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Comity and Tragedy: The Case of Rule 407

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NOTES

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I. INTRODUCTION

Maine Rule of Evidence 407[1] allows the injured party in a tort action to present evidence that the defendant took remedial measures after the injury, as evidence of the defendant's negligence. Federal Rule of Evidence 407,[2] on the other hand, excludes such evidence on the theory that admitting the evidence would discourage subsequent repairs. The Maine Rule and the Federal Rule collided in *Rioux v. Daniel International Corp.*[3]

In *Rioux* the United States District Court for Maine applied the federal rule, deciding the case based on a time-honored but simplistic approach. The court relied on *Hanna v. Plumer*[4] for the proposition that a rule which the United States Congress enacts is constitutional as long as the rule is procedural.[5] Under this constitutional standard, all the Federal Rules of Evidence are "unquestionably valid"[6] because the test of whether a rule is rationally capable of classification as procedure has a low threshold. Thus, the confiict in *Rioux* posed little trouble for the court: it applied Federal Rule 407 because it is constitutional and brushed aside the state rule.[7]

The *Rioux* court's approach is unsatisfactory. Undoubtedly, Congress has the constitutional power to enact rules of procedure that alter state substantive rights. As Professor Wellborn has noted, however, "[t]hat the power exists does not justify the assumption that it has been exercised."[8] The *Rioux* court never examined Rule 407 to determine whether it is even "arguably" procedural. This examination would have revealed that Rule 407 is based primarily on the social policy of encouraging repairs and, therefore, is more arguably substantive than procedural.[9] The

1. The Maine Rule appears in relevant part *infra* note 201.
2. The Federal Rule appears in full *infra* note 183.
3. 582 F. Supp. 620 (D. Me. 1984).
4. 380 U.S. 460 (1975).
5. 582 F. Supp. at 625; *see* Hanna v. Plumer, 380 U.S. 460, 472 (1965) (setting out the standard for an act of Congress); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698, 706, 740 (1974); Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Court*, 55 TEX. L. REV. 371, 398, 400 (1977).
6. Wellborn, *supra* note 5, at 398.
7. *Rioux*, 582 F. Supp. at 625.
8. Wellborn, *supra* note 5, at 401.
9. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 235 (1978 & Supp. 1984); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 407(01), at 7 (1982).

court should have made this inquiry for several reasons. Both Congress and the federal courts have indicated a sensitivity to state substantive law in conflicts with federal rules. The Rules of Decision Act (RDA)[10] and the Rules Enabling Act (REA)[11] also indicate a concern for protecting state substantive law. Furthermore, former Federal Rule of Civil Procedure 43(a) reflects an attitude of deference to state policy. Finally, Congress altered the proposed Federal Rules of Evidence to protect state substantive law.[12]

In light of this deferential attitude, Congress arguably did not focus on the possibility that Rule 407 would conflict with a state rule.[13] That Congress failed to require reference to state evidence law in Rule 407 is probably a result of the belief that the exclusionary principle of Rule 407 was a universal common-law principle.[14] In 1975, when Congress enacted the Federal Rules of Evidence, the exclusionary principle was traditional.[15] The Maine Rules of Evidence did not become effective until 1976,[16] and Maine is the only state that admits evidence of subsequent repairs as circumstantial evidence of negligence.[17] Congress, therefore, could not have foreseen any conflict between Rule 407 and state substantive law.[18]

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10. 28 U.S.C. § 1652 (1982). The Act is provided *infra* text accompanying note 19.

11. 28 U.S.C. § 2072 (1982). The Act is provided in part *infra* note 58.

12. *See Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser.1, at 171-73 (1973) [hereinafter cited as *Hearings*]; H.R. REP. No. 650, 93d Cong., 1st Sess. 8-9 (1973); Wellborn, *supra* note 5, at 401.

13. *See* D. LOUISELL & C. MUELLER, *supra* note 9, at 264-66.

14. *Id.*

15. *Id.*; *see* Note, *The Repair Rule: Maine Rule of Evidence 407(a) and the Admissibility of Subsequent Remedial Measures in Proving Negligence*, 27 ME. L. REV. 225, 235 (1975).

16. The Supreme Judicial Court of Maine promulgated the state rules on May 13, 1975, and they became effective on February 2, 1976. Field, *Maine Rules of Evidence: What They Are and How They Got That Way*, 27 ME. L. REV. 203, 203 n.1 (1975).

17. *See* Note, *supra* note 15, at 235.

A few state rules do not bar evidence of subsequent measures when offered as proof in a products liability action. *See* ALASKA R. EVID. 407; HAWAII R. EVID. 407; IOWA R. EVID. 407; TEX. R. EVID. 407. On the other hand, some state rules explicitly provide that the exclusionary rule applies to products liability actions. *See* ARIZ. REV. STAT. ANN. § 12-686 (1981); NEB. REV. STAT. § 27-407 (1979). Another federal-state conflict is likely in this situation. Circuit courts in those circuits in which states admit the evidence in products liability actions have not yet decided whether the federal rule preempts the state rule. *See* D. LOUISELL & C. MUELLER, *supra* note 9, at 243 (Supp. 1984).

18. Congress also did not foresee the federal-state conflict in products liability actions. The state rules allowing evidence in products liability actions also were enacted after the Federal Rules of Evidence. *See* D. LOUISELL & C. MUELLER, *supra* note 9, at 221-23 (Supp. 1984).

This Note advocates that when a Federal Rule of Evidence conflicts with a state rule, a court should examine closely the purpose of the rules in an effort to balance the competing policies of comity and procedural uniformity. Part II of this Note provides a general background on legislative and court decisions concerning federal-state conflicts. Part II also illustrates the congressional and judicial inclination to protect state substantive law. Part III discusses the conflict between the Maine Rule and Federal Rule 407. Part IV suggests an approach to the general conflict between state and federal rules and applies that approach to Rule 407.

II. Legal Background

The legal background necessary to any discussion of a conflict between a federal and state rule of evidence encompasses a much-debated combination of issues of federalism and federal separation of powers. Although the courts' approach to this conflict is simple, this Note contends that that approach is incomplete. To lay the groundwork for this proposition, the following background discusses the doctrines of federalism and separation of powers as they have arisen under the RDA, the REA, which Congress used to promulgate the Federal Rules of Evidence, former Federal Rule of Civil Procedure 43(a), the predecessor of the modern rules of evidence, and the congressional and scholarly debate surrounding the promulgation of the Federal Rules of Evidence.

A. The Rules of Decision Act

Congress enacted the RDA in 1789 as section 34 of the Federal Judiciary Act. The RDA provides: "The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States . . . ."[19] Probably the most difficult and important issue facing courts trying to apply the broad language of the RDA is the meaning of the words, "[t]he laws of the several states." In the nearly two hundred years of the RDA's existence, a handful of relatively recent decisions give these words their current meaning.

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19. 28 U.S.C. § 1652 (1982).

1. *Erie Railroad Co. v. Tompkins*

Erie Railroad Co. v. Tompkins,[20] one of the modern foundations of federalism,[21] is the primary decision that construes the RDA. *Erie* overruled the doctrine of *Swift v. Tyson*,[22] which had held, among other things, that the word "laws" in the RDA referred only to state legislative enactments, and that the federal courts were not bound to follow state court decisions.[23] The Erie Court disapproved of *Swift* because it "introduced grave discrimination by noncitizens against citizens"[24] by making legal rights vary according to whether the action was in state or federal court. Because the noncitizen had the privilege of selecting the court, the doctrine "rendered impossible equal protection of the law."[25] The *Erie* Court primarily disapproved of the practice of "forum shopping" that had arisen in response to the *Swift* doctrine.[26] The *Erie* court concluded that to end discrimination and forum shopping, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[27]

Although the *Erie* decision is the landmark case on federal-state conflicts, it provides little guidance on actual RDA issues.[28] The Court did not suggest a limit to the application of state law in

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20. 304 U.S. 64 (1938).

21. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

22. 41 U.S. (16 Pet.) 1 (1842).

23. *Id.* at 19.

24. *Erie*, 304 U.S. at 74. For a discussion of the meaning of the "grave discrimination" that *Swift* introduced, see Ely, *supra* note 5, at 712 n.111. Commentators have criticized the reference in *Erie* to "discrimination hy non-citizens against citizens," 304 U.S. at 74, because citizen plaintiffs also have access to the federal courts. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 707 (2d ed. 1973). The *Erie* Court, however, was referring to the asymmetry that arises wben a nonresident sues a resident. A resident defendant has no rigbt to removal, *see* 28 U.S.C. § 1441 (1982), and thus must abide by the nonresident plaintiff's choice of forum. *See* Ely, *supra* note 5, at 712 n.111. Professor Ely discusses an additional meaning of the *Erie* discrimination. He refers to the unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law that is different from the body of law that applies wben his next-door neighbor has a similar litigation with a cocitizen. *Id.*

25. 304 U.S. at 75.

26. *Id.* at 73-74; *see* Hanna v. Plumer, 380 U.S. 460, 467 (1965) (first using the term "forum shopping"). *Erie* cited the decision in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1927), in which a Kentucky corporation reincorporated in Tennessee to sue in federal court under Tennessee law. The *Erie* Court frowned upon the practice of picking a court by its law. *Erie*, 304 U.S. at 73-74, 76-77.

27. *Erie*, 304 U.S. at 78.

28. Ely, *supra* note 5, at 707-08.

the face of a conflicting federal law.[29] Courts and commentators, however, have assumed that substance and procedure were the critical concepts.[30] The Federal Rules of Civil Procedure substituted national uniformity for state conformity in federal procedure the same year that *Erie* required adherence to state law in questions of substantive law. This concurrent, diverse treatment represents the Court's recognition of a dichotomy between substance and procedure.[31] The broad command of *Erie*, therefore, is that federal courts should apply state substantive law and federal procedural law.[32] Because the *Erie* decision is so ambiguous, however, concern arose among jurists and scholars that the Court might destroy procedural uniformity by failing to adhere to the presumed substance-procedure dichotomy.[33] After *Erie*, therefore, the test that courts should apply to a conflict under the RDA remained uncertain.

2. *Guaranty Trust Co. v. York*

The first significant judicial attempt to formulate a test for the RDA came in 1945, in *Guaranty Trust Co. v. York*.[34] Justice Frankfurter discarded the labels "substance" and "procedure" in the context of the RDA. Instead, he established an "outcome determination" test, reasoning that the essence of *Erie* was that in a diversity suit the outcome of the litigation in federal court should be substantially the same as the outcome in state court.[35] Justice Frankfurter stated that courts should follow state law on any issue with "consequences that . . . intimately affect recovery or non-recovery."[36] This test flows logically from *Erie* because if the federal rule would alter the outcome significantly, the rule would lead to forum shopping and discrimination.

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29. *See* Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950) (discussing the *Erie* rule as invading the federal rules and causing uncertainty and confusion).

30. *See* Ely, *supra* note 5, at 708.

31. Merrigan, *supra* note 29, at 711. An example of a substantive law would be an implied warranty of merchantability. *See* U.C.C. § 2-314 (1978). An example of a procedural rule is a rule requiring that the parties put their names on their pleadings. *See* FED. R. CIV. P. 10.

32. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

33. Merrigan, *supra* note 29, at 716.

34. 326 U.S. 99 (1945).

35. *Id.* at 109.

36. *Id.* at 110.

