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The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis

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Abstract

Since announcing Erie Railroad v. Tompkins in 1938, the Court has developed, discussed and applied Erie's doctrine by attempting to decide whether the state and federal rules potentially governing the issue in question are substantive or procedural. That is often not an easy characterization to make, and it depends greatly on context. Statutes of limitation, for example, are substantive for Erie purposes but procedural for most other choice-of-law purposes. The result has been uncertainty and confusion in applying the Erie doctrine. This article suggests that there is a better way to understand the doctrine and to predict how the Court will decide vertical choice-of-law questions in future. If one uses the lens of interest balancing, the most common horizontal choice-of-law technique today, to understand the Court's decisions, they make a lot more sense and, in fact, display a coherence long thought to be lacking in Erie jurisprudence. The doctrine becomes easier to understand and to apply, and the interest-balancing analysis dispenses with the centrality of the question of whether a particular rule or issue is substantive or procedural.

THE UNSEEN TRACK OF *ERIE RAILROAD*: WHY HISTORY AND JURISPRUDENCE SUGGEST A MORE STRAIGHTFORWARD FORM OF *ERIE* ANALYSIS

Donald L. Doernberg*

INTRODUCTION

It probably is fair to say that *Erie v. Tompkins*[1] and the doctrine that bears its name[2] have caused more *angst* among first-year law students than any other single concept. Students tend to recall that Justice Brandeis said that there is no federal common law, but he did not.[3] They tend to recall that state, not federal, substantive law applies in diversity cases. That is often, but not always, true,[4] not least because

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[1] 304 U.S. 64 (1938).

[2] The term "*Erie* doctrine" today is commonly understood to embrace all situations in which the court must choose between federal or state law, an election known as "vertical" choice of law to distinguish it from choosing among states' laws, which is known as "horizontal" choice of law. *See infra* note 11. This is so even though Hanna v. Plumer, 380 U.S. 460 (1965), said the Rules Enabling Act ("REA"), 28 U.S.C. § 2072 (2000), rather than by *Erie* itself, governs questions about the applicability of the Federal Rules of Civil Procedure. *See infra* notes 126-30 and accompanying text. *See generally* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974). This Article will use "*Erie* doctrine" consistently with the commonly understood convention.

[3] The critical sentence reads, "There is no federal *general* common law." *Id.* at 78 (emphasis added). On the same day, Justice Brandeis announced the opinion of the Court in a case involving an interstate boundary dispute, creating and applying federal common law. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). *See generally* Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-07, 421-22 (1964). "General common law" was actually a reference to natural law concepts. *See infra* notes 24-38 and accompanying text.

[4] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (dominant federal interest (DFI) in foreign relations compels application of federal act-of-state doctrine in a contract dispute brought to the federal court under diversity jurisdiction); Boyle v. United Technologies Corporation, 487 U.S. 500 (1988) (unique federal interest in having a federal military contractor's immunity). *See infra* notes 211-19 and accompanying text. *See also* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (where jurisdiction

choice of law proceeds on an issue-by-issue basis, not with respect to an entire case.[5] They tend to believe that *Erie* reflected a clear demarcation between substantive and procedural law, but nothing could be further from the truth.[6] They tend to believe at least that when a federal court *does* apply state law, it applies the substantive law of the state in which it sits. Alas, that too is a misleading and oversimplified statement.[7]

Given the number of cases the Supreme Court has taken since announcing the doctrine in 1938,[8] it causes a fair amount of trouble in the

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rested on the United States being the plaintiff (*see* Act of Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091, 1091 (current version at 28 U.S.C. § 1345 (2000)), DFI in the obligations created by federally issued commercial paper justified application of a federal common law rule). *See infra* notes 183-88 and accompanying text.

[5] In conflicts law, this approach is known as *dépeçage*. *See infra* note 250 and accompanying text. Dean Symeonides characterizes issue-by-issue consideration as "one of the conflicts revolution's main accomplishments." Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 82 (2001). *Accord* Alfred Hill, *For a Third Conflicts Restatement—But Stop Trying to Reinvent the Wheel*, 75 IND. L.J. 535, 538 (2000).

[6] *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (statutes of limitation always substantive for *Erie* purposes because they are outcome determinative). Although the Court has abandoned exclusive reliance on the outcome-determinative test in vertical choice-of-law situations, *see, e.g.*, Byrd v. Blue Ridge Rural Elec. Co-op, 356 U.S. 525 (1958), the holding of *Guaranty Trust* remains untouched.

[7] *Erie* implied and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), confirmed that when a federal court applies state law, it applies the substantive rules that the state in which the federal court sits would apply under the state's conflicts rules. Those rules may refer to the substantive rules of some other state. *See generally* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 1.1, at 1-1 (2001). In conflict-of-laws terms, *Klaxon* explicitly accepts the *renvoi*. *See* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 980 (1991). (In addition, when a federal court transfers a case to another district pursuant to 28 U.S.C. § 1404 (2000), the transferee court applies the law that the transferor court would have applied. *See* Ferens v. John Deere Co., 494 U.S. 516 (1990); Van Dusen v. Barrack, 376 U.S. 612 (1964)).

Erie itself is a fine example. The accident underlying the case occurred in Pennsylvania. Tompkins sued in the Southern District of New York. The critical issue was whether Tompkins, walking along the *Erie*'s right-of-way, was a licensee or a trespasser, the latter being owed only the most minimal duty of care by the owner. When the Supreme Court considered the issue, it looked at the difference between federal law and Pennsylvania law on the point, notwithstanding that the case began in a New York federal court. That is because New York then followed the *lex-loci-delictus* approach to choice of law in torts cases.

[8] Limiting oneself to the cases in which the Court has elaborated the doctrine (rather than simply citing *Erie* in passing) nonetheless produces an impressive list. *See,*

lower federal courts as well. Professor Thomas Rowe asks, "Does anyone else think the Supreme Court is doing a halfway decent job in its *Erie-Hanna* jurisprudence?"[9] Well, I do. I might even suggest that the Court has done an excellent job. It simply has done a notably poor job of explaining its decisions, in part because the Court has not realized what actually underlies its own decision-making process. The premise of this Article is that a form of myopia has made the doctrine blurrier than it needs to be. Concentrating first on the state of American law in the colonial and early constitutional period and second on shifts in jurisprudential thinking in the late nineteenth and early twentieth century causes the doctrine to come into much sharper focus. Analysis of cases presenting *Erie* questions becomes more straightforward and less mysterious.

The Article proceeds in four parts. Part I discusses federal law as a new category of law after ratification of the Constitution and what that connotes for the time before any federal law existed. Part II examines the shift from the natural law perspective, which had dominated jurisprudence into the late nineteenth century, to legal positivism. It was that change, more than anything else, that doomed the doctrine of

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e.g., Gasperini v. Center for Humanities, 518 U.S. 415 (1997); Boyle v. United Tech. Corp., 487 U.S. 500 (1988); Sun Oil v. Wortman, 486 U.S. 717 (1988); Burlington N.R. Co. v. Woods, 480 U.S. 1 (1987); Walker v. Armco Steel Corp., 446 U.S. 740 (1980); Miree v. DeKalb County, 433 U.S. 25 (1977); Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); Hanna v. Plumer, 380 U.S. 460 (1965); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

Two commentators remarked that the doctrine had commanded the attention of an entire generation of academic lawyers. Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980). That statement is now hopelessly dated; *Erie* and its doctrine are now well into their third generation of academic lawyers. *See, e.g.*, Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie *Jurisprudence?*, 73 NOTRE DAME L. REV. 963 (1998); Martha A. Field, *Sources of the Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Ely, *supra* note 2; Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Paul J. Mishkin, *The Variousness of "Federal" Law: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Charles E. Clark, *The* Tompkins *Case and the Federal Rules*, 1 F.R.D. 417 (1940); Harry Shulman, *The Demise of* Swift v. Tyson, 47 YALE L.J. 1336 (1938).

[9] Rowe, *supra* note 8.

Swift v. Tyson,[10] which controlled vertical choice-of-law[11] questions in the federal courts for ninety-six years until the *Erie* Court declared the unconstitutionality of following it.[12] Part III canvasses the development of the *Erie* doctrine in the terms the Supreme Court has used, from *Erie* to *Gasperini v. Center for Humanities, Inc.*,[13] the Court's most recent *Erie* effort. Part IV proposes a different way of doing *Erie* analysis, one that is consistent with the Court's results in *Erie* cases but more coherent and easier to understand. Part IV also examines the approach to the *Erie* doctrine that some well known scholars have adopted. It argues that the *Erie* problem simply represents one type of choice-of-law problem, which the Court has always resolved (albeit without acknowledging or perhaps even realizing what it was doing) using a governmental interest analysis of the type now common in conflict of laws.[14] To be sure, the balancing of interests is different in *Erie* situations because there is a constitutional thumb on the scales in the form of the Supremacy Clause,[15] but that ends up making the inquiry easier, not harder.

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[10] 41 U.S. (16 Pet.) 1 (1842).

[11] It is important to distinguish between vertical and horizontal choice of law. The former refers to the choice of whether federal or state law governs a particular question. In many circumstances, the Supremacy Clause, U.S. CONST. art. VI, § 2, controls that question. Horizontal choice of law involves choosing among the laws of the states as co-equal sovereigns. The Constitution has relatively little to say about how the courts must make such horizontal choices. *See generally* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS §§ 94-98, at 299-314 (3d ed. 2002).

[12] *Erie*, 304 U.S. at 77-78. *See infra* notes 62-64 and accompanying text.

[13] 518 U.S. 415 (1996).

[14] *See, e.g.*, DAVID P. CURRIE, HERMA HILL KAY & LARRY KRAMER, CONFLICT OF LAWS 132 (6th ed. 2001): "On the one hand, few courts purport . . .to apply 'interest analysis' in the form Currie advocated. . . . On the other hand, many courts that claim to follow the Second Restatement's "most significant relationship" test . . . apply it in a way . . . indistinguishable from straightforward interest analysis."

[15] U.S. CONST. art. VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

I

THE LAW EXTANT IN THE UNITED STATES BEFORE 1787 AND IMMEDIATELY AFTERWARD

In the beginning, there was the law the states used. That was all there could have been, since there was no central government on the American continent during the colonial period. The first attempt at creating a central government, during the confederation period, failed because of state law's dominance and the states' unwillingness to permit any significant concentration of power in a central government. It effectively collapsed in six years.[16] As a practical matter, therefore, when the ninth state ratified the Constitution in 1788, state law governed nearly all areas of society.

The greatest single struggle of the Constitutional Convention revolved around the distribution of power between the states and the federal government.[17] To be sure, other battles raged, notably between large and small states over how their disparate sizes should translate into influence within the federal government[18] and between northern and southern states over the institution of slavery.[19] The single concern that united the states, however, was that the centralized govern-

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[16] *See* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 4-5 (2005). *See also* THE FEDERALIST NOS. 15-17, 21-22 (A. Hamilton), 18-20 (A. Hamilton & J. Madison). Max Farrand summarized its shortcomings. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 42-53 (1913).

[17] *See generally, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 321-79 (1992). *See also* THE FEDERALIST Nos. 37, 45, 46 (James Madison).

[18] The result the Framers reached, with all states having equal representation in the Senate and representation in the House of Representatives according to population, is known as the Great Compromise. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 950 & n.15 (1983) (referring to the Great Compromise as establishing that the Senate represented the states and the House represented the people); Reynolds v. Sims, 377 U.S. 533, 574 (1964) (Great Compromise "averted a deadlock in the Constitutional Convention which [*sic*] had threatened to abort the birth of our Nation"); FARRAND, *supra* note 16, at 91-112.

[19] *See* FARRAND, *supra* note 16, at 110, 149-52. Farrand noted that "[i]n 1787, slavery was not the important question[;] it might be said that it was not the moral question that it later became. The proceedings of the federal convention did not become known until the slavery question had grown into the paramount issue of the day." *Id.* at 110. Perhaps so, but it was a thorny enough issue that the delegates felt it necessary to use a constitutional provision to defer one of the important disputes about it. *See* U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congress from banning the slave trade until at least 1808, but allowing federal import taxes on slaves).

ment would invade their prerogatives, impose its view and eventually threaten their existence.[20]

This was the backdrop against which the federal government began. Justices over the centuries have been fond of saying that the federal government is one of limited powers.[21] That is well enough, but it oversimplifies the relationship between federal and state power. The Constitution's enumeration of federal power (primarily in Article I, § 8) is an exclusive list of areas in which the federal government may act, but that is a one-dimensional view. The missing dimension is that the list also describes areas in which federal law can *displace* state law.[22] When nation began, state law effectively "occupied the field."[23] Its dominance, however, was more akin to power filling a vacuum than to a doctrine of enforced exclusivity.

State law, however, was not the only game in town. Natural law had existed since at least ancient Greece. Plato, Aristotle, Aquinas, John Locke and many others referred to a transcendent body of princi-

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[20] Some delegates worried that establishing a central government variously described as national, supreme or federal, was inimical to states' survival. "Mr. Charles Pinkney wished to know of Mr. Randolph whether he meant to abolish the State Governts. altogether." I MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 33-34 (1966). One resolution, adopted early in the Convention, provided: "That a national government ought to be established, consisting of a supreme judicial, legislative and executive." James Madison's notes reflect Pinkney's concern. "[T]he term supreme required explanation—It was asked whether it was intended to annihilate state governments?" *Id.* at 39. That fear has not entirely faded from view. *See, e.g.*, Pete DuPont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137 (1993).

[21] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("[O]ur cases are quite clear that there are real limits to federal power."); New York v. United States, 505 U.S. 144, 155 (1992) ("[N]o one disputes that proposition that '[t]he Constitution created a Federal Government of limited powers.' ") (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)). *See also* Griswold v. Connecticut, 381 U.S. 479, 529-30 (1965) (Stewart, J., dissenting) (referring to "the plan that the Federal Government was to be a government of express and limited powers. . .); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United Statos* [*sic*] have no claim to any authority but such *as the States have surrendered to them*. . . .").

[22] This occurs because of the interaction of the power-granting clauses of the Constitution and the Supremacy Clause, U.S. CONST. art. VI, § 2.

[23] The Court uses this phrase to describe federal preemption even of state law that is not incompatible with existing congressional regulation. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

ples to which people should aspire or that governed human relations.[24] In England, the dominant theory of the common law was that judges did not make it; they discovered it.[25] In effect, pre-*Erie* America knew three types of law: state law, federal law and natural law, often referred to as "general" law. It took the rise of legal positivism, typified by one of Oliver Wendell Holmes's most famous admonitions,[26] to remake the American view of law as a whole and of the law of federal-state relations in particular.

II

COMMON LAW, NATURAL LAW, AND THE RISE OF LEGAL POSITIVISM

"The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . . ."[27] Legal positivism is "[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law."[28] The rise of legal positivism doomed natural law; the two could not co-exist.[29] The Supreme Court decided *Swift v. Tyson*,[30] under the banner of general law, and *Swift* provided the doctrinal basis for the vertical choice-of-law approach that governed for nearly a century.

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[24] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. 1988) (1690); THOMAS AQUINAS, THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS (Fathers of the English Dominican Province Christian Classics 1981) (1274); ARISTOTLE, NICHOMACHEAN ETHICS (Terrence Irwin trans., Hacket Pub. Co. 2d ed. 1999) (350 B.C.); PLATO, THE LAWS (Trevor G. Saunders trans., Penguin Classics 1970) (360 B.C.).

[25] *See* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *70 (1765). *See also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 38 (2001).

[26] *See infra* text accompanying note 27.

