whether or not section 901(b) was intended by New York officials to apply in federal court.¹⁷⁶

In his concurring opinion, Justice Stevens disagreed with Scalia about the restrictions imposed by section 2072(b). The substantive right limitation was intended to protect certain state regulatory interests. There are, he argued, “some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State’s definition of substantive rights and remedies.”¹⁷⁷ Although Stevens’s language might mean that the state’s rule must be bound up with its cause of action, such that it follows that action into sister state courts,¹⁷⁸ it is not clear that he believes this to be necessary. He cites the forum state rules in *Cohen* and *York* as satisfying his test,¹⁷⁹ and, as we have seen, in those cases the rules were probably not bound up with the state’s cause of action.¹⁸⁰ Indeed, in *Cohen* the cause of action was not even under forum state law.¹⁸¹ This leaves the scope of the substantive rights limitation as Stevens understands it in doubt. Section 901(b) might count as a substantive right even if it extended only to federal courts in the state, in violation of the principle of coordinancy. In the end, however, Stevens concluded that the substantive right limitation in section 2072(b) was inapplicable in *Shady Grove* because there was

¹⁷⁴ *Shady Grove*, 559 U.S. at 406.

¹⁷⁵ Under *Hanna v. Plumer*, Congress’s power over federal procedure extends to all matters “which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.” *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). Any rule rationally capable of classification as procedural can probably be understood to really regulate procedure. Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 97 (1998). But see Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1004 (2011) [hereinafter *The Repressible Myth*].

¹⁷⁶ *Shady Grove*, 559 U.S. at 406.

¹⁷⁷ *Id.* at 416-17 (Stevens, J., concurring).

¹⁷⁸ Justice Stevens argued that under § 2072(b) the federal court could ignore § 901(b) only if it was “so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Id.* at 423.

¹⁷⁹ *Id.* at 420.

¹⁸⁰ See *supra* Part II.A.2.

¹⁸¹ See *supra* Part II.A.2.

no evidence that New York officials intended section 901(b) to apply beyond New York state courts.¹⁸²

In her dissenting opinion, Justice Ginsburg agreed with Stevens that the applicability of a Federal Rule must take into account significant state regulatory interests.¹⁸³ Furthermore, because she thought New York officials intended section 901(b) to apply in federal court, she argued that Rule 23 must be read to make it compatible with New York law.¹⁸⁴

Ginsburg primarily argued that New York officials intended section 901(b) to be bound up with New York statutory damages actions. So understood, her argument was in keeping with the principle of coordinancy.¹⁸⁵ But there was a problem with this reading of section 901(b)'s scope. There was evidence that New York officials wanted section 901(b) to be used by New York courts when entertaining causes of action under other sovereigns' laws.¹⁸⁶ If section 901(b) was applied by a New York state court to a statutory damages action under sister state or federal law, it cannot be bound up with New York statutory damages actions.

Responding to the problem, Ginsburg (citing *Cohen*) suggested that the fact that section 901(b) applies in New York state courts to foreign causes of action does not mean that it cannot extend to federal courts in New York:

Shady Grove's argument that § 901(b) is procedural based on its possible application to foreign claims is also out of sync with our *Erie* decisions, many of them involving state statutes of similarly unqualified scope. The New Jersey law at issue in *Cohen v. Beneficial Industrial Loan Corp.*, for example, required plaintiffs to post a bond as security for costs in "any [stockholder's derivative] action." Our characterization of a state statute as substantive for *Erie* purposes has never hinged on whether the law applied only to domestic causes of action. To the contrary, we have ranked as substantive a variety of state laws that the state courts apply to federal and out-of-state

¹⁸² *Shady Grove*, 559 U.S. at 416, 436 (Stevens, J., concurring).

¹⁸³ *Id.* at 439-45 (Ginsburg, J., dissenting). Unlike Stevens, however, Ginsburg did not rest her argument on the substantive-right limitation in section 2072(a). For a discussion, see Clermont, *The Repressible Myth*, *supra* note 175, at 1015-16.

¹⁸⁴ *Shady Grove*, 559 U.S. at 443-55, 457 (Ginsburg, J., dissenting).

¹⁸⁵ *Id.* at 452-58.

¹⁸⁶ For a critical discussion of this aspect of her opinion, see Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845, 869-70 (2013).

claims, including statutes of limitations and burden-of-proof prescriptions.¹⁸⁷

Ginsburg also offered *York* as an example where New York law extended to federal courts in New York, even though the law was applied in New York state courts to actions under sister state law:

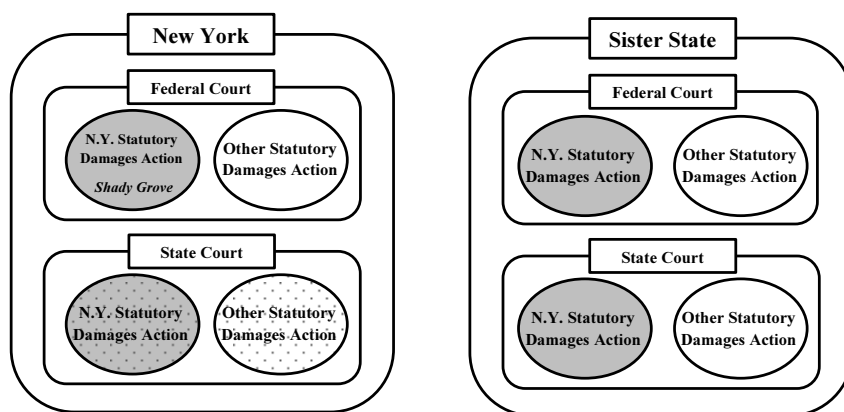
Moreover, statutes qualify as “substantive” for *Erie* purposes even when they have “procedural” thrusts as well. Statutes of limitations are, again, exemplary [citing *York*]. They supply “substantive” law in diversity suits, even though, as *Shady Grove* acknowledges, state courts often apply the forum’s limitations period as a “procedural” bar to claims arising under the law of another State.¹⁸⁸

Here, Ginsburg appears to be rejecting the principle of coordinancy. There are three interpretations of section 901(b) that would allow it to apply of its own force to a federal court in New York entertaining New York statutory damages actions, given that it applies in New York state court to statutory damage actions under other sovereigns’ laws. The first, which would be compatible with the principle, is that section 901(b) created two rules: one that applies in New York state courts to all actions for statutory damages (including actions under the law of other sovereigns) (Rule 1), and another that is bound up with New York statutory damages actions, following them into other court systems (Rule 2) (Figure 11).

¹⁸⁷ *Shady Grove*, 559 U.S. at 454 n.12 (citation omitted).

¹⁸⁸ *Id.* at 455 (citation omitted).