3. *Ragan, Woods,* and *Cohen*

Although the *York* outcome determination test endured for some time, it soon seemed overly hroad because it threatened to erode the authority of the Federal Rules of Civil Procedure.[37] In *Ragan v. Merchants Transfer & Warehouse Co.*[38] the Court held that it could not apply Rule 3 of the Federal Rules of Civil Procedure[39] in a diversity case arising out of a state cause of action. The state statute of limitations would have barred the suit in state court, but under the federal rule the statute of limitations would not have run. The Court applied the state rule to be consistent with *Erie* and *York*,[40] reasoning that because local law provided the cause of action, qualifications or abridgements of the action were possible only under local law.[41] The Court believed that a contrary holding would create a "different measure of the cause of action in one court than in the other, and the principle of *Erie* [would be] transgressed."[42]

In *Woods v. Interstate Realty Co.*[43] the Court assumed that no federal rule was relevant to the case and, instead, applied a state statute providing that corporations which had not qualified to do business in the state could not sue in its courts.[44] Although the Court did not mention Federal Rule 17(b),[45] that rule addresses this issue and dictates that the Court should apply the rule of the incorporating state. Citing *York* and *Erie*, the Court held

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37. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); *see also* Ely, *supra* note 5, at 709 (pushed to an extreme, the *York* test implies that a litigant in a diversity action could insist on filing pleadings under state timetable because the federal timetable would cause him to lose); Merrigan, *supra* note 29, at 718-23 (describing inconsistency that resulted from the application of the *York* test). *Hanna* addressed these fears by elevating the federal rules to a constitutional status and refining the RDA test. *See infra* text accompanying notes 80-82.

38. 337 U.S. 530 (1949).

39. Rule 3 of the Federal Rules of Civil Procedure states: "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

40. 337 U.S. at 532. Kansas had a two-year statute of limitations that would toll only by the service of a summons. The federal rule would toll the statute upon the filing of a complaint. Two years ran between the filing of the complaint and the service of the summons. *Id.* at 531.

41. *Id.* at 533.

42. *Id.*

43. 337 U.S. 535 (1949).

44. *Id.* at 536.

45. Rule 17(b) of the Federal Rules of Civil Procedure states in part: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." FED. R. CIV. P. 17(b).

that to discourage the discrimination that *Erie* was designed to eliminate, the state rule must apply.[46]

In *Cohen v. Beneficial Industrial Loan Corp.*[47] the Court applied a state statute that required the plaintiff to post a bond securing payment of defense costs as a prerequisite to bringing suit.[48] Federal Rule 23 also provides prerequisites for bringing an action, but the Court concluded that no conflict existed between the state statute and Rule 23.[49] Citing the RDA, *Erie*, and *York*, the Court further reasoned that the only substantial argument that the plaintiff below could raise against applying the state statute would be that its provisions were "mere rules of procedure rather than rules of substantive law."[50] The Court held that the statute in question was not merely a regulation of procedure because it created a "new liability where none existed before."[51]

Ragan, Woods, and *Cohen* led to confusion and fear in many jurists and scholars. In each case, Justice Rutledge dissented from the Court's extension of the *Erie* doctrine and stated that judges could not escape making the decision between substance and procedure, even though it could become "well-nigh impossible."[52] Commentators feared that the *Erie* doctrine, as extended, would erode the federal rules and destroy the hope of a uniform federal procedure.[53] Today, the Court and commentators recognize that the main problem with *Ragan, Woods*, and *Cohen* is that the Court decided them under the wrong statutory test. When the federal rule of decision at issue is wholly judge-made, the RDA is the standard by which to determine whether state or federal law applies.[54] On the other hand, when the federal rule at issue is a Federal Rule of Civil Procedure or another rule promulgated pursuant to the Rules Enabling Act (REA), as in *Ragan, Woods*, and *Cohen*,

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46. 337 U.S. at 538.

47. 337 U.S. 541 (1949).

48. *Id.* at 556.

49. *Id.*

50. *Id.* at 555.

51. *Id.* The Court concluded: "We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." *Id.* at 556.

52. *Cohen*, 337 U.S. at 559 (Rutledge, J., dissenting).

53. Merrigan, *supra* note 29, at 711, 717, 719; *see also* Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417, 419 (1940) (advocating following federal procedures unless state public policy unequivocally demanded an opposite result).

54. *See* Hanna v. Plumer, 380 U.S. 460, 470-71 (1965); Ely, *supra* note 5, at 698; Wellborn, *supra* note 5, at 399.

the REA and cases construing it provide the relevant standard.[55] Not until 1965 did the Supreme Court set out the proper guidelines for distinguishing between the statutory tests.[56]

Although the Supreme Court decided *Ragan, Woods*, and *Cohen* under the wrong standard, they accurately reflect the policies of the RDA, particularly its sensitivity to state substantive law. *Erie* and its progeny addressed the twin evils of forum shopping and discrimination by noncitizens against citizens. To cure these evils, the Court applied state law whenever the answer to the legal question at issue would determine the outcome of the litigation.

B. The Rules Enabling Act

In 1934 Congress enacted the REA[57] to give the Supreme Court the power to prescribe the general rules of practice and procedure in the federal courts.[58] Congress also provided that these rules could not change a substantive right. The first sentence of the Act embodies a checklist approach to determining whether a rule is authorized by the Act. The first sentence imposes the same limitation on the scope of rules that the *Hanna* Court set out in its discussion of the constitutional standard for Acts of Congress relating to the federal courts: "[T]he constitutional provision for a federal court system . . . includes a power to regulate matters which . . . are rationally capable of classification as either [substance or procedure]."[59] The second sentence of the REA, however, imposes a limitation that appears to create an area of exclusive

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55. *See Hanna*, 380 U.S. at 471; Ely, *supra* note 5, at 698; Wellborn, *supra* note 5, at 398.

56. *See Hanna*, 380 U.S. at 470-71. The Court held that the *Erie* line of cases applied if a conflict existed between judge-made federal law and a state law. *See infra* notes 75-89 and accompanying text (discussing *Hanna*). *Hanna* did not overrule *Woods* because the *Woods* Court had assumed that no federal rule covered the point in question and, therefore, no conflict existed. The *Hanna* Court distinguished *Ragan* and *Cohen* by characterizing them as cases in which the Court construed the Federal Rule narrowly to avoid a clash with state law. 380 U.S. at 470 n.12; *see* Walker v. Armco Steel Corp., 446 U.S. 740, 749-52 (1980) (holding that *Hanna* did not overrule *Ragan* because the federal and state rule did not collide).

57. 28 U.S.C. § 2072 (1982).

58. The REA states in relevant part:

> 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 appeal of the United States in civil actions . . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right . . . .

Id.

59. *Hanna*, 380 U.S. at 472; *see* Ely, *supra* note 5, at 718.

state authority.[60] Although the decisions construing the Act reflect a deference to state substantive law, they do not consider expressly the second sentence.[61]

1. Supreme Court Decisions

In *Sibbach v. Wilson & Co.*,[62] the landmark REA case,[63] the Court construed the Act merely as a checklist of areas subject to the Act and ignored the second sentence.[64] When the plaintiff in *Sibbach* refused to submit to a mental examination under Federal Rule of Civil Procedure 35,[65] the lower court imposed sanctions for contempt of court. The plaintiff contended that Congress had intended the REA to prevent federal courts from dealing with substantive rights.[66] The Court responded that "[t]he [REA] test must be whether a rule really regulates procedures,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for [their] disregard or infraction . . . ."[67] The plaintiff admitted that the rule was procedural, but contended that the second sentence of the REA imposed a separate limit on rules with substantive effects. The Court, however, was unwilling to go beyond the first sentence and held that the rule was valid under the REA because it was procedural. The Court could not accept that a rule may be procedural and at the same time abridge substantive rights.[68] By only asking whether the rule regulated procedure, the Court collapsed the REA's two questions into one.[69] Courts[70] and commentators[71] have cited the *Sib-*

60. Ely, *supra* note 5, at 719. The second sentence is not necessarily limited to preserving state law, but also must apply to federal substantive rights. The sentence reveals, at least in part, a concern for state law.

61. *But see* Perry v. Allen, 239 F.2d 107, 111-12 (5th Cir. 1956) (giving effect to the limitation of the second sentence); *infra* text accompanying notes 90-99 (discussing *Perry*).

62. 312 U.S. 1 (1941).

63. Ely, *supra* note 5, at 719.

64. *Sibbach*, 312 U.S. at 14; Ely, *supra* note 5, at 719.

65. Rule 35 of the Federal Rules of Civil Procedure states in part: "[When] the mental or physical condition of a party is in controversy, the court . . . may order [the party] to submit to a physical or mental examination . . . ." FED. R. CIV. P. 35.

66. *Sibbach*, 312 U.S. at 13.

67. *Id.* at 14.

68. Ely, *supra* note 5, at 719.

69. *Id.*

70. *See, e.g., Hanna*, 380 U.S. at 465; Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445-46 (1946).

71. *See Hearings, supra* note 12, at 155 (statement of former Supreme Court Justice Arthur J. Goldberg); Korn, *Continuing Effect of State Rules of Evidence in the Federal Courts*, 48 F.R.D. 65, 76 (1969).

bach construction as the proper test of a rule's validity under the REA.

Even though the *Sibbach* Court collapsed the two sentences, it nonetheless recognized the substantive-procedural dichotomy inherent in the REA. The Court implied that the purpose of the dichotomy was to protect federalism.[72] According to the Court, the first sentence delegates to the Court Congress' power to regulate procedure, but draws the line at substantive law because Congress never has established state substantive law or abolished a state substantive right.[73] The Court then referred to the RDA, which requires application of the state rule when the federal rule has crossed the line from procedure to substance.[74] The Court held that it reached the limits of its authority under the REA at the point where state law became applicable under the RDA. Although the Court muddied the tests, it recognized the importance of protecting state substantive law against federal intrusion.

In *Hanna v. Plumer*[75] the Court clarified many aspects of the federal-state conflict, but did not provide a lucid, structural analysis of the REA. The litigation concerned the Federal Rules of Civil Procedure and a conflicting state statute on service of a summons. The Court merely reiterated *Sibbach*'s "really regulates procedure" test[76] and, in a footnote, illustrated that the rule in question was procedural.[77] The *Hanna* Court, however, did provide a useful analysis of the appropriate standard for determining whether a federal rule should preempt state law. The Court distinguished the circumstances in which the REA standard applies from situations in which the RDA standard applies.[78] The Court held that the federal rules are subject to the terms of the REA and constitutional restrictions, reasoning that neither Congress nor the federal courts can fashion rules that the United States Constitution does not authorize.[79] The Court further held that the test of the constitutionality of a rule is whether the rule is "rationally capable of classifi-

72. *See Sibbach*, 312 U.S. at 10; *see also* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 & n.430 (1982) (discussing *Sibbach*).

73. *Sibbach*, 312 U.S. at 9-10.

74. *Id.* at 10.

75. 380 U.S. 460 (1965).

76. *Id.* at 464.

77. *Id.* at 462 n.1.

78. *Id.* at 471.

79. *Id.* at 471-72. The Court held that the RDA test applied to conflicts between federal judge-made law and state law. *Id.* at 470-71.

cation as either" procedural or substantive.[80] The *Hanna* Court did not indicate whether it intended to create a constitutional test separate from the REA restrictions or within the REA itself. Commentators, however, generally agree that the first sentence of the REA embodies the constitutional test because the sentence tracks the *Hanna* Court's statement of the requirements of the Constitution.[81] Apparently, the Court felt that Congress included the first sentence of the REA to provide the Court with rulemaking power and to indicate that Congress did not want to give the Court any more power than Congress itself has.[82] The *Hanna* Court, therefore, interpreted "procedure" broadly and, like *Sibbach*, ignored the possibility that a procedural rule can also affect substantive rights. Because the Court has not given any consideration to the second sentence of the REA, the Court has made the REA test of whether a federal rule is valid equivalent to the constitutional test of Congress' power to promulgate rules.[83]

Justice Harlan, in his concurring opinion in *Hanna*, provided more guidance about the significance of substantive state law in the REA context. Justice Harlan would have inquired whether "the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[84] If so, Justice Harlan believed that *Erie* and the Constitution would require that the state rule prevail over a conflicting federal rule.[85] According to Justice Harlan, the Court had eroded a basic principle of federalism by its "arguably procedural ergo constitutional" test.[86] Although Justice Harlan's

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80. *Id.* at 471.