[27] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

[28] BLACK'S LAW DICTIONARY 915 (8th ed. 2004).

[29] One might, of course, take an ecclesiastical view, considering natural law to be the law's interpretation of God's command, but neither the United States nor England ever explicitly embraced theocracy. In the United States, such an approach would present obvious First Amendment problems. Perhaps for that reason, United States courts have always referred to general law.

[30] 41 U.S. (1 Pet.) 1 (1842).

Swift was the Court's first interpretation of the Rules of Decision Act ("RDA").[31] "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."[32] For a single-sentence, apparently straightforward provision, the Act has provided a remarkable amount of grist for the federal judicial mill.

The Act's wording reflects the presumed primacy of state law by making state law the default rule. This may signal the continuing tension between state and federal power that was so manifest at the Constitutional Convention and the uneasy settlement that the Framers reached: state law would continue to govern unless federal law displaced it. It would be hard to find a clearer expression of Congress's disinclination to have the courts create federal common law.

It is difficult to know what to make of the last clause. "[I]n cases where they apply" has provided all of the action in vertical choice-of-law. Perhaps Congress simply meant that federal courts should not apply state law when the state courts themselves would not apply it. That view, however, makes the clause almost meaningless, violating a basic canon of statutory construction.[33] The only other interpretation that readily suggests itself is tautological, and tautologies are singularly unhelpful. In any event, the federal courts have assumed that Congress intended it as a direction to the federal courts of what law to apply in diversity cases.[34] The task is to determine the sources from

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[31] The first Congress passed RDA as § 34 of the Judiciary Act of 1789. *See* Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92. It remains today, essentially unchanged, as 28 U.S.C. § 1652 (2000).

[32] *Id.*

[33] *See* Mastro Plastics Corp. v. Nat'l Labor Relations Bd., 350 U.S. 270, 298 (1956) ("As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' "). *See also* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (referring to "the canon that every word of a statute must be given significance; nothing in the statute can be treated as surplusage.").

[34] Professor Wilfred Ritz argued that RDA had a wholly different purpose and was not intended to apply to diversity cases at all.

> [S]ufficient evidence [exists] to demonstrate that Section 34 could not possibly have been intended by Oliver Ellsworth and the other members of the Senate and the House of Representatives in the summer of 1789 to have performed the functions that Professors Warren and Goebel, Justices Story and Brandeis, and

among which the federal courts might make the choice-of-law decision.

As *Swift* reflects, American jurisprudence in 1842 recognized three sources of law. The case involved a dispute over a bill of exchange that the defendant Tyson had dishonored when Swift presented it for payment. Swift argued that he was, in today's parlance, a holder in due course.[35] Tyson repudiated the note, claiming that Swift's predecessors in interest obtained it fraudulently. The dispute had contacts with New York and Maine. Justice Story considered New York cases on

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> the Supreme Court majority in *Erie Railroad Co. v. Tompkins* have attributed to it. It would literally have been unthinkable for the members of the First Congress to have directed national courts sitting in diversity cases to apply the law of the states in which they sat. The necessary conceptual framework was only in the early stages of formation.
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> Section 34 is a direction to the national courts to apply American law, as distinguished from English law. American law is to be found in the "laws of the several states" viewed as a group of eleven states in 1789, and not viewed separately and individually. It is not a direction to apply the law of a particular state, for if it had been so intended, the section would have referred to the "laws of the respective states."
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> The section most probably was intended as a temporary measure to provide an applicable American law for national criminal prosecutions, should national criminal prosecutions be brought in the national courts, pending the time that Congress would provide by statute for the definition of national crimes.
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> An alternative possibility, although less likely, is that the section was intended as a direction to the national courts to apply American law in all judicial proceedings at common law, both civil and criminal. This application would have included the diversity jurisdiction.
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> The one thing that can be said with assurance is that Section 34 was not intended to apply exclusively to diversity proceedings; that it was not intended to direct the application of the law of particular states in diversity proceedings; and that it was not intended to apply to suits in equity. In short, on its historical basis, *Erie* is dead wrong.

WILFRED RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 79, 148 (1990). Whether Professor Ritz or other scholars who have addressed the vertical choice-of-law problem are historically correct about Congress's intent, it is clear that today RDA is viewed as a diversity choice-of-law statute.

[35] A holder in due course is "[a] person who in good faith has given value for a negotiable instrument that is complete and regular on its face, is not overdue, and, to the possessor's knowledge, has not been dishonored." BLACK'S LAW DICTIONARY 749 (8th ed. 2004).

whether Tyson could defend Swift's action on the same ground that would have been available had Swift's predecessors in interest sued. He found New York's position unclear, but declared it irrelevant. In the process, he identified the various sources of law that might bear on resolution of the case.

> [I]t remains to be considered, whether it [the New York doctrine] is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable, that the courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. . . . In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reexamined, reversed and qualified by the courts themselves. . . . The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. . . . And we have not now the slightest difficulty in holding, that this section [the Rules of Decision Act], upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.[36]

Thus, law might come from statutes (and, by inference, constitutions) of the states or of the federal government. Clearly, however, the pronouncements of courts were not "laws." Equally clearly, "general principles and doctrines" existed for courts to consult. "[S]o-called 'general' matters, in the absence of a valid state statute, were to be determined by the federal courts according to what they conceived to be widely held jurisprudential doctrines."[37] *Swift*'s approach was grounded in con-

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[36] *Swift*, 41 U.S. (16 Pet.) at 18-19.

[37] JACK H. FRIENDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 4.1, at 204-05 (4th ed. 2005).

> Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason,

cepts of natural law.[38]

In the late nineteenth century, natural law came under attack.[39] Perhaps the best known early positivist formulation is John Austin's: law as the command of the sovereign.[40] In any event, by the mid-twentieth century it was possible in *Guaranty Trust Co. v. York*[41] for Justice Frankfurter to say a few words over the corpse (no longer the corpus) of natural law. He noted that *Erie*'s significance lay not merely in overruling *Swift*, but in the fact that "it overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."[42] Thus, the entitlement of the federal courts to decide matters of "general" law had vanished.

> and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was "between Citizens of different States" under Art. III, § 2, of the Constitution of the United States.

Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945).

[38] *See, e.g.*, Michael G. Collins, *Before* Lochner—*Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1263 (2000) (referring to *Swift*'s echo of natural law sentiments); Note, *Determination of State Law in Diversity Cases:* Salve Regina College v. Russell, 105 HARV. L. REV. 309, 314 (1991) ("natural law underpinnings of *Swift v. Tyson*").

[39] *See, e.g.* Edward A. Purcell, Jr., *The Story of* Erie: *How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 32 (Kevin M. Clermont, ed. 2004):

> Since the Civil War, jurisprudential positivism had been spreading among American lawyers, judges, scholars, and treatise writers. Stemming in part from the writings of the English philosophers John Austin and Jeremy Bentham, positivism rejected the idea that "law" was based on rational or moral principles that transcended human experience. Positivists defined law as the de facto rules and customs that existed in a society and that were generally followed by its members. More "scientifically," they defined it as the "command" of the sovereign that was backed by the force of the state. "Law" was thus a social and empirical fact, not a philosophical concept.

[40] *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE 3-25 (R. Campbell ed. 1875).

[41] 326 U.S. 99 (1945). *See infra* notes 81-95 and accompanying text.

[42] *Id.* at 101.

III

THE TORTUOUS DEVELOPMENT OF THE *ERIE* DOCTRINE

A. The Announcement

Even on its own terms, unclouded by subsequent developments, the Court's opinion in *Erie Railroad Co. v. Tompkins*,[43] although it signified an enormous shift in the law applicable in the federal courts, is not a model of analytical clarity. The facts were simple enough. Tompkins, the plaintiff, was walking on a well-worn footpath beside Erie's tracks in Pennsylvania when a passing train with something projecting from its side struck him, severing his arm. He brought a diversity action in the Southern District of New York, and recovered a $30,000 jury verdict.[44] Erie had argued that Pennsylvania law should apply to the action. Under that law, as the Supreme Court recited it, Tompkins was a mere trespasser, and Erie was "not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful."[45] Citing *Swift v. Tyson*,[46] Tompkins argued successfully that, there being no Pennsylvania statute on point, federal general law governed. The Second Circuit affirmed, and Erie pursued the matter to the Supreme Court.

Justice Brandeis opened the opinion with a surprise: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[47] That was striking; the petition for certio-

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[43] 304 U.S. 64 (1938).

[44] Professor Purcell identifies the reason for the choice of federal rather than state court as Pennsylvania's insistence that Tompkins was a trespasser, whereas the general rule would have treated him as a licensee. The choice of the New York rather than the Pennsylvania court rested on counsel's perception that

> [t]he Third Circuit, which covered Pennsylvania, tended to encourage greater deference to the rulings of state courts, while the Second Circuit, which governed the New York federal courts, applied *Swift* more readily and broadly. Thus, a New York federal court would be more likely to ignore Pennsylvania "local" law and apply the *Swift* doctrine.

Edward A. Purcell, Jr., *The Story of* Erie: *How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 39 (Kevin M. Clermont, ed. 2004).

[45] *Erie*, 304 U.S. at 70.

[46] 41 U.S. (1 Pet.) 1 (1842).

[47] *Erie*, 304 U.S. at 69 (citation omitted).

rari did not present that question, and neither of the parties briefed it.[48] Erie, which invoked Supreme Court review, wanted Pennsylvania rather than federal law to apply, but rather than urging the Court to overrule *Swift*, it characterized the Pennsylvania rule as a local property rule that applied under *Swift*'s regime.[49] Tompkins, of course, was perfectly happy with the federal rule and so had no incentive to disturb *Swift*.

The Court listed several reasons to overrule *Swift*. Justice Brandeis first cited a law review article by Charles Warren[50] that closely examined the legislative history of RDA and

> established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law was controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[51]

However, as the Court pointed out, it would not ordinarily alter such a long-standing interpretation of a statute simply on the basis of secon-

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[48] *See* Petition for Writ of Certiorari at 7-9, Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) (No. 37-367), *in* 35 PHILIP B. KURLAND & GERHARD CASPER, LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 601, 614-16 (1975); Brief for Petitioner, Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), *in id.* at 675-730; Brief for Respondent, Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), *in id.* at 731-68; Reply Brief for Petitioner, Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), *in id.* at 769-82. Justice Brandeis had, however, asked counsel's views of *Swift* at oral argument. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 376 n.4 (6th ed. 2002).

[49] Justice Brandeis's opinion for the Court obscured Erie's argument: "The Erie had contended that application of the Pennsylvania rule was required, among other things by § 34 of the Federal Judiciary Act of September 24, 1789. . . ." This might suggest that Erie had indeed urged overruling *Swift*, but it had not. Erie's argument was that the status of one passing over another's land was a matter of property law, not torts. Thus, it would have been part of the "local law" that *Swift* had left to the states. *See infra* notes 58-59 and accompanying text. Professor Purcell suggests that although the Railroad would have benefited in *Erie* from overruling *Swift*, it probably did not adopt that strategy because the *Swift* approach continued to serve it well in many other cases. *See* EDWARD A. PURCELL, JR., LOUIS BRANDEIS AND THE PROGRESSIVE CONSTITUTION 97-101 (2003).

[50] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[51] *Erie*, 304 U.S. at 72-73 (footnote omitted).

dary authority.[52] Nonetheless, noting the intensified criticism *Swift* received following the famous forum-shopping case of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*,[53] the Court pushed ahead.

The second point that the Court relied upon stemmed directly from its experience under *Swift*. Justice Brandeis was candid that things had not worked out as the *Swift* Court might have hoped. "Persistence of state courts in their own opinions on questions of common law prevented uniformity. . . ."[54] For many students, this statement is puzzling. They wonder how the states could have persisted in their own opinions after the Supreme Court had spoken. After all, federal common law declared by the Supreme Court is binding on the states, is it not?[55]

Here the difference between the natural-law and the legal-positivist approaches becomes critical. Justice Brandeis continued: "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."[56] This observation recalled the three sources of law that the federal courts knew until *Erie*.[57] First, there was federal law, which stemmed from the Constitution, from federal statutes and from judicial decisions of questions of law that fell within one of the Consti-

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[52] *Id.* at 77.

[53] 276 U.S. 518 (1928). It is not clear whether one should refer to this case as "celebrated" or "infamous," but it is at least well known. The Brown & Yellow Taxicab Company wanted exclusive rights to pick up passengers at the Louisville & Nashville Railroad's Bowling Green station in Kentucky. Brown & Yellow negotiated an exclusivity contract with the railroad. Black & White, a local competitor, refused to cease its activities at the station and sometimes occupied Brown & Yellow's parking spaces. Both companies were Kentucky corporations. Kentucky law made exclusivity contracts void, but the federal courts recognized them. Brown & Yellow therefore unincorporated in Kentucky, reincorporated in Tennessee, and sued Black & White in Kentucky federal court, seeking injunctive relief. The lower courts rejected Black & White's argument that the invocation of diversity jurisdiction was fraudulent, finding the change of citizenship actual and declining to consider Brown & Yellow's motives. Brown & Yellow prevailed. The Supreme Court affirmed. Justice Holmes filed a vigorous dissent. *See infra* note 68 and accompanying text.

[54] *Erie*, 304 U.S. at 74.

[55] Indeed it is, provided that it is federal common law and not federal *general* common law. *See infra* notes 60-61, 239-40 and accompanying text.

[56] *Id.*

[57] *See supra* text accompanying note 25.

tution's grants of federal power.[58] Second, there was state (or, as Justice Brandeis referred to it, "local") law. Under *Swift*'s regime, that included state constitutions, state statutes, and state decisional law that related to local matters.[59] General rules of contract law applicable in the states were not considered state law within the meaning of RDA unless declared by state statute; they were general common law not associated with any sovereign. That body of "general commercial law"[60] was common (so to speak) to the states and the federal government. Neither could authoritatively expound it to bind courts of other jurisdictions. That is why the state courts were able to "persist" in their own opinions of general law without running afoul of the Supremacy Clause.[61]

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[58] *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive") (citations omitted); Kenna v. Claumet, H. & S.E.R. Co., 120 N.E. 259 (Ill. 1918) (recognizing that the Supreme Court's implying a private right of action under the Federal Safety Appliance Act, Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (*repealed* Pub. L. 103-272, § 7(b), July 5, 1994)), in Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33 (1916), bound the state courts not to permit any relief under state law inconsistent with *Rigsby*); Spalding v. Vilas, 161 U.S. 483 (1896) (overturning a damage award against the Postmaster General by the Supreme Court of the District of Columbia, on the ground that the federal common law principle of absolute immunity for federal officers prohibited the award).

[59] The Court defined local matters as

> rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

Swift v. Tyson, 41 U.S. (1 Pet.) 1, 18-19 (1842). *See supra* note 36 and accompanying text.

[60] The Court explicitly applied this approach to torts in Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368 (1893), over the protest of Justice Field, who urged that the federal courts could not displace state law—including state decisional law—with respect to areas of law that the Constitution does not commit to the federal government. He rejected the idea of general law in the federal courts, arguing that the *Swift* doctrine improperly undermined the states' independence. *See id.* at 401.

[61] *See* U.S. CONST. art. VI, § 2.

Then Justice Brandeis made a remarkable pronouncement: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."[62] As he put it later in the opinion: "We *merely* declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."[63] This declaration would be extraordinary enough standing alone—the Court announcing that it (and, under its guidance, the lower federal courts) had been adjudicating cases in an unconstitutional manner for ninety-six years. The Court was not through, however, and expounded the core of the *Erie* Doctrine.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[64]

That short passage effected a notable change in the law. "It is impossible to overstate the importance of the Erie decision."[65]

First, Justice Brandeis effectively banished general law to the past, reconceptualizing the sources of law to only two: state and federal law.[66] In this, he echoed Justice Holmes, who had argued forcefully

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[62] *Erie*, 304 U.S. at 77-78.

