Statutory Genres: Substance, Procedure, Jurisdiction

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To decide many cases, courts need to characterize some of the legal rules involved, placing each one in a specific doctrinal category to identify the rule's effect on the litigation. The consequences of characterization decisions can be profound, but the grounds for making and justifying them are often left unstated. This Article offers the first systematic comparison of two important types of legal characterization: the distinction between substantive and procedural rules or statutes, a distinction federal courts make in several contexts; and the distinction between jurisdictional and nonjurisdictional rules, especially those relating to litigation filing requirements. The Article explains the reasons for the differences between the doctrines governing each type of characterization by contextualizing each as an example of the same activity: the identification of the "genre," or kind, to which particular legal texts belong. Showing that decisions in both areas do in fact involve genre classification, the Article explains how it follows that legal characterization is an aspect of legal interpretation, although courts have seldom recognized as much. This analysis further suggests new lines of development for both Erie *doctrine and jurisdictional characterization. Judges making* Erie *decisions should characterize both the state and federal laws at issue according to their sources, as well as under the substantive-procedural rubric, and should recognize that the question of conflict, if reached, is akin to other questions of federal preemption. Judges making jurisdictional-characterization decisions should extend the existing doctrinal framework to take into account other consequences of characterization and to allow the analogous handling of federal rules. The U.S. Supreme Court already has most of the resources it needs to move down these paths. Still,*

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courts and commentators have something to learn from contemporary theories of discourse genres, which teach that every classificatory decision changes, even if only slightly, the landscape of existing categories. For this reason, purely formalist approaches to characterization doctrine—insistence on bright-line rules for distinguishing substantive from procedural and jurisdictional from nonjurisdictional rules—are ill-advised. A functional and incremental approach to legal characterization is not just theoretically sound, but also practically necessary for stable, workable law in this area.

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INTRODUCTION

In recent terms, the U.S. Supreme Court decided several cases turning on apparently technical issues of legal characterization: the classification of rules of law (primarily statutes, but also judicially promulgated rules and other legal authorities) into doctrinally defined categories.[1] In a case raising a characterization issue, the decision to place a statute or rule in a particular category may determine the case's outcome.[2] If the Court's attention is any gauge, these issues are important. But the grounds for making and justifying characterization decisions remain elusive. Justices past and present have disagreed significantly about when and how such decisions should be made.

This Article is the first to compare two kinds of characterization that have generated recent controversy: (1) the distinction between substantive and procedural rules or statutes, a distinction federal courts make in several contexts; and (2) the distinction between jurisdictional and nonjurisdictional rules, especially those relating to litigation filing requirements.[3] (This second distinction might seem to be a sub-distinction within the "procedural" category, but as explained below, the relation between the two distinctions is more complex.) Only a few commentators have noted the overlap between these two sets of characterization issues.[4] The overlap is both conceptual and structural; each type of characterization involves the labeling of a rule or statute as

1. The term "characterization" is used in this sense by Walter Wheeler Cook, *"Characterization" in the Conflict of Laws*, 51 YALE L.J. 191 (1941), and Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 56 (2008) [hereinafter Dodson, *Removal Jurisdiction*]. This Article focuses on the Supreme Court's treatment of the issues discussed. Other courts must consider the same issues even more often, and many of the arguments advanced below pertain to these courts' characterization practices as well. The Supreme Court's activity in these areas is institutionally unique, however, whether or not the Court's decisions do in fact bind lower federal courts. That question is discussed further *infra* note 308.

2. Many of the consequences of particular characterizations are uncontroversial. But see the arguments that these consequences should be considered more carefully by Scott Dodson in the sources cited *infra* notes 4 and 123, and *supra* note 1.

3. Characterization can be determinative in other doctrinal areas, such as First Amendment law. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803 (2010) (considering purpose-based classification of a Department of Defense appropriations act transferring land from government to private party); *infra* note 252 (noting discussions of categorization in First Amendment doctrine). Characterization can also be determinative in administrative law. *See, e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010); *infra* note 322 (discussing legislative-rule characterization).

4. *See, e.g.*, Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 21–51 (1994) (discussing features of jurisdictional rules and their overlaps with rules affecting the merits); Dodson, *Removal Jurisdiction*, *supra* note 1, at 59–61 (discussing differences between jurisdictional and procedural statutes); Scott Dodson, *Hybridizing Jurisdiction*, 99 CAL. L. REV. 1439, 1443–48 (2011) [hereinafter Dodson, *Hybridizing*] (summarizing attributes of "jurisdictionality" and "nonjurisdictionality").

a premise for further legal decision-making. While each form of characterization has prompted significant critique, there has been no systematic comparative analysis of the two areas of law.

Most lawyers first learn of the substantive-procedural distinction when they cover the *Erie* doctrine in their first-year civil procedure courses. Developed over the past eighty years, *Erie* doctrine requires a federal court exercising diversity jurisdiction to apply state law rather than federal law under certain circumstances.[5] Some formulations of the doctrine require courts to base this choice on a determination of whether the federal, and perhaps also the state, laws that might apply are substantive or procedural in character. As civil procedure students know, however, the Court has long debated the grounds for making such determinations, their relevance to the *Erie* choice-of-law issue, and their very feasibility. After nearly a decade of silence on the subject, the Court again took up the issue in its 2010 decision in *Shady Grove Orthopedic Associates, Inc. v. Allstate Insurance Co.*[6] In *Shady Grove*, Justices Scalia and Ginsburg disagreed sharply about whether a New York state statute conflicted with Rule 23 of the Federal Rules of Civil Procedure, and therefore whether a class action statutorily barred in state court could proceed in federal court.[7] Their disagreement turned on whether these two provisions belonged in the same category of procedural (as opposed to substantive) law. Justice Scalia regarded both provisions as procedural and therefore concluded the federal court could not apply state law.[8] In contrast, Justice Ginsburg understood the state law to be substantive and thus binding on the federal diversity court.[9] Despite their incompatibility, both positions find support in *Erie* precedent. But commentators have been largely critical of *Shady Grove*, mainly for its failure to clarify an already much-criticized area of law.[10] Indeed, the opinions seem to reopen questions that some thought

5. *See generally* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

6. 130 S. Ct. 1431 (2010).

7. *Id.*

8. *Id.* at 1437–38.

9. *Id.* at 1465–66, 1471.

10. *See, e.g.*, Leading Cases, *Preemption of State Procedural Rules*, 124 HARV. L. REV. 179, 327, 329–30 (2010) (criticizing the majority's approach to determining "meaning" of the state statute at issue, and predicting that "the Court's fractured holding—and even more fractured reasoning—will continue to frustrate litigants and disempower state legislatures"); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 65–66 (2010) (recommending alternative analysis); Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 903–05 (2011) ("[T]he Court's present bifurcated approach to Rules Enabling Act/'procedural *Erie*' issues suffers from a final flaw: it is inelegant."); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 106 (2011) (adding "a new level of critique" to criticisms of recent developments

the Court had already answered in the early twentieth century.[11] *Shady Grove* is troubling, however, not just because it represents a missed opportunity to tidy up *Erie* doctrine. The *Shady Grove* opinions are also symptomatic of the Court's continued reluctance to acknowledge the centrality of characterization issues to *Erie* doctrine and to draw on its more successful treatment in other areas.

One such area, the second doctrinal focus of this Article, is jurisdictional characterization. In its decisions on this subject, the Court has appeared eager to develop a jurisprudence of characterization[12]—so eager, in fact, that opinions increasingly refer to the doctrine even when it does not directly apply. For example, in 2011, the Court decided *Henderson ex rel. Henderson v. Shinseki*,[13] a case concerning the circumstances under which a federal court of appeals might depart from a statutory requirement for the timing of filing notices of appeal from denials of veterans' benefits claims. The Court unanimously held that the statutory rule in question was nonjurisdictional and, therefore, that the petitioner should have been permitted to file his appeal. But much of Justice Alito's opinion in *Henderson* addressed the consistency of this conclusion with other recent decisions addressing jurisdictional-characterization issues.[14] This line of cases is rooted in pre-*Erie* decisions,[15] but only in the past few decades has it received sustained

in *Erie* doctrine, including *Shady Grove*).

11. *See, e.g.*, Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 418 (1941) ("[T]he orthodox distinction of substance and procedure offers a guiding hand and a convenient working rule."); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 355–56 (1933) ("There is . . . no reason to be disturbed when we find . . . arbitrariness at the border line [between substantive and procedural law] and . . . relativity of decision."); Lehan Kent Tunks, *Categorization and Federalism: "Substance" and "Procedure" after* Erie Railroad v. Tompkins, 34 ILL. L. REV. 271, 302 (1939) ("In any drive toward flexibility of treatment, the conflict of laws cases present a parallel. From a more or less iron dichotomy, those cases have come to a place where some courts find no difficulty in calling a matter 'procedural' and giving it 'substantive' consequences, if necessary in the solution of a comparable problem.").

12. *See infra* Part II.E (discussing six substantial decisions addressing this type of characterization since 2009); *see also, e.g.*, Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. COLLOQUY 947, 947 (2011) (discussing the trend in Supreme Court opinions toward "better defining which legal rules properly should be called 'jurisdictional'").

13. 131 S. Ct. 1197 (2011).

14. *Id.* at 1202–04.

15. *See, e.g.*, E. King Poor, *Jurisdictional Deadlines in the Wake of* Kontrick *and* Eberhart*: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181, 187–90 (2007) ("[B]y the end of the 1930s, the principle of jurisdictional time limits, recognized . . . almost ninety years before, was firmly interwoven with the fabric of the law."); Christopher W. Robbins, Comment, *Jurisdiction and the Federal Rules: Why the Time Has Come to Reform Finality by Inequitable Deadlines*, 157 U. PA. L. REV. 279, 286–88 (2008) (discussing nineteenth-century origins of the principle).

attention from the Court. Spurred by commentary,[16] the Justices have developed a sophisticated, yet still-evolving, consensus on the appropriate resolution of at least some jurisdictional-characterization issues.

In addition to explaining the foundations of these recent decisions, this Article explores the lack of cross-pollination between the two lines of characterization doctrine and shows how looking beyond the confines of each can suggest improvements to both. Parts I and II consider the reasons each characterization puzzle has become important—for independent and doctrinally path-dependent reasons—and the state of each doctrine today. Part III explains how, despite their surface differences, each characterization doctrine is an example of the same more general activity: the identification of the "genre," or kind, to which a particular statute or rule belongs. Part III shows that in working through this task, the Court anticipated many of the more recent insights of genre theory, as developed in classical and Renaissance rhetoric and refined by twentieth-century rhetoricians.

16. *See, e.g.*, Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64 (2007) (advocating a functional approach to jurisdictional characterization); Perry Dane, *Sad Time: Thoughts on Jurisdictionality, the Legal Imagination, and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 164 (2008) (critiquing the Court's decisions concerning the jurisdictionality of time limits); Dodson, *Removal Jurisdiction*, *supra* note 1, at 56 (discussing the Court's treatment of the jurisdictional-characterization issue); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008) [hereinafter Dodson, *Mandatory*]; Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42 (2007) [hereinafter Dodson, Bowles] (suggesting an alternative approach to treatment of statutory time limits); Katherine Florey, *Insufficiently Jurisdictional: The Case against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CAL. L. REV. 1375 (2004) (offering critique of references to sovereign immunity as "jurisdictional" doctrine); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003) (arguing that "the conventional wisdom" about jurisdiction is misleading and, on occasion, "dangerous"); David S. Kantrowitz, Note, *Caveat Emptor: Jurisdictional Rules*, Bowles v. Russell, *and Reliance on Our Judicial System*, 89 B.U. L. REV. 265 (2009) (critiquing Dodson's suggested "mandatory rules" approach); Vincent Pavlish, Note, Bowles v. Russell*: They Got Me on a Technicality*, 70 MONT. L. REV. 147 (2009) (criticizing the Court's reasoning in *Bowles v. Russell*); Poor, *supra* note 15 (defending recent Supreme Court decisions but recommending clarifications); Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of* Kontrick, Eberhart *and* Bowles, 59 RUTGERS L. REV. 847 (2007) (offering specific suggestions for clarification of doctrine governing particular statutory time limits); Johnathan A. Rhodes, Note, *The Jurisdictional Nature of Statutory Time Restrictions*, 47 WASHBURN L.J. 605 (2008) (criticizing labeling of statutory deadlines as "jurisdictional" and advocating for a functional approach); Robbins, *supra* note 15, at 285 ("The Court should find statutory deadlines nonjurisdictional by default unless Congress clearly intended otherwise."); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005) (criticizing doctrine and judicial practice with respect to jurisdictional issues); Joseph A. Valenti, Recent Decision, *Statutory Procedural Deadlines Are Jurisdictional in Nature for All Civil Cases and Therefore Must Never Be Equitably Excused:* Bowles v. Russell, 46 DUQ. L. REV. 245 (2008) (explaining the inconsistency of *Bowles v. Russell* with earlier decisions).

From this perspective, it also becomes evident that characterization is an aspect of textual interpretation, something the Court has only intermittently acknowledged. Considering characterization doctrine in this light helps to clarify which components of existing doctrine can and should form the basis for a more comprehensive, functional approach to each area. Part IV addresses this task, explicitly reviewing what the Court should preserve and abandon with respect to each type of characterization. In brief, substantive-procedural characterization doctrine should take jurisdictional-characterization doctrine as a model of the successful integration of formal and functional attitudes toward legal interpretation in a structured analysis that can command the allegiance of judges across the methodological spectrum. More generally, the development of higher-order rules like those involved in characterization doctrines—rules for the treatment and analysis of other rules—is inevitable, endemic in many other areas of law and every complex legal system, and not cause for regret or concern.

I. CHARACTERIZATION TYPE ONE: THE SUBSTANTIVE-PROCEDURAL DISTINCTION

Substantive-procedural and jurisdictional-characterization doctrines have developed along contrasting paths. Substantive-procedural doctrine has long incorporated skepticism about the stability and importance of the distinction between substantive and procedural law. In the *Erie* context, this skepticism was partly a product of timing, since the doctrine was born during the heyday of anti-formalist legal realism. Jurisdictional-characterization doctrine is also a product of its times, but flowered much later, coming into its own only since the final decades of the twentieth century, when formalist approaches were reemerging in many areas of decisional law. This doctrine has accordingly tended, more formalistically, to assume that legal rules must be susceptible to unambiguous characterization. Despite these contrasts, the two doctrines also have many similarities, as the following discussions of their respective evolutions show.

A. Development of the Doctrine: An Overview

Legal historians have traced the distinction between substantive and procedural law back as far as medieval Europe.[17] In the modern era, the

17. The origins of the distinction have been attributed to medieval judicial decisions, Ailes, *supra* note 11, at 396; to William Blackstone in the mid-eighteenth century, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 805 (2010); and to Jeremy Bentham in the late eighteenth century, D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable*

distinction initially became significant in the context of conflict-of-laws decisions in the early United States; then, in the early twentieth century, it migrated to *Erie* doctrine, at issue in *Shady Grove* and the focus of this Section.

Whatever the original source of the distinction between substantive and procedural law, it was well enough established in the conflicts field by the early twentieth century[18] to be criticized by the legal realist Walter Wheeler Cook.[19] Under then-prevailing conflicts doctrine, a court would apply foreign law to decide the substance, or merits, of a dispute, but forum law on procedural issues. Therefore, in jurisdiction-spanning disputes, courts needed to be able to characterize particular rules as substantive or procedural. In a highly influential 1933 article, Cook argued that "the line between [substance and procedure]" should not be assumed to be "the same for all purposes."[20] Cook maintained that in each conflicts case, the decision to classify a rule as substantive or procedural should be made in the interest of furthering the general purposes of conflicts doctrine (the equitable and efficient resolution of disputes), rather than simply for the sake of adhering to any label courts might have previously affixed to the rule in question.[21] Cook's critique of inflexible, formalist categorization had its own critics, who insisted that his skepticism failed to respect the functional need for consistency.[22] But Cook's point about the context-dependence of characterization decisions has proven influential, not just in the conflicts context,[23] but also in *Erie* doctrine.

Presumptions," 30 UCLA L. REV. 189, 191, 192 n.16 (1982) ("The procedure-substance dichotomy . . . was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*, sub nom the distinction between substantive law and adjective law.").

18. *See* Risinger, *supra* note 17, at 195 (discussing Dicey's 1896 conflicts treatise and the alignment of "procedure" with remedial law in this context).

19. Cook apparently objected to being classed as a legal realist, but his perspective was aligned with that of his avowed realist contemporaries. *See, e.g.*, Michael S. Green, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967, 969 n.13 (1995) ("Although Cook objected to being labeled a realist, the descriptive or functional approach to the law that he employed is a cornerstone of realist jurisprudence. Cook has been included among the legal realists for just this reason." (citations omitted)).

20. Cook, *supra* note 11, at 337.

21. *Id.* at 341–43 ("[A] person asking where the line *ought* to be drawn might well conclude that this ought to be at one place for one purpose and at a somewhat different place for another . . . .").

22. *See, e.g.*, Ailes, *supra* note 11, at 406–08 (discussing the difficulty of distinguishing between substance and procedure, and arguing that "we need not choose between the rock of an inflexible rule and the whirlpool of no rule at all").

23. *See, e.g.*, Laura Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 368–69, 373 (1986) (presenting Cook-influenced critique of recent developments in choice-of-law doctrine); Susan Swilling Craft, Case Comment, *Choice of Law*—Sun Oil Co. v. Wortman*: The*

Erie doctrine gets its name from the Court's 1938 decision in *Erie Railroad Co. v. Tompkins*.[24] *Erie* concerned the meaning and implications of the Rules of Decision Act (RDA),[25] which requires federal courts to apply state law rules "in cases where they apply."[26] The development of *Erie* doctrine is also bound up, however, with the enactment of the Rules Enabling Act (REA)[27] in 1934 and the initial Federal Rules of Civil Procedure in 1938. Since its inception, *Erie* doctrine has moved through three phases, marked by shifts in the Court's attitudes toward the relative authority of federal and state sources of law,[28] and toward the importance and nature of characterization. In the first period, from 1938 to 1965, the Court searched for a formula for making *Erie* decisions and, acknowledging the blurriness of the line between substance and procedure, did not insist that characterization played a role in the analysis. In the second period, from 1965 to 1998, the Court ostensibly adopted a brighter-line, more formalist doctrine. At the same time, because of a growing concern with the Court's analyses, academics began to propose tests for making the *Erie* choice that presupposed an even brighter line between substantive and procedural laws. In the third period, from 1996 to the present, judicial consensus on characterization issues has evaporated. Justices have disagreed about the need for substantive-procedural characterization, the terms in which it should be used, and its place in *Erie* analysis. Some of the scholarly commentary, however, has

Constitutionality of the Lex Fori Approach to Statutes of Limitation, 19 MEM. ST. U. L. REV. 407, 419 (1989) (noting the parallel between functionalist "interest analysis" approach in modern choice-of-law and *Erie* doctrine); Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705, 727–28 (2002) (arguing that for choice-of-law purposes, "[c]ourts should interpret prejudgment interest rules dynamically, as opposed to statically"); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1030–31 (1994) ("[T]o pretend that choice of law principles should be determinative in all multistate cases is to increase obfuscation in an area already characterized more by mud than by crystal."); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 690 ("[C]ourts should choose limitations law without formulaic contrivances, employing ordinary purposive reasoning.").

24. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

25. 28 U.S.C. § 1652 (2006).

26. The RDA currently provides, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

27. 28 U.S.C. § 2072 (2006).

28. In a recent article, Jennifer Hendricks describes the phases of *Erie* doctrine along these lines. *See generally* Hendricks, *supra* note 10. Specifically, she describes, first, a "deference to the states" period lasting from 1938 to 1965, *id.* at 110–13; second, an "[i]mperial [Federal] Rules" period from 1965 to the early 1990s, *id.* at 113–17; and third, a "[w]ay to [n]owhere" period of confusion since the early 1990s, *id.* at 117–24.

continued along the trajectory marked out previously, urging formal resolutions of these disagreements and seeming less and less tolerant of the idea that such resolutions might remain elusive.

B. Phase One: Skepticism about Characterization (1938–1965)

At the time of the *Erie* decision and the promulgation of the Federal Rules of Civil Procedure, five years had passed since the publication of Cook's article.[29] The implications of these events for one another would not become fully evident for decades, even though both *Erie* and the Federal Rules made characterization questions important to legal analysis.

In *Erie*, the Court held that the RDA required a federal court sitting in diversity to apply state law defining the elements of, and defenses to, a claim for negligence.[30] Justice Brandeis, author of the majority opinion, made only passing reference to the distinction between substantive and procedural law, observing in a discussion of the constitutional basis for the decision that "Congress has no power to declare substantive rules of common law applicable in a state . . . ."[31] Justice Reed's concurrence more directly anticipated the later significance of the substantive-procedural distinction to *Erie* jurisprudence.[32] Disagreeing with the constitutional component of Justice Brandeis's opinion, Justice Reed maintained that a federal lawmaking power did indeed exist: "The line between procedural and substantive law is hazy, but no one doubts federal power over procedure."[33] Justice Reed's reference to the "hazy" line between the categories, and his acknowledgment of the link between this distinction and the allocation of legal authority, was consistent both with Cook's argument[34] and with then-current views of substantive law as dealing with ends and procedural law with means to those ends.[35]

Such views had underlain the enactment of the REA four years

29. *See generally* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Cook, *supra* note 11.

30. *Id.* at 70–72, 80.

31. *Id.* at 78.

32. *Id.* at 90–92 (Reed, J., concurring). *See* Hendricks, *supra* note 10, at 111–12 (making a similar observation).

33. *Erie*, 304 U.S. at 92.

34. *See, e.g.*, Cook, *supra* note 11, at 335–37 and accompanying explanatory parentheticals; Tunks, *supra* note 11, at 277 ("[M]any items waver from one category to the other, a fact best explained by reference to the purposes for which the classifications were made.").