Figure 11



Scope of N.Y. C.P.L.R. 901(b) (McKINNEY 2006)

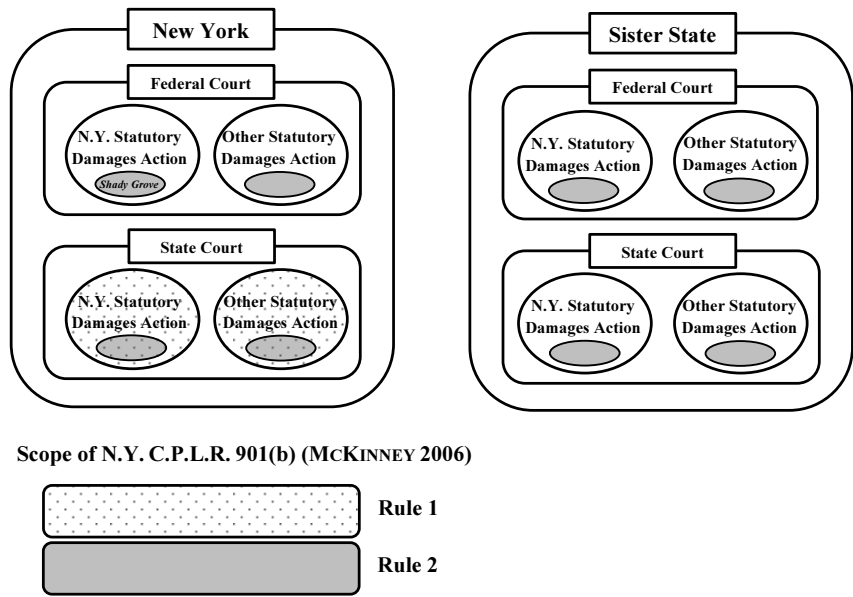


Such a scenario is arguably compatible with Ginsburg's citation to *York*, because in *York* the plaintiff sued under New York law in federal court in New York. But it is not compatible with her citation to *Cohen*, for in *Cohen* the cause of action was not under the law of the forum.¹⁸⁹ This interpretation must therefore be excluded.

Under the second interpretation, which would also be compatible with the principle, section 901(b) again created two rules. One rule applies in New York state courts to all actions for statutory damages. Another is tied to some other locus of New York regulatory interest in statutory damages actions implicated in the *Shady Grove* case (other than the fact that the actions are under New York law), such as the New York domicile of a party. This second rule would extend to all court systems in which the locus of regulatory interest is implicated (Figure 12). But there is no evidence of this tortured reading of the section 901(b) and neither Ginsburg nor anyone else involved in the case ever mentioned it.

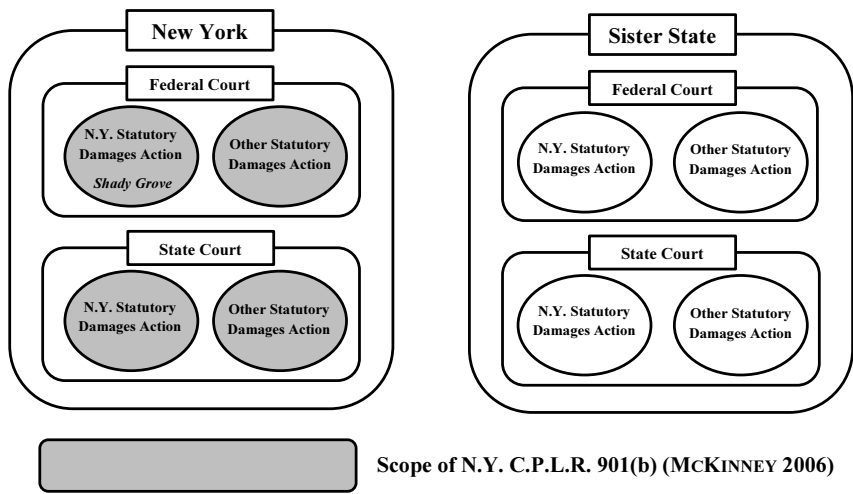
¹⁸⁹ See *supra* Part II.A.2.

Figure 12



The third and most plausible interpretation is that Ginsburg thought that section 901(b) extends vertically to all statutory damages actions in federal court in New York, in violation of the principle of coordinancy (Figure 13).

Figure 13



Although only Justices Kennedy, Breyer, and Alito joined Ginsburg's opinion, it is not clear that a rejection of the principle is a minority position on the Court, for no one questioned Ginsburg's assumption about New York's power.

2. *Godin v. Schencks*

Because five Justices (Stevens, Ginsburg, Kennedy, Breyer, and Alito) concluded in *Shady Grove* that a Federal Rule can be inapplicable due to a conflict with state regulatory interests, federal courts arguably must assess the scope of competing state rules in order to determine the validity of Federal Rules.¹⁹⁰ As a result, the validity of the principle can arise. An example is *Godin v. Schencks*, decided by the U.S. Court of Appeals for the First Circuit nine months after *Shady Grove*.¹⁹¹

Godin concerned whether a federal court in Maine entertaining defamation actions under Maine law should use Maine's anti-SLAPP statute, which provides defendants with procedural devices to prevent meritless suits from chilling protected speech.¹⁹² In the end, the court concluded that Maine's statute did not conflict with any Federal Rules (in particular Rules 12(b)(6) and 56).¹⁹³ But it came to this conclusion because it thought the statute was "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."¹⁹⁴ If a Federal Rule had been incompatible with the statute, "a serious question might be raised under the Rules Enabling Act."¹⁹⁵ Having characterized the case as a relatively unguided *Erie* choice, the court appealed both to the twin aims and to Maine's goal of protecting defendants from meritless suits that chill free speech to conclude that the state rule should be used.¹⁹⁶

Despite characterizing Maine's anti-SLAPP statute as intertwined with state rights, the First Circuit never concluded that the statute was intended by Maine authorities to follow Maine actions into sister state courts. The statute speaks solely of its effect in Maine courts without

¹⁹⁰ E.g., *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983-85 (10th Cir. 2010). Under this reading of *Shady Grove*, Justice Stevens's interpretation of the substantive-right limitation in section 2072(b) is controlling. For a different view, see Clermont, *The Repressible Myth*, *supra* note 175, at 1015-16.

¹⁹¹ *Godin v. Schencks*, 629 F.3d 79, 80-81 (1st Cir. 2010).

¹⁹² *Id.* at 80-82.

¹⁹³ *Id.* at 87-91.

¹⁹⁴ *Id.* at 89.

¹⁹⁵ *Id.* at 90.

¹⁹⁶ *Id.* at 86.

any limitation to Maine causes of action.¹⁹⁷ Thus, in claiming that the anti-SLAPP statute defined the state-created right, the *Godin* court appeared to be rejecting the principle of coordinancy. The statute applied in federal courts in Maine (including to actions under sister state law), but not to federal or state courts in sister states.

C. The Principle in Federal Question Actions

Finally, let us turn to rejections of the principle of coordinancy in federal question actions. An example is Justice Scalia's concurrence in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, which addressed whether a federal court in Pennsylvania entertaining a civil RICO action that lacked its own limitations period should use Pennsylvania's statute of limitations for fraud or a limitations period from an analogous federal statute.¹⁹⁸

In her majority opinion, Justice O'Connor noted as a threshold matter that "[t]he characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law."¹⁹⁹ The question was not whether the forum state statute of limitations applies of its own force to the RICO action, but whether state law should be borrowed to serve federal purposes.

The theory that federal courts borrow rather than apply state statute of limitations to federal statutes in federal court has been accepted for more than a century. As Justice Frankfurter put it in *Board of Commissioners of Jackson County v. United States*,²⁰⁰ "plainly whatever rule [for a limitations period] we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of [the state]."²⁰¹

Having characterized the matter as solely about whether the forum state period should be borrowed, O'Connor noted the "longstanding practice" of federal courts engaging in such borrowing for federal statutes that lacked limitations periods.²⁰² In the light of the

¹⁹⁷ ME. REV. STAT. tit. 14, § 556 (2012).

¹⁹⁸ *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157-70 (1987) (Scalia, J., concurring).

¹⁹⁹ *Id.* at 146 (majority opinion).

²⁰⁰ 308 U.S. 343, 349-50 (1939).

²⁰¹ *Id.* Justice Frankfurter came to the same conclusion in *Holmberg v. Armbrrecht*, where he argued that "it is federal policy to adopt the local law of limitation." *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946).

