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Robert J. Condlin

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"A Formstone[1] of Our Federalism": The *Erie/Hanna* Doctrine & Casebook Law Reform©

ROBERT J. CONDLIN*

* Professor of Law, University of Maryland School of Law. I am grateful for grants from the UM Foundation which supported work on this article. I also owe a debt of gratitude to the editorial and research assistance of Ryan Easley of the University of Maryland Law Library and to Marck Stanley of the University of Maryland School of Law. Tragically, Ryan Easley died in an automobile accident before this article went to print. He is and will be missed dearly by everyone who knew him.

1. Formstone is a kind of ersatz stone, a Portland-cement based mixture pasted on brick (most commonly), and other exterior building materials, to make them look like stone. It would not make a very good cornerstone because it has no structural integrity of its own. *See* MARY ELLEN HAYWARD & CHARLES BELFOURE, THE BALTIMORE ROWHOUSE 181-82 (Jan Cigliano ed., 1999) (discussing whether formstone is "friend or faux"); Michelle Trageser, *Skin Deep*, HOUSE BEAUTIFUL, Nov. 1999, at 32, 38, 160, 225 (describing formstone as "a nonstructural skin, a cementitious product applied by hand with a trowel . . . found most often on downtown row houses," and once described by John Waters as "the polyester of brick," with only "one great advantage. It's very helpful in giving directions"); Ron Pilling, *Unmuddling . . . Removing Formstone & Other Indignities*, *in* THE OLD HOUSE JOURNAL NEW COMPENDIUM 185 (Patricia Poore & Clem Labine eds., 1983) (describing formstone as temporary, damaging to a house, and fundamentally ugly); Chris Kaltenbach, *Baltimore Puts Up a Good Front*, THE BALT. SUN, Sept. 17, 1997, at 1E (describing the making of "Little Castles: The Formstone Phenomenon," a film about formstone); Nicole Lewis, *Filmmaker Doesn't Take Facades for Granite*, WASH. POST, Mar. 11, 1999, at CO5 (same); LITTLE CASTLES: A FORMSTONE PHENOMENON (Formstone Foundation Inc. & Truckstop Motion Pictures 1998) (a film about the application of formstone to the exterior of houses in Baltimore, with varying comments about formstone's aesthetic qualities). Formstone was patented in 1937 by L. Albert Knight. *See* HAYWARD & BELFOURE, *supra*, at 181. There is a Formstone Foundation of American, located in Baltimore, Maryland, the geographical and spiritual center of the formstone universe, and the phenomenon has spread (at least nominally) as far as Australia, where "formstone" is used to make "architectural and decorative stone pieces [of] practically any shape or size." *See* Formstone Australia, Online Catalogue, Custom Made Formstone, *at* http://www.formstone.com.au/productind.html (last visited Apr. 16, 2005).

I. INTRODUCTION

The person I feel sorry for is John Ely. More than thirty years ago he laid it all out.[2] Painstakingly, if not clearly, he explained to anyone with a mind to listen how thinking of the doctrine as a constitutional "cornerstone of our federalism"[3] was a mistake. Such a view, he pointed out, "has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation."[4] He described the analytical and practical costs of the mistake, showed how the analysis ought to proceed, explained why academics and judges had failed to get it right up until then, and proposed a minimally disruptive cure for straightening out the case law confusion then in effect. Nearly every academic commentator of note signed off on Ely's analysis, almost immediately,[5] and acknowledged the power of his analytical framework even when they disagreed with its application to particular cases.[6] Judges cited to his analysis routinely, sometimes reverentially, as if to a shrine of our federalism, even as they

2. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). Sadly, John Ely died a short time ago. Like many others in the legal academy, I had a tremendous amount of respect and admiration for the man. I thought the best thing I could do to honor his memory was to "renew his copyright" on *Erie/Hanna* analysis, as Janet Alexander so felicitously put it in an email describing this article. For three recent symposium issues devoted to Ely's work, see *Symposium – On Democratic Ground: New Perspectives on John Hart Ely*, 114 YALE L.J. 1193 (2004); *Symposium in Honor of John Hart Ely*, 57 STAN. L. REV. 695 (2004); Tribute to *John Hart Ely*, 58 U. MIAMI L. REV. 953 (2004). Ely concluded his distinguished career as the Richard A. Hausler Professor of Law at the University of Miami School of Law.

3. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). The "constitutional cornerstone" view is mistaken for reasons I will explain shortly, but "the prestige of Justice Harlan" gave it a life it otherwise might not have had. *See* Ely, *supra* note 2, at 699, 701 (1974) ("the prestige of Justice Harlan" is "[s]urely one reason" for the perpetuation of the view of Erie as a constitutional doctrine).

4. *See* Ely, *supra* note 2, at 698.

5. *See, e.g.*, Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Paul J. Mishkin, *Some Further Last Words on* Erie *– The Thread*, 87 HARV. L. REV. 1682 (1974).

6. *See* Chayes, *supra* note 5, at 741.

> With [Professor Ely's] overall framework I have no quarrel. On the contrary, I think his approach clarifies much that has mystified several decades of civil procedure students – which probably means that their professors have been mystified as well. . . . [However,] Professor Ely thinks that [*Sibbach*] was wrong . . .

simultaneously misapplied its central tenets. While it was troublesome that so many self-designated adherents seemed not to understand, it was still early, with plenty of time for future generations of law students to learn the doctrine accurately and to correct lingering doctrinal problems when they became law clerks and drafted opinions for judges too busy to do the research themselves. Ely even held out hope that the Supreme Court would understand the full implications of the interpretive project it had set in motion and take the first available opportunity to complete its analysis.[7] It must have been a very optimistic time.

I am talking about the *Erie/Hanna* "doctrine,"[8] of course, and Ely's well-known article, "The Irrepressible Myth of Erie,"[9] what one might think of as one of the Supreme Court's most interesting set of federalism glyphs and its best English translation. But then the casebook authors got hold of the project, and all bets were off. Many of these authors would not have decided the *Erie/Hanna* cases in the same way as the Court. They object most to the decision to replace the "sensible modera-

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> and that [*Ragan*] and [*Hanna*] were correctly decided. As it happens, I think exactly the opposite . . . .

Id. passim; Mishkin, *supra* note 5, at 1682-83.

> I . . . accept the general analysis advanced in [Professor Ely's] article and find it sound and clarifying. . . . My disagreement can be simply stated: Ely treats the Constitution as relevant only in terms of Congress' power to displace state substantive law; he sees the Constitution as having no special view on the power of the federal courts to do so. I maintain that the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law.

Id. passim.

7. *See* Ely, *supra* note 2, at 737 ("shifts in the Court's perception of the interrelationship between the" Rules of Decision Act and the Rules Enabling Act provide reason to think the Court will complete its *Erie/Hanna* analysis).

8. Taken literally, the term "*Erie/Hanna* doctrine" is incoherent. There is no *Erie/Hanna* doctrine as such, but instead only a line of Supreme Court cases, identified on one end by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and on the other by *Hanna v. Plumer*, 380 U.S. 460 (1965). These cases interpret two federal statutes, the so-called Rules of Decision Act, 28 U.S.C. § 1652 (2000), and Rules Enabling Act, 28 U.S.C. § 2072 (2000), which help to define the operational relationship between state and federal courts. The cases also have something to say about the constitutionality of the Decision and Enabling Acts, though more by implication than by express statement. The cases do not announce a judge-made or constitutional rule, substantive or procedural, about federalism or the application of state law in federal courts, and to think of them in that way is a mistake. I will use the term "*Erie/Hanna* doctrine" nonetheless because just about everyone else does, even Charles Alan Wright. *See, e.g.*, CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 374 (5th ed. 1994) (Professor Wright used "*Erie* doctrine," but I prefer "*Erie/Hanna*" because *Hanna* contributes more to the Court's final view on the two statutes than *Erie*). Professor Wright used the term because "lawyers commonly" do. *Id.* at 381. Professor Wright also died recently, leaving gargantuan shoes to fill.

9. *See* Ely, *supra* note 2.

tion"[10] of the *Byrd v. Blue Ridge*[11] balancing test with the more difficult to understand "refined outcome determination" test of *Hanna v. Plumer*,[12] although some even deny that this has happened.[13] They also object to the Court's failure to ground the doctrine more explicitly in the Tenth Amendment of the Constitution, as a protection of a fixed enclave of state power forever off limits to federal regulation, rather than a shifting enclave of statutorily protected state power residual to the Constitution's grant of federal power. For whatever reasons, and there are many, the casebook authors seem more enamored with the ideological and rhetorical force of an argument for states' rights than one for enumerated federal powers.

Scholarly disagreement over the meaning of case law is common, of course. Legal academics often argue not only with the Supreme Court, but also among themselves over the proper interpretations to be given to doctrinal, constitutional, and statutory texts,[14] as well as the proper sources of information to be used in making such interpretations. What makes the *Erie/Hanna* dispute unusual is that the casebook authors acknowledge the persuasiveness of Ely's analysis, often citing to it as definitive, and yet do not use it to organize their treatment of the doctrine in their casebooks.[15] It is as if they are "persuaded" by Ely's argu-

10. *See* Ely, *supra* note 2, at 696; *see also The Supreme Court, 1995 Term – Leading Cases*, 110 HARV. L. REV. 256, 266 (1996) (criticizing the Court for abandoning the "useful analytical framework" of the *Byrd* balancing test); WRIGHT, *supra* note 8, at 409 (same).

11. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

12. *Hanna*, 380 U.S. at 460.

13. *See* WRIGHT, *supra* note 8, at 409 ("Byrd v. Blue Ridge has not been overruled, nor its interest-balancing technique repudiated, and, when faced with the typical, relatively unguided Erie choice, its approach has been found useful."). *But see* Wade v. Danek Med. Inc., 182 F.3d 281, 289 n.11 (4th Cir. 1999) (finding that only a "minority of the federal courts" still rely on *Byrd's* balancing test).