81. *See, e.g.*, Ely, *supra* note 5, at 718, 723; Wellborn, *supra* note 5, at 398-99. The first sentence imposes the same limitation as article III and the "necessary and proper" clause of the Constitution. *Hanna*, 380 U.S. at 472; *see* U.S. CONST. art. III & art. I, § 8. The Framers intended the reference to diversity jurisdiction in article III, U.S. CONST. art. III, § 2, augmented by the "necessary and proper" clause and the article I power to establish lower federal courts, as a grant of power to provide courts for diversity cases and to prescribe the rules of practice and procedure by which the courts could hear cases. *See* Ely, *supra* note 5, at 704.

82. *See* Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 356 (1969) (contending that if the Supreme Court adopts a rule and Congress does not veto the rule under the REA, courts may rely upon the rule to show what Congress authorized and what it could authorize).

83. *See supra* notes 79-81 and accompanying text.

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

85. *Id.* (Harlan, J., concurring); *see* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1st ed. 1953) (Harlan refers to this test in his opinion.).

86. *Hanna*, 380 U.S. at 475-76 (Harlan, J., concurring).

belief that *Erie* was controlling[87] would confuse the relevant statutory standard, his emphasis on federalism suggests that the REA is also concerned with state powers. Justice Harlan never rejected the majority's reliance on the REA; he only repudiated the majority's application of the "arguably procedural" test to the federal rules because it ignored what he believed was the main issue in a federal-state conflict—federalism.[88]

The *Hanna* majority, despite its broad interpretation of the term "procedural" and its emphasis on the first sentence of the REA, expressed concern about federalism as well. The Court found that the "broad command of *Erie*" was identical to the command of the REA: federal courts must apply state substantive law and federal procedural law.[89] Although the *Hanna* Court recognized that the problems were different under each standard and applied a constitutional test under the REA, the Court recognized that both standards seek to protect federalism. Thus, although the *Hanna* Court did not recognize that a procedural rule also may be substantive, the Court nonetheless emphasized federalism concerns in the context of the REA.

2. The Fifth Circuit

Although the Supreme Court has not given much consideration to the second sentence of the REA, the United States Court of Appeals for the Fifth Circuit has given effect to the limitation that the sentence imposes. In *Perry v. Allen*[90] the plaintiff sued the Internal Revenue Service for recovery of taxes. The plaintiff died during the litigation and the case focused on Federal Rule of Civil Procedure 25(a)(1), which provides that if a litigant does not bring a motion for substitution of a deceased party within two years after the death, the court must dismiss the action.[91] The plaintiff's successors argued that the rule impermissibly infringed upon the plaintiff's federal substantive right to sue. The court noted that when the Supreme Court enacted Rule 25(a)(1) a federal statute of limitations existed, and the Supreme Court intended Rule 25(a)(1) merely to provide the means for enforcing the statute of limita-

87. *Id.* at 474 (Harlan, J., concurring). Justice Harlan felt that the *Erie* doctrine alone should control all choices between state and federal law in diversity cases. *See* Ely, *supra* note 5, at 699.

88. *Hanna*, 380 U.S. at 475-77 (Harlan, J., concurring).

89. *Id.* at 465.

90. 239 F.2d 107 (5th Cir. 1956).

91. FED. R. CIV. P. 25(a).

tions.[92] The statute provided the substance and the rule provided the procedure. The court further noted that Congress repealed the statute in 1948, several years before the *Perry* case commenced.[93] The court, therefore, had to evaluate the effect and the validity of the federal rule standing alone.[94]

The court held Rule 25(a)(1) invalid, reasoning that the REA required that a rule be procedural and that it not affect substantive rights.[95] The court found that the REA authorized rules that "provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and do not purport to deal with the law which gives or defines such rights . . . or the existence or boundaries of the remedies" for those rights.[96] Thus, the court held that Rule 25(a)(1) was invalid because it attempted to abridge the plaintiff's right to bring an action to trial on the merits.[97] The court stated that "[s]uch an attempt is outside the mandate and inside the caveat of the Act of Congress."[98] The court concluded that for the substantive law of limitations on the right of substitution, the court must look to the "general law," federal or state.[99]

The Fifth Circuit, therefore, has given effect to the Act's second sentence. The *Perry* court recognized that although the Supreme Court designed Rule 25(a)(1) to be procedural, it abridged substantive rights. While *Perry* arguably implied that the lack of a federal statute of limitations caused the rule to cease to be procedural, the Fifth Circuit's concern that the rule fell outside the mandate of the REA because it affected substantive rights suggests that the court recognized the REA contemplates that a rule can be procedural yet also affect substantive rights. The *Perry* opinion arguably meets Professor Ely's criticism that the *Sibbach* Court was unwilling to accept the possibility of a situation that the drafters of the Act addressed in the second sentence.[100] The Supreme Court, nevertheless, has not gone beyond *Sibbach* and *Hanna* in its analysis of the second sentence. Scholarly opinion in the area may help flesh out the meaning of the REA and the broad lan-

92. 239 F.2d at 110.
93. *Id.*
94. *Id.* at 110-11.
95. *Id.* at 111-12.
96. *Id.*
97. *Id.* at 112.
98. *Id.*
99. *Id.* The court then looked to federal law because the subject matter was federal.
100. Ely, *supra* note 5, at 719.

guage of the opinions that have interpreted the Act.

3. Commentators

Professors Ely and Burbank disagree in their interpretations of the Rules Enabling Act,[101] but a comparison of their approaches will help focus the state-federal conflict. Professor Ely believes that the substantive-procedural dichotomy reflects a federalism concern. Professor Burbank proposes that the dichotomy reflects a federal allocation of powers concern.

Professor Ely approaches conflicts between federal and state rules of civil procedure under the REA with two constructs: (1) the federal checklist approach, which provides that the Constitution lists the powers of the federal government; and (2) an enclave construct, which recognizes an enclave of exclusive state authority.[102] According to Professor Ely, the first sentence of the Act embodies the federal checklist approach and the second sentence contains the enclave analysis.[103] He defines a procedural rule as a rule designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes,[104] while a substantive rule is a right granted for one or more nonprocedural reasons.[105] Professor Ely then proposes a two-step analysis. The first step is to determine whether the rule is procedural and thus satisfies the first sentence of the REA. The second step is to determine whether applying the rule would abridge any substantive rights under a conflicting state statute in violation of the second sentence of the REA.[106]

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101. *See* Burbank, *supra* note 72; Ely, *supra* note 5.

102. Ely, *supra* note 5, at 701-02.

Generally, Professor Ely rejects the idea that the Constitution embodies an enclave of state power, believing instead that whatever is not on the federal checklist belongs to the states, as the tenth amendment provides. *Id.* at 701-02. For the REA, however, he resurrects the enclave analysis, in light of the second sentence. *Id.* at 719.

103. *Id.*

104. *Id.* at 724.

105. *Id.* at 725. Professor Ely suggests that a rule could be both procedural and substantive. For example, he explains that states enact statutes of limitations for the substantive purpose of relieving people's minds and for the procedural purpose of keeping down the size of court dockets and avoiding stale, untrustworthy evidence. According to Professor Ely, a rule that is procedural and substantive would pass the first sentence of the REA but fail under the second sentence. *Id.* at 726-27.

106. *Id.* Aiming to resurrect the second sentence of the Act, Professor Ely discusses *Ragan*, *Woods*, and *Cohen*. *See supra* text accompanying notes 38-56. He argues that the Court decided *Ragan* correctly, although the Court applied the wrong standard because the state's choice of the service of summons as the event that tolls the statute of limitations may be substantive. The statute guarantees the right to "breathe easy" at the end of two years

Professor Ely takes a different approach to the Federal Rules of Evidence.[107] He recognizes that because Congress, not the Court, promulgated the Rules of Evidence, the REA is not in issue, and only the Constitution limits Congress' power to enact rules. For example, Congress could pass a rule abolishing state privileges because arguably it would be procedural.[108] Professor Ely proposes, however, that Congress should be aware that enacting this kind of rule ignores a view of federalism that has "throughout our history been imposed on the allocation of lawmaking authority in connection with diversity jurisdiction."[109] Professor Ely, therefore, is aware of the congressional power to promulgate procedural rules that abridge substantive rights, but he believes that federalism concerns will, or at least should, guide Congress.[110]

Professor Burbank criticizes scholars and jurists for consigning the legislative history of the Act to "oblivion."[111] He believes that the history reflects the primary focus of the Act: allocating power

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unless notified otherwise. Ely, *supra* note 5, at 731. Professor Ely also suggests that the statute in *Woods*, which denied jurisdiction to some corporations, could have had the substantive goal of encouraging corporate qualification. *Id.* at 728. In *Cohen* the state statute intended to deter the small stockholder's "strike suit" to harass and coerce settlement. According to Ely, the substantive purpose of the statute was to stop the stockholder from acting in bad faith. *Id.* at 729. He concludes that because the statutes in *Ragan*, *Woods*, and *Cohen* did more than improve the process of conducting a lawsuit, the Federal Rules should not have supplanted the statutes, in light of the second sentence of the REA.

107. *See* Ely, *supra* note 5, at 740.

108. *Id.*

109. *Id.* Professor Ely points out that, considering all the ways in which Congress has power to displace state law, the realization that Congress has broad power to promulgate rules that displace state law in diversity cases becomes considerably less frightening. *Id.* at 706 n.77. Ely contends that no reason exists in the diversity jurisdiction context to be less trustworthy of the sensitivity of the political process to potential administrative nightmares and legitimate claims of local control. Professor Ely cites RDA, the REA, and Congress' recent intervention and revision of the Federal Rules of Evidence as examples of congressional sensitivity to legitimate claims of local control. *Id.*

110. Professor Ely published his theory before Congress enacted the Federal Rules of Evidence. In line with his "warning," Congress substituted Rule 501, which refers to state law on privileges in cases under state substantive law, for the Court's version. As stated in the *Hearings*, the rules as proposed encroached on legislative prerogatives and, by abrogating state privileges, violated principles of federalism. *Hearings*, *supra* note 12, at 171; *see also* S. REP. No. 1277, 93d Cong., 2d Sess. 1, 11 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7052-53 (discussing Rule 501 and the controversial nature of the proposed rules on privileges).

