Notre Dame Law Review

Volume 63 | Issue 5 Article 6

1-1-1988

Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law

Stephen B. Burbank

Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law

*Stephen B. Burbank**

> To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest.[1]

This description of federal practice and procedure under the Conformity Act of 1872[2] was an article of faith with those who labored for years to persuade Congress to replace that statute with an act empowering the Supreme Court to promulgate rules of procedure for actions at law.[3] The accuracy of the description was disputed by some members of the bar, of the judiciary, and of Congress during the entire period of that long campaign.[4] There would be little point in trying to determine who had the better of the debate, for even those who are interested in the history of American procedure and in the rhetoric of procedural reform are likely to be more interested in areas within the contemporary landscape of federal practice and procedure where yesterday's rhetoric is today's reality. I propose to examine one such area, federal limitations law, where there is a distressing aptness for our situation in this rhetorical gem of another age. I will also argue that federal limitations law is not unique—that the description is more broadly applicable—and suggest a strategy for reform. But the occasion would not permit careful broad-scale exploration, and perhaps the major lesson that I derive from this work is that the quest for broad-scale solutions is at times misdirected.

Since the beginning of the Republic, the federal courts have struggled with the problem of limitations periods for federal statutes that do not specify the time within which a suit must be brought.[5] Unable to fill the gaps with judge-made rules,[6] but unwilling to indulge the notion that

* Professor of Law, University of Pennsylvania. I appreciate the comments of those at the Symposium and of participants at the Legal Studies Seminar, University of Pennsylvania Law School, on various incarnations of this paper. As usual, I owe a special debt of gratitude to Frank Goodman, Seth Kreimer, Linda Silberman and Steve Subrin for wise suggestions and warm support.

1 *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921).

2 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

3 *See* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1039-42 (1982).

4 *See id.* at 1041 nn.107-108, 1063-64, 1083-84 n.296.

5 *See* McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830). *See generally* Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011 (1980).

6 *See* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 769-70 (1986); Currie, *On Blazing Trails: Judge Friendly and Federal Jurisdiction*, 133 U. PA. L. REV. 5, 6, 8 (1984); Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1721 (1982). "The length of a limitations period is arbitrary—you can't reason your way to it—and courts are supposed not to be arbitrary; when they are, they get criticized for it." Hemmings v. Barian, 822 F.2d 688, 689 (7th Cir. 1987).

a federal statutory claim is timeless,[7] the federal courts found in the Rules of Decision Act's reference to the "laws of the several states" the path of least resistance.[8] But it was hardly a clear path, as cases involving claims within the exclusive jurisdiction of the federal courts demonstrated. Whatever the role envisioned for the Rules of Decision Act at the time it was passed,[9] how can a state statute of limitations plausibly be thought to "apply" in a case that the courts of the state are powerless to hear?[10]

Although Congress has in some instances rescued the federal courts from this embarrassment, as in the Clayton Act,[11] the proliferation of federal statutory law and of implied rights of action in this century have combined to keep litigants and courts busy guessing, in a pale imitation of comparative law, what the most closely analogous state law is. I doubt that anybody would contend that such activity represents an optimal use of resources. It may be useful, however, to identify its costs.[12]

A regime of borrowed state limitations law imposes a variety of costs on litigants. Until such time as the most closely analogous state law has been authoritatively identified, a conscientious lawyer who has been consulted about the possibility of commencing litigation must become conversant with multiple sources of substantive law[13]—in the process, identifying the pertinent choice of law rule.[14] Having determined the most closely analogous body of state substantive law and its governing limitations provision, our hypothetical lawyer must consider whether, applied to the federal claim in question, that provision would be hostile to or inconsistent with the policies animating the federal statute or with fed-

7 *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 271 (1985); Campbell v. Haverhill, 155 U.S. 610, 616-17 (1895); Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805). *But see* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (refusing to borrow state statute of limitations for EEOC enforcement action).

8 The Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1982).

For a revisionist reading of the Court's cases by a Justice who regards the Rules of Decision Act as redundant and who *is* willing to indulge the notion that a federal statutory claim is timeless, see Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2767-74 (1987) (Scalia, J., concurring in judgment). Revisionism is not, however, uncommon in this corner of the law. *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983); *infra* text accompanying note 81.

9 *See* Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Burbank, *supra* note 6, at 761 n.121.

10 *See* Campbell v. Haverhill, 155 U.S. 610, 614-20 (1895) (state statute of limitations applied under Rules of Decision Act in federal patent action); Burbank, *supra* note 6, at 824 n.440.

11 15 U.S.C. § 15b (1982). *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966).

12 *Cf.* Burbank, *supra* note 6, at 767-68 (costs of borrowed state preclusion law applied to federal question judgment of federal court). *Compare id.* at 811-12 (state court judgments).

13 *See* Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759, 2763-64 (1987). *Compare* Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2621 (1987) (§ 1981 actions sound in tort) *with id.* at 2625-31 (Brennan, J., concurring in part and dissenting in part) (§ 1981 actions sound in contract).

14 *See* Burbank, *supra* note 6, at 768 ("[T]he constraints on choice of law applicable to the exercise of diversity jurisdiction do not obtain outside of that context"). *See also* University of Tenn. v. Elliott, 478 U.S. 788, 796-99 (1986) (using a federal choice of law rule that, when uniform federal requirements are met, refers to the law of the rendering state to determine the preclusive effects of the unreviewed proceedings of a state administrative agency on a subsequent § 1983 action in federal court).

eral rights.[15] This is likely to be a difficult, time-consuming, and expensive process, and no less so for a conscientious defense lawyer. Moreover, neither the lawyers' unilateral research nor, if they disagree, their subsequent litigation on the question has anything to do with the merits of federal claims that might be or have been made in litigation. There may be some questions of federal law, uncertainty about which, at least for a time, benefits the federal system,[16] but limitations is not one of them.[17]

The difficulty of ascertaining the governing period in a system of borrowed state limitations law suggests that other, more significant, costs may be entailed. Even a conscientious plaintiff's lawyer may prove to be wrong about the answer to the problem, and the costs of error may include the loss of the client's federal substantive rights.[18] If the client is risk averse, the most likely strategy in response will be (if possible) to bring suit within the shortest of all putatively applicable limitations periods. Such a strategy imposes costs of its own, driving into court grievances that, in the ripeness of time, might never become disputes,[19] increasing the incidence of frivolous claims,[20] and creating the possibility of duplicative litigation.[21] From the perspective of putative defendants, uncertainty as to the governing limitations period is at war with the goal of repose that is thought to animate that body of law.[22]

A regime of borrowed state limitations law also imposes costs on courts, both federal, and in cases of concurrent jurisdiction, state. The problem of finding the "right" period may be no less difficult for judges,[23] and, depending on the quality of advocacy, it may be no less time-consuming. Again, that time is spent on a question unrelated to the merits of the litigation, one for which simplicity and predictability are traditionally thought a necessary, if not an adequate, answer to a charge of arbitrariness.[24] But in this instance, the charge cannot be laid at the

15 *See, e.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("[I]t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies").

16 *See* United States v. Mendoza, 464 U.S. 154, 160 (1984); S. ESTREICHER & J. SEXTON, REDEFINING THE SUPREME COURT'S ROLE 48-52, 73-74 (1986).

17 *See* Wilson v. Garcia, 471 U.S. 261, 272 (1985) ("uncertainty and time-consuming litigation"); Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations"). *See also* Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

18 *See* Wilson v. Garcia, 471 U.S. 261, 275 n.34 (1985). By reason of the operation of preclusion rules, the rights lost may include rights, both federal and state, that were not asserted in the complaint. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e (1982).

19 *See* Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

20 *See* FED. R. CIV. P. 11 advisory committee note ("[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer . . . .").

21 My hypothetical risk averse plaintiff may be forced to split her claim because part of it is not yet ripe. Imagine, for instance, a person who is not yet entitled to sue under Title VII. *See* 42 U.S.C. § 2000e-5(f) (1982).

22 *See* Wilson v. Garcia, 471 U.S. 261, 275 n.34 (1985).

23 *See supra* note 13.

24 In McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830), the Court stated:

> Of late years, the courts, in England and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy and tend to the peace and

doorstep of the legislature.[25] Moreover, because the process of finding the most closely analogous state law has the trappings of rationality, when itself revealed as arbitrary, it may detract from the appearance of justice under law that is important to continued respect for the institution of courts.[26]

Finally, some of the costs identified above and others to be mentioned here should be viewed from the discrete perspective of the federal policies or interests sought to be advanced in the underlying substantive law. The inadvertent loss of a federal claim by a plaintiff whose lawyer, without fault, guessed wrong about the governing limitations period is one such cost. The existence of disuniform limitations periods for the same federal claim, depending on the state in which suit is brought, and difficult to explain or justify to a lay person,[27] is another. The problems of supervising a system of borrowed state limitations law, particularly acute in cases within concurrent jurisdiction, present a third.[28] The Supreme Court may feel pressure to allot a disproportionate amount of its precious docket to borrowed limitations cases, either to minimize interstate disuniformity or to check the application of state statutes that are hostile to or inconsistent with federal rights.

I believe that, in recent years, the Court has felt pressure on its docket from federal limitations cases. In any event, the Court has evinced awareness of many of the costs imposed by a system of borrowed state limitations law. The Court appears to be following a number of different, but related, strategies to minimize these costs.