14. According to Richard Posner, a common law doctrine is more like a collection of concepts, which judges manipulate syllogistically in response to changing perceptions of public policy needs, than a text. For Posner, this difference between concept and text distinguishes common law rules from constitutional and statutory ones. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 182-86 (1987). It is true that common law rules are more easily changed by courts than statutory or constitutional ones and that common law rules exist only in language, whether on paper, a video screen, or in the head. However, language in any form is a text that must be interpreted before it can be modified, ignored, or followed. No doubt, important differences exist between doctrines, statutes, and constitutional provisions, but the difference between concept and text is not one of them.

15. The newest generation of books may not have the same respect for Ely's discussion. *See, e.g.*, RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 959-69 (4th ed. 2005) (questioning whether Ely's reading of *Hanna* is "anachronistic"); STEPHEN C. YEAZELL, CIVIL PROCEDURE 221-53 (6th ed. 2004) [hereinafter YEAZELL (6th ed.)] (deleting all quotations from and references to the "Irrepressible Myth" article in the fifth and sixth editions). MARCUS, REDISH & SHERMAN, *supra*, still quotes the "Irrepressible Myth" article at length, see MARCUS, REDISH & SHERMAN, *supra* at 958-60, and is

ment while simultaneously not agreeing with it.[16] Law students learn one or another casebook version of *Erie/Hanna*, since casebooks are one of a student's primary sources of information about the doctrinal universe.[17] When the students become law clerks, as ultimately some must, they draft *Erie/Hanna* opinions based on their slightly-off-track versions of the doctrine because these are the only versions they know.[18] The principal consequence of this exercise in what one might think of as "casebook law reform,"[19] is a major doctrinal disconnect between the upper and lower branches of the federal judicial system, with the Supreme Court on one page (pretty much), and the lower federal courts on several others.[20] As if playing an extended telephone game, the

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one of the few books to do so, but it questions whether the article's analysis is "accurate." *Id.* at 960.

16. *See infra* notes 329-32 and accompanying text.

17. Some might argue that hornbooks and commercial outlines are students' principal sources of information about legal doctrine. While this may be true for all students some of the time, and some students all of the time, it is probably not as true with respect to the *Erie/Hanna* doctrine. *Erie/Hanna* is usually taken up in the first semester of law school when students are still making an effort to read cases directly, and before they have adopted an "expurgated" method of legal research and study. However, it might not make a difference where students learn the doctrine, since the authors of hornbooks and commercial outlines usually are the authors of casebooks as well, where they communicate the same understandings of the *Erie/Hanna* doctrine.

18. This may explain the law review note by a student at Cornell Law School. J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161 (1997). In the article, King argues that the *Byrd* balancing test is still a viable part of the *Erie/Hanna* doctrine, even though the Supreme Court repudiated balancing in *Hanna*. *Id.* at 183-87. For an analysis of how the court did not approve of the balancing test, see *infra* notes 166-73 and accompanying text. King thanks Cornell Law Professor Kevin Clermont for his assistance in helping to write the note; Clermont co-authored one of the most well-known procedure casebooks which still seems to see *Byrd* balancing as a viable standard. *See* RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 379 (8th ed. 2003).

> Does the Court's decision to respect the federal interests in controlling the standard of appellate review in the federal courts of appeals [in *Gasperini*] prove that *Byrd* lives . . . ? If so, did the majority perhaps reach its judge/jury holding also by the same ad hoc balancing process, implicitly finding that the state interests in its own new trial standard outweigh the net of federal interests minus the refined outcome-determinative effect – and thus . . . did not in fact resurrect the substance/procedure test or preserve the outcome-determinative test?

Id. at 379.

19. For a friendly discussion of this phenomenon, see Jean Stefancic, *Needles in the Haystack: Finding New Legal Movements in Casebooks*, 73 CHI.-KENT L. REV. 755 (1998). *See also* Thomas Hayes, *A Goode Judge is Hard to Find: An Essay on Legal Realism and Law School Casebooks*, 54 J. LEGAL EDUC. 216, 220-22 (2004) (describing how casebooks change student perceptions of law).

20. *See, e.g.*, Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 189 U. BALT. L. REV. 403, 467-74 (1989) (summarizing the differences between Supreme Court and lower federal court *Erie/Hanna* decisions). "[O]f the many cases since 1974 involving *Erie* disputes, only a handful have used an analysis that arguably tracks the Supreme Court's standard . . . ." *Id.* at 405-06.

lower federal courts report back a different version of the *Erie/Hanna* doctrine than the one sent out by the Supreme Court, Ely's efforts to provide an interpretive algorithm notwithstanding.

In this article I examine this episode of casebook law reform to determine how and why it occurs, and whether anything can or should be done about it. For the most part I do not discuss the wisdom of the *Erie/Hanna* doctrine itself. That ground has been plowed, almost to exhaustion, by many excellent commentators and I have little, if any, new growth to tease from those well-worn furrows.[21] Instead, I examine the way in which the casebook authors codify the *Erie/Hanna* doctrine, so to speak, for study by law professors and students, in order to suggest ways in which the efforts of courts and authors could be better coordinated. I do not doubt that what I say about *Erie/Hanna* also could be said about other complicated statutory and constitutional doctrines. The doctrine is not a unique instance of casebook law reform, just an interesting one.

I organize the discussion in the following manner. Section II describes the development of the *Erie/Hanna* doctrine, principally as articulated in the four well-known Supreme Court cases associated with it. Because of the contested meaning of these cases, I quote from them extensively to make clear why I read them as I do. Given that I see the cases as stages in a common project, in a sense successive drafts of the same document, I emphasize the ways in which they build on and improve one another, more than the ways in which they differ. Section III describes the manner in which several of the most widely adopted and highly regarded civil procedure casebooks present the doctrine, and compares those presentations with what the Supreme Court has said in the *Erie/Hanna* line of decisions itself. I focus generally on how casebook authors have chosen to edit the cases for inclusion in their books, as well as on the suggestions they make in the notes and comments regarding how the cases might be analyzed. Finally, Section IV asks why it matters that the casebook treatment of *Erie/Hanna* differs so appreciably from the Supreme Court's views and offers modest suggestions for getting *Erie/Hanna* instruction back on track. No doubt this is a quixotic undertaking. Ely explained the doctrine thirty years ago and look what happened then. Yet, I cannot get rid of the idea that *Erie/Hanna* is an understandable doctrine, a relatively stable one,[22] and

21. For an excellent summary and discussion of that scholarship, see Lawrence B. Solum, *Procedural Justice* 9-22 (Feb. 23, 2004) (U. San Diego Law & Econ. Research Paper No. 04-02; U San Diego Pub. Law Research Paper No. 04-02), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=508282 (research paper on file with the Social Science Research Network Electronic Library).

22. Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the*

something the casebook authors ought to be able to get right.

II. THE *ERIE/HANNA* DOCTRINE

The *Erie/Hanna* doctrine is not really a doctrine, but a set of rules, mostly statutory,[23] that coordinate the operation of state and federal courts within a single geographical jurisdiction. The need for coordination arises from the fact that, left unregulated, state and federal courts can work at cross-purposes by producing different substantive outcomes for parties with essentially identical claims. As independent sovereigns, state and federal governments are constitutionally entitled to judicial systems of their own. They also are entitled, within the limits of their constitutional authority, to design those systems to operate in whatever fashion they choose. There is no overarching command authority binding on both levels of government that requires the legal systems of the two entities to be identical. It is the essence of federalism, in fact, that different levels of government are free to experiment with different institutional arrangements. In part, that is the theory of how innovation occurs within a federal system. When legal systems are constituted differently, however, it sometimes happens that lawsuits adjudicated in one system are resolved differently from identical lawsuits adjudicated in another. Differences in each system's rules of operation can and do affect the way in which the systems define and protect the legal rights of parties. Since legal rights within single jurisdictions ought not to vary appreciably from one judicial system to the next, particularly if both systems are not equally available to all litigants, some means is needed to ensure that state and federal courts within the same geographical district follow the same substantive rules. The *Erie/Hanna* doctrine is one such means.

Sometimes the differences between state and federal judicial systems are merely procedural, that is, differences exist between the rules the systems use to prescribe the "manner and mode" of filing and prosecuting lawsuits. Rules about the size of paper on which a complaint

Supreme Court is Doing a Halfway Decent Job in Its Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998) ("[I]t seems to me that since the Court decided *Hanna* in 1965 it has provided and maintained a reasonably stable, workable, and sensible structure for analyzing issues in . . . the *Erie-Hanna* area of state-federal law choice for federal courts.").

23. *See* discussion *supra* note 8.

must be filed[24] or the means by which service of process may be made,[25] serve as two well-known examples. With respect to federal and state differences in these kinds of rules, nothing needs to be done. They exist as a consequence of our federalism. They give judicial systems their distinctive identities and make separate state and federal judicial systems possible. Most of the time, these differences are of little consequence in dictating the outcome of lawsuits. If such differences were not permitted, neither government could exercise its sovereign prerogative to construct a judicial system of its own. However, substantive rules of legal liability, such as the duty of care owed a trespasser on land, or the elements of a cause of action for breach of contract, are another matter. These rules create substantive rights which ought not to vary within single jurisdictions. Whether one thinks of this as a requirement of equal protection of the laws,[26] or as a right to fair treatment generally,[27] claims about substantive legal rights ought to be evaluated by the same standards in a single jurisdiction wherever those claims may be litigated.[28] This does not mean that all courts must agree about the strength of such

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24. JONATHAN M. LANDERS, JAMES A. MARTIN & STEPHEN C. YEAZELL, CIVIL PROCEDURE 238-39 (2d ed. 1988) [hereinafter YEAZELL (2d ed.)], the predecessor book to YEAZELL (6th ed.), *supra* note 15, at 233 n.2, was one of the first procedure books to use this example now in wide use. *See, e.g.*, JOHN J. COUND, JACK H. FRIEDENTHAL, ARTHUR R. MILLER & JOHN E. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 385 (8th ed. 2001) (paper size example); MARCUS, REDISH & SHERMAN, *supra* note 15, at 938 (brief cover color example). The example appears to have come from *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279 (9th Cir. 1983) (holding that a complaint on long paper should be considered filed on the date received, even though local rule requires use of short paper).

25. Whether to use the state or federal service rule was the issue in *Hanna*. *See* Hanna v. Plumer, 380 U.S. 460, 461 (1965).