111. Burbank, *supra* note 72, at 1024-26. Professor Burbank criticized several Supreme Court decisions. Concerning *Hanna*, he declared, "the case gave new life to another myth"—federalism. *Id.* at 1035. Referring to *Sibbach*, he stated that the court erroneously implied that the substance-procedure dichotomy had its roots in federalism concerns. *Id.* at 1108. Professor Burbank also regrets the Court's "hypersensitivity" regarding the displacement of state law. *Id.* at 1187.

between the Supreme Court as rulemaker and Congress.[112] Professor Burbank argues in favor of the significant interpretive value of the pre-1934 history.[113] He recalls that in cases in which the reports and debates preceding passage of legislation by Congress have been uninformative, the Court has considered materials from prior sessions of Congress when the Act in question has remained constant and the language of the original bill was carried forward into the act.[114] In reference to the REA, Professor Burbank notes that the bill before Congress in 1934 essentially was unchanged from the 1924 version.[115] Conceding that a gap of several years existed between the consideration of the bill and its enactment, Burbank finds that nothing happened in the interim to suggest that Congress sought to achieve a different purpose in using the identical language.[116] Professor Burbank also argues that the ABA mate-

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112. *Id.* at 1025 *passim.*

The legislative history of the Act traces nearly half a century of efforts to devise a uniform set of federal procedure rules. The American Bar Association (ABA) Committee on Uniformity of Procedure and Comparative Law became active in the late nineteenth century. In 1911 the Supreme Court began to revise its Equity rules. *Id.* at 1048. In the following year, the Report of the ABA Committee on Judicial Administration and Remedial Procedure recommended that Congress adopt the federal model of uniform procedure that the Supreme Court had prepared. The ABA Committee on Uniform Judicial Procedure collaborated with Judge Clayton, Chairman of the House Judiciary Committee, in preparing a bill that was introduced in both houses of Congress. At the request of the ABA, the House Judiciary Committee held hearings on the Clayton Bill in 1914. *Hearings on ABA Bill Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. 22 (1914). The 1914 House Report emphasized that the bill represented an equitable division of power between the Supreme Court and Congress. H.R. REP. No. 462, 63d Cong., 2d Sess. 1, 14-15 (1914).

In 1923 Senator Cummins and Chief Justice Taft rewrote the uniform federal procedural bill, introducing the two sentences of the present REA almost verbatim. Burbank, *supra* note 72, at 1071-75; *see* S. 2061, 68th Cong., 1st Sess., 65 CONG. REC. 1074 (1924) (the Cummins bill). According to the draftsmen, they designed the sentence to provide that the rules shall not abridge substantive rights to emphasize that Congress could not confer legislative power upon the Supreme Court. Burbank, *supra* note 72, at 1073 (quoting letter from the Honorable Albert B. Cummins to the Honorable William H. Taft (Dec. 17, 1923)) (William Howard Taft Papers, Library of Congress, Washington, D.C., reel 259). In 1926 the Senate Judiciary Committee stated that the bill's grant to make rules governing the practice and procedure of courts did not extend any power to affect substantive rights or remedies. S. REP. No. 1174, 69th Cong., 1st Sess. 1, 9 (1926). The Committee reasoned that these matters were not "mere procedure" but were "solely within the legislative power." *Id.* Controversy arose over the scope of the grant of power to the Court and the bill did not reach a vote in the Senate. Burbank, *supra* note 72, at 1085-89. In 1934 the bill was reintroduced and became law in almost the same form as the original version. *Id.* at 1097; *see* Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064; *cf.* S. 2061, 68th Cong., 1st Sess., 65 CONG. REC. 1074 (1924) (the original version—the Cummins Bill).

113. Burbank, *supra* note 72, at 1098-1101.

114. *Id.* at 1098-99.

115. *Id.* at 1099.

116. *Id.*

rial concerning the uniform federal procedure bill is helpful in interpreting the REA because the congressional materials are ambiguous.[117] Finally, he reasons that because ambiguity exists, the public history of the time and historical and jurisprudential perspectives give meaning to the Act.[118]

Although Professor Burbank concedes that the foregoing historical interpretation is "delicate," he nevertheless constructs a definitive purpose from these materials.[119] His conclusion—that Congress intended the REA to ensure congressional/judicial separation in rulemaking—is inconsistent with the history of the time because it does not consider federalism. Although the Supreme Court decided *Erie* in 1938, concern with state powers existed before then. In fact, some commentators refer to that concern as the "pervasive problem of federalism."[120] In light of the ever present issue of federalism, the REA must encompass more than just a purpose to allocate federal power. ABA materials and hearings on bills that Congress never passed cannot furnish the only means by which to interpret the Act. The structure and language of the Act suggest a congressional concern with substantive rights, and federalism is the doctrine that protects state substantive law.[121] The Supreme Court has recognized federalism considerations in both the RDA and the REA context. In addition, Congress made changes in the Court's proposed Rules of Evidence to protect state substantive law and to preserve federalism.[122] By intervening, Congress enforced the limitation in the second sentence of the REA.[123] Finally, many commentators agree that Congress has demonstrated a sensitivity to state law.[124]

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117. *Id.* at 1100-01.

118. *Id.* at 1101.

119. *Id.*

120. H. HART & H. WECHSLER, *supra* note 85, at 578.

121. Professor Burbank contends that the pre-1934 history makes clear that "the protection of state law was deemed a probable effect, rather than the purpose of, a limitation designed to allocate lawmaking power between federal institutions." Burbank, *supra* note 72, at 1106. To label the protection of state law an "effect," however, is misleading. While the primary purpose of the Act may have been to allocate power between the Court and Congress, this assumption does not foreclose the possibility that Congress also wanted to protect state law as a corollary, or at least a secondary, purpose. By preserving the allocation of power, Congress preserved its power over substantive law, and in the tradition of federalism, Congress probably intended to protect rather than abridge already existing state substantive law. *See supra* notes 109-10 and accompanying text.

122. *Hearings*, *supra* note 12, at 171; *see* Ely, *supra* note 5, at 719.

123. Wellborn, *supra* note 5, at 401.

124. *See* D. LOUISELL & C. MUELLER, *supra* note 9, at 264-65; Wellborn, *supra* note 5, at 401. *See generally* Ely, *supra* note 5. Professor Burbank feels that these commentators

C. *Federal Rule of Civil Procedure 43(a)*

Before Congress enacted the Federal Rules of Evidence, Federal Rule of Civil Procedure 43(a) was the law of evidence in the federal courts in civil cases.[125] Treatment of federal-state conflicts under the rule, therefore, is enlightening to the discussion of the Rule 407 conflict. Rule 43(a) established a three-part test, and courts used the rule to admit, rather than exclude, evidence.[126] During the rule's tenure, few federal statutes addressed evidence in civil cases, and courts cited even fewer evidentiary rules in federal equity cases.[127] A conflict between a federal and a state rule, therefore, would have been rare if the courts had construed the rule narrowly. Courts, however, interpreted the rule liberally for two reasons. First, courts had an expansive view of the "federal equity" ground of admissibility.[128] Second, because courts thought of Rule 43(a) as a rule of admissibility, the idea arose that federal courts possessed the inherent power to admit evidence that did not even fit within the three categories of Rule 43(a).[129]

In *Monarch Insurance Co. v. Spach*[130] the United States Court of Appeals for the Fifth Circuit approached a federal-state conflict as an *Erie* problem and applied a hybrid RDA-REA test. *Monarch* was one of the rare cases that faced the *Erie* problem squarely under Rule 43(a).[131] Other courts had refused to follow state exclusionary rules in the face of a conflict, but reached this decision with little analysis.[132] In *Monarch* the state statute man-

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have failed to do adequate research. "Scholars and law reformers both need to set priorities on original investigation. Over time, one person's neglect becomes another's ignorance." Burbank, *supra* note 72, at 1024.

125. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2403 (1971); Wellborn, *supra* note 5, at 406-08.

The rule provided in part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held.

FED. R. CIV. P. 43(a) (substantially amended 1975).

126. 9 C. WRIGHT & A. MILLER, *supra* note 125, at 313.

127. Wellborn, *supra* note 5, at 407.

128. 9 C. WRIGHT & A. MILLER, *supra* note 125, at 316; Wellborn, *supra* note 5, at 407; *see* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960); *infra* text accompanying notes 130-43 (discussing *Monarch*).

129. 9 C. WRIGHT & A. MILLER, *supra* note 125, at 319; Wellborn, *supra* note 5, at 407.

130. 281 F.2d 401 (5th Cir. 1960).

131. 9 C. WRIGHT & A. MILLER, *supra* note 125, at 322-24.

132. *Id.*; *see, e.g.*, Mutual Life Ins. Co. v. Bohlman, 328 F.2d 289, 293-94 (10th Cir. 1964) (stating that questions of evidence are procedural not substantive); Hambrice v. F. W.

dated exclusion of evidence that was admissible under Rule 43(a).[133] The court referred to *Erie* and *York*,[134] but reasoned that the court should balance countervailing policy considerations against the outcome determinative test.[135] Two of these considerations, according to the court, were the historic purpose of the federal rules—to establish uniformity in federal procedure—and the forces that led Congress to pass the REA.[136] The court found that the Rules of Evidence were mostly procedural, but could affect substantive rights as well.[137] The court, however, concluded that the very presence of Rule 43(a) in the Federal Rules proved that it was procedural. The court reasoned tbat the Supreme Court was aware of the limits of its power under the REA when the Court decided to include Rule 43 in the Federal Rules. The Fifth Circuit, therefore, found that concerning *admissibility* at least, the Rules of Evidence were procedural.[138]

According to the *Monarch* court, resolving a conflict between state and federal rules of evidence is a two-step process. The first step is to determine whether the evidence is admissible under Rule 43(a). The court gave an expansive reading to prior federal equity practice and held that the evidence was admissible.[139] The second step is to decide whether any considerations would call for excluding the evidence.[140] The court stated that *Erie*, in some situations, would limit Rule 43(a).[141] The court held that it had to undertake an analysis of the nature of the state policy behind the rule of ex-

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Woolworth Co., 290 F.2d 557, 559 (5th Cir. 1961) (same); Gillespie v. Equitable Life Assurance Soc'y, 152 F. Supp. 109, 111 (W.D. PA. 1957) (same).

133. *Monarch*, 281 F.2d at 404. The state rule excluded written statements by injured parties who did not have the opportunity on demand to see those statements. *Id.* at 401.

134. *Id.* at 404-05.

135. *Id.* at 406-08; *see* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-38 (1958) (the federal policy favoring jury decisions of disputed fact questions is a countervailing consideration to the outcome determinative test).

136. *Monarch*, 281 F.2d at 408.

137. *Id.* The court emphasized that "many so called procedural rules may represent local policy . . . . [S]uch rules in that sort of context are sometimes indistinguishable from principles traditionally regarded as substantive." *Id.*

138. *Id.* at 409. The court's attempt to prove that the rules are procedural is weak at best. The Supreme Court also thought that the proposed Federal Rules of Evidence were appropriate, yet Congress disagreed. Thus, relying solely on the Supreme Court's opinion of what is appropriate is misleading. In addition, the *Monarch* court implied that exclusionary rules, as opposed to rules of admissibility, are substantive. The court, therefore, cleared Rule 43(a) by declaring that it was a rule of admissibility. *Id.* at 409-10.

139. *Id.* at 411.

140. *Id.* at 410.

141. *Id.*

clusion in light of the outcome determinative test. The court found no significant effect on the outcome would occur if it admitted the evidence.[142] The second step of the analysis focused on "other factors implicit in the *Erie* concept"[143] that are more in line with an REA analyses. The court's reasoning is muddied because it applied a hybrid of RDA and REA analysis. The use of the outcome determination test, the references to the REA, and the overall labeling of the test as applying "*Erie* considerations" confuse the appropriate standards. The opinion, nonetheless, clearly illustrates a sensitivity to state substantive policy under Rule 43(a).

D. The Federal Rules of Evidence

Before Congress enacted the Federal Rules of Evidence,[144] the body of evidence law that the federal courts applied was complex and impractical.[145] The draftsmen of the Federal Rules of Civil Procedure recognized the need but lacked the time and resources to deal comprehensively with evidence.[146] Rule 43(a) was an unsatisfactory "stop-gap" measure in light of the need for uniformity in federal procedure.[147] Controversies, however, arose concerning the nature of rules of evidence and the scope of the power that Congress gave the Court through the REA. On the one hand, some scholars proposed that rules of evidence are procedural, rather than substantive.[148] Professor Morgan, for instance, reasoned that rules of evidence are necessarily procedural, basing that conclusion on his doctrinal approach to the terms "substance" or "procedure": rules of substance determine the legal relations between parties; rules of procedure guide the judicial system in fact-finding.[149] Professor Morgan noted, for example, that when legislatures draft codes of procedure, they include rules governing not only the competency but also the privileges of witnesses.[150] He reasoned, there-

142. *Id.* at 412.