²⁰² *Agency Holding*, 483 U.S. at 147. Section 1658 established a four-year federal limitations period for federal statutory causes of action, but it does not apply to federal statutes enacted before December 1, 1990. 28 U.S.C. § 1658 (2006). Thus, the practice

“congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law.”²⁰³ Nevertheless, it is permissible, she argued, for a federal court to use an analogous limitations period from a federal statute, if federal interests recommend it.²⁰⁴

In his concurrence, Justice Scalia challenged O'Connor's view that federal courts entertaining federal actions borrow the forum state's statute of limitations.²⁰⁵ In doing so, he rejected the principle of coordinancy. Historically, he argued, federal courts “applied state limitations periods to federal causes of action because [they] believed that those state statutes applied of their own force, unless pre-empted by federal law.”²⁰⁶ His primary example was *McCluny v. Silliman*.²⁰⁷

1. *McCluny v. Silliman*

In *McCluny*, the plaintiff sought to purchase land in Ohio owned by the United States, as was his right under a federal statute, but the federal officer refused to accept his payment, causing him \$50,000 in damages.²⁰⁸ McCluny sued in federal court in Ohio for trespass on the case, but the officer prevailed on the ground that the Ohio statute of limitations barred his suit.²⁰⁹ The Supreme Court appeared to have no difficulty with the notion that Ohio's statute of limitations might apply to a federal action in federal court. “It is a well settled principle,” Justice McLean argued, “that a statute of limitation is the law of the forum, and operates upon all who submit themselves to its jurisdiction.”²¹⁰ McLean's only concern was whether the Ohio legislature intended the statute to apply to actions against federal officers for violation of rights created by federal law.²¹¹ Although he admitted that the legislature

of borrowing still occurs concerning such statutes.

²⁰³ *Agency Holding*, 483 U.S. at 147.

²⁰⁴ *Id.* at 146-56.

²⁰⁵ *Id.* at 157-59 (Scalia, J., concurring).

²⁰⁶ *Id.* at 158. Out of respect for this historical position, Scalia was unable to accept the reasoning of the Court. Instead, he argued that the federal court was free to borrow a limitations period from another federal statute, because the forum state's statutes of limitations did not provide an “appropriate” limitations period for the federal statute. *Id.* at 170.

²⁰⁷ 28 U.S. (3 Pet.) 270 (1830).

²⁰⁸ *Id.* at 275-76.

²⁰⁹ *Id.* at 276.

²¹⁰ *Id.* at 275.

²¹¹ *Id.* at 276-78.

probably did not have such actions in mind, it was enough that the language of the statute appeared to include them.²¹²

Admittedly, McCluny's immediate cause of action was probably under Ohio law, even though Ohio law was violated due to the deprivation of a right created by federal law. Thus, one might argue that Ohio had regulatory power by virtue of its ability to define McCluny's cause of action. But the Court's emphasis was clearly not on the cause of action but upon jurisdiction.²¹³ The presence of the parties before a federal court in Ohio was, it seems, enough to give Ohio the power to control what limitations period the federal court used.

It is true that in coming to its conclusion in *McCluny*, the Court relied on the Rules of Decision Act.²¹⁴ But, as we have seen, the Court did not treat the RDA as incorporating state standards into federal law.²¹⁵ The RDA could not direct federal courts to use the forum state's statute of limitations unless the statute would have applied of its own force even in the RDA's absence.

It follows that *McCluny* (and Justice Scalia, insofar as he relies upon it) implicitly rejects the principle of coordinancy. The forum state's statute of limitations extends beyond its own courts to, and only to, federal courts within the state.

Federal courts at the time *McCluny* was decided considered the forum state's statute of limitations to apply vertically of its own force to *federal* causes of action in federal court. Therefore, it comes as no surprise that they also considered the forum state's statute of limitations to apply vertically of its own force to actions in federal court under state law, including the law of a sister state.²¹⁶ Furthermore, statutes of limitations were not the only area where the forum state was thought to have this power over federal courts within its borders. Federal courts also held that the forum state's evidence law applied to them of its own force.²¹⁷

²¹² See *id.*

²¹³ See *id.*

²¹⁴ *Id.*

²¹⁵ See *supra* Part II.A.3.

²¹⁶ See, e.g., *Bauserman v. Blunt*, 147 U.S. 647, 652 (1893) (holding that Kansas statute of limitations applies in diversity case in Kansas); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 413-14 (1850) (applying Alabama statute of limitations to a Mississippi contract action brought in federal court in Alabama); *Le Roy v. Crowninshield*, 15 F. Cas. 362 (C.C.D. Mass. 1820) (applying Massachusetts statute of limitations to New York contract action in federal court). See generally Hill, *State Procedural Law*, *supra* note 163, at 78-81 (discussing role of state statutes of limitations in federal court during the time of *McCluny*).

²¹⁷ Initially it was unclear whether the relevant rule was that the forum state's law applied or the law under which the plaintiff sued applied. *M'Niel v. Holbrook*, 37 U.S.

Such cases are surprising, given the expressed view of the Court in *Wayman* that federal power over the procedure of federal courts is exclusive. To make sense of the special treatment given to statutes of limitations and rules of evidence, one would have to argue that they implicated some special regulatory interests of the forum state that other procedural rules did not. But it is hard to see what these interests could possibly be. In *Wayman*, Chief Justice Marshall concluded that Kentucky has no power to regulate how federal courts executed federal judgments in the state.²¹⁸ The execution of a judgment involves significant interference with property and liberty interests, with respect to which the state has strong regulatory concerns. If such matters are nevertheless beyond the state's power, it is hard to see how the limitations periods and rules of evidence used by a federal court in the state should not also be.

Cases such as *McCluny* are important for a number of reasons. First of all, they (and Justice Scalia's endorsement of them) show the extent to which the principle of coordinancy has been rejected even in federal question actions. But *McCluny* also poses a challenge to my defense of the principle. If federal courts traditionally thought of state statutes of limitations as applying vertically to federal courts within the state, any defense of the principle is suspect.

2. *McCluny* Explained

However, I do not think that *McCluny* and allied cases should be taken as evidence against the principle. One puzzle about *McCluny* is how its conclusion that the forum state's statute of limitations applies of its own force in federal court is compatible with the existence of the Process Acts, which directed federal courts to adopt the "forms of writs and execution . . . and modes of process" of the forum state.²¹⁹ If states had an original power to determine the limitations periods and rules of evidence used by federal courts within their borders, they should also have had an original power to regulate other means by which rights are litigated in federal courts. But that would mean that forum state law on the matter should have applied in federal courts of its own force, even

(12 Pet.) 84, 89-90 (1838); *Hinde v. Vattier's Lessee*, 30 U.S. (5 Pet.) 398, 401 (1831); Hill, *State Procedural Law*, *supra* note 163, at 81-82. But eventually it became clear that the forum state's law applied. See *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 250, 255 (1884); *Potter v. Nat'l Bank*, 102 U.S. 163, 165 (1880); *Ryan v. Bindley*, 68 U.S. (1 Wall.) 66, 68 (1863).

²¹⁸ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 50 (1825).

²¹⁹ E.g., Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93; see also Process Act of 1842, ch. 109, 5 Stat. 499, 499; Process Act of 1828, ch. 51, § 1, 4 Stat. 278, 279-80.

in the absence of the Process Acts. The Process Acts, like the Rules of Decision Act, would be superfluous, except as a declaration of the federal government's disinclination to displace applicable state law.

