

NOTES

REASSESSING THE DOCTRINE OF JUDICIAL ESTOPPEL: THE IMPLICATIONS OF THE JUDICIAL INTEGRITY RATIONALE

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* J.D. 2015, University of Virginia School of Law; B.A. 2012, Patrick Henry College. I am deeply indebted to Professor Caleb Nelson for his instruction, guidance, and input throughout the entire process of writing this Note. I am also immensely grateful for the comments provided by Joel Johnson, Mark Kubisch, Nicholas Reaves, and Rachel Wade during the drafting process. Finally, I am very appreciative of the careful review and editing performed by the editors of the *Virginia Law Review*.

INTRODUCTION

WHEN a party “assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.”¹ This doctrine is most often termed “judicial estoppel,” but it may also be called “fact preclusion,” “judicial preclusion,” or “estoppel in pais.” Judicial estoppel is an equitable, court-created, discretionary doctrine that may be invoked by either a party or the court *sua sponte*.² Very simply stated, the doctrine prevents a party from taking a position contradictory to a position which that party adopted previously.

The most difficult questions of judicial estoppel tend to arise when a party asserts an inconsistent claim in two *different* proceedings, since judicial estoppel “prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.”³ For estoppel to be considered in a second proceeding, the first proceeding need not have been a complete case; rather, it may have taken a variety of forms—from a complete court case, to a pleading, to a sworn statement made to an administrative agency.⁴ And questions of judicial estoppel arise in a variety of different factual scenarios, from boundary disputes to bankruptcy cases.

Despite enjoying recognition for over one hundred and fifty years in some state courts and over one hundred years in the U.S. Supreme Court, the doctrine of judicial estoppel has never taken one settled form. In the nearly fifteen years since *New Hampshire v. Maine*—the Court’s seminal modern case on judicial estoppel—was handed down, various federal courts of appeals have changed their approaches to the federal doctrine of judicial estoppel, but no uniform approach has emerged. Different federal courts continue to emphasize different factors and ration-

¹ *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

² *Id.* at 750; see also *Love v. Tyson Foods*, 677 F.3d 258, 261 (5th Cir. 2012) (noting that “[t]he doctrine of judicial estoppel is equitable in nature and can be invoked by a court”).

³ *New Hampshire v. Maine*, 532 U.S. at 749 (citations omitted) (internal quotation marks omitted). Judicial estoppel also may be applied to prevent a party from making two inconsistent claims in the same case, but that scenario is not the primary focus of this Note.

⁴ See, e.g., *DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010) (noting that “[j]udicial estoppel applies to sworn statements made to administrative agencies such as the Social Security Administration as well as to courts”); *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 47 (1857) (applying judicial estoppel when the statement upon which estoppel was based surfaced in a pleading in a prior case).

ales relevant to judicial estoppel when applying their own federal common law approaches to judicial estoppel. At the same time, there continues to be a circuit split over whether the Supreme Court's decision in *Erie Railroad Co. v. Tompkins* requires federal courts to apply state law of judicial estoppel in some cases.

Little to no literature exists on the development of federal judicial estoppel—especially in relation to the *Erie* doctrine—since *New Hampshire v. Maine*.⁵ This Note attempts to fill that gap. Part I of this Note will lay out the background law of judicial estoppel. It will first outline the Supreme Court's decision in *New Hampshire v. Maine* and then sketch the ways in which the courts of appeals have emphasized different elements of judicial estoppel when applying their own variations on the doctrine. It also will discuss the various rationales underlying different federal approaches to judicial estoppel.

Part II will begin with an explanation of the split among the courts of appeals over what form of judicial estoppel applies in particular scenarios under the *Erie* doctrine. The bulk of this Part will outline and defend the proposed rule: that judicial estoppel should be categorized as substantive for the sake of the *Erie* doctrine, and that a federal court considering the application of judicial estoppel in any case should apply the judicial estoppel doctrine that would be applied by the court that adjudicated the first proceeding. Part III will provide a cursory outline of state approaches to choice-of-law questions that states are faced with when applying judicial estoppel. This Part will also discuss the possible application of *Semtek International Inc. v. Lockheed Martin Corp.*⁶ to

⁵ Only a handful of academics have seriously addressed the relationship between the *Erie* doctrine and judicial estoppel, and none have done so since *New Hampshire v. Maine* was decided. The primary piece of literature addressing the issue was written by Professor Ashley Deeks while a law student at the University of Chicago; Mark Plumer and Eric Schreiber also both devoted a few pages of their works to the relationship between the two doctrines. See Ashley S. Deeks, Comment, Raising the Cost of Lying: Rethinking *Erie* for Judicial Estoppel, 64 U. Chi. L. Rev. 873, 891 (1997) (refusing to categorize judicial estoppel as substantive or procedural and instead developing a modified *Erie* approach in which a federal court sitting in diversity is to compare the relevant state and federal versions of the doctrine and then apply the more aggressive version); Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L. Rev. 409, 434 (1987) (arguing that judicial estoppel is procedural in nature under the *Erie* doctrine); Eric A. Schreiber, Comment, The Judiciary Says, You Can't Have it Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions, 30 Loy. L.A. L. Rev. 323, 352 (1996) (briefly arguing that judicial estoppel is procedural in nature for the sake of the *Erie* doctrine).

⁶ 531 U.S. 497, 508 (2001).

the doctrine of judicial estoppel and propose a state approach to choice-of-law questions that arise when states consider judicial estoppel; this proposed state rule mirrors the proposed federal rule under the *Erie* doctrine.

I. APPROACHES TO AND RATIONALES FOR JUDICIAL ESTOPPEL

A. *The Supreme Court on Judicial Estoppel*

The doctrine of judicial estoppel is widely believed to have first surfaced in 1857, when the Tennessee Supreme Court discussed the doctrine in the case *Hamilton v. Zimmerman*.⁷ But there is some academic debate over precisely when judicial estoppel was first recognized by the Supreme Court. While multiple scholars and courts believe that judicial estoppel was not the type of estoppel at issue in the 1895 case of *Davis v. Wakelee*,⁸ the Supreme Court has more recently cited that case as outlining the doctrine of judicial estoppel.⁹ The Court very clearly reiterated the doctrine of judicial estoppel and discussed its parameters in the 2001 case of *New Hampshire v. Maine*. In 1977, the Court had adopted a consent decree in which New Hampshire and Maine had come to an agreement on a boundary dispute.¹⁰ Nearly twenty-five years later, however, New Hampshire urged the Court to adopt a different boundary line; the Court in *New Hampshire v. Maine* refused to do so, holding instead that New Hampshire's new interpretation of the boundary line was precluded due to the prior decree.¹¹ The Court took advantage of this decision to extensively discuss the requirements for a claim to be estopped under a theory of judicial estoppel, and also to outline some of the justifications for judicial estoppel.

Refusing to adopt a strict formula for determining when judicial estoppel may be invoked, the Court noted that “several factors typically

⁷ See, e.g., T.H. Malone, *The Tennessee Law of Judicial Estoppel*, 1 *Tenn. L. Rev.* 1, 4–5 (1922) (stating that the doctrine of judicial estoppel originated in *Hamilton*).

⁸ 156 U.S. 680, 689–91 (1895).

⁹ See *New Hampshire v. Maine*, 532 U.S. at 749 (quoting *Davis v. Walkee*, 156 U.S. 680, 689 (1895)) (calling the doctrine outlined in that quote “judicial estoppel”). But see, e.g., *Edwards v. Aetna Life Ins.*, 690 F.2d 595, 598 (6th Cir. 1982) (listing *Davis* as an example of equitable estoppel rather than judicial estoppel); Deeks, *supra* note 5, at 877 n.15 (noting that “courts have not universally read *Davis* to mandate application of judicial estoppel”).

¹⁰ *New Hampshire v. Maine*, 532 U.S. at 747.

¹¹ *Id.* at 748, 755.

inform the decision whether to apply the doctrine in a particular case.”¹² The Court listed three factors, all of which have been widely cited by lower courts. First, the Court stated that “a party’s later position must be ‘clearly inconsistent’ with its earlier position.”¹³ Lower courts have construed this provision as prohibiting some types of omissions when the party takes its position in the first case, especially in the context of bankruptcy proceedings. For example, “A debtor’s failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed.”¹⁴ While inadvertent failure to list a claim may be excused in a later case, even the test for inadvertence may require the party to meet a high standard; as one court has noted, when “a debtor has both knowledge of the claims and a motive to conceal them, courts routinely . . . infer deliberate manipulation.”¹⁵

Second, the Court wrote that another important factor is success; that is, the scales should tip in favor of estoppel if the party “has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.”¹⁶ The Court has construed this requirement somewhat narrowly; recently, the Court held that when parties had made prior statements when in negotiations and while defending a settlement agreement, the parties were not estopped from making inconsistent statements in a later case.¹⁷

Third, if the party asserting an inconsistent position “would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped,” that fact weighs in favor of preclusion.¹⁸ This factor does not require that there was bad faith or manipulative intent on the part of the party that may be estopped; rather, it turns on whether failure to estop would be unfair to the other party in the current proceeding.

The Court seemed to hold that only the first factor is a necessary one; it stated that the two positions “*must* be clearly inconsistent.”¹⁹ This re-

¹² Id. at 750.

¹³ Id.

¹⁴ *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (internal quotation marks omitted).

¹⁵ *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1157 (10th Cir. 2007).

¹⁶ *New Hampshire v. Maine*, 532 U.S. at 743.

¹⁷ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010).

¹⁸ *New Hampshire v. Maine*, 532 U.S. at 751.

¹⁹ Id. at 750 (emphasis added) (internal quotation marks omitted).

quirement has been closely followed; all federal courts—regardless of whether they directly list clear inconsistency as an element of their test of judicial estoppel—apply some sort of inconsistency standard as a threshold question when determining whether or not judicial estoppel is applicable. By contrast, the Court in *New Hampshire v. Maine* described the second factor as something about which “courts regularly inquire,”²⁰ a statement that seems to indicate that this factor should normally be applied, but is not absolutely necessary. The Court described the third factor as a mere “consideration” and went on to note that “[a]dditional considerations” may be taken into account in some cases.²¹ Thus, as the Court concluded, with the exception of the first factor, the factors of judicial estoppel are neither “inflexible prerequisites” nor an “exhaustive formula.”²²

While the decision has been widely cited among circuit and district courts, the Supreme Court has cited its decision in *New Hampshire v. Maine* only five times and has not modified the doctrine or its underlying rationales in any way.²³ Since judicial estoppel is a discretionary, equitable, court-created doctrine, the Court in *New Hampshire v. Maine* only held that the first factor in its judicial estoppel analysis is a necessary one. And since the various courts of appeals had developed different approaches to the doctrine before the Supreme Court handed down *New Hampshire v. Maine*, it is unsurprising that the courts of appeals have treated the *New Hampshire v. Maine* decision with varying degrees of respect.

B. The Courts of Appeals on Judicial Estoppel

The U.S. Courts of Appeals for the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits adhere strongly to the three *New Hampshire v. Maine* factors. The *New Hampshire v. Maine* Court stated that these factors are neither inflexible nor exhaustive,²⁴ and these courts of

²⁰ *Id.*

²¹ *Id.* at 751.

²² *Id.*

²³ See *Already, LLC v. Nike*, 133 S. Ct. 721, 728 (2013); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 (2010); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Zedner v. United States*, 547 U.S. 489, 504 (2006).