143. *Id.* (emphasis added).

144. For a detailed history of the rules, see P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 1-9 (Supp. 1975); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1007 (1969 & Supp. 1983).

145. Weinstein, *supra* note 82, at 354; Wellhorn, *supra* note 5, at 372.

146. Weinstein, *supra* note 82, at 354.

147. *Id.* at 355; *cf.* Wellborn, *supra* note 5, at 373.

148. *See, e.g.*, Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 277-82 (1962); Morgan, *Rules of Evidence—Substantive or Procedural*, 10 VAND. L. REV. 467, 483-84 (1957).

149. Morgan, *supra* note 148, at 468.

150. *Id.* at 483.

fore, that when a legislature delegates to the courts the function of regulating procedure, as Congress did in the REA, the legislature intends to include the subject of privileges.[151]

Judge Weinstein, on the other hand, recognized that certain evidence rules are substantive.[152] He developed the thesis that evidence law has three kinds of rules: (1) rules that aim at ensuring accurate fact-finding; (2) rules that prescribe burdens of proof and presumptions; and (3) rules that further wholly extrinsic policies.[153] The third category includes rules designed to achieve independent substantive impact.[154] According to Judge Weinstein, this third group of rules presented the most difficult problem for the drafters of the federal uniform rules of evidence.[155] Judge Weinstein proposed three possible approaches to this problem: (1) apply the state rule in all cases; (2) ignore the state rule in all cases; and (3) apply the state rule only to issues to which state substantive law is material.[156] Weighing the concerns on each side, Judge Weinstein concluded that a federal rule is useful, but should include a provision deferring to state evidence law in cases predicated on state substantive law.[157] Under Judge Weinstein's approach, the law of the state that creates the privileges, or makes evidence admissible or inadmissible, or makes witnesses competent or incompetent on the basis of state substantive policies, should control.[158]

The Supreme Court's proposed Rules of Evidence incorporated little state evidence law by reference, notwithstanding a considerable body of critical opinion favoring more deference to state law.[159] As Judge Weinstein had feared, the rules threatened to encroach upon areas of substantive law. Consequently, Congress deferred the effective date of the rules until it had an opportunity to consider and approve each rule.[160] The main issues facing Congress were whether the Supreme Court had the power to adopt substan-

151. *Id.*
152. Weinstein, *supra* note 82, at 370.
153. *Id.* at 361.
154. *Id.* at 370.
155. *Id.*
156. *Id.* at 371
157. *Id.* at 373.
158. *Id.* at 376.
159. Wellborn, *supra* note 5, at 373-74; *see* Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence*, 122 U. PA. L. REV. 594, 625-26, 629 (1974); Weinstein, *supra* note 82, at 363, 370, 373, 375-76.
160. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

tive rules[161] and whether the proposed rules violated principles of federalism.[162] Former Supreme Court Justice Arthur J. Goldberg testified that the legislative history of the REA clearly indicated that Congress intended to limit the power of the Court to rules of practice and procedure of the kind Goldberg characterized as "housekeeping rules."[163] Quoting the second sentence of the REA, Goldberg reasoned that the Supreme Court had no delegated power to approve rules of evidence that concerned matters of "substance."[164] He testified that privileges, burdens of proof, and conclusive presumptions were substantive issues and thus beyond the rulemaking power.[165] Goldberg also cited *Erie* for the proposition that "federal courts in diversity cases have no power to create and apply substantive federal law in conflict with the laws of the states where the courts preside."[166] Goldberg elevated the *Erie* principle of federalism to a constitutional level and had trouble with the proposed rules for that reason.

The testimony of two representatives of the Washington Council of Lawyers[167] also referred to the scope of the rulemaking power and the problem of federalism.[168] They believed that Article V of the Proposed Rules of Evidence, which abolished all state-created privileges, infringed on legislative responsibility.[169] Moreover, because of the special nature of rules of privilege as expressions of state policy, both representatives felt that total abrogation of state privileges by federal judicial rulemaking raised the most fundamental problems of federalism.[170] The representatives testi-

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161. *Hearings, supra* note 12, at 142 (testimony of former Supreme Court Justice Arthur J. Goldberg). Goldberg's testimony supports Professor Burbank's analysis that the REA is concerned with the allocation of power between the Court and Congress. *See supra* text accompanying note 112. Goldberg's testimony, however, also referred to *Erie* and principles of federalism. *See Hearings, supra* note 12, at 156.

162. *Hearings, supra* note 12, at 171 (testimony of Charles R. Halpern & George T. Frampton, Jr., on behalf of the Washington Council of Lawyers). This testimony runs counter to Professor Burbank's analysis and supports the analyses of Professors Ely and Wellborn.

163. *Id.* at 142-43.

164. *Id.* at 155.

165. *Id.* at 156.

166. *Id.*

167. Charles R. Halpern & George T. Frampton, Jr., spoke as representatives of the Washington Council of Lawyers, a professional organization formed in 1971. The organization does *pro bono* work and sends its representatives to testify in front of Congress on legal matters.

168. *Hearings, supra* note 12, at 171.

169. *Id.*

170. *Id.*

fied that the social value of certain relationships was a paramount *state* interest worthy of protection.[171]

In light of the debates, proposals, and hearings, Congress changed the rules that the Court drafted.[172] Certain of the changes Congress fashioned were in response to complaints of infringement of state substantive law.[173] For example, Congress replaced the Court's specific privilege rules with Rule 501, which refers to state law on privileges in cases in which state substantive law governs.[174] Congress also included other changes to make the rules conform to state substantive law by providing a reference to state law in Rule 601, which discusses the competency of witnesses.[175] Congress, therefore, changed the rules that were most "conspicuously vulnerable" to a challenge under the second sentence of the REA.[176] Congress was careful to ensure that the uniform procedural rules did not infringe on state substantive law.[177] Applying the constitutional standard to rules of evidence, therefore, although proper because of the method of promulgation, would erode the very reason that Congress intervened and revised the rules of evidence.[178]

Courts, nevertheless, generally use the Constitution to determine whether a Federal Rule of Evidence is valid:[179] If a rule is procedural, then it is valid.[180] Under this approach, all of the Federal Rules of Evidence are valid.[181] Commentators disagree over whether the courts' approach is correct.[182] The debate centers

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171. *Id.*

172. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

173. Wellborn, *supra* note 5, at 401.

174. FED. R. EVID. 501; *see* S. REP. No. 1277, 93d Cong., 2d Sess. 6-7 (1974); H.R. REP. No. 650, 93d Cong., 1st Sess. 8-9 (1973).

175. H.R. REP. No. 650, 93d Cong., 1st Sess. 9 (1973). Rule 601 of the Federal Rules of Evidence states in part: "With respect to an element of a claim or defense as to which State law supplies the Rule of decision, the competency of a witness shall be determined in accordance with State law." FED. R. EVID. 601.

176. Wellborn, *supra* note 5, at 401.

177. *Id.* at 402.

178. *Id.* at 406.

179. *See* Rioux v. Daniel Int'l Corp., 582 F. Supp. 620, 624 (D. Me. 1984); *cf. Hanna*, 380 U.S. at 471-72. *Rioux* referred to *Hanna* in applying the constitutional standard to acts of Congress, such as the Rules of Evidence. Commentators also support this position. *See* Ely, *supra* note 5, at 698, 740; Wellborn, *supra* note 5, at 398.

180. *See Hanna*, 380 U.S. at 472; Wellborn, *supra* note 5, at 398.

181. Wellborn, *supra* note 5, at 398, 400. Professor Wellborn, however, argues that, with respect to the displacement of state law, the second sentence of the REA also should guide the construction of the rules. *Id.* at 398 n.154.

182. Professor Wright has argued that the *Erie* doctrine of federalism affects the Federal Rules of Evidence the least because the rules are arguably procedural. 19 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4512, at 190 (1982). He con-

around the extent to which courts should consider the second sentence of the REA in evaluating rules of evidence, or simply rubberstamp the rules without considering issues of federalism.

III. The Instant Conflict

A. *Federal Rule of Evidence 407*

Federal Rule of Evidence 407 excludes evidence of subsequent remedial measures as proof of negligence or culpable conduct.[183] The second sentence of the rule admits evidence when a party offers it for purposes other than to prove fault.[184] The scope of the rule includes any postaccident change, repair, or precaution. It codifies the almost uniform practice in American courts of excluding evidence of subsequent repair.[185] The rule applies most often in manufacturer liability cases to exclude evidence of subsequent modifications in product designs.[186]

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cedes that a varied collection of state rules exist that courts sometimes consider as rules of evidence, when in fact they serve as substantive state policies. Professor Wright realizes that rules such as parole evidence, statutes of fraud, and other state rules are more properly substantive laws within the meaning of *Erie*, but he concludes that the Federal Rules of Evidence do not affect or alter these "substantive rules of evidence." *Id.* at 194-95; *see also* Ely, *supra* note 5, at 740 (contending that the REA is not the appropriate standard by which to measure the rules). Professor Wellborn, on the other hand, fears that the Federal Rules of Evidence can derogate state substantive law. Wellborn, *supra* note 5, at 406. He focuses primarily on the impact of relevancy rules. Professor Wellborn proposes that in light of the historical background of the Rules of Evidence, the REA is an appropriate guideline for applying the rules, and the Court should interpret the rules as falling within the command of the second sentence of the Act. *Id.* at 402.

183. Rule 407 of the Federal Rules of Evidence states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

184. *Id.*

185. D. LOUISELL & C. MUELLER, *supra* note 9, at 235; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, at 5.

186. 2 J. WEINSTEIN & M. BERGER, *supra* note 9, at 5. Before the Federal Rules of Evidence, the court applied the common-law exclusionary rule to product design cases. *See* Stephan v. Marlin Firearms Co., 353 F.2d 819, 822-23 (2d Cir. 1965) (safety mechanism installed in rifle to prevent accidental discharge); Cox v. General Elec. Co., 302 F.2d 389, 390 (6th Cir. 1962) (change in washing machine to prevent opening before spinning stopped). Some circuits also have applied Rule 407 to products liability actions. *See* Hall v. American Steamship Co., 688 F.2d 1062 (6th Cir. 1982); Oberst v. International Harvester Co., 640 F.2d 863 (7th Cir. 1980). The Eighth Circuit, however, will not extend the rule to products liability cases. *See* Unterberger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980). Finally, some states expressly admit subsequent repair evidence in products liability actions. *See supra*

The primary reason for excluding evidence under Rule 407 is to promote the social policy of encouraging people to take safety precautions, especially after an accident has proven that precautions were needed.[187] The Advisory Committee Note to rule 407 states that the rule rests on two grounds.[188] First, the conduct—improving safety after an accident—is not an admission of negligence because the conduct is equally consistent with injury by mere accident or contributory negligence.[189] The Committee, however, concedes that under the Federal Rules' liberal theory of relevancy, the first ground alone would not justify excluding the evidence because the inference that the conduct is an admission is still possible.[190] Federal Rule of Evidence 401 provides a low threshold for relevancy,[191] which evidence of subsequent repairs arguably meets. Thus, the Advisory Committee identifies a second, "more impressive" ground for excluding evidence: the social policy of encouraging people to take steps to promote safety.[192] The Advisory Committee, therefore, recognizes that the procedural grounds for the rule are tenuous; the main reason for the rule is the social policy.