35. *See, e.g.*, SIR JOHN W. SALMOND, JURISPRUDENCE OR THE THEORY OF THE LAW 577–78 (1902) (discussed in Risinger, *supra* note 17, at 197); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1052, 1058–60, 1068 (1982) (discussing attempts by state and federal legislatures in the early twentieth century to draw a line between substantive law and procedural law in an effort to codify substantive law).

earlier. That statute empowered the Supreme Court to create rules regulating the "practice and procedure" of the federal courts, so long as any such rules did not "abridge, enlarge[,] or modify any substantive right."[36] The REA thus codified the substantive-procedural distinction as an aspect of, and a crucial limitation on, federal lawmaking power. Many state constitutions contained (and still contain) similar distinctions.[37] As later Supreme Court decisions would make clear, in order to determine whether a rule was consistent with the REA and thus valid, a court needed to be able to classify the rule—to decide whether it was a rule of "procedure" or not. Although the statute thus seemed to mandate characterization, neither its drafters nor the drafters of the Federal Rules agreed about how characterization decisions should be made; both groups contested the characterization of particular types of rules as substantive or procedural.[38] Such disagreements confirmed Cook's point that particular rules might serve substantive purposes in some contexts and procedural purposes in others. But as suggested below, the existence of these disagreements has never completely discouraged more formalist, absolutist approaches to these issues.

Reflecting this early controversy, the Court made the substantive-procedural distinction key to an *Erie* analysis nine years later, in *Sibbach v. Wilson*,[39] without offering a clear standard to use in drawing the distinction.[40] *Sibbach* concerned the validity of Rule 35 and Rule 37 of the Federal Rules of Civil Procedure, under which a district court

36. 28 U.S.C. § 2072 (2006).

37. *See, e.g.*, Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265, 275 (2010) (discussing constitutionality of state evidence rules under state constitutional provisions resembling the REA); Michael P. Dickey, *The Florida Evidence Code and the Separation of Powers Doctrine: How to Distinguish Substance and Procedure Now that It Matters*, 34 STETSON L. REV. 109, 111 (2004) (discussing the importance of distinction to assessing the constitutionality of the Florida Evidence Code); Kent R. Hart, Note, *Court Rulemaking in Utah Following the 1985 Revision of the Utah Constitution*, 1992 UTAH L. REV. 153, 161 (discussing the Utah equivalent to the REA); Allen L. Lanstra, Jr., Case Note, McDougall v. Schanz*: Distinguishing the Authorities of the Michigan Legislature and the Michigan Supreme Court to Establish Rules of Evidence*, 2000 L. REV. MICH. ST. U. DET. C.L. 857, 859–60 (discussing the Michigan equivalent to the REA); Robert G. Lawson, *Modifying the Kentucky Rules of Evidence—A Separation of Powers Issue*, 88 KY. L.J. 525, 545–46, 549–50 (1999–2000) (discussing the Kentucky equivalent to the REA); Patrick Vrobel, Note, *Harnessing the Hired Guns: The Substantive Nature of Ohio Revised Code § 2743.43 Under Article IV, Section 5(B) of the Ohio Constitution*, 21 J.L. & HEALTH 123, 133–34 (2008) (discussing the Ohio equivalent to the REA).

38. *See* Burbank, *supra* note 35, at 1131–33 (discussing limitations of the REA).

39. 312 U.S. 1, 10–14 (1941).

40. In 1974, John Hart Ely identified *Sibbach* as the first case to suggest that the substantive-procedural distinction might be central to *Erie* decisions and noted that the case treated the distinction as unproblematic. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 708, 737–38 (1974).

had ordered a plaintiff to submit to a medical examination in the face of state law forbidding orders of this kind.[41] Writing for the majority, Justice Roberts described the decision as turning on the Rules' validity under the REA,[42] which "was purposely restricted in its operation to matters of pleading and court practice and procedure."[43] Accepting without discussion that "substantive" matters are meaningfully distinct from procedural ones, the Court rejected the plaintiff's argument that laws pertaining to "'important' or 'substantial' rights" should be classed as "substantive."[44] The Court, however, did not clarify what *could* qualify a law as "substantive"; instead, the majority focused on what could qualify a law as "procedural." "The test," Justice Roberts stated, "must be whether a rule really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law[,] and for justly administering remedy and redress for disregard or infraction of them."[45] As Justice Frankfurter's skeptical dissent made clear, the clarity of this "test" was not apparent to the entire Court: "[I]t does not seem to me that the answer . . . is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents."[46]

Justice Frankfurter's skepticism on this point also shaped his majority opinion in the next major *Erie* decision, *Guaranty Trust Co. of New York v. York*, in which the Court turned to an alternative test.[47] *Guaranty Trust* presented the issue of whether a state statute of limitations should apply in a class action brought on diversity grounds "on the equity side of a federal district court."[48] According to Justice Frankfurter, it did not matter whether the statute of limitations had been "deemed a matter of 'procedure'" by other courts;[49] the focus in an *Erie*

41. *Sibbach*, 312 U.S. at 1, 6–7.

42. *Id.* at 9–11.

43. *Id.* at 10.

44. *Id.* at 11.

45. *Id.* at 14.

46. *Id.* at 17 (Frankfurter, J., dissenting). In a seeming departure from a Cook-style approach, Justice Frankfurter argued that the decision should be justified solely by reference to Supreme Court precedent. *Id.*

47. 326 U.S. 99 (1945). It was in this case, according to Ely, that the Court first tried to develop a clear test for making REA decisions. Ely, *supra* note 40, at 708.

48. 326 U.S. at 101.

49. *See id.* at 109 ("It is . . . immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of these terms unrelated to the specific issue before us. *Erie* . . . was not an endeavor to formulate scientific legal terminology.").

decision should be on

> whether such a statute concerns merely the manner and the means by which a right to recover . . . is enforced, or whether [it] . . . is a matter of substance in the aspect that alone is relevant . . . , namely, does it significantly affect the result of a litigation for a federal court to disregard a law . . . that would be controlling in an action upon the same claim by the same parties in a [s]tate court?[50]

Justice Frankfurter advocated this functional approach not exactly because he considered the substantive-procedural distinction irrelevant, but rather because he acknowledged its context-dependence.[51] In dissent, Justice Rutledge argued that acknowledging the instability of the distinction between substance and procedure called for more careful application of the terms, rather than refusal to use them.[52] This contrast—between a temptation to dismiss the substantive-procedural distinction as a labeling matter peripheral to the real issues at stake (Justice Frankfurter's position) and an embrace of the labels as useful, if delicate, tools for handling those issues (Justice Rutledge's position)—persists in contemporary *Erie* doctrine. Indeed, the analysis below will

50. *Id.*

51. *See id.* at 108 ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course . . . [n]either 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").

52. Justice Rutledge described the instability in both territorial and aesthetic terms:

> [I]n some instances, the[] application [of particular rules] may lie along the border between procedure or remedy and substance, where the one may or may not be in fact but another name for the other. It is exactly in this borderland, where procedural or remedial rights may or may not have the effect of determining the substantive ones completely, that caution is required in extending the rule of the Erie case . . . .
>
> The words 'substantive' and 'procedural' or 'remedial' are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance. But they have come to designate[,] in a broad way[,] large and distinctive legal domains within the greater one of the law[,] and to mark, though often indistinctly or with overlapping limits, many divides between such regions.
>
> One of these . . . has been the divide between the substantive law and the procedural[,] or remedial[,] law to be applied by the federal courts in diversity cases[,]a division sharpened[,] but not wiped out[,] by Erie. . . . The large division between adjective law and substantive law still remains, to divide the power of Congress from that of the states and consequently to determine the power of the federal courts to apply federal law or state law . . . .
>
> This division, like others drawn by the broad allocation of adjective or remedial and substantive, has areas of admixture of these two aspects of the law. In these areas, whether a particular situation or issue presents one aspect or the other depends upon how one looks at the matter. As form cannot always be separated from substance in a work of art, so adjective or remedial aspects cannot be parted entirely from substantive ones in these borderland regions.

Id. at 115–16 (Rutledge, J., dissenting).

suggest that Justice Rutledge's take more accurately describes subsequent developments: the labeling-cum-characterization distinction remains one of the vehicles for discussion of the other issues at stake in *Erie* cases, so that failure to confront the characterization issue in its own right may have contributed to the Court's inability to achieve consensus on related matters.

Over the fifteen years following *Guaranty Trust*, the Court's major *Erie* decisions followed Justice Frankfurter's preferred path of avoidance.[53] In *Ragan v. Merchants Transfer & Warehouse Co.*, decided in 1949, the Court again confronted a choice between a state statute of limitations and a federal rule that supported a different determination of the action.[54] While acknowledging that the Federal Rules "determine the manner in which an action is commenced in the federal courts[,] a matter of procedure which . . . *Erie* . . . does not control," the Court concluded that in this case, as in *Guaranty Trust*, it could not "give [the cause of action] longer life than it would have had in the state court without adding something to the cause of action."[55] Nine years later, in *Byrd v. Blue Ridge Rural Electric Cooperative*, the last major decision of the first phase of *Erie* doctrine, the Court held that a personal injury plaintiff in federal court was entitled to have a jury decide whether the plaintiff had been the defendant's employee as defined by statute, even though the state law that set forth the relevant definition of "employee" also committed that issue to the trial judge for decision.[56] The key question, according to the *Byrd* majority, was not whether the state rule was substantive or procedural, but the "affirmative countervailing consideration" of how the Seventh Amendment and Federal Rules established to enforce that state rule "distribute[] trial functions between judge and jury . . . ."[57] Moreover, of the three opinions offered in addition to the majority opinion (which included a dissent by Justice Frankfurter), only Justice Whittaker's mentioned substantive-procedural characterization, and it did so without conceding the utility of the distinction.[58] After *Byrd*, it seemed that the

53. *See, e.g.*, Ely, *supra* note 40, at 729–32 (arguing that *Ragan* exemplified the fluidity of the substance-procedure distinction).

54. 337 U.S. 530, 533–34 (1949).

55. *Id.*

56. 356 U.S. 525, 531–32 (1958).

57. *Id.* at 537.

58. Justice Whittaker, largely summarizing parts of Justice Rutledge's *Guaranty Trust* dissent, *see supra* note 52, wrote:

> The words 'substantive' and 'procedural' are mere conceptual labels and in no sense talismanic. To call a legal question by one or the other of these terms does not resolve the question otherwise than as a purely authoritarian performance. When a question[,]

tension apparent in *Guaranty Trust* concerning substantive-procedural characterization had been resolved in favor of Justice Frankfurter's dismissive position. Most of the Justices at this point appeared to regard characterization as a distraction from the appropriate analysis in *Erie* cases.

C. Phase Two: Resurgence of the REA and Characterization Analysis (1965–1996)

The second period of *Erie* doctrine jurisprudence saw renewed attention to the distinction discarded in the late 1940s and 1950s. But following its 1965 decision in *Hanna v. Plumer*,[59] which took off from the position Justice Reed had mapped out in his *Erie* concurrence and helped to pinpoint the place of characterization issues in at least some *Erie* cases, the Court disavowed any need for further doctrinal development. The result was an increasingly muddled stance on the role of characterization in *Erie* analysis.

In *Hanna*, the Court explicitly set out to renovate and clarify *Erie* doctrine, at least in cases requiring a choice between application of a federal rule and a different state law standard.[60] The Court held in *Hanna* that service on a defendant would be proper if completed in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure (permitting "substituted service" on a competent person at the defendant's residence), despite a state law requirement of in-person service of certain complaints.[61] Chief Justice Warren's opinion for the majority identified the central issue in the case as the validity of Rule 4(d)(1) under the REA.[62] On this premise, only the federal law at issue needed to be characterized as substantive or procedural:

> The broad command of Erie was . . . [originally] identical to that of the Enabling Act: federal courts are to apply state substantive law and

> though denominated 'procedural,' is nevertheless so 'substantive' as materially to affect the result of a trial, federal courts, in enforcing state-created rights, are not free to disregard it on the ground that it is 'procedural,' for such would be to allow, upon mere nomenclature, a different result in a state court from that allowable in a federal court though both are, in effect, courts of the State . . . .

Byrd, 356 U.S. at 549 (Whittaker, J., concurring in part and dissenting in part).

59. 380 U.S. 460 (1965).

60. *See, e.g.*, Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 852 (1974); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the* Erie *Doctrine*, 85 YALE L.J. 678, 695 (1976) (discussing the standard proposed by Justice Harlan).

61. *Hanna*, 380 U.S. at 473–74.

62. *See id.* at 464 ("Under the cases construing . . . the Enabling Act, Rule 4(d)(1) clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the 'practice and procedure of the district courts.'").

> federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following Erie diverged markedly from the line construing the Enabling Act. *Guaranty Trust Co. of New York v. York* made it clear that Erie-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction.[63]

This divergence between the two strands of law, the opinion later explained, was compelled by the nature of the substantive-procedural distinction: "[T]he development of two separate lines of cases [has not] been inadvertent. The line between 'substance' and 'procedure' shifts as the legal context changes."[64] In light of this acknowledged context-dependent standard, *Hanna* eschewed formalism in the "relatively unguided" terrain of cases involving no Federal Rule,[65] but seemed to encourage it for purposes of assessing REA compliance. The decision thus more precisely identified the range of questions to which characterization might provide an answer. But *Hanna* did not present guidelines for characterizing any particular rules or statutes.[66]

Moreover, given that the Supreme Court has consistently treated *Hanna* as a mere clarification of existing precedent rather than an initial step in the further development of *Erie* doctrine, the Court has never resolved whether characterization of state rules is a necessary component of *Erie* decisions. In *Walker v. Armco Steel Corp.*, for example, the Court unanimously denied that *Hanna* had changed the *Erie* landscape so much as to require a different answer to the question presented in *Ragan*.[67] In explaining why state law should apply in *Walker*, Justice Marshall noted that the case did not (as *Hanna* had) involve a "collision" between a federal rule and state law.[68] But the Court also based its conclusion on characterization of the state law at issue.[69] That is, instead of assuming a conflict and asking whether the Federal Rule was procedural and therefore valid, as it had in *Hanna*, the

63. *Id.* at 465–66 (citation omitted).

64. *Id.* at 471.

65. *Id.*

66. *See id.* at 475 (Harlan, J., concurring) ("To my mind the proper line of approach in determining whether to apply a state or federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.").

67. 446 U.S. 740 (1980).

68. *See id.* at 749 ("Application of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law.")

69. The Court characterized the state law as "a statement of a substantive decision by the state that actual service on . . . the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751.

Court in *Walker* asked whether the state law in question was substantive in order to decide whether it conflicted with the Federal Rule.[70] *Walker* did not, however, present this approach—involving characterization of both state and federal law—as required.

In its next major *Erie* decision, *Burlington Northern Railroad Co. v. Woods*, the Court reverted to the *Hanna* focus on the validity of any pertinent federal rule.[71] The rationale for the decision suggested an "incidental effects" or "relaxed separation" approach to *Erie* analysis,[72] reconceiving characterization along functionalist lines to accommodate the possibility of substantive-procedural overlap. But this approach did not solve the puzzles introduced by *Walker*: in what types of cases should a court consider not only the procedural character of the federal rule, but also the substantive character of the state rule? And can a substantive state rule ever "collide" with a procedural federal rule?

The discontinuous nature of the decisions issued during this period gave commentators ample opportunity to suggest unifying principles. A prominent 1980 law review article described the *Erie* doctrine as the "most studied principle in American law."[73] Much of this commentary continued the tradition of skepticism about formal substantive-procedural distinctions.[74] Toward the end of the 1980s, the discussion

70. *See Walker*, 446 U.S. at 752 (concluding that the state law at issue was substantive and did not conflict with the Federal Rule).

71. In *Burlington*, the Court unanimously held that Rule 38 of the Federal Rules of Appellate Procedure, which gives courts of appeals "plenary discretion to assess 'just damages' . . . [on] an appellant who takes a frivolous appeal," should be applied in federal court in preference to a state statute requiring appellate courts to assess a fixed penalty on certain appeals. 480 U.S. 1, 7 (1987).

72. Justice Marshall's opinion explained that "[r]ules which incidentally affect litigants' substantive rights do not violate . . . [the REA] if reasonably necessary to maintain the integrity of that system of rules." *Id.* at 5. The approach has been both praised for its sensitivity to the purposes of the REA, Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 32 (2008), and criticized for its expansiveness, Kurt M. Saunders, *Plying the* Erie *Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653, 714 (1987).

73. Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *after the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980).

74. *See, e.g.*, Cooper, *supra* note 23, at 372, 376, 378 ("The use of a procedural categorization . . . makes the outcome of a case depend not on thorough analysis, but rather on a single bipolar inquiry which must necessarily be artificial and inaccurate."); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact on the First Amendment*, 66 TEX. L. REV. 215, 223 (1987) ("To speak of procedural and substantive rules as if each can be defined independently of the other is inaccurate. Law is the product of an interaction between substance and procedure."); Saunders, *supra* note 72, at 692–93 ("Substance, like procedure, is an amorphous concept incapable of an all-inclusive definition."). Some writers continued to criticize formalistic approaches to characterization. *See, e.g.*, Cooper, *supra* note 23, at 376, 378 ("To attempt to maintain a traditional substance-procedure distinction in the midst of a modern choice of law method[] has been rejected by virtually every scholar, court and legal committee which has

became increasingly critical. *Erie* doctrine was seen as not just intellectually dissatisfying but also sowing inconsistency[75] and chaos in the federal courts.[76] Scholars did not, however, converge on a common framework for distinguishing substantive from procedural rules.[77] The next phase of Supreme Court decisions seemed to amplify this cacophony.

considered the issue."). Many noted how a wide variety of rules—including rules of evidence, statutes of limitations, pleading rules, and fee-shifting provisions—cannot be accounted for by a one-size-fits-all approach to substantive-procedural distinctions.

On rules of evidence, see, for example, Bishop, *supra* note 37 (criticizing formalist approaches); Lindsey C. Boney IV, Note, *Forum Shopping through the Federal Rules of Evidence*, 60 ALA. L. REV. 151 (2008) (same); Dickey, *supra* note 37, at 122 (same); Lanstra, *supra* note 37, at 858, 875 (same); Lawson, *supra* note 37, at 551–53 (same); Richard Henry Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37, 91–92 (2006) (same); Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 396 (1977) ("[S]tate courts not infrequently phrase rulings in terms of evidence law that in fact are decisions about substantive law.").

On statutes of limitations, see, for example, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290–91, 295 (discussing various possible characterizations of statutes of limitations); Craft, *supra* note 23 (same); Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1102–03 (1989) (same).

For pleading rules, see, for example, Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 59 (1998) (noting that "[p]leading is quintessentially procedural," but "the impact of relaxed pleading requirements on substantive outcomes is apparent"); Jeffrey A. Parness, Amy M. Leonetti & Austin W. Bartlett, *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 439–41 (1999) (making a similar observation).

For fee-shifting provisions, see, for example, Jeffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393, 399, 401, 442 (1988) ("[A] court can characterize a single fee-shifting provision as either procedural or substantive, depending upon the setting.").

For an argument that all procedural rules have a substantive dimension, and vice versa, see Main, *supra* note 17.

75. Freer, *supra* note 74, at 1090.

76. Darrel N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403, 474 (1989).

77. Suggestions from commentators included identifying procedural rules as those "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes," Ely, *supra* note 40, at 724; identifying procedural rules as those that "control[] the conduct of litigation" and substantive rules as those that "control[] social conduct outside the courtroom," Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 721–22 (1975); identifying substantive rules as those having a nonprocedural purpose or "calculated to affect behavior at the planning stage as distinguished from the disputation stage of activity," Wellborn, *supra* note 74, at 404; identifying procedural rules as those that "refer[] to the way legal disputes are resolved in court," but noting four distinct senses in which a rule may be "substantive," Westen & Lehman, *supra* note 73, at 360–62; and identifying substantive rules as those identifying "legal rights to be applied" and procedural rules as those that "structure the process for laying claim to such rights," Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 832–35 (1985) (citing Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring)).

D. Phase Three: The Court Takes Up the Struggle (1996–Present)

Since the 1990s, the Court has experimented with a variety of approaches to *Erie* issues, drawing on models from every earlier period without settling on a scheme satisfying a majority of Justices. Academic commentary has grown ever more critical, but most recently appears, unfortunately, to have renounced earlier skepticism about the virtues of a formalist approach to characterization.

Skepticism of this kind has, however, been one of the few constants in the Court's recent *Erie* decisions. In the 1996 case, *Gasperini v. Center for the Humanities*, the Court engineered a delicate compromise between state and federal law.[78] The case presented the question of whether federal courts were required to follow a state statute empowering appellate courts to order new trials when jury awards "deviate[] materially from what would be reasonable compensation."[79] Justice Ginsburg, writing for the majority, explained that while the Seventh Amendment's reexamination clause prohibited federal *appellate* courts from obeying this command, federal *district* courts could pursue the policy expressed in the statute.[80] Her analysis did not, however, track any substantive-procedural distinction. Indeed, she explained, characterization could not decide the case because the state statute at issue was "both 'substantive' and 'procedural': 'substantive' in that [its] 'deviates materially' standard controls how much a plaintiff can be awarded; 'procedural' in that [it] assigns decision-making authority to [the state] Appellate Division."[81] Justices Stevens and Scalia both dissented, objecting to this analysis for contrary reasons. Justice Stevens considered the substantive objective of the state statute to be controlling.[82] But Justice Scalia viewed the provision as entirely procedural, while suggesting that the substantive-procedural distinction was a distraction from the more basic distinction between a "*rule of law*" and a "*rule of review*."[83] Justice Scalia also saw the case as

78. 518 U.S. 415 (1996).

79. *Id.* at 418–19.

80. *Id.*

81. *Id.* at 426. Later in the opinion, Justice Ginsburg again described the state statute as both substantive and procedural: "[The state statute] contains a procedural instruction . . . but the State's objective is manifestly substantive." *Id.* at 429.

82. *See id.* at 447 (Stevens, J., dissenting) ("The majority's persuasive demonstration that New York law sets forth a substantive limitation on the size of jury awards seems to refute the contention that New York has merely asked appellate courts to reexamine facts [a procedural request]. The majority's analysis thus would seem to undermine the conclusion that the Reexamination Clause is relevant to this case.").