²⁴ See *New Hampshire v. Maine*, 532 U.S. at 751.

appeals pay lip service to this idea.²⁵ In actuality, however, these courts of appeals actually tend to apply the three factors rigidly—as a three-part test. Additionally, the Second and District of Columbia Circuits have adopted language that indicates they may apply an additional element in *every* case involving judicial estoppel, but it is unclear whether these additional elements pull any extra weight or whether any case involving judicial estoppel has ever been decided on one of these factors.²⁶

Other courts of appeals focus more intensely on other factors when applying judicial estoppel. These circuits can be loosely categorized as adopting two different approaches that emphasize different elements of the doctrine of judicial estoppel: the “success approach” and the “intent approach.” The First, Sixth, and Seventh Circuits emphasize whether the party succeeded in the initial proceedings when determining whether that party is precluded from making a contradictory argument in a later case.²⁷ Professor Ashley Deeks calls this requirement the “success test”—a term that has since been taken up in other academic literature.²⁸ While following the Court’s instruction in *New Hampshire v. Maine* that all factors besides its first factor are neither exhaustive nor inflexible, courts in these circuits tend to treat a showing of success as a necessary condition for applying judicial estoppel.²⁹ In short, for these courts, “judicial estoppel precludes a party from abandoning positions after . . . prevail[ing] on them in earlier litigation.”³⁰ As long as *New Hampshire v. Maine*’s first factor, the threshold element of clear incon-

²⁵ See *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1087 (10th Cir. 2013); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 993–94 (9th Cir. 2012); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 679 (8th Cir. 2012).

²⁶ The Second Circuit has repeatedly stated that it limits application of judicial estoppel “to situations where the risk of inconsistent results with its impact on judicial integrity is certain,” *Intellivision v. Microsoft Corp.*, 484 F. App’x 616, 619 (2d Cir. 2012) (citations omitted) (internal quotation marks omitted), but this factor has never been clearly defined or applied. When applying judicial estoppel, the District of Columbia Circuit requires there “must be a discernible connection between the two proceedings,” *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799 (D.C. Cir. 2010), but has yet to decide a case that turns on this factor.

²⁷ See *Alt. Sys. Concepts v. Synopsys*, 374 F.3d 23, 33 (1st Cir. 2004); *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990).

²⁸ Deeks, *supra* note 5, at 876.

²⁹ See *Bonkowski v. Allstate Ins. Co.*, 544 F. App’x 597, 602 (2013) (citing *New Hampshire v. Maine* repeatedly, but ultimately applying the success approach); *In re Knight-Celotex*, 695 F.3d 714, 722 (7th Cir. 2012) (refusing to hold that “the bankruptcy court’s failure to march through the *New Hampshire v. Maine* factors one by one was error in itself”).

³⁰ *Williams v. Hainje*, 375 F. App’x 625, 627 (7th Cir. 2010).

sistency, is met, the courts that rely on the success approach seem also to treat success as a sufficient requirement for a finding of judicial estoppel.³¹

The Third and Eleventh Circuits focus more heavily on the subjective intent of the party who may be estopped, and do not find the success of the party in the prior proceedings to be determinative when adjudicating questions of judicial estoppel.³² The intent element is not listed as an element in *New Hampshire v. Maine*, and while it may seem similar to the Court's third factor in that case, the two factors are actually quite different.³³ The third factor in *New Hampshire v. Maine* states that preclusion should be considered if the party asserting an inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."³⁴ A party could gain an unfair advantage or impose an unfair detriment even if the party had no subjective bad faith intent. By contrast, a party could have subjective bad faith intent "to play fast and loose with the court[]"³⁵ without having succeeded in the first proceeding, and thus without having any opportunity to gain an unfair advantage. Thus these two factors are not interchangeable, and each cuts at different issues—the unfair advantage inquiry regulates the fairness of the outcome regardless of the intent of the party, and the intent inquiry focuses on that intent regardless of the outcome.

A finding of bad intent requires that there be "a purposeful contradiction—not simple error or inadvertence."³⁶ To determine that there was intent to manipulate the legal system, courts may infer intent from the

³¹ See, e.g., *Alt. Sys. Concepts*, 374 F.3d at 33 (holding that judicial estoppel attaches when "the responsible party" has "succeeded in persuading a court to accept its prior position").

³² *Krystal Cadillac-Oldsmobile GMC Truck v. Gen. Motors Corp.*, 337 F.3d 314, 319–20 (3d Cir. 2003); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285–86 (11th Cir. 2002). Some scholars have described this factor as the "fast and loose test." See Deeks, *supra* note 5, at 878–79. Additionally, while intent tends to be the touchstone of judicial estoppel analysis in the Third and Eleventh Circuits, courts may also make use of other factors, especially the success element. See, e.g., *United States v. Pelullo*, 399 F.3d 197, 222–23 (3d Cir. 2005) (holding that judicial estoppel was inapplicable because the party had not succeeded in persuading the court to accept that party's position in a prior case).

³³ However, the Court did state that "[w]e do not question that it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. at 753 (citations omitted) (internal quotation marks omitted).

³⁴ *Id.* at 751.

³⁵ *Krystal Cadillac-Oldsmobile GMC Truck*, 337 F.3d at 319 (quoting *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779–80 (3d Cir. 2001)).

³⁶ *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1294 (11th Cir. 2003).

facts; for example, if there was knowledge at the time of the first proceeding and a motive can be shown, an inference may be permitted.³⁷ While intent tends to be the touchstone of judicial estoppel analysis in the Third and Eleventh Circuits, courts may also make use of other factors, especially the success element.³⁸ Similarly, the Fourth and Fifth Circuits tend to require a showing of *both* success and intent before holding that a party is estopped from making a claim that is inconsistent with a claim made in a prior proceeding.³⁹

C. *The Goals of Judicial Estoppel*

Three primary rationales are repeatedly articulated by courts as to why judicial estoppel exists and when it should be applied: protection of the sanctity of oaths, protection of the integrity of the courts, and protection of fairness to all parties. The first and oldest justification for judicial estoppel appeared in the first case to discuss the doctrine, *Hamilton v. Zimmerman*. There, the Tennessee Supreme Court noted that the sanctity of oaths played a key role in protecting the end of justice; the court went so far as to say that “[t]he chief security and safeguard for the purity and efficiency of the administration of justice, is to be found in the proper reverence for the sanctity of an oath.”⁴⁰ Under this rationale, judicial estoppel protects the sanctity of oaths by placing a strong deterrence on lying, intentional misrepresentation, or knowing omissions. If an individual knows that her lie, misrepresentation, or omission will bar her from relying on the whole truth in a later proceeding, she may be more likely to aver that whole truth at the first proceeding.

According to the Supreme Court, the second rationale for judicial estoppel is the primary one: protection of the integrity of the judicial process.⁴¹ The Court hopes to use the doctrine to protect the integrity of courts and their determinations, avoiding the “perception that either the first or the second court was misled.”⁴² Often, this rationale is couched

³⁷ See *id.*; see also *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002) (holding that intentional manipulation can be inferred from the record).

³⁸ See, e.g., *United States v. Pelullo*, 399 F.3d 197, 222–23 (3d Cir. 2005) (holding that judicial estoppel was inapplicable because the party had not succeeded in persuading the court to accept that party’s position in a prior case).

³⁹ *United States v. Williams*, 489 F. App’x 655, 662 (4th Cir. 2012) (Agee, J., dissenting); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012).

⁴⁰ *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 48 (1857).

⁴¹ *New Hampshire v. Maine*, 532 U.S. at 749.

⁴² *Id.* at 750 (citations omitted) (internal quotations marks omitted).

in terms of self-protection—that is, the second court’s “ability to protect *itself* from manipulation.”⁴³ Other courts focus more heavily on protecting the integrity and determinations of the court involved in the first adjudication, noting that “the primary purpose of judicial estoppel is to preserve the integrity of the prior judicial proceeding.”⁴⁴ Ultimately, a court’s choice-of-law doctrine for judicial estoppel relies heavily on whether that court views judicial estoppel primarily as a mechanism of self-protection or primarily as a means of protecting a *different* court. It is thus important to keep in mind that the Supreme Court sees the protection of the integrity of *both* courts and their judgments as crucial.

A third rationale for judicial estoppel is protection of fairness to all parties by disallowing any party from playing with the facts in order to gain an advantage over another party. In short, “judicial estoppel forbids use of intentional self-contradiction . . . as a means of obtaining unfair advantage.”⁴⁵ This rationale, however, is generally seen as a lesser rationale than protection of the integrity of the courts. Some courts have even flatly rejected this justification altogether; the Fifth Circuit has stated that “the doctrine is intended to protect the judicial system, *rather than the litigants*.”⁴⁶ Thus, while there are three oft-cited goals of judicial estoppel, two goals emerge prominent: protection of the integrity of both the first and the second courts and preservation of the sanctity of oaths.

D. The Uniqueness of the Goals of Judicial Estoppel: A Brief Comparison of Judicial Estoppel to Equitable and Collateral Estoppel

The goals of judicial estoppel differentiate the doctrine from other, related types of estoppel. While both equitable estoppel and collateral estoppel at first glance appear to be similar to judicial estoppel, differences in their underlying rationales and the elements they require highlight the unique role that judicial estoppel plays in protecting the integrity of the courts and their judgments.⁴⁷

⁴³ Eastman v. Union Pac. R.R., 493 F.3d 1151, 1156 (10th Cir. 2007) (emphasis added).

⁴⁴ Dall. Sales Co. v. Carlisle Silver Co., 134 S.W.3d 928, 931 (Tex. App. 2004).

⁴⁵ *New Hampshire v. Maine*, 532 U.S. at 751 (citations omitted) (internal quotation marks omitted).

⁴⁶ *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

⁴⁷ Res judicata is not discussed here since, as one scholar put it, “[r]es judicata and judicial estoppel are quite different doctrines that should not be confused.” Plumer, *supra* note 5, at 414. Under the most common modern formulation of res judicata, “the effect of the judg-

Similar to judicial estoppel, equitable estoppel may also be applied “to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding.”⁴⁸ In equitable estoppel, however, “[t]he party seeking to invoke the estoppel . . . must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent’s prior position, and must now face injury if a court were to permit his opponent to change positions.”⁴⁹ These three requirements—privity, reliance, and prejudice—ultimately demonstrate that the fundamental rationale for equitable estoppel is “to ensure fairness in the relationship between the parties.”⁵⁰

Despite its similarities to equitable estoppel, judicial estoppel does not require the elements of privity, reliance, or prejudice. As one court has noted, “This distinction reflects a difference in policy objectives: in contrast to equitable estoppel’s concentration on the integrity of the parties’ relationship to each other, judicial estoppel focuses on the integrity of the judicial process.”⁵¹ Compared to the elements of and rationales for equitable estoppel, then, judicial estoppel is uniquely positioned to protect the integrity of the courts and their judgments and to protect the sanctity of oaths.

Collateral estoppel also requires a variety of elements that are not necessary for the application of judicial estoppel. In order for collateral estoppel to be applied, a court must have actually and finally decided an issue of fact or of the application of law to fact, and that decision must

ment extends to all claims arising from the same injury whether or not the plaintiff raised these claims at trial.” *Id.* By contrast,

Judicial estoppel is not concerned with distinguishing the claims arising from a single transaction that a party has pleaded from those that might have been pleaded. It seeks only to ensure that facts pleaded and relied upon by a court will not thereafter be repudiated by the pleader in order to effect a double recovery.

Id. Thus, a comparison between *res judicata* and judicial estoppel is less helpful than a comparison between judicial estoppel and both equitable estoppel and collateral estoppel—which have far stronger parallels to judicial estoppel.

⁴⁸ *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). For somewhat longer discussions of the differences between judicial estoppel and equitable estoppel, see Plumer, *supra* note 5, at 416–17; see also Rand G. Boyers, Note, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 *Nw. U. L. Rev.* 1244, 1249–50 (1986) (discussing the elements of judicial estoppel that differentiate it from other forms of estoppel).

⁴⁹ *Konstantinidis*, 626 F.2d at 937.

⁵⁰ *Id.*

⁵¹ *Id.*

have been necessary to the outcome of the prior action.⁵² These elements are not required for judicial estoppel to be applied. In jurisdictions without the success approach, a party is not necessarily required to have succeeded in persuading the court to adopt a position in order to be estopped against taking a contrary position in a later case. Additionally, even among courts that follow the success approach, there is not usually a requirement that the position taken in the first case have been necessary to the determination of that case in order for that position to form the basis of judicial estoppel in a later case.