[63] *Id.* at 80 (emphasis added).

[64] *Id.* at 78.

[65] WRIGHT & KANE, *supra* note 48, at 378 (footnote omitted).

[66] Justice Brandeis emphasized the sentence so often imperfectly recalled, declaring the non-existence of federal general common law. *See supra* note 3. Thus, the entire body of general law created under *Swift v. Tyson* became, in an instant, dead authority, although that is not to say that the Court never looked to that body of law again.

> [T]he *Erie* decision did not require that federal courts stop citing cases decided before 1938 and reinvent federal common law from scratch. The Supreme Court has continued to rely on pre-1938 cases about federal officers' immunity

against the idea of a body of general law independent of a sovereign, first expressing his reservations in *Southern Pacific Co. v. Jensen*,[67] and then in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[68]

> from suit and interstate boundary disputes. Former doctrines of "general common law" have been reconceptualized as doctrines of federal common law that continue to govern in areas of dominant federal concern.

Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997).

Only five years after *Erie*, the Court decided that federal law should govern a dispute with respect to the rights and obligations of the United States on its own commercial paper. The Court found the appropriate rule of decision in a case that antedated *Erie*. *See* United States v. Clearfield Trust Co., 318 U.S. 363, 367-68 (1943):

> And while the federal law merchant developed for about a century under the regime of *Swift v. Tyson* . . . represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.
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> *United States v. National Exchange Bank* . . . [1909] falls in that category. The Court held that the United States could recover as drawee from one who presented for payment a pension check on which the name of the payee had been forged, in spite of a protracted delay on the part of the United States in giving notice of the forgery. The Court followed *Leather Mfrs.' Bank v. Merchants Bank* . . . [1888], which held that the right of the drawee against one who presented a check with a forged endorsement of the payee's name accrued at the date of payment and was not dependent on notice or demand.

See infra notes 183-88 and accompanying text.

[67] 244 U.S. 205 (1916) (Holmes, J., dissenting. *See supra* note 27 and accompanying text.

[68] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting):

> If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

It would be difficult to find a more forthright statement of the legal positivist thesis in

Second, for diversity purposes state decisional law became indistinguishable in authoritativeness from state statutory or constitutional law, which RDA had always commanded the federal courts to use. The federal courts would later face the problems of when state decisional law was clear enough, whether any court below the state's highest court can declare state law binding in diversity cases,[69] and whether the federal courts may predict that a state's highest court will abandon an old precedent.[70] Those, however, involved mere details; the Court had firmly set the underlying principle.

Third, the Court reflected the Constitution's limitations on federal legislative authority and tied its own power to those limitations. This part of *Erie* taught that if Congress had no legislative authority to create a federal rule governing the case, then the Court similarly had none.[71] Logic demanded this result. The Constitution is not simply an empowering document; it is also a severely limiting document. It would have made little sense for the Framers to cabin federal legislative power only to permit the federal courts to announce and apply rules that would have been regarded as usurpations of state authority if

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any federal opinion.

[69] *See, e.g.*, King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948) (state decisions having no precedential value in the state not authoritative for *Erie* purposes); Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) (recognizing intermediate state appellate courts as authoritative for *Erie* purposes in the absence of an opinion from the highest state court).

[70] *See, e.g.*, Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957) (predicting that Mississippi would no longer follow a products liability rule announced in a 1928 case but would instead conform state law to the modern trend). This problem has diminished considerably in importance with the advent of state authorizations for federal courts to certify unclear questions of law to the highest state court. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) ("Most states have adopted certification procedures."). *Accord* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 (2003).

[71] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 471-72 (1965) (footnote omitted):

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

See infra notes 119-30 and accompanying text. *See also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956) ("*Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.").

Congress had enacted them.[72]

This part of the opinion also contained the single word destined to cause the most trouble in later years. Justice Brandeis announced that Congress lacked the power to create certain *substantive* rules of law.[73] That is the only appearance of that word or of the substantive/procedural distinction in the entire opinion. Later Courts would have to deal with the thorny question of what was substantive and

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[72] There is a bit of irony in the Court's approach. Although Justice Brandeis held that the *Swift* approach violated the Constitution, he never identified how. At one point he observed that *Swift*'s doctrine "rendered impossible equal protection of the law," *Erie*, 304 U.S. at 75, suggesting an equal protection component. That seems an unlikely basis for the decision, however. The Equal Protection Clause is in the Fourteenth Amendment, which regulates state but not federal conduct. *See* U.S. CONST. amend. XIV. The Court would eventually recognize an equal protection component to the Due Process Clause of the Fifth Amendment, but not until its decision in Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), that involved segregated schools in the District of Columbia. Justice Brandeis also noted that "in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." *Erie*, 304 U.S. at 80. Perhaps that was a reference to the Tenth Amendment, but there is no citation to it. In fact, there is no citation to any constitutional provision anywhere in the opinion.

Commentators have observed how remarkable this all is. The Court could have reached the same outcome simply by disapproving *Swift*'s interpretation of RDA, and Justice Reed's concurrence urged precisely that disposition. *See Erie*, 304 U.S. at 91 (Reed, J., concurring). Instead, the Court reached out to decide a constitutional question that neither party had presented. Moreover, the Court did so without specifying the provision of the Constitution upon which it relied. And the author? The selfsame Justice Brandeis who, in a famous concurrence only two years earlier, had urged the Court to avoid unnecessarily deciding constitutional questions. *See* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39 (1885) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' ")). Yet, he managed somehow to reconcile the approach he urged in *Ashwander* with the inscrutable constitutional opinion he wrote in *Erie*. *See* WRIGHT & KANE, *supra* note 48, § 56, at 382-83.

Professor Ely, on the other hand, viewed this apparent omission as a strength. He noted that the defect in *Swift* existed "because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising. . . ." Ely, *supra* note 2, at 702-03. The point was that there was no federal power *simpliciter*, rather than that the federal law the Court had created encroached on some state power enclave. The Constitution enumerated no such power, so the question of encroachment should never have arisen. It was the Constitution's silence, not any particular declaration, that doomed *Swift*.

[73] *See supra* text accompanying note 64.

what was procedural.[74]

B. The Application

1. *Sibbach v. Wilson & Co.*[75]: What Is Procedural?

The Court began to wrestle with that issue in *Sibbach v. Wilson & Co.*, a personal injury case. Plaintiff suffered injuries in Indiana but sued in Illinois federal court. The issue was whether the Federal Rules of Civil Procedure's authorization of pre-trial physical and mental examinations[76] was substantive or procedural. Illinois did not permit such examinations, but Indiana did. The district court had found Sibbach in contempt for refusing its order to submit to a physical examination by a court-appointed physician. She argued that Rules 35 and 37 (which then, as now, prescribed the actions a court might take to deal with discovery problems) exceeded the mandate of the Rules Enabling Act ("REA"), which specified that rules promulgated under its ægis "neither abridge, enlarge or modify the substantive rights of any litigant."[77] The *Sibbach* Court had to decide whether "the right to be ex-

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[74] *See infra* notes 75-100 and accompanying text. Justice Reed commented on the difficulty: "The line between procedural and substantive law is hazy. . . ." *Erie*, 304 U.S. at 92 (Reed, J. concurring in part). Under the method of analysis that this Article proposes, however, the characterization is unnecessary. *See infra* Part IV.

Erie eliminated what had been a conflicts anomaly in *Swift*'s approach to the vertical choice-of-law problem. Under the conflicts approaches of the time, a court typically applied its own procedural rules but the substantive rules of the jurisdiction in which the claim arose. *See, e.g.*, EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDIES, CONFLICT OF LAWS § 3.8, at 128 (4th ed. 2004) ("The distinction between 'substance' and 'procedure' has medieval origins: a court will apply foreign law only to the extent that it deals with the substance of the case, *i.e.* affects the outcome of the litigation, but will rely on forum law to deal with the 'procedural' aspects. . . .") (footnotes omitted); ROBERT LEFLAR, AMERICAN CONFLICTS LAW 126-27 (3d ed. 1977). In diversity cases, the claims arose in the individual states, not in the United States, as it were. Normal conflicts approach would have called for the federal courts to apply the law of the states on substantive matters and federal law on procedural matters. *Swift* eschewed that approach in favor of what Justice Brandeis would later call federal general common law. *Erie* adopted the dominant approach to conflicts questions.

[75] 312 U.S. 1 (1941).

[76] FED. R. CIV. P. 35 (1937), *in* 7 MOORE'S FEDERAL PRACTICE § 35App.01, at 35App.-1 (3d ed. 2006) (current version at FED. R. CIV. P. 35).

[77] Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (2000)). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

empt from such an order is one of substantive law. . . ."[78] If it was substantive, *Erie* demanded that the Illinois federal court apply the Indiana rule (because that was where the cause of action arose). Sibbach therefore tried to walk a fine line, conceding that Rule 35 dealt with procedure but arguing that it nonetheless violated the limitation of REA.

The Court rejected Sibbach's suggestion that Congress intended not merely to forbid rules that would change the elements of a claim or the underlying legal rights giving rise thereto (such as the right to be free from harm caused by another's negligence), but also to protect any other "important and substantial rights theretofore recognized."[79] The majority recoiled, noting that the plaintiff's approach would entail endless litigation in future cases. Justice Owen Roberts expressed an apparently simple test that turned out to be remarkably unhelpful. "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[80]

2. *Guaranty Trust Co. v. York*[81]: What Is Substantive for *Erie* Purposes?

In only four years, the Court returned to the problem of characterizing a rule as substantive or procedural. *Guaranty Trust Co. v. York* concerned whether a state statute of limitations was substantive or procedural for *Erie* purposes. York sued Guaranty Trust for breach of fiduciary duty under state law, seeking an accounting. The case reached the Supreme Court after the Second Circuit found the New York limitation period inapplicable because the action sounded in eq-

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[78] *Sibbach*, 312 U.S. at 10.

[79] *Id.* at 13.

[80] *Id.* at 14. One might have thought this would portend affirmance of Sibbach's contempt citation. The Court reversed, however, admonishing the district court for having committed plain error in ignoring Rule 37's specification that contempt was not an available sanction for violation of an order to take a physical examination.

Sibbach has had its share of academic detractors. Professor Ely argued that the Court essentially ignored the second sentence of REA by failing to consider whether Federal Rule 35, even if it did "really regulate[ ] procedure," nonetheless abridged, enlarged or modified state substantive rights in violation of REA, 28 U.S.C. § 2072 (2000). *See* Ely, *supra* note 2, at 719.

[81] 326 U.S. 99 (1945)

uity. Justice Frankfurter noted that the Court had applied *Erie*'s rule to an equity case the same year it decided *Erie*.[82] The question that *Guaranty Trust* considered, therefore, was "whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties."[83] The answer was no.

Two aspects of *Guaranty Trust* are particularly significant. First, Justice Frankfurter endeavored to clarify what was substantive and what was procedural for *Erie* purposes by announcing an outcome-determinative test.

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.[84]

Thus, if applying federal instead of state law would cause the outcome of the case to change, the federal court had to apply state law. Statutes of limitations became substantive,[85] a holding the Court has never modified, although the test's dominance has waned.[86] The outcome-determinative test, while certainly more concrete than *Sibbach*'s "really regulates procedure," nonetheless would create significant problems for the Court, but there is one more aspect of *Guaranty Trust* that commands close attention first.

Erie had announced a constitutional imperative. In discussing *Erie*, *Guaranty Trust* never suggested that the Constitution compelled

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[82] *Id.* at 107 (citing Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938)).

[83] *Id.*

[84] *Id.* at 110.

[85] In horizontal choice-of-law situations, courts generally view statutes of limitations as procedural, subject to narrow exceptions: 1) if a statute creates a new liability and also contains the limitation, 2) if a statute creates a new liability and the limitation, although in another statute, is "directed to the newly created liability so specifically as to warrant saying that it qualified the right," 3) if the forum that created the limitation period treats it as substantive, and 4) if the limitation completely extinguishes the underlying right. *See* Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154-56 (2d Cir. 1955) (internal quotation marks omitted).

[86] *See* Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525 (1958), discussed *infra* at notes 102-18, 178-82 and accompanying text.

using the state limitations period. Instead, Justice Frankfurter referred four times to *Erie*'s "*policy* of federal jurisdiction."[87] The reason almost certainly is that, in contrast to *Erie*'s statement that federal power did not extend to the issue in question, in *Guaranty Trust* it did. Few would have disputed that Congress could enact limitations periods applicable in the federal courts, even for state claims being heard under diversity jurisdiction. The combination of Congress's power to create inferior federal courts[88] and the Necessary and Proper Clause[89] certainly would have permitted Congress to decide how long federal courts should remain open to increasingly-stale claims.

Guaranty Trust made clear that *Erie* proceeds on two levels. First, there is the constitutional level that *Erie* announced. In areas not committed by the Constitution to the federal government, state law must govern. Second, even in areas where the federal government has constitutional power, one must remember *Erie*'s disapproval of cases reaching different results merely because they were tried in different courts. Recall Justice Brandeis's comment about the *Swift* doctrine making equal application of the law impossible.[90] Therefore, the fact that Congress *could have* prescribed a rule does not mean that the federal courts *should*. They must serve the policy of having diversity claims reach the same result in the federal courts that they would have

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[87] *Guaranty Trust*, 326 U.S. at 101 (emphasis added). *See also id.* at 109 (*Erie* "expressed a policy "that touches vitally the proper distribution of judicial power between State and federal courts"); *id.* ("policy . . . underlies *Erie*. . ."); *id.* at 110 ("A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.").

[88] *See* U.S. CONST. art. I, § 8, cl. 9. It is important to remember that Article III, § 2, does not vest jurisdiction in any inferior federal court. It merely describes the extent of the jurisdictional power that Congress may vest in any inferior courts that Congress might create, *see* U.S. CONST. art. III, § 1, pursuant to its power under Article I, § 9.

[89] *See* U.S. CONST. art. I, § 8, cl. 18.

[90] *Erie*, 304 U.S. at 74-75 (footnote omitted):

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.

in the state courts.[91] This policy reflects the emerging *Erie* doctrine's distaste for result-changing forum shopping.[92]

The policy perspective had its problems also. Almost any variation in law can change the outcome of a case,[93] and after *Guaranty Trust*, the Court had several opportunities to see how the outcome-determinative test would work. Three cases decided the same day in 1949 show how the outcome-determinative test became a dominant direction to apply state law even in the face of contrary federal law. *Ragan v. Merchants Transfer & Warehouse Co.*[94] asked whether state or federal law determined the event that stopped a state statute of limitations from running. Under state law, that occurred when the defendant received service of process. Federal Rule 3, by contrast, stated that an action began when the plaintiff filed the summons and complaint, though it said nothing about limitations. Filing in *Ragan* came before expiration of the limitation, but service came after. The Court applied the outcome-determinative test, and the result was clear. State law had to govern, and the limitation barred Ragan's action.[95]

Cohen v. Beneficial Industrial Loan Corp.[96] was a shareholder's derivative action. Plaintiff sued in New Jersey federal court. The Supreme Court had to decide whether to apply Federal Rule 23(b)[97] or a

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[91] *See, e.g., id.*; *Guaranty Trust*, 326 U.S. at 109:

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, 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.