26. The *Erie* decision mentions the equal protection clause in its discussion, but does not develop an equal protection rationale to any extent. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This is not surprising. As Ely explained, "the construction of a federal statute was in issue, and *Bolling v. Sharpe* [citation omitted] had not yet been decided." Ely, *supra* note 2, at 713 n.114. But even if it had, "[i]t would not be irrational to fight bias against out-of-staters by giving them access to a body of law, developed by persons beholden to no particular state, unavailable in suits between cocitizens." *Id.* at 713. "The *Erie* opinion suggested a denial of equal protection was involved, but surely that was a metaphor." *Id.* at 712-13; *see also* discussion *infra* note 54.

27. This is Ely's view. *See* Ely, *supra* note 2, at 712 (arguing that *Erie* was concerned with the "unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen").

28. Professor Henry Hart has given perhaps the most well-known explanation for the importance of a single system of substantive law within a political jurisdiction. He wrote:

> The law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately authoritative voice, however difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority. In the long run and in the large, this must be so. People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could

claims when litigated, but that they should use the same substantive standards in making such decisions.

The *Black & White Taxicab*[29] case, one of the most well-known of the pre-*Erie* cases to deal with the problem of "different standards," illustrates the unfairness produced when state and federal courts do not play by the same substantive rules. In the case, the Black & White Taxicab Company, a Kentucky corporation, contracted with the Louisville & Nashville Railroad for the exclusive right to provide taxi service to and from the railroad station in Bowling Green, Kentucky. Black & White sought to enjoin a competitor, the Brown & Yellow Taxicab Company, another Kentucky corporation, from providing taxi service to the same station in violation of its exclusive rights contract with the Railroad. However, Kentucky common law did not recognize the validity of an exclusive rights contract and Kentucky state courts would have refused to enforce it. Taking this into consideration, Black & White dissolved as a Kentucky corporation and formed a new corporation under the same name in Tennessee. Black & White then assigned the exclusive rights contract to the new corporation, and the new corporation in turn sued Brown & Yellow in Kentucky federal court, grounding subject matter jurisdiction on diversity of citizenship. The Kentucky federal court held that the issue of the contract's validity was governed by "federal general common law," which enforced exclusive rights contracts, and not by Kentucky state common law, and accordingly granted Black & White's request for an injunction. By reincorporating in Tennessee, Black & White was able to enforce its exclusive rights contract in Kentucky federal court under federal law, while an identical Kentucky corporation would not have been able to enforce the same contract in Kentucky state court, under Kentucky state law.

In deciding the *Black & White Taxicab* case, the court invoked a federal statute designed to insure that federal and state courts apply the same substantive legal rules. Section 34 of the Judiciary Act of 1789, or the Rules of Decision Act,[30] provided at the time that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United

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not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown.

Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489-90 (1954). Professor Ely describes the picture painted by Professor Hart as "frightening, but . . . overdrawn." Ely, *supra* note 2, at 711.

29. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

30. *See* 28 U.S.C. § 1652 (2000).

States in cases where they apply."[31] Under the Act, the Kentucky federal court had to determine whether the Kentucky common law making exclusive rights contracts unenforceable was a "law of the several states" and as such, had to be regarded as a "rule of decision" in the case. Over the years, the phrase, "laws of the several states," has proved notoriously difficult to interpret,[32] but at that time, the controlling precedent was the 1842 Supreme Court case of *Swift v. Tyson*.[33] In *Swift*, the Court had held that "laws of the several states" referred to "state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to . . . real estate, and other matters immovable and intraterritorial in their nature and character."[34]

The phrase did not include:

> 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, . . . the construction of ordinary contracts or other written instruments, and especially . . . 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.[35]

Following *Swift*, the federal court in the *Black & White Taxicab* case determined that the Rules of Decision Act did not command the application of Kentucky common law. Instead, the question of the validity of an exclusive rights contract was one of general jurisprudence, and as such, the federal court was "free to exercise an independent judgment as to what the common law of the state [was] – or should be . . . ."[36]

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31. *Id.* In a 1948 revision of the statute, the phrase "civil actions" was substituted for "trials at common law."

32. In Charles Alan Wright's view "no issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of this statute." *See* WRIGHT, *supra* note 8, at 369 (referring to the Rules of Decision Act).

33. Swift v. Tyson, 41 U.S. 1 (1842). There were earlier attempts to interpret "laws of the several states," but as Professor Wright explains, these "decisions . . . were neither consistent nor considered . . . the first attempt at a definitive answer was in 1842 in the celebrated case of Swift v. Tyson." WRIGHT, *supra* note 8, at 369-70. The correct spelling of the defendant's name was Tysen. *Id.* at 370 n.5.

34. *Swift*, 41 U.S. at 18.

35. *Id.* at 18-19.

36. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938). Eventually this led to a state of affairs in which "federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." *Id.* at 72. In theory, state statutes were protected against this federal judicial imperialism by the prevailing jurisprudential framework within which the Rules of Decision Act was interpreted. If general law existed as a "brooding omnipresence of reason" and was discovered rather than made by both state

"General jurisprudence" (also described as "federal general common law" or "general law"), is a difficult-to-explain concept that was controversial even in its own time.[37] This jurisprudential theory was on its way out even as it was used to decide cases like *Black & White Taxicab*. In a few years *Erie* would drive another nail in its coffin and relegate this so-called "brooding omnipresence of reason" view of law to the category of jurisprudence past.[38] During its one-hundred year reign, however, this theory authorized the federal courts to determine for themselves the content of most common law rules, without regard for what the highest courts of the various states had to say. So elastic a conception of federal law virtually guaranteed interpretive conflicts between state and federal courts over the extent of federal judicial power and the relationship of that power to the reserved powers of the states. This conflict is the animating force at the heart of the *Erie/Hanna* doctrine.

A. *Erie*

Swift was criticized from its inception, even by those resigned to

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and federal judges, then federal judges could "discover" it directly for themselves. There was no need to go through state judges. As the Court said:

> It never has been supposed by us, that the [Decision Act] did apply, or was designed to apply, to questions of a more general nature . . . 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 just rule furnished by the principles of . . . law to govern the case.

Id. at 71-72. A state could modify the received wisdom of the general law if it wanted to, however, and it did this through its legislature, by enacting statutes. Federal courts were supposed to respect these modifications by enforcing state statutes, but often this respect was shown more in the breach than the observance. This resulted, the Court said:

> from the broad province accorded to the so-called 'general law' . . . . '[G]eneral law' was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded.

Id. at 75-76. To paraphrase Woody Allen, when general law and local law lay down together, local law didn't get much sleep.

37. *See* GEOFFREY C. HAZARD, JR., COLIN C. TAIT & WILLIAM A. FLETCHER, PLEADING AND PROCEDURE, STATE AND FEDERAL: CASES AND MATERIALS 484-85 (8th ed. 1999) (describing "general law").

38. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 65-67 (1989) (describing the Supreme Court's commitment to a natural law jurisprudence that regarded law as a brooding omnipresence of reason); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525-32 (1974) (arguing that opposition to slavery in late nineteenth and early twentieth centuries intensified judicial belief in natural rights doctrines).

live with it but not inclined to extend it,[39] but it was not overruled until *Erie Railroad Co. v. Tompkins*.[40] *Erie*, once described as "one of the most important cases at law in American legal history,"[41] is the first of four Supreme Court decisions handed down over a period of almost thirty years which collectively articulate the core of the *Erie/Hanna* doctrine. Factually, the *Erie* case involved a simple railroad tort. Harry Tompkins was struck "by something which looked like a door projecting from one of the moving cars" of the Erie Railroad Company while walking home late at night on a footpath running alongside the railroad's tracks.[42] Tompkins sued the Railroad for negligence in the United States District Court for the Southern District of New York. Tompkins claimed that he rightfully occupied the footpath as a licensee of the Railroad and was thus owed a duty of ordinary care under the general law (i.e., federal common law). The Railroad denied liability and argued that its duty to Tompkins should be determined in accordance with Pennsylvania common law as declared by that state's highest court. Under Pennsylvania law persons who used longitudinal pathways alongside railroad rights of way were deemed to be trespassers to whom railroads had a duty to avoid only wanton and willful negligence. Thus defined, the same issue emerged in *Erie* as in the *Swift* and *Black & White Taxicab* cases: must a federal court sitting in diversity under the command of the Rules of Decision Act apply the common law as

39. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting) (arguing that he would not disturb the doctrine of *Swift v. Tyson* but would not extend it into new fields); *see also* Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 391-411 (1893) (Field, J., dissenting) (arguing that the doctrine of *Swift v. Tyson* was unconstitutional, but acquiescing in the application of the doctrine thereafter).

40. *Erie*, 304 U.S. at 77-80.

41. *See* Hugo Black, *Address*, 13 MO. B. J. 173, 174 (1942). The decision was not noticed when it was first announced, but eight days later Justice Stone wrote to Arthur Krock of the New York Times calling Krock's attention to "the most important opinion since I have been on the court." *See* Irving Younger, *Observation: What Happened in* Erie, 56 TEX. L. REV. 1011, 1029 (1978) (citation omitted); *see also* Bob Rizzi, Erie *Memoirs Reveal Drama, Tragedy,* 63 HARV. L. REC., Sept. 24, 1976, at 2. Krock subsequently wrote a column about the decision. Arthur Krock, *In the Nation; A Momentous Decision of the Supreme Court, State "General Law" Supreme*, N.Y. TIMES, May 3, 1938, at 22. Since then the case has been the subject of as much debate as perhaps any case in the history of the Supreme Court. *See, e.g.*, the Ely-Chayes-Mishkin exchange: Ely, *supra* note 2; Chayes, *supra* note 5; Mishkin, *supra* note 5; John Hart Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); *see also, e.g.*, the Redish & Phillips-Westen & Lehman exchange: Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980); Martin H. Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980); Peter Westen, *After "Life for* Erie*" – A Reply*, 78 MICH. L. REV. 971 (1980).