First, the Court has made it clear that the search for analogies can include other federal substantive schemes as well as state substantive law, and that if the most closely analogous scheme with a limitations period is federal, that limitations period should be borrowed.[29] Even when the

---

welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation.

Id. at 278-79. *Cf.* Miner v. Atlass, 363 U.S. 641, 648-49 (1960) ("So long as the time set be not unreasonable, it is less important what the limit be than that there be a rule whereby some timetable may be known to the profession.").

25 Except in the case of rights of action implied by the courts, however, Congress can and should be criticized for failing to provide a limitations period in the statute.

26 *Cf.* Burbank, *supra* note 6, at 826 ("Even if the administrability of a system of borrowed state law were the only relevant consideration, one might well conclude that federal judges should not be distracted by the judicial equivalent of a wild goose chase."). *But see* Hemmings v. Barian, 822 F.2d 688, 690 (7th Cir. 1987) ("Of course, in deciding which statute of limitations to borrow, the court is choosing among arbitrary periods set by a legislature; but the choice itself is not arbitrary.").

Whether or not the process is arbitrary, it can entail the cost posited in the text if it engenders uncertainty that leads to the inadvertent loss of federal substantive rights. *See supra* note 18, *infra* text accompanying notes 34-35.

27 "Where legal rules are essentially arbitrary and cannot even be defended on grounds of sovereign or institutional integrity, one who suffers their consequences is quick to sense inequitable administration of the law." Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 327 (1982). Compare the application of disuniform state law for a federal claim when state interests are implicated. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

28 *Cf.* Burbank, *supra* note 6, at 767-70 (administrability problems of borrowed state preclusion law applied to federal question judgment of federal court).

29 *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983).

plausibility of the federal alternative is subject to question, as it was in the Court's recent decision borrowing a limitations period found in the Clayton Act for civil RICO actions,[30] the benefits of a uniform limitations period may appear sufficient, particularly considering the irreducible arbitrariness of all limitations law, to carry the day.

Second, in civil rights cases subject to 42 U.S.C. Section 1988, the Court has also attempted to minimize the costs of the borrowing process. By prescribing uniform federal characterizations of actions under 42 U.S.C. Section 1983[31] and 42 U.S.C. Section 1981,[32] the Court has reduced both the transaction costs for litigants and courts and the costs that errors by either entail for the federal system.[33] Of course, those characterizations are crude, but they could hardly be cruder than the assumption that individually tailored solutions are always synonymous with just solutions.[34] When limitations are at issue, the plaintiff may not be alive to wear the suit.[35]

Third, the Court has addressed the problem of subsidiary rules that are part of the baggage of limitations law, rules that, for instance, determine when a limitations period begins to run, when it is suspended, and when it ceases to run. For a time it seemed that the Court was willing to rest with the perception that in the case of some such rules the trip is nothing without the baggage, that, in other words, limitations periods should not be viewed, and thus not borrowed, in isolation.[36] That perception has recently been confirmed by Paul Carrington, whose analysis of modern limitations law makes the point that, in an age of discovery and other equitable doctrines, one often cannot tell a statute of limitations by the statute.[37]

---

30 *See* Agency Holding Corp. v. Malley-Duff & Assoc., 107 S. Ct. 2759 (1987); Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447 (1988). *See also* In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir. 1988) (borrowing provisions from 1934 Securities Act for implied right of action); Reed v. United Transp. Union, 828 F.2d 1066 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 1105 (1988) (borrowing provision in § 10(b) of National Labor Relations Act for claims under § 101 of Labor-Management Reporting and Disclosure Act).

31 Wilson v. Garcia, 471 U.S. 261 (1985).

32 Goodman v. Lukens Steels Co., 107 S Ct. 2617 (1987).

33 That is hardly to say, however, that these cases have solved all of the problems. *See, e.g.*, Owens v. Okure, 816 F.2d 45 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1218 (1988) (choosing between different state statutes of limitations for intentional and unintentional personal injuries in section 1983 action).

34 *Cf.* Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981) (" 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case"). *See also infra* text accompanying note 189.

35 *See, e.g.*, Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2621-22 (1987) (2-year statute applied retroactively); Cannon v. Kroger Co., 837 F.2d 660, 669-70 (4th Cir. 1988) (Murnaghan, J., dissenting from denial of rehearing en banc) (contending that "majority's new filing rule . . . should not be applied retroactively"). *See also* Hemmings v. Barian, 822 F.2d 688, 691 (7th Cir. 1987) ("No federal RICO litigant (plaintiff or defendant) could have had reasonable expectations about the applicable statute of limitations when this case arose, because the question of the applicable statute was (and is) intensely contested and highly uncertain.").

36 *See, e.g.*, Johnson v. REA, 421 U.S. 454, 463-64 (1975).

37 *See* P. Carrington, An Appreciation of Walter Wheeler Cook, Erie and the Rules Enabling Act 5-7 (January 9, 1988) (unpublished remarks at Association of American Law Schools, Section on Civil Procedure).

Recently, however, the Court has become restless, and, with visions of uniformity dancing in their heads, the Justices have determined to be even more aggressive in seeking federal fillers for the gaps in federal limitations law. The issue before the Court in *West v. Conrail*,[38] or so it may have seemed, was selecting a rule to determine when a borrowed statute of limitations ceases to run on federal claims. The claims in question were brought by a railroad employee against his employer, union, and union representative under the Railway Labor Act.[39] The six-month limitations period governing them was borrowed from federal, not state, law—the National Labor Relations Act[40]—in an extension of the drive toward uniformity that I have briefly described.[41] Finding in the same statute a rule that required service within the six-month period, the district court dismissed the action. The Court of Appeals affirmed.[42]

The Court announced in *West* that Rule 3 of the Federal Rules of Civil Procedure—"A civil action is commenced by filing a complaint with the court"[43]—provides the rule for stopping limitations periods that are borrowed to fill gaps in federal law.[44] Because the employee in *West* had

38 107 S. Ct. 1538 (1987).

39 45 U.S.C. §§ 151-88 (1982).

40 Section 10(b) of the National Labor Relations Act provides:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 160(b) (1982).

41 The Court of Appeals for the Third Circuit had previously held that section 10(b) of the National Labor Relations Act governs a claim of unfair representation under the Railway Labor Act. Sisco v. Conrail, 732 F.2d 1188, 1193 (3d Cir. 1984). The court relied on DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), which involved a hybrid action under the Labor Management Relations Act, 29 U.S.C. § 185 (1982). *See supra* text accompanying note 29. In *West*, the parties agreed that the same limitations period governs hybrid breach of contract/breach of the duty of fair representation claims under the Railway Labor Act, but neither the court of appeals nor the Supreme Court passed on the question. *See* West v. Conrail, 780 F.2d 361, 362 (3d Cir. 1985); West v. Consolidated Rail Corp., 107 S Ct. 1538, 1541 n.2 (1987).

42 West v. Conrail, 780 F.2d 361 (3d Cir. 1985).

43 FED. R. CIV. P. 3.

44 Although we have not expressly so held before, we now hold that when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been "commenced" in compliance with Rule 3 within the borrowed period.

filed his complaint within the six-month period, the Court reversed the decision below.[45] So intent was the Court on extending uniformity to this subsidiary matter that it simply ignored the sources of its lawmaking authority. If that were all—if in this case, as in others in the progression, the objection were one of technique rather than result—the matter might be, as Paul Carrington has suggested it is,[46] merely of academic interest. But both the technique and the result in *West* are open to objection, and, in any event, academics are not the only people who should be interested.

Since the Supreme Court's 1941 decision in *Sibbach v. Wilson & Co.*,[47] neither courts nor commentators have evinced much interest in reconsidering the restrictions imposed on Federal Rules by the Rules Enabling Act.[48] In the case of the lower federal courts, this is not surprising. The rules in question are promulgated by the Supreme Court, and lower federal courts may assume, as the chairman of the original Advisory Committee guessed the bar would assume, "that the Court will stand by its rules."[49] Indeed, in light of the failure of the Court to strike down any Federal Rule of Civil Procedure challenged in the intervening fifty years, experience confirms what psychology suggests. Even a judge or a court that believes there is always a first time—or that there can be when the restrictions in question were intended to restrain those called upon to interpret them[50]—confronts (1) authoritative pronouncements that the Act's restrictions implement, and implement only, federalism concerns;[51]

West v. Consolidated Rail Corp., 107 S. Ct. 1538, 1541 (1987). *See id.* at 1542 n.6 ("The governing principle is that we borrow only what is necessary to fill the gap left by Congress.").

45 *Id.* at 1540, 1542.

46 *See* P. Carrington, *supra* note 37, at 21-22.

47 312 U.S. 1 (1941).

48 The Rules Enabling Act provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. § 2072 (1982). *See* Burbank, *supra* note 3, at 1021-23; Whitten, *Erie and the Federal Rules: A Review and Reappraisal after* Burlington Northern Railroad v. Woods, 21 CREIGHTON L. REV. 1, 1-2, 42 (1987).

49 Letter from William D. Mitchell to the Hon. Warren Olney, Jr. (January 15, 1938) (Clark Papers, Sterling Library of Yale University, box 111, folder 54). *See* Burbank, *supra* note 3, at 1134 n.530.

50 *See* Burbank, *supra* note 3, at 1101-02.