Likewise, the primary rationales guiding the application of collateral estoppel differ from the preeminent rationales governing the application of judicial estoppel. The Supreme Court has listed the rationales for applying collateral estoppel against a party as “protect[ing] their adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions.”⁵³ Ultimately, then, collateral estoppel serves both to conserve judicial resources by preventing repetitive litigation⁵⁴ and to ensure the finality of judgments, thereby protecting “a litigant’s peace of mind”⁵⁵ and pocketbook. By contrast, judicial estoppel is applied for a different rationale—protection of the court’s integrity—rather than protection of the court and the opposing party’s time and resources.⁵⁶

II. JUDICIAL ESTOPPEL AND *ERIE*

Due to the different rationales underlying judicial estoppel and the equitable common law roots of the doctrine, both state and federal courts continue to adopt a variety of different approaches to judicial estoppel. And these different approaches can lead to very different outcomes.⁵⁷ The potential for different outcomes based on different formulations of judicial estoppel becomes a major factor in certain categories of cases in

⁵² See *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979).

⁵³ *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

⁵⁴ *Boyers*, supra note 48, at 1247–48.

⁵⁵ *Plumer*, supra note 5, at 415.

⁵⁶ *Boyers*, supra note 48, at 1248 (“[T]he essential distinction is that collateral estoppel prevents the assertion of the same position in order to conserve judicial resources, while judicial estoppel prevents the assertion of a contradictory position in order to protect the judicial process as a whole.”).

⁵⁷ *Deeks*, supra note 5, at 874.

which courts are faced with substantial choice-of-law questions when applying judicial estoppel.

When, for example, a federal court is required to apply state substantive law in a case, the ultimate outcome of the case may hinge on whether the court applies the state or federal understanding of judicial estoppel. Imagine that a state court requires application of the success element in order for a party to be estopped from making an argument, while the federal court does not. Imagine further that the party facing judicial estoppel did not succeed in persuading a court to adopt its position in a prior proceeding. If the federal court applies federal law of judicial estoppel and estops the party's argument, it might estop the only argument upon which the party's case is based, thus subjecting the case to dismissal.⁵⁸ But if the federal court applies the state law of judicial estoppel and allows the party to continue with its argument, the case may proceed to determination on its merits. Thus the different approaches taken by the courts of appeals on the issue of how to treat judicial estoppel under *Erie* and its progeny may have an enormous impact on whole categories of cases.

A. Federal Approaches to Judicial Estoppel in Diversity Cases and the Rationales Behind the Various Approaches

There is a circuit split over whether federal or state law of judicial estoppel should be applied in cases heard in federal court based on state law. Under the Rules of Decision Act, federal courts are required to apply “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide . . . in cases where they apply.”⁵⁹ The parameters of the Rules of Decision Act were famously taken up in the seminal case of *Erie Railroad Co. v. Tompkins*, and have been subjected to much debate and elucidation in the years and cases following *Erie*.⁶⁰

⁵⁸ See *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003) (recognizing “the intrinsic ability of courts to dismiss an offending litigant’s complaint without considering the merits of the underlying claims when such dismissal is necessary to prevent a litigant from ‘playing fast and loose with the courts’”).

⁵⁹ 28 U.S.C. § 1652 (2012).

⁶⁰ See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (applying the Rules of Decision Act to hold that the substantive law of the state shall apply in federal cases brought on diversity grounds and denying the existence of federal common law).

A unique set of questions arises under the *Erie* doctrine in cases in which no provision of written federal law applies and the federal court must apply some state law. This category of cases is “exemplified (but not exhausted) by diversity cases involving state-law actions and defenses.”⁶¹ As a court-created, common law doctrine, judicial estoppel is neither explicitly nor implicitly contained in any federal law, be it constitutional or statutory. When no provision of written federal law is applicable, the federal courts must determine whether the Rules of Decision Act, as construed by *Erie* and its progeny, requires the courts to follow state or federal law. Briefly stated, if the matter is substantive and is a type of issue over which states have lawmaking power, federal courts are required to follow state law; if the matter is procedural, however, federal courts must follow their own customary practice or federal common law.⁶²

In various areas of law, the substantive-procedural distinction is difficult to determine; the Supreme Court itself has noted that “[t]he line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”⁶³ And marking out the substantive-procedural line for the sake of judicial estoppel is *especially* difficult since judicial estoppel is “a hybrid between substance and process that on occasion affects the outcome” of a case.⁶⁴ Thus circuits have split over this issue when confronted with cases that are in federal court due to diversity of citizenship, or in other cases in which a federal court applies state substantive law. While this Note will ultimately argue that judicial estoppel is best categorized as substantive in nature, it will first turn to outlining the three positions currently taken by circuits on the nature of judicial estoppel—that it is substantive, that it is procedural, or undecided—and addressing those circuits’ rationales for the positions they have chosen under *Erie* and its progeny.

⁶¹ Craig Green, *Repressing Erie’s Myth*, 96 Calif. L. Rev. 595, 614 (2008). Throughout this Note, the phrase “diversity cases” or a similar phrase is used as shorthand for the longer, more precise phrase “cases in which a federal court must apply at least some state substantive law.”

⁶² See *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (noting that “[t]he broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law”).

⁶³ *Id.* at 471.

⁶⁴ *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1551 (7th Cir. 1990).

1. Circuits That Apply State Law

The Eighth and Eleventh Circuits apply state law of judicial estoppel in diversity cases, although neither circuit has actually grappled with rationales for their determinations. These courts have solely held that state law applies and applied it. For example, the Eighth Circuit has merely stated that “[b]ecause this is a diversity case, we must apply the substantive law of [the state]” and then immediately applied that state’s law of judicial estoppel.⁶⁵ In these cases, the Eighth Circuit and its district courts have applied the doctrine of judicial estoppel of the state courts in which the federal district court adjudicating the second proceeding sits.

Likewise, the Eleventh Circuit once stated that “[h]ad this case originated as a diversity action, it appears this court would be bound to apply the relevant state formulation of judicial estoppel,”⁶⁶ and in a later diversity case applied the applicable state law—a decision followed by its district courts.⁶⁷ In some cases, following the state doctrine of judicial estoppel means refusing to apply judicial estoppel at all if the underlying state law does not recognize that doctrine. For example, the Eleventh Circuit refused to apply judicial estoppel when Georgia courts had not recognized the doctrine.⁶⁸

It is unclear whether the Eighth and Eleventh Circuits follow a consistent approach as to whether they will apply a state’s choice-of-law doctrine or the law of the state in which the federal court sits. The Eighth Circuit and its district courts do not appear to have considered whether those state courts whose law the federal courts are applying

⁶⁵ *Monterey Dev. Corp. v. Lawyer’s Title Ins. Corp.*, 4 F.3d 605, 608–09 (8th Cir. 1993) (applying Missouri’s law of judicial estoppel); see also *Spencer v. Annett Holdings, Inc.*, 905 F. Supp. 2d 953, 984–89 (S.D. Iowa 2012) (applying Iowa’s law of judicial estoppel); *Basham v. Am. Nat’l Cnty. Mut. Ins. Co.*, No. 4:12–CV–04005, 2012 WL 3886189, at *5–6 (W.D. Ark. Sept. 6, 2012) (applying Arkansas’s law of judicial estoppel); *Skavlem v. Frankovic*, No. CIV A2–99–56, 1999 WL 33283341, at *3 (D.N.D. Sept. 23, 1999) (applying North Dakota’s law of judicial estoppel).

⁶⁶ *Chrysler Credit Corp. v. Rebhan*, 842 F.2d 1257, 1261 (11th Cir. 1988).

⁶⁷ See *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 44 F.3d 925, 930 (11th Cir. 1995) (applying Georgia’s law of judicial estoppel); see also *Sunbelt Cranes Const. & Hauling, Inc. v. Gulf Coast Erectors, Inc.*, 189 F. Supp. 2d 1341, 1345–46 (M.D. Fla. 2002) (applying Florida’s law of judicial estoppel); *Murray v. Sevier*, 50 F. Supp. 2d 1257, 1270–71 (M.D. Ala. 1999) (applying Kansas’s law of judicial estoppel because a diversity case had been transferred from its original venue in Kansas).

⁶⁸ *Original Appalachian Artworks*, 44 F.3d at 930. Georgia courts have since begun to apply their own version of judicial estoppel. See *Ga. Dep’t of Cmty. Health v. Northside Hosp., Inc.*, 750 S.E.2d 401, 410 (Ga. Ct. App. 2013).

have a choice-of-law doctrine that might require the application of the law of a different forum; rather, the federal courts have just applied the law of the court of the state in which the federal court sits. The approach of the Eleventh Circuit's district courts is equally unclear.⁶⁹

2. Circuits That Apply Federal Law

Seven circuits—the Third, Fourth, Sixth, Seventh, Ninth, Tenth, and District of Columbia—apply federal law of judicial estoppel in diversity cases.⁷⁰ When defending the choice of federal as opposed to state law for judicial estoppel, this group of courts tends to rely on a simple understanding of the purpose and nature of judicial estoppel: Federal judicial estoppel should be applied in *all* cases in federal court because “the doctrine is designed to protect the integrity of judicial institutions, and because the question (when presented in federal court) primarily concerns federal interests.”⁷¹ Such courts then apply their own approaches to judicial estoppel; they do not generally look to state law when deter-

⁶⁹ See, e.g., *Sevier*, 50 F. Supp. 2d at 1270–72 (treating judicial estoppel as substantive in nature for the sake of the *Erie* doctrine but failing to ask and answer the state choice-of-law question it asked and answered when applying the *Erie* doctrine to the remainder of the substantive issues arising in the same case).

⁷⁰ See *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 797–98 (D.C. Cir. 2010); *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 261 (3d Cir. 2009); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007); *Pennycuff v. Fentress Cnty. Bd. of Educ.*, 404 F.3d 447, 452 (6th Cir. 2005); *Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp.*, 179 F.3d 523, 527 n.1 (7th Cir. 1999); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.4 (4th Cir. 1982). It should be noted that while the Ninth Circuit first clearly stated in the 1996 case of *Rissetto* that federal judicial estoppel should be applied in diversity cases, its district courts have at least once since then applied state judicial estoppel in a diversity case. See *DC3 Entm't, LLC v. John Galt Entm't, Inc.*, 412 F. Supp. 2d 1125, 1147 (W.D. Wash. 2006) (applying California's law of judicial estoppel in a diversity case). This case was not appealed.

⁷¹ *Warda v. Comm'r*, 15 F.3d 533, 538 n.4 (6th Cir. 1994) (citation omitted); see also *G-I Holdings*, 586 F.3d at 261 (holding that “[a] federal court’s ability to protect itself from manipulation by litigants should not vary according to the law of the state in which the underlying dispute arose”) (citation omitted) (internal quotation marks omitted); *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 914 (7th Cir. 2005) (applying federal judicial estoppel because it is intended to “reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant”) (citation omitted) (internal quotation marks omitted); *Rissetto*, 94 F.3d at 603 (applying federal law in a diversity case because it is the “federal court’s integrity that is presently at stake”); *Zurich Ins. Co.*, 667 F.2d at 1167 n.4 (applying federal law of judicial estoppel in a diversity case “since it relates to protection of the integrity of the federal judicial process”).

mining the content of their federal common law approaches to judicial estoppel.⁷²

Before the Supreme Court handed down *New Hampshire v. Maine* in 2001, both the Tenth Circuit and the District of Columbia Circuit were part of the group of circuits that applied state law in diversity cases.⁷³ At the time, both circuits refused to recognize a federal doctrine of judicial estoppel, and thus only applied judicial estoppel in diversity cases, when state law so permitted.⁷⁴ After *New Hampshire v. Maine* was decided, however, both circuits began to apply federal law of judicial estoppel in all cases, including diversity cases.⁷⁵ Neither circuit has explained why they interpret *New Hampshire v. Maine* as requiring them to shift to following the federal law of judicial estoppel in diversity cases. It is thus unclear why after *New Hampshire v. Maine* the Tenth and District of Columbia Circuits summarily announced that they not only would begin to apply federal judicial estoppel in cases arising under federal law, but also would begin to apply the federal doctrine in cases in which they had previously applied state law—diversity cases.