42. *Erie*, 304 U.S. at 69. For a more complete story of the case, see Younger, *supra* note 41, and Rizzi, *supra* note 41. This case serves as a classic example of how not to manage tort litigation. For a daylight photograph of the scene where Tompkins was struck, see FIELD, KAPLAN & CLERMONT, *supra* note 18, at 327.

defined by the highest court of the state in which it sits (trespasser owed a duty to avoid wanton and willful conduct), or is it free to decide what the common law requires under its authority to interpret federal general common law (licensee owed a duty of ordinary care)?[43]

"The trial judge refused to rule that the applicable law precluded recovery," and the jury returned a verdict for Tompkins in the amount of $30,000, which was affirmed by the Second Circuit.[44] The court of appeals based its decision on the "well settled" principle "that the question of the responsibility of a railroad for injuries caused by its servants is one of general law," and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is . . . ."[45] According to the court, the "general law" required that:

> [w]here the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.[46]

The Supreme Court granted the Railroad's petition for certiorari and reversed.[47]

The parties probably sensed something surprising was in the works when the Supreme Court began its opinion: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[48] Neither Tompkins nor the Railroad had briefed or argued the validity of the *Swift* doctrine, and the issue had not been raised, at least

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43. There were other issues in the case. For example, Tompkins denied that Pennsylvania common law imposed a duty to avoid only wanton and willful conduct, *Erie*, 304 U.S. at 80, but for present purposes those issues are beside the point.

44. *Id.* at 70.

45. Tompkins v. Erie R.R. Co., 90 F.2d 603, 604 (2d Cir. 1937).

46. *Id.* (citations omitted).

47. *Erie*, 304 U.S. at 80. During the pendency of the petition for certiorari to the Supreme Court, Erie Railroad offered to settle the case for $7500, but Tompkins turned down the offer on the advice of his lawyers, and ultimately took nothing. The actual sequence of events was a little more bizarre. Not long after the Railroad's motion to set aside the verdict was denied, the owner of the Hughestown gas station (Hughestown was the town in which Tompkins' accident took place), reported to Tompkins that a friend of his who worked for the Railroad wanted Tompkins to know that the Railroad was prepared to pay $7500 to settle the case. Tompkins' lawyer advised him that the sum was too little for the loss of an arm and recommended that he not take it. The lawyer worried that Tompkins might give in to the temptation of quick money, so he invited Tompkins to visit him at his (the lawyer's) home and hid him out for two weeks until the appeal was well under way. *See* Younger, *supra* note 41, at 1021-22.

48. *Erie*, 304 U.S. at 69.

not directly, in the petition for certiorari.[49] The opinion was structured as a catalogue of the difficulties with *Swift*. As the Court explained, "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."[50] The Court also noted the "doubt . . . repeatedly expressed as to the correctness of [*Swift*'s] construction [of] section 34,"[51] and the existence of "recent research of a competent scholar . . . which established that the construction . . . was erroneous."[52] While this characterization of Charles Warren's research, and its implications for the Rules of Decision Act, was far from self-evident, as many commentators have pointed out,[53] the problems with the *Swift* doctrine were real and substantial.

In addition to introducing "discrimination by non-citizens against citizens" of the sort illustrated by the *Black & White Taxicab* case,[54] *Swift*'s general law-local law distinction did not result in the sought after uniformity in the conduct of interstate business that it had been expected to produce. State courts persisted in reaching their own (different) conclusions about the content of common law rules, and "the impossibility

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49. *See* Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 399 n.71 (1964). The Court had given signals that it was prepared to overrule *Swift* but the Railroad chose to try to distinguish the case and leave the *Swift* doctrine undisturbed. *See* Younger, *supra* note 41, at 1027-28. In its brief, for example, the Railroad stated that it did "'not question the finality of the holding of this Court in Swift v. Tyson. . .[,]'" *see* WRIGHT, *supra* note 8, at 375 (quoting Brief for the Erie Railroad Company at 27, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (No. 367)), and argued instead that Pennsylvania case law defining the duty owed to a person in Tompkins' position was sufficiently "local" to be controlling, even under *Swift*. *Id.*

50. *Erie*, 304 U.S. at 74.

51. *Id.* at 72. (citations omitted).

52. *Id.* (referring to Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923)).

53. Many scholars think Warren's work supported a conclusion opposite from the one the Court described. It may not matter since the Warren reference appeared to be more window dressing than the actual basis for the Court's decision to overturn *Swift*. For discussions and further references, see MARCUS, REDISH & SHERMAN, *supra* note 15, at 928-29; COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 381; HAZARD, TAIT & FLETCHER, *supra* note 37, at 495.

54. In the Court's words, *Swift*:

> 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 non-citizen. Thus, the doctrine rendered impossible equal protection of the law.

Erie, 304 U.S. at 74-75. It is not clear how literally the Court intended this equal protection language. *See* discussion *supra* note 26. As Charles Alan Wright (and others) has pointed out, "[i]t was not until many years [after *Erie*] . . . that it was first held that the notion of equal protection binds the federal government as well as the states." *See* WRIGHT, *supra* note 8, at 382 n.6 (citations omitted); *see also* Westen, *supra* note 41, at 980 n.35 ("Needless to say, in speaking of 'equal protection,' Justice Brandeis was not referring to the fourteenth amendment (which, then, applied only to the states) or to any other constitutional limitation.").

of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."[55] General law also proved voraciously expansive, ultimately including not only questions of purely interstate commercial law, but also:

> obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.[56]

Soon, there was little left for state common law rules to regulate, and the advantage to non-citizens bringing suits in federal courts based on diversity jurisdiction where general law would be applied, became "far-reaching."[57]

Some thought it was possible to avoid these problems by interpreting the "laws of the several states" language in the Rules of Decision Act to include state decisional law as well as state statutes.[58] That way, federal courts under a federal statutory command would apply common law rules as declared by the highest courts of the states in which they sat. This hope proved illusory, however, as long as there remained a separate category of federal general common law applicable to the same areas of regulation. Under the rubric of interpreting federal common law, federal judges would still be free to decide what the common law required and, if the federal version of common law conflicted with the state version, federal law would control under the Supremacy Clause of the Constitution.[59] To undo the harms produced by *Swift*, the Court in *Erie* had to reconsider the legitimacy of the federal general common law

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55. *Erie*, 304 U.S. at 74.

56. *Id.* at 75-76.

57. "The discrimination resulting became in practice far-reaching." *Id.* at 75.

58. Justice Reed concurred on the ground that *Erie* could have been decided on just a statutory rationale, and that it was unnecessary to go into the constitutional problems created by *Swift*. *See id.* at 92 (Reed, J., concurring).

59. For a description of the debate over the complicated constitutional relationship between federal common law, the Rules of Decision Act, and state law, and a collection of relevant articles and cases, see MARCUS, REDISH & SHERMAN, *supra* note 15, at 1005-08; WRIGHT, *supra* note 8, at 412 n.5. *See also* Sosa v. Alverez-Machain, 124 S. Ct. 2739, 2770 (2004) (Scalia, J., concurring) (arguing that "[g]eneral common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties," and citing U.S. CONST., art. VI, cl. 2, and Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279-85 (1996)).

itself. In the most well-known and controversial part of its opinion, that is precisely what it did.

"If only a question of statutory construction were involved," the Court began, "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."[60] In ringing language known to almost every American law student, the Court announced:

> 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.[61]

It is a "fallacy,"[62] the Court explained, to think there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,"[63] which federal courts have the power to interpret directly and independently. The view that common law originates in a "brooding omnipresence of reason" to which federal and state courts have equal access must give way to one which sees law as originating in a "command" of the state. As the Court put it:

> '[L]aw 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 . . . . The authority and only authority is

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60. *Erie*, 304 U.S. at 77-78 (footnote omitted).

61. *Id.* at 78. The emphasis here should be on the adjective "general." It is clear that federal courts continued to have common law rule-making power after *Erie*. As almost every casebook points out, a federal statute regulating the duty of care owed trespassers on longitudinal pathways next to interstate railroads (including Tompkins), could almost certainly have been justified by the Commerce Clause of the Constitution (though the scope of Commerce Clause power is no longer as extensive as it was once thought to be, see discussion *infra* note 152). Some books also point out that on the same day *Erie* was decided, the Supreme Court held in another case that "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." Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). *See, e.g.*, FIELD, KAPLAN & CLERMONT, *supra* note 18, at 387. *Hinderlider* is the decision reported immediately after *Erie* in volume 304 of the U.S. Reports. What federal courts do not have, however, according to *Erie*, is a common law blank check to make rules regulating any and every kind of subject, irrespective of whether legislative authority over such matters is given to the federal government in the Constitution. Federal common law power extends to things interstitial to, supplementary of, and inherent in the nature of federal constitutional power, but is not a source of all encompassing law making authority.

62. *Erie*, 304 U.S. at 79.

63. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

> the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'[64]

The doctrine of *Swift v. Tyson* was thus "an unconstitutional assumption of powers by the Courts of the United States"[65] not because it "invaded rights . . . reserved by the Constitution to the several states,"[66] as some argue,[67] but because it "assumed . . . the power to declare rules of decision which Congress was confessedly without power to enact as statutes."[68] Nothing in the Constitution authorized the creation of federal general common law. It was the absence of a constitutional authorization, and not the invasion of an exclusive Tenth Amendment right of the states to regulate commercial transactions,[69] that made the "course pursued" in *Swift* unconstitutional. It was not surprising, therefore, that in disavowing *Swift*, the Court did not hold section 34 of the Rules of Decision Act unconstitutional. There was nothing wrong with the statute itself, just the federal general common law overlay under which it had been interpreted. Once federal general

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64. *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533-35 (Holmes, J., dissenting) (alterations in original)). For an excellent discussion of *Erie*'s attack on the legal philosophy underlying *Swift*, see George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENTARY 285 (1993).

65. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

66. *Id.* at 80.

67. *See, e.g.*, WRIGHT, *supra* note 8, at 410.

> Erie and its progeny recognize[d] that the choice of law to be applied in the federal courts in diversity cases is an important question of federalism, and that the constitutional power of the states to regulate the relations among their people does overlap the constitutional power of the federal government to determine how its courts are to be operated.

Id.