Because Rule 407 rests in large part on an extrinsic policy,[193] it may affect substantive rights. Professor Schwartz called this problem to the attention of the House Judiciary Committee at the hearings on the proposed rules.[194] He told Congress that Rule 407 ignores the *Erie* principle because the rule is not based on relevance, but on the goal of encouraging repairs.[195] He concluded that

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note 17 (citing relevant state statutes).

187. Hall v. American Steamship Co., 688 F.2d 1062, 1067 (6th Cir. 1982); Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Stephan v. Marlin Firearms Co., 353 F.2d 819, 823 (2d Cir. 1965) (applying state version of Rule 407); FED. R. EVID. 407 advisory committee note; *see* D. LOUISELL & C. MUELLER, *supra* note 9, at 235; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, at 7.

188. FED. R. EVID. 407 advisory committee note.

189. *Id.*

190. See *infra* text accompanying notes 287-89 for a discussion of the probative value of the evidence.

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

192. FED. R. EVID. 407 advisory committee note.

193. D. LOUISELL & C. MUELLER, *supra* note 9, at 235.

194. *Hearings, supra* note 12, at 302-03 (letter of July 31, 1973, Professor Victor E. Schwartz to the Honorable William L. Hungate).

195. *Id.* at 303. Professor Schwartz also asserted that the rule would not achieve this substantive goal because many defendants would make repairs even if the evidence were

whether such evidence is excluded should be a matter of state policy.[196] Congress ignored Professor Schwartz' point.[197] This oversight, however, is understandable because at the time most states recognized Rule 407,[198] and Congress changed only rules that were most conspicuously vulnerable to an REA challenge.[199] Maine did not adopt a rule contrary to Rule 407 until after Congress had enacted the Federal Rules. The rules of privilege and competency were highly controversial evidence rules before and after the draft because of the various state rules and underlying policies.[200] Rule 407 remained intact, however, because at the time there was no conflict with state law.

B. Maine Rule of Evidence 407

Unlike Federal Rule of Evidence 407, Maine Rule of Evidence 407 admits evidence of subsequent remedial measures for any purpose, including to prove negligence.[201] The Supreme Judicial Court of Maine promulgated the state rules of evidence in 1975, upon the recommendation of the state advisory committee.[202] The advisory committee, prompted to draft uniform rules for the state by the United States Supreme Court's promulgation of the Federal Rules of Evidence, nevertheless did not intend to conform to the Federal Rules merely for the sake of conformity.[203] In some instances, including Rule 407, the committee chose rules that differed from both existing Maine law and the proposed Federal Rules.[204] The basic premise behind adopting the Maine rules, as with the Federal Rules of Evidence, was an increased desire to admit evidence.[205]

When Maine promulgated Rule 407, it was contrary to Maine law, to the generally prevailing state law, and to the Federal

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admissible. *Id.*

196. *Id.*

197. D. LOUISELL & C. MUELLER, *supra* note 9, at 236.

198. *Id.* at 235, 265; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, at 5.

199. Wellborn, *supra* note 5, at 401. For example, Congress changed the rules of privilege and competency, which, unlike Rule 407, were highly controversial before and after the draft because of the various state rules and underlying policies.

200. *See id.*

201. Maine Rule of Evidence 407 states in part: "[W]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is admissible." ME. R. EVID. 407(a); *see* Note, *supra* note 15 (discussing the Maine Rule).

202. Field, *supra* note 16, at 203-04.

203. *Id.* at 204-05.

204. *Id.* at 206, 217.

205. *Id.* at 207.

Rule.[206] The rule evoked more comment in the public meetings on the rules than any other proposed rule and elicited dissenting views from two members of the Maine Advisory Committee.[207] Professor Field, then a consultant to the Maine Supreme Judicial Court's Advisory Committee on Rules of Evidence and an adviser to the Supreme Judicial Court of Maine, provided a commentary to accompany the rules.[208] In the commentary, Professor Field rejects the argument that Federal Rule 407 is based on the irrelevancy of evidence of subsequent repairs, because the broad definition of relevancy in Rule 401 would admit such evidence.[209] He also refutes the remaining ground for the exclusionary principle—"the sound public policy of encouraging repairs."[210] Professor Field reasons that Federal Rule 407 largely defeats this policy by admitting evidence for purposes other than proving negligence,[211] such as proving ownership or control. According to Professor Field, a limiting instruction to a jury to consider the evidence for only a narrow purpose is unlikely to be effective.[212] The Advisers' note to the Maine rule also expressly refutes the repair policy rationale.[213] Both Professor Field and the Advisers' note conclude that a judge may bring Rule 403 into play to exclude the evidence if the danger of prejudice substantially will outweigh the probative value of the evidence.[214] Professor Field's comments and the Advisers' note, however, indicate that, in the majority of cases, the social policy behind Federal Rule 407 and the argument that evidence of subsequent repairs is irrelevant were not persuasive to the Maine Supreme Court.

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206. *Id.* at 217.

207. *Id.*

208. *See* R. FIELD & P. MURRAY, MAINE EVIDENCE § 407.1, at 78 (1976) (commentary to the rule) [hereinafter cited as Commentary].

209. *See id.*

210. *Id.*; *see* Field, *supra* note 16, at 218.

211. Commentary, *supra* note 208, at 78; Field, *supra* note 16, at 218.

212. Commentary, *supra* note 208, at 79. Professor Field also contends that the "cold-blooded" defendant that the federal rule envisions would he aware of the many exceptions to the rule and that "enlightened self-interest" would lead a defendant to make repairs, even though the court might admit evidence of the action to prove fault. *Id.*

213. ME. R. EVID. 407 advisers' note.

214. Commentary, *supra* note 208, at 79; ME. R. EVID. 407 advisers' note. A clear case for using Rule 403 is when the defendant makes a change for reasons unrelated to the hazard. Field, *supra* note 16, at 218.

C. Rioux v. Daniel International Corp.

In *Rioux v. Daniel International Corp.*[215] the United States District Court for Maine held that Federal Rule of Evidence 407 applied in a diversity action in federal court and thus preempted Maine Rule 407.[216] The plaintiff in *Rioux* sued for the wrongful death of the defendant's employee, who died when a falling section of concrete-filled steel pipe struck him on the head.[217] The plaintiff contended that the pipe fell because it did not have adequate support.[218] The plaintiff tried to introduce evidence, pursuant to Maine Rule 407, to demonstrate that after the accident the defendant had changed its method of securing the piping.[219] The plaintiff argued that the evidence was relevant to show negligence.[220] The defendant filed a pretrial motion pursuant to Federal Rule of Evidence 407 to exclude the plaintiff's evidence.[221]

The court first focused on *Hanna v. Plumer*[222] and the arguably-procedural standard in the REA test.[223] The *Rioux* court held that even if the REA applied, the federal rule was valid because it was procedural.[224] The court stressed that no court ever had struck down a federal rule of procedure or evidence as exceeding Congress' constitutional power.[225]

The *Rioux* court also relied on the circumstances surrounding the promulgation of the Federal Rules of Evidence. The court noted that when Congress intervened and rewrote and enacted the rules of evidence,[226] Congress removed the rules from review under the RDA and the REA.[227] The court concluded that the Constitution alone determined the validity of the rules.[228] The court then found that because the rules of evidence are arguably procedural,

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215. 582 F. Supp. 620 (D. Me. 1984).

216. *Id.* at 625.

217. *Id.* at 622.

218. *Id.*

219. *Id.*

220. *Id.* at 622.

221. *Id.* at 621.

222. 380 U.S. 460 (1965).

223. *Id.* at 472. See *supra* notes 75-88 and accompanying text for a discussion of *Hanna* and the REA test.

224. *Rioux*, 582 F. Supp. at 624.

225. *Id.*

226. See *supra* notes 160-76 and accompanying text for a discussion of congressional intervention in the rules of evidence.

227. *Rioux*, 582 F. Supp. at 625.

228. *Id.*

they are clearly constitutional.[229] To bolster its conclusion, the court noted that Congress had deferred to state evidentiary laws by explicitly incorporating certain state evidentiary practices into other rules of evidence.[230] The court reasoned that because Congress had enacted a uniform rule for admission of subsequent remedial measures, rather than referring to state law, as in Rule 302, Rule 501, and Rule 601, Rule 407 was intended to supersede state law and was valid unless unconstitutional under the *Hanna* test.[231] The court refused to hold that Congress exceeded its constitutional power in promulgating the rule or that Congress erroneously considered the recommendations of the Advisory Committee and the Supreme Court.[232]

D. Moe v. Avions Marcel Dassault-Breguet Aviation *and* French v. Fleet Carrier Corp.

Less than two months before the decision in *Rioux v. Daniel*, the United States Court of Appeals for the Tenth Circuit held that Federal Rule of Evidence 407 did not preempt a contrary state rule.[233] In *Moe* the plaintiffs brought a products liability action seeking damages for wrongful death arising from an airplane crash, contending that the crash was due to a defective flight control system.[234] The plaintiffs sought to admit evidence of a document that the defendant manufacturer had published that warned of a known defect in the aircraft.[235] The trial court rejected the evidence on the basis of Federal Rules 407 and 403.[236] The court determined that state law did not govern Rule 407.[237] The plaintiffs appealed, arguing that under state law the court should admit evi-

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229. *Id.* The court applied the constitutional standard that the Supreme Court established in *Hanna*. *See supra* text accompanying note 59.

230. *Rioux*, 582 F. Supp. at 625; *see supra* notes 174-75 and accompanying text.

231. *Rioux*, 582 F. Supp. at 625; *see supra* notes 174-75 and accompanying text (discussing Rule 501 and Rule 601). Rule 302 states: "in civil actions . . . the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." FED. R. EVID. 302.

232. *Rioux*, 582 F. Supp. at 625.

233. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984).

234. *Id.* at 920-21.

235. *Id.* at 923.

236. *Id.* at 930. Federal Rule of Evidence 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403.

237. *Moe*, 727 F.2d at 931.

dence in a products liability action of the manufacturer's postaccident warning.[238]

The Tenth Circuit disagreed with the trial court's conclusion that the Federal Rules of Evidence exclusively govern the admissibility of evidence in diversity actions.[239] The court held that the question whether to exclude subsequent remedial measures is a matter of state law.[240] The court focused specifically on the conflict between Maine Rule 407 and Federal Rule 407.[241] The court reasoned that because products liability, like any tort action, is a state cause of action, and because the social policy of repairs is a state policy decision, a court should apply a state rule that conflicts with Rule 407 in a diversity action.[242] The court, however, held that no harm had resulted from the trial court's ruling that Federal Rule 407 applied because the trial court had expressly excluded the evidence under Rule 403.[243] The circuit court, therefore, affirmed the judgment. Although the court decided the case on a different ground, the court nonetheless held that the state rule should preempt Federal Rule 407 in diversity cases.

In *French v. Fleet Carrier Corp.*,[244] decided less than one month after *Rioux*, the District Court of Maine responded to the *Moe* holding in an extensive footnote.[245] The district court again focused on the promulgation of the Federal Rules of Evidence, which the court accused the Tenth Circuit of failing to consider.[246]

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238. *Id.* at 931; *see* Good v. A. B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977) (establisbing controlling state law in Colorado); Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). The *Good* court followed the reasoning in *Ault* that in a products liability action evidence of postaccident repair has a direct bearing on liability.

239. 727 F.2d at 931.

240. *Id.* at 932.