⁷² See, e.g., *Warda*, 15 F.3d at 538–39 & n.4 (basing its formulation of judicial estoppel on federal, and not state, precedent). It is of course possible that a federal court could adopt the position that the doctrine of judicial estoppel is beyond the reach of state law in federal court, but federal common law incorporates state law in diversity cases, similar to the reasoning in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), discussed in Part III of this Note. It appears that no federal court has taken this position, however.

⁷³ See *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (holding that, in a diversity case, “the Supreme Court’s decisions . . . compel us to look to District of Columbia law to determine whether judicial estoppel should be applied”); *Ellis v. Ark. La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) (applying Oklahoma’s state law of judicial estoppel in a diversity case).

⁷⁴ See *S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 591 n.3 (D.C. Cir. 1995) (calling judicial estoppel a “disfavored doctrine” and noting that the District of Columbia Circuit has “firmly disapproved of judicial estoppel in prior cases”); *FDIC v. Grant*, 8 F. Supp. 2d 1275, 1285 (N.D. Okla. 1998) (noting that “[i]n non-diversity cases, such as this, the Tenth Circuit has rejected the doctrine of judicial estoppel”).

⁷⁵ *Moses*, 606 F.3d at 797–98 (citing *Eastman* and stating—without explaining why—that in the aftermath of *New Hampshire v. Maine* the court was required to apply federal judicial estoppel in diversity cases); *Eastman*, 493 F.3d at 1156 (reasoning that “a federal court’s ability to protect itself from manipulation should not depend upon the law of the state under which some or all of the claims arise” and thus holding that it would apply federal law even in diversity cases).

3. Circuits That Are Undecided or Apply Different Law in Different Scenarios

The First Circuit has never had to directly address the question of whether federal or state law of judicial estoppel should be applied in federal court when the claim is based on state law. In diversity cases raising the question of judicial estoppel that have come before the First Circuit, the court has held that when “[t]he parties have addressed the judicial estoppel issue on the frank assumption that federal standards control and the district court operated on that assumption,” it would abide by that choice of law by the parties since if “the parties have agreed about what law governs, a federal court sitting in diversity is free, if it chooses, to forgo independent analysis and accept the parties’ agreement.”⁷⁶ In one case, however, the court went on to state that “we would likely reach this same conclusion even without the parties’ acquiescent behavior,” thus indicating that it would apply federal judicial estoppel in such diversity cases.⁷⁷

The First Circuit seemed to indicate, however, that if it ever chooses to adopt this “likely” rule it will apply federal law of judicial estoppel in diversity cases when both cases occurred in federal court, while it might apply state law of judicial estoppel in cases in which the first case occurred in state court.⁷⁸ If the First Circuit ever adopts this rule, it will be the only circuit to make a distinction of this type.⁷⁹ The First Circuit has also indicated that in at least some cases the choice would be immaterial, since state law of judicial estoppel may be identical to federal law.⁸⁰ Similar to the First Circuit, the Second Circuit has never addressed the

⁷⁶ *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32 (1st Cir. 2004) (citation omitted) (internal quotation marks omitted); see also *Thore v. Howe*, 466 F.3d 173, 182 n.1 (1st Cir. 2006) (stating that “[t]he parties have assumed federal law applies, and so shall we”).

⁷⁷ *Alt. Sys. Concepts*, 374 F.3d at 32 (citation omitted) (internal quotation marks omitted).

⁷⁸ See *id.* (indicating that the court would “likely” apply federal law of judicial estoppel in a diversity case “[w]here, as here, both the putatively estopping conduct and the putatively estopped conduct occur in a federal case”).

⁷⁹ At least one district court has indicated that this distinction (whether the first case was in state or federal court) would be the appropriate rule. See *Wang Labs., Inc. v. Applied Computer Scis., Inc.*, 741 F. Supp. 992, 997 (D. Mass. 1990), *rev’d on other grounds*, 958 F.2d 355 (Fed. Cir. 1992) (“[E]ven if the Court had diversity jurisdiction only, the proper estoppel law would be federal because the parties have made each of their two contradictory representations to a federal court.”).

⁸⁰ See *Lydon v. Bos. Sand & Gravel Co.*, 175 F.3d 6, 12 n.3 (1st Cir. 1999) (stating that “[i]n any event, Massachusetts judicial estoppel principles do not vary significantly from those [federal principles] that we apply”).

issue of whether state law of judicial estoppel may be applied by federal courts in the appropriate scenario.⁸¹

The Fifth Circuit applies federal judicial estoppel in some cases and state judicial estoppel in other cases. First, it has applied federal judicial estoppel to a specific fact pattern: when the first case was a bankruptcy proceeding in federal court.⁸² Second, the Fifth Circuit seems to generally apply federal judicial estoppel in cases in which the claim arises out of Texas state law.⁸³ In the case *Hall v. GE Plastic Pacific Pte Ltd.*, the Fifth Circuit stated that it was applying the federal law of judicial estoppel for two reasons: first, since “the application of federal law is not outcome determinative because Texas law would likely require the same result” and second, “because both suits filed by Hall ended up in federal court and it is the federal court that is subject to manipulation and in need of protection.”⁸⁴ Thus, in cases that arise under Texas state law, both the Fifth Circuit and its district courts have consistently applied federal law of judicial estoppel.⁸⁵

In other scenarios and in other jurisdictions, however, the Fifth Circuit has applied state law of judicial estoppel. In the 1969 case of *Breeland v. Security Insurance Co. of New Haven*, the Fifth Circuit applied Louisiana’s state law of judicial estoppel without giving any justification whatsoever for its choice of state law of judicial estoppel.⁸⁶ This case has never been overruled. To date, the Fifth Circuit’s district courts have sometimes applied state law of judicial estoppel in cases that arise under Louisiana state law, but sometimes have applied federal law of judicial estoppel in such cases.⁸⁷

⁸¹ At least one district court mistakenly believes that the Second Circuit has held that federal law of judicial estoppel should be applied in diversity cases. See *Vitrano v. State Farm Ins. Co.*, No. 08 Civ. 103(JGK), 2009 WL 3365866, at *4 (S.D.N.Y. Oct. 19, 2009). Other district courts in the Second Circuit, however, have applied federal law of judicial estoppel in diversity cases. See, e.g., *Laskowski v. Liberty Mut. Fire Ins. Co.*, No. 5:11-cv-340 (GLS/ATB), 2012 WL 2120089, at *3 (N.D.N.Y. June 11, 2012).

⁸² *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 332 nn.17–18 (5th Cir. 2007).

⁸³ See *Hall v. GE Plastic Pac. Pte Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003).

⁸⁴ *Id.* at 395–96.

⁸⁵ See *RSR Corp. v. Int’l Ins. Co.*, 612 F.3d 851, 859 (5th Cir. 2010); *Reneker v. Offill*, No. 3:08–CV1394–D, 2012 WL 2158733, at *22 (N.D. Tex. June 14, 2012); *Kira, Inc. v. All Star Maint.*, No. A-03-CA-950 LY, 2006 WL 2193006, at *12 (W.D. Tex. July 31, 2006).

⁸⁶ 421 F.2d 918, 921 (5th Cir. 1969).

⁸⁷ See, e.g., *Berk-Cohen Assocs., L.L.C. v. Orkin Exterminating Co.*, No. Civ.A. 94–3090, 2004 WL 834639, at *2–4 (E.D. La. Apr. 16, 2004) (applying Louisiana state law of “mend the hold doctrine,” which the state considers to be “a form of judicial estoppel,” in a diversi-

B. The Proposed Rule According to Erie: Federal Interests Demand Application of State Law when the Prior Case Was in State Court

Given the rationales surrounding choice-of-law questions under *Erie* and its progeny, and given the unique nature of judicial estoppel as a doctrine that protects the sanctity of oaths generally and allows courts to protect their own integrity, a new approach to judicial estoppel that better supports these varying interests is needed. As a predicate for applying this new approach, judicial estoppel is properly conceptualized as substantive in nature. The various considerations (as discussed in detail below) that play into the substantive-procedural determination under *Erie* and its progeny all weigh in favor of categorizing the doctrine as substantive, and thus mandate applying state law as the applicable rule of decision in appropriate cases. But after categorizing judicial estoppel as substantive, the proposed approach involves a twist on the typical understanding of a substantive rule under the *Erie* doctrine, requiring a forum-based rather than law-based determination of which jurisdiction's iteration of the substantive doctrine of judicial estoppel will apply.

This Note proposes a new rule: that whenever a federal court faces a choice-of-law question on judicial estoppel it should apply the judicial estoppel doctrine of the court that adjudicated the first proceeding.⁸⁸ Thus, when the second case is adjudicated in federal court, the *nature* of the first court should be the determining factor rather than the *law* that the first court applied in the first proceeding. This forum-based rule would require a federal court considering the application of judicial estoppel—regardless of whether it is sitting in diversity or deciding a federal question case—to adopt the law that the prior state forum would apply if it were considering estopping against a prior case that occurred

ty case). But see, e.g., *Engines Sw., Inc. v. Kohler Co.*, No. 03-1460, 2006 WL 1896071, at *5 (W.D. La. July 7, 2006) (applying federal law of judicial estoppel in a diversity case).

⁸⁸ A few scenarios are helpful for clarifying the proposed rule. Under the proposed rule, if a federal court in Indiana were applying judicial estoppel when the prior proceeding occurred in a state court in Indiana, it would apply the *state* judicial estoppel doctrine of Indiana. If a federal court in Indiana were applying judicial estoppel when the prior proceeding occurred in a state court in California, it would apply the *state* judicial estoppel doctrine of California. If a federal court in Indiana were applying judicial estoppel when the prior proceeding occurred in a federal court in Indiana, it would apply the *federal* judicial estoppel doctrine of the Seventh Circuit. And, if a federal court in Indiana were applying judicial estoppel when the prior proceeding occurred in a federal court in California, it would apply the *federal* judicial estoppel doctrine of the Ninth Circuit.

within its own court.⁸⁹ When a federal court determined the first proceeding, regardless of whether the first case involved a question of state or federal law, a federal court in the second proceeding should apply the federal law of judicial estoppel that would be applied by the prior federal court. This approach is fitting because the first court was a federal court and the proposed rule requires application of the judicial estoppel doctrine of the *court* that adjudicated the first proceeding.

Undoubtedly, this approach differs substantially from typical approaches under *Erie*, since it looks solely to the forum in which the prior proceeding was adjudicated in order to determine the appropriate law to apply in a later case. But this departure from the traditional *Erie* approach is justified for at least three reasons: it makes best sense of the unique nature of judicial estoppel, it rightly embraces *Erie*'s complex approach to the substantive-procedural distinction, and it is partially in line with one circuit's tendencies. Expanding on these three rationales, this Note will briefly justify the departure from the traditional *Erie* approach in the context of judicial estoppel before turning to a more rigorous defense of the proposed rule.