68. *Erie*, 304 U.S. at 72. That Congress could not enact general law as statutes is not as simple an issue as the Court makes it seem. *See, e.g.*, WRIGHT, *supra* note 8, at 384-85 (describing arguments for federal constitutional authority to make "general law"). The Court could have made its reading of the Constitution clearer than it did. The *Erie* opinion does literally say that the *Swift* doctrine invaded rights "reserved by the Constitution to the several States." *Erie*, 304 U.S. at 80. It is this language that those who see the Tenth Amendment as protecting a fixed enclave of state power pick up on and cite. But the Constitution does not protect a fixed enclave of state power. *See* Ely, *supra* note 2, at 701-06 (describing the difference between an "enclave" and "checklist" view of the relationship between federal and state power in the Constitution). The Court does not refer to the Tenth Amendment in its opinion, nor in any other way make it look as if it is adopting the enclave view of state power. It is quite the opposite. Throughout the opinion it finds the unconstitutionality of the course pursued by *Swift* to be based on the lack of an explicit constitutional authorization of federal power, rather than a violation of an explicit grant of constitutional state power. *See Erie*, 304 U.S. at 77-78.

69. This makes the common casebook query, "Which provision of the Constitution did *Swift* violate?" beside the point. *See, e.g.*, YEAZELL (6th ed.), *supra* note 15, at 228; MARCUS, REDISH & SHERMAN, *supra* note 15, at 928-30; STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 729 (2d ed. 2004).

common law was eliminated and state decisional law was included within the "laws of the several states" language of the Rules of Decision Act,[70] there was little left to do in *Erie* but apply the Pennsylvania "wanton and willful conduct" rule to Tompkins's claim. There was no other law which might govern.[71] Since the circuit court had not ruled on the duty imposed by Pennsylvania common law, however, the Supreme Court remanded the case for further proceedings.[72]

The *Erie* decision changed the understanding of the Rules of Decision Act in many notable ways including eliminating the local/general and statutory/decisional law distinctions of *Swift.* However, *Erie* is most well known for something it did not do as explicitly. The case came to be regarded, even in subsequent opinions of the Supreme Court,[73] as having announced a substance/procedure test for interpreting the Rules of Decision Act and its well known phrase the "laws of the several states." That is, *Erie* was understood to have held that the Rules of Decision Act required federal courts sitting in diversity to apply state substantive law and federal procedural law.[74] While the substance/procedure distinction is a famously difficult one to make operational, as any first-year law student knows, in a situation like *Erie* it works perfectly well. Once the possibility of federal general common law was eliminated, there was only one substantive negligence standard available to the district court with which to resolve the issue of the railroad's liability. No difficult choice had to be made between competing state and federal tort rules. *Erie* was a Rules of Decision Act case to be sure, but it was not a hard one, in the sense that it did not present any of the difficult substance/procedure choices lurking in the phrase "laws of the several states," that were to become the Court's standard fare down the

70. 28 U.S.C. § 1652 (2000).

71. Except, perhaps, New York tort law. But the case's only connection to New York was its filing there. All of the events giving rise to Tompkins' claim took place in Pennsylvania. Moreover, the conflicts of laws rules of both Pennsylvania and New York would have applied Pennsylvania law.

72. *Erie*, 304 U.S. at 80.

73. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 10-11 (1941); Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 105-112 (1945); Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 427 (1996).

74. This is not a wildly inaccurate way to summarize *Erie* as the decision does say something of this sort, but it is not what it says literally. One can extract a substance/procedure test from *Erie* by combining Justice Brandeis's statement for the majority, that Congress is powerless to declare "substantive rules of common law applicable in a state," *Erie*, 304 U.S. at 78, with Justice Reed's statement in his concurring opinion, that "no one doubts federal power over procedure," *Id.* at 92. Nonetheless, the opinion itself does not combine these statements, and it would be a stretch to think of them as the explicit holding of the case. For example, the Rules of Decision Act, on which *Erie* is based, makes no reference to procedural law of any kind. Commentators quickly criticized this introduction of a substance/procedure distinction into the Decision Act. *See, e.g.*, WRIGHT, *supra* note 8, at 399 n.5 (listing of "scholarly criticism").

road. That is why most of the opinion is concerned with explaining the Court's repudiation of *Swift*. *Erie* was only a first draft of the Rules of Decision Act's standard for determining when a federal court sitting in diversity must apply state law, however, and like most first drafts it would soon need to be refined. Difficult issues lay on the horizon, and the first of them came to the Court a short seven years later in the case of *Guaranty Trust Co. of New York v. York*.[75]

B. *York*

York was the first post-*Erie* case to consider the application of the Rules of Decision Act to a state law that was both substantive and procedural and thus, not readily classifiable under the *Erie* test.[76] Guaranty Trust Company was appointed trustee for the noteholders of the Van Sweringen Corporation and charged with enforcing their rights and obligations in the assets of the Corporation. Subsequent to its appointment as trustee, Guaranty Trust made large cash advances to companies affiliated with the Corporation and wholly controlled by the Van Sweringen brothers. When it became evident that the Corporation could not meet its financial obligations, Guaranty Trust cooperated in a plan to purchase the outstanding notes for fifty cents on the dollar and shares of Van Sweringen Corporation stock. Noteholders who accepted this offer subsequently sued Guaranty Trust for fraud and misrepresentation for failing to disclose its self-interest in proposing the offer (the *Hackner* litigation). The trial court granted Guaranty Trust's motion for summary judgment against the noteholders in *Hackner*, and this decision was affirmed on appeal.[77]

York owned $6000 worth of notes in the Corporation, which were given to her by someone who had not accepted the Guaranty Trust purchase offer. After an unsuccessful attempt to intervene in the *Hackner* litigation, she instituted an equity action in New York federal district court against Guaranty Trust on behalf of the non-accepting noteholders, for fraud, misrepresentation, and breach of trust. The trial court granted Guaranty Trust's motion for summary judgment (this time based on the preclusive effect of York's unsuccessful attempt to intervene in *Hackner*), but the court of appeals reversed. On appeal, Guaranty Trust argued (for the first time) that York's claim was time barred

75. Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945).

76. On its face, the case was complicated by claim preclusion and equity jurisprudence issues that seemed to limit its value as a Decision Act precedent. For the most part the Court dismissed or minimized these issues and considered the Decision Act question in its most straightforward form.

77. Hackner v. Morgan, 130 F.2d 300 (2d Cir. 1942). The initial case filed in the Southern District of New York was *Eastman v. Morgan*, 43 F. Supp. 637 (S.D.N.Y. 1942).

because it was filed after the relevant New York state statute of limitations had run. The court of appeals rejected this argument, holding that a federal court was not required to apply a statute of limitations that would govern if the suit had been filed in state court. Because of "[t]he importance of the question for the disposition of litigation in the federal courts"[78] the Supreme Court granted certiorari "to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes [of limitations] and decisions affecting those remedies."[79]

The Supreme Court used its opinion in *York* to do two things. First, the Court explained the underlying rationale for the *Erie* decision in greater detail, including its all-important shift in jurisprudential thinking from a "brooding omnipresence of reason" to a command theory of law. Second, *York* reformulated the substance/procedure test in more functional terms, so as to counteract the over-inclusiveness problems present when the test is read literally. The *York* opinion has a more self-consciously jurisprudential tone than *Erie*, perhaps because Justice Frankfurter wrote for the majority. He began by pointing out how the "policy"[80] of federal jurisdiction embodied in *Erie*:

> did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations.[81]

"[T]he doctrine was congenial to the jurisprudential climate of the time,"[82] because it gave legitimacy to the "attractive vision of a uniform body of federal law,"[83] and allowed federal courts to "ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law . . . ."[84] The Court added:

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78. *York*, 326 U.S. at 101.

79. *Id.* at 99.

80. It is not clear what the Court means by the term policy in this context. *Erie* was a judicial interpretation of a statutory command. The source of law in *Erie* was an act of Congress, not a judge made common law doctrine, policy, or judicial practice that had grown up over time. Language of this sort, which is sprinkled throughout the *Erie/Hanna* decisions, contributes to the wide variety of beliefs about the nature and origin of the *Erie/Hanna* rule.

81. *York*, 326 U.S. at 101-02. (citations omitted). "Brooding omnipresence" was Justice Holmes' famous sarcasm. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) ("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 . . . .").

82. *York*, 326 U.S. at 103.

83. *Id.*

84. *Id.* at 102. Because *York* was an equity action, the Court also explained that "such sentiments for uniformity of decision and freedom from diversity in State law" were particularly attractive "in cases where equitable remedies were sought, because equitable doctrines are so

> this impulse to freedom from the rules that controlled State courts regarding State-created rights was so strongly rooted in the prevailing views concerning the nature of law, that the federal courts almost imperceptibly were led to mutilating construction even of the explicit command given to them by Congress [in the Rules of Decision Act] to apply State law in cases purporting to enforce the law of a State.[85]

The difficulty with applying federal law in *York*, however, was that "[i]n giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave [them] . . . the power to deny substantive rights created by State law or to create substantive rights denied by State law."[86]

> Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law.[87]

The issue in *York* then, was whether "the outlawry, according to State law, of a claim created by the States [is] a matter of 'substantive rights' to be respected by a federal court of equity . . . or [whether] such [a] statute [is] of 'a mere remedial character,' which a federal court may disregard?"[88]

Problems arise, however, when one tries to answer the question of whether a state statute of limitations is substantive or procedural, for in a real sense it is both. Looked at one way, a limitations rule defines a constituent element of a cause of action (the length of time the cause of action exists) and thus, is substantive. From another perspective, however, it is simply a scheduling rule for administering the prosecution of a claim and thus, is procedural. A state statute of limitations serves simultaneously as an element of the claim and a procedural restriction on the claim's enforcement. It does no good to characterize it in the abstract, for the characterization depends completely upon the purpose for which

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often cast in terms of universal applicability when close analysis of the source of legal enforceability is not demanded." *Id.* at 103. The longstanding nature of a separate system of federal equity jurisdiction seemed to undercut the argument for applying state law in *York*, but the Court disagreed. The Court concluded that the failure to apply the state limitations rule would cause litigants to plead artfully in order to take advantage of federal equity power and in the process undercut *Erie* and the Rules of Decision Act. *Id.* at 103-07.

85. *Id.* at 102 (citations omitted).

86. *Id.* at 105.

87. *Id.* at 106-07.

88. *Id.* at 107-08 (citation omitted).

one asks. This problem did not arise in *Erie*, where everyone agreed that the Pennsylvania duty of care standard was a substantive rule of law and the only available substantive rule of law. In *Erie* the substance/procedure dichotomy worked perfectly well, but in *York* it did not.