[92] The Court would later refer to avoiding forum shopping as one of the "twin aims" of . . . *Erie*." *See infra* notes 124-25 and accompanying text.

[93] As Justice Harlan put it in *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring), "any rule, no matter how clearly 'procedural,' can affect the outcome of litigation if it is not obeyed."

[94] 337 U.S. 530 (1949).

[95] The Court would later hold that Rule 3 does not address when a limitations period stops running in diversity cases, Walker v. Armco Steel Corp., 446 U.S. 740 (1980). *See infra* notes 131-33 and accompanying text.

[96] 337 U.S. 541 (1949).

[97] At the time, Rule 23(b) read as follows:

> SECONDARY ACTION BY SHAREHOLDERS. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorpo-

New Jersey statute that required the plaintiff to post a bond to cover the corporation's expenses and counsel fees if the plaintiff lost. Rule 23(b) required no bond. *Cohen* resembles *Ragan*; neither of the federal rules specifically mentioned the matter at issue. The Court held that because the state's bond requirement might deter some plaintiffs from suing, it was outcome-determinative within the meaning of *Guaranty Trust*.

Woods v. Interstate Realty Co.[98] was a Mississippi federal case in which a Tennessee corporation sued to recover a broker's commission. Under Mississippi law, a foreign corporation not qualified to do business in the state could not sue in its courts. Federal Rule 17(b), by contrast, explicitly provided that the law of the state of incorporation governed capacity to sue, and Tennessee law created no disability. *Woods* differs from *Ragan* and *Cohen* because Rule 17(b) spoke directly to the point. Nonetheless, the Court, referring to *Guaranty Trust*'s statement that the federal court in a diversity case is "in effect, only another court of the State . . . ,"[99] held that the state rule applied.[100] This was outcome-determination with a vengeance. The fact that there was a Fed-

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> rated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction in any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

AMERICAN BAR ASSOCIATION, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 48-49 (1938). Today, Rule 23.1 governs shareholder derivative actions in the federal courts. It, like the differently numbered rule that preceded it, contains no requirement that the plaintiff post security.

[98] 337 U.S. 535 (1949).

[99] *Guaranty Trust*, 326 U.S. at 108. *See supra* note 91.

[100] The *York* case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate.

Woods, 337 U.S. at 538.

eral Rule of Civil Procedure directly on point did not matter; the only thing that did matter was that applying the state rather than the federal rule would produce a different result.

These three cases demonstrated how dominant the outcome-determinative test was. State provisions could undercut all of the Federal Rules of Civil Procedure. Applying state law in the face of directly contrary federal law seemed to turn supremacy on its head. An adjustment was inevitable.[101]

3. *Byrd v. Blue Ridge Electrical Cooperative, Inc.*[102]: Acknowledging the Balance

Byrd was a North Carolina lineman employed by a contractor hired by Blue Ridge, a South Carolina corporation. He was injured and sought damages from Blue Ridge in a diversity action in South Carolina. Blue Ridge argued that Byrd was limited to worker's compensation. Byrd denied that he was a statutory employee under South Carolina law. In South Carolina's courts, the judge would have decided the statutory-employee question,[103] but the district court sent the issue to the jury, which returned a verdict for Byrd. The choice-of-law issue for the Supreme Court was whether South Carolina or federal practice should govern.[104]

Blue Ridge asserted that *Erie*'s policy favoring uniform results compelled adhering to South Carolina's practice.[105] The Court first asked, in effect, whether the state practice was substantive or procedural for *Erie* purposes.[106] South Carolina's Supreme Court had stated

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[101] *See* Ely, *supra* note 2, at 709.

[102] 356 U.S. 525 (1958).

[103] *See* Adams v. Davison-Paxon Co., 96 S.E.2d 566 (S. C. 1957).

[104] There was a second issue before the Court as well: whether the Fourth Circuit, when it reversed and directed entry of judgment for Blue Ridge, should instead have remanded the case to give Byrd an opportunity to introduce further evidence on whether he was a statutory employee. The Supreme Court ruled for Byrd on that issue. *Byrd*, 356 U.S. at 533.

[105] *Id.* at 534.

[106] *Id.* at 535:

> It was decided in *Erie R. Co. v. Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the [state] rule . . . to determine

no reasons for displacing the jury's normal functioning[107] with respect to this single issue. Justice Brennan downplayed the rule's importance, characterizing it as "merely a form and mode of enforcing the [employer's] immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties."[108] Then he noted the *Erie* policy that *Guaranty Trust* identified: having litigation come out the same way in state and federal courts. He initially assumed that whether a judge or jury determined the issue could have a substantial effect on the result, but then he went in a wholly new direction: "Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice."[109]

Before 1958, the *Erie* doctrine involved two considerations. The first, exemplified by *Erie*, was whether there was federal competence to act in the area. The *Erie* Court held that there was no federal authority,[110] and the choice-of-law inquiry ended there. The second inquiry is whether, if there is federal competence, federal or state law should gov-

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whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.

[107] *Id.* at 535-36.

> The South Carolina Supreme Court states no reasons . . . why, although the jury decides all other factual issues raised by the cause of action and defenses, the jury is displaced as to the factual issue raised by the affirmative defense. . . . The decisions relied upon . . . furnish no reason for selecting the judge rather than the jury to decide this single affirmative defense in the negligence action. They simply reflect a policy . . . that administrative determination of "jurisdictional facts" should not be final but subject to judicial review. . . .

That does not mean that no such policy existed. South Carolina may have wanted judges to decide the issue out of concern that juries, knowing that statutory compensation would likely be less than damages recoverable in tort, might strain to find plaintiffs non-statutory employees. Were that to happen with any regularity, it might imperil the workers compensation system's goals of assuring speedy, no-fault relief for the injured employee and predictable financial exposure for the employer.

Of course, by positing the issue in this manner, Justice Brennan committed the logical fallacy of assuming his conclusion. Under South Carolina's approach, the "normal function" of the jury did not extend to the issue of whether someone was a statutory employee.

[108] *Id.* at 536. It is not hard to imagine another reason for the South Carolina rule. *See supra* note 107.

[109] *Id.* at 537.

[110] *See supra* text accompanying note 64.

ern. *Guaranty Trust* adopted the outcome-determinative approach to decide that question.[111] Until *Byrd*, outcome *was* the only consideration, as *Ragan*, *Cohen* and *Woods* demonstrated.[112] *Byrd* identified two additional factors.

The Court emphasized the strong federal policy favoring jury trials. *Erie* notwithstanding, Justice Brennan looked at a pre-*Erie* diversity case to underscore the importance of the federal policy.[113] He noted that distribution of trial functions between judge and jury was integral to the federal system and that "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[114] Justice Brennan lionized federal policy while minimizing South Carolina's interest in its own rule.[115] Although he did not phrase it so, the opinion actually exemplifies balancing state and federal interests in application of their respective rules. *Guaranty Trust* knew nothing of the sort. There was no discussion of any federal interest (for

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[111] *See supra* notes 81-95 and accompanying text.

[112] *See supra* notes 94-100 and accompanying text. *See also* Berhnardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) (state law governed enforceability of a contract's arbitration clause because of arbitration's presumed effect on outcome); Angel v. Bullington, 330 U.S. 183 (1947) (state law governs *res judicata* effect of state court judgment; no different outcome in subsequent federal diversity action would be proper).

[113] *See* Herron v. Southern Pac. Co., 283 U.S. 91 (1931) (extant federal directed verdict practice overcame state constitutional requirement that all questions of contributory negligence go to the jury). This is another illustration of pre-*Erie* case law having post-*Erie* relevance. *See supra* note 66 and accompanying text.

[114] *Byrd*, 356 U.S. at 538. Justice Brennan also noted the "influence—if not the command—of the Seventh Amendment. . . ." *Id.* at 537. It is not entirely clear why the Seventh Amendment was influential only. It may be because the Amendment speaks in terms of common law actions as of 1791, when worker compensation claims did not exist. *See, e.g.*, Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by* Erie, *The Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 616-17 (2004). On the other hand, one commentator has noted that Justice Brennan's language

> has left generations of commentators free to disagree about whether *Byrd* is really a Seventh Amendment case or not, that is, whether the Seventh Amendment provides a better grounding for the decision than the one(s) the Court adopted more explicitly. Without more guidance from the Court[,] however, there is no way to argue dispositively for this interpretation based on what the Court said.

Robert J. Condlin, *"A Formstone of Our Federalism": The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 506 (2005) (footnote in title omitted).

[115] *See supra* text accompanying notes 107-08.

example) in closing the federal courts to stale claims. For that matter, there was no discussion of the importance to the state of its limitations period. Before *Byrd*, it was outcome-determination or nothing. After *Byrd*, there was more to think about.

The Court was not quite done with *Guaranty Trust*, however. Justice Brennan backtracked on his earlier assumption that the choice of law in *Byrd* was outcome-determinative.[116] He recognized that it was uncertain but speculated that it was less likely to be outcome-determinative than the choices in previous cases.[117] After *Byrd*, therefore, the Court had shifted to a three-part vertical choice-of-law inquiry. A district court should balance the federal interest underlying creation or application of a federal rule of decision, the state interest in application of the state rule, and the outcome-determinative effect of the choice. If the choice will be clearly outcome-determinative, there is additional weight on the state side of the balance, but the outcome-determinative test has ceased to be solely dispositive.

Byrd did not end the development of vertical choice-of-law doctrine because it did not involve application of the Federal Rules of Civil Procedure. The Court's last word on that subject had come in *Woods v. Interstate Realty Co.*[118] and had left the Federal Rules in a precarious position *vis-à-vis* conflicting state rules. Seven years after *Byrd*, the Court addressed that problem.

4. *Hanna v. Plumer*:[119] The Federal Rules Become More Robust

Hanna sought damages arising from automobile negligence; Plumer was the executor of the estate of the driver who had caused the accident. Hanna complied with Federal Rule 4 in serving the summons and complaint; the process server left copies with Plumer's wife at their residence.[120] Massachusetts law required personal, not substituted,

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[116] *See supra* text accompanying notes 108-09.

[117] "We do not think the likelihood of a different result is so strong a to require the federal practice of jury determination of factual issues to yield to the state rule in the interest of uniformity of outcome." *Byrd*, 356 U.S. at 540.

[118] 337 U.S. 535 (1949). *See supra* notes 98-100 and accompanying text.

[119] 380 U.S. 460 (1965).

[120] Then, as now, the relevant part of the Rule allowed service "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . ." FED. R. CIV. P. 4(d)(1) (1937), *in* 1

service on an executor.[121] Plumer won summary judgment on that point, the district court relying on *Guaranty Trust* and *Ragan*. The First Circuit affirmed, reasoning that Massachusetts's firm purpose to require personal service made the matter substantive, not procedural, for *Erie* purposes. The Supreme Court reversed, holding that the federal service rule governed.

Although the Court adverted to *Sibbach v. Wilson Co.*,[122] which had upheld the applicability of Federal Rules 35 and 37 in a diversity action under an *Erie* analysis, *Hanna*'s thrust was considerably different. Plumer had argued that *Erie* and the outcome-determinative test required using the Massachusetts rule.[123] The Court demurred, noting instead the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[124] It found that, considered *ex ante*, the different service rules would be unlikely to affect a plaintiff's choice of forum. Therefore, the difference was insufficiently substantial to compel using the state rule.[125]

MOORE'S FEDERAL PRACTICE § 4App. 01, at 4App.-1 (3d ed. 2006) (current version at FED. R. CIV. P. 4(e)(2)).

[121] MASS. GEN. LAWS ANN., ch. 197, § 9 (1958), *quoted in Hanna*, 380 U.S. at 462.

[122] 312 U.S. 1 (1941). *See supra* notes 75-80 and accompanying text.

[123] Reduced to essentials, the argument is: (1) *Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for the petitioner. (3) Therefore, *Erie* demands application of the Massachusetts rule.

Hanna, 380 U.S. at 466.

[124] *Id.* at 468 (footnote omitted).

[125] Justice Harlan's concurrence expressed it differently:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

Id. at 475 (Harlan, J., concurring).

Professor Rowe has argued that *Hanna*'s reference to the "twin aims" of *Erie* effectively supplanted *Byrd*'s balancing approach. Rowe, *supra* note 8, at 985-86. With great respect for my long-time friend and colleague, I see it differently. *Hanna* and *Byrd* are not alternatives; they act together. *See infra* notes 244-50 and accompanying text.

Then came the surprise. The Court announced that the *Erie* line of cases did not supply the proper standard for resolving the choice-of-law issue in *Hanna*.

> The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of the Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule *which* [*sic*] *governed the point in dispute*, *Erie* commanded the enforcement of state law.[126]

Hanna was obviously not such a case; Rule 4 spoke unambiguously to the very point at issue.[127] Instead, the Court ruled that the *Sibbach*

A brief word on forum shopping and *Hanna*'s reference to the "twin aims" is in order. Although the Court clearly intended to discourage vertical forum shopping, perspectives on forum shopping's desirability differ. Surely the Court could not have blinded itself to the reality of forum shopping; indeed, counsel's ethical obligation to the client includes the duty, when more than one forum is available, to choose the one in which successful representation of the client's interests is most likely. *See, e.g.*, Deborah Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 370-71 (2006) (citing Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 106 (1999); Russell J. Weintraub, *International Litigation and* Forum Non Conveniens, 29 TEX. INT'L L.J. 321, 322 (1994)). The forum shopping against which *Erie* and *Hanna* inveighed was vertical forum shopping that changed the results of cases because the federal courts' adhered to *Swift v. Tyson*. *See supra* notes 30-38, 53 and accompanying text. The *Erie* line of cases has nothing to do with the permissibility, desirability and prevalence of horizontal forum shopping.

Second, one must at least question whether the "twin aims" that the *Hanna* Court identified really stand independently. As the *Erie* Court saw the problem, vertical forum shopping combined with *Swift*'s approach to choice of law produced the inequitable administration of the laws. Justice Brandeis's whole point in this regard was that the *Swift* rule gave an undeserved substantive advantage to out-of-staters over in-staters. *See Erie*, 304 U.S. at 75. Thus, it is not clear whether the "twin aims" are truly separate considerations or are Siamese twins, linked in pursuit of the same goal.

[126] *Hanna*, 380 U.S. at 470 (emphasis added). The Court did not mention *Woods* in this regard, although Rule 17(b) clearly covered the issue there. But then, the *Woods* Court never cited Rule 17(b) at all. *See* Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

[127] "Here … the clash is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that inhand service is not required in the federal courts." *Id.* In Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974), the First Circuit argued that the *Hanna*

really-regulates-procedure test[128] was the proper test for evaluating the Federal Rules. REA, not *Erie*, governed the legitimacy of the Federal Rules, although both involved vertical choice-of-law issues. Chief Justice Warren contrasted the way *Erie* and REA work.

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[129]

Thus, after *Hanna*, there were alternative vertical choice-of-law analyses. On the Federal Rules side, REA prescribed the inquiry. For other matters, *Erie* dominated, but the Court cautioned against rigidity in applying its lessons, quoting with approval a Fifth Circuit case that warned against a knee-jerk approach and recalled *Byrd* balancing.[130]

Court had misunderstood the intensely substantive purpose of the Massachusetts statute and therefore reached the wrong decision.

[128] *Sibbach*, 312 U.S. at 14. *See supra* notes 75-80 and accompanying text.