First, the proposed rule's rejection of the majority of approaches that result from *Erie* analysis in other areas of law is appropriate because *Erie* did not anticipate a scenario in which the protection of a prior court

⁸⁹ This rule could in some rare cases result in the application of federal law of judicial estoppel even when the prior case was adjudicated in a state court. Imagine a scenario in which there is a bankruptcy case, and the federal court is considering estoppel against a fact litigated in a Federal Employer's Liability Act ("FELA") case that was previously determined in state court. FELA causes of action are based on federal law. Imagine further that the state has adopted an approach to judicial estoppel that requires it to apply the federal doctrine of judicial estoppel when it is adjudicating claims arising out of federal law. (In other words, the state court would apply federal judicial estoppel in a second case in its court if it was considering estoppel against a claim made in a prior FELA case in that court.) The federal court determining the bankruptcy action would thus apply federal law of judicial estoppel when considering estoppel against the FELA case that was adjudicated in state court. The outcome in such cases could theoretically depend on the status of *renvoi* in that state's choice-of-law doctrine. The application of *renvoi*, however, occurs very rarely today. William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 Md. L. Rev. 1196, 1224–25 (1997). And, when there are concerns about the unbreakable cycle in which both federal and state law require adoption of the other's choice-of-law doctrine, courts appear to apply a limited form of *renvoi* in order to break that cycle. See *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1302 (Md. 1995) ("What breaks the endless cycle? As shall be seen, we adopt a limited form of *renvoi* in the instant case that does not have the endless cycle." (emphasis omitted)). Thus, it seems unlikely that any strict application of *renvoi* will create problems in choice-of-law cases involving judicial estoppel.

is the primary concern. Rather, under *Erie*, courts are typically concerned with deciding whether to apply federal or state law in the present case because of concerns raised by the present case. But because of the unique nature of judicial estoppel, *Erie* analysis in this area must help determine whether to apply federal or state law in the present case because of concerns raised by a *prior* case.⁹⁰ And the concerns raised by that prior case center on the need to protect the integrity of the particular court that determined that prior case. Thus the forum in which the prior case was adjudicated, and that forum's chosen method of self-protection via its chosen method of judicial estoppel, should be the touchstone for a later federal court's judicial estoppel analysis. On a very broad level, insofar as judicial estoppel is a means of self-protection for a court, the ends of *Erie* are upheld by this rule, since *Erie* intended to leave precisely such issues of the forum to the determination of the states. When analyzed in tandem with the unique nature of judicial estoppel, the various concerns protected by the *Erie* doctrine ultimately support such a rule.

Second, while the proposed rule relies on the understanding that judicial estoppel is substantive in nature, it also appropriately follows the Court's instruction that "*Erie*-type problems [are] not to be solved by reference to any traditional or common-sense substance-procedure distinction."⁹¹ Thus, under the modern approach to the *Erie* doctrine, in close cases in which a legal rule is neither clearly substantive nor clearly procedural, various considerations help determine on which side of the line a legal rule should fall. Per *Guaranty Trust Co. of New York v. York* and *Hanna v. Plummer*, then, the conclusion that the proposed rule is appropriate is—quite properly—*not* based on any attempt to create common-sense categories of substantive and procedural law. Indeed, the proposed rule produces a sort of patchwork outcome that is a far cry

⁹⁰ The choice-of-law issue for judicial estoppel is thus analogous to that issue in the area of claim preclusion, which is typically governed by the preclusion doctrine of the first forum, although when the first forum is a federal court *Semtek International Inc. v. Lockheed Martin Corp.* introduces further complications. See *infra* text accompanying notes 135–141 (discussing *Semtek* and arguing that if the Supreme Court decides to follow the logic of *Semtek* in the area of judicial estoppel, it should hold that federal common law governs the choice-of-law doctrine state courts are to apply when considering estopping new arguments because of a prior judgment in federal court—and follow *Semtek* no further).

⁹¹ *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965). The Court stated in *Hanna* that the message of *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), was “that choices between state and federal law are to be made not by application of any automatic, ‘litmus paper’ criterion, but rather by reference to the policies underlying the *Erie* rule.” *Hanna*, 380 U.S. at 467.

from a traditional substance-procedure distinction, since federal courts sitting in diversity will often apply federal law of judicial estoppel (when the prior case was adjudicated in federal court), and federal courts determining federal claims will sometimes apply state law of judicial estoppel (when the prior case was determined in state court). But this outcome is the natural result of following the spirit of *Erie* in the judicial estoppel context.

Third and finally, there is at least partial support for this approach in the courts since the First Circuit and its district courts have hinted that they might base a choice-of-law doctrine on the court rather than the law of the prior proceeding, choosing to apply federal law of judicial estoppel in diversity cases when both cases occurred in federal court, while applying state law of judicial estoppel in cases in which the first case occurred in state court.⁹² But it is worth noting that the proposed rule would reach further than the First Circuit has suggested, applying to *all* cases adjudicated in federal court when the prior case was decided in state court.

This Note next examines the categorization of judicial estoppel as substantive while simultaneously discussing the merits of the proposed rule for judicial estoppel. In this analysis, it looks to four considerations relevant to the *Erie* procedural-substantive categorization: outcome-determinativeness, discouragement of forum shopping, avoidance of inequitable administration of the laws, and promotion of federal interests. Undoubtedly, the proposed rule is imperfect; for example, it is limited in its ability to deter forum shopping in many cases. But, when all four of these considerations are taken together—as the *Erie* doctrine instructs us to do—it becomes clear that *Erie* supports *both* the categorization of judicial estoppel as substantive *and* the adoption of the proposed rule.⁹³

⁹² See *supra* text accompanying notes 78–79.

⁹³ If the doctrine of judicial estoppel were characterized as procedural in nature rather than substantive, federal common law on the issue would govern, as it does currently in all the circuits that conceptualize judicial estoppel as procedural. In practice, the courts of appeals articulate the content of the federal common law as essentially a uniform rule of federal common law, see *supra* note 72 and accompanying text, although of course they have adopted different, slight variations on their articulations of the content of that uniform federal common law. Theoretically, the content of this federal common law could take another form: It could incorporate state common law in the jurisdiction in which the federal court sits as the content of federal common law. See *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), for an example of the Supreme Court mandating such an approach in the area of contract law. This approach would likely result in a similar outcome as the proposed rule, since federal courts would in many—but not all—instances fall into applica-

1. Outcome-Determinativeness

The practice of avoiding the selection of federal law that would be outcome-determinative is a key component of *Erie* analysis; as the Court noted in *York*, “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”⁹⁴ The choice between two doctrines of judicial estoppel that may be applied by a court can have a substantial impact on the outcome of a case. For example, in some cases, if a federal court follows the state doctrine of judicial estoppel, that application will result in a refusal to apply judicial estoppel at all if the underlying state law does not recognize that doctrine. Take, for example, the Eleventh Circuit’s decision in *Original Appalachian Artworks, Inc. v. Southern Diamond Associates, Inc.* In that case, the Eleventh Circuit applied state law of judicial estoppel and thus refused to apply judicial estoppel at all, since the court found that “[i]t appears from our independent research that the Georgia courts have not expressly sanctioned this method of . . . preclusion.”⁹⁵

By contrast, if the Eleventh Circuit had applied its own federal law of judicial estoppel instead, it would have applied the intent element in order to decide whether judicial estoppel was appropriate. Depending on the facts, the choice between federal and state law of judicial estoppel in such a case could be outcome-determinative: The case will always be allowed to proceed on its merits under state law, but may be subject to substantial limitations or dismissed altogether if federal law of judicial estoppel is applied and the requisite intent is found. Thus the outcome-determinativeness concern is a very real one in cases involving choice-of-law for judicial estoppel. The *York* Court’s worry that application of federal law in such cases would result in a “substantially different result”⁹⁶ supports a rule in which judicial estoppel is categorized as sub-

tions of federal common law based on state law that would be the same as applications of state law under the proposed rule. However, since all federal courts that understand judicial estoppel to be procedural in nature articulate the content of federal common law on their own terms, rather than by reference or bounded reference to any state law, this approach would appear unlikely to ever occur.

⁹⁴ *York*, 326 U.S. at 109.

⁹⁵ 44 F.3d 925, 930 (11th Cir. 1995). Georgia courts have recently begun to apply their own version of judicial estoppel. See *supra* note 68.

⁹⁶ *York*, 326 U.S. at 109.

stantive and federal courts apply the state law of judicial estoppel when the prior proceeding took place in state court.

2. *Discouragement of Forum Shopping*

In *Hanna*, the Court listed discouragement of forum shopping as one of the “twin aims” of *Erie*—used to help decide the “outcome-determination test.”⁹⁷ The proposed rule discourages forum shopping between state and federal court in the second proceeding. As discussed above, the variations in formulating doctrines of judicial estoppel can result in substantially different impacts in some cases, depending on which formulation is applied. A savvy litigant with sharp counsel would undoubtedly be aware of significant differences, and would choose a forum accordingly, based on whether that litigant hopes to avoid being subjected to judicial estoppel or intends to subject another party to judicial estoppel.

The proposed rule would primarily work against forum shopping in two types of cases. First, if the party has the option to file the second case in more than one federal district court, the proposed rule would make such a choice irrelevant for the sake of judicial estoppel, since all federal courts would be required to apply the law that would have been applied by the prior court.⁹⁸ Second, if the party has the option to file the second case in either the state court that adjudicated the first proceeding or a federal court, the proposed rule would do nothing to encourage forum shopping, since both courts would follow the state’s approach to judicial estoppel.⁹⁹ Thus the difference between a rule allowing federal

⁹⁷ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (internal quotation marks omitted); see also *id.* at 467 (stating that *Erie* was a “reaction to the practice of forum shopping” (internal quotation marks omitted)).

⁹⁸ Admittedly, *Erie* and its progeny focus on discouraging forum shopping between federal and state courts, not between two federal courts. See, e.g., *Klaxon*, 313 U.S. at 496 (holding that a federal court sitting in diversity should apply the choice-of-law doctrine of the state in which the federal court sits). But the Court’s logic in such cases as to why forum shopping should be deterred largely applies equally to forum shopping between two federal courts that have two formulations of a doctrine that could be so different as to be outcome-determinative. Additionally, *Erie* and its progeny may not have discussed the issue of forum shopping between two federal courts because the issue did not arise, since federal law was uniform. See, e.g., *York*, 326 U.S. at 99 (dealing with a choice-of-law question under *Erie* involving a statute of limitations).

⁹⁹ In one type of case, however, the proposed rule will not discourage forum shopping in the second case. Suppose that the first case took place in Indiana state court. A party to that case, who is concerned about being estopped due to a position it took in that case, has the

courts to always apply federal law of judicial estoppel and this proposed rule is of substantial relevance to the choice of forum.¹⁰⁰

The proposed rule admittedly does not discourage all forum-shopping, however; it might even encourage forum shopping in the first proceeding if a party anticipated that it could potentially be subject to estoppel due to a position it takes in that proceeding. In such a case, the suggested rule would encourage the party to choose the forum that adopts the most lenient formulation of judicial estoppel possible; that is, a formulation of the doctrine that does not estop easily (or perhaps at all). The proposed federal rule would thus potentially promote forum shopping in the first case not only between state and federal courts, but also among state courts.¹⁰¹

The proposed rule is admittedly not a silver bullet that will solve forum shopping. But when forum shopping cannot be discouraged in both cases, it is more important to discourage forum shopping in the second proceeding than in the first. Presumably, many parties who may be subject to judicial estoppel in a later case will not be able to anticipate that fact when filing the first case. The party may have no intent at the first filing to later contradict any position maintained in the first case, and the party may not even foresee the possibility of any subsequent litigation. By contrast, if judicial estoppel is likely to play a crucial role in a second proceeding, a party will likely be aware of that fact when filing the second case. Thus a rule that discourages forum shopping for the second proceeding, even at the cost of potentially encouraging it at the level of the first proceeding, is to be preferred over a rule to the contrary.¹⁰²

choice to file its next case in either Michigan state court or federal district court. If Michigan applies its own state law of judicial estoppel in *every* case adjudicated in a Michigan court, the party will be encouraged to forum shop between Michigan state court and federal district court based on whether Indiana law of judicial estoppel (which will be applied by the federal district court) or Michigan law of judicial estoppel is more lenient.

¹⁰⁰ But see *Hanna*, 380 U.S. at 468–69 (noting that while in some senses, “every procedural variation is outcome-determinative,” under the twin aims of *Erie* there will be cases in which “choice of the federal or state rule will . . . have a marked effect upon the outcome of the litigation,” but “the difference between the two rules would be of scant, if any, relevance to the choice of a forum” (internal quotation marks omitted) (emphasis omitted)).

¹⁰¹ Note that if the state courts chose to follow a similar rule and, when applying judicial estoppel in a secondary proceeding, applied the judicial estoppel doctrine of the forum that adjudicated the initial proceeding, the potential for forum shopping would be even further reduced. See Part III of this Note for a discussion of this proposed rule and its implications on forum shopping.