To apply the Decision Act standard to the *York* facts, the Supreme Court had to reformulate the substance/procedure standard. In doing so, the Court took a functional rather than formal approach,[89] since substance and procedure imply "different variables depending upon the particular problem for which [they are] used."[90] The Court did not reject *Erie* or the substance/procedure test, but simply refined them. Its well-known refinement, the so-called "outcome determination" test almost got it perfect. The question of whether a statute of limitations "is a matter of substance in the aspect that alone is relevant to our problem," the Court said, is whether it would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court[.]"[91] *Erie* (and *a fortiori*, the Rules of Decision Act),

> was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. 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 concluded that when rights under state law are enforced in federal court, that federal court is, in effect, "only another court of the State,"[93] and, as such, "cannot afford recovery if the right to recover is made unavailable by the State."[94] When Congress created diversity jurisdiction it "afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law."[95] When applied to a state statute of limitations, the Court found the implications

89. In this sense, *York*, like *Erie* itself, is another offspring of legal realism and as such, part of the general movement away from the formalism that represented American jurisprudence in the first part of the twentieth century.

90. *York*, 326 U.S. at 108 (citations omitted).

91. *Id.* at 109.

92. *Id.*

93. *Id.* at 108; *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) ("[T]he federal court enforcing a state-created right in a diversity case is . . . [citation omitted] in substance 'only another court of the State.'").

94. *York*, 326 U.S. at 108-09.

95. *Id.* at 112.

of such a test clear. "[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."[96]

While *York*'s outcome determination test represented an advance in the Court's effort to make the Rules of Decision Act operational, it did not yet express a final understanding of the relationship between state and federal judicial power contemplated by the Act. For example, the statement that a federal court enforcing state created rights is "only another court of the state," produced what came to be called the ventriloquist's dummy objection.[97] As "only another court of the state," a federal court would have no independent identity or function, contrary to the sovereign purposes underlying the establishment of the federal court system. Asking federal courts to act as dummies for state court ventriloquists did not permit the two judicial systems to co-exist as independent entities. The "only another court of the state" view merely subordinated one judicial system to the other by asking federal courts to imitate state courts rather than emulate them.

The outcome determination test had other problems as well. As many commentators and judges pointed out, an outcome determination rule taken literally is over-inclusive. All legal rules, procedural as well as substantive, can affect outcome, especially in the typical *Erie* situation.[98] Consider the well known paper size example.[99] A rule specifying the size of paper on which pleadings must be filed is prototypically a procedural rule. Paper size says nothing about what a party must prove to succeed on the merits of its claim or which party should win. Furthermore, once complied with, such a rule drops out of a lawsuit as an influence on outcome altogether. Yet, suppose that in a given jurisdiction federal courts require that pleadings be on fourteen-inch paper, while state courts permit either fourteen or eleven-inch paper.[100] Assume fur-

96. *Id.* at 110 (citations omitted).

97. The characterization of a ventriloquist dummy was that of Judge Jerome Frank in *Richardson v. Comm'n Internal Revenue*, 126 F.2d 562, 567 (2d Cir. 1942). Charles E. Clark, the principal drafter of the Federal Rules of Civil Procedure, and Frank's colleague on the Second Circuit also used it. *See* Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 766 (1995).

98. *See, e.g.*, WRIGHT, *supra* note 8, at 379.

> [If the *York* test was] applied literally, very little would remain of the Federal Rules of Civil Procedure in diversity cases, for almost every procedural rule may have a substantial effect on the outcome of a case. If the test was not to be carried to its literal limits, however, there was confusion as to how far it was to go.

Id.

99. *See* discussion *supra* note 24.

100. So as to avoid complications involving the Rules Enabling Act and its different definition

ther that one tries to file a federal action on eleven-inch paper two minutes before the clerk's office will close on the last day before the statute of limitations will run. The clerk refuses to accept the filing because it is not on fourteen-inch paper. After filing the same claim the next day on fourteen-inch paper, and in response to the defendant's motion to dismiss the claim as time barred, one argues that under the Rules of Decision Act the federal court must apply the state paper size rule because a failure to apply the rule will result in the claim being dismissed, and there is no greater effect on outcome than dismissal. A version of this argument always will be available in an *Erie* situation. The only time a party will argue for the application of a state rule will be when he or she can no longer comply with the equivalent federal rule. If the party could comply, he or she would just do that and avoid the extra expense and delay entailed in defending against the inevitable motion to dismiss. Yet, a paper size rule is purely procedural because it says nothing, one way or the other, about legal liability. If a federal court must apply it, the court truly will have become "only another court of the state."

While easy to show that the outcome determination test, taken literally, is overinclusive, that does not mean that the test is not essentially correct, for it is. It captures the core of the federalism concerns at the heart of the different standards problem the Rules of Decision Act was designed to resolve. Litigants should not be able to shop for different justice for the same claims in a single jurisdiction just because they have access to both state and federal courts. A focus on outcome embodies that concern directly. Difficulties with the outcome determination test arise only when the focus on outcome is left unqualified. Then, an outcome determination test swallows up too much federal law (particularly the Federal Rules of Civil Procedure) by requiring the application of contrary state law in its place. The Court will solve this problem in the *Hanna* decision a few years later by adding important refinements to the idea of outcome determination but it will leave the key idea of effect on outcome essentially intact. The problem with the *York* standard then was not in its central insight, but in the way it translated that insight into a doctrinal standard. *York* laid the foundation and provided the intellectual core for a final Rules of Decision Act standard. Because of that, apart from *Hanna*, *York* is the most important of the *Erie/Hanna* line of cases.[101]

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of the substance/procedure distinction, suppose also that this is a decisional rule, not part of the Federal Rules of Civil Procedure or the Court's local rules.

101. The *York* decision continues to be the principal authority for the requirement that federal diversity courts apply state statutes of limitations to claims created by state law, even though the

C. *Byrd*

The Supreme Court's next major discussion of the *Erie* doctrine came in the confusing[102] case of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[103] Blue Ridge sold electric power to subscribers in rural South Carolina. Byrd worked as a lineman for R.H. Bouligny, Inc., a Blue Ridge sub-contractor responsible for building new power lines, reconverting existing lines to higher capacities, and constructing new substations. Byrd was injured while connecting power lines to one of the new substations. Byrd sued Blue Ridge in South Carolina federal district court, alleging that his injuries were caused by Blue Ridge's negligence. Blue Ridge defended on the ground, *inter alia*, that Byrd was a statutory employee under the South Carolina Workmen's Compensation Act because the work he did was the kind of work done by Blue Ridge's own crews. As such, he was barred from suing Blue Ridge directly and had "to accept statutory [workmen's] compensation benefits as the exclusive remedy for his injuries."[104] The district court struck Blue Ridge's statutory immunity defense based on its reading of the Workmen's Compensation Act and ruled that Byrd was not a statutory employee under the Act. The case went to the jury on the merits. The jury found for Byrd, and Blue Ridge appealed. The Fourth Circuit disagreed with the district court's interpretation of the Workmen's Compensation Act and reversed. Rather than order a new trial to give Byrd a chance to offer proof pertinent to its interpretation of the Act, however, the Fourth Circuit made its own determination that Byrd was a statutory employee and directed the entry of a judgment for Blue Ridge.[105] The Supreme Court granted certiorari to determine "whether the Court of Appeals erred in directing judgment for [Blue Ridge] without a remand to give [Byrd] an opportunity to introduce further evidence . . . to meet [Blue Ridge's] case under the correct interpretation" of the statute.[106]

Whether a person is a statutory employee under the South Carolina Workmen's Compensation Act is a question of fact. In the words of the South Carolina Supreme Court, "it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the [Workmen's Compensation] statute. It is in each case largely a

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refinement of the outcome determination test developed in the *Hanna* decision calls this conclusion into question.

102. Charles Alan Wright calls it "Delphic." *See* WRIGHT, *supra* note 8, at 403.

103. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

104. *Id.* at 527.

105. *Id.* at 529-31.

106. *Id.* at 528, 531.

question of degree and of fact . . . ."[107] In the case of *Adams v. Davison-Paxon Co.*,[108] decided several months after the Fourth Circuit's decision in *Byrd*,[109] the South Carolina Supreme Court held that, contrary to federal practice, the factual issue of whether a person is a statutory employee under the Workmen's Compensation Act was to be decided by a judge and not a jury. The principal question for the Supreme Court to answer in *Byrd*, therefore, was whether on remand the federal district court, under the command of the Rules of Decision Act and *Erie*, had to apply the South Carolina *Adams* rule. Either the Court could decide for itself whether *Byrd* was a statutory employee, or it could follow federal practice and send the question to the jury. Justice Brennan wrote the opinion for the Court's majority.

Like other well known Brennan procedure opinions, *Byrd* had a little something for everyone.[110] Its statement of the Rules of Decision Act standard was a laundry list of the various ways the standard had been expressed until then with no new suggestions for how all of these not fully compatible versions of the standard were to be combined into a single, coherent rule. The decision arguably was based on four or perhaps five different, although not wholly discrete, grounds. The first was the rule announced in *Erie*, that "federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts."[111] This was the substance/procedure test in different language. Applying this standard, the Court examined "the rule in *Adams v. Davison-Paxon Co.*, to determine whether it was bound up with these rights and obligations in such a way that its application in the federal court is required," and concluded that it was not.[112] Instead, the Court

107. Marchbanks v. Duke Power Co., 2 S.E.2d 825, 831 (S.C. 1939) (quoting Fox v. Fafnir Bearing Co., 139 A. 778, 779 (1928)).

108. Adams v. Davison-Paxon Co., 96 S.E.2d 566 (S.C. 1957).

109. Blue Ridge Rural Elec. Coop. v. Byrd, 238 F.2d 346 (4th Cir. 1956).

110. For example, compare *Byrd* with the decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), a well-known personal jurisdiction opinion also written by Justice Brennan. The standard announced in each case takes the form of what might be best described as a sliding scale relationship between the "real" test, that is, the one articulated in past cases, and a balancing of all other relevant factors Justice Brennan thought important. (In *Burger King* the real test was the "contacts/fairness factors" standard articulated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and in *Byrd* the real test was the substance/procedure standard of *Erie*, as refined by the outcome determination paraphrase of *York*).