[129] *Hanna*, 380 U.S. at 471 (footnote omitted). In fairness, one must note that the Chief Justice undermined the relative clarity of this approach at the very end of the opinion:

> Thus, although a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, . . . it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

380 U.S. at 473-74 (citation and footnote omitted). Regrettably, the Court has never provided very clear guidance about when a Federal Rule "covers the point" and when it does not. *See, e.g.*, Walker v. Armco Steel Co., 446 U.S. 740 (1980), *infra* at notes 132-33 and accompanying text; Gasperini v. Center for Humanities Inc., 518 U.S. 415 (1996), *infra* at notes 149-63 and accompanying text.

[130] "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which [*sic*] relate to the administration of legal proceedings, an area in which the federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the

C. Aftermath

With *Hanna*, basic vertical choice-of-law analysis was in place, but that did not make things easy for the Court. Challenges concerning both the Federal Rules and federal common law continued to arise. In 1980, the Court again confronted the issue that *Ragan*[131] had decided under the outcome-determinative approach: whether Federal Rule 3 (the action commences upon the filing of the summons and complaint) or state law (the action commences upon service of the summons and complaint on the defendant) provides the relevant moment for stopping the statute of limitations. *Walker v. Armco Steel Co.*,[132] reached the same result as *Ragan*, but by a different route. Applying *Hanna*, the Court held that Rule 3 simply did not address the issue. That rule says nothing explicit about statutes of limitations. The state rule therefore governed by default, there being no federal rule on point.[133] This stands in sharp contrast to *Ragan*, where the state rule applied because it was outcome-determinative.

The Court also applied the *Hanna-Walker* approach in *Burlington Northern Railroad Company v. Woods*.[134] The plaintiffs sued Burlington in an Alabama state court to recover damages for personal injuries. Burlington removed and, upon losing a jury verdict, appealed. The Fifth Circuit affirmed without modification and granted the plaintiffs' motion for imposition of a 10% penalty that Alabama law[135] mandated. Burlington took the case to the Supreme Court, arguing that the penalty was unconstitutional. A unanimous Court did not reach the constitutional question, finding instead that Rule 38 of the Federal Rules of

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> Rules. The purpose of the *Erie* doctrine, even as extended in *York* and *Ragan*, was never to bottle up federal courts with outcome-determinative and integral-relations stoppers—when there are affirmative countervailing (federal) considerations and when there is a Congressional [*sic*] mandate (the Rules) supported by constitutional authority."

Hanna, 380 U.S. at 472-73 (quoting Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)) (footnote and internal quotation marks omitted).

[131] 337 U.S. 530 (1949). *See supra* notes 94-95 and accompanying text.

[132] 446 U.S. 740 (1980).

[133] On the other hand, for federal question cases, the filing of the complaint, as described in Rule 3, does mark the stopping of the statute of limitations. *See* West v. Conrail, 481 U.S. 35, 39 (1987).

[134] 480 U.S. 1 (1987).

[135] *See* ALA. CODE § 12-22-72 (1986).

Appellate Procedure[136] controlled to the exclusion of the Alabama statute.

The Court's analysis was straightforward enough; Rule 38 both directly controlled the issue and clashed with the state rule. Rule 38 permits, but does not direct, the appellate court to impose damages and costs if it finds the appeal to have been frivolous. Alabama law, by contrast, leaves the appellate courts no discretion and sets the amount of damages at a fixed 10% of the underlying judgment. In effect, Alabama law erected a conclusive presumption that any losing appeal is frivolous. The Supreme Court found a direct collision[137] and then considered whether the Federal Rule ran afoul of the second sentence of the REA by impermissibly affecting substantive rights.

Here the Court's reasoning was less persuasive. Relying *inter alia* on *Hanna*, Justice Marshall argued that "Rules which [*sic*] incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."[138] The first question was whether Alabama law created any substantive

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[136] "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

[137] "[T]he Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute." *Burlington Northern*, 480 U.S. at 7.

[138] *Id.* at 5. That appears to clash directly with the REA's insistence that federal rules not "abridge, enlarge or modify *any* substantive right. . . ." 28 U.S.C. 2072 (2000) (emphasis added). On the other hand, Justice Marshall relied on *Hanna*'s observation that REA does not require the Federal Rules to have no effect at all on litigants' rights, only that they not affect the substantive rules that will determine what the litigants' rights actually are.

> "Undoubtedly most alterations of the rules of practice and procedure may and do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. . . . The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights."

Hanna, 380 U.S. at 464-65 (quoting Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445-46 (1946) (citation omitted)).

right. The Court concluded that it did not,[139] but one might quarrel with that conclusion because the Court had recognized earlier in the opinion that the Alabama statute had two purposes: "to penalize frivolous appeals and appeals interposed for delay . . . and to provide 'additional damages' as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal."[140] The Court could have viewed the second purpose as substantive, which would have compelled deciding Burlington's due process and equal protection claims.[141]

The last piece of the conceptual puzzle came in 1988. *Stewart Organization, Inc. v. Ricoh Corporation*[142] involved a contract with a forum-selection clause specifying that disputes were triable only in a state or federal court in the Borough of Manhattan in New York City. Stewart sued in an Alabama federal court. Ricoh sought dismissal for improper venue[143] or transfer to the Southern District of New York.[144] The district court denied the motion on the ground that state law governed and that Alabama disfavored forum-selection clauses. The Eleventh Circuit reversed, holding that federal law governed, and the Supreme Court affirmed.

The important thing about *Ricoh* for *Erie* purposes is the manner in which the Court approached the federal statute. Section 1404(a) says

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[139] *Id.* at 8:

> Federal Rule 38 regulates matters which [*sic*] can reasonably be classified as procedural, thereby satisfying the constitutional standard for validity. Its displacement of the Alabama statute also satisfies the statutory constraints of the Rules Enabling Act. The choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves.

[140] *Id.* at 4 (citations omitted).

[141] If the Court had applied the interest analysis approach that its other *Erie* cases exemplified and that the Court later used to decide *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), discussed *infra* at notes 149-63, 220-21 and accompanying text, it would have reached a different conclusion, but that is not the crux of the matter. Once the Court decided that the Alabama statute had no substantive component and that the Federal Rule spoke directly to the point, there was no balancing to be done. The Court's casual conclusion that there was no substantive state right that eliminated the problem with the Rule's validity that might otherwise have existed.

[142] 487 U.S. 22 (1988).

[143] *See* 28 U.S.C. § 1406 (2000).

[144] *See* 28 U.S.C. § 1404 (2000).

nothing about forum selection clauses.[145] One might have expected, because of *Hanna* and *Walker*, that the Court would find that the federal transfer statute did not speak to enforceability of forum-selection clauses. Justice Marshall's opinion for the Court, however, took a different approach from the one used in cases concerning the Federal Rules of Civil Procedure, including *Walker*, which he had written. He noted that § 1404(a) lists several factors the courts should consider in deciding whether to transfer a case. In the majority's view, a forum-selection clause bore heavily (but not dispositively) on whether a transfer would be in the interest of justice. The Court did not insist that the conflict between state and federal law be as direct and unavoidable as *Hanna* and *Walker* had suggested. "[T]he statute, fairly construed, does cover the point in dispute."[146] In *Walker*, Rule 3 did not speak of statutes of limitations and so did not apply on its own terms. In *Hanna*, Rule 4 did specify how service should be made, in direct conflict with state law.[147] In *Stewart*, the clash was more oblique. Alabama law refused to recognize forum-selection clauses. Federal law was silent. Nonetheless, the Court found Alabama law in conflict with Congress's direction that the court deciding a transfer motion consider party and witness convenience and the interest of justice. In effect, statutes get wider interpretive latitude than non-congressional rules.[148]

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[145] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *See* 28 U.S.C. § 1404(a) (2000).

[146] *Stewart*, 487 U.S. at 29.

[147] *See supra* note 127.

[148] That is the point Justice Scalia overlooked in his strong dissent. He argued that the statute did not speak to forum-selection clauses and further that the federal courts could not, "consistent with the twin-aims test of *Erie* . . . , fashion a judge-made rule to govern this issue of contract validity." *Stewart*, 487 U.S. at 33 (Scalia, J., dissenting). In his view, § 1404(a) "looks to the present and the future. As the specific reference to convenience of parties and witnesses suggests, it requires consideration of what is likely to be just in the future, when the case is tried, in light of things as they now stand." *Id.* at 34. He concluded that the majority misapplied § 1404(a) by "import[ing], in my view without adequate textual foundation, a new *retrospective* element into the court's deliberations, requiring examination of what the facts were concerning, among other things, the bargaining power of the parties and the presence or absence of overreaching at the time the contract was made." *Id.* at 34-35. He also saw the majority's approach to the case as incompatible with the fact "issues of contract, including a contract's validity, are nearly always governed by state law." *Id.* at 36. He could find no reason in § 1404(a)'s language or history to depart from that customary approach.

One might quibble with characterizing the Alabama rule as going to validity of the contract. Alabama interprets its statute as making forum-selection provisions unenforce-

The most difficult cases, though, involve neither federal statutes nor federal rules. When those exist, the court's problem is a rather ordinary one of interpretation. The *Erie* doctrine presents its greatest challenges when there is no regulatory material, so that the courts must decide whether to create new federal rules. *Gasperini v. Center for Humanities Inc.*[149] was such a case. Gasperini sought damages for loss of 300 photographic transparencies. He prevailed at trial, the jury returning a $450,000 verdict. Under New York law, appellate courts review jury verdicts and must order new trials if they find the verdict "deviates materially from what would be reasonable compensation."[150] The Second Circuit attempted to follow the New York approach and found the verdict excessive, ordering a new trial unless Gasperini agreed to accept a $100,000 award. The Supreme Court focused on the conflict between the New York approach and the Seventh Amendment,[151] which forbids appellate reexamination of facts determined by juries except as the common law permitted.

Justice Ginsburg's majority opinion noted that "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."[152] She first considered whether the materially-

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able. This allows an Alabama court to retain and adjudicate a contract case even if there is a forum-selection clause in the contract specifying another forum. The contract is otherwise in effect. *See, e.g.*, Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980). One might also disagree with Justice Scalia's characterization of § 1404 as forward-looking only. The statute does refer to convenience and the interest of justice, as he noted, but text suggests no reason to disregard forum selection clauses or other pre-dispute matters that may, after all, give some insight into those two factors.

The more important point, however, is that Justice Scalia looked at the federal statute in *Stewart* through the lens that *Hanna* provided for evaluating a Federal Rule of Civil Procedure. It is a mistake to read statutes with the narrow focus that the Court has prescribed for the Federal Rules, which do not go through the legislative process and require only the passive acquiescence of Congress to go into effect.

[149] 518 U.S. 415 (1996).

[150] N.Y. C.P.L.R. § 5501(c) (McKinney 1995) (current version at N.Y. C.P.L.R. § 5501(c) (McKinney Supp. 2005)).

[151] U.S. CONST. amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

[152] *Gasperini*, 518 U.S. at 427 (footnote omitted).

deviates standard was "outcome affective,"[153] observing that a statutory cap on damages certainly would be substantive for *Erie* purposes. She found that a cap determined by case law was not significantly different. "In sum, § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive."[154] The problem was that New York specified a particular procedure for accomplishing the objective, one that clashed with federal law—and not just any law, but a provision of the Constitution.

The Court found that New York's attempt to limit excessive damages did implicate *Erie*'s twin aims, but it separated New York's substantive goal from the procedure for achieving it. The Court decided that it could serve the substantive objective without violating the Seventh Amendment by having federal trial judges make the excessiveness determination, using New York's deviates-materially standard and operating under traditional powers to grant new trials.[155] Federal law permits granting a new trial if the verdict is against the great weight of the evidence.[156] "This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)."[157]

Gasperini has its share of critics, not least Justice Scalia, whose dissent Chief Justice Rehnquist and Justice Thomas joined.[158] Justice

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[153] *Id.* at 428.

[154] *Id.* at 429.

[155] *Id.* at 433.

[156] *See* FED. R. CIV. P. 59(a) (allowing new trials in jury cases "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States"); Cities Serv. Co. v. Launey, 403 F.2d 537, 540 (5th Cir. 1968); William Ingliss & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981); Motorola, Inc. v. Interdigital Tech. Corp., 121 F.3d 1461, 1470 (Fed. Cir. 1997) (all articulating the "great weight" standard).

[157] *Gasperini*, 518 U.S. at 433 (citing Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935)). The majority was not quite finished, however, for Justice Ginsburg said that the courts of appeals could still review district court determinations for abuse of discretion. *Id.* at 438.

[158] Justice Stevens also dissented. Although he agreed with the majority's approach, he thought Justice Ginsburg reached the wrong conclusion. Noting that the Center had requested a new trial and argued excessiveness, Justice Stevens did not think that ultimate remand to the district court was appropriate. Instead, he concluded that the Court should affirm the Second Circuit's judgment, because "there is no reason to suppose that the Court of Appeals has reached a conclusion with which the District Court

Scalia thought the clash with the Seventh Amendment unavoidable. In his view, the Amendment prohibits any appellate review of verdicts for excessiveness.[159] He further argued that it is impermissible for states to dictate to federal courts whether judges or juries should perform particular functions,[160] relying in part on *Byrd*.[161] He faulted the majority for paying too little attention to the principle that federal appellate courts cannot re-examine facts, including to evaluate excessiveness.[162] His biggest criticism, however, went to the heart of the *Erie* problem: "The Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive. . . ."[163] In short, Justice Scalia did not agree that the matter was substantive for *Erie* purposes.

The point, however, is not whether the majority or Justice Scalia was correct about the matter being substantive or procedural. Instead, it is that nearly six decades after the Court announced *Erie*, it was still possible for the Justices to split so sharply on the issue. There is, however, another and better way to characterize the *Erie* problem and to approach the analysis. The next part suggests that other way and further suggests that the Court has actually, though perhaps unconsciously, been applying it since it decided *Erie*.

IV

THE UNSEEN TRACK

A. A New Approach

At the outset, remember that the *Erie* doctrine is a response to a

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could permissibly disagree on remand. . . ." *Id.* at 441 (Stevens, J., dissenting). Here he misunderstood the majority's position. The Second Circuit reached its conclusion *de novo*. Justice Ginsburg's opinion made clear that that raised insurmountable Seventh Amendment problems. The district court should make the excessiveness determination, and the appellate court can disturb it only if the district court has abused its discretion. Surely viewing the matter differently from the Second Circuit's unwarranted determination is not *ipso facto* an abuse.

Justice Stevens also took the position that the function that the Second Circuit had performed did not clash with the Seventh Amendment for historical reasons that he traced. *Id.* at 441-47. That discussion, however, does not implicate the problem of *Erie* and its application.

[159] *Id.* at 449 (Scalia, J., dissenting).

[160] *Id.*

[161] *Id.* at 463.

[162] *Id.* at 457-58.

[163] *Id.* at 465.

choice-of-law problem, a typical conflict-of-laws issue. The Court, however, did not speak in conflicts terms originally and has since avoided that terminology except for a brief flirtation with it in *Byrd*.[164] Perhaps this is not surprising, since the technique of interest analysis made no formal appearance until the scholarly work of Brainerd Currie suggested it.[165] Yet today, unlike when the Court decided *Erie*, government interest analysis is an important mode of conflicts analysis.[166] It provides both a better explanation of the *Erie* doctrine's past and a better approach to *Erie* issues yet to arise.

A single presumption and a single question underlie the vertical choice-of-law problem. The presumption stems from the history of law

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[164] *See supra* text accompanying note 115.

[165] *See, e.g.*, Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). *See also* SCOLES, ET AL., *supra* note 74, § 2.9, at 25-38 (noting that "Currie's theory dominated choice-of-law thinking in the United States for almost three decades. . . .") (footnote omitted).