83. *Id.* at 464–65 (Scalia, J., dissenting). Justice Scalia continued:

> A tighter standard for reviewing jury determinations can no more plausibly be called a "substantive" disposition than can a tighter appellate standard for reviewing trial-court

demanding the type of analysis used in *Hanna* and *Burlington Northern*.[84] *Gasperini* thus revealed considerable disagreement among the Justices about the importance and proper structuring of characterization decisions.[85]

Reaching agreement on these questions was not on the Court's agenda in *Semtek v. Lockheed Martin Corp.*,[86] the next major decision addressing the validity of a federal rule and the choice between state and federal law. *Semtek* raised the issue of whether "the claim preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the [dismissing] federal court sits."[87] Writing for a unanimous Court, Justice Scalia concluded that judgments dismissing claims under Rule 41(b) of the Federal Rules of Civil Procedure did not have such preclusive status; a contrary conclusion, the opinion suggested, might be foreclosed by the REA.[88] This analysis implied that one attribute of "procedural" rules might be their narrow scope of application—the limited number of people and institutions bound by their commands. The *Semtek* opinion also noted the "substantive" character of the state law of claim preclusion at issue.[89] But it provided no further guidance

> determinations. The one, like the other, provides additional assurance *that the law has been complied with* [and is therefore procedural]; but the other, like the one, *leaves the law unchanged*.

Id. at 465.

84. *See id.* at 467–68 ("[I]n my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 . . . . That is undeniably a federal standard. . . . It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, one has no choice but to apply the Federal Rule.").

85. Not surprisingly, commentators criticized *Gasperini* for reimposing a "case-specific and issue-specific approach to balancing." Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 16, 20 (2006). *See also* Hendricks, *supra* note 10, at 125–26 (listing praise and criticism of the case-specific approach to *Erie*).

86. 531 U.S. 497 (2001). In 2010, Jeffrey Cooper described this case as "still . . . the Court's most recent authoritative guidance as to how to assess a Federal Rule's validity under the [Enabling Act]." Jeffrey O. Cooper, *Summary Judgment in the Shadow of* Erie, 43 AKRON L. REV. 1245, 1263 (2010).

87. *Semtek*, 531 U.S. at 499.

88. *See id.* at 503–04 ("[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the [federal] procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act . . . . In the present case, for example, if California law left petitioner free to sue on his claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate this limitation."). *See infra* note 311 (discussing the consequences of jurisdictional characterization).

89. *Id.* at 508 ("Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule.").

on the factors courts should consider in deciding a particular rule's character, and Justice Scalia did not mention whether his *Gasperini* distinction between rules of law and rules of review applied to the question.

Nor did this distinction play any role in Justice Scalia's majority opinion in *Shady Grove Orthopedic Associates, Inc. v. Allstate Insurance Co.*, the first Supreme Court decision since *Burlington Northern* to involve a traditional *Erie* question.[90] As noted above, *Shady Grove* required the Court to decide whether a New York state statute prohibiting class actions in suits seeking certain remedies (section 901(b))[91] barred a federal court in New York from certifying a class under Rule 23 of the Federal Rules of Civil Procedure.[92] In his opinion, Justice Scalia stressed that section 901(b) directly conflicted with Rule 23.[93] Under *Hanna*, the presence of this conflict barred the federal court from applying section 901(b)—as long as Rule 23 was procedural and therefore valid (an issue on which all of the Justices agreed).[94] Justice Scalia justified his finding of a direct conflict in part by rebutting the arguments advanced by Justice Ginsburg in dissent that section 901(b) had substantive purposes—the protection of certain vulnerable defendants—and thus could not conflict with Rule 23.[95] Justice Ginsburg's focus on the New York legislature's "intentions," Justice Scalia argued, was misguided and unworkable.[96] Moreover,

90. Shady Grove Orthopedic Assocs., Inc. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

91. N.Y. C.P.L.R. § 901(b) (McKinney 2010).

92. *Shady Grove*, 130 S. Ct. at 1436.

93. *Id.* at 1438. The majority opinion continued:

> [Section] 901(b)'s rule barring class actions for certain claims is set off as its own subsection, and where it applies § 901(a) [permitting class certification in situations analogous to those provided for in Rule 23] does not. This shows, according to Allstate [the party arguing for application of § 901(b)], that § 901(b) concerns a separate subject. Perhaps it does concern a subject separate from the subject of § 901(a). But the question before us is whether it concerns a subject separate from the subject of *Rule 23*—and for purposes of answering *that* question the way New York has structured its statute is immaterial.

Id. at 1438–39.

94. *See id.* at 1442–44; *id.* at 1457–60 (Stevens, J., concurring in part and concurring in judgment) (finding that, because Rule 23 permits plaintiffs to join separate claims against the same defendants in a class action, the Rule is procedural and therefore valid); *id.* at 1466–68 (Ginsburg, J., dissenting) (stating that Rule 23 regulates procedural aspects of class litigation).

95. *Id.* at 1439–42.

96. *See id.* at 1440–41 ("The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.' It would mean . . . that district courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous. Many laws further more than one aim, and the aim of others may be impossible to discern.

Justice Scalia maintained, substantive-procedural characterization is simply irrelevant to the initial question of conflict under *Hanna*,[97] and the characterization of state laws as substantive or procedural is also irrelevant to *Erie* analysis in cases involving Federal Rules.[98] Only "the substantive or procedural nature of the Federal Rule" is relevant.[99] It may not be surprising that Justice Scalia traced what he considers to be the only relevant characterization issue to the textual requirements of the REA: "The statute itself refers to 'substantive right[s],' . . . so there is no escaping the substance-procedure distinction."[100]

The last component of Justice Scalia's relatively formalist analysis—that a court making an *Erie* decision should focus on characterizing only the federal rule under consideration—was one of the main issues dividing the majority from the concurring and dissenting Justices. Justice Stevens's concurrence agreed that section 901(b) was "a procedural rule," but also agreed with Justice Ginsburg's dissenting position that "there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the state's definition of substantive rights and remedies."[101] For Justice Stevens, a federal rule cannot be characterized definitively without also considering the character of any state rules whose operation the federal rule might affect. That consideration, however, should ask not whether the state rules are "substantive," but "whether the state law actually is part of a State's framework of rights and remedies."[102] This departure

Moreover, to the extent the dissent's purpose-driven approach depends on its characterization of § 901(b)'s aims as substantive, it would apply to many state rules ostensibly addressed to procedure. . . . It is not even clear that a state supreme court's pronouncement of the law's purpose would settle the issue, since existence of the factual predicate for avoiding federal pre-emption is ultimately a federal question." (citation omitted)).

97. *See id.* at 1442 ("*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it 'significantly affect[s] the result of a litigation.'" (quoting Guaranty Trust Co. v. York, 236 U.S. 99, 109 (1945))).

98. *See id.* at 1443–44 ("[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference*. A Federal Rule of Civil Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural rule enacted for substantive purposes).").

99. *Id.* at 1443–44. Although he explicitly denied the need to characterize state law, Justice Scalia did liken the state law at issue to other provisions he appeared to consider indisputably procedural. *See id.* at 1443 ("[Section] 901(b) is no different from a state law forbidding simple joinder.").

100. *Id.* at 1447.

101. *Id.* at 1448 (Stevens, J., concurring in part and concurring in judgment).

102. *Id.* at 1449–50 ("[T]he balance Congress has struck [in the REA] turns, in part, on the nature of the state law that is being displaced by a federal rule. And in my view, the application of that balance does not necessarily turn on whether the state law at issue takes the *form* of what

from the language of substantive-procedural characterization suggests skepticism about the ease of distinguishing substantive from procedural rules.[103] Still, Justice Stevens ultimately agreed with the result of Justice Scalia's analysis in *Shady Grove*, concluding that section 901(b) was not "so intertwined with a state right or remedy that it functions to define the scope of the state right."[104]

Justice Ginsburg also considered the character of section 901(b), but reached a different conclusion. She agreed with Justice Stevens that federal courts deciding *Erie* cases should characterize both federal and putatively conflicting state rules[105] and criticized the majority's approach as "mechanical, . . . insensitive to state rules[,] and productive of discord."[106] Justice Ginsburg further argued that section 901(b) could only be understood as "a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit to prevent the exorbitant inflation of penalties."[107] In light of this purpose of the provision, it was irrelevant that section 901(b) appeared alongside otherwise procedural statutes in the New York Code.[108] Furthermore, given this characterization of section 901(b), no conflict could exist between it and Rule 23, whose procedural character was undisputed.[109] Finally, the substantive character of section 901(b) dictated that it must

is traditionally described as substantive or procedural. . . . [I]t turns on whether the state law actually is part of a State's framework of substantive rights or remedies.").

103. *Id.* Accordingly, Justice Stevens proposed a framework for *Erie* analysis focusing not primarily on conflict, like *Hanna*, but on the function of the state law at issue: "A federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary [sense] of the term but is so intertwined with a state right or remedy that it functions to define the scope of the [state right]." *Id.* at 1452. This framework, he contended, was more consistent than Justice Scalia's with the REA itself. *See id.* at 1454 ("The question . . . is not what rule we think would be easiest in federal courts. The question is what rule Congress established. Although[] Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act.").

104. *Id.* at 1452. Justice Stevens continued: "The text of CPLR § 901(b) expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State. And there is no interpretation from New York courts to the contrary. It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies." *Id.* at 1457.

105. *Id.* at 1461 (Ginsburg, J., dissenting).

106. *Id.* at 1463–64.

107. *Id.* at 1465.

108. *See id.* at 1469 ("Placement in the CPLR is hardly dispositive. The provision held 'substantive' for *Erie* purposes in *Gasperini* is also contained in the CPLR . . . , as are limitations periods, prescriptions plainly 'substantive' for *Erie* purposes however they may be characterized for other purposes." (citations omitted)).

109. *See id.* at 1465 (accepting for purposes of analysis the majority's refusal to find Rule 23 invalid); discussion *supra* note 94 (establishing that all the justices in *Shady Grove* agreed Rule 23 was procedural and valid).

prevail, rather than Rule 23, despite the validity of the Federal Rule.[110]

The three *Shady Grove* opinions thus proposed three frameworks for *Erie* analysis using characterization in completely different ways. Justice Scalia would only characterize federal rules in order to determine their validity. Justice Ginsburg would characterize the state law, as well, in order to determine the existence of a conflict and the applicability of the RDA. Justice Stevens also would examine both federal and state rules, but instead of characterizing the state rule, would subject it to an "intertwined remedy" analysis. Each of these approaches finds support in precedent.[111] As *Shady Grove* illustrated, however, each might also support different conclusions in the same case.

E. The Current Status of Substantive-Procedural Characterization

The discord apparent in *Shady Grove* has prompted a small but passionate chorus of criticism.[112] Academic recommendations might in fact be partly responsible for the lack of judicial consensus on the role of characterization in *Erie* analysis. That is, it might be that the Justices have not ignored the suggestions of commentators, but taken them too much to heart—without being able to integrate these suggestions satisfactorily with their preexisting methodological and doctrinal commitments.

Both Justice Scalia's limiting of characterization to federal law, and Justice Stevens's reframing of state law characterization as "intertwined remedy" analysis, speak to the continued influence of Cook's realist argument and the skepticism to which it leads.[113] But each of the three

110. *See id.* at 1471 ("Shady Grove's effort to characterize § 901(b) as simply 'procedural' cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* . . . develop, the Rules of Decision Act commands application of the State's law . . . .").

111. Commentators have perceived tension between *Shady Grove* and other cases, especially *Sibbach*. *See supra* note 10 and accompanying text (describing criticism of *Shady Grove* for its failure to clarify an already criticized area of law). Justice Stevens disagreed that the issue in *Shady Grove* resembled that in *Sibbach*. *Shady Grove*, 130 S. Ct. at 1455 (Stevens, J., concurring in part and concurring in judgment).

112. *See generally, e.g*, Burbank & Wolff, *supra* note 10 (presenting generally critical reactions and recommending an alternative analysis); Hendricks, *supra* note 10 (presenting a new level of *Erie* critique by analyzing *Shady Grove*); Tidmarsh, *supra* note 10 (arguing that the bifurcated approach to *Erie* issues is flawed).

113. A skeptical position remains popular among some commentators. *See, e.g.*, Burbank & Wolff, *supra* note 10, at 30, 47 (noting the possibility that the meaning of "procedure" changes over time along with "our understanding of what it means to have legal rights" and of "what in the legal landscape . . . determines whether citizens will be able to fructify their legal rights"); Kelleher, *supra* note 74, at 62–69 (noting that the substance-procedure distinction has proven ineffective in defining the roles of the legislature and the court because both legislative

Shady Grove opinions also insists on the need for a structured analysis to ensure predictability. This goal echoes the concerns of recent commentators, who have continued to criticize *Erie* doctrine as unpredictable[114] and as reflecting, among other things, an insufficiently crisp understanding of the distinction between substantive and procedural rules.[115] These commentators have recognized the continued importance of characterization but have struggled, like the Justices, to pinpoint the role it should play in *Erie* analysis. When they provide explicit recommendations, their proposals tend toward the formalist—urging a search for "a single answer that explain[s] the Court's intuitions about when a federal court must strive to achieve the outcome that a state court would have achieved,"[116] and advocating a "single-dimensional" understanding of the substantive-procedural distinction, under which each "legal rule should be classified as either black or white: either substantive or procedural."[117] Yet many

enactments and court rules contain elements of substance and procedure); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 401–02 (2010) ("From the debut of the Federal Rules until the 1970s . . . , Cook's take on the shadowy divide between substance and procedure prevailed as accepted wisdom."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992) ("[A]ny marginal statute . . . can be made to appear 'procedural' by means of a simple rhetorical device."); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997) ("Neither the Supreme Court . . . nor academic exegesis over five decades has cogently illuminated how best to determine whether a rule is 'substantive' or 'procedural.'").

114. Commentators have described the doctrine as a "complex and dubiously predictable group of choice of law principles," John A. Lynch, Jr., *Federal Procedure and* Erie*: Saving State Litigation Reform through Comparative Impairment*, 30 WHITTIER L. REV. 283, 283–84 (2008), beginning to "fray around the edges," Justice Jack B. Jacobs, *The Vanishing Substance-Procedure Distinction in Contemporary Corporate Litigation: An Essay*, 41 SUFFOLK U. L. REV. 1, 2 (2007), and remaining "remarkably unsettled," Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1253 (2010). This is all despite the length of time the doctrine has had to develop: "More than sixty years of . . . jurisprudence has yet to result in any clear consensus on the distinction between substance and procedure." Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 193 (2004). The doctrine "does not provide a clear analytical pathway for assessing whether a particular rule . . . impermissibly crosses the line between the procedural and substantive law." Bishop, *supra* note 37, at 284. Under current doctrine, characterization questions "lack a clear answer." Tidmarsh, *supra* note 10, at 879.

115. *See, e.g.*, C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 270 ("[D]etermining the sense in which a state rule of decision should be regarded as 'substantive' should be the critical determinant of whether a competing federal rule should be applied.").

116. Tidmarsh, *supra* note 10, at 904.

117. Hendricks, *supra* note 10, at 106–08. Hendricks argues that this approach would advance "transparency" in legislative activity. *Id.* *See* Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 429 (2010) ("[T]o the extent that one can identify 'procedural' rules and distinguish them from rules that are 'substantive' and prone to pernicious competition, then it is possible to seek the benefits of a centralizing rule without fearing its costs.").

commentators are also unwilling to abandon entirely the more skeptical, functionalist perspective inherited from Cook and earlier *Erie* doctrine: what is needed, according to some, is simply to "revisit the line between 'procedure' and 'substance' in light of practical experience and evolving legal norms."[118]

So far, commentators have ignored the possibility of making use of the Court's recent successful development of characterization doctrine in the distinct legal area of jurisdictional rules. As the next Part will explain, this development shows that it is possible for characterization doctrine to be both sensitive to functionalist concerns and structured enough to enjoy consensus. Pure formalism is not the only alternative to realist skepticism.

II. CHARACTERIZATION TYPE TWO: JURISDICTIONAL-NONJURISDICTIONAL DISTINCTIONS

We can put *Erie* characterization into useful perspective by considering the fortunes of characterization decisions in another area: determinations of the character of certain litigation requirements, including prerequisites to suit and appeal. Supreme Court decisions addressing these issues make a number of distinctions among such prerequisites, the most basic being the distinction between jurisdictional and nonjurisdictional rules. A rule classified as jurisdictional will have special attributes, such as nonwaivability and insusceptibility to judicial modification, that nonjurisdictional rules largely lack; rules within the nonjurisdictional category are sometimes also grouped into further subcategories. These distinctions have proliferated in an astonishingly short period of time—over just the past decade—yet have won more consensus than any comparable approach to *Erie* characterization.

The contrasting development of these two areas of doctrine makes it easy to overlook their fundamental similarities. Both types of characterization range broadly over statutory and judge-made legal rules. Thus, each borrows at times from rules of statutory interpretation and the principles underlying those rules, while sometimes extending these principles to situations not strictly involving statutory application (though still involving interpretation, as discussed below). In both areas, decision-makers also must consider issues of power allocation. In the *Erie* context, judges confront the allocation of power between state and federal lawmaking processes, as well as between legislatures and courts. In the jurisdictional-rules context, they consider the allocation of power between legislatures and courts as well as between

118. Burbank & Wolff, *supra* note 10, at 20.

litigants and government institutions. And in both areas of characterization doctrine, with varying success, the Court has sought to steer a middle course between the skeptical-functionalist insight that characterization is ultimately an arbitrary exercise, at least in some borderline cases, and the clarity and stability of categorical formalism.

A. Development of Jurisdictional-Characterization Doctrine: An Overview

The most dramatic developments in the jurisdictional-characterization area are much more recent than in *Erie* doctrine. Decisions setting forth guidelines for jurisdictional characterization have proliferated over the past decade, and the past few years in particular.

Students of this topic commonly credit the Supreme Court's 1848 decision in *United States v. Curry*[119] with establishing most of the basic principles. *Curry* articulated a firm distinction between jurisdictional and other types of statutes and set forth the premise that the primary source of power to establish jurisdictional rules of law is legislative.[120] The case addressed whether the Court had appellate jurisdiction over an appeal taken pursuant to a district court order specifying a deadline for notifying the appellees in the matter. Chief Justice Taney's opinion for the Court concluded that appellate jurisdiction was lacking because the statute granting the Court jurisdiction over such appeals did not give district courts power to control the terms or manner in which appeals might occur:

> The power to hear and determine a case like this is conferred upon the Court by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them.[121]

The links *Curry* established among the characterization of a rule as jurisdictional, the presence or absence of judicial power, and the enterprise of statutory application would reemerge and become more complex in Supreme Court decisions issued after the year 2000.

For more than a century, however, jurisdictional characterization received little further attention. In the last decades of the twentieth century, a series of Supreme Court decisions, many written by Justice Ginsburg, began to consider whether Federal Rule-based and non-time-

119. 47 U.S. (6 How.) 106 (1848).

120. Robbins, *supra* note 15, at 288–89 (discussing the significance of *Curry* in the development of jurisdictional doctrine).

121. *Curry*, 47 U.S. (6 How.) at 113.

limit statutory litigation requirements merit characterization as jurisdictional. Early cases addressing these issues reached varying conclusions, prompting an attempt by the Court to clarify the doctrine in the mid-2000s, punctuated by the arguably anomalous *Bowles v. Russell* decision in 2007.[122] Led by Justice Ginsburg and joined by a growing group of her fellow Justices, the Court since *Bowles* has renewed its efforts at doctrinal construction.

In this process, the Court has adopted several suggestions made by academic commentators, who, like some of their counterparts writing on *Erie* issues, have directly engaged with the skeptical-functionalist critique of characterization to inform their suggestions regarding formal doctrinal elaboration.[123] The options for jurisdictional-characterization analysis have proliferated as a result. In commentary and opinions, jurisdictional rules are sometimes simply opposed to nonjurisdictional rules,[124] but sometimes they are opposed to rules governing the "merits," a category overlapping with the "substantive";[125] sometimes they are opposed to procedural rules[126] and sometimes to so-called

122. 551 U.S. 205 (2007). *See infra* Parts II.C and II.D (discussing the emergence of the jurisdictional-nonjurisdictional distinction and the initial formalization of the jurisdictional-characterization doctrine).

123. *See generally* Dane, *supra* note 4 (arguing that the doctrine of jurisdictional time limits is a miscalculation due to the categorical distinction between jurisdictional and nonjurisdictional rules); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011) [hereinafter Dodson, *Complexity of Jurisdictional Clarity*] (discussing the lack of clarity within jurisdictional doctrine due to the mistaken assumption that jurisdictional rules must be clear, and arguing that clarity can be obtained to a certain degree, but at a price); Dodson, *Hybridizing*, *supra* note 4 (arguing that jurisdictional rules can be "hybridized" with nonjurisdictional rules to regulate federal jurisdiction in desirable ways); Lee, *supra* note 16 (arguing that conventional thought on jurisdiction is misleading and dangerous).

124. *See, e.g.*, Dane, *supra* note 4, at 5, 7 (stating that jurisdictional rules concern the power of a tribunal and nonjurisdictional rules do not); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1458 (2006) ("It is a basic axiom of American jurisprudence that legal issues are classified as either 'jurisdictional' or 'nonjurisdictional.'").

125. *See, e.g.*, Dane, *supra* note 4, at 42–44 (emphasizing how "jurisdictional issues sometimes do touch matters of substance"); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1207–09 (2001) (discussing characterization of jurisdictional issues in contrast to "merits" issues); Lee, *supra* note 16, at 1613–14 (arguing, *inter alia*, that "there is no hard conceptual difference between jurisdiction and the merits"); Wasserman, *supra* note 12, at 498 (distinguishing "adjudicative-jurisdictional rules" from both "substantive merits rules" and "procedural, or 'claim-processing,' rules"). Sometimes, this distinction is expressed in terms of H.L.A. Hart's distinction between primary (substantive, merits-oriented) rules and secondary (procedural, jurisdictional) rules, as in Wasserman, *supra* note 16, at 670–71. *Cf.* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1021 (2008) ("[M]y use of the terms 'substance' and 'process' roughly parallels H.L.A. Hart's distinction between primary and secondary rules." (citing H.L.A. HART, THE CONCEPT OF LAW 80–81 (2d ed. 1994)).