241. *Id.*

242. *Id.*

243. *Id.* at 934. The trial court excluded the evidence under Rule 403 because of unfair prejudice and jury confusion, and the appellate court held that the trial court did not abuse its discretion. *Id.*

244. 101 F.R.D. 369 (D. Me. 1984). In *French* the plaintiffs' jury trial demand was not timely under the Federal Rules of Civil Procedure. *Id.* at 370 n.2; *see* FED. R. CIV. P. 81(c). The plaintiffs argued that the Maine rule of procedure should apply. 101 F.R.D. at 370. The court held that because the federal rule was arguably procedural, the court did not have to apply the state rule. *Id.* at 372. This holding is proper because the disagreement between the rules is procedural, relating to the fairness and efficiency of the lawsuit. Nonetheless, perhaps the court should have examined whether the state rule was substantive because the plaintiffs sought a jury trial. *See* City of Aurora v. Erwin, 706 F.2d 295, 298 (10th Cir. 1983) (state may grant the right to a jury trial for either procedural or substantive reasons).

245. 101 F.R.D. at 371 n.3.

246. *Id.*

The district court reasoned that, although all rules have underlying policy considerations, the Supreme Court had held that the federal courts should apply the federal rules in diversity cases to the extent that the rules can "rationally be classified" as procedural.[247] The district court interpreted this language as a determination by Congress and the Court that the authority of federal courts to govern their own proceedings takes precedence over state policy considerations.[248] The court concluded that its interpretation did not violate *Erie*[249] and that the better approach to the problem was to follow *Hanna*.[250]

IV. The Proposed Approach

This Note contends that the *Rioux* court's analysis is incomplete and proposes a more intensive approach to conflicting state and federal rules. A more thorough analysis that shows greater deference to state law would conform to the approach that courts and Congress generally have taken to the federal rules and would agree with the opinions of jurists and scholars. A three-step approach would ensure proper emphasis on both principles of federalism and uniformity of federal procedure. First, the REA is an appropriate tool to balance conflicting rules, not only because the REA would have applied to Rule 407 if Congress had not intervened in the rule's promulgation,[251] but also because the purpose of Congress' intervention was to ensure that the rules of evidence were within the limitations of the REA.[252] In addition, the federal rule should pass the standards of both sentences of the REA.[253] Second, the policies underlying the RDA and the *Erie* line of cases should be a significant part of the analysis. The twin evils of *Erie*—forum shopping and discrimination[254]—are important concerns in any complete analysis of a federal-state rules conflict. The Tenth Circuit, the Fifth Circuit, and Congress have considered the issues of outcome determination and forum shopping in assessing the valid-

247. *Id.* The court referred to the language in *Hanna*. *See supra* text accompanying note 59.

248. 101 F.R.D. at 371 n.3.

249. See *supra* notes 20-27 and accompanying text for a discussion of *Erie*.

250. 101 F.R.D. at 372 n.3. The court's reference to *Hanna* seems to mean that rather than trying to separate substance and procedure, *Hanna* simplifies the test as solely a determination of whether the rule is arguably procedural. *Id.*

251. The Supreme Court reported the rules to Congress under the REA.

252. Wellborn, *supra* note 5, at 401; *see supra* text accompanying notes 172-77.

253. See *supra* notes 57-124 and accompanying text for a discussion of the REA.

254. *See supra* notes 24-27 and accompanying text.

ity of a federal rule.[255] Third, a court could interpret the rule narrowly to avoid the conflict with state law. Similarly, Congress or the Supreme Court should consider the feasibility and propriety of modifying the federal rule. This final step would entail determining whether a court can avoid the conflict by narrowing the scope of the rule.

A. The Rules Enabling Act Analysis

Some commentators and one federal court that has considered the validity of the Federal Rules of Evidence have opined that the REA does not apply to conflicts with state evidence rules.[256] The REA is no more than a statutory grant to the judiciary of Congress' constitutional authority to promulgate rules of procedure. They argue, therefore, that because Congress intervened directly in the promulgation of the Rules of Evidence, the rules are not subject to review under the REA but rather under Congress' constitutional authority to promulgate rules. In *Hanna v. Plumer*,[257] however, the Supreme Court elevated the REA to the level of a constitutional standard, implying that Congress passed all of its constitutional rulemaking authority to the courts when Congress enacted the REA. Assuming this contention is accurate, the REA, and the case law and comment it has engendered, *is* the proper standard by which to judge a rule that Congress promulgated.

1. Sentence One: Is the Federal Rule Procedural?

To determine whether a rule "really regulates procedure,"[258] or is "arguably procedural,"[259] as the first sentence of the REA demands, requires a definition of procedure. Procedure is an elusive and variable concept. According to Professor Ely, a procedural rule is a rule designed to get at the truth and make the litigation process a fair and efficient mechanism for the resolution of disputes.[260] Professor Morgan defines procedural rules as guides to judges and litigants for the use of judicial machinery for finding facts.[261] Fi-

255. *See* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 932 (10th Cir. 1984); Monarch Ins. Co. v. Spach, 281 F.2d 401, 412 (5th Cir. 1960); H.R. REP. No. 650, 93d Cong., 1st Sess. 9 (1973).

256. *See supra* notes 179-82 and accompanying text.

257. See *supra* notes 75-89 and accompanying text for a discussion of *Hanna*.

258. *See supra* text accompanying note 67.

259. *See supra* text accompanying notes 80-86.

260. Ely, *supra* note 5, at 724.

261. Morgan, *supra* note 148, at 468.

nally, the Fifth Circuit has indicated that the rules provided for in the REA establish

> [the] machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and [the rules] do not purport to deal with the law which gives or defines such rights, . . . [the rules] provide . . . only means to the end of achieving substantial justice and are not ends in themselves.[262]

Applying these definitions to Federal Rule 407, the rule clearly is not procedural. Rule 407 is based primarily, if not solely, upon social policy considerations and not upon relevancy or a concern for truthfinding.[263] The Advisory Committee note indicates that the principal ground for exclusion rests on a social policy of encouraging people to take steps to promote safety.[264] The purpose of Rule 407 has nothing to do with the fairness or efficiency of the litigation process. Nor is the rule a guide for factfinding. Rule 407 seeks to provide an end in itself—safety—and is not a means to the end of achieving substantial justice. Thus, Federal Rule 407 is merely a substantive policy in the guise of procedure and, therefore, arguably is not procedural. Nonetheless, the rule probably passes the first sentence of the REA because "arguably procedural" is a low threshold.[265] Assuming the rule could pass sentence one, however, it still must pass the test of sentence two.

2. Sentence Two: Is the State Rule Substantive?

Although most courts, including the Supreme Court, have not considered the second sentence of the REA, which expressly prohibits a rule from interfering with substantive law, there is good reason to believe that Congress intended the sentence to be a separate hurdle for federal rules that conflict with state rules. Some commentators and courts believe that the second sentence of the REA recognizes that a rule can be procedural and abridge substantive rights.[266] This approach is based on the belief that the REA would not expressly recognize this possibility if it did not intend to

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262. Perry v. Allen, 239 F.2d 107, 111 (5th Cir. 1956).

263. *See Moe*, 727 F.2d at 932; Hall v. American Steamship Co., 688 F.2d 1062, 1067 (6th Cir. 1982); Oberst v. International Harvester Co., 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., concurring and dissenting in part); *see supra* text accompanying notes 187-92.

264. FED. R. EVID. 407 advisory committee note.

265. See *supra* text accompanying notes 180-82 for a discussion of the arguably procedural standard.

266. *See Moe*, 727 F.2d at 932; Perry v. Allen, 239 F.2d 107 (5th Cir. 1956); Ely, *supra* note 5, at 719; *supra* text accompanying note 100 (discussing *Perry's* recognition that a rule could be procedural and substantive).

prohibit arguably procedural rules that have substantive effects from interfering with substantive law.[267] Congress apparently was impressed with this view when it agreed, in response to such federalism concerns, to intervene in the promulgation of the Federal Rules of Evidence. Congress changed many of the rules to protect against conflicts with state substantive law, overlooking Rule 407 probably only because no actual conflict with state law existed at the time.[268]

To determine whether a federal rule abridges, alters, or modifies any state substantive right and thus should be prohibited by the REA, the central issue is whether the conflicting state rule is substantive. Professor Ely defines a substantive right as a right granted for some purpose that does not have to do with the fairness or efficiency of the litigation process.[269] He focuses, therefore, on whether the state rule has any underlying substantive goal or policy.[270] Other commentators and cases take a different approach; they consider whether the area of law that the rules regulate is substantive.[271] This approach views a rule as substantive if it is so closely tied to the substantive law which it regulates that the rule becomes a part of the substantive law. A third perspective is Justice Harlan's approach in *Hanna*, in which he considered whether the choice of rule substantially would affect primary decisions respecting human conduct that the constitutional system traditionally leaves to state regulation.[272] This subsection considers each of these approaches in turn.

(a) Underlying State Policies

Under Professor Ely's approach, Maine Rule 407 contains two potential underlying substantive policies. First, the Maine Rule could reflect the basic tort policy of compensation—awarding damages to persons injured due to another's negligent acts. Admitting

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267. *See* Ely, *supra* note 5, at 719 (second sentence addresses the possibility that a rule could be procedural and at the same time abridge substantive rights).

268. *See supra* notes 15-18, 206 and accompanying text.

269. Ely, *supra* note 5, at 725.

270. *Id.* at 722.

271. *See Moe*, 727 F.2d at 932 (discussing the nature of products liability law); Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 838 (5th Cir. 1976) (evidentiary rule so bound up with state substantive law that court must apply the rule to give full effect to the law); D. LOUISELL & C. MUELLER, *supra* note 9, at 265 (discussing the field of tort law).

272. *Hanna*, 380 U.S. at 475; *see also* H. HART & H. WECHSLER, *supra* note 85, at 747 (introducing the "primary decisions respecting human conduct" formula).

evidence of subsequent repairs could be an attempt to ensure that every tortfeasor compensates his innocent victims. Perhaps Maine believes that the value of compensating victims outweighs the risk of discouraging defendants from making good faith repairs. Applying the federal rule, therefore, would defeat the substantive policy underlying the state rule.

Second, the Maine rule may reflect a substantive policy decision that encouraging repairs is not well served by the federal rule. The *Rioux* court noted that the Maine rule allows the evidence "on the basis of a deliberate policy decision,"[273] and then cited Professor Field's refutation of the repair policy rationale.[274] By considering the repair policy and expressly refuting it, therefore, the Maine committee may have made a policy choice about what promotes safety and what does not. The federal rule, by imposing the federal government's views on safety, abridges the power of the state to establish its own substantive policy.

(b) Nature of the Rule

Professors Louisell and Mueller note that state and federal Rules 407 regulate tort liability.[275] Tort law is clearly substantive. Consequently, they argue that Rule 407, by the very nature of the body of law that it regulates, is substantive. In the area of products liability, the *Moe* court adopted this theory by holding that a state rule in variance with Rule 407 "is so closely tied to the substantive law . . . which it regulates" that courts must use the state rule to avoid forum shopping.[276] Similarly, in *Conway v. Chemical Leaman Tank Lines, Inc.*[277] the court held that the state rule regulating the admission of evidence of a widow's remarriage in a wrongful death case was so bound up with state substantive law that federal courts sitting in Texas should accord the evidence the same weight as the state courts to give full effect to Texas' substantive policy.[278] According to this theory, because the nature of both state and federal Rules 407 is substantive, courts should give full effect to the second sentence of the REA by overriding the federal rule and applying the state rule instead.

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273. 582 F. Supp. at 623.
274. *See supra* text accompanying note 209.
275. D. LOUISELL & C. MUELLER, *supra* note 9, at 265.
276. 727 F.2d at 932.
277. 540 F.2d 837 (5th Cir. 1976).
278. *Id* at 838.