On the other hand, for a short while the Court itself had decreed interest balancing with respect to the effect of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, on horizontal choice of law. In Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935), the Court wrestled with when that Clause required a state to apply the law of a sister state. Then-Justice Stone announced that interest analysis was the proper approach:

> [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its [*sic*] own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.
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> . . . Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.

294 U.S. at 547-48. For full-faith-and-credit purposes, the Court abandoned that approach four years later in an opinion that Justice Stone also authored. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), focused only on finding a legitimate forum interest in the application of its own laws, and did not attempt to balance the interests of any other state. Although the Court cited *Alaska Packers* with approval for the proposition that the Full Faith and Credit Clause does not invariably require a state to apply another state's statute in preference to its own, Justice Stone did not use the *Alaska Packers* balancing technique. He did not explain why.

[166] *See supra* note 14.

in the United States from the pre-constitutional period through the present. The post-colonial nation began with only the law that the states used.[167] As federal law developed, some of it displaced state law. One may view the Constitution, particularly Article I, Section 8, as a statement to the newly formed federal government to the effect of "these are the areas in which you may displace state law."[168] Thus, one should begin analyzing any vertical choice-of-law problem by presuming that state law applies. The presumption is rebuttable, to be sure, but state law is the starting point.

The only thing that can rebut the presumption is a dominant federal interest (DFI) that demands displacement of state law.[169] If there is, federal law governs; if there is not, state law remains undisturbed. The *Erie* doctrine's history helps clarify what is and what is not a DFI.

Consider *Erie* itself. Justice Brandeis announced that there was no federal authority in the area of tort law.[170] The Constitution did not permit the federal government, either legislatively or judicially, to cre-

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[167] This included perceived natural law to some degree. *See supra* Part I.

[168] *See supra* notes 21-23 and accompanying text.

[169] I pose this question to my students in class as whether there is a Big Federal Deal (BFD). It may not be as elegant as "dominant federal interest" or "DFI," but somehow it seems easier for students to remember.

[170] *See supra* text accompanying note 64. Some have suggested that *Erie* is not a case about the scope of federal power generally so much as a separation-of-powers case. They appear to take that view on the theory that under the Commerce Clause Congress could have legislated Tompkins' status as invitee, licensee or trespasser because Erie Railroad was an interstate carrier. *See, e.g.*, Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 407 (2002) ("There is little doubt that Congress could have provided a federal answer to that question by statute under the Commerce Clause."); Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1416 (2001) ("If . . . the Court meant that Congress lacks power to enact a specific rule of decision for cases like *Erie*, then this observation is questionable in light of the Court's contemporaneous decisions broadly interpreting the scope of congressional power under the Commerce Clause.") (citing Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974)). In hindsight, that is appealing, the only problem being that the *Erie* Court apparently did not perceive that possibility and did not express itself in such terms. *See* Donald L. Doernberg, *Juridical Chameleons in the "New* Erie*" Canal*, 1990 UTAH L. REV. 759, 795-97. Professor Ely recognized that the *Erie* Court had ruled on the basis of lack of federal competence—in either Congress or the judiciary—to address this area of law, *see* Ely, *supra* note 2, at 704, 706, and the Court itself took that position in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1956) ("*Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.").

ate federal tort law and thus to displace state law.[171] Accordingly, by constitutional definition, there could not have been a DFI. The reservoir of natural law upon which the federal courts had drawn for ninety-six years had dried up with the demise of natural law jurisprudence in favor of positivist jurisprudence.[172] One might conceptualize the death of natural law theory in United States jurisprudence as creating a partial vacuum in areas of law not within the Constitution's grant of power to the federal government. State law filled it by default.

Erie, it turns out, is the easy case. Beginning with *Sibbach* and *Guaranty Trust*, things became more complicated. In both cases, there was federal power; both concerned procedure in the federal courts, an area certainly subject to congressional control.[173] In *Sibbach*, Congress had exercised the power, albeit indirectly, by passing REA and by acquiescing in the rules of procedure that the Court produced.[174] Rules 35 and 37, governing physical and mental examinations and sanctions for failure to comply with discovery rules and orders of the court entered pursuant to them, were at issue. One might regard *Sibbach* as the forerunner of *Hanna v. Plumer*,[175] which directly addressed how to analyze cases involving vertical choice-of-law problems and the Federal Rules of Civil Procedure. In *Sibbach*, however, the Court did not undertake so explicit an inquiry; it simply asked whether the rules "really regulate procedure." Having decided they did, the Court applied them. It implicitly said that the rules, being within REA, were a dominant federal interest.

Guaranty Trust v. York found no such interest. The Court discussed the case in policy rather than constitutional terms, because Congress could have prescribed limitations periods applicable in the federal courts. That Congress had not done so implies that it did not think that there was a DFI.[176] Justice Frankfurter recalled *Erie*'s pol-

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[171] Arguably, the Court forgot that lesson when it decided Boyle v. United Technologies, Inc., 487 U.S. 500 (1988). *See infra* notes 216-19 and accompanying text.

[172] *See supra* notes 27-42 and accompanying text.

[173] *See* U.S. CONST. art. I, §§ 8, 18. *See supra* notes 88-89 and accompanying text.

[174] *See* 28 U.S.C. § 2074(a) (2000) (requiring the Court to propose rules or amendments by May 1 of any calendar year, the changes to go into effect on December 1 of that year unless Congress acts to prevent that).

[175] 380 U.S. 460 (1965). *See supra* notes 119-29 and accompanying text.

[176] There might, of course, be reasons for having a federally prescribed limitation. Limitations periods exist for two purposes. One is to provide repose for the defendant,

icy of not having cases come out differently simply because of the choice of the federal rather than the state forum.[177] That policy helped the Court effectively to conclude that there was no DFI, so state law applied.

In *Byrd v. Blue Ridge Electrical Cooperative*,[178] the Court dabbled in the language of modern conflict of laws analysis, performing a governmental interest analysis to reach its conclusion that distribution of functions between judge and jury in the federal system is a DFI. Justice Brennan's majority opinion did not find a substantive policy underlying South Carolina's decision to have the statutory employee issue tried to the court.[179] He declined to speculate about substantive purposes underlying the state rule and so, as a practical matter, found the state's interest *de minimis*.[180]

On the other side of the balance, the majority found very strong federal interests in having the jury decide the issue. Justice Brennan recited the independent federal judicial system's interest in determining for itself how to allocate trial functions and adverted to the Seventh Amendment as a powerful (but not necessarily controlling) influence. He specifically recognized and subordinated the *Erie* policy of having diversity cases come out the same way in state and federal court.[181]

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see, e.g., Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)—a substantive goal but certainly not a matter of federal concern with respect to a state claim. Second, they prevent the courts from having to adjudicate stale cases, *see, e.g.*, Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965) ("Courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."), a procedural goal that certainly could be a matter of federal concern.

[177] In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a State court.

Guaranty Trust, 326 U.S. at 109.

[178] 356 U.S. 525 (1958). *See supra* notes 102-18 and accompanying text.

[179] *But see supra* note 108, suggesting that the Court did not look very hard for one.

[180] *See id.* at 536.

[181] The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created obli-

Finally, he asserted the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts, . . ."[182] citing a pre-*Erie* case that refused, *Swift v. Tyson* notwithstanding, to apply a state constitutional provision in similar circumstances. In short, the Court found a DFI in the allocation of tasks between judge and jury in the federal courts that overcame both *Erie*'s policy of uniform treatment and the fact that the choice of law might be outcome determinative.

It was not astonishing that the Court balanced state and federal interests when considering vertical choice of law. Only five years after *Erie* and fully fifteen years before *Byrd*, the Court anticipated the technique Justice Brennan employed in *Byrd*, albeit in a case under a grant of jurisdiction other than diversity. *Clearfield Trust Co. v. United States*[183] concerned a government-issued check cashed on a forged endorsement. The theft was discovered and a new check issued to the intended payee. For many months, the government did not notify Clearfield Trust, which had processed the original check, that the government wanted reimbursement.[184] The issue was whether delay in notification barred recovery or whether the bank should have to show prejudice from the delay. The state rule did not require any showing; unreasonable delay *simpliciter* barred the claim. The Court ruled for the government, but the result is not nearly as important as the technique the Court used to reach it.

The Court began by declaring that *Erie* did not apply. It is impor-

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> gations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. . . . Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.
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> We think that in the circumstances of this case the federal court should not follow the state rule.

Id. at 537-38 (citations and footnotes omitted).

[182] *Id.* at 538 (citing Herron v. Southern Pacific Co., 283 U.S. 91 (1931)). *See supra* note 113 and accompanying text.

[183] 318 U.S. 363 (1943). The United States invoked the court's jurisdiction pursuant to Act of Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091, 1091 (current version at 28 U.S.C. § 1345 (2000)).

[184] The check was for $24.20. *Clearfield*, 318 U.S. at 364. History does not record how much the government spent in the recovery effort—our tax dollars at work.

tant, however, that the Court did not say that *Erie* was inapplicable because jurisdiction rested on something other than diversity. Instead, the opinion distinguished *Erie*.

> When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935. . . . The authority to issue the check had its origin in the Constitution and statutes of the United States and was in no way dependent on the laws of . . . any . . . state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.[185]

Erie did not apply because there *was* federal power to issue checks and to determine the rights and obligations that they created. By contrast, the *Erie* Court had declared that there was no federal power with respect to torts.

Erie's inapplicability did not, however, guarantee that federal substantive law principles would govern. The Court made that clear in two ways. First, it did not declare that because *Erie* did not apply, federal law governed *a fortiori*. Second, Justice Douglas recognized that "[i]n our choice of the applicable federal rule we have occasionally selected state law."[186] He went on, however, to explain why using state law would be inappropriate in *Clearfield*, and he did so in the language of interest balancing:

> The issuance of commercial paper by the United States is on a vast scale[,] and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability

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[185] *Id.* at 366-67 (citations and footnote omitted). The first sentence of the quotation stands in sharp contrast to Justice Brandeis's declaration in *Erie* that "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Erie*, 304 U.S. at 78. *See supra* notes 62-68 and accompanying text.

[186] *Clearfield*, 318 U.S. at 367.

of a uniform rule is plain.[187]

The only thing Justice Douglas did not do was to use the term DFI, but it is unmistakable that the Court felt that the federal interest was so overwhelming that no state interests could overcome it.[188]

Hanna v. Plumer[189] and *Stewart Organization, Inc. v. Ricoh Corporation*[190] illustrate the remaining applications of the suggested approach. In *Hanna*, the Court essentially found that a Federal Rule of Civil Procedure that is valid under REA[191] is a DFI. That should not

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[187] *Id.* The Court found the appropriate content for the new federal common law rule it was fashioning in the pre-*Erie* general commercial law that the Court had articulated under the ægis of *Swift*. *See supra* note 66.

[188] One should conclude that either having the federal government as a party or having federal commercial paper involved or both (and both were the case in *Clearfield*) thereafter meant that there was automatically a DFI. In Bank of America Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956), the United States called some bonds for early payment. Some of Bank of America's bonds disappeared the day after the call. Parnell cashed them four years later. Bank of America sued for conversion, naming as defendants Parnell, an associate and the banks that had processed the bonds after presentment. The choice-of-law issue concerned who had the burden of proof with respect to good faith in presenting the bonds. Under state law, the burden was on the presenters to show good faith, but federal law placed the burden on Bank of America to show its absence. The Third Circuit ruled for Parnell, relying on *Clearfield*. A seven-to-two Court reversed. Justice Frankfurter's majority opinion sounded miffed at the Third Circuit's handling of the matter. "The Court of Appeals misconceived the nature of this litigation in holding that the *Clearfield Trust* case controlled. . . . The basis for this decision was stated with unclouded explicitness." *Id.* at 33. In essence, the Court explained that the conversion action involved a property dispute—whether Parnell or Bank of America owned the bonds when they were presented—and that state law governed property law claims, including burden of proof, particularly when only private parties were involved. In other words, there was no DFI. *Cf.* T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964) (dispute over ownership of royalty rights under a copyright was a matter of state law and did not present a federal question within the meaning of 28 U.S.C. § 1331).

Even when the United States is a party *and* federal loans are involved, state law may nonetheless provide the content of the rule of decision. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (Federal law should govern disputes arising out of SBA and FHA loans, but state law provides the content because the government individually negotiates loan agreements with the borrowers. Contrast *Clearfield*, which makes clear that the federal government issues checks *en masse*, without individual negotiation. The federal interest in uniformity in *Clearfield* was accordingly not present in *Kimbell Foods*. In other words, there was no DFI.).

[189] 380 U.S. 460 (1965). *See supra* notes 119-30 and accompanying text.

[190] 487 U.S. 22 (1988). *See supra* notes 142-46 and accompanying text.

[191] 28 U.S.C. § 2072 (2000). *See supra* note 138.

have surprised anyone; when there is a clash between federal and state law, federal law always prevails because of the Supremacy Clause[192]—the constitutional thumb on the scales of the interest balancing in which the Court has engaged. True, the *Hanna* Court specified that a Federal Rule of Civil Procedure, must speak "with unmistakable clarity"[193] to trump a state rule, but that is merely a determination of the Rule's scope. As *Hanna* noted, previous cases occasionally declined to apply a federal procedural rule on the ground that it did not speak to the issue at hand.[194] If a Federal Rule does "cover[ ] the point in dispute,"[195] it governs. Put another way, the Supremacy Clause prescribes that the federal interest in any authorized rule of federal law automatically outweighs any state interest in a conflicting state rule. The Constitution has weighed the interests and struck the balance, and the federal courts need not—indeed, cannot—engage in any supplemental weighing.

Hanna also contained a phrase to which the Court would refer explicitly far more often than to *Byrd* balancing. Confirming the diminished role of *Guaranty Trust*'s outcome-determinative test, Chief Justice Warren emphasized *Erie*'s twin aims: discouraging forum shopping and avoiding inequitable administration of the laws.[196] The interest balancing approach the Court has used accommodates both interests.[197]

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[192] U.S. CONST. art. VI, § 2. This is subject to the Clause's requirement that the federal rule under "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . ." Thus, as *Stewart* demonstrates, a statute need only pass constitutional muster, whereas a federal rule (whether stemming from the Supreme Court as in the case of the Federal Rules of Civil Procedure, or from an executive agency pursuant to a grant of rule-making authority from Congress) must additionally satisfy the limitations of the statute that authorizes it. For the Federal Rules of Civil Procedure, the relevant statute is REA. *See supra* text accompanying note 129.

[193] *Hanna*, 380 U.S. at 470. *See also id.* at 472, referring to the "direct collision" between the state and federal provisions; Walker v. Armco Steel Corp., 446 U.S. 740, 749 & n.9 (1980); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 n.4 (1988) (both referring to "direct collision" as the standard when a Federal Rule of Civil Procedure is involved). Regrettably, the Court itself has not spoken with unmistakable clarity about when that sort of clash exists or when the Federal Rule in fact "covers" the point in dispute, s*ee supra* note 129, and candor compels recognizing that the technique suggested here does nothing to eliminate that particular *Hanna* problem.

[194] *See supra* text accompanying note 126.

[195] *Hanna*, 380 U.S. at 472.

[196] *See supra* notes 124-25 and accompanying text.

[197] This assumes that the interests are distinct and separable, which they may not

Swift encouraged forum shopping by allowing federal courts to apply different substantive rules from those that the state courts would have used. Cases turned purely on forum identity, which rested on the parties' citizenship. That created the inequity of which Justice Brandeis spoke,[198] because out-of-state parties gained a forum-selection advantage solely by reason of their citizenship.