126. *See, e.g.*, Dodson, *Removal Jurisdiction*, *supra* note 1, at 59 ("[J]urisdiction is the power or authority of a court to issue legitimate, binding, and enforceable orders. Procedure is the

"claim-processing" rules.[127] Thus, depending on the context, jurisdictional rules might be either second-order rules (rules governing the application of first-order rules, which govern conduct) or third-order rules (rules governing the application of both second- and first-order rules).[128] In either case, however, the rules for deciding the character of a particular rule are of an order higher than the rule whose character is being decided: they are the rules for identifying the category in which to place lower-order rules. This structural characteristic is common to both substantive-procedural characterization and jurisdictional characterization, yet the Court seems to have recognized it only in the latter context. At this level, in the jurisdictional-characterization context, the Court has achieved significantly more consensus than in the context of substantive-procedural characterization.

B. Phase One: Emergence of the Issues (1960–2004)

The 1960 decision in *United States v. Robinson* laid the groundwork for the Court's early twenty-first-century development of jurisdictional-characterization doctrine.[129] *Robinson* extended the principles set out in *Curry* to appeal-filing requirements set out in the Federal Rules rather than in statutes, and held that "the filing of [a] notice of appeal within the 10-day period prescribed by [Federal] Rule [of Appellate Procedure] 37(a)(2) is mandatory and jurisdictional."[130] The Court explained its determination by noting that all precursors to Rule 37(a)(2) had been similarly understood to be "mandatory and jurisdictional, and appeals not taken within [the specified time] appear always to have been dismissed regardless of cause."[131]

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regulation of that power or authority once obtained.").

127. *See, e.g.*, Perry A. Craft, *Framed by the Times*, 40 TENN. B.J. 18, 22 (2004) (summarizing the distinction drawn in *Kontrick v. Ryan* between jurisdictional and claim-processing rules); *infra* notes 144–47 and accompanying text (same).

128. *See supra* note 125 and accompanying text (discussing how jurisdictional, or secondary, rules can oppose substantive, or primary, rules).

129. 361 U.S. 220 (1960).

130. *Id.* at 224.

131. *Id.* at 227. In part, the analysis turned on the meaning not only of the time limit prescribed in Rule 37(a)(2), but also of the power given to district courts by Rule 45(b), which permits a court to "extend the time" within which "an act must or may be done within a specified period." The majority concluded that Rule 45 must be read to preclude an "extension" of time to file a notice of appeal by district court order. *Id.* Justice Black, dissenting, contended that the court of appeals in *Robinson* had been correct to hold that "an extension of time, granted after the 10-day period for an appeal has passed, is not an 'enlargement' of the time in the narrow sense in which Rule 45(b) uses the word." *Id.* at 230 (Black, J., dissenting). Justice Black's analysis of the issue using tools of statutory interpretation would come to be a typical approach in later jurisdictional-characterization decisions. *See infra* Parts II.C–F (discussing the development of the doctrine through its initial formalization, disruption, and subsequent revival).

This approach to time limits set out in Federal Rules, relying largely if not exclusively on precedent (that is, prior characterizations of similar rules), remained the standard approach for most of the next few decades.[132] (It resembled the approach Cook had criticized much earlier in the conflicts area.) For example, in *Browder v. Director*,[133] the Court held that an appellate court lacks jurisdiction to review an order directing discharge of a habeas corpus petitioner from custody if the appeal from the order was untimely under applicable Federal Rules.[134] Justice Powell's majority opinion pointed not just to precedent, but also to the administrative difficulties and perceived unfairness that might result from declining to characterize the time limit under Rule 4(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107 as "mandatory and jurisdictional":[135] "The confusion that would result from litigants' divergent views of the completeness of proceedings would be wholly at odds with the imperative that jurisdictional requirements be explicit and unambiguous."[136]

The Court found that precedent and practical consequences dictated a different characterization conclusion in *Zipes v. Trans World Airlines*, decided in 1982.[137] In *Zipes*, the Court held that despite its statutory status, the "time limit for filing charges under Title VII of the Civil Rights Act" was not a "jurisdictional prerequisite to a suit" in district court.[138] The fact that the filing requirement appeared in a statute was just the beginning of the inquiry in this case. Justice White's opinion analogized this statutory time limit to a (nonjurisdictional) "statute of limitations"; considered "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of our cases";[139] and noted the absence of any time limit in "[t]he provision granting district courts

132. Robbins, *supra* note 15, at 299.

133. 434 U.S. 257 (1978), *superseded by statute*, 28 U.S.C. § 2245, *as stated in* Ukawabutu v. Morton, 997 F. Supp. 605 (D.N.J. 1998).

134. *Id.* at 264–65.

135. *Id.* at 264. The two provisions both set out a thirty-day time limit.

136. *Id.* at 266–67. In a concurring opinion, Justice Blackmun warned against the "exalt[ation of] nomenclature over substance," but he was referring to the characterization of the petitioner's motion for reconsideration of the district court's order, not to the majority's use of "mandatory and jurisdictional" terminology. *Id.* at 272 (Blackmun, J., concurring). Later commentators would come to consider the "mandatory and jurisdictional" term more problematic because of its apparent formalism. *See* Dodson, *Hybridizing*, *supra* note 4, at 67–68 (noting that Congress might intend statutory requirements to be mandatory without intending them to have other jurisdictional attributes); Dodson, *Mandatory*, *supra* note 16 (presenting a framework for distinguishing mandatoriness from other effects of jurisdictionality).

137. 455 U.S. 385 (1982).

138. *Id.* at 387, 393.

139. *Id.* at 393.

jurisdiction under Title VII," as well as the failure of the time limit provision itself to "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[140] The last of these points would become especially influential in later jurisdictional-characterization doctrines. Textual and practical considerations similarly oriented the Court's analysis in *Becker v. Montgomery*, decided in 2001. Justice Ginsburg's majority opinion in *Becker* held that an appellant's failure to sign a notice of appeal did not deprive the federal appellate court of jurisdiction over the appeal, at least if "the appellant promptly supplie[d] the signature once the omission [wa]s called to his attention."[141] Justice Ginsburg denied any intention to overrule precedent that had described Rule 3 and 4 of the Federal Rules of Appellate Procedure (prescribing requirements for an effective notice of appeal) as "jurisdictional in nature."[142] Rather, she argued that the particular mistake committed by this appellant should not be treated as equivalent to noncompliance with these slightly different requirements, in the absence of a specific statutory reference and in light of the drastic consequences of a contrary conclusion.

By the time of *Becker*, the Court had thus begun to distinguish among pre-litigation requirements based not only on the authority issuing the particular requirement and on prior characterizations of that requirement, but also on specific features of the legal sources containing the requirement, and on the systemic implications of particular characterization decisions. As in the contemporary *Erie* context, the Court tended in its decisions to deny that it was departing from precedent, while sometimes reaching conclusions difficult to reconcile with prior cases. While a few commentators noted these inconsistencies, they, unlike the Court's *Erie* decision, did not inspire wide criticism.[143]

140. *Id.* at 393–94.

141. Becker v. Montgomery, 532 U.S. 757, 760 (2001). The signature requirement in this case was supplied by a local rule. *Id.* at 765.

142. *Id.* at 765–66. Justice Ginsburg wrote:

> We rule simply . . . that Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a "jurisdictional" impediment to pursuit of his appeal. Appellate Rules 3 and 4 . . . are indeed linked jurisdictional provisions. . . . Notably, a signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional.

Id.

143. *See, e.g.*, Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 GA. L. REV. 399, 399–400 (1986) (contending that "[t]he appellate courts have made a fetish of their own authority by characterizing defects in notices of appeal as 'jurisdictional'" and arguing against this use of the term); *see generally* Dane, *supra* note 4 (exploring recent irregularities in courts' descriptions of requirements as "jurisdictional").

C. Phase Two: Initial Formalization (2004–2007)

In the mid-2000s, the Court began trying to tidy up its jurisdictional-characterization doctrine through a straightforward program of disciplining the use of characterization labels. In *Kontrick v. Ryan*, decided in 2004, Justice Ginsburg presented the first statement of this program:

> Courts, including this Court, . . . have been less than meticulous [in their use of the term "jurisdictional"]; they have more than occasionally used the term . . . to describe emphatic time prescriptions in rules of court. "Jurisdiction," the Court has aptly observed, is a word of many, too many, meanings . . . . Classifying time prescriptions, even rigid ones, under the heading "subject matter jurisdiction" can be confounding. . . . Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.[144]

On this premise, the Court characterized Rule 4004 of the Federal Rules of Bankruptcy Procedure (which set a time limit for filing a plea objecting to a debtor's discharge petition) as "claim-processing" rather than jurisdictional, and therefore forfeited as a basis for defense to such a plea if not timely raised.[145] However, while *Kontrick* clearly specified two distinct categories of rules (jurisdictional versus claim-processing), it did not describe any standards for identifying rules that might qualify as jurisdictional, beyond noting that such rules "delineat[e] . . . classes of cases . . . or persons."[146] The petitioner in *Kontrick* had conceded that Rule 4004 did not relate to subject-matter jurisdiction, making it unnecessary for Justice Ginsburg to analyze the features of the Rule that justified placing it in the "claim-processing" category.[147]

Later in 2004, Justice Ginsburg provided further guidance in *Scarborough v. Principi*.[148] In *Principi*, the Court characterized a statutory filing time limit (for a fee application under the Equal Access to Justice Act) as nonjurisdictional, explaining that the time limit did "not concern the federal courts' 'subject-matter jurisdiction,'" but rather involved "a mode of relief . . . ancillary to the judgment of a court that has plenary 'jurisdiction of the [civil] action' in which the fee

144. 540 U.S. 443, 454–55 (2004) (internal citations and quotations omitted).
145. *Id.* at 447.
146. *Id.* at 455.
147. *Id.* at 454–55.
148. 541 U.S. 401 (2004).

application is made."[149] Borrowing language from *Kontrick*, Justice Ginsburg looked to the content of the statutory provision at issue to justify this characterization: because the statute "does not describe what 'classes of cases' . . . the [Court of Veterans Claims] is competent to adjudicate," "the provision's 30-day deadline for fee applications and its application-content specifications are not properly typed 'jurisdictional.'"[150]

The Court also refused to apply the "jurisdictional" term to provisions failing to describe "classes of cases" in two more cases over the next two years: *Eberhart v. United States*,[151] a per curiam opinion, and *Arbaugh v. Y & H Corp.*,[152] authored by Justice Ginsburg. In *Eberhart*, the Court held that the seven-day limit on motions for new trials in Rule 33(a) of the Federal Rules of Criminal Procedure[153] did not bar a motion for a new trial made outside that period, if the opposing party did not raise the issue of the motion's timeliness until appeal.[154] The Court analyzed the issue as indistinguishable from that in *Kontrick*[155] and explained that *Kontrick* itself had been consistent with the Court's 1960 decision in *Robinson*. That earlier case, the Court explained, had concerned the judicial duty to apply statutes according to their terms, not according to the labeling of particular provisions:

> *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory* and *jurisdictional*." The resulting imprecision has obscured the central point of the *Robinson* case—that when the Government objected to a filing untimely under Rule 37, the Court's duty to dismiss the appeal was mandatory.[156]

149. *Id.* at 413.

150. *Id.* at 414.

151. 546 U.S. 12 (2005) (per curiam).

152. 546 U.S. 500 (2006).

153. The Rule contains an exception for motions based on newly discovered evidence. *See* FED. R. CRIM. P. 33(a).

154. *Eberhart*, 546 U.S. at 13.

155. *See id.* at 15–16 ("The Rules we construed in *Kontrick* closely parallel those at issue here. . . . It is implausible that the Rules considered in *Kontrick* can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of their subject-matter jurisdiction. . . . Moreover, the most recent decisions have attempted to brush away confusion introduced by our earlier decisions. . . . We break no new ground in firmly classifying Rules 33 and 45 as claim-processing rules, despite the confusion generated by the 'less than meticulous' uses of the term 'nonjurisdictional' in our earlier cases.").

156. *Id.* at 17–18 (citing United States v. Robinson, 361 U.S. 220, 229 (1960)). *See id.* at 19 ("Our repetition of the phrase 'mandatory and jurisdictional' has understandably led the lower courts to err on the side of caution by giving the limitations in Rules 33 and 45 the force of subject-matter jurisdiction.").

In *Arbaugh*, Justice Ginsburg further developed a set of rules for structuring characterization decisions. In this case, the Court held that the statutory requirement that a defendant in a Title VII action have fifteen or more employees to qualify as an "employer" "does not circumscribe federal subject-matter jurisdiction" but rather "relates to the substantive adequacy of . . . [a] Title VII claim."[157] Justice Ginsburg noted that the Court had been "less than meticulous" about the distinction between subject-matter jurisdiction and the substantive requirements of a claim, just as it had been about the analogous jurisdiction/claim-processing distinction:

> Subject-matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant is bound by the federal law asserted as the predicate for relief—a merits-related determination." Judicial opinions . . . "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject-matter jurisdiction or for failure to state a claim." We have described such unrefined distinctions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question whether the federal court had authority to adjudicate the claim in suit.[158]

Recalling the 1982 analysis of Title VII characterization decision in *Zipes*,[159] and picking up on a hint in Justice Black's dissent in *Robinson*,[160] Justice Ginsburg encouraged courts to ground their characterization of statutory requirements in close analysis of the statutes at issue. In the provision disputed in *Arbaugh*, "[n]othing in the text of Title VII indicate[d] that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement [wa]s met."[161] Although "Congress could make the employee-numerosity requirement 'jurisdictional,'" it had not explicitly done so; the requirement did not appear in the "jurisdictional" provision of Title VII authorizing federal district courts to decide claims under the statute.[162] Rather, "the 15-employee threshold appear[ed] in a separate provision that 'd[id] not speak in jurisdictional terms or refer in any way to the

157. *Arbaugh*, 546 U.S. at 503–04.

158. *Id.* at 511 (citing 2 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 12.30[1], at 12-36.1 (3d ed. 2005)); Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 361 (2d Cir. 2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)).

159. *See supra* text accompanying notes 139–40 (describing statutory analysis in *Zipes*).

160. *See supra* note 131 (describing Justice Black's construction of Federal Rules of Appellate Procedure 37(a)(2) and 45(b)).

161. *Arbaugh*, 546 U.S. at 514.

162. *Id.* at 514–15.

jurisdiction of the district courts.'"[163] Without disavowing the concern for precedent displayed in *Zipes* and *Eberhart*, *Arbaugh* implied that characterization questions should be treated as essentially issues of statutory interpretation, at least when statutory requirements are at issue.[164]

D. Phase Three: The Bowles *Disruption (2007)*

Until the *Arbaugh* decision, the Court—especially Justice Ginsburg—seemed to be developing a characterization doctrine along a coherent (if not yet comprehensive) trajectory. The Court's next decision in this area departed from the pattern, confounding observers.[165] In 2007, one year after *Arbaugh*, the Court decided *Bowles v. Russell*, which held that a time limit prescribed in a Federal Rule and a parallel statute was jurisdictional, apparently merely because it was a time limit.[166] Justice Thomas's majority opinion noted that the Court had "long held that the taking of an appeal within the prescribed time limit is 'mandatory and jurisdictional,'"[167] and that none of its recent characterization decisions (such as *Kontrick* and *Arbaugh*) had overridden the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[168] Justice Thomas did, however, seek to show that the decision fit within the scheme Justice Ginsburg had been developing in recent cases: "[T]he notion of 'subject-matter' jurisdiction . . . is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment."[169]

In his dissenting opinion, Justice Souter argued that the Court's attempt to reconcile *Bowles* with precedent was no more than a gesture. It made little sense, he contended, to characterize statutory time limits as "jurisdictional" per se, without regard to the indicia of legislative purpose used to characterize other statutory litigation prerequisites.[170]

163. *Id.* at 515 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).

164. *See id.* at 516 ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

165. *See* discussion *infra* notes 172–173 (discussing how *Bowles v. Russell* further complicated the doctrine of jurisdiction).

166. 551 U.S. 205, 206–07 (2007). More specifically, the Court held that a notice of appeal that was untimely under a federal rule and statute imposing parallel requirements could not confer appellate jurisdiction over the appeal, even if the appeal was timely under a district court order extending the time to file. *Id.* at 213–14.

167. *Id.* at 209.

168. *Id.* at 210–11.

169. *Id.* at 213 (internal citations omitted).

170. *See id.* at 218 (Souter, J., dissenting) ("A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside

Commentators echoed Justice Souter's judgment that *Bowles* "le[ft] the Court incoherent."[171] The decision was seen as making "a mess of the doctrine of jurisdiction and the idea of jurisdictionality" and a "conceptual muddle of the received wisdom on jurisdictional time limits."[172] It "overstated the supporting precedent, inflated the jurisdictional importance of statutes, and undermined an important recent movement to clarify when a rule is jurisdictional and when it is not."[173]

The following year, in *John R. Sand & Gravel v. United States*, the Court recognized "jurisdictional" attributes in another statutory time limit.[174] The statute in question governed the timeliness of lawsuits filed in the Court of Federal Claims.[175] As in *Bowles*, the majority looked largely to precedent,[176] but it also considered the text and legislative history of the statute, which here explicitly referred to "jurisdiction."[177] Justice Stevens (joined by Justice Ginsburg) again dissented, arguing that text should prevail over precedent and noting that the Court had in two previous cases "ignored[,] and thus

the class of limitations on subject-matter jurisdiction unless Congress says otherwise."); *see also id.* ("The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, and is not jurisdictional." (citations omitted)). According to Justice Souter, the majority's conclusion was inconsistent with its recent decisions in this area:

> [T]he Court's opinion in this case . . . suddenly restores *Robinson*'s indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson*'s error [in *Kontrick*, *Eberhart*, and *Arbaugh*]. This is puzzling, the more so because our recent (and . . . unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority opinion makes no attempt to show that they were not.

Id. at 216 (citations omitted).

171. *Id.* at 220.

172. Dane, *supra* note 16, at 168. *See* Leading Cases, *Statutory Time Limits to Appeal*, 121 HARV. L. REV. 315, 315–16 (2006) ("[B]y ruling that the mere presence of a time limit in a statute made it jurisdictional, the Court failed to take statutory purposes and history seriously and created a rule only a step less obscuring and overbroad than the old treatment of jurisdictionality the Court had campaigned to reform.").

173. Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631, 632 (2008). For additional criticism, see Dodson, Bowles, *supra* note 16, at 43 ("By eliding the complexity and far reach of jurisdictional characterizations, *Bowles* creates tension with precedent and increases the risk of wasted litigant and judicial resources."); Kantrowitz, *supra* note 16, at 289–90 (offering a critique of Dodson's proposals).

174. 552 U.S. 130, 133–34 (2008).

175. *Id.* at 132.

176. *See id.* at 134 ("The Court has long interpreted the court of claims limitation statute as setting forth this . . . more absolute[] kind of limitations period.").

177. *Id.* at 134–36. The majority opinion stopped short of explicitly labeling this provision "jurisdictional," instead holding that the time limit could and should be raised by the court sua sponte. *Id.* at 132.

presumably abandoned," precedent "customarily" requiring jurisdictional treatment of "statutes of limitations in suits against the Government."[178] In a separate dissent, Justice Ginsburg also stressed the tension between this decision and her "recent efforts to apply the term 'jurisdictional' with greater precision":[179] "After today's decision, one will need a crystal ball to predict when this Court will reject, and when it will cling to, its prior decisions interpreting legislative texts."[180]

E. Phase Four: Formalization Revived (2009–Present)

Since *John R. Sand & Gravel*, Justice Ginsburg seems to have successfully reasserted control over the development of jurisdictional-characterization doctrine. A majority of Justices now agree that the appropriate analysis focuses on features of the legal provision at issue and considers precedent only secondarily.

The first sign of this realignment was Justice Ginsburg's 2009 opinion for a unanimous Court in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen*.[181] In *Union Pacific*, the Court held that procedural rules raised sua sponte by members of National Railroad Adjustment Board (NRAB) panels could not be considered jurisdictional, given the text and structure of the statutes conferring authority on the NRAB to adjudicate disputes.[182] The Court reasoned that "[i]f the NRAB lacks authority to define the jurisdiction of its panels, . . . surely the panels themselves lack that authority."[183] The opinion presented the character of the rules at issue as a straightforward matter of the implications of statutory text.

Justice Thomas wrote an opinion for another unanimous Court the following year in *United Student Aid Funds, Inc. v. Espinosa*, the next

178. *Id.* at 140 (Stevens, J., dissenting) (citing Honda v. Clark, 386 U.S. 484 (1967); Bowen v. City of New York, 476 U.S. 467 (1986)).

179. *Id.* at 145 (Ginsburg, J., dissenting).

180. *Id.* at 146.

181. 130 S. Ct. 584 (2009).

182. *Id.* at 597. Justice Ginsburg wrote:

> The additional requirement of a conference . . . is independent of the [collective bargaining agreement] process. . . . [T]he conference requirement is stated in the "[g]eneral duties" section of the R[ailroad]L[abor]A[ct], a section that is not moored to the "[e]stablishment[,] . . . powers[,] and duties" of the NRAB . . . . Rooted in [a specific statutory provision] and often informal in practice, conferencing is surely no more 'jurisdictional' than is the presuit resort to the EEOC held forfeitable in *Zipes*. And if the requirement to conference is not 'jurisdictional,' then failure initially to submit proof of a conferencing [one of the grounds of the NRAB decision being reviewed] cannot be of that genre.

Id. (citations omitted). *See infra* Part III on the implications of the last sentence of this passage.

183. *Id.* at 598.

decision to touch on characterization.[184] The question of jurisdictionality was not at issue in *United Student Aid*,[185] but Justice Thomas's opinion addressed it anyway, adopting Justice Ginsburg's text- and structure-focused approach.[186] In this way, *United Student Aid* indicated the beginnings of a principled, functionalist justification for Justice Ginsburg's characterization framework, one tying that framework to broader policies of institutional power allocation.