¹⁰² It is of course possible that an exceptionally savvy litigant could forum shop when selecting the first forum, attempting to find a forum that adopts an articulation of judicial es-

3. Avoidance of Inequitable Administration of the Laws

On a very basic level, this proposed rule also avoids the “simple unfairness” that John Hart Ely has noted is a crucial concern in the decisions of *Erie* and its progeny.¹⁰³ For Ely, one crucial fairness consideration stems from the concept that it is fundamentally unfair to afford “a nonresident plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit [is] to be determined.”¹⁰⁴ By discouraging forum shopping in a second proceeding, the proposed rule ensures that the law is set in a broad category of cases: In second cases in which the choice is between filing in the same state court that oversaw the first proceeding and any federal court, a nonresident plaintiff suing a resident defendant does not have any choice as to what law of judicial estoppel will be applied in the case.

Admittedly, this protection of fairness is not universal under the suggested rule. In second cases in which the choice is between filing in federal court and filing in a state court that did not oversee the first proceeding (and that has a different approach to judicial estoppel than the state that oversaw the first proceeding), a nonresident plaintiff suing a resident defendant may have unilateral power to decide the doctrine of judicial estoppel that will apply via the plaintiff’s power to choose between filing in federal and in state court.¹⁰⁵ But by addressing the first aim of *Erie* and discouraging forum shopping overall, the proposed rule based on the substantive nature of *Erie* reduces inequitable administration of the laws by generally protecting fairness between resident and nonresident plaintiffs, although in some individual cases that general protection may not be realized.

toppel that results in that doctrine almost never being applied. But, given the very unique goals of judicial estoppel, that possibility does not truly act as a strike against the proposed rule. As discussed below, *infra* text accompanying notes 111–14, the doctrine of judicial estoppel is properly conceptualized as relying on the centrality of the first court in determining what it means for its own integrity to be protected.

¹⁰³ John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 712 (1974); see also *Hanna*, 380 U.S. at 468 (listing “avoidance of inequitable administration of the laws” as one of the “twin aims” of *Erie* that are important considerations when deciding the “outcome-determination test” (citations omitted)).

¹⁰⁴ Ely, *supra* note 103, at 712.

¹⁰⁵ See *supra* note 99 for a hypothetical description of such a scenario.

4. Promotion of Federal Interests

From *York* through *Hanna*, the Court has emphasized that *Erie* analysis must be conducted with another crucial end in view: protection of federal interests.¹⁰⁶ Even if the court chooses to follow state law, such a choice must have a justification based on federal interests. In order to determine the federal interests in play, the various rationales for judicial estoppel and the federal interests upheld by either application of state law or federal judicial estoppel must be considered. For, as one court has correctly noted, “[t]he doctrine of federal judicial estoppel is foremost designed to protect the federal judicial process.”¹⁰⁷ It is crucial to keep in mind, however, that judicial estoppel is different from many other issues that arise under *Erie* because the relevant consideration is that two courts—the federal and the state court—are involved.

Federal courts that consider judicial estoppel to be procedural in nature generally rely on the argument that the doctrine concerns federal issues when performing their cursory analysis on the procedural-substantive determination.¹⁰⁸ But these courts fail to recognize that the federal interests at issue are multifaceted, and that a proper understanding of those interests must include a consideration of both the goals of judicial estoppel and possible federal interests in protecting state court judgments. As previously discussed, the two unique and primary goals of judicial estoppel are protection of the sanctity of oaths and protection

¹⁰⁶ See Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich. L. Rev. 311, 377 (1980) (stating that in *York* the Court chose to uphold a “federal policy favoring identical outcomes in diversity cases” and that this choice is indicative of the fact that “*Erie* cases turn exclusively on federal assessments of federal policies”).

¹⁰⁷ *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007). It is worth noting that the *Erie* analysis in this Note would suggest adoption of the proposed rule even if that analysis were to follow the Court’s balancing approach in *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958). In *Byrd*, the Court qualified *York*’s outcome-determinative approach by adding a balancing analysis, holding that outcome-determinativeness should be weighed against “affirmative countervailing considerations.” *Id.* at 536–37. Today the continuing significance of that balancing approach is controversial, and it seems that analysis under the more recent *Hanna* is likely to be applied by the Court in lieu of analysis under the *Byrd* balancing test. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (analyzing the question of whether Federal Rule of Civil Procedure 23 is valid under *Hanna*, but never discussing the *Byrd* balancing analysis). But *Byrd* would result in the same outcome here. For example, even if *Byrd* balancing analysis is performed, that analysis also must be performed in view of protecting federal interests which weigh heavily in favor of the proposed rule. See Westen & Lehman, *supra* note 106, at 377.

¹⁰⁸ See *supra* note 71 and accompanying text.

of the judicial process by insulating the integrity of the judicial process; these two goals should thus guide the proper understanding of federal interests. Ultimately, both rationales are supported by the categorization of judicial estoppel as substantive in nature and the adoption of a rule that a federal court should apply the judicial estoppel law of the prior state forum when the prior proceeding took place in state court. Judicial estoppel's lesser rationale of protecting fairness to all parties is also supported by the proposed rule, albeit somewhat more weakly.

a. Protection of the Integrity of Oaths

Judicial estoppel protects the sanctity of oaths by strongly deterring lying, intentional misrepresentation, and knowing omissions. This deterrence is rooted in the idea that if a party realizes that his lie, misrepresentation, or omission will bar him from relying on the whole truth in a later proceeding, he may be more likely to aver that whole truth at the first proceeding. Protection of the sanctity of oaths undoubtedly begins in the first court in which the first proceeding occurs. The first court promotes the integrity of oaths made in that court by its own doctrine of judicial estoppel. When the first court adopts a doctrine of judicial estoppel, and a party to a case that is before that court is aware of that doctrine, that party is more likely to adopt a true position in that court—as long as that party may bring another case in that court in the future. The party is thus discouraged from changing that position and going against his oath when before another court, since the first court encouraged the party to adopt a true position in the first proceeding.¹⁰⁹

Thus the federal interest of protecting the integrity of oaths is promoted by adopting the first court's conception of judicial estoppel, since such an adoption encourages the party to be true to its oath in that initial proceeding. Imagine a world in which federal courts always apply their own version of federal judicial estoppel, even when the first decision was made in state court. In such cases, if a party makes an oath in state court, it does so knowing that it may or may not be required to adhere to that oath in a later case in an as-yet unknown federal court, depending on the federal judicial estoppel doctrine applied by whatever federal court considers estoppel in the later case. Given the current variety of doctrines of judicial estoppel applied by the various federal courts, the

¹⁰⁹ Of course, a party could still forum shop when selecting the first forum, but that possibility is not fatal to the proposed rule. See *supra* note 102.

party might be willing to roll the dice and misrepresent its position or omit crucial facts in the first case in state court, since it does not know to which doctrine of judicial estoppel it might be subjected in the future. The uncertainty embraced by such a rule would thus encourage parties to take a risk and play with the facts in state court.

By contrast, a rule requiring federal courts to apply the state law of judicial estoppel when the prior proceeding took place in state court would reduce such pitfalls. When in state court, a party would be fully aware of the doctrine of judicial estoppel that would be applied against any oaths made in that proceeding, regardless of whether a future case arises in the same state court, a federal court in that geographic area, or another federal court.¹¹⁰ The party would thus be encouraged to tell the full truth as understood by the doctrine of judicial estoppel adopted in that state. Overall, then, by applying state law of judicial estoppel in appropriate cases, a federal court promotes the integrity of oaths from the very first moment that a party sets its foot in state court, which ultimately promotes the integrity of oaths sworn before the federal court.

b. Protection of the Integrity of the Judicial Process Through Protection of Courts and Their Judgments

Likewise, the goal of protection of the integrity of the federal judicial process by avoiding the perception that either court was misled is best protected by the proposed rule. Currently, a majority of federal courts couch this goal in terms of self-protection; that is, they focus on the second court's "ability to protect *itself* from manipulation."¹¹¹ But a minority of federal courts and some state courts seem to be more focused on protecting the "integrity of the prior judicial proceeding."¹¹² And the Supreme Court views judicial estoppel as protecting the integrity of both courts by avoiding the "perception that either the first or the second court was misled."¹¹³ Thus the Supreme Court has elucidated a vital interest that should be protected by the federal courts: avoiding the perception that the first court was misled—whether that first court was a federal or a state court.

¹¹⁰ While the proposed rule would not ensure that another state court would adopt the first state's law of judicial estoppel in a later case, the adoption of the proposed federal rule might encourage states to adopt a similar rule.

¹¹¹ *Eastman*, 493 F.3d at 1156 (emphasis added).

¹¹² *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App. 2004).

¹¹³ *New Hampshire v. Maine*, 532 U.S. at 750 (citation omitted).

Regardless of the varying levels of importance that different courts currently place on protecting the first or the second court when formulating a doctrine of judicial estoppel, this Note is premised on the idea that the first court's judgment should be the most important judgment for the sake of judicial estoppel. This understanding adopts the logic that judicial estoppel's goal of protection of the integrity of the courts should focus on protecting the integrity of the first court's judgment and should rest on the assumption that the first court best knows how to protect its own judgment through its own conception of judicial estoppel. For example, when judicial estoppel is *not* applied by a second court, the court that is primarily in danger of being subjected to the perception that it was misled is the first court. Imagine a scenario in which the first proceeding is a bankruptcy proceeding in which a party fails to disclose all of its assets. The party then commences a second proceeding in a second court that involves one of the assets that it failed to disclose in the bankruptcy proceeding. If the second court does not apply judicial estoppel and allows a claim to go forward based on an asset that went undetected in the first proceeding, the obvious implication is that the first court was misled, rather than the second. As seen by an outside observer, the second court's integrity remains intact because it recognizes a fuller set of facts that the first court failed to recognize when it was misled by the party. But if the second court applies judicial estoppel and refuses to allow the second case based on the undisclosed asset from the first case to proceed, *neither* court appears to have been misled, since both courts have based their decisions on the same foundational set of facts that the party swore to in the first case.

When a second court is applying judicial estoppel, then, the direct, *individual* reputational interest at issue is that of the first court. The proposed rule best allows federal courts to protect this individual reputational interest. By applying the doctrine of the state court in appropriate cases, the federal court helps that state court to engage in self-protection in the manner that the state court has decided best protects its own integrity. This doctrine protects federal and state interests because, as the Supreme Court has indicated, protection of both courts is at issue when the second court is determining whether and what type of judicial estoppel should be applied.

But there is also a second, broader interest at issue under protecting the integrity of the federal judicial process: promotion of the public's faith in the judicial system as a whole by protecting the reputation of *all*

courts. The protection of this broader interest is encapsulated in the looser descriptions of what federal courts hope to avoid by applying judicial estoppel: preventing parties from “playing fast and loose with the courts” and avoiding “the perversion of judicial machinery.”¹¹⁴ This facet of judicial estoppel is thus premised on a cousin to the idea that “[i]njustice anywhere is a threat to justice everywhere,”¹¹⁵ since it is based on the conception that damage to *any* court’s reputation negatively reflects on the reputations of *all* courts.

This broader interest is also best protected by the proposed rule. Assuming that a state court best knows how to protect the integrity of its own judicial processes through its doctrine of judicial estoppel, the integrity of that state court and its judgment is best protected in federal court when the federal court applies the state court’s doctrine of judicial estoppel. In so doing, the federal court best upholds the broader interest of protecting the public’s faith in the entire judicial system by best promoting the integrity of an individual court judgment in an individual court. The federal court’s *federal* interest of promoting a public image in which federal courts are seen as bastions of justice and inerrancy is thus maximally protected by applying state law of judicial estoppel in appropriate cases.

c. Protection of Fairness to All Parties

According to some courts, protection of the integrity of the judicial process through protection of fairness to all parties is also seen as being a goal of judicial estoppel, though it is a lesser goal that is largely protected by other forms of estoppel. Narrowly stated, according to this rationale “judicial estoppel forbids use of intentional self-contradiction . . . as a means of obtaining unfair advantage.”¹¹⁶ Under this narrow conception, the proposed rule does nothing overall to either advance or deter this goal. The extent to which a party is protected will depend on the strength of the formulation of judicial estoppel that will be applied in a certain case. In some cases, the federal law of judicial estoppel will be stronger than state law, and in other cases the state law

¹¹⁴ Reynolds v. Comm’r., 861 F.2d 469, 472 (6th Cir. 1988) (citation omitted) (internal quotation marks omitted).