By contrast, the interest balancing approach makes the choice of law turn on the state and federal governments' interest in applying their respective rules, not on the accident of the parties' citizenships. It is a rational rather than a whimsical system of choosing law. That is not to say that it is necessarily precise or easily predictable; no one who has followed interest analysis since Brainerd Currie called attention to the technique could say that. It does, however, make the choice turn on considerations external to the parties' desire to be in one forum or another. "There is nothing inequitable about choosing one law over another if the means is itself permissible."[199] Moreover, once a federal common law rule exists, the federal rule is binding even in the state courts because of supremacy, diminishing the incentive to forum shop.[200]

Stewart is entirely consistent with this approach. It involved interpreting a statute, not a rule of civil procedure, but the same supremacy mechanism was clearly operating; the Court simply failed to articulate it, as had failed to do in *Hanna*. The difference between *Stewart* and *Hanna* is the latitude the courts have in interpreting the underlying federal principle. Regrettably, the Court echoed *Hanna* in asking whether "the statute covers the point in dispute."[201] That obscured the fact that the Court will infer congressional intent when interpreting a statute but will not rest on inference about the scope of a Federal Rule. Thus, in *Hanna*, Rule 4 prescribed the manner of service, and the clash with the more restrictive Massachusetts provision was unavoidable. By contrast, *Walker v. Armco Steel Co.*,[202] which resurrected the statute-

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be. *See supra* note 125.

[198] *See supra* note 72.

[199] Undated letter received in April, 2006, from Professor David I. Levine to the author (on file with the author).

[200] *See infra* note 240 and accompanying text.

[201] *Stewart*, 487 U.S. at 26. *See supra* text accompanying note 126.

[202] 446 U.S. 740 (1980).

of-limitations problem *Ragan*[203] addressed, refused to apply Rule 3 on the ground that the Rule said nothing about statutes of limitations and how to stop them from running out.

Federal statutes are different. The Court rarely requires Congress to legislate in read-my-lips terms.[204] *Stewart* reflects that difference in interpretive approach. "If Congress intended to reach the issue before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter. . . ."[205] The Court found that 28 U.S.C. § 1404 governs the effect of forum selection clauses in contracts despite a state law forbidding them. The language the Court used is significant: "We believe that the statute, *fairly construed*, does cover the point in dispute. . . . The flexible and individualized analysis Congress prescribed in § 1404(a) . . . encompasses consideration of the parties' private expression of their venue preferences."[206] Consideration, however, is not dictation. Under state law, the forum-selection clause was disallowed; under federal law it was not. The federal statute prevailed. But why should that be a shock? The Supremacy Clause says that any valid federal law or rule

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[203] *See supra* notes 94-95 and accompanying text.

[204] This is one of those circumstances in which the exceptions prove the rule. For example, there are two situations in which the Court has required Congress to be absolutely explicit. The first involves the states' Eleventh Amendment immunity from having to defend civil actions in the federal courts. *See* U.S. CONST. amend. XI. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), held that Congress may, in legislating under § 5 of the Fourteenth Amendment, abrogate the states' Eleventh-Amendment immunity from federal suit. Nine years later, Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), ruled that an authorization of suits against "any recipient" of funds under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2002), did not permit a private federal action against a state agency, referring to "the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." *Id.* at 242.

The Court has followed a similarly restrictive path with respect to implying private rights of action in federal statutes. *Compare*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), and Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33 (1916), *with* California v. Sierra Club, 451 U.S. 287 (1981), and Thompson v. Thompson, 484 U.S. 174 (1988).

[205] *Stewart*, 487 U.S. at 27.

[206] *Id.* at 29-30 (emphasis added). Thus, the Court noted that the district court should consider the forum-selection clause as a part of "the convenience of parties and witnesses, in the interest of justice. . . ." 28 U.S.C. § 1404(a) (2000). The Court has made clear that it will not *construe* a Federal Rule of Civil Procedure in making choice-of-law decisions. That is the effect of the "unmistakable clarity," and "direct collision" requirements, *see supra* note 193, the Court has imposed.

trumps any inconsistent state provision. The federal standard is, by constitutional definition, a DFI.

The difficult cases have no federal regulatory material—constitutional provision, statute or rule. Yet even here, the underlying presumption and question remain the same: state law governs unless there is a DFI. The difficulty arises because the courts must figure out for themselves if there is a DFI.[207] Such cases sometimes divide the Court, but history shows that it is capable of making those determinations.

Byrd[208] is in that mold. The Court avoided a constitutional issue by implying that the Seventh Amendment did not control.[209] There was, therefore, no regulatory material. Nonetheless, the majority found that the federal interest in regulating procedure in federal courts overcame South Carolina's preference for trying the issue of whether the plaintiff was a statutory employee to a judge.[210]

In *Banco Nacional de Cuba v. Sabbatino*,[211] the Cuban government had expropriated a sugar crop that a Cuban corporation had contracted to sell to an American company. After delivery of the expropriated crop, the purchaser paid Sabbatino as receiver for the original owner, rather than the Cuban government. Banco Nacional, a government instrumentality, brought a diversity action sounding in conversion to recover the money. The issue was whether the act-of-state doctrine[212]

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[207] One may suspect at times that declaration of a DFI is merely a conclusion rather than the end product of careful analysis; the cases vary. In *Clearfield Trust*, for example, Justice Douglas made a plausible case that the obligations of the federal government on its own commercial paper issued in bulk could not rationally turn on the law of whatever state the paper was in when a problem arose. *See supra* notes 183-88 and accompanying text. On the other hand, Justice Scalia's declaration for the five-to-four majority in *Boyle v. United Technologies, Inc.*, 487 U.S. 500 (1988), is more difficult to swallow, particularly because on six occasions Congress had considered, but not enacted, a federal rule similar to the one the Court announced. Congress, at least, did not seem to perceive a DFI. *See infra* notes 216-19 and accompanying text.

[208] *See supra* notes 102-17, 178-82 and accompanying text.

[209] Justice Brennan adverted to the "influence—if not the command—of the Seventh Amendment. . . ." *Byrd*, 356 U.S. at 537.

[210] *See supra* notes 113-17 and accompanying text.

[211] 376 U.S. 398 (1964).

[212] "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Id.* at 401.

supported the Cuban government's claim to ownership of the crop. Although the Court noted that the issue might come out the same way under either New York or federal law, it went out of its way to find a DFI in foreign relations that compelled the governing law to be federal.[213]

In 1988, the Court found a DFI in another area. David Boyle died when his marine helicopter crashed off the Virginia coast. His father brought a wrongful-death diversity action against United Technologies (parent of Sikorsky Division, the manufacturer). He argued two theories of liability, first that the crash occurred because Sikorsky negligently repaired the helicopter, and second that Sikorsky defectively designed the co-pilot's emergency escape system, which prevented Boyle's escape after the crash.[214] Although a jury found for the plaintiff, the Court of Appeals reversed. The Fourth Circuit first found that Boyle had not carried his burden of proof with respect to the defective repair. More significantly for present purposes, the court ruled that Boyle could not rely on defective design because the court had that day recognized a military contractor defense,[215] which provided United Technologies with immunity.

When *Boyle v. United Technologies, Inc.*[216] reached the Supreme Court, a five-to-four majority affirmed. Justice Scalia's majority opinion found both that "the procurement of equipment by the United States is an area of uniquely federal interest . . ."[217] and that there was a "significant conflict . . . between an identifiable federal policy or inter-

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[213] Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

> [W]e are constrained to make it clear than an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.

Id. at 423-25.

[214] The escape hatch opened outward. That is great . . . except when the craft is under water.

[215] *See* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986).

[216] 487 U.S. 500 (1988).

[217] *Id.* at 507.

est and the [operation] of state law. . . ."[218] So saying, the Court found (over Justice Brennan's vigorous dissent)[219] that Virginia's tort law, which would have allowed recovery on the plaintiff's defective-design theory, had to yield to the military contractor defense that the Court recognized, following the Fourth Circuit's lead. The point here is not whether the majority was justified in finding the federal interest predominant; it is rather that *Boyle* is another example of a DFI preempting a substantive state rule.

Even *Gasperini* yields to the DFI approach. As the majority opinion noted, the New York statute contained a substantive goal wrapped in a procedural approach. The split result that the majority adopted was difficult to explain in traditional *Erie* terms, but it is much easier in the context of interest balancing on an issue-by-issue basis. With respect to New York's desire to limit excessive jury awards, there was no DFI.[220] The underlying claim was not federal, and there was no reason for the federal government to care whether tort awards were large or small, excessive or inadequate. When it came to the mechanism for determining excessiveness, however, there was a DFI. Just as allocating functions between judge and jury was a DFI in *Byrd*, in *Gasperini* allocating functions between trial and appellate courts was a matter on which the Supreme Court was unwilling to take dictation from the states. From an interest-analysis perspective, *Gasperini* is indistinguishable from *Byrd*, and both make perfect sense.[221]

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[218] *Id.* (citation and internal quotation marks omitted).

[219] Justice Brennan disagreed about the significant conflict between state law and federal interests. He argued that the majority's decision violated separation of powers, not least because Congress had twice considered limiting the government contractors' liability and had considered indemnifying such contractors against civil liability on four other occasions. None of the legislation passed. *See id.* at 515 & n.1 (Brennan, J., dissenting).

[220] Justice Scalia thought otherwise. To him, the DFI that would have justified ignoring the New York law *in toto* was essentially identical with that in *Byrd*—the responsibility of the federal courts to allocate functions among juries, trial judges and appellate courts as required by federal law. *See Gasperini*, 518 U.S. at 462 (Scalia, J., dissenting). He thought that allowing the state substantive standard to govern "bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system." *Id.* at 467.

[221] Perhaps it stretches the point, but *Byrd* also resembles *Gasperini* in another way. There was no federal interest in *Byrd* in whether the plaintiff was limited to the workers compensation award or could recover in common law tort, and the Court never suggested that there was.

Burlington Northern is more difficult to evaluate from this perspective. Recall that

The Supreme Court has *never* acknowledged the technique it uses to resolve vertical conflicts. It is interest balancing, nothing more, and it is a simple process except when there is no federal regulatory material.[222] If there is no federal authority under the Constitution, state law must govern under the rule of *Erie*. All remaining cases assume that there is such authority. If a federal constitutional provision or a federal statute or any other authorized federal rule or regulation speaks to the issue, it must govern. If applies, it must govern. In all those variations, the Supremacy Clause commands that the balance is on the federal side.

Only if there is no federal regulatory material do the federal courts face a difficult decision—the "relatively unguided *Erie* choice" to which *Hanna* referred.[223] Sometimes, as *Clearfield*, *Byrd*, *Banco Nacional*, *Boyle* and *Gasperini*'s procedural aspect demonstrate, the Court will identify a DFI that requires making federal common law. Other times, as exemplified by *Guaranty Trust*, *Parnell*, *Walker* and *Gasperini*'s substantive aspect, the Court will decline. Separation of powers becomes a powerful consideration in such cases. Various Justices have explained that although Congress has great latitude to declare a DFI, being constrained only by the Constitution, the Court must be more restrained.[224] It will act only if the federal interest is overwhelming,

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Alabama had expressed two interests underlying its mandatory affirmance penalty statute: deterring frivolous appeals and compensating money-judgment creditors for delay in recovering on the judgments. One might certainly argue, *à la Byrd*, that Alabama had no legitimate interest in whether the federal courts heard frivolous appeals, but it is harder to say that Alabama's policy of compensating money-judgment creditors for delays in collection occasioned by fruitless appeals is not both substantive and a matter of important state policy. The Supreme Court might have agreed with this observation had it done an analysis similar to that in *Gasperini*, but instead it simply declared that there were no state substantive interests at stake, avoiding serious analysis under the second sentence of the Rules Enabling Act, 28 U.S.C. § 2072 (2000). *See supra* notes 138-41 and accompanying text. The technique is a bit reminiscent of Justice Brennan's approach in *Byrd*, when he failed to consider seriously why the state might have had the rule it did. *See supra* note 108.

[222] One can represent the analytical process in a flowchart. *See* Appendix A.

[223] *Hanna*, 380 U.S. at 471.

[224] This distinction shows up particularly well in the Court's increasingly narrow view of when it is appropriate to imply a private right of action in a federal statute or constitutional provision. Justice Powell was the standard-bearer of this approach, beginning with his dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979). Justice Scalia, concurring in Thompson v. Thompson, 484 U.S. 174, 192 (1988), where the Court refused to imply a private right of action in the Parental Kidnapping Prevention Act, said "we should get out of the business of implied private rights of action altogether." As Pro-

largely because the Justices do not see their role as making policy.[225]

The DFI approach explains the results in the sixty-eight years of *Erie* jurisprudence, with less contorted reasoning than the Court has managed. There is another advantage as well: in doing the DFI interest analysis, it is not necessary to label the state and federal rules as either substantive or procedural. To be sure, if the matter is traditionally viewed as substantive, there is little likelihood in a diversity case that there will be a DFI.[226] By the same token, if the matter is typically procedural, it is more likely (but certainly not inevitable[227]) that

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fessor Chemerinsky noted, "Advocates of this position maintain that Congress alone has the power to authorize private rights of action and that the Court oversteps its bounds when it both creates the basis for the suit and awards a remedy under it." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3, at 388 (4th ed. 2003) (footnote omitted).

[225] " 'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress[,]' not the federal courts." Atherton v. FDIC, 519 U.S. 213, 218 (1997) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)). *See also, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983) ("We sit as judges, not legislators, and the wisdom of the decision . . . is best left to the States."); Cannon v. University of Chicago, 441 U.S. 677, 730-31, 743 (1979) (Powell, J., dissenting):

> . . . Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy. . . . *Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch.

See also Gregg v. Georgia, 428 U.S. 153, 174-75 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) ("While we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.); Southern Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 794-95 (1945) (Black, J., dissenting):

> The balancing of these probabilities, however, is not in my judgment a matter for judicial determination, but one which [*sic*] calls for legislative consideration. Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which [*sic*] govern the people. That at least is the basic principle on which our democratic society rests.

The Justices do not always agree about what is overwhelming and what is not. *Boyle* is a perfect example of a clash on that point. *See supra* notes 216-19 and accompanying text.

[226] That is not to say there never is; that clearly would be wrong, as *Clearfield*, *Banco Nacional* and *Boyle* demonstrate. *See supra* notes 211-19 and accompanying text.

[227] *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *See supra* notes 81-95 and accompanying text. *Guaranty Trust* is a particularly good case for demonstrating the inutility of the labels. Under outcome-determinative analysis, statutes of limitation became substantive so that the case would reach the same result in state or federal court. Had more than one state been involved, there would have been a question of which state's

there may be a DFI.[228] The labels themselves, however, are beside the point. Even when properly and uncontroversially applied, they are flawed predictors of how the Court will resolve a vertical conflict. That being the case, there is little reason to strain to apply one or the other; it certainly does not end the inquiry or even advance the analysis very much to do so.

B. Scholarship and the Court's Lack of Awareness

Since 1938, the Court has analyzed its vertical choice-of-law cases with its goals relatively firmly in mind, but without much self-awareness about the process it uses to achieve them. The only explicit acknowledgement of the interest balancing process came in *Byrd*, and as Professor Rowe has pointed out, the Court has not referred many times to that language, relying far more often on the "twin aims" formulation of *Hanna*.[229] That has obscured what is actually going on, and it has caused scholarship to focus too much on what the Court says and not enough on what it does.