51 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state 'substantive' law and federal 'procedural' law."); *id.* at 471 ("both the En-

(2) a so-called "test" for validity that, unless one is very careful, answers itself;[52] and (3) a presumption of validity that effectively passes the buck to Congress.[53]

It is less easy either to explain or justify the failure of scholars to confront the Court's approach to the Enabling Act. To a considerable extent, I suspect, that failure was due for many years to vagaries in what I have misleadingly called the Court's "approach," and to fascination with *Erie R.R. Co. v. Tompkins*,[54] a brooding omnipresence[55] that was responsible for those vagaries and that, while it was omnipresent, rendered the Enabling Act a small point at which to stick.[56]

More recently, a distinguished scholar bucked this trend.[57] He did so with such clarity, verve and style that those inclined to follow in his path may have failed to note that, in an otherwise valuable article dispelling one myth, Professor Ely helped to entrench another. I speak of the myth of federalism, which would have us believe that, four years before *Erie* — when *Swift v. Tyson*[58] was in full flower — and in a statute authorizing rules of practice and procedure for all civil litigation in the federal courts — litigation that even in the early 1930's involved predominantly questions of federal substantive law[59]—Congress was only concerned, or even primarily concerned, about the inappropriate displacement of state law.[60]

As a historical matter, there can be no doubt that the major purpose of those who wrote and defended the bill that became the Enabling Act was to allocate power to make federal law prospectively between the Supreme Court as rulemaker and Congress, not to protect only lawmaking that has already occurred, and certainly not to protect only state law. Such a purpose accommodates the reality that substantive rights are "enlarged" when they are created for the first time in court rules. Although animated by concern for separation of powers, it also holds the potential

---

abling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law"). *See also* Burbank, *supra* note 3, at 1028-30, 1034-35.

52 "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). *See* Hanna v. Plumer, 380 U.S. 460, 464-65 (1965).

53 *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965); *see also* Burlington N.R.R. v. Woods, 107 S. Ct. 967, 970 (1987); Sibbach v. Wilson & Co., 312 U.S. 1, 15-16 (1941). For criticism of the Court's reliance on the provision in the Enabling Act requiring proposed Federal Rules to lie before Congress, see Burbank, *supra* note 3, at 1102, 1178-79, 1196 & n.779. For demonstration that the original Advisory Committee relied on at least one principle of rulemaking (incorporation of existing federal law) that calls into question an essential predicate of the Court's presumption of validity, see *id.* at 1147-57.

54 304 U.S. 64 (1938).

55 *See* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267 (1946).

56 *See* Burbank, *supra* note 3, at 1027-33, 1110-11 n.435.

57 *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

58 41 U.S. (16 Pet.) 1 (1842).

59 A study of civil cases in thirteen districts for the year ending June 30, 1930 revealed that jurisdiction in 77.7% of the cases was based only on the presence of the United States as a party or on the assertion of a federal question. AMERICAN LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES 47 (1934). Diversity cases accounted for only 18.4% of the total. *Id.*

60 *See* Burbank, *supra* note 3, at 1033-35, 1106-12, 1122-25.

to serve federalism values, protecting both existing and potential state law by remitting to Congress the decision whether there shall be prospective federal law on "substantive" matters and the content of that law.[61]

For one who does not admit the relevance of the Enabling Act's legislative history to its interpretation, both the Court's[62] and Professor Ely's[63] approaches to the Enabling Act should nevertheless pose an uncomfortable dilemma: either their respective tests for validity of Federal Rules should be extended to a context—federal question cases—not considered by them, or the Enabling Act imposes no restrictions on supervisory court rules in that context, at least no restrictions different from those the Constitution imposes on Congress in the area of federal procedure.[64]

For one brief but hopeful moment a few years ago, it appeared that the Court would be required to reconsider its interpretation of the Enabling Act in a federal question case. In *Marek v. Chesny* the Court of Appeals had refused to interpret Rule 68 so as to deny post-offer attorney's fees to a prevailing civil rights plaintiff, relying alternatively on the statute governing fees in such cases and on the Enabling Act.[65] Moreover, in an amicus brief the Solicitor General had referred to the legislative history that the Court has never acknowledged, let alone discussed. But the Court managed to sustain Rule 68 in *Marek* without reference to the Enabling Act.[66]

West is of a piece with *Marek*, but it is worse. The Court asserted the irrelevance of restrictions on its power to fashion federal common law for state law diversity cases that had driven its decision in *Walker v. Armco Steel Co.*.[67] Fair enough. But the Court had also said in *Walker* that those restrictions were applicable only because Rule 3 does not as a matter of

61 *See id.* at 1106-14, 1121-27.

62 *See supra* note 52 and accompanying text.

63 *See* Ely, *supra* note 57, at 725-38. *See also* Burbank, *supra* note 3, at 1123 nn.495-96.

64 *See* Burbank, *supra* note 3, at 1110. Dictum in a recent decision of the Court suggests that view. *See* Omni Capital Int'l v. Wolff & Co., 108 S. Ct. 404, 413 (1987) (suggesting that the Court could promulgate a valid Federal Rule of Civil Procedure "authorizing service [of process] on an alien in a federal-question case"). *But see* Burbank, *supra* note 3, at 1172-73 n.673; Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41 (1988); *infra* note 186.

65 *See* Chesny v. Marek, 420 F.2d 474 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985). The attorney's fee statute at issue in *Marek* was the Civil Right's Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

66 *See* Marek v. Chesny, 473 U.S. 1 (1985); Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425, 433 n.42, 437-38 (1986).

67 Walker v. Armco Steel Co., 446 U.S. 740 (1980).

> When the underlying cause of action is based on state law, and federal jurisdiction is based on diversity of citizenship, state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980). Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit "be considered part and parcel of the statute of limitations." *Id.* at 752 (footnote omitted). This requirement, naturally, does not apply to federal question cases. Indeed, *Walker* expressly declined to "address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." *Id.* at 751 n.11.

West v. Conrail, 107 S. Ct. 1538, 1541 n.4 (1987).

"plain meaning," and was not intended to, furnish what it called a "tolling provision" for state statutes of limitations.[68] With sleight of hand that still leaves me blinking, the Court in *West* supplied a different "plain meaning" to Rule 3 for federal question cases[69] and did not consider the Enabling Act problems that interpretation might be thought to present. In particular, the Court did not consider the fact that the original Advisory Committee, in a Note which had been quoted in *Walker*, feared such problems in both federal question and diversity cases.[70] One is left wondering after *West* whether the Court believes that there are any restrictions on Federal Rules in federal question cases.

As this analysis may suggest, it is considerably less important that we reach agreement about the implementation of the Enabling Act's restrictions on supervisory court rulemaking than that we agree on Congress' purposes in imposing those restrictions. The question whether the Enabling Act authorizes a Federal Rule defining when statutes of limitations, federal or state, stop running is a detail. Having failed to acknowledge the relevance of the Enabling Act in federal question cases, the Court in *West* obviously did not consider that detail. If the Court had reached the question, its answer might have turned on the answer to an anterior question: whether a test for validity implementing restrictions allegedly imposed by Congress for reasons that are not pertinent in federal question cases is plausible in such cases.[71] If instead the Court had turned to the Enabling Act's legislative history, it is most unlikely that Rule 3 would have been sustained as a supplemental provision for statutes of limitations, federal or state.[72]

---

68 *See* Walker v. Armco Steel Co., 446 U.S. 740, 749-50 & nn.9-10 (1980).

69 To be sure, the Court in *Walker* had left open the question of "the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." 446 U.S. at 751 n.11. But neither in *Walker* nor in *West* did the Court explain how a Federal Rule can have two "plain meanings," and, as demonstrated below, the drafting history of Rule 3 is to the contrary.

70 In *Walker*, the Court observed:

> "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1057, p.191 (1969).
>
> The Note of the Advisory Committee on the Rules states:
>
> "When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising." 28 U.S.C. App., pp. 394-395.
>
> This Note establishes that the Advisory Committee predicted the problem which arose in *Ragan* and arises again in the instant case. It does not indicate, however, that Rule 3 was *intended* to serve as a tolling provision for statute of limitations purposes; it only suggests that the Advisory Committee thought the rule *might* have that effect.

446 U.S. at 750 n.10.

71 *See supra* text accompanying notes 62-64.

72 *See* Burbank, *supra* note 3, at 1158-60.

Court rules are not the only means by which the Supreme Court makes federal law. In a case like *West*, brought in federal court to adjudicate federal substantive claims, there is undoubtably federal power to furnish all of the subsidiary rules, be they characterized as substantive or procedural.[73] Whether, in the absence of explicit congressional provision or direction, the *federal courts* have the power to furnish those rules depends on one's approach to federal common law.

As regards subsidiary rules of substantive law and "[l]egal rules which impact significantly upon the effectuation of legal rights,"[74] the Court's approach seems to be that a finding of federal power usually entails a conclusion of federal judicial power and that the question whether federal law shall be uniform or shall consist of state law borrowed as federal law is a matter of discretion. To be sure, in recent years the Court has provided guidance on the exercise of that discretion, the purpose of which is to require more than mere rhetoric to justify the creation or application of uniform judge-made rules. But, according to the Court, the guidelines are entirely a judicial construct.[75]

The Court has yet to articulate or demonstrate a coherent approach to the common-law powers of federal courts for matters that, because they do not involve rules of substantive law or rules that "impact significantly upon the effectuation of legal rights," can without controversy be deemed procedural. *Hanna v. Plumer* may suggest that federal courts are free to formulate federal rules for, or apply them to, such matters, so long as they do not run afoul of the restrictions applicable in state law diversity cases.[76]

My own view is that the Rules of Decision Act speaks directly to the circumstances in which federal courts can fashion or apply federal judge-made rules, however they are characterized. When state law is found to apply, in a federal question case as well as in a state law diversity case, that result follows not because of judicial grace or borrowing, but because Congress has directed it.