¹¹⁵ Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), reprinted in *Why We Can’t Wait* 77, 79 (1964).

¹¹⁶ *New Hampshire v. Maine*, 532 U.S. at 751 (citation omitted) (internal quotation marks omitted).

will prove stronger. Thus in some cases a federal court's application of state law of judicial estoppel will better uphold this goal than application of federal law, while in other cases application of state law will result in a lesser furtherance of this goal than could have been achieved by federal law of judicial estoppel.

But if judicial estoppel's goal of protecting fairness to all parties is conceptualized more broadly, even the possibility of achieving this lesser goal may tip in favor of the proposed rule. As discussed above, the proposed rule partially avoids the unfairness that *Erie* and its progeny repudiate by helping to ensure that, at least in a second case in which the choice is between filing in the same state court that oversaw the first proceeding and any federal court, a nonresident plaintiff suing a resident defendant does not have a unilateral choice of the rules by which a lawsuit will be determined.¹¹⁷ At a higher level of generality, then, even the lesser goal of protecting fairness to all parties is somewhat protected by the proposed rule.

C. The Proposed Rule Versus a "Strength Rule": A Comparison to Professor Ashley Deeks's Approach

Since the relative "strength" of formulations of judicial estoppel is raised above, a brief comparison between Professor Ashley Deeks's suggested approach to judicial estoppel and the proposed rule is worthwhile. Analyzing the doctrine of judicial estoppel before the Court's decision in *New Hampshire v. Maine*, Professor Deeks proposed a rule that is best termed the "strength rule": that a federal court sitting in diversity should "compare the relevant state and federal versions of the doctrine, and then apply the most aggressive version."¹¹⁸ The "strength rule" relies heavily on the perceived need of the federal court adjudicating the second case to protect itself.¹¹⁹ In brief, the strength rule does not sufficiently promote either the stated ends of judicial estoppel or the respect that the *Erie* doctrine affords state courts.

First, given the clarity that *New Hampshire v. Maine* gave to one of the goals of judicial estoppel—the protection of the integrity of courts—the strength rule does not appropriately further the ends of judicial estoppel, since it focuses on the wrong court and the wrong metric for de-

¹¹⁷ Ely, *supra* note 103, at 712.

¹¹⁸ Deeks, *supra* note 5, at 891.

¹¹⁹ See *id.* at 892, 895.

termining the appropriate formulation of judicial estoppel to be applied. The strength rule emphasizes the protection of the integrity of the second court and relies on the assumption that application of the strongest formulation of judicial estoppel possible is always preferable. But as discussed extensively in this Note, *New Hampshire v. Maine* indicates that the protection of the first court and its judgment are also at issue in cases involving judicial estoppel, and good sense suggests that the protection of that prior court is actually the *primary* concern of judicial estoppel. And the Court never indicated that a strong formulation of judicial estoppel is inherently preferable to a weak formulation.

By contrast, the proposed rule properly understands that the doctrine of judicial estoppel should promote the central role played by the first court in determining what it means for its own integrity to be protected. Under the theory of the proposed rule, then, if a court believes that its integrity can be respected even though it applies a weak doctrine of judicial estoppel and allows litigants to change positions without penalty, that choice should be respected by later courts since the first court is the primary court whose integrity is at issue, even in a second proceeding in a second court. In contrast to the strength rule, the proposed rule thus properly rests on the assumption that each court is best able to determine whether a more aggressive or less aggressive doctrine is preferable for purposes of self-protection.

Second, the proposed rule—with its respect for the doctrines adopted by prior state courts—is superior to the strength rule because its premise is more in line with *Erie*, which instructs federal courts to defer to and apply state law in many areas. By forcing courts to apply the strongest doctrine of judicial estoppel, the strength rule might often result in federal courts ignoring state law of judicial estoppel merely because the federal formulation of judicial estoppel is stronger. By allowing federal law to trump state law solely because there has been a federal judgment that a stronger formulation of judicial estoppel is preferable in all circumstances, the strength rule—at least as applied in some cases—would undermine the respect that the *Erie* doctrine mandates federal courts to give to state courts.

But the proposed rule rightly recognizes the importance that the *Erie* doctrine places on state law and state court judgments. It realizes that the level of protection of the sanctity of oaths should be calibrated by the first court to hear a case, since that court's judgment is what will be called into question in later proceedings—regardless of whether that first

court is a state court or a federal court. The nature of judicial estoppel and the spirit of *Erie* thus both tip the scale in favor of the proposed rule over the strength rule.

D. Erie and Judicial Estoppel: A Conclusion

Judicial estoppel is properly conceptualized as substantive in nature because the various *Erie* considerations that play into this determination all point in favor of federal courts applying the estoppel doctrine of the prior court. The choice between federal and state doctrines of judicial estoppel can be outcome-determinative. And the crucial goals of discouraging forum shopping, avoiding inequitable administration of the laws, and protecting the federal policy interests upheld by judicial estoppel all support adoption of the state formulation of judicial estoppel in appropriate cases. Thus a federal court should apply state law of judicial estoppel when the initial proceeding occurred in state court.

III. STATE APPLICATION OF FEDERAL LAW OF JUDICIAL ESTOPPEL

While it appears that most state courts apply state law of judicial estoppel even when considering estoppel of facts litigated in federal court, some state courts apply federal law of judicial estoppel in certain circumstances, which provides an intriguing parallel to federal courts that apply state law in some circumstances. Although a detailed discussion of state choice-of-law doctrine in the area of judicial estoppel is outside the scope of this Note, this Note will sketch a rough outline of state approaches to judicial estoppel in choice-of-law cases. Then it will briefly analogize to the Supreme Court's decision in *Semtek International Inc. v. Lockheed Martin Corp.*, which governs the application of res judicata and collateral estoppel by state courts when estopping prior judgments in federal court. Finally, this Note will propose a choice-of-law doctrine that states should adopt when applying judicial estoppel in cases in which the first judgment was in another state's court or a federal court: Similar to the approach proposed for federal courts under the *Erie* doctrine, state courts should apply the judicial estoppel doctrine of the prior forum when applying judicial estoppel.

A. The State of the Law: States, Choice of Law, and Judicial Estoppel

Some state courts will apply state law of judicial estoppel when considering estoppel of a fact previously decided in federal court, or when

considering estoppel in a case controlled by federal substantive law.¹²⁰ At other times, state courts will apply their own version of judicial estoppel while applying the substantive law of another state.¹²¹ Such states that apply the law of the present forum when applying judicial estoppel largely follow the previously articulated federal rationales for construing judicial estoppel as procedural in nature and thus applying the law of the second forum. As the Georgia Court of Appeals reasoned, judicial estoppel is procedural in nature and “[i]t is the integrity of the court, not the parties or cause of action, that is at the crux of judicial estoppel. . . . [I]t is a Georgia court that is interested in preserving the integrity of the judicial process.”¹²² Similarly, the Supreme Court of Alabama recognized that although judicial estoppel may have “an impact upon the substantive result of a case,” it is “no less a rule of procedure on that account.”¹²³ Rather, the court held, judicial estoppel is procedural in nature because “[t]he primary purpose of the doctrine of judicial estoppel is to protect the integrity of our judicial system from those who may play fast and loose with the courts.”¹²⁴

Yet at least three states apply the law of the prior court in some scenarios when analyzing judicial estoppel. Texas courts have repeatedly applied the law of judicial estoppel of the prior forum in their own courts.¹²⁵ For example, in one case the Texas Court of Appeals applied the federal law of judicial estoppel when the prior proceeding was in

¹²⁰ See *State v. St. Cloud*, 465 N.W.2d 177, 179 (S.D. 1991) (applying state judicial estoppel in a proceeding in state court against a position that had been previously taken in federal court); *Regions Fin. Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 401–02 (Tenn. Ct. App. 2009) (applying state judicial estoppel in state court when determining whether to preclude a fact litigated earlier in federal court).

¹²¹ See *Middleton v. Caterpillar Indus., Inc.*, 979 So. 2d 53, 60 (Ala. 2007) (holding that judicial estoppel is procedural in nature and applying Alabama state judicial estoppel although the underlying substantive law at issue was the law of another state).

¹²² *CSX Transp., Inc. v. Howell*, 675 S.E.2d 306, 309 (Ga. Ct. App. 2009) (citation omitted) (internal quotation marks omitted); see also *Middleton*, 979 So. 2d at 60 (following a similar rationale). Note that while this rationale has become prevalent in cases handed down by the Georgia Court of Appeals, the Georgia Supreme Court has continued to apply the federal law of judicial estoppel when the prior case was adjudicated in federal court. See *infra* text accompanying note 132.

¹²³ *Middleton*, 979 So. 2d at 60.

¹²⁴ *Id.* (citations omitted) (internal quotation marks omitted).

¹²⁵ See, e.g., *Truck Ins. Exch. v. Mid-Continent Cas. Co.*, 320 S.W.3d 613, 620 n.5 (Tex. App. 2010) (noting that “Texas courts look to the law governing the previous proceeding when considering a judicial estoppel claim”).

federal bankruptcy court.¹²⁶ The court gave two reasons for rejecting the law of the current forum in favor of the law of the prior forum. First, it noted that since “the primary purpose of judicial estoppel is to preserve the integrity of the prior judicial proceeding . . . it makes sense to apply the law applicable to the prior proceeding.”¹²⁷ Second, the court analogized to the doctrine of *res judicata*, noting that “the [Texas] Supreme Court has long held that federal law governs when determining whether a state court claim is barred by a prior federal judgment.”¹²⁸ The court reasoned that since the Texas Supreme Court’s approach in *res judicata* cases “serves to preserve the integrity of prior federal proceedings,” so should a court’s approach to judicial estoppel.¹²⁹

For a period of time, all state courts in Georgia closely followed this approach, applying federal law when the first case took place in federal court. One state appellate court reasoned,

We apply federal law in order to give the proper effect to the judgment of the bankruptcy court sitting in Texas which ruled upon plaintiff’s bankruptcy case. The goal is to afford the judgment of the bankruptcy court the same effect here as would result in the court where that judgment was rendered.¹³⁰

Since that decision the Georgia Court of Appeals has repudiated this approach.¹³¹ Without addressing the shift in the Georgia Court of Appeals, however, the Georgia Supreme Court has continued to apply the federal law of judicial estoppel when the prior proceeding occurred in federal court.¹³²

¹²⁶ *Dallas Sales Co. v. Carlisle Silver Co.*, 134 S.W.3d 928, 931 (Tex. App. 2004).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Southmark Corp. v. Trotter, Smith & Jacobs*, 442 S.E.2d 265, 266 (Ga. Ct. App. 1994); see also *Clark v. Perino*, 509 S.E.2d 707, 710 (Ga. Ct. App. 1998) (considering judicial estoppel because of a position taken in a prior bankruptcy proceeding and stating that “[t]he doctrine of judicial estoppel arises under federal law”).

¹³¹ See *CSX Transp., Inc. v. Howell*, 675 S.E.2d 306, 308–09 (Ga. Ct. App. 2009) (holding that judicial estoppel is a procedural matter, and thus state law of judicial estoppel applies to a Federal Employer’s Liability Act (“FELA”) claim in federal court, since FELA cases adjudicated in state courts are subject to state procedural rules although the substantive law governing them is federal); see also *Cox v. Hardrick*, 710 S.E.2d 873, 873–74 (Ga. Ct. App. 2011) (applying the state law of judicial estoppel when the prior proceeding was a bankruptcy proceeding and citing *Howell*).