Professor John Hart Ely contributed one of the most well-known articles about *Erie*, discussing what he saw as *Erie*'s "irrepressible myth."[230] His theory was that

> the indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of "the Erie doctrine" or "the Erie problem," has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation.[231]

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limitation period to use. "Traditional conflicts law characterized statutes of limitations as procedural because it is 'the purpose of a statute of limitations . . . to protect both the parties and the local courts against the prosecution of stale claims.' " SCOLES ET AL., *supra* note 74, § 3.9, at 129 (quoting AMERICAN LAW INSTITUTE, RESTATEMENT, SECOND, CONFLICT OF LAWS § 142, cmnt. (d) (1971)) (footnotes omitted). Thus, it would have been possible for the same state limitations period to apply because it was procedural for horizontal choice-of-law purposes but substantive for vertical choice-of-law purposes. Small wonder that first-year law students roll their eyes when trying to make sense of the *Erie* doctrine.

[228] *See, e.g.*, Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525 (1958). *See supra* notes 102-16, 178-82 and accompanying text.

[229] *See supra* note 125.

[230] Ely, *supra* note 2.

[231] *Id.* at 697-98.

He saw the inquiry subdivided into parts governed, respectively, by the Constitution, RDA, and REA.

> The United States Constitution . . . constitutes the relevant text only where Congress has passed a statute creating law for diversity actions, and it is in this situation alone that Hanna's "arguably procedural" test controls. Where a nonstatutory rule is involved, the Constitution necessarily remains in the background, but is functionally irrelevant because the applicable statutes are significantly more protective of the prerogatives of state law. Thus, where there is no relevant Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Enabling Act and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by the Rules of Decision Act, the statute construed in Erie and York. Where the matter in issue is covered by a Federal Rule, however, the Enabling Act—and not the Rules of Decision Act itself or the line of cases construing it—constitutes the relevant standard.[232]

Without disagreeing with Professor Ely's general hierarchical formulation, I suggest that it is nonetheless possible (and preferable) to view the vertical choice-of-law inquiry as subsuming the subdivisions to which he referred. Each of the three measuring rods he discussed operates in aid of the Constitution's only choice-of-law rule with respect to vertical conflicts:[233] the Supremacy Clause. That Clause is quintessentially a choice-of-law rule; that is its only purpose. It teaches that whenever federal law legitimately exists, it trumps inconsistent state law. The three referents that Professor Ely specified are measures of legitimacy for federal law.

Professor Ely's view is certainly not erroneous. It merely focuses exclusively on the trees (each worth careful attention in its own right) without giving overall consideration to the forest. The Constitution is the only test of legitimacy for acts of Congress. RDA and REA, as constitutional exercises of congressional power with respect to the federal judiciary's functioning, are the appropriate legitimacy tests for nonstatutory federal rules in the federal courts. The fact remains that the overarching questions are whether the Constitution *allows* federal law

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[232] *Id.* at 698.

[233] With respect to horizontal conflicts, both the Full Faith and Credit Clause and the Fourteenth Amendment's Due Process Clause come into play. *See generally* CURRIE, ET AL., *supra* note 14, Chapter 3.

on a particular issue to exist, whether there *is* federal law on the issue, and, if not, whether the federal courts should *create* federal law.

Professor Ely's approach seems also to be a bit underinclusive, because it does not address the phenomenon of federal law controlling substantive issues in (admittedly rare, but certainly not unheard of) diversity cases. He took the position that

> When there is no Federal Rule, and as a result the Rules of Decision Act constitutes the controlling text, the court need ordinarily not concern itself with whether the federal rule urged by one party, or the state rule urged by the other, is most fairly designated substantive or procedural. The test is whether the choice between the two is material in the sense *Hanna* indicated, and that is not a function of the goals the rulemakers on either side were pursuing.[234]

This language strongly connotes that if applying a federal rule might adversely affect the twin aims of the *Erie* doctrine, the choice-of-law decision must be in favor of state law. Yet, this is demonstrably not so. In *Banco Nacional de Cuba v. Sabbatino*[235] and *Boyle v. United Technologies, Inc.*,[236] both diversity cases, the Supreme Court directed application of federal judge-made rules to issues that were substantive by any measure and that implicated *Erie*'s twin aims.[237]

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[234] Ely, *supra* note 2, at 722-23.

[235] 376 U.S. 398 (1964). *See supra* notes 211-13 and accompanying text.

[236] 487 U.S. 500 (1988). *See supra* notes 214-19 and accompanying text.

[237] In *Banco Nacional*, had plaintiff and defendant shared citizenship, the case would have gone forward in the New York courts. They apparently would have recognized the act-of-state doctrine, but might have applied it as a matter of state, not federal law. That would have made a difference, because if a state "misapplies" state law, the case is not reviewable in the Supreme Court; that court lacks jurisdiction under 28 U.S.C. § 1257 (2000). *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935). *See also* Murdock v. City of Memphis, 187 U.S. (20 Wall.) 590 (1875) (no statutory authorization for Supreme Court to review issues of state law). For the issue to be reviewable, the underlying law would have to be federal; that is the importance of the *Sabbatino* Court making it clear that the act-of-state doctrine must be a matter of federal law.

In *Boyle*, the effect is even more dramatic. If *Boyle* had proceeded under Virginia law, the Virginia courts would not have recognized the federal-contractors'-immunity defense that the Fourth Circuit had created the same day it decided *Boyle*, and Boyle would have recovered. The Supreme Court might have elected to review and to declare that the Fourth Circuit's immunity rule pre-empted Virginia's law, but the incentive to forum shop is clear.

Or did they? Before *Erie*, there were two types of federal judge-made law. First, there was the federal general common law created on *Swift*'s authority. That law, though created by a branch of the federal government, was nonetheless not authoritative for supremacy purposes,[238] which is why the states were, to paraphrase Justice Brandeis, free to persist in their own opinions on the same legal issues.[239] Second, there was some one might call genuine federal common law—judge-made principles that were federal for supremacy purposes (and therefore binding on the state courts), as *Sabbatino* itself made clear.[240] Thus, declaration of a principle of genuine federal common law, whether before or after *Erie*, did not risk the perceived evils of forum shopping and inequitable administration of the laws. Those came from lack of vertical uniformity in the law applied to non-federal issues by state and federal courts. Supremacy ensured that with respect to genuine federal common law, there would be vertical uniformity, and *Erie* recognized both the extent and the limits of that choice-of-law rule and confirmed that RDA was consistent with that view.[241]

There is one more place in which I see Professor Ely's approach as less illuminating than it might be. In highlighting *Hanna*'s focus on REA as the appropriate test for the validity of a Federal Rule of Civil

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[238] That is, the federal courts and the principles of general common law that they discovered and articulated had the same precedential status as the state courts and the principles of general common law that they announced.

[239] *See supra* notes 54-61 and accompanying text.

[240] *Banco Nacional*, 376 U.S. at 426:

> The Court in the pre-*Erie* act of state cases, although not burdened by the problem of the source of applicable law, used language sufficiently strong and broadsweeping to suggest that state courts were *not* left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under *Swift v. Tyson* . . .).

See supra notes 211-13 and accompanying text. *See also, e.g.*, Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5 (N.Y. 1984) (recognizing *Sabbatino* as authoritative).

[241] *See* Ely, *supra* note 2, at 715:

> [T]he problem reduces itself to a choice of uniformities, specifically a choice between horizontal uniformity among all the federal courts and vertical uniformity between the federal and state courts of a given state. But that choice was at the heart of the disagreement between *Swift* and *Erie*, and *Erie* signaled a recognition that although the promotion of one kind of uniformity inevitably sacrifices the other, the Rules of Decision Act had made a choice, and had chosen vertical uniformity.

Procedure and RDA as the test for everything else,[242] Professor Ely failed to account for *Byrd*. The conflict of laws involved in that case[243] clearly implicated what the *Hanna* Court would later characterize as the twin aims of *Erie*. It takes no great leap of imagination to anticipate that a litigant might choose the federal forum precisely to get a jury trial—not available in the state's courts—on a critical issue in the case. In any diversity case, then, the possibility for the discrimination between citizens and non-citizens that both *Erie* and *Hanna* discussed would exist. Applying Professor Ely's test would lead to the conclusion that the state rule should apply, yet *Byrd* demonstrates that it does not. The correct test, which the Court used in *Byrd* but has not otherwise articulated, is whether there is a DFI. *Byrd* found that allocating work between judge and jury in the federal courts is a DFI. *Hanna*, articulating the twin-aims concern several years later, by no means disapproved *Byrd* or its technique; it simply said that when there is a Federal Rule of Civil Procedure, *Byrd*'s (or, indeed, any) RDA analysis was inappropriate. This shows how the Court's lack of awareness of its own reasoning process (and concomitant failure to articulate that process in clear terms) has clouded what it is really doing and misled those who have tried to analyze and rationalize the Court's *Erie* decisions on the Court's own terms.

Having agreed with Professor Rowe's general evaluation of *how* the Court is doing in this area,[244] I must diverge from his overall view of *what* the Court is doing. His view is that *Byrd* is of minimal importance. "Whatever the lower federal courts were doing, the Supreme Court never returned to *Byrd*-style balancing[,] and the last time before *Gasperini* that a Court majority cited *Byrd* was in 1977, in a *per curiam* opinion. . . ."[245] I see it differently; in my view the Court has never departed from *Byrd*-style balancing and, in fact, has been using it at least since the *Clearfield* decision in 1943.[246] Professor Rowe's thesis is that

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[242] *See supra* note 234 and accompanying text.

[243] The conflict was whether Byrd was a statutory employee for purposes of South Carolina's workers compensation law, which limited recovery to the statutory amount and prevented recovery on any common law theory. *See supra* text accompanying note 104.

[244] *See supra* note 9 and accompanying text.

[245] Rowe, *supra* note 8, at 986 (footnote omitted).

[246] *See supra* notes 183-221 and accompanying text. I realize that this may seem heretical to my colleague.

Hanna's articulation of the twin aims of the *Erie* doctrine is the approach the Court has used since 1965.[247] He implies that *Hanna*'s twin-aims approach and *Byrd*'s balancing are mutually exclusive alternatives.[248] I suggest that the two operate together. *Byrd* balancing

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> [F]or evaluating arguments made after the Court's latest *Erie-Hanna* decision about whether it did nor did not mark a major departure, it is worth observing that anyone who in (at least) the last ten or so years had thought—or worse, taught—that *Byrd* was the dominant approach with current sanction by the Supreme Court for general application in cases involving judge-made federal procedural law had not been paying close attention to the Court's recent decisions.

Rowe, *supra* note 8, at 987. I plead guilty as charged, for reasons already explained, *see supra* notes 165-228 and others that will shortly follow. *See infra* notes 248-50 and accompanying text.

[247] *See, e.g.*, Rowe, *supra* note 8, at 998 (discussing *Gasperini* and observing that "it is significant that the discussion in part III.A on the choice of review standard relies entirely on the *Hanna* 'twin aims' rendition of *Erie* and *York* and—like every other Supreme Court invocation of the 'twin aims' test,—conspicuously omits *Byrd*.") (footnotes omitted).

[248] *See id.* at 1014:

> As best we may be able to tell on the basis of *Gasperini* itself and subsequent lower-court decisions, the *Hanna* "twin aims" approach remains applicable to such decisional-rule cases—unless an "essential characteristic" of the federal judicial system presenting a "countervailing federal interest" is involved. In such cases *Byrd* and *Gasperini* call for a broadening beyond the "twin aims" version of "outcome-determination" analysis to include consideration of the nature and weight of the state's interest in application of its own rule in federal court, with particular focus on whether it is "bound up with" clearly substantive state-law rights and an eye to whether the state or federal interest should prevail or if the two can be accommodated.

I think it is fair to say that Professor Rowe is not a great fan of *Byrd* balancing, for he quotes a leading treatise:

> [T]here is no scale on which the balancing process called for by the [*Byrd*] Court can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the value of preserving uniformity of result with the state court. Even if there were such a scale, the weights to be placed upon it must be whatever the judges say they are.

Id. at 1010 (citing 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4508, at 242 (2d ed. 1996)). Here I can agree wholeheartedly with Professor Rowe, but the criticism is applicable to all qualitative balancing processes. Boyle v. United Technologies, Inc., 487 U.S. 500 (1987), *see supra* notes 214-19 and accompanying text, demonstrates how posited federal interests may appear certain and overwhelming to some while appearing non-existent or ephemeral to others. As Dean Larry Kramer has pointed out, "The Second Restatement [of Conflict of Laws] is the most widely used alternative to

and *Hanna*'s twin aims operate on different levels in service of the same goal. *Hanna*'s expression is in the nature of a mission statement; *Byrd* balancing is the method that the Court has used to achieve it. The goal is to avoid vertical forum shopping and the inequity between citizens and non-citizens that Justice Brandeis identified in *Erie*. The Court achieves that goal by refusing to displace state law (whether substantive or procedural) unless there is some dominant federal need to do so—hence the balancing approach. The underlying presumption that state law applies to every issue,[249] the decision in *Gasperini* and the whole of the *Erie* doctrine reflect deference to state law by the federal judiciary and exemplify a variation on the conflict-of-laws concept of *dépeçage*.[250] That term ordinarily refers to choices of law involving equally authoritative sources—different states. In the *Erie* context, *dépeçage* calls for applying state laws to some issues and federal laws to others, keeping the twin aims firmly in the courts' sights.

Conclusion

The Court's failure to realize how it actually approaches vertical choice-of-law questions has made the *Erie* problem look harder than it really is. The Justices have never taken the proverbial step back and focused on the *process* they have been using instead of simply looking at the issues presented by particular cases. There is no mystery here. There appears to be only because the Court has groped toward its individual case conclusions afflicted by an exceptionally restrictive form of tunnel vision.

State law will apply to any issue unless federal law trumps it via the Supremacy Clause. In any situation where there is a federal constitutional, statutory or regulatory provision that addresses the issue,[251] supremacy decides the choice-of-law issue; it makes the extant

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the traditional approach, although this may be only because it is so amorphous that courts commit themselves to nothing by adopting it." LARRY KRAMER, TEACHER'S MANUAL TO ACCOMPANY CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 89 (6th ed. 2001). For better or worse, courts balance interests regularly, despite the vagueness of such approaches, presumably because balancing seems better than the Procrustean rigidity of rules that allow no exercise of judgment in individual cases.

[249] *See supra* text accompanying note 167.

[250] BLACK'S LAW DICTIONARY 469-70 (8th ed. 2004): "[French 'dismemberment'] A court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis."

[251] Recall, though, that a Federal Rule of Civil Procedure (as opposed to a federal statute) must explicitly resolve the issue. *Compare* Hanna v. Plumer, 380 U.S. 460 (1965), *and* Walker v. Armco Steel Co., 446 U.S. 740 (1980), *with* Stewart Org., Inc. v.

federal rule automatically a DFI. In the absence of such a provision, the federal courts must determine whether there is, nonetheless, some DFI that requires the court to displace state law by creating a federal rule. That necessitates examining whether the issue involves an area of unique federal interest *and* whether there is a significant conflict between the federal interest and state law.[252] That inquiry can never have the simplicity of a bright-line test, but it is far more straightforward if one keeps in mind the basic interest balancing approach that underlies all of the *Erie* doctrine, as it has since the very beginning.

Ricoh Corp., 487 U.S. 22 (1988). *See supra* notes 119-46 and accompanying text.

[252] Several of the Supreme Court's recent cases call for this conjunctive test. *See, e.g.*, Boyle v. United Technologies, Inc., 487 U.S. 500, 507-08 (1988); Atherton v. FDIC, 519 U.S. 213, 224 (1997).