But the Process Acts were clearly not thought to be superfluous. Unlike the Rules of Decision Act, the Process Acts were understood to *incorporate* forum state standards into federal law.²²⁰ Indeed, forum state standards *had* to be understood as incorporated, since the standards used by federal courts were not those currently in force in the forum state, but those in place at the time of the enactment of the relevant Process Act.²²¹ Dynamic conformity to forum state law was put in place only with the Conformity Act of 1872.²²² Dynamic conformity was resisted because it was thought to be an improper delegation of lawmaking power to the states.²²³ But if state law applied of its own force, a Process Act with dynamic conformity would not involve delegation. It would simply be federal acquiescence in the use of state law that already applied of its own force.

Given its incompatibility with the existence of the Process Acts (and with Marshall's position in *Wayman* that federal power over the procedure of federal courts is exclusive), it is clear that something very puzzling is going on in *McCluny*. Something must have pushed the Court to adopt a position at odds with its other commitments. The explanation is that it was attempting to overcome the problem of lack of dynamic conformity in the Process Acts. Bound by static conformity, federal courts found themselves compelled to use outdated versions of forum state procedure. The solution was to understand a state procedural rule as applying of its own force in federal court, since that would allow the court to use the *current* version of the rule, rather than the version in place at the time of the enactment of the relevant Process Act.²²⁴ Concerning statutes of limitations and rules of evidence, the Court took advantage of this possibility.

With the introduction of dynamic conformity in 1872, federal courts no longer needed to engage in this fiction. And we immediately begin

²²⁰ *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 359 (1835) (stating, with respect to state laws incorporated under the Process Acts, that "[t]he whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress" and that "[b]eyond this, they have no controlling influence"); *see also* Barrett, *supra* note 19, at 838-39.

²²¹ *See Wayman*, 23 U.S. (10 Wheat.) at 47-48.

²²² Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.

²²³ *See supra* Part I.B.

²²⁴ *See* Hill, *State Procedural Law*, *supra* note 163, at 77; Caleb Nelson, *Persistence of General Law*, 106 COLUM. L. REV. 503, 550 n.229 (2006).

to see the abandonment of the notion that the forum state's statute of limitations and rules of evidence apply of their own force in federal court, in favor of the view that they are incorporated into federal law.²²⁵ Therefore, *McCluny* and similar cases decided before the introduction of dynamic conformity should not be taken as evidence against the principle of coordinancy. Federal courts' considered position is the modern approach, under which the forum state's statute of limitations and rules of evidence do not apply of their own force to federal causes of action in federal court.

III. THE PRINCIPLE DEFENDED

As the many examples above show, the validity of the principle of coordinancy is a significant question, for the principle has been rejected by federal courts and scholars in a wide variety of circumstances. It is now time to take on the question of whether the principle is indeed justified.

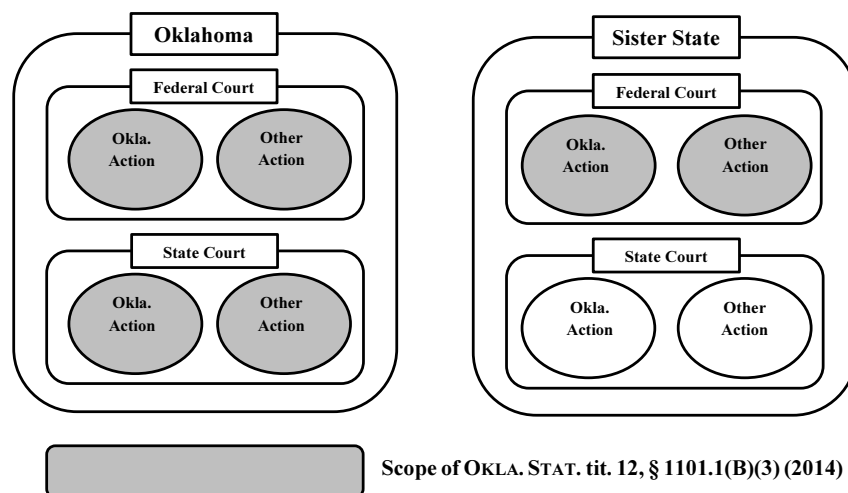
A. Direct Discrimination Against Federal Courts

I would like to begin my defense of the principle by considering an extreme case in which a state chooses to extend its law to *all* federal courts, including federal courts in sister states, but *not* to sister state courts. An example would be Oklahoma taking its attorney-fee

²²⁵ *Campbell v. Haverhill*, 155 U.S. 610, 616-18 (1895); *Ex parte Fisk*, 113 U.S. 713, 719-20 (1885); *Fisher Flouring Mills Co. v. United States*, 17 F.2d 232, 235 (9th Cir. 1927); *Stewart v. Morris*, 89 F. 290, 291 (7th Cir. 1898). In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 160-61 (1987), Scalia points to *Campbell* as an example of the view that the forum state's statute of limitations applies of its own force to federal actions in federal court. But *Campbell* actually suggests incorporation. Tellingly, Justice Brown drew an analogy between the use of the forum state's statute of limitations for federal causes of action and the use of forum state procedure under the Conformity Act. *Campbell*, 155 U.S. at 616-18. If the forum state's statute of limitations were considered inapplicable to a federal cause of action in federal court, he argued, then the forum state's methods of process and pleadings should also be inapplicable in federal court despite the Conformity Act. *Id.* at 617-18. This suggests that he was not arguing that the forum state genuinely has the power to regulate federal procedure vertically, but was only suggesting that the language of the forum state's procedural rules should not be read so narrowly to defeat their effective incorporation into federal law. Furthermore, he argued, if forum state statutes of limitation are not employed for federal causes of action in federal court, the unacceptable conclusion would be that these federal actions are subject to no time limitations at all. *Id.* at 616-17. This argument proceeds not from premises about state power over federal procedure, but from federal interests in repose for defendants from the threat of federal causes of action and in avoiding actions in which evidence was so stale as to be unreliable.

provision in section 1101.1(B)(3), which we can assume applies to all contract actions (including contract actions not under Oklahoma law) brought in Oklahoma state courts,²²⁶ and extending it to all contract actions brought in any federal court (Figure 14).

Figure 14



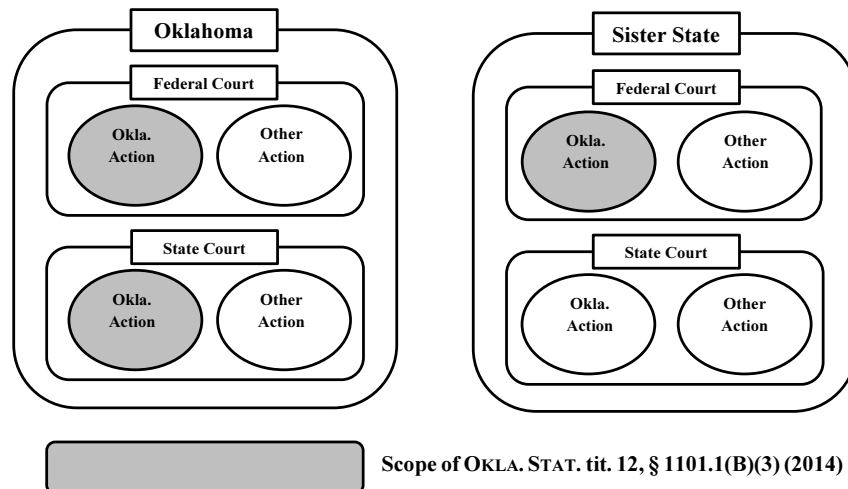
Here, I think it is easy to see why the state regulation of federal procedure is illegitimate. It is true that Oklahoma can have a legitimate interest in the attorney fees rules used by federal courts that entertain Oklahoma contract actions, that have Oklahoma domiciliaries as parties, or before whom Oklahoma attorneys appear. But such loci of state interest cannot justify the extension of section 1101.1(B)(3) to all and only federal courts. If they were the grounds for the extension of section 1101.1(B)(3) beyond the Oklahoma state court system, section 1101.1(B)(3) would also apply to cases in sister state courts that involve Oklahoma contract actions, have Oklahoma domiciliaries as parties, or concern Oklahoma attorneys. And section 1101(B)(3) would not apply to cases in federal courts that do not involve Oklahoma contract actions, do not have Oklahoma domiciliaries as parties, and do not concern Oklahoma attorneys. The only conceivable criterion that could explain why Oklahoma has extended section 1101.1(B)(3) in this way is that it is interested in regulating federal courts simply because they are federal courts.