> [T]here is no historical warrant for the suggestion that *Erie's* constitutional holding exhausts the Rules of Decision Act, whatever confusion about the reach of that holding may have followed in its wake. The Act is not confined to cases in which state law governs "of its own force." Moreover, the language of the Act requires federal judges to justify federal common law by reference to a constitutional or statutory source that either explicitly or implicitly authorizes — "provides" for — or implicitly and plausibly calls for — "requires" — its creation.[77]

73 *See* Hanna v. Plumer, 380 U.S. 460, 471-72 (1965). I assume, of course, that the substantive law claims are within federal competence under the Constitution.

74 Burks v. Lasker, 441 U.S. 471, 477 (1979).

75 *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); Burbank, *supra* note 6, at 755-62.

76 *See Hanna*, 380 U.S. at 466 (dictum); Burbank, *supra* note 6, at 787-91.

77 Burbank, *supra* note 6, at 759 (footnotes omitted) (criticizing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973) and United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979)). For the role of Federal Rules in fashioning federal common law under the Rules of Decision Act, see *id.* at 772-75.

It is also my view that recent Supreme Court decisions on federal common law, albeit not the Court's inconsistent and insupportable statements about the Rules of Decision Act, can be reconciled with this approach.[78] Ironically, the Court's roughest treatment of the Act occurred in the *DelCostello* case, where the Court made the limitations borrowing from the National Labor Relations Act that led to the subsidiary question posed in *West*.[79] Confronted with an inflexible view of the Rules of Decision Act's direction to apply state law in Justice Stevens' dissent,[80] the *DelCostello* majority effectively read it out of federal question cases.[81] As I have previously observed,

> [The] suggestion [that the Act is confined to diversity cases] finds no support in the language of the Act, in history, or in the Court's own fumblings with the Act in nondiversity cases. The fact that considerations requiring application of state law in diversity cases are not relevant to the elaboration of a federal legislative scheme tells us nothing about the relevance of the Rules of Decision Act in the latter context. Similarly, the fact that "neither *Erie* nor the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices" does not answer the question whether the Act speaks to the circumstances when the filling of those interstices with judge-made federal law is permissible.[82]

DelCostello thus set the stage for *West* in more ways than one. Reading those two cases, one might think that neither the Rules of Decision Act nor the Rules Enabling Act constrains the Supreme Court when it makes law for federal question cases — either in the common-law mode or prospectively — total victory for myths of federalism.

Yet a view of the Rules of Decision Act that is not "crabbed or wooden"[83] comfortably yields the same conclusion in *DelCostello* as does traditional federal common law analysis: when federal substantive rights are put at risk by a system of borrowed state law, the substantive scheme requires "otherwise" than that state laws apply.[84] As I hope to have demonstrated, federal substantive rights *are* put at risk by a regime of borrowed state limitations law. The possibility of inadvertent loss of those rights alone supports uniform rules, and the other costs of borrowed state limitations law may also. Due attention to the separation of powers constraints on common-law courts prompts the federal courts to find plausible alternatives in other federal statutes, and they sometimes reach to do so.[85]

---

78 *See id.* at 758-62.

79 *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983); *supra* note 41 and accompanying text.

80 *See DelCostello*, 462 U.S. at 172-74 (Stevens, J., dissenting).

81 *See id.* at 159 n.13.

82 Burbank, *supra* note 6, at 760 (footnotes omitted). *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759, 2771 n.2 (Scalia, J., concurring).

83 Robertson v. Wegmann, 436 U.S. 584, 598 (1978) (Blackmun, J., dissenting).

84 *Cf.* Burks v. Lasker, 441 U.S. 471, 479 n.6 (1979) (situations in which "the very application of varying state laws would itself be inconsistent with federal interests"); Burbank, *supra* note 6, at 765-71 (preclusion law for federal question judgments of federal courts).

85 *See supra* text accompanying notes 13-30.

Why, then, is the problem with *West* not of merely academic interest?[86] If the Court could have formulated a valid common law rule for federal question cases involving borrowed limitations periods, why quibble about its imputation of such a provision to Rule 3?

First, I do not believe that questions of technique are or should be of concern only to academics, at least when the lawmaking powers of federal courts are concerned. Even if analysis reveals that the Court could have reached the same result in *West* as a matter of federal common law, we still should be concerned about the possibility that the Court regards the Rules Enabling Act as irrelevant in federal question cases. For we now know that existing Federal Rules can have two plain meanings. What is to prevent the Court in the future from promulgating Federal Rules for application only in federal question cases? Indeed, that is a possibility the Advisory Committee is exploring in connection with Rule 4[87] and one that should be explored generally by those who are interested in reexamining the notion of trans-substantive procedure, the notion that the same rules of procedure should, or can appropriately, apply across the whole spectrum of substantive law.[88] As prospectively formulated procedure is more closely tied to the substantive law, however, both the viability and the importance of effective restrictions on court rulemaking should become more apparent.[89]

Second, it is not at all clear that the Court could have formulated a valid common law rule identical in scope of application to the scope its decision in *West* accorded Rule 3. To be sure, in cases that, there being no pertinent Federal Rule, would be treated like *West*, or rather as *West* should have been treated—a garden variety federal common-law case—the only formal legal barriers under the Court's approach are constitutional.[90] There is undoubted federal power and also, it would seem, federal judicial power to fashion a rule defining a limitations period in federal question cases, whatever the source of that limitations period.

The scope given to Rule 3 in *West* was not confined to cases like *West*, however. The Court's opinion suggests that Rule 3's limitations function extends to cases under 42 U.S.C. Section 1988, a statute similar to the Rules of Decision Act but more narrowly focused and hence not as easy to ignore or wish away.[91] Moreover, it is precisely cases subject to sec-

86 *See supra* text accompanying note 46.

87 *See* Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988). *See also supra* note 64; *infra* note 186.

88 *See infra* text accompanying notes 170-89.

89 *See infra* text accompanying notes 151-53, 183-89.

90 *See supra* text accompanying note 75. In addition to constitutional restraints on federal lawmaking by Congress, at some point — a point that is not reached if the Rules of Decision Act is taken seriously — constitutional restraints on federal lawmaking by the federal courts are implicated. *See* Burbank, *supra* note 6, at 756-57 n.102.

91 *See* West v. Conrail, 107 S. Ct. 1538, 1541 (1987), *quoted supra* note 44; *id.* at 1542 n.6; DelRaine v. Carlson, 826 F.2d 698, 706 (7th Cir. 1987).

Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not

tion 1988 that have caused the Court to articulate the perception that limitations periods are not as simple as they may appear and thus to extend its borrowing from state law to supplementary rules.[92] One may treat this aspect of *West* as dictum, but it has the appearance of dictum intended to be acted upon as if it were holding. One may also observe that the Court has hardly been more consistent or clear in its treatment of Section 1988 than of the Rules of Decision Act.[93] Let that person try, without relying on Rule 3, to reach *West's* result under the statute in all cases to which it applies, but do not hold your breath.

Finally, on the question of validity, the *reasoning* of the Court's decision in *West* extends to all federal question cases, including those in which there is a directly applicable federal limitations period.[94] Cases in which the period is not further defined by a statutory rule present no problem for a judge-made rule under traditional federal common-law analysis, or for that matter under the Rules of Decision Act. But what of cases in which the federal statute carries its own provision defining when the period ceases to run? Paul Carrington has suggested that the Court will not permit the application of Rule 3 in such cases,[95] but I am not sure that I understand why. If a Federal Rule is valid, it supersedes previously enacted federal statutes with which it is inconsistent.[96] Perhaps Rule 3 has *three* plain meanings. In any event, apart from Rule 3, it is

---

adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1982).

92 *See supra* text accompanying note 36.

[T]he cases that require federal courts to borrow the whole state statute of limitations and not just the limitations period . . . are best explained not by 42 U.S.C. § 1988 (although they were civil rights cases to which section 1988 applies and they did rely in part on that statute) but by the inseparability of the time period itself from some (though not necessarily all) other provisions of a state's limitations law . . . . The actual generosity of a statute of limitations depends not only on the nominal period within which suit must be brought but on provisions allowing that period to be extended for various reasons, so that if the federal court borrows just the period it may in fact be giving plaintiffs more or less time than the state that enacted the borrowed statute would have thought appropriate in the circumstances.

DelRaine v. Carlson, 826 F.2d 698, 706 (7th Cir. 1987).

93 *See* Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985). *But see id.* at 620; *infra* text accompanying note 111.

94 The Court's stated holding was limited to cases in which "the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute." West v. Conrail, 107 S. Ct. 1538, 1541 (1987). *See supra* note 44. But unless Rule 3 has multiple plain meanings in federal question cases, it furnishes a subsidiary limitations rule in all such cases. That appears to have been the expectation of the Court in *Walker*. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 n.11 (1980), *quoted supra* note 69.

95 *See* P. Carrington, *supra* note 37, at 27-28.

96 *See* 28 U.S.C. § 2072 (1982), *quoted supra* note 48; Burbank, *supra* note 66, at 437. Of course, if the hypothetical statute had been enacted after 1938, the year Rule 3 became effective, it would control.

clear that the Court could not apply a judge-made rule inconsistent with a pertinent and valid federal statutory provision.