111. *Byrd*, 356 U.S. at 535.

112. *Id.* (citation omitted). This part of the opinion also seems to say that if the Court had come to the opposite conclusion and determined that the South Carolina rule was substantive, the federal district court would have had to apply it, other considerations notwithstanding. But later parts of the opinion seem to conflict with this reading and say that even substantive state law would have to give way to countervailing federal interests. It is not necessary to resolve this confusion, however, because of the Court's conclusion that the South Carolina rule was not substantive.

held that:

> [T]he *Adams* holding is grounded in the practical consideration that . . . South Carolina courts [in appeals] from the Industrial Commission . . . had become accustomed to deciding the factual issue of immunity without the aid of juries. . . . Thus the requirement appears to be merely a form and mode of enforcing the immunity, and not a rule intended to be bound up with the definition of the rights and obligations of the parties.[113]

Under *Erie* this should have been enough. A federal court need not apply a state law which provides only a manner and mode of enforcing substantive rights. Such rules are procedural. Since the Supreme Court ultimately decided that the district court did not have to apply the South Carolina rule, this would have been a good place for the opinion to stop, but the Court (or Justice Brennan), was just getting started. Next, the Court explained that:

> [C]ases following *Erie* have evinced a broader policy to the effect that the federal courts should conform as near as may be – in the absence of other considerations – to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. [citing *York* and *Bernhardt v. Polygraphic Co.*][114]

This seemed to say that a federal court, under the command of *Erie* (and the Rules of Decision Act), must apply state procedural rules, rules even of form and mode,[115] whenever they bear substantially on outcome.[116] This was a surprising. *Erie* made it clear that federal courts have control over their own procedure and that without such control they could not operate as a separate and distinct judicial system. After *Erie,* one would have thought that a federal court would never have to apply a state procedural rule, but the discussion in *Byrd* seemed to say otherwise.

The Court's understandable mistake here was to see *Erie* and *York* as separate and distinct Rules of Decision Act standards, rather than as successive phrasings of the same standard. In what seemed to be an

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113. *Id.* at 536 (citation omitted).

114. *Id.* at 536-37.

115. While the Court says that other considerations may override a state rule's effect on outcome and thus outcome determinative state procedural rules might not have to be applied, the very act of identifying this possibility implicitly acknowledges that the opposite may sometimes be the case.

116. The Court's opinion also could be read as saying that a state law that does not bear substantially on outcome does not have to be applied, even if it is "bound up [in the definition] of rights and obligations" or substantive under *Erie.* This possibility is probably only hypothetical, however, since it is difficult to imagine what such a law would look like.

effort to give independent significance to everything that had been said doctrinally up until then, the *Byrd* court tried to combine *York* and *Erie* into a single, two-part test.[117] But in the process it provided for a kind of *York* override of *Erie* instead, suggesting that federal courts must enforce all state law, including procedural law, if it is outcome determinative. *York* did not intend to override *Erie,* however, it just intended to paraphrase it. "Outcome determination" was intended only to restate the substance/procedure test in a form that allowed it to be applied to state rules that were both substantive and procedural in the ordinary sense of those terms. In fairness, it is easy to see how the *Byrd* Court could have misread *York. York*'s statement of the outcome determination standard did say that federal courts must apply state rules that have an effect on outcome. To read *York* this literally, however, not only ignored the Rules of Decision Act context of the case, but it also rendered *Erie* a near nullity and undercut other parts of the *Byrd* opinion inconsistent with this reading of *York.* For example, there was no reason for the Court in *Byrd* to bother with a substance/procedure analysis of the *Adams* rule, as it did in the first section of its opinion, if ultimately the only important issue was the effect the rule had on outcome. Why not simply start and finish with the outcome determination question? It seemed as if the *Byrd* Court had not yet worked out its final understanding of the relationship between *Erie* and *York.*

In deciding *Byrd,* the Court applied the outcome determination test to the *Adams* rule, but in a curiously inconsistent manner. At one point, the Court acknowledged that in a personal injury action "it may well be that . . . the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury."[118] But later in the opinion, the Court said that it did not think there was "the strong possibility" that outcome would "be substantially affected by whether the issue of immunity is decided by a judge or a jury."[119] It did not say how these statements were to be reconciled, but it probably did not have to given its analysis in the next part of the opinion.

In the most difficult to interpret part of the opinion, the Court concluded that the federal district court was not required to apply the South

117. For a similar criticism of lower federal court attempts to combine rather than synthesize the *Byrd* and *Hanna* standards and a description of the confusion this created, see MARCUS, REDISH & SHERMAN, *supra* note 15, at 961.

118. *Byrd,* 356 U.S. at 537. This language seems to ignore the *York* point that it is the nature of the legal rule, and not the nature of the tribunal, that must have the effect on outcome. *York*'s language reads, "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." *York,* 326 U.S. at 109 (emphasis added).

119. *Byrd,* 356 U.S. at 539-40 (citations omitted).

Carolina rule because of "affirmative countervailing considerations."[120] The Court's argument was structured logically as follows. Federal courts serve as an independent system for administering justice to parties who properly invoke its jurisdiction. "An essential characteristic of that system is the manner in which . . . under the influence – if not the command – of the Seventh Amendment, [it] assigns the decisions of disputed questions of fact to the jury."[121] Thus, "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts,"[122] because "state laws cannot alter the essential character or function of a federal court."[123] The proper inquiry, therefore, "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."[124] Not surprisingly, the Court found that the federal policy should not yield.[125]

While it did not use the term, this part of *Byrd* is generally regarded as having "balanced" the federal interest in assigning fact questions to juries against the interest in having the litigation come out the same way in state and federal court.[126] In fact, *Byrd's* claim to fame is for introducing a so-called balancing test into the Rules of Decision Act analysis.[127] This move, while understandable for reasons I will explain shortly, created a number of new problems for the *Erie* doctrine. Balancing is a notoriously open-ended and easy-to-abuse standard, a "last refuge of

120. *Id.* at 537.

121. *Id.*

122. *Id.* at 538.

123. *Id.* at 539 (quoting Herron v. S. Pac. Co., 283 U.S. 91, 94 (1931)). This language suggests that some features of the federal judicial system are so important that they could never be outweighed or balanced away by a state law, no matter how strong the state interest involved. Yet at other points in the opinion the Court suggests that the stronger of the state and federal interests should always prevail. It is not always easy to reconcile various parts of the *Byrd* opinion.

124. *Id.* at 538.

125. *Id.*

126. While this interest is ostensibly that of the states, it also is a federal interest since it traces its origins to the Rules of Decision Act, a federal statute. Those who believe that the Tenth Amendment gives states a federal constitutional right to have their substantive law applied in federal court might see it as a mixed state and federal interest, though for reasons I describe elsewhere, see *infra* notes 148-52 and accompanying text, the belief is based on a mistaken enclave view of the Tenth Amendment.

127. There are different ways of looking at how *Byrd* balancing is to be done. One could see the decision as describing a kind of simple-balancing in which state and federal interests of any kind are considered and weighed, or a kind of two-stage balancing in which only state interests that are outcome determinative are weighed against federal interests. There is language in the opinion to support both views. *Byrd* has one other, lesser claim to fame. It is the only Supreme Court case, so far as I have been able to determine, in which the names of counsel arguing the case are doubly alliterative: Henry Hammer for Byrd and Wesley Walker for Blue Ridge. *Byrd*, 356 U.S. at 526.

scoundrels" to borrow Samuel Johnson's famous phrase.[128] And it is a particularly difficult test to apply in a Rules of Decision Act context. As Charles Alan Wright explains:

> [T]here is no scale in which the balancing process called for [by *Byrd*] 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 interest in preserving uniformity of result with the state court. Even if there were such a scale, the weights to be put in it must be whatever the judges say they are.[129]

In addition, neither the Rules of Decision Act nor the Constitution authorizes balancing explicitly. It is hard to imagine why either would. If federal courts have constitutional and statutory authority to create their own procedures, what countervailing state interest could be so strong as to balance this authority away? If they do not have such authority, what federal interest could be so strong as to outweigh the state interest, protected by the Rules of Decision Act, in having state law apply? No matter how one thinks an *Erie/Hanna* analysis is grounded, balancing is difficult to justify.

On the other hand, it is not hard to understand the *Byrd* Court's turn to balancing. Balancing can be an undemanding standard. It allows for a consideration of all factors a court thinks are relevant, yet leaves the court free to decide how to combine and weigh those factors in reaching particular results. And it does this without requiring a precise doctrinal explanation of how the decision is justified. Balancing permits a court to do the right thing, in other words, while effectively insulating itself from knock-down criticisms by others who disagree. As a result, balancing is a hard test to fail, and such tests are attractive by definition.

But in *Byrd* there may have been something else going on as well. Recall that the central problem with the outcome determination test was its over-inclusiveness. All state law is outcome determinative when a party can no longer comply with federal law, and the *Erie* issue arises in only that context. If state law is always outcome determinative in an *Erie* context, however, federal law, particularly federal procedure and the right of federal courts to control their own essential character and function, is lost. For the Court in *Byrd*, balancing was simply a way to reign in the scope of an unqualified outcome determination test. If the application of state law cut too deeply into things federal, a court could prevent this by having recourse to "affirmative countervailing federal

128. JAMES BOSWELL, LIFE OF JOHNSON 615 (R.W. Chapman ed., Oxford Univ. Press 1980) (1775). Johnson was referring to the dishonest expression of nationalistic sentiments to establish one's patriotism, but using a balancing test to establish the legitimacy of a gut reaction is equally dishonest.

129. *See* WRIGHT, *supra* note 8, at 404.

considerations." These considerations could provide a counterweight to the "effect on outcome," and make that concern only one of several factors to be taken into account in determining whether a state law was a "rule of decision."[130]

While the introduction of balancing to *Erie* analysis was understandable and well intended then, it also was doomed to fail. Balancing is too crude an analytical instrument to provide any clear and consistent check on outcome determination analysis and too difficult a concept to ground in the text of the Rules of Decision Act. The Court would have been better off trying to combine *Erie* and *York* into a single, integrated test, capable of distinguishing between outcome determinative rules that are substantive on the one hand, and rules that are procedural on the other, and to require the application of only the former. This will be *Hanna*'s contribution to the Decision Act standard, but *Hanna* was still a few years away. It is a mistake to criticize *Byrd* for not being *Hanna*, however. *Byrd* was the Court's first attempt to solve the over-inclusiveness problem in the outcome determination standard. It was an interim draft, and like most interim drafts, it needed more work.