²²⁶ But see discussion *supra* note 113.

Such a regulatory purpose is obviously illegitimate. To extend Oklahoma law to a matter, the extension must be rationally related to some legitimate Oklahoma interest,²²⁷ and Oklahoma cannot have a legitimate interest in federal courts simply because they are federal courts. That is, I think, as close as we can get to “one of those political axioms, an attempt to demonstrate which, would be a waste of argument not to be excused.”²²⁸

But let us assume that Oklahoma officials extend section 1101.1(B)(3) beyond their own court system on the basis of some legitimate interest — say, the cause of action being under Oklahoma law — but halt the extension at federal courts that entertain Oklahoma actions, without including sister state courts entertaining such actions (Figure 15).

Figure 15



Given that there is a legitimate Oklahoma regulatory purpose in each case to which Oklahoma law extends, would this be permissible?

I think the answer is again clearly no. Just as a state must have a legitimate reason to regulate a matter, a state, having such a legitimate reason, must also have a legitimate reason to limit its regulation.

²²⁷ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (stating that to satisfy the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause, a forum state needs “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

²²⁸ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 49 (1825).

Consider the following analogy. Except in unusual circumstances, a state may not regulate on the basis of race. It may not impose some legal burden only on African-Americans just because they are African-American. But it is also true that a state, having a legitimate reason to regulate, cannot limit the regulation on the basis of race. Having created a speed limit of sixty-five to make people safer, it cannot limit that speed limit to African-Americans.²²⁹

The same point is true concerning a state's regulation of federal courts. Even when it has a legitimate reason for regulating other court systems, it may not discriminate against federal courts in the way that it limits its regulation.²³⁰ One way of putting this point is that any regulation a state imposes on the procedure of federal courts must be based upon a criterion that is neutral with respect to the court system to which the regulation applies. The regulation must be based on a criterion that applies to similarly situated sister state courts.

B. Justifying the Principle

But, to my knowledge, no one has ever suggested that a state's officials extended their law to all federal courts. As we have seen, rejections of the principle always involve the notion that a state's officials have extended their law vertically — to federal courts *within the state's borders*.²³¹ Demonstrating that such vertical state regulation is impermissible is more challenging because there is an apparently neutral criterion that distinguishes regulated from non-regulated courts, namely presence of the parties before a court within the state.

²²⁹ Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1980 (1997) ("It does not follow that just because an interested state does not have to apply another state's law, it may choose not to do so for whatever reasons or in whatever manner it wants, no more than the fact that Congress does not have to confer welfare benefits means that Congress may confer such benefits on the basis of race or religion.").

²³⁰ A similar antidiscrimination principle comes into play in *Testa v. Katt*, 330 U.S. 386, 387-89 (1947), which is commonly understood as holding that a state court may not discriminate against federal law when determining jurisdiction. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 643 n.50 (1993); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 692 n.62 (1976); see also *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950); *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934); *Mondou v. N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912). Here I am arguing that a state may not discriminate against federal courts when determining the scope of state law.

²³¹ See *supra* Part II.

1. Federal Question and Diversity Cases Must Be Treated the Same

My first argument in defense of the principle starts with the modern consensus, discussed above,²³² that a state's statute of limitations cannot apply of its own force to federal actions brought in federal court within the state. According to this consensus, New York cannot extend its statute of limitations to a federal action in a federal court in New York, even in the absence of competing federal law. If that is true, I will argue, it follows that New York cannot extend its statute of limitations vertically to a federal court entertaining a state law action, including an action under New York law. As far as vertical power is concerned, federal question actions and diversity (or supplemental jurisdiction) actions must be treated the same.

To see why, let us first consider the purposes standing behind statutes of limitations. The two most commonly mentioned are: (1) that the defendant has a right to repose when a reasonable amount of time has passed for the plaintiff to sue;²³³ and (2) that the passage of time makes evidence, particularly witnesses' testimony, too unreliable.²³⁴ With these purposes in mind, which sovereigns would have a legitimate regulatory interest in their statute of limitations applying to an action?

One, of course, is the sovereign that created the action.²³⁵ Since it did so with certain regulatory purposes in mind, it has an interest in determining when vindicating those purposes should be sacrificed to provide the defendants with repose. It also has an interest in determining when the available evidence has become so stale that the purposes standing behind its action cannot be effectively vindicated through litigation.

Another sovereign that has an interest in extending its statute of limitations to an action is the one whose court has jurisdiction. State courts entertaining actions under sister state law often apply their own statute of limitations for this reason.²³⁶ As the sovereign that is directly threatening the defendant with liability, it has an interest in determining when the goal of providing the defendant with repose should justify

²³² See *supra* Part II.C.2.

²³³ Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 290.

²³⁴ E.g., *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Addison v. California*, 21 Cal. 3d 313, 316-17 (1978).

²³⁵ See *Schrabauer v. Schneider Engraving Prod., Inc.*, 25 S.W.2d 529, 532 (Mo. Ct. App. 1930) ("[T]he lawmaking body which has the power to create the right may affix the conditions under which it is to be enforced.").

²³⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 603 (1934).

lifting this threat. Furthermore, since it bears the cost of adjudication, it has an interest in determining when those costs are unjustified because the available evidence is too stale to be reliable.

But these interests cannot justify a state extending its statute of limitations to federal causes of action brought within federal court in the state. Such an extension cannot be justified by pointing to the interests of the sovereign that created the cause of action since the action was created by the federal government.²³⁷ Nor can one appeal to the interests of the sovereign whose court has taken jurisdiction of the action, for it is a federal court, not a state court, that has jurisdiction.

It is true that one might be able to identify other sources of state interest. For example, New York might have an interest in determining the scope of the defendant's right to repose if she was domiciled in New York, even when New York is not the sovereign that created the cause of action and is not the sovereign whose court has taken jurisdiction of the case.²³⁸ To my knowledge, however, there is no evidence that any state's officials have read the scope of their statute of limitations in light of such an interest. In any event, such a source of state interest could not explain why New York's statute of limitations applies of its own force to federal actions brought in federal court in New York. The extension of New York's statute of limitations would still be *coordinate* — the statute would extend to actions involving defendants who are New York domiciliaries when brought in federal or state courts in sister states and would not extend to federal actions in federal court in New York when the defendant was domiciled outside New York.

In the end, there is only one possible contact with New York that can explain why New York's statute of limitations applies of its own force to federal actions brought in federal court in New York. This is precisely the one identified in *McCluny* — the presence of the parties before a

²³⁷ To the contrary, these interests justify a federal statute of limitations applying to a federal action when brought in New York state court. *E.g.*, *Atl. Coast Line R.R. Co. v. Burnette*, 239 U.S. 199, 201 (1915) (holding that a federal statute of limitations applied to a federal action brought in New York state court).