Third, whatever the Court's conception of its common-law powers or of the restrictions placed on those powers by Section 1988, I doubt that, if it had approached the question on a case-by-case basis, which is to say statute-by-statute, the Court *would* have reached the results portended by *West*. One who regards criticism of *West* as academic may be viewing that case as another example of borrowing, what I have elsewhere called reverse incorporation: the use of a Federal Rule in its substantive aspects as the basis for federal common law.[97] Apart from the fundamental problem that a federal common-law rule of similar scope of application might be invalid, *West* furnishes ample proof of the dangers of that technique. For, although the drafting history of the Federal Rules of Civil Procedure indicates that the Reporter and some members of the Advisory Committee wished that Rule 3 could furnish a rule to stop the running of limitations periods, it also is replete with evidence of controversy on that question,[98] controversy that led to the compromise Advisory Committee Note so prominent in the Court's decision in *Walker* and so conspicuously ignored in *West*.[99] In all of this, I can find not the slightest hint that, in formulating Rule 3, the Advisory Committee was relying on case law that identified the filing of the complaint as the appropriate event for a federal statute of limitations. Indeed, if the rulemakers had been seeking guidance in the cases, they would have found a different rule.[100]

Of course, much has changed since those old cases were decided, especially arrangements for service of federal process. Consideration of those changes and of lower court cases treating the problem might have led the Court to the result it reached, and to the results it signalled, in *West*. In fact, the lower court cases provide little sustenance,[101] and, although the Court did rely on a Federal Rule governing service of process in *West*, the move was part of the sleight of hand to which I have referred.[102] When the matter is properly analyzed, additional doubts arise about *West* from the perspective of federal common law.

The federal statute from which the limitations period was borrowed in *West* requires not only that a charge be filed with the General Counsel of the NLRB within six months but that it be *served* on the subject of the complaint within that period.[103] In defending the use of Rule 3 instead of the borrowed statute's service rule, the Court in *West* resorted to a trick it has found useful before, artificially parsing a statute of limitations into limitations and service provisions.[104] In this case, according to the

97 *See* Burbank, *supra* note 3, at 1158-63.

98 *See id.* at 1159-60 n.619.

99 *See supra* note 70 and accompanying text.

100 *See* Burbank, *supra* note 3, at 1162 & n.633.

101 *See, e.g.*, Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1624 (1987); United States v. Wahl, 583 F.2d 285 (6th Cir. 1978); Bomar v. Keyes, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

102 *See supra* text accompanying notes 69-70.

103 29 U.S.C. § 160(b) (1982).

104 *See* Hanna v. Plumer, 380 U.S. 460, 462-63 n.1 (1965); Burbank, *supra* note 3, at 1173-76.

Court, the service provision in the statute could be disregarded because Rule 4(j)[105] governs that subject.[106]

Rule 4(j), which is a statute,[107] does not, and was not intended to, provide a rule affecting limitations periods.[108] The statutory service requirement that the Court declined to borrow in *West* cannot reasonably be regarded as anything other than such a rule.[109] The result reached in *West* transmogrifies a six-month limitations period into a ten-month period. Even acknowledging irreducible arbitrariness in limitations law, that looks like distortion. If so, it would be distortion somewhat different from the distortion that, in cases under Section 1988, has prompted the Court's refusal to borrow piecemeal.[110] In those cases, selective borrowing may lead to distortion of state law, the source to which, at least on this subject, the Court is directed by the statute and from which it is empowered to depart only if the borrowed rules discriminate against or would cause distortion in federal law, the destination.[111] In a case like *West*,[112] one need only be concerned about the latter type of distortion. The Court in *West* failed satisfactorily to explain, however, why the ten-month limitations period emerging from its combination of Rules 3 and 4(j) serves the policies that caused it to borrow the six-month limitation period in the first place.[113] The common-law method might at least have

105 SUMMONS: TIME LIMIT FOR SERVICE. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule. FED. R. CIV. P. 4(j).

106 The only gap in federal law that we intended to fill in *DelCostello* was the appropriate limitations period. We did not intend to replace any part of the Federal Rules of Civil Procedure with any part of § 10(b) of the National Labor Relations Act. Rule 3 of the Federal Rules of Civil Procedure provides that a civil actin is commenced by filing a complaint with the court, and Rule 4 governs the procedure for effecting service and the period within which service must be made. . . .

West v. Conrail, 107 S. Ct. 1538, 1541 (1987). *See id.* at 1542 n.7 ("Respondents also argue that § 10(b)'s service requirement must be adopted in order to assure that defendants receive prompt notice of suit against them. The requirement of timely service in Rule 4(j) satisfied this need without recourse to the service requirement of § 10(b)").

107 Rule 4(j) was added by P.L. No. 97-462, § 2, 96 Stat. 2527, 2528 (1983).

108 *See* 128 CONG. REC. H9850 (daily ed. Dec. 15, 1982) (remarks of Rep. Edwards). Because there are no committee reports, this analysis by the bill's sponsor should be accorded great weight.

109 *See* 29 U.S.C. § 160(b) (1982), quoted *supra* note 40.

110 *See supra* text accompanying notes 36 & 91-92.

111 *See* Chardon v. Fumero Soto, 462 U.S. 650, 660-61 (1983); Kreimer, *supra* note 93, at 620.

112 When required to displace state law, federal judges have the power to fashion a substitute that is fully adequate in light of all of the policies and interests that a common law court would consider in making law to govern a matter. They need not blind themselves to the procedural opportunities afforded by the Federal Rules of Civil Procedure . . . . But, at the same time, they should not confuse stated opportunities with stated requirements. . . .

Burbank, *supra* note 6, at 771 (footnotes omitted). *See id.* at 766-67.

113 While it is possible that a defendant will not be served with the complaint until ten months after the cause of action accrues, this result is not inconsistent with our adoption of a six-month statute of limitations for breach of contract, breach of duty of fair representation claims. See *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The administrative scheme for unfair labor practices only requires that the *charge* be filed and served within six months of the date the cause of action accrued. The defendant does not receive the complaint, if any, until the General Counsel has investigated the charge and decided to proceed. Under both the administrative procedure for unfair labor practices and the judicial procedure for hybrid

evoked more attention to the problem,[114] as it might have prompted awareness of other problems that flow from the Court's reliance on Federal Rules in this context.

Notwithstanding the possibility of distortion of substantive law, a uniform and trans-substantive federal common-law rule might be justified if such a rule mitigated the administrability problems, for litigants and courts, of the system of borrowed limitations law. But such a justification is not clear in a case like *West* and, it would seem, in some of the other cases within the reach of its reasoning if not its holding. The cases in question involve borrowed limitations periods found in statutes that also contain rules providing when the periods cease to run.[115] In such cases, the existence of the rule in the same statute as the governing limitations period should prevent the inadvertent loss of federal rights by any litigant whose lawyer was consulted in time to comply. The possibility that a trans-substantive judge-made rule requiring only filing of a complaint might preserve even a few meritorious claims from inadvertent loss is important. Moreover, a trans-substantive common-law rule requiring only filing would not be difficult to remember once it was learned. But the resulting melange of legal sources might *seem* more complicated, a perception that could impose costs of its own.[116] If so, reliance on Rule 3, with its multiple plain meanings,[117] does not solve the problem.

---

claims, the statute of limitations and the tolling provisions extinguish stale claims; they guarantee that the defendant is not subject to suit for conduct that occurred more than six months before the complaining party initiates appropriate legal process, by filing either a charge with the NLRB or a complaint in federal court.

West v. Conrail, 107 S. Ct. 1538, 1542 n.7 (1987) (emphasis in original). As noted by the court of appeals in *West*:

> While it is true, as Judge Gibbons notes, that the complaint in an unfair labor practice proceeding is filed by the General Counsel after an investigation of the employee's charge, *it is the filing and service of the charge that notifies the employer of the charge and initiates the dispute resolution process in such a proceeding*. The filing and service of the complaint performs the same function in a hybrid labor suit like the one before us. Section 10(b) promotes the prompt resolution of labor disputes by requiring an early initiation of the dispute resolution process and *DelCostello* teaches that this policy should be implemented in hybrid labor suits as well. That policy is best served by borrowing the service requirement, as well as the filing requirement, of Section 10(b).

West v. Conrail, 780 F.2d 361, 363-64 (3d Cir. 1985) (emphasis added), *rev'd*, 107 S. Ct. 1538 (1987). *See also infra* note 114.

114 In American Postal Workers Union v. United States Postal Service, 823 F.2d 466 (11th Cir. 1987), the court of appeals borrowed the three-month limitations period in the Federal Arbitration Act, 9 U.S.C. § 12 (1982), to govern a suit to vacate an arbitration award that was brought under the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified in relevant part at 39 U.S.C. § 1208(b) (1982)). Although the Federal Arbitration Act requires service of a notice of motion to vacate within the three-month period, the court of appeals felt compelled by *West* to reject the borrowing of that subsidiary rule:

> Whatever our doubts about adding an additional four months onto a three-month (or even six-month) limitations period specifically chosen for its brevity, that decision is no longer ours to make. Therefore, if the plaintiff filed its complaint to commence the action within three months (which it did), and effected proper service within 120 days of filing (which it did), then the actions are timely.

823 F.2d at 477 (footnotes omitted).

115 *See, e.g., id.*

116 It might not, however, *be* more complicated.

117 *See supra* text accompanying notes 67-70, 94-97.