The Court's most recent decisions—four and counting over the past three terms—have continued to clarify the relationship between text- and precedent-focused characterization decisions and the grounding of these decisions in principles of judicial power. In *Reed Elsevier, Inc. v. Muchnick*,[187] another Justice Thomas opinion, the Court followed Justice Ginsburg's *Kontrick* distinction between jurisdictional and claim-processing rules in classifying the statutory requirement that copyright holders register their copyrights before filing suit as a "nonjurisdictional limitation[] on causes of action."[188] In reasoning reminiscent of Justice Ginsburg's opinion in *Union Pacific*, Justice Thomas justified this conclusion based largely on features of statutory text:

> A statutory condition that requires a party to take some action before filing a lawsuit is not automatically "a *jurisdictional* prerequisite to suit." Rather, the jurisdictional analysis must focus on the "legal character" of the requirement, which we discern[] by looking to the condition's text, context, and relevant historical treatment.[189]

This analysis was not inconsistent with *Bowles*, Justice Thomas insisted, because "*Bowles* stands [only] for the proposition that context, including this Court's interpretation of similar provisions in many years

184. 130 S. Ct. 1367 (2010).

185. *United Student Aid* held that an order confirming the discharge of a student loan debt in the absence of certain findings and procedures could not be considered "void" under Federal Rule 60(b)(4). *Id.* at 1373.

186. *Id.* at 1377–78. Justice Thomas noted,

> This case presents no occasion to . . . define the precise circumstances in which a jurisdictional error will render a judgment void because United does not argue that the Bankruptcy Court's error was jurisdictional. Such an argument would fail in any event. First, [11 U.S.C.] § 523(a)(8)'s statutory requirement that a bankruptcy court find undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction. Second, the requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules, which are "procedural rules adopted by the Court for the orderly transaction of business" that are "not jurisdictional."

Id. (citations omitted).

187. 130 S. Ct. 1237 (2010).

188. *Id.* at 1243–44.

189. *Id.* at 1246–47 (citations omitted).

past, is relevant to whether a statute ranks a requirement as jurisdictional."[190] Also relevant in Justice Thomas's jurisdictional-characterization analysis are wording, structure, placement, and the implications of other provisions.[191]

More recent decisions have continued to develop and expand this jurisdictional-characterization framework. In 2010, the Court in *Dolan*

190. *Id.* at 1247–48. Justice Thomas continued:

> *Bowles* . . . demonstrates that the relevant question . . . is not . . . whether § 411(a) [the registration requirement at issue in *Muchnick*] itself has long been labeled jurisdictional, but whether the type of limitation that § 411(a) imposes is one that is properly regarded as jurisdictional absent an express designation. The statutory limitation in *Bowles* was of a type that we had long held *did* "speak in jurisdictional terms" even absent a "jurisdictional" label . . . .
>
> . . . Although § 411(a)'s historical treatment as "jurisdictional" is a factor . . . , it is not dispositive. The other factors discussed . . . demonstrate that § 411(a)'s registration requirement is more analogous to the nonjurisdictional conditions we considered in *Zipes* and *Arbaugh* than to the statutory time limit at issue in *Bowles.*

Id. at 1248 (citations omitted).

191. Justice Thomas's methodical analysis indicates the variety of considerations relevant to the determination:

> We must consider whether § 411(a) "clearly states" that its registration requirement is "jurisdictional." It does not. . . . [The statute's] reference to "jurisdiction" cannot bear the weight that amicus places upon it. . . .
>
> Congress added this sentence . . . to clarify that a federal court can determine "the issue of registrability of the copyright claim" even if the Register does not appear in the infringement suit. That clarification was necessary because courts had interpreted § 411(a)'s precursor provision . . . as prohibiting copyright owners who had been refused registration by the Register . . . from suing for infringement until the owners *first* sought mandamus against the Register. . . . The word "jurisdiction," as used here, thus says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works.
>
> Moreover, § 411(a)'s registration requirement, like Title VII's numerosity requirement, is located in a provision "separate" from those granting federal courts subject-matter jurisdiction over those respective claims. . . .
>
> Nor does any other factor suggest that . . . § 411(a)'s registration requirement can be read to "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." First, and most significantly, § 411(a) expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances . . . . Separately, § 411(c) permits courts to adjudicate infringement claims over certain kinds of unregistered works . . . . It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.

Id. at 1245–46 (citations omitted).

Justice Ginsburg concurred in part and in the judgment, writing to explain how *Muchnick* could be reconciled with *Arbaugh* and *Bowles*, and more precisely why precedent properly played no role in the *Muchnick* inquiry. *Arbaugh*, she maintained, had presented the general text- and structure-based framework for analysis of jurisdictional characterization issues. *Id.* at 1250 (Ginsburg, J., concurring in part and in judgment). *Bowles* offered an exception to that rule for statutes subject to "longstanding decisions of this court typing the relevant provisions 'jurisdictional.'" *Id.* at 1251. Since only lower courts, and not the Supreme Court, had characterized the copyright-registration provision in *Muchnick* as jurisdictional, these previous characterizations were irrelevant to the Court's decision in this case. *Id.*

v. United States examined the status of a statutory time limit on a district court's "determination of the victim's losses" for purposes of a restitution order against a criminal defendant.[192] In explaining the majority's decision that a court might set a restitution amount after this time limit had expired, Justice Breyer noted that the Court's doctrine distinguished among "'jurisdictional' condition[s]," forfeitable "claims-processing rules," and "time-related directive[s] that [are] legally enforceable but do[] not deprive a judge . . . of the power to take the action to which the deadline applies if the deadline is missed," the last category fitting the provision at issue.[193] In his dissent, Chief Justice Roberts criticized Justice Breyer's discussion of characterization issues, finding it "perplexing" that the majority would "suggest[] that references to the authority of trial courts necessarily implicate questions of jurisdiction."[194] This difference of opinion suggests some resistance on the current Court to extend jurisdictional-characterization doctrine into other areas implicating judicial power—but it was a minority position, and moreover, not a criticism of the basic framework developed by Justice Ginsburg in *Kontrick*, *Arbaugh*, and *Muchnick*.[195]

As noted in the Introduction to this Article, Justice Alito's opinion for a unanimous Court[196] in *Henderson ex rel. Henderson v. Shinseki*[197] similarly reviewed jurisdictional-characterization doctrine beyond its relevance to the issue in the case. Noting that the question "whether a procedural rule is 'jurisdictional'" is "not merely semantic but one of considerable practical importance for judges and litigants,"[198] Justice Alito described the jurisdictional-characterization analysis as involving, first, consideration of the content of the rule at issue ("rules that seek to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times," for example, being "quintessential claim-processing rules"); second, a determination of whether Congress has "attach[ed] the consequences that go with the

192. 130 S. Ct. 2533, 2538 (2010) (quoting 18 U.S.C § 3664(d)(5)).

193. *Id.* at 2538–39.

194. *Id.* at 2547–48 (Roberts, C.J., dissenting). In response, Justice Breyer observed for the majority, "[T]he dissent's assertion—that it uses the term 'authority' not in its 'jurisdictional' sense, but rather in the sense that a court lacks 'authority' to 'impose a sentence above the maximum'—introduces a tenuous analogy that may well confuse this Court's precedents regarding the term 'jurisdictional.'" *Id.* at 2543–44 (citations omitted).

195. *See supra* notes 144–47 and accompanying text (discussing *Kontrick*); *supra* notes 157–64 and accompanying text (discussing *Arbaugh*); *supra* notes 187–91 and accompanying text (discussing *Muchnick*).

196. Justice Kagan recused herself from the case.

197. 131 S. Ct. 1197 (2011). *Henderson* concerned a statutory timing requirement for the filing of notices of appeal from denials of claims of veterans' benefits. *Id.* at 1200.

198. *Id.* at 1202–03.

jurisdictional label to a rule that we would prefer to call a claim-processing rule," either explicitly, by using the term "jurisdictional," or by textual and structural implication; and third, an examination of whether "'a long line of this Court's decisions left undisturbed by Congress' has treated a similar requirement as 'jurisdictional,'" as in *Bowles*.[199] In a lengthy analysis applying this framework to the provision in *Henderson*, Justice Alito concluded that the statute's "120-day deadline for seeking Veterans Court review was not meant to have jurisdictional attributes."[200]

Most recently, in January 2012, the Court held in *Gonzalez v. Thaler* that a provision in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires certificates of appealability in federal habeas corpus proceedings to "indicate which specific issue" of constitutional violation the petitioner had presented, was "not a jurisdictional requirement."[201] The issue of the jurisdictionality of the provision had not been raised by the state in earlier stages of the litigation, but the Court, in an opinion for eight Justices written by Justice Sotomayor, considered it anyway.[202] Consistent with the framework developed in the cases discussed above, Justice Sotomayor treated this issue as a matter of statutory interpretation, considering the text of the statute, its structure and relationship to other provisions, and "Congress'[s] intent in [the] AEDPA."[203] Although Justice Scalia wrote an impassioned dissenting opinion on the question of the provision's jurisdictionality, he presented his contrary conclusion as more faithful to the "[f]air [m]eaning of the [t]ext"[204] and "[p]ast [t]reatment of [s]imilar [p]rovisions,"[205] as well as the provision's legislative history.[206] That is, Justice Scalia's disagreement with the majority concerned the inferences to be drawn from interpretive signals, not the pertinence of those signals to the task of characterization. This dissent may well mark the coming of age of jurisdictional-characterization doctrine as an established component of Supreme Court jurisprudence on issues of legal interpretation (although the Court has never explicitly described it as such). If new decisions continue to build on this growing foundation, debate seems likely to concern not the

199. *Id.*
200. *Id.* at 1204.
201. 132 S. Ct. 641, 646 (2012) (addressing 28 U.S.C. § 2253(c)(3)).
202. *Id.* at 646–56.
203. *Id.*
204. *Id.* at 656–58 (Scalia, J., dissenting).
205. *Id.* at 658–60.
206. *Id.* at 660–61 (discussing the "Jurisdictional Nature of Predecessor Provisions").

relevance of the inquiry or its appropriate reference points, but rather the features of text, structure, and context that justifiably support particular characterization conclusions.

F. The Current Status of Jurisdictional-Characterization Doctrine

The current state of jurisdictional-characterization doctrine contrasts dramatically with the state of substantive-procedural characterization in *Erie* doctrine. Justices are divided about the role of characterization in *Erie* decision-making, in part because they remain divided about the feasibility of this type of characterization. But every Justice of the current Court seems to accept the validity and utility of distinguishing between jurisdictional and other pre-litigation requirements; to agree on most of the consequences flowing from characterization decisions (jurisdictional requirements usually being nonwaivable, nonforfeitable, and nondiscretionary);[207] to agree about the matters pertinent to making characterization decisions (first, statutory text and structure, and second, prior characterizations of the same or similar provisions); and, finally, to understand characterization decisions as implicating issues of judicial and party control over the course of litigation that reverberate beyond cases in which jurisdictional characterization in its strictest sense is at issue. (The next Section considers the contrast between these doctrines at more length.)

This state of affairs does not make jurisdictional-characterization doctrine immune to criticism, or imply that it will undergo no further development. Like other issues of legal interpretation, virtually all jurisdictional-characterization decisions have an inevitable discretionary dimension,[208] and, as the *Gonzalez* opinions indicate, disagreements about the application of the agreed-upon framework will continue to

207. Scott Dodson's work has contributed to clarification of this issue. *See, e.g.*, Dodson, *Removal Jurisdiction*, *supra* note 1, at 60 (noting, for example, that subject matter jurisdictional defects cannot be "forfeited, waived, or consented to"); Dodson, *Hybridizing*, *supra* note 4, at 1445 (describing jurisdiction as a rigid set of rules and effects, rather than something controllable by the parties themselves, in that it is "not subject to the principles of equity, waiver, forfeiture, consent, or estoppel"); Dodson, Bowles, *supra* note 16, at 42 ("[W]hether a particular limitation is jurisdictional or not can be an important question, for jurisdictional limitations are not subject to waiver or equitable exceptions, may be raised at any time, and obligate courts to monitor and raise them *sua sponte*."). *See also* Dane, *supra* note 4, at 40 (characterizing jurisdictional rules as mandatory by nature, and indicating that "courts cannot waive them as a matter of discretion, or put aside their consequences").

208. *See, e.g.*, David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 588 (1985) ("[T]he responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction.").

generate some unpredictability.[209] Consideration of "context" is an important source of discretion and unpredictability in this area, just as it is in the *Erie* characterization area and in legal interpretation generally.[210]

More specifically, it seems inevitable that at some point the Court will need to address the extent to which federal rules are subject to the same text- and structure-focused analysis as federal statutes that set forth litigation prerequisites. Scott Dodson, one of the most visible and prolific of a handful of commentators in this area over the past decade, has seemed to urge a unified framework for the characterization of both statutes and federal rules.[211] He has proposed a four-factor analysis considering: (1) the presence or absence of statutory designation of a provision as jurisdictional; (2) the function of the provision; (3) whether the consequences of characterizing the provision as jurisdictional would be consistent with that function; and (4) previous judicial treatment of the provision.[212] Initially advanced in 2008, this framework roughly describes the Court's current approach to the jurisdictional characterization of statutes. While Dodson does not describe jurisdictional-characterization doctrine as a matter of statutory interpretation, his recommended factors—and those actually cited by the Court in its jurisdictional-characterization decisions—are familiar to students of statutory interpretation.[213] Whether rule interpretation should proceed along identical lines is open to debate.

G. A Preliminary Comparison

Still, the decisions in this area have steadily, case by case, been developing guidelines for the justification of characterization decisions,

209. *See, e.g.*, Dane, *supra* note 4, at 12, 20, 37–40 (describing inconsistencies resulting from failure to develop comprehensive framework for analysis of jurisdictionality).

210. *See id.* at 44 ("[I]f it did turn out that 'jurisdictional,' like 'substantive' or 'procedural,' had different meanings in different contexts, and that a rule of law could be jurisdictional in one sense but not in another, there would still be a problem and a puzzle to solve."); Lee, *supra* note 16, at 1614 ("[J]udges and lawyers should refrain from making appeals to the 'nature' or 'concept' of jurisdiction. Whether a particular matter is to be treated as 'jurisdictional' or 'the merits' should be decided not by resort to metaphysics, but by resort to such familiar policy considerations as notice, reliance interests, finality, judicial efficiency, and the equities.").

211. *See supra* notes 1, 4, 16, and 123 (discussing several of Dodson's articles on the Court's treatment of jurisdictional issues). For other work that may have influenced the Court's decisions in this area, see Lees, *supra* note 124; Wasserman, *supra* note 16. *See also* Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdictional Decisions*, 46 UCLA L. REV. 75 (1998) (analyzing rhetoric of Supreme Court analysis of jurisdictional issues).

212. Dodson, *Removal Jurisdiction*, *supra* note 1, at 66.

213. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 830–46 (4th ed. 2007) (describing a prevailing "pragmatic" approach to statutory interpretation).

clarifying when and how such decisions should be made, and what their consequences should be. In this respect, jurisdictional-characterization presents a stark contrast to the Court's characterization practices in the *Erie* context. In the jurisdictional-characterization context, the Justices have confidently devised standards for characterization decisions that can appeal to both those Justices with formalist interpretive allegiances and those of a more functionalist or eclectic bent. Many Justices seem willing to note the potential relevance of characterization distinctions to distinct types of decisions. In the *Erie* context, no such guidelines have emerged, even though Justices have, generation after generation, continued to fall back on substantive-procedural distinctions in explaining their conclusions.[214]

The differences in development do not overwhelm the basic parallels between the types of decisions required in each area. In both, a characterization decision can determine an outcome. In both, characterization is ultimately an interpretive task, partly a matter of respecting lawmakers' purposes, and partly a matter of weighing the anticipated effects of characterization. Characterization in both areas involves a kind of higher-order lawmaking—the establishment of rules for distinguishing between lower-order legal rules—but this lawmaking has proceeded further in the jurisdictional-characterization context than in the *Erie* context. In both areas, any such higher-order rules, as well as the categories into which they sort lower-order legal rules, are meaningful mostly, if not only, to the legally trained.[215] The esoteric nature of characterization decisions may discourage appreciation of their importance as well as scholarly and judicial investment in doctrinal development. In the *Erie* context in particular, it may seem more difficult to make a judicial reputation through the elaboration of higher-order procedural doctrine, since the *Erie* choice-of-law question also affords judges the opportunity to develop doctrine on more glamorous and accessible constitutional and quasi-constitutional topics.[216]

214. *See, e.g.*, *supra* Parts I.B–E (tracing the history and development of substantive-procedural characterization in the context of *Erie* doctrine).

215. *See* Dane, *supra* note 4, at 84 ("[T]he law of jurisdiction, particularly on matters as arcane as time limits, is quintessential 'lawyer's law,' loved by judges but provoking legislatures to a collective yawn."); Dodson, *Complexity of Jurisdictional Clarity*, *supra* note 123, at 30 ("Federal jurisdiction . . . is seen as 'law for lawyers' because it concerns the intricate navigation of the federal-court system as opposed to the regulation of primarily lay conduct.").

216. In the constitutional context, the elaboration of doctrine (that is, second-order rules for the implementation of those rules contained in the Constitution itself), and commentary on that doctrine, have recently been a growth industry among Justices and scholars. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Brannon P. Denning, *The*

To date, no commentator has seriously considered the implications of these parallels. This Article has begun mapping them in order to make the case for a consistent approach to legal characterization drawing on the Court's best practices in each area. A thorough inquiry, however, requires more than just comparisons of the decisions in each area. It also requires looking directly at the lawmaking function performed by courts (especially courts of last resort) making characterization decisions and understanding exactly what kind of law courts are making in the course of such decisions, and how. As the next Part explains, legal characterization is not just a kind of lawmaking, but also an example of an even more general human activity: the classification of texts into categories, or genres, in the process of interpreting them, that is, making them meaningful and putting them to practical use. Only by looking directly at what legal characterization involves can we understand the nature of the threat, if any, it poses to legislative supremacy and legal consistency.

III. THE COURT AS GENRE THEORIST

In *Union Pacific*, Justice Ginsburg reasoned that if one of the statutory requirements at issue in the case was "not 'jurisdictional,'" then a different, disputed requirement could not "be of that genre" either.[217] Justice Ginsburg has elsewhere referred to legal characterization as a matter of genre identification,[218] but she is

New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller, 75 TENN. L. REV. 789 (2008); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005); Micah W.J. Smith, *Popular Metadoctrinalism: The Next Frontier?*, 1 HARV. L. & POL'Y REV. 507 (2007).

217. *See* 130 S. Ct. 584, 597 (2009) ("[I]f the requirement to conference [prior to submission of a dispute to the NRAB] is not 'jurisdictional,' then failure initially to submit proof of a conferencing cannot be of that genre.").

218. *See, e.g.*, Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002) ("Unlike 42 U.S.C. § 1988 and EAJA, 42 U.S.C. § 406(b) does not authorize the prevailing party to recover fees from the losing party. Section 406(b) is of another genre: It authorizes fees payable from the successful party's recovery." (citations omitted)); Lee v. Kemna, 534 U.S. 362, 385 (2002) ("Rule 24.10, like other state and federal rules of its genre, serves a governmental interest of undoubted legitimacy."); Carlisle v. United States, 517 U.S. 416, 435 (1996) (Ginsburg, J., concurring) ("This Court has recognized one sharply honed exception to rules of the [Federal Rules of Criminal Procedure] 29(c)/45(b) genre [which prescribe time and preclude extensions].").

Most often, however, Justice Ginsburg has used the term "genre" to refer to types of decisions, cases, or claims; this usage seems related to her notion of jurisdictional rules as those pertaining to "classes of cases." *See, e.g.*, Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2334–35 (2010) (referring to "cases of this genre" and "other cases of the same genre"); Kucana v. Holder, 130 S. Ct. 827, 836 (2010) (referring to "decisions of the same genre"); Plains Commerce Bank v.

virtually alone among her current colleagues in drawing this parallel.[219]

Long Family Land & Cattle Co., 554 U.S. 316, 343 (2008) (Ginsburg, J., concurring in part, concurring in judgment and dissenting in part) (concluding that Tribal Court is "competent to adjudicate" claims of a certain "genre"); Empire Healthchoice Assurance., Inc. v. McVeigh, 547 U.S. 677, 683 (2006) (referring to "claims of this genre"); Marshall v. Marshall, 547 U.S. 293, 314 (2006) (referring to "a claim of that genre"); Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (referring to "[c]ases of this genre," i.e., "'drive-by jurisdictional rulings'"); Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006) ("Subject-matter jurisdiction . . . . poses a 'whether,' not a 'where' question: Has the Legislature empowered the court to hear cases of a certain genre?"); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 121 (2005) ("In cases of this genre . . . the Court has resisted adoption of a categorical rule."); Lincoln Prop. Co. v. Roche, 546 U.S. 81, 92 (2005) (concluding that "[d]ecisions of this genre are bottomed on this Court's recognition of a State's asserted Eleventh Amendment right not to be haled into federal court"); City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 211 (2005) (in summary of district court's decision, noting, "Cases of this genre, the court observed, 'cr[ied] out for a pragmatic approach'"); Pa. State Police v. Suders, 542 U.S. 129, 147 (2004) (observing that plaintiff's claim is "of the same genre as the hostile work environment claims the Court analyzed in *Ellerth* and *Faragher*"); Porter v. Nussle, 534 U.S. 516, 522 (2002) (noting, in a summary of an appellate court's analysis, that "Congress sought to curtail suits qualifying as 'frivolous' because of their 'subject matter,'" and that the Second Circuit concluded that "[a]ctions seeking relief from corrections officer brutality . . . are not of that genre"); Dusenbery v. United States, 534 U.S. 161, 182 (2002) ("The Due Process Clause requires nothing of the Government in cases of this genre beyond the practicable, efficient, and inexpensive reform the BOP has already adopted."); Saucier v. Katz, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring) ("Application of the *Graham* objective reasonableness standard is both necessary . . . and . . . sufficient to resolve cases of this genre."); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 94 (2000) (Ginsburg, J., concurring in part and dissenting in part) (noting that prior cases "hold that the party resisting arbitration bears the burden of establishing the inadequacy of the arbitral forum for adjudication of claims of a particular genre"); Jones v. United States, 529 U.S. 848, 859 (2000) ("As we read § 844(i), Congress left cases of this genre to the law enforcement authorities of the States."); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 370–71 & n.3 (1999) ("UNUM cites a handful of California cases of this genre."); United States v. O'Hagan, 521 U.S. 642, 645 n.11, 672 (1997) ("Rule 14e-3(a), as applied to cases of this genre, qualifies . . . as a 'means reasonably designed to prevent' fraudulent trading on material, nonpublic information."); United States v. Virginia, 518 U.S. 515, 535 (1996) ("In cases of this genre, our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically . . . ."); Thompson v. Keohane, 516 U.S. 99, 111 (1995) ("This Court has reasoned that a trial court is better positioned to make decisions of this genre . . . ."); Arizona v. Evans, 514 U.S. 1, 27 (1995) (Ginsburg, J., dissenting) (referring to "another case of the same genre").