²³⁸ Given this possibility, it is not clear that we should read the consensus that state statute of limitations cannot apply of their own force to federal causes of action in federal court as denying the permissibility of such an extension to defendant domiciliaries. It is conceivable that New York's statute of limitations can apply of its own force to a federal cause of action in New York, in the absence of competing federal law, by virtue of a New Yorker being the defendant. It is perhaps for this reason that Justice O'Connor argued that "[t]he characterization of a federal claim for purposes of selecting the appropriate statute of limitations is *generally* a question of federal law." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987) (emphasis added).

court within the state.²³⁹ As Justice Mclean put it, “a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction.”²⁴⁰

The modern consensus, in rejecting *McCluny*, must therefore reject the notion that the presence of the parties before a federal court in New York is sufficient to give New York a legitimate interest in extending its statute of limitations to them when the plaintiff sues under federal law. But if New York lacks vertical power when the plaintiff sues under federal law, how could it possess vertical power when she sues under state law?

Consider a federal court in New York entertaining an action under Pennsylvania law. How could New York’s vertical power be any greater in such a case than it was when the federal court entertained a federal action? In both cases, New York is not responsible for the action and is not asserting jurisdiction. And in both cases, any source of New York regulatory authority independent of the presence of the parties before a court in New York, such as the defendant being domiciled in New York, can justify only coordinate, not vertical, power.

Matters are no different when one assumes that the plaintiff sues in federal court in New York under New York law. New York is free to assert regulatory authority over the procedure of such a federal court by virtue of being the author of the cause of action.²⁴¹ But that power is a source of coordinate, not vertical, power. If New York is asserting vertical power, its basis must be that the parties are present before a court within New York. But that means that New York should have vertical power when the plaintiff sues in federal court in New York under federal or sister state law too.

Thus, as far as vertical power is concerned, federal question and diversity (or supplemental jurisdiction) cases must be treated the same. If New Jersey had vertical power in *Cohen*, then Ohio had vertical power in *McCluny*. If Justice Ginsburg is right about New York’s power in *Shady Grove*, then Scalia is right about Pennsylvania’s power in *Agency Holding*.

But, one might argue, maybe we should conclude that Scalia is right in *Agency Holding*. Perhaps the fact that the parties are before a federal court in New York gives New York a legitimate interest in regulating

²³⁹ *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 275 (1830).

²⁴⁰ *Id.*

²⁴¹ E.g., *Schrabauer v. Schneider Engraving Prod., Inc.*, 25 S.W.2d 529, 532 (Mo. Ct. App. 1930).

the court's procedure, even when the plaintiff sues under federal law. Further arguments in favor of the principle are therefore needed.

In offering such arguments, however, it is best to concentrate on cases in which all other reasons for New York to extend its law to a federal court besides the parties' presence before a court in the state are absent. In cases in which the plaintiff sues under New York law or a party is domiciled in New York, one is always in danger of concluding that New York law applies on the basis of coordinate rather than vertical lawmaking power. Our question, therefore, should be whether New York can regulate the procedure of a federal court in New York entertaining a federal action (or an action under sister state law) between parties who are not domiciliaries of New York.

2. States Lack a Legitimate Interest in Extending Their Law Vertically

My second argument in defense of the principle is that the presence of the parties before a federal court within New York is simply not enough to give the state of New York a legitimate interest in regulating the federal court's procedure. To justify the applicability of a state's law, it is not sufficient to identify *some* connection to the state. The connection must be *rationally related* to purposes standing behind the law.²⁴² And the bare presence of the parties in New York is insufficient.

Consider, once again, New York's statute of limitations. When New York extends its statute of limitations to a case, it seeks either to protect the defendant's repose or to impose its view about when the evidence is so stale that the law at issue cannot be effectively enforced. As we have seen, New York's creating the cause of action or a New York state court actually taking jurisdiction can give New York a legitimate interest in regulating such matters.²⁴³ It is also barely possible that the defendant (or perhaps the plaintiff) being domiciled in New York gives New York a legitimate interest in extending its statute of limitations to a case, although that stretches the scope of New York's regulatory power beyond what has ever been asserted by a state. But none of these connections can justify vertically extending New York's statute of limitations to federal courts within the state. For New York to extend its statute of limitations vertically, it must be saying, in effect:

²⁴² See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

²⁴³ See, e.g., *Schraubauer*, 25 S.W.2d at 532 ("[T]he lawmaking body which has the power to create the right may affix the conditions under which it is to be enforced.").

We wish to protect the repose and ensure the quality of evidence presented against anyone who happens to be within our borders, even when it is not our court that is threatening the defendant with liability, we are not responsible for the cause of action, and no party is domiciled within our state.

Such a thin connection between New York and the case is insufficient. Granted, the presence of the parties before a court in New York gives New York *some* regulatory authority over them. Were one party to assault the other within the federal courthouse, New York law could still apply to the matter of its own force, in the absence of competing federal law.²⁴⁴ But when New York seeks to extend its statute of limitations vertically, it is regulating the federal lawsuit itself, not matters that are tangential to the suit. It seeks either to protect the defendant's repose from the threat imposed by the federal lawsuit or to impose its judgment about when the evidence in that lawsuit is so stale that the law cannot be effectively enforced.²⁴⁵ And the presence of the parties in New York cannot justify such regulation.

Indeed, if it could, why should the presence of the parties in New York not give the state an interest in extending its statute of limitations

²⁴⁴ To say that New York law might apply of its own force to the assault is compatible with the Enclave Clause, which states that Congress has the power "[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . ." U.S. CONST. art. I, § 8, cl. 17; see *United States v. Vaughan*, 682 F.2d 290, 295 (2d Cir. 1982) (applying the Clause to federal courthouses). The Clause cannot reasonably be taken to mean that federal legislative authority over what goes on in the enclave is exclusive. Although the Court has held that the United States acquires "complete sovereignty" over the enclave, it more reasonably treated states as still possessing concurrent lawmaking power that becomes relevant when federal preemption is removed. *S.R.A., Inc., v. Minnesota*, 327 U.S. 558, 562-63 (1946); see *Howard v. Comm'rs of Sinking Fund*, 344 U.S. 624, 626 (1953); Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1234-42 (2011). In the end, the Enclave Clause merely means that Congress has the power to preempt otherwise applicable state law with federal law. So understood, it appears constitutionally superfluous. See Erbsen, *supra*, at 1234-42.

Because actions concerning enclaves that rely on state law standards have been held to have federal question jurisdiction, it would appear that all state law has in fact been fully preempted by federal law, although many state law standards have been incorporated. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006); see *Assimilative Torts Act*, 16 U.S.C. § 457 (2006); *Assimilative Crimes Act*, 18 U.S.C. § 13 (1996). But even if that is true, states still possess a concurrent defeasible lawmaking authority over federal enclaves.

²⁴⁵ See *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Addison v. California*, 21 Cal. 3d 313, 316-17 (1978); Carrington, *supra* note 233, at 290.

to a lawsuit in a sister state court? Assume that a Minnesota domiciliary, sued on a Connecticut cause of action in a Connecticut state court, stays in a New York hotel during the course of the lawsuit. If the presence of the defendant in New York gives the state an interest in extending its statute of limitations to a federal court in New York, why not to the state court in Connecticut?