If anyone continues to doubt that technique matters, a few minutes with a recent Fourth Circuit decision should do the trick. Whatever restrictions the Enabling Act imposes on Federal Rules in federal court, I hope we can agree that neither the Enabling Act[118] nor the Federal Rules themselves[119] authorize their imposition on state courts. If the Court in *West* had thought of that and adverted to the fact that most federal claims are within the concurrent jurisdiction of state courts, it should also have realized that Rule 3 was not a panacea on the question before it. Because the Federal Rules of Civil Procedure do not apply in state court litigation, only a uniform federal common-law rule, binding on state courts as well as federal, can yield true uniformity. Here again, however, looking at the problem from the perspective of federal common law raises doubts whether uniformity, let alone trans-substantive uniformity, is all that it appears.

The plaintiff in *Cannon v. Kroger Co.*[120] sued her employer and her union in a hybrid section 301/unfair representation action in state court. As permitted under North Carolina law, she commenced that action on the last day of the six-month period not by filing a complaint, but by the issuance of a summons upon her application "stating the nature and purpose of the action and requesting permission to file [her] complaint within 20 days" and a court order "stating the nature and purpose of the action and granting the requested permission."[121] After removal of the action to federal court, the district judge dismissed it as barred by the (borrowed) six-month limitations period. On appeal, a panel of the Court of Appeals for the Fourth Circuit affirmed, holding that the plaintiff's failure to file a "complaint" in accordance with Rule 3 within the six-month period was fatal.[122] Rehearing and rehearing en banc were denied,[123] with Judge Murnaghan writing a lengthy and vigorous dissent.[124]

---

118 *See supra* note 48. The Federal Rules there authorized are for "the district courts and courts of appeals of the United States."

119 These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

FED. R. CIV. P. 1.

120 832 F.2d 303 (4th Cir. 1987), *reh'g and reh'g en banc denied*, 837 F.2d 660 (4th Cir. 1988).

121 N.C. R. CIV. P. 3. *See Cannon*, 832 F.2d at 304.

122 After *West*, there can be no question that commencement of a "hybrid" claim brought in district court is to be assessed in accordance with the Federal Rules of Civil Procedure. Unlike appellant, we can perceive no justification for allowing a different result simply because the underlying action is initiated in a state court. The substantive rights involved remain purely federal in nature. Moreover, the choice of a forum in no way diminishes the subtle balance of interests noted in *DelCostello* as a justification for uniformity. The application of alternative state law procedures must inevitably intrude into the balance and threaten the goal of uniform adjudication. We conclude, therefore, that the statute of limitations applicable to hybrid actions runs until the action is properly commenced under the dictates of the Federal Rules of Civil Procedure.

Cannon, 832 F.2d at 305-06. One member of the panel dissented. *See id.* at 306-07 (Smalkin, D.J., dissenting).

123 Cannon v. Kroger Co., 837 F.2d 660 (4th Cir. 1988).

124 *Id.* at 660-70 (Murnaghan, J., dissenting from denial of rehearing en banc).

The Court of Appeals' decision in *Cannon* is remarkable not so much for imposing Rule 3 on a state court, as for imposing Rule 8(a), which defines what a "pleading which sets forth a claim for relief" in federal court shall contain.[125] Whatever its power in other cases of borrowed limitations law, the Court in *West* had the power to fashion a uniform common-law rule for the hybrid federal claims at issue in that case, and its reliance on Rule 3 can be excused as shorthand.[126] Moreover, it would not do to have one rule defining when a federal limitations period stops running for cases brought in federal court and a consequentially different rule for cases brought in state court. The Court also has the power, although it has been reluctant to use it, to displace state-law rules in state court litigation on federal claims when those rules are hostile to or inconsistent with a scheme of federal rights.[127] In that aspect of *Cannon*, the Fourth Circuit can be seen as merely extending the Court's shorthand reference to Rule 3.

Accepting the proposition that the Court could fashion a uniform rule for hybrid actions, binding in state as well as federal court, the question becomes whether it could also require that the paper filed within the statutory period, which Rule 3 calls a "complaint," satisfy the requirements of Rule 8. That is the effect of *Cannon*.[128] This result is difficult if

125 CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

FED. R. CIV. P. 8(a).

126 *See supra* text following note 89.

127 *See, e.g.*, Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980); Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952); Brown v. Western Ry., 338 U.S. 294 (1949); Davis v. Wechsler, 263 U.S. 22 (1923). *See also* Burbank, *supra* note 6, at 805-17. In displacing particular state-law rules, or requiring use of a uniform federal common-law rule, in state court litigation, the Court is bound by the Rules of Decision Act. *See id.* at 809 n.366; *supra* note 8.

After this paper was delivered, the Supreme Court decided two cases that bear on the problem of federal law in state court. One of them, Monessen Southwestern Ry. Co. v. Morgan, 108 S. Ct. 1837 (1988), held that the availability of prejudgment interest in a state court FELA action is a matter of federal law. The other, Felder v. Casey, 108 S. Ct. 2302 (1988), held that a state notice of claim statute could not be applied in a state court § 1983 action. *Felder* is of particular interest because, although using the language of "preemption," *see id.* at 2307, it confirms the potential of the general approach to federal common law that I have advocated. *See* Burbank, *supra* note 6. *Felder* thus also suggests the bankruptcy of the Court's approach to the full faith and credit statute. *See id.* at 805-22.

128 Appellant's alternative contention that the state summons issued pursuant to North Carolina Rule 3 was somehow equivalent to a complaint under the Federal rules is unpersuasive. A valid complaint under the Federal Rules must satisfy, *inter alia*, the demands of Rule 8(a)(2) by including a "plain statement of the claim showing that the pleader is entitled to relief." The state summons issued to defendants below fell significantly short of this requirement.

Cannon v. Kroger, 832 F.2d 303, 306 (4th Cir. 1987) (footnote omitted), *reh'g and reh'g en banc denied*, 837 F.2d 660 (4th Cir. 1988). In referring to the "state summons," the court of appeals evidently intended the "Application and Order Extending Time to File Complaint," which was served with the summons. Ms. Cannon's application stated as the nature and purpose of the action: "Recovery of damages and other relief by employee for Union's breach of its duty of fair representation and employer's breach of collective bargaining agreement under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Sec. 185." Application and Order Extending Time to File Complaint, Cannon v. Kroger, No. 86-CVS-1176 (March 7, 1986).

not impossible to square with the Court's traditional approach to federal common law and radically inconsistent with the Court's approach to federal law in state courts, which has been largely *sui generis*.[129]

For good or ill, *West* makes it clear that actual notice to a defendant within the limitations period is not important to the policies of the (borrowed) statute of limitations.[130] Ms. Cannon filed her complaint within 20 days, and it was served on the defendants within 30 days, of the issuance of the summons. The defendants therefore had notice of the claims brought against them long before they might have had notice if the action had been brought originally in federal court, where Rule 4(j) allows 120 days for service of process.[131] In that light, the precise content of the filed paper that commences the lawsuit is irrelevant. Under traditional federal common law analysis or a Rules of Decision Act approach, there is not a sufficient basis to displace the North Carolina system, let alone to impose on North Carolina courts a uniform federal definition of a complaint.[132] Moreover, the administrability costs of such a rule for people desiring to litigate in state court are significant.[133] Under a "preemption" approach, a uniform federal rule can only be harder to justify.[134]

Just as visions of uniformity may have blinded the Court in *West*, so may they have prevented the Court of Appeals for the Fourth Circuit from seeing the endpoint of the course on which it embarked. Imposing the requirements of Rules 3 and 8 on state courts will not ensure uniformity in the limitations period applicable to a federal claim. Conceivably, a state might permit a period longer than 120 days for service of process. If so, it is possible that the Supreme Court would require that a state court plaintiff follow Federal Rule 4(j). Is it not more likely that the Court would look to the facts to determine whether notice was given so late as to be inconsistent with the policies of the governing limitations period? If so, Ms. Cannon would have additional reason to wonder what happened to her.

Whatever the accuracy of a would-be reformer's description of federal practice and procedure under the Conformity Act, there can be no doubt that to "the average lawyer," federal limitations law today "is Sanskrit."[135] Nor can there be any doubt that, notwithstanding the Supreme

129 *See* Burbank, *supra* note 6, at 805-17; *supra* note 127.

130 *See supra* text accompanying notes 103-14.

131 *See Cannon*, 837 F.2d at 661 & n.3 (Murnagham, J., dissenting from denial of rehearing en banc). *See also id.* at 662 n.4, 666 & n.11.

132 *See id.* at 663-64, 666-68. *Cf.* Burbank, *supra* note 6, at 810-12 (uniform federal preclusion rules for state court judgments not justified).

133 *See Cannon*, 837 F.2d at 668 (Murnaghan, J., dissenting from denial of rehearing en banc). The problem is not, however, confined to litigants who fear that their state court action may be removed to federal court and for that reason attempt "to comply with *both* sets of rules." *Id.* As Judge Murnaghan elsewhere demonstrates, removal is irrelevant. *See id.* at 664; FED. R. CIV. P. 81. The panel opinion in *Cannon* represents that court's conclusion as to the law applicable in a case litigated wholly within the state court system and, implicitly, its prediction of what the Supreme Court would hold in reviewing a state court decision under 28 U.S.C. § 1257 (1982). *See supra* note 122; note 127 and accompanying text. *Cf.* Burbank, *supra* note 6, at 811-12 (administrability problems of uniform federal preclusion rules for state court judgments).