See also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007) (referring to certain inferences of scienter as "irrefutable, *i.e.*, of the 'smoking-gun' genre"); Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 662 (2006) (referring to "genre of plan" at issue in an ERISA action); Pasquantino v. United States, 544 U.S. 349, 380 (2005) (Ginsburg, J., dissenting) (noting that "Congress has enacted a specific statute criminalizing offenses of the genre committed by the defendants" in the case); Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 618 (2003) ("Portions of the complaint . . . are of this genre."); M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) ("Sanctions of the *Williams* genre . . . are not merely *disproportionate* in impact.").

219. Occasionally, Justice Scalia has indulged in similar usage. INS v. St. Cyr, 533 U.S. 289, 338 (2001) (Scalia, J., dissenting) ("Suspension Acts had been adopted (and many more proposed) both in this country and in England during the late 18th century. . . . Typical of the genre was the prescription by the Statute of 1794 that '[a previous statute] be suspended [for one year].'"); Harmelin v. Michigan, 501 U.S. 957, 978 n.8 (1991) (noting that the New Hampshire

This Part explains why Justice Ginsburg's apparently casual observations are more than a superficially appropriate metaphor. In fact, in its characterization doctrine, the Court has implicitly acted on and anticipated many of the conclusions reached by genre theorists; that is, scholars studying the history and practice of textual classification.

As Justice Ginsburg's usage suggests, and as this Part will show, the characterization of legal rules is one kind of generic categorization. Rule characterization of many varieties other than those discussed in Parts I and II is endemic in legal practice. Every first-year law student in the United States is drilled in distinguishing among legal authorities based on their source—understanding the respective characteristics of statutes (enacted by legislatures), Rules (usually issued by committees and approved by legislatures), and doctrinal rules (created by judges and lawyers), among other categories. Students receive less explicit instruction in non-source-based rules for the characterization of legal rules within each of these categories. Such non-source-based rules are almost exclusively doctrinal. Both *Erie* doctrine and jurisdictional-characterization doctrine are examples of guidelines for the characterization of legal rules other than by source; both can function to characterize rules within a single source category or across categories. In the interest of simplicity, this Part focuses on the "intra-source" characterization of specifically statutory rules. This is perhaps the most troublesome sort of legal characterization, since it involves judicial determinations of the effects of legal rules created by a competing authority. Most of the points made below, however, are also pertinent, with appropriate modification, to the characterization of legal rules whose source is in the judicial branch, such as Federal Rules, local rules, and precedential or doctrinal rules.

Part III.A below considers some objections to taking Justice Ginsburg's expression seriously and explains why it makes sense, under current theoretical understandings of discourse genres, to refer to legal characterization decisions as decisions about genre. Although legal rules, especially statutes, differ from the kinds of texts we are accustomed to thinking of as generically distinguishable, it is indeed useful to think of sorting legal rules and statutes into genres, in more than a metaphorical way. In fact, American lawyers are trained to do this in many ways other than the two on which this Article focuses. Part III.B then presents some basic assumptions and insights of genre theory, tracing the development of that theory from antiquity to the present. This review shows that the Court's approaches to legal characterization

proportionality in sentencing provision is "the most detailed of the *genre*").

are consistent with the most sophisticated contemporary work on the topic and have even, in some ways, been in advance of that work.

A. Why Genre Theory?

1. Legal Rules Are Relevantly Similar to Other Texts

One might question the accuracy of describing distinctions among types of statutes as generic distinctions. Statutes represent an unusual, perhaps unique, use of language; they are created and used differently from most other texts.[220] Statutes also have political and cultural functions different from those of aesthetic and even other functional texts. But none of these differences makes it inaccurate to think of distinctions among statutes as, basically, generic distinctions.

Since the early twentieth century, critiques of the traditional notion of legislative intent have pointed out that statutes lack individual "authors" in the sense that, for example, novels have authors.[221] In light of this fact, it might seem misguided to think of statutes as differentiable into genres, especially to those inclined to think that the generic identity of a text is determined by authorial adherence to established models (as the older versions of genre theory discussed below held) or creative authorial choice. But the corporate authorship of statutes is, strictly speaking, irrelevant to their generic features. In fact, contemporary genre theorists focus mainly on how we recognize and understand communications with multiple or ambiguous authorship, such as films, corporate communications, and public records.[222] Moreover, as

220. The same is true of Federal Rules, local rules, and appellate opinions.

221. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930) (discussing implications of collective authorship of statutes). A similar point could be made about Federal Rules, local rules, and appellate opinions.

222. An important early departure from the traditional focus on high-art texts in studies of genre was Mikhail Bakhtin's mid-twentieth-century work, which argued for the basic kinship of literary genres (the kind of "highly developed and organized cultural communication" traditionally addressed by poetics) with all communications, including ordinary forms of utterance, like greetings and "[single-word] rejoinder[s]." Mikhail Bakhtin, *The Problem of Speech Genres* (1952–53), *in* SPEECH GENRES AND OTHER LATE ESSAYS 60, 61–72 (Vern W. McGee trans., Caryl Emerson & Michael Holquist eds., 1986). Following Bakhtin, twentieth-century scholars have examined and theorized about genres of not just film and popular culture, but also, for example, academic research articles, the opinion letters of tax accountants, and presidential State of the Union addresses. *See, e.g.*, CAROL BERKENKOTTER & THOMAS N. HUCKIN, GENRE KNOWLEDGE IN DISCIPLINARY COMMUNICATION: COGNITION/CULTURE/POWER 31–43 (1995) (discussing generic features of scientific journal articles); KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, DEEDS DONE IN WORDS: PRESIDENTIAL RHETORIC AND THE GENRES OF GOVERNANCE 52–75 (1990) (providing a critical analysis of presidential discourse, including, in particular, the State of the Union Address); AMY J. DEVITT, WRITING GENRES 66–87 (2004) (discussing the genres used by tax accountants, particularly features of tax regulations and accountant opinion letters); BARRY KEITH GRANT,

explained below, the generic identity of a text does not preexist the attribution of that identity to the text, so the generic dimension of any particular communication is always, in a sense, multi-authored (by at least the drafter and the reader).[223]

There are further differences between statutes and other texts that might seem to make the notion of statutory genres problematic. For example, we read statutes very differently from the way we "read" most other texts—even those, like films and political speeches, that have multiple authors. The "reader" of a film usually considers the film as a whole, from beginning to end, at least once. And the ability to see that film as an example of a particular genre seems to presuppose this type of unified "reading." We come to be fluent in recognizing a film as a Western, for example, after seeing several films identified as Westerns; from their similarities, we extrapolate the characteristics we expect of a Western, including large-scale characteristics like narrative arc and character development, as well as details of form and content.[224] Ordinarily, then, it seems we attain competence in making genre distinctions through exposure to whole texts.[225] With the possible exception of legislative drafters and analysts, however, virtually no one reads statutes in this way; for many statutes, such a reading would be

FILM GENRE: FROM ICONOGRAPHY TO IDEOLOGY 33 (2007) (discussing study of "genre films"); JANICE A. RADWAY, READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR CULTURE 119–56 (1984) (exploring generic features and implications of pulp romance fiction, such as the way principal characters are portrayed, the narrative structure of the ideal romance, and the qualities of a romantic heroine); JOHN M. SWALES, GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS 114–95 (Michael H. Long & Jack C. Richards eds., 1990) (discussing the features and construction of the "research article" as genre); Catherine F. Schryer, *Genre Time/Space: Chronotopic Strategies in the Experimental Article*, 19 JAC: A JOURNAL OF COMPOSITION THEORY 81 (1999) (discussing generic features of articles reporting results of scientific experiments). While many of these non-literary genres are distinctly modern communication forms, current writing on genre also studies distinctions among older discourse forms that went unremarked in earlier periods. *See, e.g.*, DEVITT, *supra*, at 99–135 (analyzing generic characteristics and shifts in early modern Scottish religious treatises, official correspondence, public records, and private correspondence and records).

223. *See* DEVITT, *supra* note 222, at 33 ("[G]enres require multiplicity, multiple actions by multiple people."); ALASTAIR FOWLER, KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRES AND MODES 92, 144, 155 (1982) (making similar points).

224. *Cf.* GRANT, *supra* note 222, at 21 ("Genre films work by engaging viewers through an implicit contract. They encourage certain expectations on the part of spectators, which in turn are based on viewer familiarity with the conventions.").

225. *See, e.g.*, JONATHAN CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE 113–30 (1975) (developing a holistic account of genre, starting with the phonological and grammatical structure of word sequences and their connection to meaning); FOWLER, *supra* note 223, at 45 ("[S]ometimes readers can grasp a genre with mysterious celerity, on the basis of seemingly quite inadequate samples, almost as if they were forming a hologram from scattered traces.").

impossible.[226] Again, however, statutes are not really unique in this sense. We can and do develop generic competence without exposure to entire texts.[227] For example, we all can recognize a troubleshooting guide without ever necessarily having perused one from beginning to end. Cognizant of such everyday practices of comprehension, contemporary genre theory recognizes that parts of communications may have generic identities, that these parts may independently contribute to the generic identity of a larger communication, and that texts in some genres are actually characterized by segmentability, not unity. Many, perhaps most, legal rules and statutes are of precisely this type.

Another objection to thinking of statutes in terms of genre might focus on the ways in which legislative language differs from other language uses—apart from features of authorship and form. In a 1990 article on the nature of legislative language, Heidi Hurd argued for such a special status for legislative language use.[228] Hurd noted that many judicial and theoretical approaches to statutory meaning assume that statutes are communications analogous to direct commands from one individual to another, but she maintained that this assumption is a misconception. According to Hurd, "communication," strictly speaking, cannot be said to occur unless all parties involved—listeners as well as speakers—can and do occupy appropriate mental states.[229] Statutory language, she argued, does not support such communicative intentions.[230] Thus, it should be understood not as a form of communication, but as "description" of a political-ethical reality

226. For example, the content of many statutes undergoes continuous change through amendment, and statutes often incorporate other statutes by reference. *Cf.* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1698–703 (2010) (presenting an analysis of linguistic complexity and frequency of amending selected major federal statutes). Federal Rules, local rules, and appellate opinions are likely more often read as unified texts, and to the extent they are, this objection to considering them in generic terms is weakened.

227. An academic, for example, can recognize research articles as such through formal features and contextual cues without necessarily ever having read an entire example of the genre. BERKENKOTTER & HUCKIN, *supra* note 222, at 31–43; *see* SWALES, *supra* note 222, at 114–70 (discussing the features and construction of the academic research article as genre).

228. Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990). For a similar argument against the application of "ordinary language" principles to legislative language, see Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325 (2004); *but see* FREDERICK BOWERS, LINGUISTIC ASPECTS OF LEGISLATIVE EXPRESSION 18–46 (1989) (analyzing legislative "expression" as linguistically analogous to ordinary interpersonal communication).

229. Hurd, *supra* note 228, at 958–81. More specifically, communication as defined by Hurd (following W.V. Quine) involves an intent, on a communicator's part, to produce a certain intentional state in recipients of the communication. *Id.* at 958–62.

230. *Id.* at 968–81.

identified and constructed by legislators, a description Hurd's sophisticated argument compares to the entries in a scientist's notebook.[231] Hurd's argument presents a difficulty for the inquiry proposed here, however, only if language needs to be "communication" to have a generic identity. As explained below, no such requirement exists. In fact, Hurd's position is consistent with contemporary understandings of genre distinctions, which do not demand an alignment of mental states between authors and readers, and acknowledge that we sometimes recognize classes of texts based on characteristics of which their authors and some of their readers are unaware.[232]

A final objection to thinking of statutes in terms of genre might point to the difficulty of devising any fixed and comprehensive single scheme for classifying statutes and other legal rules into genres.[233] As Cook pointed out, for example, the same statute can be classified as substantive for one purpose and procedural for another.[234] And statutes and their parts can be differentiated along many dimensions. A single civil rights enactment, for example, could include jurisdictional provisions, savings clauses, and retroactive provisions, among other components.[235] These features of statutory law make it challenging to develop a doctrine of statutory categorization, conceived as a doctrine of generic classification. But the task is not impossible. In no area does the identification of textual genres depend on the existence of a fixed scheme for sorting those genres. As explained below, generic distinctions are now understood as ultimately arising from the ways texts are used—and, clearly, some texts can be used in multiple ways. To take just one example, an academic research article can be used as a pedagogical tool, a journalistic source, or a premise in a subsequent researcher's argument. Yet the article is still identifiable as a particular type of text in each of these contexts. Such a text can function usefully in several distinct roles, just as a legal rule can function differently in different contexts.

2. Habits of Legal Characterization Are Pervasive and Internalized

If we can defensibly think of legal characterization as a kind of

231. *Id.* at 983, 990–1009.

232. DEVITT, *supra* note 222, at 132–34.

233. *See* discussion *infra* note 295 and accompanying text (addressing the impossibility of creating a comprehensive "map" of genres).

234. *See supra* notes 19–22 and accompanying text (introducing Cook's skeptical approach to characterization).

235. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981 *et seq.*).

generic classification, why do lawyers not do so more often? Why does the Court fail to see the analogy, for example, between the kinds of characterization involved in the legal traditions discussed above and other kinds of textual classification—or, for that matter, the analogy between the two types of characterization discussed in Parts I and II of this Article? A definitive answer to these questions would require much more extensive discussion of, for instance, the psychology of legal practice and reasoning than is possible in the space available here. This Part, however, outlines the beginnings of an explanation, stressing the very pervasiveness of legal characterization practices. Legal characterization is not just a component of judicial reasoning, but something that all legal professionals do every day in a dizzying variety of contexts. Legal education and practice require legal professionals to understand legal rules as belonging to a welter of "natural kinds."[236] These "kinds" are the basic premises of legal and legal-academic discourse; lawmakers' and lawyers' distinct social roles are based largely on their ability to recognize and manipulate such distinctions.[237] Legal professionals have traditionally been more concerned with making and manipulating the distinctions, however, than with questioning the grounds for making them or likening them to activities that non-legal professionals engage in. This Part surveys some of the assumptions about "kinds" of legal rules structuring lawmaking, legal education, and legal scholarship, and describes a few of the mechanisms encouraging silence about them in legal doctrine and commentary.

First, those responsible for the creation of statutes understand their task in terms of statutory "natural kinds." Manuals for and by legislative drafters counsel them to approach the composition of amendments, for example, differently from the composition of statutes that add to existing law without changing it,[238] and explain how revenue

236. In philosophy, the term "natural kind" refers to a grouping of particulars that has a group identity independent of the attribution of any such identity to the group by an observer. The chemical elements are the classic example of natural kinds offered by those who defend the meaningfulness of the concept. Whether natural kinds actually exist continues to be a topic of philosophical debate. *See, e.g.*, W.V. Quine, *Natural Kinds*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 114 (1969) (introducing the concept of natural kinds into modern philosophical debate); Ian Hacking, *Natural Kinds*, *in* PERSPECTIVES ON QUINE 129–41 (Robert B. Barrett & Roger F. Gibson eds., 1990) (explicating Quine's analysis); Hilary Putnam, *The Meaning of "Meaning,"* *in* 7 MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 131–93 (Keith Gunderson ed., 1975) (developing Quine's analysis). Natural kinds are closely akin to folk categories. *See infra* notes 255–64 and accompanying text.

237. For an argument making a similar point from the perspective of private-law doctrine rather than statutory law, see Jay Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989).

238. *See, e.g.*, LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 168–

bills have formal features different from those of other bills.[239] Rules governing the legislative process also require legislators and legislative proceduralists to think of statutes categorically. Such higher-order rules mandating statutory characterization are partly, but not entirely, judicial products. The Constitution wholly prohibits Congress from enacting certain kinds of statutes, namely bills of attainder and ex post facto laws.[240] Judicial decisions considering challenges to legislation under these clauses involve impressive feats of classificatory analysis.[241] Legislatures' internal rules also require parliamentarians to distinguish private from public bills[242] and to identify bills' subject matter in order to identify permissible (germane or relevant) amendments.[243] Many state constitutions also regulate statutory specificity; when invoked in litigation, such provisions require the categorization of statutes based on their content.[244] Sorting by subject matter also structures the process of statutory publication. In the federal legislature, the House of Representatives' Office of Law Revision Counsel is responsible for policing the organization of the United States Code[245] by gathering

207 (1992) (presenting guidelines for "writing amendatory provisions").

239. The Constitution draws this distinction. *See* U.S. CONST. art. I, § 7 (requiring "Bills for raising Revenue" to originate in the House of Representatives). *See also* FILSON, *supra* note 238, at 404–05 (discussing "'revenue' style" as "a very disciplined [statutory drafting] style, and without question the most intricate and demanding of all the accepted Federal drafting styles"); JACK STARK, THE ART OF THE STATUTE 25 (1996) ("The multiplicity of relevant facts and the goal of minutely regulating economic behavior . . . are two reasons for tax law's specificity.").

240. U.S. CONST. art. I, § 9, cl. 3. *See generally* Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355 (1978) (providing an overview of criteria for identifying enactments as bills of attainder); T.B.G., Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475 (1984) (discussing rationale for constitutional characterization).

241. *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468–73 (1977) (analyzing and rejecting the argument that a federal statute authorizing Administrator of General Services to take custody of Presidential papers was a bill of attainder).

242. *See, e.g.*, Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87 (2007) (providing an overview of scope, prevalence, and features of private laws); Notes, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966) (offering early authoritative introduction to the topic).

243. *See, e.g.*, H.R. Rule XVI, Cl. 7; *see also* EDWARD V. SCHNEIER & BERTRAM GROSS, LEGISLATIVE STRATEGY: SHAPING PUBLIC POLICY 132 (1993) (discussing restrictions on amendment).

244. *See, e.g.*, Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. LEGIS. 101 (2001) (offering an overview of related state constitutional restrictions on legislative form); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006) (reconsidering single-subject rules from a positive political theoretical perspective); Millard H. Ruud, *"No Law Shall Embrace More Than One Subject,"* 42 MINN. L. REV. 389 (1958) (presenting an early authoritative discussion of the single-subject rule).

245. Section 205(c)(1) of House Resolution 988, 93d Cong., Pub. L. No. 93-554 (2 U.S.C. § 285b(1)), requires the Office of the Law Revision Counsel to

together provisions "closely related by subject" and otherwise "revisit[ing] the organizational structure of statutory material" to "yield[] a statutory product that is easier to use and that fosters a more comprehensive understanding of the law."[246] It is the decisions made by this legislative office (and its state analogues), as much as the decisions of drafters and legislators, that determine the proximity of different enactments to one another in published form, and in this manner affect judicial conclusions about statutory type.[247]

Legal education in the United States also encourages lawyers and judges in training—even those who reflect less often on legislative processes—to think of legal rules as naturally falling into categories differentiated by content and function. The upper-level doctrinal curriculum in American law schools reinforces the subject-matter classifications that structure compilations of published statutes. Instruction specifically focused on the implementation of statutes perpetuates these same distinctions, as well as others. The widely used Eskridge, Frickey, and Garrett legislation casebook, for example, includes sections on the interpretation of retroactive statutes, statutes *in pari materia* (on the same subject) and modeled on other statutes, and substantive canons (which are applicable only to certain categories of statutes and situations).[248] The casebook also notes that many theoretical models of legislation assume some basic distinctions among statutory types.[249] But it does not include any readings on the grounds

> prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law.

See FILSON, *supra* note 238, at 336–37 (discussing the irregularity of enactment of the United States Code, as revised by the Office of the Law Revision Counsel, into positive law).

246. OFFICE OF THE LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE, *available at* http://uscode.house.gov/codification/Positive%20Law%20Codification.pdf.

247. *Cf. supra* notes 99 and 108 and accompanying text (discussing the *Shady Grove* opinions regarding the inferences to be drawn from the positioning of section 901(b) in the New York procedural code).

248. *See* ESKRIDGE, FRICKEY, & GARRETT, *supra* note 213, at 663–86, 880–938, 1066–81.

249. *See id.* at 47–82. Other legislation casebooks follow the same pattern. The Popkin casebook includes sections devoted to retroactive statutes; the single-subject rule, state constitutional restrictions on special legislation, and federal limitations on private legislation; and a chapter on "statutory patterns," including a subsection on the differences in treatment between substantive statutes and appropriations acts, and one on "different types of statutes," including multilingual statues, grant-in-aid statutes, "super-statutes," omnibus legislation, initiatives, and "private lawmaking." *See* WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL

for making and justifying such distinctions among types of statutes. Other upper-level course material on related topics, such as judicial review of the constitutionality of legislation, also trains students and professors to think of laws as coming in certain "kinds," without prompting direct reflection on that habit.[250] The processes of legal enculturation thus accustom future lawyers and judges to understand statutes as naturally falling into categories that often must be identified for legal reasoning to proceed, but these professionals are not explicitly trained how to explain their decisions to identify statutes as belonging in particular categories.

The same professors who create most legal instructional materials also produce legal scholarship, including the kinds of commentary on legal characterization mentioned throughout this Article. But commentary on these issues has tended to focus on particular characterization issues, not on legal characterization in general. This neglect is a little surprising, given academics' interest in other higher-order legal rules—that is, rules for the choice between and treatment of more basic rules.[251] It also has not escaped scholarly notice that all law,

LANGUAGE AND THE POLITICAL PROCESS 344–76, 394–407, 775–844, 1037–69, 1135–53 (4th ed. 2005). *See also* OTTO J. HETZEL, MICHAEL E. LIBONATI, & ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION CASES AND MATERIALS 257–72, 404–11, 420–52 (4th ed. 2008) (devoting sections to the identification of "local and special legislation," the interpretation of statutes *in pari materia*, and "substantive legislation by appropriations act") .

250. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 264–316 (3d ed. 2009) (addressing legislation authorizing suit against state governments); *id.* at 607–22 (addressing "laws protecting unionizing," "maximum hours laws," "minimum wage laws," and "consumer protection legislation"); *id.* at 748–942 (addressing classificatory and discriminatory laws); JESSE A. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR, & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 73–86 (10th ed. 2006) (addressing "regulation of national economic problems"); *id.* at 111–23 (addressing regulation through taxing and spending); *id.* at 1178–440 (addressing discriminatory regulation); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 451–78 (14th ed. 2001) (addressing economic regulations and substantive due process); *id.* at 605–794 (addressing economic regulation and regulation of "fundamental interests"); *id.* at 863–925 (addressing civil rights legislation).

251. This interest in higher-order rules is evident, for example, in work on such topics as the choice between rules and standards, minimalist versus maximalist decision styles, and the selection of interpretive methods, as well as the work on constitutional doctrine noted *supra* note 216. On the choice between rules and standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992). On minimalist decision-making, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001). On the selection of interpretive methods, see Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000); Karen Petroski, *Does It Matter What We Say About Legal Interpretation?*, 43 MCGEORGE L. REV. 359 (2012). The doctrines that would seem most hospitable to development of decisional frameworks for statutory classification—the *in pari materia* doctrine being the most obvious example—have received little or no critical analysis. In fact, a recent Westlaw and Hein Online search revealed no scholarly analysis of the *in pari*

statutory and otherwise, involves the categorization of people and actions, and thus that work on categorization in other disciplines may be relevant to legal theory and doctrine.[252] The focus in this scholarship, however, has been on the categorizing that legal texts perform, not the categorizing of the texts themselves by legal professionals and officials.

As the next Part explains, in some ways the Supreme Court is actually more sophisticated on this point than legal commentators. The rudimentary doctrine that the Court has developed concerning jurisdictional characterization coheres better with the most advanced work on genre than do the formalist recommendations of most commentators. It might be that courts' institutional position uniquely qualifies judges (and litigants suggesting reasons for decision directly to judges) as statutory classifiers and clarifiers of that practice.[253] To the extent judges have shrunk from this role, scholarly input may be useful, but ideally it will recognize, not disavow, courts' basic fitness for the task of legal characterization.

B. History and Development of Genre Theory

In Western culture outside the law, writers have been interested since antiquity in analyzing genre—the "kinds" of literary and other communications.[254] Despite shifts in scope and emphasis, writing of

materia rule. The absence of an explicit doctrine of statutory classification does have some benefits. Because there has been no assumption that statutory classifications have to be justified systematically, legal practice has rarely, if ever, categorized statutes on the neoclassical assumption that a single coherent system of statutory types exists, even as legal doctrine became quite neoclassical in other regards. *Cf. infra* Part III.B.1 (noting trends toward renewed formalism in certain doctrinal areas).

252. *See, e.g.*, STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 69–103 (2001) (offering an overview that describes categorization as a "dynamic process that is flexible in application and elastic in scope"). This topic has received particular attention in the context of First Amendment doctrine. *See, e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1490–93 (1975) (discussing the fondness of early Warren Court for "categorizing," rather than "balancing," issues related to First Amendment restrictions); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–93 (2009) (discussing features of and rationale for "categoricalism" in First and Second Amendment doctrine).

253. *See infra* Part IV (discussing implications of genre theory for characterization doctrine).

254. The following discussion uses the term "communication" in a nontechnical sense, rather than in the technical sense examined by Hurd and some philosophers of language. *See supra* notes 228–31 and accompanying text. This term is more general than one available substitute, "text," and more familiar to the legal audience than others, like "utterance" and "discourse." *See supra* note 222 (tracing the evolution of critical genre analysis from a discipline that focused solely on "high-art texts" to one that finds all "communications," including "academic research articles, the opinion letters of tax accountants, and presidential State of the Union addresses," for example, to be worthy of analysis).

this sort has long done two things. First, it has described different types of communications, either identifying distinctions already in use or proposing new ones. Second, such writing has also typically explained the distinctions it identifies, which involves some higher-order accounting of why the distinctions get made as they do. This second task is analogous to the task of elaborating a general theory of legal characterization, one that can give direction and structure to categorization doctrine.

Over the centuries, theoretical explanations of the reasons for generic distinctions have become more sophisticated. The trend has been away from what might be called a "folk conception" of genre as "natural kind" and toward understanding generic distinctions as social practices enabling the sophisticated coordination of human activity.

1. Folk and Pre-Romantic Conceptions of Genre

When they refer to "genre," lawyers and legal scholars are usually drawing on a simple folk conception of genre.[255] For much of Western intellectual history, this folk conception—which understands texts as falling into natural kinds—was the primary attitude toward written genres, and it still has a strong hold on most of us.[256] In learned writing on the subject, however, the folk conception came into question in the early nineteenth century and is now largely discredited.

The folk conception of genre is an example of what linguist George Lakoff calls a folk conception of categorization.[257] Those who hold to this conception think of communications as falling into distinct

255. References to statutes as a single unified genre of legal discourse, contrasted with other genres such as contracts or decisional law, are not uncommon. *See, e.g.*, Dennis Kurzon, *Themes, Hyperthemes, and the Discourse Structure of British Legal Texts*, 4 TEXT: AN INTERDISC. J. FOR THE STUDY OF DISCOURSE 31, 32, 45 (1984) (referring to statutory law as "genre" of legal discourse). At the other end of the spectrum of classification, some authors have described every statute as a kind of genre of its own. *See, e.g.*, Geoffrey Bowman, *The Art of Legislative Drafting*, 7 EUR. J.L. & REFORM 3, 4 (2005) ("[A]ll Bills are different. . . . The legislative drafter can very rarely draw on a precedent. Each Bill needs to be approached as a unique exercise."); *see also id.* at 6, 14, 16 (summarizing Justices Ginsburg's and Scalia's use of the term and discussing tendency to think of statutory types as "natural kinds"); *supra* notes 236–37 and accompanying text (same).

256. Much contemporary popular discourse reinforces this understanding, especially the marketing and criticism of popular books, music, and film, the main examples of generic identification that non-specialists encounter. *See, e.g.*, Manohla Dargis, *The Janitor, It Seems, Always Rings Twice*, N.Y. TIMES, Apr. 2, 2010, at C6 (describing the movie DON MCKAY (Image Entertainment 2009) as "an oddball comedy with the knowing, festering heart of a neo-noir," and subsequently listing features of the movie that justify this classification: the protagonist receives a "blast out of the past"; "a phantom lady beckons"; the protagonist "heads down mystery street").

257. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5 (1987).

categories that preexist the identification of any distinctions among the categories.[258] From this perspective, a genre is understood as a group of communications sharing certain properties, especially formal ones such as structure, point of view, and vocabulary, as well as content.[259] Identifying the properties shared by the members of a genre, from the folk conception, allows us to understand reality better and thus, secondarily, to orient our action with respect to the communications and each other in consistent and understandable ways.[260]

The earliest Western writing on literary genres—major instances being Plato's *Republic*, Aristotle's *Poetics*, and Horace's *Ars Poetica*—exemplified this approach. Plato, Aristotle, and Horace explained the specific distinctions they drew (between, for example, epic and dramatic poetry) as flowing directly from underlying ethical and even metaphysical differences between categories, or "kinds," of people and experience. They distinguished different types of communication in "essentializing" ways, as natural vessels for features such as meter, subject matter, and differences in ethos among authors.[261] Horace's *Ars Poetica* went so far as to identify generic distinctions with natural laws, suggesting that such distinctions were neither products of human decision nor susceptible to deliberate alteration by humans.[262] Classical authors writing on genre did not deny the functional dimensions of generic distinctions; Aristotle, in particular, distinguished modes of poetry in part based on their different effects on audiences.[263] In general, however, classical discussions of genre regarded genres

258. *See supra* note 236 (discussing the notion of "natural kinds").

259. *See, e.g.*, DAVID DUFF, ROMANTICISM AND THE USES OF GENRE 31–32 (2009) ("The basic premisses of neoclassical genre theory can be briefly stated. A genre is a 'species of composition' (other common terms are 'kind,' 'order,' 'class') defined by subject matter, form, and/or purpose. There are a finite number of genres, each of which has its own 'laws' or 'rules,' adherence to which is necessary for a successful performance of that genre. The rules specify permissible subject matter, external form (including metre), and type of language. These features must be internally consistent, in accordance with the principle of decorum, or 'propriety,' which states that the elements of a work must match one another and fit the intended purposes of that type of writing. The rules, codified by critics, are derived from the practice of specified authors . . . .").

260. *See, e.g.*, ARISTOTLE, POETICS, § 1, Pt. 1 ("I propose to treat of Poetry in itself and in its various kinds, noting the essential quality of each. . . . Following the order of nature, let us begin with the principles which come first.").

261. Joseph Farrell, *Classical Genre in Theory and Practice*, 34 NEW LITERARY HIST. 383, 383 (2003). *See id*. at 384–86, 394 (further developing the point).

262. *Id.* at 394.

263. *See, e.g.*, ARISTOTLE, POETICS, Pts. XII–XIV (discussing effects of tragedy); *see also* Daniel Javitch, *The Emergence of Poetic Genre Theory in the Sixteenth Century*, 59 MOD. LANGUAGE Q. 139, 146 (1998) (noting Aristotle's statement that the kinds of mimesis are distinguishable according to means, objects, and modes).

themselves as formal, fixed, and preexisting their descriptions. The higher-order rules for characterizing particular communications were based on static features of the communications and prohibited assigning a communication to more than one category.

Much the same was true throughout early modern European writing on genre.[264] Horatian-style normativity remained central to writing about genre during this era.[265] Eventually, however, writers on genre began to perceive that classical and neoclassical genre theory was descriptively inaccurate in certain ways.[266] Horace himself, they noted, had freely mixed subject matter and formal features that classical theory assigned to distinct genres.[267] As a result, theorists began to move beyond the enumeration of generic features to offer new explanations of the practice of distinction-drawing.[268] By the late eighteenth and early nineteenth centuries, a more historicized, functionalist approach to genre was gaining acceptance.[269] Theorists taking this approach

264. For David Duff's description of the neoclassical paradigm, see *supra* note 259. Sixteenth-century Italian writing on genre elaborated on Aristotelian distinctions without departing from the folk conception. *See* Alastair Fowler, *The Formation of Genres in the Renaissance and After*, 34 NEW LITERARY HIST. 185, 186 (2003) (noting that Renaissance theorists were "more concerned with defining vague entities and invented categories than with describing kinds actually practiced"). Renaissance genre theorists continued to assume that writing about genre should focus on identifying standards that could be used to fix a communication within a genre. Daniel Javitch has explained the proliferation of new generic categories and criteria in the Renaissance as based on the need for models for literary production and evaluation in a context in which classical categories had lost some functionality. *See* Javitch, *supra* note 263, at 141, 143 (noting that after the 1530s, an increasing number of writers wanted "normative accounts" of "the differences between the genres" and turned to Aristotle for this purpose); *see also id.* at 166–69 (further developing the point).

265. *See, e.g.*, GERARD GENETTE, THE ARCHITEXT: AN INTRODUCTION 5, 33–36 (Jane E. Lewin trans., 1992) (describing the process by which theorists accommodated new observations about genre practices within classical normative framework); *see also* DUFF, *supra* note 259, at 28–32 (describing the same process, as illustrated by particular eighteenth- and nineteenth-century rhetorical works).

266. *See* Farrell, *supra* note 261, at 402 ("[T]he 'implied theory' instantiated in ancient poetry is far more sophisticated than the explicit theory developed by philosophers and literary critics and apparently espoused by the poets themselves . . . .").

267. *Id.* at 395.

268. *See* Fowler, *supra* note 264, at 186 (explaining how Joseph Scaliger's *Poetice* (1561), a foundational work in this tradition, initiated a skepticism about the purposes of writing on genre that competed with the early modern neoclassical approach to genre); *see also* DUFF, *supra* note 259, at 28–41 (narrating developments in neoclassical genre theory through the Renaissance and early modern period); GENETTE, *supra* note 265, at 5–42 (discussing developments in thinking about genre before the eighteenth and nineteenth centuries).

269. *See* DUFF, *supra* note 259, at 41, 60–94, 108 (noting, *inter alia*, the effects of Benthamite utilitarianism on writing and thinking about genre); Michael B. Prince, *Mauvais Genres*, 34 NEW LITERARY HIST. 452, 454–76 (2003) (describing the shift away from neoclassical conceptions of literary genre in the eighteenth century as a function of crises in the epistemology and metaphysics of categorization generally).

explained the classification of communications based on principles other than the natural laws invoked by earlier theory. Unlike their predecessors, Romantic-era writers were willing to acknowledge that, for example, a genre distinction initially made in the fifth century might not be meaningful for the nineteenth century—both because texts created in the nineteenth century would not likely have the same characteristics as texts created in the fifth century (making the older distinction still valid for older texts, but not for new ones), and because the distinction itself might serve a different function at the later time (making the old distinction perhaps useless even as to the texts it had originally been used to classify). This perspective implied that particular categories of communications could become obsolete, and also that new categories could both deliberately and inadvertently be brought into being.[270] Observations of this sort called for a new explanation of the reasons we make generic distinctions.

2. Post-Romantic Writing on Genre

Since the nineteenth century, writing on genre has not only offered new descriptions of genre distinctions but also, partly as a result, expanded its scope greatly to address many kinds of communications about which classical and neoclassical theory were silent—everything from business letters to instruction manuals.[271] Contemporary writing on genre has also become more theoretically powerful and ambitious; it explains categorizing and creative decisions about genre as linked, complementary aspects of a social activity that confer meaning on human action and help us align our mutual expectations.[272]

This understanding of why people make generic distinctions is deeply functionalist. For Aristotle, function was an inherent property of different literary natural kinds: every type of text had one proper function.[273] The Romantics and post-Romantics, in contrast, came to regard the functions of a communication as potentially varying depending on historical and social context. This understanding flowed

270. *See* DUFF, *supra* note 259, at 60–94 (describing the development of Romantic genre theory).

271. *See supra* note 222 (recounting in more detail the course of, and reasons for, this expansion).

272. *See* FOWLER, *supra* note 223, at 22 ("[T]here is no doubt that genre primarily has to do with communication. It is an instrument not primarily of classification or prescription, but of meaning."); JOHN FROW, GENRE 19 (2006) ("Genre . . . works at a level of semiosis—that is, of meaning-making—which is deeper and more forceful than that of the explicit 'content' of a text."); Carolyn Miller, *Genre as Social Action*, 70 Q.J. OF SPEECH 151, 163 (1984) (defining genre as form "at one particular level that is a fusion of lower-level forms and characteristic substance").

273. *See supra* note 263 (noting Aristotle's views on the effects of different genres).

from increased attention to readers' roles and interests in making and recognizing distinctions among "kinds," in addition to the roles of text and creator in constraining those distinctions.[274] From this perspective, generic differences are explained as functions of perception, situation, and motivated action.

A central premise of contemporary genre theory is that comprehension of any communication occurs partly through identification of the genre or genres to which the communication belongs. Generic classification, that is, is a component of interpretation. More specifically, generic identity is a dimension of meaning irreducible to other dimensions of meaning, one that cannot be fully captured in descriptions of particular aspects of form or content, but rather derives from the relation of aspects of form and content to each other, to similar aspects of other communications, and to the communication's original context and its context of reception. The explicit identification of a communication as participating in a genre thus in turn contributes to the meaning of that communication.

An influential early articulation of this understanding was a 1984 essay by the rhetorician Carolyn Miller, *Genre as Social Action*.[275] Miller argued that genre identifications, properly understood, focus "not on the substance or the form of discourse but on the action it is used to accomplish."[276] She described genres as "rhetorical means for mediating private intentions and social exigence,"[277] or practical social demands, and as vehicles for "conventionalized social purpose, or exigence, within the recurrent situation."[278] The currently prevailing view in genre theory follows Miller in considering genre distinctions to be not abstract formal constraints but rather recognizable, material clusters of communicative patterning that emerge from the joint use people make of communications.[279] On this understanding, we are driven to make generic distinctions (and to recognize new genres) not just out of a compulsion to conform to past practices, but also out of a

274. *See, e.g.*, DUFF, *supra* note 259, at 43, 46, 108 (presenting historical examples of arguments for a more context- and reader-focused approach to genre).

275. Miller, *supra* note 272. According to Google Scholar, as of September 2012, Miller's article had been cited more than 1700 times. GOOGLE SCHOLAR, http://scholar.google.com (search "Carolyn Miller + Genre as Social Action"; the number of times article is cited is directly below article hyperlink and description).

276. Miller, *supra* note 272, at 151.

277. *Id.* at 163. Miller's use of the term "exigence" reflects her influence by Kenneth Burke. *See infra* note 280.

278. Miller, *supra* note 272, at 162.

279. Fowler, *supra* note 264, at 190.

constant need to stabilize our own, and others', expectations.[280] Generic classification fulfills this need by implying a frame or script for action and expectation; such a classification does more than refer to a blueprint underlying the text.[281] This understanding explains more than the folk conception or classical understanding of genres had, but also suggests a paradox: "[P]eople recognize recurring situations because they know genres, yet genres exist only because people have acted as though situations have recurred."[282] How, that is, can we explain when particular generic distinctions are merited, or functional, without stepping into the future to see whether they "work" to align expectations?

3. Contemporary Genre Theory and the "Law" of Genre

Contemporary genre theorists have developed a coherent new account of why, in general, we make generic distinctions and have persuasively shown that we do so in an unexpectedly wide variety of settings—virtually every time we seek to comprehend a communication. These theorists have been less successful in explaining the persistence of the folk conception of genre; even sophisticated theorists are still drawn to treat generic distinctions as a kind of "law."[283] Contemporary accounts of genre focus above all on description but sometimes slip into a prescriptive vocabulary, referring to genre distinctions as matters of rule-following[284] and struggling to account for this prescriptive

280. *See, e.g.*, KENNETH BURKE, COUNTER-STATEMENT 124 (1968) (presenting an early version of this argument); DEVITT, *supra* note 222, at 78, 98, 138, 141 (elaborating on the implications of genre as a device for shaping expectations); FROW, *supra* note 272, at 19, 83–87 (discussing "genre as [cognitive] schema").

281. DEVITT, *supra* note 222, at 182–83. Think of the expectations you develop as a movie viewer upon learning or recognizing that a movie belongs to a particular genre. Like characterizing a legal rule, identifying the genre of a movie has consequences for expectation and action.

282. *Id.* at 21.

283. *See* Jacques Derrida, *The Law of Genre*, 7 CRITICAL INQUIRY 55, 56, 58, 77 (Avital Ronell trans., 1980) (noting that references to genre invariably invoke a "limit" or interdiction). *See also* David Duff, *Intertextuality Versus Genre Theory: Bakhtin, Kristeva, and the Question of Genre*, 25 PARAGRAPH 54, 56 (2002) (discussing Derrida's critique of genre theory).

284. *See, e.g.*, Miller, *supra* note 272, at 164 (arguing that genre is inherently a normative concept, and in particular that Environmental Impact Statements do not constitute a genre because they have no "coherent pragmatic force" or "satisfactory fusion of function and form"); DEVITT, *supra* note 222, at 141 ("Once established, genres operate as language standards, like 'proper English.'"); FROW, *supra* note 272, at 101–02 (describing genre as "a constraint on semiosis, the production of meaning" that "specifies which types of meaning are relevant and appropriate in a given context"). It seems possible that this issue has been a difficult one for genre theory because of the contexts and purposes of that tradition of writing. Theories of genre have historically been written by and for people working outside the law, that is, working with language whose effects on behavior are not institutionalized in a legal or coercive apparatus but depend on consensus and

dimension of genre in terms that do more than copy Horace's model. On this point, genre theorists might have something to learn from judicial approaches to legal characterization.

Legal theory and doctrine have long explored the normative force of particular instances of communication, as well as particular instances of categorization.[285] Many (though not all) such questions are internalized in legal training and addressed in doctrine.[286] The legally trained intuitively, if not explicitly, understand that particular instances of classification gain their normative force as a result of processes similar to those described by genre theorists. Some individuals and institutions—such as legislators, law revision committees, legal publishers, judges, and treatise authors—are accorded authority, by social practice and other institutional mechanisms, to make classifications that others will treat as having normative force.[287] The characterization doctrines discussed above represent judicial attempts to work through precisely these questions, although Supreme Court Justices seem to have been conscious of this activity only in the jurisdictional-characterization cases. In both doctrinal areas, however, as a result of these efforts, the pertinent issues have come into sharper focus over time. Substantive-procedural characterization doctrine has established that characterization may be necessary because existing authorities (such as *Erie* precedents and the REA) contemplate or presuppose such characterization;[288] that the characterization of legal rules generated by different institutions (such as state statutes and federal rules) may require different kinds of analysis and

acculturation. Since Horace, poetics has thus borrowed from legal vocabulary to describe a feature of categorizing language that is so pervasive in legal communication that it is taken for granted. *See supra* notes 248–50 and accompanying text (discussing how legal scholarship naturally places statutes into classifications).

285. For example, in an influential 1935 article, Felix Cohen argued that the reasons given for an interpretive conclusion in a judicial opinion—the rules putatively "followed" by that decision—ordinarily and logically have little or nothing to do with the process of reaching that conclusion. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811–12 (1935). For examples of more recent explorations of this issue, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 112–28 (1991) (discussing the normative force of rules in justification); Martin Stone, *Focusing the Law: What Legal Interpretation Is Not*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 31, 31–96 (Andrei Marmor ed., 1995) (using Wittgensteinian perspective to explain the validity of Cohen's point).

286. *See supra* notes 24–27, 36, 39–45, 60–64, 93–100 and accompanying text (discussing areas of legal doctrine and instruction that depend on categorization of legal texts).

287. *Cf.* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) (presenting theory of legal authority based on deference to others' decisions).