What is more, if the presence of the parties within a state were a legitimate reason for the state's extending its statute of limitations to them, one would expect it to have been mentioned as a reason why a state court can apply its statute of limitations to the parties over whom it has asserted jurisdiction, even when the plaintiff sues under sister state law. But it has not. The justification for the state court applying its statute of limitations is based instead on the fact that it has *actually* taken jurisdiction, thereby incurring certain costs and obtaining certain powers over the parties.²⁴⁶

3. Vertical Power Discriminates Against Federal Courts

My third argument in favor of the principle is that if New York is asserting vertical lawmaking power, it would not be adopting a neutral criterion for extending its law beyond its own court system. The parties do not just happen to be present within New York. They are there as a result of Congress's decisions to place a federal court within New York's borders and to give the court jurisdiction over the action. Had Congress decided to place all federal district courts in the District of Columbia, or had it decided that a federal court in New York was not the proper venue for the plaintiff's suit, the parties would not be litigating in New York. For New York officials to take Congress's decisions as grounds for extending their law to the federal court's procedure is to impermissibly single out federal courts for regulation.²⁴⁷

It is true the vertical regulation might be facially neutral. New York officials might claim their law extends to all those who happen to be present before a court within New York, whether the court is federal or sister state. But if facial neutrality were sufficient, New York would have a license to single out federal courts for regulation since only federal courts can be located within New York's borders. Permitting such regulation would be equivalent to allowing a state to discriminate against African-Americans, provided that they were singled out on the basis of a purportedly neutral criterion that only they possessed.

²⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 603 (1934).

²⁴⁷ See *supra* Part III.A.

Nor can New York claim power to extend its law on the basis of some presence of the parties in the state that is unrelated to litigation in federal court. It is true that, in most cases, the parties before a federal court in New York would have had some presence in the state even if the federal litigation had occurred elsewhere. But such contact with New York cannot explain how New York has vertical power over federal procedure.

Consider a Californian, tagged in New York while on a business trip, who is now before a federal court in New York litigating a federal cause of action that arose outside of New York. It is true that the defendant would have been in New York on her business trip even if there were no federal court in the state. But how can that connection justify New York extending its statute of limitations to the defendant? If it could, New York would be able to use the contact to extend its statute of limitations to the California defendant in whatever federal or state court she was sued. But the notion that the defendant's business trip to New York would allow New York's statute of limitations to extend (even defeasibly) to a suit against the defendant under federal law in federal court in the District of Columbia, or under Pennsylvania law in state court in Alaska, is absurd.²⁴⁸

In the end, the only contacts that can conceivably justify New York's asserting vertical lawmaking power are those generated by the federal government's own choices. It is only on the basis of the fact that the federal government has chosen to threaten the defendant with liability within the state of New York that New York would have any argument that it can assert its views about her right to repose or the staleness of the evidence against her. But that means extending New York law beyond the New York state court system in a manner that uniquely identifies federal courts.

For the same reason that Congress's choice to place a federal court in New York cannot justify the vertical extension of New York's statute of

²⁴⁸ What is more, even if New York could claim power over federal procedure on the basis of the defendant's being tagged in the state, it would follow that New York would have vertical power only in a subset of actions brought in federal court in New York. Some federal statutes have provisions allowing for nationwide service of process. As a result, federal courts are able to entertain such actions in circumstances where a state court would have been unable to get jurisdiction over the parties. *E.g.*, 29 U.S.C. § 1132(e)(2) (2006) (providing nationwide service of process for ERISA). Likewise under Federal Rule of Civil Procedure 4(k)(2), a federal court entertaining a federal cause of action can get personal jurisdiction over a defendant who would not be subject to the jurisdiction of a state court. Federal Rule of Civil Procedure 4(k)(1)(B) (also known as the "100-mile bulge") also allows a federal court to assert personal jurisdiction over certain parties not subject to jurisdiction in a forum state court.

limitations to that court, it cannot justify the vertical extension of other New York procedural rules. With respect to each rule, there may be some connection with New York that could justify its *coordinate* extension. For example, it is likely that the fact that communications between an attorney and client occurred in New York is enough for New York to extend its attorney-client privilege, at least defeasibly, to federal courts, including those entertaining actions under federal law. But for New York to assert vertical regulatory authority, such connections are insufficient.

4. Two *Reductiones ad Absurdum*

My final argument in defense of the principle consists of a pair of *reductiones ad absurdum*. Assume that the fact that the parties are before a federal court in New York gives the state the power to extend its statute of limitations or other procedural law to them. What would happen if Congress chose to place all federal district courts in New York? Would it really follow that New York's statute of limitations applied of its own force to all actions in federal court, unless preempted by federal law? Would New York, among all the states, have unique regulatory authority over federal courts? The answer, I think, is clearly no. But if Congress's choice to place *all* federal courts in New York cannot give the state vertical power, how can Congress's choice to place *some* federal courts in the state do so?

What is more, assume the presence of the parties before a federal district court in New York gave the state the power to vertically extend procedural law for New York *trial* courts to the federal district court. Why should it not also follow that Congress's choice to place a federal court of appeals in New York gives the state the power to vertically extend New York *appellate* procedure to the federal court of appeals? New York law would apparently apply of its own force in the Second Circuit, until displaced by federal law. And had Congress chosen to place the United States Supreme Court within New York City, New York's rules of appellate procedure would apparently apply of their own force to it too. That cannot be true.

C. Refining the Principle

The principle of coordinancy, I conclude, is justified. In particular, a forum state law that is "procedural," in the sense that it applies to all actions of a certain type when brought before the state's courts — without limitation on the basis of some locus of state interest that would

justify the law's extension to sister state courts — cannot be extended to federal courts in the state.

An example of such a “procedural” law is the New Jersey statute in *Cohen*, which applied to “any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares.”²⁴⁹ Satisfaction of that standard did not, on its own, generate a New Jersey interest. The only reason New Jersey was legitimately interested in the statute applying in a New Jersey state court was fact that the court had actually taken jurisdiction over the parties. And that is insufficient to give New Jersey power beyond its own court system.

Examples of state laws that, like the statute in *Cohen*, cannot be read as extending to federal courts of their own force, are the New York statute of limitations in *York*,²⁵⁰ the New Jersey affidavit of merit statute in *Chamberlain*,²⁵¹ and the New York restriction on class actions in *Shady Grove*.²⁵² In each case, the law applied in forum state courts to all causes of action of a certain type, without being limited by any locus of forum state regulatory interest that could justify the law's extension to sister state courts. State interests should be irrelevant when federal courts decide whether the standards in such laws should be used.

To repeat, a state's regulation of the procedure of federal courts must satisfy the principle of coordinancy. That does not mean, however, that a state's extension of its law beyond its own court system on the basis of criteria that satisfy the principle might not, as a matter of fact, result in the law applying only to federal courts within the state. This could occur if the interest that justifies the extension of the state's law beyond its own court system satisfies the principle, but the extension becomes limited to federal courts in the state in a manner that likewise satisfies the principle.

The simplest example is, curiously, the Kentucky statute at issue in *Wayman*.²⁵³ Why would Kentucky officials wish this statute to apply beyond the Kentucky state court system to federal courts within the state? The reason is not bare fact that the federal court or the parties are within the state's borders. Rather, it is the fact that the execution of a federal judgment against property in Kentucky is a matter of state concern. Such an interest satisfies the principle because it would apply to sister state courts, to the extent that they execute their judgments in Kentucky. But because sister state courts have no constitutional power

²⁴⁹ N.J. STAT. ANN. § 14:3-15 to 17 (West 1945).

²⁵⁰ *Guar. Trust Co. v. York*, 326 U.S. 99, 110 (1945).

²⁵¹ *Chamberlain v. Giampapa*, 210 F.3d 154, 161 (3d Cir. 2000).

²⁵² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010).