134 *See* Burbank, *supra* note 6, at 807-10; *supra* note 127.

135 *See supra* text accompanying notes 1-4.

Court's efforts to reduce the costs entailed by a system of borrowed state limitations law, truly effective reform will come, if at all, only when Congress determines comprehensively to address the problem. For, even an expansive view of the common-law powers of federal courts confronts continuing concern about charges of "judicial legislation"[136] that, in an area of irreducible arbitrariness, cannot be answered by reference to legislative policies. And not even the Court that decided *West* is likely to essay limitations periods in Federal Rules.

Studying the Supreme Court's responses to the problem is nonetheless instructive. We see in those responses a quest for simplicity and predictability, and for adjudication of claims on the merits, that recalls the stated goals of those who sought to replace the Conformity Act with court rules of practice and procedure.[137] We also see a quest for uniformity, one that is much easier to understand and defend than the similar quest of proponents of the Enabling Act,[138] because it concerns only federal substantive claims and, moreover, matters bearing so directly on those claims as to "define or limit"[139] their very existence. Finally, in *West*, we see the triumph of the trans-substantive solution, discovered in that compendium of trans-substantive solutions known as the Federal Rules of Civil Procedure.

The Supreme Court's responses to the problem of federal limitations law thus follow the plot line of modern federal procedure. I have asked you to pay close attention to the last chapter, because it is, I believe, the most important. In moving from a goal of uniformity to a result of trans-substantive uniformity, the Court in *West* offered no more explanation of why one must accompany the other than did those who gave us the Federal Rules of Civil Procedure.[140] Even in the substantive

136 UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702-04 (1966). *See supra* text accompanying notes 6, 23-26.

137 The 1926 Senate report on the bill that, with the change of one word, was ultimately passed as the Rules Enabling Act of 1934, enumerated the general purposes of the grant of rulemaking power to the Supreme Court as follows:

> First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that [*sic*] lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.
>
> Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists.
>
> Third, it would tend toward the speedier and more intelligent disposition of the issues presented in law actions and toward a reduction in the expense of litigation.
>
> Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just defense he would not be denied by any artifice of [*sic*] the opportunity to present it.

S. REP. No. 1174, 69th Cong., 1st Sess. 1-2 (1926). *See, e.g., Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509 (1920); Burbank, *supra* note 3, at 1067-68 & n.236; Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 948-61 (1987).

138 *See supra* note 137.

139 S. REP. No. 1174, *supra* note 137, at 10 (quoting 3 REPORT OF THE BOARD OF STATUTORY CONSOLIDATION ON THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF NEW YORK 477 (1915)); Burbank, *supra* note 3, at 1122.

140 *See* Burbank, *supra* note 3, at 1135-36 & n.539. The debate chronicled there concerned the meaning of "general rules" as used in the Enabling Act, see *supra* note 48, and in particular whether

context that brought it forth, the trans-substantive solution is problematic in terms of the policies animating the governing substantive law.[141] Moreover, although the benefits of simplicity and predictability afforded by a trans-substantive solution might be thought to outweigh the costs of any distortion, it is not clear that *West's* solution promises those benefits for federal court litigation,[142] and it surely does not when extended to state court litigation.[143]

Perhaps, however, I am being unfair, and we are or should be talking about different books. Limitations law has always been difficult to characterize,[144] and its substantive implications are hard to miss, if not to ignore.[145] In addition, Rule 3, as interpreted in *West*, makes a clear policy choice that has predictable consequences for a statute of limitations.[146] Further still, the administrability costs of borrowed law are obvious and perhaps different in kind from comparable costs in a system that, by and large, eschews borrowing.[147] What can we learn from *West* about real procedure, about "adjective law?"[148] Moreover, what can we learn from that case about really uniform federal procedure?

An answer to some of these possible objections to the comparison lies in *West* itself, where the Supreme Court manifested no interest in the question of characterization posed by the Enabling Act. A more satisfactory answer lies in a perception that may help to explain the Court's failure to pause: the perception "that 'procedure' and 'substance' are elusive words that must be approached in context, and that there can be no one, indeed any, bright line to mark off their respective preserves."[149] In much of today's litigation landscape, procedure is adjectival to substantive law in the same way that, in negligence law, reasonable is to man.[150] In other words, "real procedure" is hard to find.

Possible objections based on the atypical nature of Rule 3, read to make a policy choice in the limitations area, or on the supposedly unique

---

the Act contemplated uniformity or would accommodate rules requiring strict conformity to state law. The question whether uniformity necessarily entails trans-substantive uniformity was not addressed, probably because it was assumed. *See* Subrin, *supra* note 137, at 956-61, 995-96.

141 *See supra* text accompanying notes 103-13. The problem of distortion is even more serious when Rule 3 is used for other statutory limitation periods. *See supra* note 114.

142 *See supra* text accompanying notes 115-17.

143 *See supra* note 133 and accompanying text.

144 *Compare* Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 2871 (1988) ("principal purpose of limiting statutes is the prevention of stale claims [from the perspective of courts], and . . . the repose of defendants is merely an incidental benefit. . . .") *with* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.16, at 218-19 (3d ed. 1985) (ordering "[p]rotection of a defendant from stale claims" and "[p]rotection of defendant from insecurity" ahead of "[p]rotection of courts from the burden of stale claims" in policy analysis).

145 *See supra* text accompanying notes 67-72,

146 *See id.*; Burbank, *supra* note 3, at 1160.

147 *But see* FED. R. CIV. P. 64, 69; Burbank, *supra* note 3, at 1145-47.

148 "Law reformers have long assured us that procedure is technical, details—in short, adjective law. Whatever the accuracy of those labels as to other matters, only in Wonderland do they describe rules of preclusion." Burbank, *Afterwords: A Response to Professor Hazard and a Comment on* Marrese, 70 CORNELL L. REV. 658, 662 (1985) (footnote omitted).

149 Burbank, *supra* note 3, at 1188.

150 *See, e.g.*, Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1471-76 (1987).

administrability problems of a system of borrowed law are more interesting, but not for reasons that those tempted to make them might think.

It is not surprising that, with some notable exceptions, the trend of modern procedural law has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion.[151] For once one has settled upon trans-substantive rules as the best way of achieving uniformity, simplicity and predictability, and once one acknowledges the impact of procedure on the substantive law, concerns about either the legitimacy of the enterprise[152] or its efficacy[153] push in that direction. Moreover, in a system dominated, as modern American procedure has been dominated, by equity,[154] the avoidance of prospective policy choices holds the promise that justice may be done, with procedure its servant rather than master.[155]

Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense.[156] More important, the banner of simplicity and predictability under which they fly[157] is by now false advertising. There is little that is simple or predictable about contemporary federal procedure. Litigants and courts need more guidance than the Federal Rules provide, and to find it they must turn to a bewildering array of local rules, standing orders, and standard operating procedures, to say nothing of case law.[158] Too often they must turn to the judge herself.[159] The Federal Rules may largely eschew borrowing, [160] but they are nonetheless heavily in debt. Ours is a system that would have appalled those who hoped for "speedier and more intelligent disposition of the issues . . . and . . . a reduction in the expense of litigation."[161]

Attempts to discipline this chaos, such as the admirable project currently studying local court rules, [162] may not succeed in reducing the multiplicity of sources of rules. They may simply drive the rules further

151 *See id.* at 1474. There is also a trend in favor of greater allocative discretion. *See, e.g.*, FED. R. CIV. P. 52.

152 *See* Burbank, *supra* note 150, at 1474-76; Subrin, *supra* note 137, at 960-61.

153 *See* Burbank, *supra* note 27, at 311, 324 (contrasting problems of foreseeability and risks of inappropriate procedural choices posed for trans-substantive rules with those posed for rules to implement a single substantive scheme).

154 *See* Subrin, *supra* note 137; Burbank, *supra* note 150, at 1469-70, 1478-80; Burbank, *The Chancellor's Boot*, 54 BROOKLYN L. REV. 31 (1988).

155 *See* Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297 (1938); Subrin, *supra* note 137, at 961-82.

156 Burbank, *supra* note 150, at 1473-74.

157 *See supra* text accompanying note 137.

158 The ninety-four federal district courts currently have an aggregate of 4,998 local rules, not including thousands of "sub-rules," standing orders and standard operating procedures. These rules are extraordinarily diverse, and the numbers continue to grow rapidly. To give one stark example, the Central District of California . . . has 31 local rules with 434 "sub-rules," supplemented by approximately 275 standing orders. . . .

Coquillette, Introduction to The Special Invitational Conference on Local Court Rules 2 (Nov. 12-13, 1987).

159 *See* Burbank, *The Chancellor's Boot*, *supra* note 154, at 33.

160 *See supra* text accompanying note 147.