288. *See supra* notes 60–66, 90–111 and accompanying text (describing statutory justification for requiring characterization in the context of *Erie* doctrine).

justification;[289] that characterization has a variety of consequences, or may play different roles in the logic of a judicial rationale (establishing conflict between two rules or, on the contrary, demonstrating the absence of conflict);[290] and most generally that, as Cook argued, characterization is always performed for some practical purpose (in the *Erie* context, the judicial delimitation of the scope of federal legislative and judicial power).[291] Jurisdictional-characterization doctrine has recently developed more robust guidelines for justifying some of the analogous characterization decisions that must be made in that area of law.[292] Issues do remain, however, for resolution in this area. As noted above, at some point the Court will need to address the characterization of non-statutory pre-litigation requirements and the conditions under which the consequences of making a jurisdictional characterization are independent of one another.

In developing the doctrine that has sharpened these issues, the Court has wrestled directly with exploring and justifying the normative consequences of characterization decisions. Not always self-consciously, the Court has developed a set of higher-order rules for some characterization decisions. These rules reflect a highly functionalist understanding of such decisions along lines similar to those developed in genre theory. In the process, the Court has from time to time recognized its own practical, institutional, and social responsibility for developing these higher-order rules. Indeed, among all the institutions granted authority to make normative classifications in our current social arrangement, courts of last resort may be uniquely well situated to develop these kinds of classificatory rules. Unlike most other legal interpreters, the judges of these courts are able to take into account all of the prior characterization decisions made by legislative drafters and boards of revision, as well as parties and lawyers, lower court judges, and previous Justices.[293]

Still, the Court and its commentators might have something to learn

289. *See supra* Part I.C (discussing doctrinal recognition of source-based justifications for characterization); *see also infra* notes 306–08 and accompanying text (discussing the need to determine whether interpretation of Federal Rules should differ from interpretation of statutory law).

290. *See supra* notes 90–111 and accompanying text (discussing divergent positions on this point taken in the *Shady Grove* opinions).

291. *See supra* notes 20–21, 32–35, 52, 63–64, 81 and accompanying text (describing Cook's argument to this effect and its recurrence in doctrine and commentary).

292. *See supra* Parts II.C–E (outlining the emerging consensus on framework for making and justifying jurisdictional-characterization decisions).

293. *See supra* note 281 and accompanying text (explaining the importance of prior characterizations to the expectation-stabilizing function of generic distinctions).

from the work summarized in this Part. Contemporary genre theory holds that a genre exists when patterns of communication recur to address a recurrent situation and are recognized as recurring.[294] Identifying the genre to which a communication belongs adds to the repertoire of tools available to explain the meaning of that communication. This is an inevitably recursive process, and as a result, there can be no such thing as a final "comprehensive map" of genres, statutory or otherwise.[295] A corollary of this insight, implicit in the Court's practices but less universally embraced by commentators, is the insusceptibility of legal-characterization issues to exclusively formalist resolution in any stable way. Insistence on fixed bright-line grounds for the distinction of substantive from procedural and jurisdictional from nonjurisdictional rules—grounds preexisting the drawing of such distinctions in individual cases—are thus both theoretically unsound and practically counterproductive.

IV. IMPLICATIONS OF GENRE THEORY FOR CHARACTERIZATION DOCTRINES

The above discussion has already suggested many of the implications of these comparisons—between doctrines, as well as between doctrine and theory—for the further development of the law of legal characterization. These implications may be drawn out even more to identify the most pressing needs in the development of *Erie* doctrine and jurisdictional-characterization doctrine. Mapping out an agenda to meet these needs is the purpose of this final Part. In the *Erie* area, courts should not be leery of substantive-procedural characterization but rather should be willing to consider all the circumstances that might be relevant to the assessment. Clarity on this point would force more direct recognition of the fact that different types of conflicts or choice between state and federal law may exist and more explicit deliberation about how these issues should be resolved. In the jurisdictional-characterization area, judicial reluctance to characterize is not the problem; constructive development of the doctrine requires merely an effort to reach comparable consensus on such associated issues as the extent to which features of jurisdictional rules (mandatoriness,

294. *See, e.g.*, DEVITT, *supra* note 222, at 20–21 ("Preexisting genres are part of what enable individuals to move from their unique experiences and perceptions to a shared understanding of recurring situation. . . . [T]he act of constructing the genre—of classifying a text as similar to other texts—is also the act of constructing the situation."); FROW, *supra* note 272, at 157–58 (noting, *inter alia*, that "we have many and confused intentions, but few effective orientation centers for joint action" and that "this may be why the whole matter of genre has become problematic").

295. Fowler, *supra* note 264, at 248.

nonwaivability, nonforfeitability) may be disaggregated from one another, and the extent to which the analytic framework the Court has developed for statutory characterization similarly applies to the characterization of Federal Rules.

A. Erie *Doctrine: Confronting Source Distinctions and Doctrinal Overlaps*

Since the origins of *Erie* doctrine, many of those contributing to its development seem to have regarded substantive-procedural characterization as a distastefully formalist exercise.[296] In recent decades, however, Justices who seem inclined to adopt this attitude toward *Erie* doctrine have also countenanced the development of a fairly structured doctrine of jurisdictional characterization.[297] Practices in the latter area suggest, nevertheless, that the development of higher-order rules for the characterization of other legal rules need not be an exclusively formalist undertaking. Rather, since characterization is an aspect of interpretation—the process of making law meaningful—it necessarily has both formal and functional dimensions.[298]

Other specific areas of disagreement have stood in the way of developing a unified doctrine of characterization for *Erie* purposes. Justices disagree about, first, whether characterization is required for federal laws only, or also for the state laws or rules involved in an *Erie* choice; and, second, the importance of direct conflict between the state and federal rules at issue, including the question of how such conflict is to be detected and, of course, the question how of it is to be resolved if present.[299]

The first of these questions cannot be answered in the abstract, since the need for characterization depends on the circumstances in which it is being contemplated. *Erie* doctrine has simply recognized that even if substantive-procedural characterization does not seem necessary to decide a particular case, other types of source-based characterization—most basically, the classification of legal rules as state or federal law—are essential to determining whether a case even presents an *Erie* issue. Beyond this recognition, several strands of *Erie* doctrine, notably *Hanna*, acknowledge a need to engage in other source-based

296. *See, e.g.*, *supra* notes 46–58, 83–84, 90, 104 and accompanying text (discussing recurrence of this theme in *Erie* doctrine).

297. *See, e.g.*, Parts II.C, II.E, and II.F (discussing the structured framework for jurisdictional characterization).

298. *See* discussion *supra* Part III.B.2 (discussing the post-Romantic recognition of relationship between formal and functional dimensions of genre classifications).

299. *See supra* notes 90–111 and accompanying text (discussing *Shady Grove*).

characterizations.[300] The federal rule at issue may be constitutional, statutory, contained in a Rule, or decisional (common-law or doctrinal), and the state rule at issue may fall into any of these categories as well. *Hanna* suggested, and Justice Scalia continues to insist, that if the federal law at issue is a properly promulgated Federal Rule, the inquiry is over.[301] The table below shows how this type of secondary characterization is implicit in cases recognized as falling within the *Hanna* model.[302]

		FEDERAL LAW			
		Constitution	**Statute**	**Rule**	**Decision**
STATE LAW	**Constitution**	*No existing framework*	*No existing framework*	*Hanna* [could be extended to]	*No existing framework*
	Statute	*No existing framework*	*No existing framework*	*Hanna*: If Rule is valid, apply federal law	*No existing framework*
	Rule	*No existing framework*	*No existing framework*	*Hanna* [could be extended to]	*No existing framework*
	Decision	*No existing framework*	*No existing framework*	*Hanna* [could be extended to]	*No existing framework*

Of course, not every *Erie* case poses a clear conflict between a federal rule and a state statute or rule. As the table above suggests, the *Hanna* framework does not directly resolve many other types of conflicts. Nevertheless, in resolving any of these conflicts, source-based characterization may be an important factor. Where the federal

300. *See supra* Part I.C (discussing characterizations made in *Hanna* and subsequent decisions).

301. *See supra* note 62 and accompanying text (concerning identification of the central issue in *Hanna*). *See also supra* note 99 and accompanying text (discussing Justice Scalia's similar position in *Shady Grove*).

302. The table illustrates that determining whether *Hanna* applies to a given case presumes some source-based characterization. It also shows that *Hanna* provides a rule for only a limited number of the scenarios in which *Erie* issues may arise.

law is clearly of constitutional status, for example, precedent suggests that the conflict should be resolved in favor of the federal law.[303] An important shortcoming of purely source-based characterization is that rules for the resolution of conflict do not help a court determine that conflict is present in the first place. Substantive-procedural characterization may be a component—but only one component—of the analysis needed to answer this question. State and federal rules falling into different categories (substantive or procedural) will not conflict, while state and federal rules falling into the same category might. Determining the presence of conflict thus involves two analytic steps: first, characterizing the laws at issue; and second, if they fall into the same category, determining whether they conflict, and, if so, how.[304]

As this Article has argued, the first of these steps is closely akin to the task of jurisdictional characterization. In the *Erie* context, as in the context of jurisdictional characterization, it should be possible to forge a framework acceptable to judges of different methodological inclinations by encouraging the characterizer to focus first on textual and structural indicia of character (some of which will be source-based, others more reminiscent of familiar interpretive details such as word choice and rule structure), and then on context, including past forms of the rule, past judicial treatment of the rule, and inferences about the purposes of the rule (either to influence primary conduct or to influence litigation conduct) that may be drawn from this contextual information. Characterization along these lines is a matter of interpreting the state and federal laws at issue. Straightforwardly acknowledging as much would give judges some common ground for agreement on characterization issues—surely an advance over current practice, in which some judges abjure the characterization process entirely while others insist on it.[305] Because it is a matter of interpretation, this characterization will be most straightforward for federal statutes, Rules, and doctrines. Federal courts already understand themselves to be interpreting federal law every day, in nearly every case they decide. The inquiry may be less straightforward when the federal court turns to characterization and interpretation of the state law at issue.[306] Since

303. *See supra* notes 56–58, 79–85 and accompanying text (discussing *Erie* decisions considering the relation between constitutional and statutory law).

304. The disagreements in *Shady Grove* seem to stem partly from disagreement over the need to disaggregate these two inquiries, as suggested in *supra* notes 99–111 and accompanying text.

305. *See supra* note 111 and accompanying text (summarizing conflicting positions on this point exhibited in the *Shady Grove* opinions).

306. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011) [hereinafter Gluck, *Intersystemic Interpretation*] (discussing the implications for *Erie* analysis of considering state court

state court interpretation practices differ in certain regards from federal court practices,[307] federal courts may need to take state interpretive practices into account in characterizing the state laws at issue, depending on the legal status of those state court practices in the relevant jurisdiction.[308]

Determining the presence or absence of conflict between federal and state rules is also an interpretive activity. If the characterization analysis clearly indicates that the federal and state laws fall into different categories, no conflict should be possible, and the inquiry will end. But this clarity will not be available in every case. Much of the confusion about substantive-procedural characterization in the caselaw stems from the possibility of characterizing a single rule as both substantive and procedural, or as procedural for one purpose and substantive for another. When this occurs in the *Erie* context, the presence of conflict should be determined by reference to the purposes of making any *Erie* decision: giving effect to the Rules of Decision Act (RDA) in light of general principles of federal law. The RDA requires federal courts to give effect to state "rules of decision"; the U.S. Constitution makes federal law the supreme law of the land. In effect, then, *Erie* cases require federal courts to decide whether state "rules of decision" with some substantive component are preempted by federal law touching the same issues or conduct. This last, crucial step of *Erie* analysis, where required, thus is akin to the analysis of preemption issues more generally. Just as the characterization component can usefully borrow from jurisdictional-characterization doctrine, so too may this component borrow from another already well-developed body of federal doctrine—a controversial one, to be sure, but one still marked by more agreement on basic principles than is current *Erie* doctrine.[309]

interpretive methodologies to be forms of law equal in authority to state common law and statutes).

307. *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) [hereinafter Gluck, *States as Laboratories*] (exploring a variety of interpretive practices used in several state supreme courts).

308. From this perspective, it is perhaps fortunate that interpretive methodologies (possibly including characterization doctrine) do not enjoy the status of law in the federal system, despite Gluck's persuasive arguments that this lack of binding legal status is undesirable. *See* Gluck, *States as Laboratories*, *supra* note 307, at 1766. If interpretive methodologies counted as federal legal rules, courts facing *Erie* questions in cases in which federal and state interpretive methodologies differ would also need to choose between state and federal law on this point. *See generally* Gluck, *Intersystemic Interpretation*, *supra* note 306. Under the current system, they need not do so.

309. For recent discussions of preemption doctrine and practice, see FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007); THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP

To summarize, the resources for developing a broadly acceptable, more structured framework for the analysis of *Erie* issues are already implicit in *Erie* precedents and in related areas of federal decisional law. Federal courts deciding *Erie* cases should more explicitly and systematically identify the state and federal laws in controversy; characterize both state and federal laws according to source and as either substantive, procedural, or an identifiable combination, using the text-, structure-, and context-focused interpretive tools developed in jurisdictional-characterization doctrine; and, if the questions of conflict and preemption have not been settled by an earlier step in the analysis, answer these questions as straightforward preemption issues.

B. Jurisdictional-Characterization: Clarifying Consequences, Interpreting Rules

In the jurisdictional-characterization area, the Court and the legal academy seem to have been engaged recently in similar enterprises: the articulation and stabilization of expectations concerning the treatment of certain legal texts through the development of higher-order characterization rules. As a result, jurisdictional-characterization doctrine has developed along lines consonant with contemporary genre theory, which acknowledges that formal features of the text being classified play a role in classification decisions alongside past treatment of that text and the consequences of characterizing it. Still, some questions remain open. One question is the issue of the consequences of jurisdictional characterization (or more precisely, characterization of a rule as nonjurisdictional): to what extent, and when, do rules characterized as nonjurisdictional share features of jurisdictional rules, such as mandatoriness, nonwaivability, and nonforfeitability?[310] Another is the question of how Federal Rules are to be characterized.[311]

LOCAL JURIES (2008); PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002); Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682 (2011); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781 (2008).

310. This question has been a focus of Scott Dodson's recent work; he has explored it in particular depth in the articles cited *supra* notes 4 and 123.

311. In one sense, Rules by definition cannot be jurisdictional. *See* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."); *see also* Burbank, *supra* note 35, at 1148 (discussing Rule drafters' understanding of this particular limitation on the judicial rulemaking power).

As Scott Dodson's recent work suggests, decisions about the practical consequences of characterizing rules as jurisdictional or nonjurisdictional should consider the same indicia that bear on the jurisdictional-characterization inquiry.[312] Text (especially the appearance of verbs conventionally considered "mandatory"), context, and prior treatment would all be appropriate to the analysis. In addition, judges already consider—if less than systematically—information about actual litigant expectations and conduct, including information about how and when parties actually did and are likely or provided with incentives to communicate complaints about opposing-party noncompliance to the opposing party and the court. Taking this information more explicitly into account, and encouraging parties to draft briefs presenting it, would allow courts deciding about the consequences of characterization to take into consideration the characterization activities of all relevant actors—lawmakers, courts, and litigants—in crafting higher-order guidelines for characterization beyond the jurisdictional-nonjurisdictional distinction.

This Article has repeatedly stressed that legal characterization is not just a form of textual characterization but also a form of legal interpretation—the attribution of meaning to legal provisions. Thus far, jurisdictional-characterization doctrine has developed relatively straightforwardly as a specialized branch of statutory interpretation, although no Justice has explicitly recognized it as such. Yet it is arguably the familiarity of this framework that has allowed consensus in the area.[313] The characterization of Federal Rules is likewise a type of Rule interpretation. But the interpretation of Federal Rules, some have argued, may require adjustments to prevailing practices of statutory interpretation.[314] Such arguments focus on the fact that different legal rules are generated by different authorities through different processes.

312. *See supra* notes 211–12 and accompanying text (summarizing Dodson's recommendations).

313. Gluck describes an analogous consensus in some state courts on issues of statutory interpretation; these courts, she shows, have converged on an approach to statutory interpretation, "modified textualism," that has features appealing to both textualist (formalist) and purposivist (functionalist) judges. Gluck, *States as Laboratories*, *supra* note 307, at 1829–46.

314. *See, e.g.*, David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927 (arguing for an approach to Rule interpretation that takes into account special circumstances under which Rules are drafted and amended); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) ("Given the[] substantial . . . powers of the Court in the promulgation process [for Federal Rules], a more activist role in the interpretative stage . . . is appropriate."); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002) ("Congress's delegation of rulemaking authority [in the REA] should constrain, rather than liberate, courts' interpretation of the Rules.").

The Supreme Court has sometimes treated Rules just like statutes for purposes of interpretation, but *Curry* (a pre-Rules decision) could be read to imply that Federal Rules are categorically different.[315] Although no agreement on this issue has emerged among commentators, there is no reason to think it would be more difficult to attain judicial consensus in this area than it has been in the context of the jurisdictional characterization of statutes. So far, jurisdictional-characterization doctrine has developed in ways that seem satisfactory to Justices espousing different interpretive philosophies (including the textualist Justice Scalia and the purposivists Justices Stevens and Ginsburg). This developing framework is respectful of text and precedent, yet also functionally oriented, and it could be extended to Rule characterization without sacrificing these attributes.[316]

To summarize, we can expect further development of jurisdictional-characterization doctrine to clarify the characteristics and practical consequences of nonjurisdictional rules and to clarify the differences in analysis, if any, needed for characterization of Federal Rules as opposed to statutes. While we cannot expect all judges to agree on the conclusions that should be reached under the existing and extended frameworks, we can expect the frameworks themselves to continue to attract broad acceptance.[317]

C. Broader Implications

The analysis presented here has implications for other areas of law. Legal characterization plays a visible role in many other doctrinal areas, including state constitutional law,[318] First Amendment law,[319] federal criminal law,[320] immigration law,[321] and administrative law.[322] The

315. *See supra* note 120 and accompanying text (noting the importance of legislative authority to *Curry*).

316. The major constraint on extension of statutory-characterization practices to Rule characterization would be the directive that Federal Rules cannot alter jurisdiction. *See supra* note 311.

317. *Cf.* Gluck, *supra* note 307, at 1798 (noting that a consensus on interpretive methodology cannot eliminate "normative disputes in statutory interpretation cases"); *see also id.* at 1853 (making a similar point).

318. *See supra* note 244 and accompanying text (discussing the "single-subject rule" in state constitutional law).

319. *See supra* notes 2 and 252 (noting case law and scholarship on the First Amendment law).

320. *See, e.g.*, John S. Baker, Jr., United States v. Morrison *and Other Arguments against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191 (2000) (addressing problems with the categorization of statutes as "hate crime" legislation); Nikhil Bhagat, Note, *Filling the Gap? Non-Abrogation Provisions and the Assimiliative Crimes Act*, 111 COLUM. L. REV. 77 (2011) (discussing analytical issues presented by federal statutes requiring characterization of state criminal statutes).

observations above—that characterization is an aspect of interpretation and that a structured doctrine of characterization is possible—apply to these areas as well. As an aspect of legal interpretation, characterization is often inevitable and always context-dependent, but it can still be disciplined.

At the most general level, the development of legal-characterization doctrines in the areas described here counsels against too-hasty dismissal of doctrinal elaboration as undesirably formalist. Only if we remain committed to a folk conception of categorization is this a danger. Cook persuasively showed that characterization always has a purpose and is always undertaken with that purpose in view, and that categories of legal rules are thus never fixed, even once they are perceived. But the fact that every characterization decision changes the possibilities for future characterizations—and that the tasks of characterization could and should be carried out more self-consciously in many areas—does not mean we inevitably face the unmanageable proliferation of doctrinal categories in law, any more than the same dynamic creates chaos in other areas of human activity.[323] This Article argues for unification as much as for specification. We need generic categories to make sense of an already increasingly complex body of legal rules, and the higher-order rules that characterization doctrine represents are an important component of our efforts to make those rules meaningful.

CONCLUSION

Systematic comparison of the Court's doctrines of substantive-procedural and jurisdictional characterization brings both areas of law

321. *See, e.g.*, Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude after* Silva-Trevino, 111 COLUM. L. REV. 313 (2011) (considering issues raised by a Supreme Court decision requiring classification of criminal statutes for purposes of determining alien's removability); Cate McGuire, *An Unrealistic Burden: Crimes Involving Moral Turpitude and* Silva-Trevino*'s Realistic Probability Test*, 30 REV. LITIG. 607 (2011) (similar).

322. *See, e.g.*, Melissa M. Berry, *Beyond* Chevron*'s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541 (2007) (considering the pertinence of substantive-procedural distinction to application of *Chevron* doctrine); Franklin, *supra* note 3 (discussing characterization of agency rules as legislative or nonlegislative); William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023 (2004) (also addressing this distinction); Todd D. Rakoff & Takehisa Nakagawa, *Introduction: Informality in Administrative Law—A Transnational Colloquy*, 52 ADMIN. L. REV. 159 (2000) (same); Russell L. Weaver, *The Undervalued Nonlegislative Rule*, 54 ADMIN. L. REV. 871 (2002) (same).

323. *Cf.* Dodson, *Complexity of Jurisdictional Clarity*, *supra* note 123, at 17 n.20 (quoting Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 2–3 (1992)) (criticizing tendency toward "legal complexity," defined as systemic "density, technicality, differentiation, and indeterminacy or uncertainty").

into clearer focus. Both types of legal characterization are examples of a more general legal and indeed human activity—the attribution of genre to texts—and, as such, both are aspects of legal interpretation. The Court has appropriately grasped its responsibility for developing guidelines for the jurisdictional-characterization doctrine, and the framework it is building strikes a good balance between respect for the textual choices of lawmakers and sensitivity to the functions of higher-order rules and interpretive decisions. *Erie* doctrine would benefit from a similar attitude. Some lines of necessary development in both areas are implicit in existing judicial practices. Judges making *Erie* decisions should explicitly characterize both the state and federal laws at issue according to their source as well as according to the substantive-procedural dichotomy, and should recognize that the question of conflict, if reached, is basically akin to other questions of federal preemption. Judges making jurisdictional-characterization decisions should extend the analytic framework that has already been developed to take account of other characterization consequences and to allow the analogous handling of Federal Rules. But judges and commentators should be patient and willing to develop the necessary higher-order rules incrementally. Such an approach is both theoretically sound and a practical necessity.