²⁵³ See MOREHEAD & BROWN, *supra* note 25, at 629-30.

to execute their judgments outside their borders,²⁵⁴ the applicability of the statute to them has no purchase. The matter is different with federal courts, which have the constitutional power to execute their judgments over any persons or property within the country.²⁵⁵ However, since the only federal court that would in fact execute its judgments in Kentucky is one located within the state,²⁵⁶ the Kentucky statute would generally apply in practice only to federal courts within Kentucky without the principle being violated. I think we must conclude, therefore, that the principle is insufficient to justify Marshall's decision in *Wayman*. It is only because he (wrongly) understood the federal government to have *exclusive* authority over federal procedure, including over the rules for the execution of federal judgments, that he arrived at his decision.²⁵⁷

Another possible example of a state law extending only to federal courts in the state in a manner that satisfies the principle is the Mississippi statute at issue in *Woods v. Interstate Realty Co.*²⁵⁸ This statute required "a foreign corporation doing business in [Mississippi] to file a written power of attorney designating an agent on whom service of process may be had," and also provided that "[a]ny foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."²⁵⁹

The Supreme Court held that the Mississippi rule should be used in federal court. It is relatively easy to justify this conclusion on the basis of the twin aims: if federal courts in Mississippi did not require out-of-state corporations to register before bringing suit, while state courts in Mississippi did, there would unquestionably be forum shopping. Out-

²⁵⁴ See *Pennington v. Fourth Nat'l Bank of Cincinnati*, 243 U.S. 269, 272 (1917).

²⁵⁵ *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838); see also *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) ("[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists."). Two areas where this power is taken advantage of are bankruptcy and judgments in favor of the United States. See 11 U.S.C. § 541 (2010); 28 U.S.C. § 2413 (1948).

²⁵⁶ Ordinarily enforcement of a judgment by a federal court is in the state where the federal court is located. See 12 WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3012 (2d ed. 1997). Under 28 U.S.C. § 1963 (1996), however, a judgment of one federal court may be registered in a different district and enforced there.

²⁵⁷ See *supra* Part I.A.1.

²⁵⁸ 337 U.S. 535, 536 (1949).

²⁵⁹ *Id.* at 536 n.1 (discussing and quoting requirements of section 5319 of the Mississippi Code of 1942).

of-state corporations would choose federal over state court to avoid the registration requirement. Furthermore, there appear to be no significant countervailing federal interests in favor of using a uniform federal common law rule.

But can we also understand Mississippi as legitimately interested in its law applying in federal courts in the state? Allan Stein argues that we can: "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."²⁶⁰ Here we can agree with Stein that Mississippi has a legitimate interest in its law extending to federal court. The Mississippi statute identifies a clear locus of Mississippi regulatory interest, namely, the corporation's doing business in the state. Mississippi puts an obligation on such corporations to register in Mississippi and penalizes them for failing to do so by prohibiting them from bringing suits. Whether Mississippi in fact sought to extend the prohibition on bringing suits to federal courts within Mississippi, it *could* have done so without violating the principle. After all, Mississippi could have kept such corporations from evading the requirement by prohibiting them from bringing suits in sister state courts as well, although sister state courts would of course have been under no obligation to respect this limitation on the corporation's power.

What is more, Mississippi would have a rational reason to limit the extension of its statute to federal courts in Mississippi, on the ground that an out-of-state corporation inclined to sue in Mississippi state courts might find it most convenient to escape the registration requirement by suing in federal courts in Mississippi rather than federal or state courts in sister states. Mississippi would not be discriminating against federal courts but simply choosing to limit the scope of its statute to cases where it would have the greatest effect.

CONCLUSION

Given that the principle of coordinancy is justified, what are the consequences? The most profound effect is on federal courts deciding *Erie* cases. Assume that a federal court is attempting to determine

²⁶⁰ Stein, *supra* note 146, at 1999. On the other hand, if Mississippi's goal had simply been to not expend its judicial resources on foreign corporations who had not registered to do business in the state, Stein admits it would have no interest in its law applying in federal court. *Id.* at 1990-91. Indeed, by taking such cases, federal courts would be doing Mississippi a favor.

whether a procedural matter should be governed by a federal common law rule that is uniform across federal courts or a rule from the forum state. In the course of the relatively unguided *Erie* analysis, some of the interests to which the court must look are federal. The twin aims — the goal of procedural uniformity with forum state courts — are motivated by federal interests.²⁶¹ Likewise, the countervailing interests that recommend using a rule that is uniform across federal courts are federal in nature.

But there is a place in the relatively unguided *Erie* analysis for state interests as well. It is here that the principle has important consequences. Anyone claiming that the forum state has an interest in its rule being used by a federal court must point to how the rule can extend to sister state courts as well. If this requirement cannot be satisfied, state interests are irrelevant.

Discussion by legal scholars of state interests in federal procedure tends to elide the crucial distinction between whether the interest is coordinate or vertical. Consider the following passage by Allan Stein:

[A state] 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.²⁶²

Stein fails to distinguish between cases in which the state's officials extend their law coordinately or vertically. Do New York officials seek to provide repose to defendants because of some connection with the state, such as the cause of action being under New York law or a party being a New York domiciliary, that would also extend the statute of limitations to sister state courts? This is permissible. Or do they simply seek to extend the statute of limitations to federal courts within New York? This is beyond New York's power.

The principle is respected by *Byrd's* bound-up test, which looks to whether the forum state's rule is part of the cause of action upon which the plaintiff sues. So understood, the rule would follow the state's cause of action into federal and state courts in sister states and would be inapplicable to sister state actions in federal courts within the forum state. The principle can also be satisfied by other accounts of the scope

²⁶¹ See *supra* Part II.A.1.

²⁶² Stein, *supra* note 146, at 1968.

of state law, such as those that look to the domicile of a party. But if the state's rule is one that applies in state court to anyone over whom the court has jurisdiction, the state has no legitimate interest in the rule's extension to federal courts. The relatively-unguided *Erie* analysis must look to federal interests alone.

One relatively unguided *Erie* case that I believe would have come out differently had the principle been recognized is *Gasperini*. In *Gasperini*, the federal interests in favor of vertical uniformity and the federal interests in favor of a uniform federal common law rule were in equipoise, such that New York interests were decisive in the Court's conclusion that the federal district court should use the New York rule.²⁶³ But because New York state courts had applied the New York rule to actions under the law of other sovereigns,²⁶⁴ had the Court recognized the principle it would have concluded that New York interests were irrelevant. The argument for a uniform federal common law rule would have prevailed.

The principle is also important to federal courts determining whether state regulatory interests trigger the substantive rights limitation on the validity of a Federal Rule of Civil Procedure. One cannot assume, as Justice Ginsburg does in *Shady Grove*, that state officials are interested in extending to federal court a rule that would not also extend to sister state courts.

But the principle has broader consequences. Congress, or those exercising delegated congressional power, regulate the procedure of federal courts in the background of respect for state interests. Here too, such interests are irrelevant unless the principle is satisfied. For example, Rule 501 of the Federal Rules of Evidence directs federal courts to use state privilege law for claims or defenses in which state law provides the rule of decision.²⁶⁵ The rule was enacted with the goal of protecting state regulatory interests in mind.²⁶⁶ To the extent that a state extends its privilege law coordinately to sister states, it can be understood as having legitimate interests to protect.²⁶⁷ But for those states that treat privileges as fully procedural matters, state interests are irrelevant and federal respect for them is misguided.

²⁶³ See *supra* text accompanying notes 115–22.

²⁶⁴ See *supra* text accompanying notes 143–45.

²⁶⁵ FED. R. EVID. 501.

²⁶⁶ See *id.*; H.R. REP. NO. 93-650, at 3, 9 (1973), reprinted in 1974 U.S.C.A.N. 7083, 7077 (“The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.”).

²⁶⁷ See *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1969).