161 S. REP. No. 1174, *supra* note 137. *See* Burbank, *supra* note 66, at 425-27.

162 *See, e.g.*, 1987 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 79; *supra* note 158.

from official view, and hence from the view of litigants and their lawyers. Worse, they may drive judges further from rules. Interstate federal practice cannot be any easier today than it was when proponents of the Enabling Act championed the cause of one interstate lawyer as against that of a hundred who stayed at home,[163] but the costs imposed by its complexity are surely more widely felt.[164] In any event, intrastate federal practice is itself complex and risky business, particularly in courts whose invocation of sanctions[165] and other "procedural" roadblocks[166] signals a reversal in the master-servant relationship.[167]

If one admits that only a lawyer can think about procedure and substantive law as if they were discrete preserves, that modern federal procedure is complex and in large measure unpredictable, and that the Federal Rules are in similar measure only superficially uniform and trans-substantive, alternative reform strategies appear in sharper focus. Two such strategies have dominated recent efforts of the rulemakers and debate in the literature. One is to enhance the power of trial judges to manage litigation.[168] Another is to enhance incentives for people to avoid litigation.[169] Both represent steps in the flight from law.

There is another way, one that takes seriously the interrelationship of procedure and substantive law, that adopts a comparative view of simplicity and predictability, that does not equate uniformity with trans-substantivity, and that is animated by faith in a liberal view of law and hence of rights.[170] If we should have standing orders for RICO cases,[171] why should we not have uniform rules that govern such cases, and those like them, *in the respects in which they are deemed atypical*, either because of their procedural requirements or the requirements of the substantive law?[172]

---

163 Senator Thomas Walsh, the *bête noir* of Enabling Act proponents, declared himself "for the one hundred who stay at home as against the one who goes abroad" as early as 1915. *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess. 28 (1915). *See* Burbank, *supra* note 3, at 1063-64.

164 "There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." Frazier v. Heebe, 107 S. Ct. 2607, 2612 n.7 (1987).

165 *See, e.g.*, FED. R. CIV. P. 11, 37; Burbank, *supra* note 150, at 1478.

166 *See, e.g.*, DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir.), *cert. denied*, 108 S. Ct. 455 (1987) (federal civil rights and other claims precluded by unreviewed state administrative proceedings); Burbank, *supra* note 6, at 817-22.

167 *See supra* note 148 and accompanying text; *infra* note 170 and accompanying text.

168 *See,e.g.*, FED. R. CIV. P. 16; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Burbank, *supra* note 150, at 1476-83.

169 *See, e.g.*, Burbank, *supra* note 150, at 1483-87; Burbank, *supra* note 66, at 432 & n.40.

170 More generally, it is judges who have been closing the courthouse door, not Congress. That they have been doing it under a system of equity rules may make the suggestion that we consider putting more law in a merged system seem not "stingier," as Judge Weinstein describes it, but more liberal, at least in the sense of valuing rights.

Burbank, *The Chancellor's Boot*, *supra* note 154, at 34 (footnotes omitted).

171 *See, e.g.*, Patti v. Seiderl, No. 87-0223 (E.D. Pa. April 16, 1987) ("RICO Case Standing Order").

172 The Federal Rules of Civil Procedure would continue to govern matters not deemed to require special rules. *Cf. Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 9, 21 n.12 (1985) (statement of Stephen B. Burbank) (noting Congress' failure to advert to

If civil rights cases really do require special pleading rules,[173] perhaps they also require other special rules that accommodate their distinctive attributes. If we should have an unofficial *Manual For Complex Litigation*,[174] why should we not think about a separate set of procedural rules for complex cases, as well as a system for identifying such cases?[175]

Objections to such a strategy are predictable. Some will conjure up the writ system and the forms of action, without mentioning, let alone comparatively evaluating, the costs of the rival system that triumphed in 1938,[176] or crediting us with the ability to avoid the sacrifice of substantive rights at the altar of procedural purity.[177] We need to see

> whether it is possible to merge law and equity, adversariness and judicial control, without submerging one or the other. The enterprise will reveal substantial—perhaps unacceptable—costs, but the relevant comparison is not just the costs of the equity-based procedure initiated in 1938. . . . [F]ederal judges are moving further beyond equity, in some cases returning to practices previously rejected, even at the trial stage.[178]

Others, taking a page from Thomas Walsh, the chief antagonist of the Enabling Act, will stress the enormity of the enterprise and the inevitable complexity of any product.[179] We are constantly reminded that "judicial reform is no sport for the short-winded,"[180] but often the quip more accurately describes the time it takes to sell a proposed reform than the time invested in conceiving it.[181] In any case, simplicity is a comparative good, and I trust that my critics will not want to buy false advertising.[182]

---

the "possible need for specialized procedure . . . when it enacts legislation" and proposing "Procedural Impact Statement"); Burbank, *supra* note 6, at 831-32 (same).

For other suggestions that we should consider departures from the norm of trans-substantive procedure, *e.g.*, Subrin, *supra* note 137, at 977, 985, 991, 995-96; Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243 (1984).

173 *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980). *But see* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986). *See also supra* note 172.

174 MANUAL FOR COMPLEX LITIGATION (SECOND) (1985).

175 On the dangers of using complex litigation as a norm for trans-substantive rules, see Sherman, *Restructuring the Trial Process in the Age of Complex Litigation* (Book Review), 63 TEX. L. REV. 721, 744-45 (1984); Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 813 (1981). *See also* Burbank, *supra* note 150, at 1465, 1468.

176 *See* Burbank, *supra* note 150, at 1479.

177 One of the purposes of the bill that became the Enabling Act was to "make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case." S. REP. No. 1174, *supra* note 137.

178 Burbank, *supra* note 150, at 1479. For a discussion of some of the costs of this approach by one who is equally aware of the costs of the current system, see Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988).

179 *See* Burbank, *supra* note 3, at 1088-89, 1111-12.

180 A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (A. Vanderbilt ed. 1949).

181 What we know as the "Field Code" was prepared in an astonishingly short period of time. *See* Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 33-34 (1949). The Federal Rules of Civil Procedure were prepared in approximately two and one half years. *See* Chandler, *Some Major Advances in the Federal Judicial System, 1922-1947*, 31 F.R.D. 307, 491-98 (1963).

182 *See supra* text accompanying note 157.

An objection to a strategy of reform of this sort not likely to be stated, but very powerful, is the objection that it would require procedural reformers to become conversant with the substantive law, or at least to work with those who are so conversant. It would thus have obvious and potentially far-reaching professional and political implications, threatening myths of expertise[183] on the one hand and of legitimacy[184] on the other. Effective procedural reform will not come from a small group of "experts," nor will it come from the Supreme Court alone. We need partnerships in determining how the field should be carved up for study, in studying it, and in implementing proposed reforms. Existing projects furnish possible models for the work,[185] and we need to think about other models. We also need to show more respect, if not for Congress, then for democratic ideals that we elsewhere profess.[186]

West may be "such a little baby,"[187] but it holds, at least for me, lessons that transcend the limitations context. To some the case may illustrate not the promise of formalism but its folly. Careful analysis reveals, however, that the problem in *West* is not formalism but rather a particular solution, itself problematic, generalized by reason of the transsubstantive scope of the Federal Rules. It is time to bring problems both of scope and of values to the surface to see whether we are, in fact, capable of generalizations, of rules, worthy of the name.[188]

In his inaugural lecture at Oxford, Professor Atiyah concluded with observations that well describe the dilemma of modern federal procedure:

> I have said that perhaps one reason for the trend I have described is that it is easier to conceal a diversity of values when principles are jettisoned in favor of individualized justice. But how long can this process of concealment last? At a time when the ideal of egalitarianism rides as high as it does today, it is supremely ironical that we should at the same time be embracing discretion and rejecting principles; for

183 *See, e.g.*, Subrin, *supra* note 137, at 968-69.

184 *See, e.g.*, Burbank, *supra* note 3, at 1068, 1194-97.

185 One existing project that could accommodate a study of the sort envisioned is the American Law Institute's Project on Compensation and Liability for Product and Process Injuries. *See* AMERICAN LAW INST., 1986 ANNUAL REPORT 15, 17.

An existing project that actually has as its goal the exploration of means to integrate substance and process is underway at Northeastern University School of Law. The work involves collaboration among Professors Judith Olans Brown and Phyllis Tropper Bauman, specialists in the field of employment discrimination, and Professor Stephen Subrin, a specialist in procedure.

186 *See* Burbank, *The Chancellor's Boot*, *supra* note 154, at 34. The proposal is decidedly *not* that Congress assume primary responsibility for prospective procedural law. It may be useful, however, to consider a two-track system for rules, involving "the submission to Congress of all provisions in the area of procedure, broadly defined, that are thought to be needed, divided into two groups: those subject to congressional review and those requiring congressional approval." Burbank, *supra* note 3, at 1195 n.775. This is in fact the approach suggestd by Paul Carrington for the amendment of Rule 4. *See* Carrington, *supra* note 87, at [Ed. Tan 51-55].

187 In a discussion about the original Advisory Committee's power to recommend Federal Rules on matters of evidence, Professor Morgan observed: "I think, if you put that up to the Court, they would say, as the servant girl said, 'It is such a little baby.' (Laughter)." 4 Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 974 (Feb. 20-25, 1936) (available in Harvard Law School Library). *See* Burbank, *supra* note 3, at 1144 n.566.

188 *See* G. HAZARD, RESEARCH IN CIVIL PROCEDURE 9-11 (1963).

> this process must of necessity encourage and legitimize a greater inequality of treatment in the judicial process. The diversity of values underlying judicial decisions is thus concealed only by encouraging a departure from the ideal of equality.[189]

I assume that equality is a goal of procedural justice as it is of substantive justice. I also assume that a redistribution of power may be necessary if equality is to be achieved. Ultimately, the fate of effective procedural reform may turn on the willingness of federal judges to share some of their power so that procedure may once again be the servant of justice, procedural and substantive.

189 Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1271 (1980).