(c) Primary Decisions Regarding Human Conduct

Justice Harlan and Professors Hart and Wechsler would apply the conflicting state rule if the choice of rule affects decisions concerning human conduct that the Constitution traditionally leaves to state regulation.[279] If Federal Rule 407 does what the Advisory Committee intended, the rule will encourage repairs and promote safety. The rule thus would affect decisions about safety, that the constitutional system leaves to state regulation. The state police power over local concerns, such as safety and health, is a well-recognized principle.[280] As Judge Weinstein concludes, Rule 407 does not address any special federal interest that would override the traditional allocation of power.[281]

(d) Summary

The foregoing analysis concludes that both Federal Rule 407 and state Rule 407 are substantive. The Maine rule, however, by rejecting the exclusionary rationale behind the federal rule, places the procedural goal of truthfinding above the substantive goal of encouraging repairs. The Maine rule, therefore, is suspiciously procedural. Because the first sentence of the REA is not concerned with arguably substantive federal rules and the second sentence does not protect arguably procedural state rules, applying this analysis to Rule 407 creates a curious stalemate. Factoring in the concerns of federalism evident in the second sentence of the REA,

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279. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); H. HART & H. WECHSLER, *supra* note 85, at 747.

280. The Supreme Court often has referred to the extensive scope of the state police power over local concerns. *See* De Canas v. Bica, 424 U.S. 351, 356 (1976) (the state possesses broad authority under its police power, exemplified in child labor laws and laws affecting occupational health and safety). Moreover, the interstate commerce cases indirectly illustrate that safety is a local concern, which the Court has balanced against a national interest in the free flow of commerce. *See* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (because safety is traditionally a local concern, regulations that promote safety are within the state's power to regulate); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443 (1978) (Court reluctant to invalidate state legislation that aims to promote safety if the propriety of the local regulation has long been recognized).

281. 2 J. WEINSTEIN & M. BERGER, *supra* note 9, at 12. On the other hand, the federal government can regulate safety or interfere with the state interest in safety. The hook that the government could use, however, is the commerce clause. Although the objective would be safety, as in federal food and health regulations, the law is bootstrapped on by the federal interest in the free flow of commerce. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 782 (1945) (holding that the national interest in the free flow of interstate commerce outweighs the state interest in safety). Obviously, the rulemaking power of the federal court system is not an appropriate hook. Safety concerns are out of place in the realm of practice and procedure.

however, indicates that the REA favors applying the state rule. To test this conclusion, the policies underlying the RDA are important.

B. *The Policies of the Rules of Decision Act*

The RDA is an inappropriate test for a federal rule, but the policies underlying the RDA—eliminating forum shopping and discrimination—often crop up in contexts other than judge-made law.[282] The strongest example of reliance on these policies is the legislative history of Congress' intervention into the proposed Federal Rules of Evidence. The House Report commented that article V, providing for specific rules or privileges, would have promoted forum shopping but for the changes Congress made.[283] The Fifth Circuit, in *Conway*,[284] expressed concern with forum shopping and outcome determinative rules in the context of the Federal Rules of Evidence. Professor Wellborn posits that the only reason for a federal court to follow a state rule is to minimize forum shopping and unequal treatment.[285] Furthermore, the Tenth Circuit, in *Moe*, held that it must apply a state rule that conflicts with Rule 407 in a diversity action to promote uniformity and prevent forum shopping.[286] Courts, therefore, often consider the policies of the RDA in striking a balance between conflicting rules.

A complete analysis would examine whether the federal rule substantially would affect the result of litigation and thus lead to forum shopping and discrimination. Considering the potentially probative value of evidence of subsequent remedies makes Federal Rule 407 appear outcome determinative. This evidence is relevant in an action for negligence.[287] To establish negligence, the plaintiff must demonstrate that the defendant did not conform to a reasonable standard of care.[288] Evidence of subsequent repairs is arguably

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282. *See supra* text accompanying notes 24-26 (discussing *Erie*, forum shopping, and discrimination). As Professor Ely has noted, the RDA would eviscerate the rules because they are replete with provisions whose implementation in lieu of state law would be outcome determinative. Ely, *supra* note 5, at 721. This Note, however, contends that courts should consider the *policies* behind the RDA, not its outcome determinative standard, in a conflict of rules case.

283. H.R. REP. No. 650, 93d Cong., 1st Sess. 9 (1973).

284. 540 F.2d 837 (5th Cir. 1976).

285. Wellborn, *supra* note 5, at 417.

286. 727 F.2d at 932.

287. *See* Commentary, *supra* note 208, at 78.

288. PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164, § 32, at 173 (W. KEETON, D. DOBBS, R. KEETON & D. OWEN 5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

probative of three of the elements that establish that cause of action: the existence of a defect or risk, the foreseeability of that risk, and the duty to take precautions against foreseeable injury.[289] Even if the probative value of the evidence is not great, the Advisory Committee note to Federal Rule 407 concedes that an inference of fault from the evidence is possible.[290] Moreover, the evidence is probably relevant under Federal Rule of Evidence 401.[291] Considering the relevance of the evidence and the possible inference of fault, together with the likely impact on a jury, the evidence could be a significant factor in the outcome of a case. As a result, if a state court admits the evidence but a federal court does not, the state forum would be far more attractive to plaintiffs. In addition, unfairness would result if a nonresident sued a resident, because the resident defendant could not remove the action to federal court.[292] Further inequities would result if a person suing a citizen from a foreign state had to submit to a body of law different from the law that applies if the same person sued a cocitizen in a similar litigation. These evils—forum shopping and discrimination—are exactly what *Erie, York,* and *Hanna* sought to prevent and yet are likely to occur because of the potential impact of Federal Rule 407 on substantive results.[293]

Although these issues are most appropriate in the context of judge-made rules, the analysis is equally appropriate in a comprehensive consideration of all the relevant factors for a federal-state conflict. The RDA analysis, therefore, considered along with the REA analysis, further points the court toward choosing the state Rule 407. When consideration of the second sentence of the REA tips the scales toward finding that the federal rule affects substantive state rights, the court should consider the concerns of forum shopping and discrimination.

C. Modifying the Rule

Rather than doing away with a federal rule that conflicts with a state rule and fails the above analysis, a court should consider interpreting the federal rule narrowly to avoid the federal-state

289. Note, *supra* note 15, at 238; *see* PROSSER & KEETON, *supra* note 288, § 30, at 164 (discussing the elements of a negligence action).

290. FED. R. EVID. 407 advisory committee note.

291. *See supra* note 191 and accompanying text (discussing and providing text of Rule 401).

292. 28 U.S.C. § 1441 (1982).

293. *See* Ely, *supra* note 5, at 712 n.11.

conflict altogether. Obviously, courts are not in the best position to change a rule, but a court could carve out an exception to the rule, or perhaps treat the rule in a limited fashion. For example, a court could hold that Federal Rule 407 does not apply in diversity actions when there is a conflicting state rule. Following the examples Congress set in Rule 501 and Rule 601,[294] the court could reason that Congress intended that in any action based on state substantive grounds the state rule of evidence should apply. The Tenth Circuit followed this approach in *Moe*, holding that a state rule that conflicts with Rule 407 "must be applied in a diversity action in order to effect uniformity and to prevent forum-shopping."[295] The District Court of Maine rejected this approach in *French*, reasoning that because Congress expressly provided for state conflicts in some rules, it must have chosen deliberately to overlook Rule 407.[296] This rationale, however, is unpersuasive because Congress faced no actual state conflict with Rule 407 when Congress promulgated the rules, unlike Rule 501 and Rule 601, which were hotly debated.

Both Dean McCormick and Judge Weinstein have suggested treating Rule 407 as a limited privilege.[297] The privilege would be unusually narrow in scope, excluding evidence of subsequent remedial measures only when a party offered the evidence to prove negligence.[298] The trial judge would have to determine whether the evidence fell within an exception to the general exclusionary rule.[299] If a party did not assert the privilege, the trial judge would have to decide whether the evidence was admissible under the general relevancy standards of Rule 401, Rule 402, and Rule 403.[300]

These alternatives would preserve Federal Rule 407 and avoid the spectre of holding "not only that Congress exceeded its constitutional power in promulgating the Rule, but that [Congress] did so upon the considered recommendation of the Advisory Commit-

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294. *See supra* notes 174-75 and accompanying text.

295. *Moe*, 727 F.2d at 932.

296. *See French*, 101 F.R.D. at 371 n.3; *see also supra* text accompanying notes 244-50 (discussing *French*).

297. C. MCCORMICK ON EVIDENCE § 275, at 817 (3d ed. 1984); 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 407[01], at 12.

298. C. MCCORMICK, *supra* note 297, § 275, at 817; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 407[01], at 12.

299. C. MCCORMICK, *supra* note 297, § 275, at 817; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 407[01], at 12.

300. C. MCCORMICK, *supra* note 297, § 275, at 817; 2 J. WEINSTEIN & M. BERGER, *supra* note 9, ¶ 407[01], at 12.

tee and of the Supreme Court."[301] A better solution would be for Congress or the Supreme Court to amend the Rule to make it consistent with the exceptions in Rule 501 and Rule 601.[302] If enough courts heed the criticisms of the commentators and follow the lead of the Tenth Circuit, Congress should become aware of this problem and solve it.

V. Conclusion

Maine Rule of Evidence 407 directly conflicts with Federal Rule of Evidence 407. Congress was not aware of the conflict when it enacted the Federal Rules because courts at that time universally recognized the exclusionary principle of Rule 407. The Maine Advisory Committee, on the other hand, was aware of the conflict when the committee chose to diverge from previous Maine law, the generally prevailing law, and the Federal Rule. A classic federal-state rules conflict, therefore, arose when the plaintiff in *Rioux* brought a diversity suit in federal court. Despite a long tradition of sensitivity to state substantive law, the *Rioux* decision ignored the federalism implications of the conflict and applied the federal rule.

Congress, the Supreme Court, and certain circuit courts consistently have responded deferentially to state substantive law. From the moment Congress enacted the RDA until Congress intervened in the Rules of Evidence, Congress has acted to protect state law. In a line a cases from *Erie* to *Hanna* the Supreme Court also has demonstrated sensitivity to state substantive law. In addition, the Fifth and Tenth Circuits have emphasized the importance of applying state substantive law in diversity cases. In light of this tradition of deference, Congress seemingly would have protected state law from Rule 407 if Congress had foreseen the conflict. The *Rioux* court, therefore, should have made a more thorough analysis, rather than simply applying a weak test to determine whether Rule 407 was constitutional.

The *Rioux* court should have analyzed this conflict by referring to the REA standards and RDA policy considerations. The court should have asked whether the rules are arguably substantive in their underlying policies, the inherent nature of the law that the rules regulate, or in terms of the constitutional scheme of federalism. The court also should have considered whether Rule 407 vio-

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301. *Rioux*, 582 F. Supp. at 625.

302. *See supra* notes 174-75 and accompanying text (discussing Rule 501 and Rule 601).

lates the aims of *Erie* to prevent forum shopping and the unfairness that naturally results when conflicting rules demand conflicting substantive results. Finally, rather than eliminating the Federal Rule, the court could have carved out an exception that would have applied conflicting state law in diversity actions, as the Tenth Circuit has done.

Uniform federal rules are undoubtedly an important aspect of the federal court system. At some point, however, uniformity must give way to federalism. When a rule is as strongly substantive as Rule 407, and its procedural grounds are as tenuous, a federal-state conflict takes on serious overtones of federalism that courts cannot ignore. Thus, in deciding future cases concerning conflicts between a Federal Rule of Evidence and a state rule, courts should use a threefold approach. First, the court should balance the rules in light of both sentences of the REA. Second, the court should consider the policies underlying the RDA. Last, the court should determine whether any alternatives exist to eliminating the federal rule altogether. This approach would provide a balanced and thorough analysis of the conflict.

MARCIA LYN FINKELSTEIN