¹³² See *Klardie v. Klardie*, 697 S.E.2d 207, 209–10 (Ga. 2010) (applying the federal doctrine of judicial estoppel in divorce proceedings when the first case was a bankruptcy pro-

At least one Missouri court has followed a similar approach, but it has done so without explaining its underlying rationale. The Missouri Court of Appeals applied federal judicial estoppel when adjudicating a Federal Employer's Liability Act ("FELA") claim and considering estoppel of the reinterpretation of a fact previously litigated in bankruptcy court.¹³³ Two facts could have been relevant to this court's choice to utilize federal judicial estoppel: that the current claim before the court was a federal claim (FELA claims are governed by federal substantive law), and that the prior forum was a federal one (bankruptcy court). Given these two facts, the Missouri Court of Appeals could have applied federal judicial estoppel for three reasons. First, the court could have decided that judicial estoppel is substantive in nature, and thus that the fact that it was adjudicating a claim based on federal law mandated its application of federal judicial estoppel. Second, the court could have determined, similar to courts in Texas and Georgia, that the law of the prior forum should govern the doctrine of judicial estoppel that is applied, thus applying federal judicial estoppel since the prior proceeding took place in federal court. Third, the court could have merely adopted the federal doctrine of judicial estoppel as its own doctrine of judicial estoppel (or perhaps recognized that Missouri and federal judicial estoppel are identical) and thus actually applied state judicial estoppel.

In general, state courts do often look to federal formulations of judicial estoppel when crafting their own versions of the doctrine, which can sometimes make it unclear precisely why a state court is referencing federal doctrine of judicial estoppel. A state court could cite federal cases on and doctrines of judicial estoppel for at least three reasons: because the court is intentionally applying federal law of judicial estoppel as opposed to state law, because the court is developing its own doctrine of judicial estoppel in line with or with reference to federal judicial estoppel, or because the court is recognizing that the already-existing state formulation of judicial estoppel is virtually identical to federal judicial estoppel. In many of the cases in which a state court cites federal law of

ceeding). The Georgia Supreme Court has only cited *Howell* once, and that case involved the application of judicial estoppel when both the first and second proceedings were adjudicated in Georgia state court. See *Sherman v. City of Atlanta*, 744 S.E.2d 689, 694 (Ga. 2013).

¹³³ *Loth v. Union Pac. R.R. Co.*, 354 S.W.3d 635, 641–43 (Mo. Ct. App. 2011).

judicial estoppel, it seems to be utilizing it for the second or third function.¹³⁴

B. Semtek and Parallels Between Res Judicata and Judicial Estoppel

It is unclear whether state or federal courts will extend the Supreme Court's logic applied to res judicata (also called "claim preclusion") and collateral estoppel in *Semtek International Inc. v. Lockheed Martin Corp.* to judicial estoppel cases. In that case, the Supreme Court announced that it "has the last word on the claim-preclusive effect of all federal judgments."¹³⁵ Thus, when determining the claim-preclusive effect of a federal court judgment in a federal question case, states "cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."¹³⁶ Likewise, "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."¹³⁷

Based on the interests of the federal courts as protected by federal common law, the Court affirmed that "the federal rule . . . deemed appropriate" is that a state court is required "to give a federal diversity judgment no more effect than it would accord one of its own judgments."¹³⁸ The Court reasoned that since state, rather than federal, substantive law is at issue in such cases, "there is no need for a uniform federal rule."¹³⁹ The Court also justified its rule by arguing that a rule to the contrary would result in forum shopping.¹⁴⁰

Yet federal common law requires state courts to chart a different course when a federal court judgment on federal law forms the basis of preclusion. In such cases, the Supreme Court has held that "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law."¹⁴¹ Thus in *Semtek* the Court drew a line based on the nature of the law that the prior federal

¹³⁴ See, e.g., *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 519–20 (R.I. 2006) (applying what appears to be state judicial estoppel but referencing a variety of federal cases—including *New Hampshire v. Maine*—in addition to state cases when describing the doctrine).

¹³⁵ 531 U.S. 497, 507 (2001).

¹³⁶ *Id.*

¹³⁷ *Id.* at 508.

¹³⁸ *Id.* (emphasis omitted).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 508–09.

¹⁴¹ *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).

court judgment was based, applying a different rule based on whether a federal court had previously determined an issue of state or federal law.

Broadly, the Court's rule in *Semtek* enshrines the idea that states do not have the power to directly regulate the preclusive effect of a federal court's judgment. Whether that rule will be extended outside the realm of res judicata to judicial estoppel remains an open question. As of now, however, there is no indication that the Supreme Court will require state courts to follow the logic of *Semtek* when applying judicial estoppel.

But if the Supreme Court does decide to follow the logic of *Semtek*, it should hold that federal common law governs the choice-of-law doctrine that states are to apply when considering whether to estop new arguments because of a prior judgment in federal court—and follow *Semtek* no further. As discussed previously, judicial estoppel has different ends than either res judicata or collateral estoppel.¹⁴² Similarly, federal interests and policies unique to res judicata and collateral estoppel, which do not apply in the context of judicial estoppel, underlie the Court's determination that state courts must apply federal rules of res judicata and collateral estoppel when determining the preclusive effect of federal court decisions on federal law, but must use the preclusion doctrine of the state in which the federal court that rendered the judgment sat when determining the preclusive effect of federal court decisions on state law. For example, res judicata aims “to protect the finality of a court's judgment and to preserve scarce judicial resources by preventing the repetitive relitigation of claims that were, or should have been, decided at trial.”¹⁴³ Thus, in cases involving res judicata, the judgment of the court under its own law is at issue rather than the integrity of the court, which is at issue in cases that involve judicial estoppel. Because of the differences in the nature of and rationales underlying res judicata and collateral estoppel as opposed to judicial estoppel, very different federal interests arise when states apply judicial estoppel—and thus different federal policies (as discussed below) will need to be furthered if the Court chooses a rule for states under the logic of *Semtek*.

¹⁴² See supra note 47 and text accompanying notes 51–56.

¹⁴³ Plumer, supra note 5, at 414.

C. The Ideal Rule for States: Applying Federal Law when the Prior Case Was in Federal Court

Whether chosen by the Supreme Court under a *Semtek*-like rationale or selected by individual states, the ideal approach to state application of judicial estoppel when the first case was adjudicated in another court should mirror the above-outlined approach for federal courts under the *Erie* doctrine: State courts should apply the judicial estoppel doctrine of the prior forum when applying judicial estoppel. In other words, a state should apply the appropriate federal version of judicial estoppel when the initial proceeding occurred in federal court—regardless of whether that federal court was considering a federal question or considering a state law question—and should apply the other state’s version of judicial estoppel when the prior case was adjudicated in that other state.¹⁴⁴ If this approach was universally adopted by state courts, and the proposed rule under *Erie* was adopted by federal courts, a shockingly simple universal rule would prevail: *Every* court—whether state or federal—in *any* type of proceeding would apply the judicial estoppel doctrine of the prior court that oversaw the first proceeding at issue.

Both the logic adopted by the Supreme Court in *Semtek* and the stances taken by various states support this approach. In *Semtek* the Court expressed concern about the issue of forum shopping when handing down its rule;¹⁴⁵ similarly, this proposed rule would discourage forum shopping. And if all states adopted this rule in tandem with adoption of the proposed federal rule by the federal courts, forum shopping in second cases would be completely eliminated in any scenario. Additionally, this rule is not novel since it has already been clearly adopted by Texas and may have been adopted by Missouri.¹⁴⁶

¹⁴⁴ Once again, a few scenarios are helpful for clarifying the rule. Under the proposed rule, if a state court in Indiana were applying judicial estoppel when the prior proceeding occurred in a state court in Indiana, it would apply the *state* judicial estoppel doctrine of Indiana. If a state court in Indiana were applying judicial estoppel when the prior proceeding occurred in a state court in California, it would apply the *state* judicial estoppel doctrine of California. If a state court in Indiana were applying judicial estoppel when the prior proceeding occurred in a federal court in Indiana, it would apply the *federal* judicial estoppel doctrine of the Seventh Circuit. And if a state court in Indiana were applying judicial estoppel when the prior proceeding occurred in a federal court in California, it would apply the *federal* judicial estoppel doctrine of the Ninth Circuit.

¹⁴⁵ See *Semtek*, 531 U.S. at 508–09.

¹⁴⁶ See *supra* text accompanying notes 126–29, 133.

The rationales supporting this rule likewise mirror the rationales underlying the above argument for the application of state law by federal courts in some cases under *Erie*. Very briefly stated, application of federal law of judicial estoppel by state courts when the prior case was litigated in federal court best upholds the ends of judicial estoppel, due to the nature of judicial estoppel as a doctrine by which courts protect their integrity and promote the sanctity of oaths. In such cases in which a state court applies federal judicial estoppel, this rule will help ensure that the integrity of that individual federal court is protected by preventing parties from manipulating that court's judgment. Likewise, by applying federal judicial estoppel, the state court will best protect the integrity of the oaths made in that federal court in the prior proceeding. Thus, similar to the rationale applied in *Semtek*, this rule will promote federal interests in state courts; however, unlike the approach adopted in *Semtek*, federal interests in judicial estoppel are best supported by a uniform rule applying to all federal court determinations.

D. Adopting the Ideal Rule for States

Widespread adoption of this suggested state approach could be enforced by the federal courts. The federal courts could force state courts to apply the judicial estoppel doctrine of the prior federal court, echoing the Supreme Court's statement in *Semtek* that it "has the last word on the claim-preclusive effect of *all* federal judgments"¹⁴⁷ and holding that the judicial estoppel effect of prior proceedings in a federal court is a matter of federal law. Such a holding would obviously not affect the choice of a state to honor another state's judicial estoppel doctrine when both cases occurred in state court; that decision would need to be made in a state court.¹⁴⁸

Or, in the absence of such a federal court holding, state courts could adopt the position that the law of judicial estoppel of the prior forum is

¹⁴⁷ *Semtek*, 531 U.S. at 507.

¹⁴⁸ It is possible, however, to argue that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, might possibly play a role in the determination of whether a state has to follow the judicial estoppel doctrine of another state. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (discussing the relationship between the Full Faith and Credit Clause and state choice-of-law doctrine and noting that while that the Full Faith and Credit Clause "is exacting with respect to [a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," that requirement "is less demanding with respect to choice of laws" (citations omitted) (internal quotation marks omitted) (alteration in original)).

to be applied in second cases involving judicial estoppel—whether the prior forum was a federal court, that state’s own court, or another state’s court. States might be more likely to adopt such a rule if the federal courts adopted the federal *Erie* rule proposed by this Note, since they would see the opportunity for predictability in the area of judicial estoppel and the potential for a substantial decrease in forum shopping opportunities. Ultimately, while the move toward such a rule could be made by federal and state courts acting together or by states alone, the nature of judicial estoppel, the *Erie* doctrine, and the logic of *Semtek* all support transitioning to an ideal world that embraces a unitary rule: *Every* court in *any* type of proceeding should apply the judicial estoppel doctrine of the prior court that oversaw the first proceeding.

CONCLUSION

Judicial estoppel, in short, is intended to ensure that a litigant “cannot have its cake and eat it too”¹⁴⁹ by preventing litigants from asserting contradictory positions in different proceedings. But federal courts apply myriad variations on judicial estoppel when applying their own versions of the doctrine. Add to this fact the fragmentation as to whether judicial estoppel is substantive or procedural for the sake of *Erie* and the task of determining what version of judicial estoppel will be applied in a given case, and the practitioner is often forced to sludge through a genuine quagmire.

Both the nature of judicial estoppel and the ends of the *Erie* doctrine support the forum-based requirement that a federal court should apply state judicial estoppel when the prior case was litigated in state court. And state courts should also apply the judicial estoppel doctrine of the prior forum—regardless of whether the prior case was litigated in another state or federal court. These approaches will help ensure that judicial estoppel fulfills its unique role in protecting the integrity of judicial proceedings, a function that is best performed by respecting the doctrines that the initial forum has developed in order to protect its own.

¹⁴⁹ Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1974).