There are those who read *Byrd* as a constitutional case, grounded in a Seventh Amendment division of labor between courts and juries.[131] The Court itself intimated something to this effect when it described the federal practice of assigning "under the influence – if not the command – of the Seventh Amendment, . . . decisions of disputed questions of fact to the jury."[132] This language is curiously equivocal,[133] however, and

130. This may be what Subrin, Minow, Brodin & Main have in mind when they refer to *Byrd* as rescuing federal practice and procedure from the overly broad sweep of the unqualified outcome determination test. *See* SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69, at 740. These authors also describe *Hanna* and *Byrd* as joined in the task of reigning in *York*. *See id.* at 754 (referring to the "*Byrd/Hanna* rescue operation"). Rather than see *Hanna* as finishing what *Byrd* started, they seem to believe that the two cases regulate different domains and articulate complementary standards; *Hanna* for cases in which a Federal Rule conflicts with state law, and *Byrd* for a case in which a federal practice conflicts with state law. *Cf. id.* at 736 ("It was left to the ingenuity of two great Supreme Court Justices to reassert [after *York*] the independence of the federal courts in the *Byrd* and *Hanna* cases . . . .").

131. *See, e.g.*, Westen & Lehman, *supra* note 41, at 346-51 (suggesting that the determination of whether *Byrd* was a statutory employee within the meaning of the Workmen's Compensation Act was not a function that the Seventh Amendment allocates to the jury, thus distinguishing between jury as detective (e.g., what did Byrd do?), and jury as policymaker (e.g., what is contemplated by the term "employee"?)).

132. *Byrd*, 356 U.S. at 537.

133. *Accord* MARCUS, REDISH & SHERMAN, *supra* note 15, at 950.

> The Court apparently believed that it need not resolve the constitutional question, because even if the Seventh Amendment did not "command" the result, its "influence" was sufficiently great to weigh heavily on the federal side of the balance. [But] [h]ow can a constitutional provision that does not dictate a particular result nevertheless "influence" the outcome?

Id.

does not help in determining the extent to which the Court relied consciously on the Constitution in reaching its decision. Given the fact that the decision was based on other, independent grounds, the Court did not need to develop its Seventh Amendment analysis to any greater extent, and it explicitly did not.[134] This 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.

Byrd is an important part of the *Erie/Hanna* line of cases, but not because it is controlling law as some argue.[135] Indeed, *Hanna* effectively repudiated it as a doctrinal statement.[136] Nor is *Byrd* the best way to formulate the Rules of Decision Act standard as others contend.[137] The decision is either incoherent or an obfuscation much of the time. However, *Byrd* is important because it identified the need for and began the process of refining the outcome determination test of *York*. It understood the purpose of the Decision Act correctly to require the same substantive justice in state and federal courts in the same jurisdiction and tried to effectuate that policy by combining the idea of effect on outcome with the idea of substance/procedure to create a doctrinal standard which protected state and federal judicial interests equally. Yet, because its solution (balancing) created new difficulties of its own, *Byrd*'s contri-

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134. *Byrd*, 356 U.S. at 537 n.10.

> Our conclusion makes unnecessary the consideration of – and we intimate no view upon – the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action.

Id.

135. *See, e.g.*, Richard D. Freer, Erie*'s, Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1107 (1989) [hereinafter *Mid-Life Crisis*] ("Most lower courts seem to ignore the Supreme Court's explication of the twin aims of *Erie* and continue to apply *Byrd*."); Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1647, 1647-51 (1998) [hereinafter *Some Thoughts*] ("*Byrd* set out what is still the Court's fullest explication of a global RDA analysis . . . ."); King, Note, *supra* note 18, at 173-74 ("*Gasperini* affirmed *Byrd's* place in the analysis and clarified how federal courts should perform the balancing test."); MARY KAY KANE, CIVIL PROCEDURE IN A NUTSHELL 280-81 (4th ed. 1996) (describing how a federal court should proceed by means of a four-fold balancing analysis in cases not involving a Federal Rule).

136. *See infra* notes 166-72 and accompanying text; *see also* Rowe, *supra* note 22, at 986-90 and authorities cited therein (discussing the extent to which *Byrd* survived *Hanna*).

137. *See Some Thoughts*, *supra* note 135, at 1651 ("*Byrd* gives a sophisticated model" for determining the applicability of state law in federal court); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 211-46 (2d ed. 1990) (arguing for the virtues of *Byrd* balancing).

bution is now largely historical. *Byrd* asked the right questions about the Act, however, and the next time the Court took up these questions it was ready to answer them. This was in the case of *Hanna v. Plumer*.[138]

D. *Hanna*

Hanna is the most important of the *Erie/Hanna* line of cases for a number of reasons. It comes last among the core cases defining the doctrine, for one thing, and presumably represents the Court's best thinking about how the Decision Act should be interpreted.[139] In addition, it reconciles the contradictions of the earlier cases, synthesizing their different formulations of the Act's standard into a new, single, and coherent statement which has the added benefit of being faithful to the Act's text because it does not rely on balancing. *Hanna*'s new formulation of the Decision Act standard makes sense as a matter of policy and provides a workable, clear, and almost algorithmic statement of how to determine the applicability of state law in federal courts. The Court's multiple drafts of the Decision Act standard finally produced a winner: a version of the standard with a legitimate claim to reflective equilibrium. The only surprising thing about *Hanna*, given its straightforwardness and eminent good sense, is that some commentators and judges have trouble understanding or accepting it.

Like its predecessors, *Hanna* was a factually unremarkable case. Hanna, a citizen of Ohio, sued Osgood and Plumer, citizens of Massachusetts, in Massachusetts federal district court for injuries resulting from an automobile accident in South Carolina, allegedly caused by the negligence of Osgood. Osgood was deceased at the time of the filing, and Plumer was the executor of her estate. The controversy in the case arose over the adequacy of service. Hanna served Plumer in his own right and as executor for Osgood's estate, by leaving copies of the summons and complaint with Plumer's wife at the family residence in compliance with then Federal Rule of Civil Procedure 4(d)(1) (hereinafter Rule 4).[140] In his answer, Plumer alleged that service was inadequate

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

139. There are *Erie/Hanna* cases decided subsequent to *Hanna* of course, but none, with the possible exception of *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), that makes any fundamental change in *Hanna*'s interpretation of the Decision Act or Enabling Act. For a discussion of *Gasperini*, see *infra* notes 203-31 and accompanying text.

140. At the time, Federal Rule of Civil Procedure 4 provided:

> Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .

See Hanna, 380 U.S. at 461. Federal Rule of Civil Procedure 4 has been since amended substantially.

because it did not comply with a Massachusetts state rule requiring in-hand service on executors and administrators of estates.[141] The district court granted Plumer's motion for summary judgment, concluding that the adequacy of service had to be measured by Massachusetts law (citing *York*).[142] The First Circuit affirmed on the ground that the conflict between the state and federal rules turned on "a substantive rather than a procedural matter."[143] The Supreme Court granted certiorari to consider the question of "whether, in a civil action . . . based upon diversity . . . service of process shall be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the Federal Rules of Civil Procedure."[144] It reversed.

Structurally, the *Hanna* opinion breaks down into three separate sections. The first section articulates an Enabling Act (or *Hanna*) basis for the decision and by itself justifies the Court's conclusion. The second section responds to Plumer's argument, accepted by the courts below, that the Decision Act and the *Erie* doctrine[145] controlled the decision in the case by showing how this argument was wrong. The third section returns to and elaborates on the Enabling Act rationale of section one. While the three sections sometimes bleed into one another and sometimes loop back on themselves, for the most part the decision is fairly straightforward and clear. This is no small feat in what by then had become a very messy area of doctrine. I will take up the sections in order.

In the first section, the Court explained how the presence of a Federal Rule of Civil Procedure[146] changed the ground rules for determining the applicable law in a diversity action. Simply stated, the Court held that when a Federal Rule, validly promulgated pursuant to an act of Congress that is itself constitutional, is pertinent to the issue before the federal court, no *Erie* problem arises. The court must apply the Federal

141. *See* MASS. GEN. LAWS. ch. 197, § 9 (1958) (current version at MASS. GEN. LAWS. ch. 197, § 9 (2004)). At the time, the law provided, in relevant part, that:

> [A]n executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, . . . unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator . . . .

Hanna, 380 U.S. at 462.

142. *Hanna*, 380 U.S. at 462.

143. Hanna v. Plumer, 331 F.2d 157, 159 (1st Cir. 1964).

144. *Hanna*, 380 U.S. at 460.

145. These are different if one sees the rule in *Erie* as constitutionally grounded. *See infra* notes 65-70, 148-52 and accompanying text.

146. I will use upper case to refer to a Federal Rule of Civil Procedure (Federal Rule), and lower case to refer to a federal common law rule (federal rule), and act of Congress, law of the United States, federal statute, or some other such term, to refer to federal statutory law.

Rule. It could not be otherwise under the Supremacy Clause of the Constitution or ironically, under the Decision Act as well.[147] In the face of a Federal Rule, therefore, a federal diversity court's duty to apply state law gives way as long as the *Hanna* requirements of pertinence, validity, and constitutionality are met. In *Hanna* they were. As the Court said, Rule 4 "neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service."[148]

Those who think of *Erie* as a constitutional doctrine, grounded in the Tenth Amendment's grant of reserved powers to the states have trouble with this reasoning. If the *Erie* doctrine is constitutional, they argue, it trumps the Federal Rules, whose force is only statutory. If it requires the application of all outcome determinative state law, as a literal reading of *York* and *Byrd* suggest, that means that the district court in *Hanna* should have applied the Massachusetts service rule, Rule 4 notwithstanding. Both the Massachusetts district court and the First Circuit relied on a version of this argument to justify their decisions,[149] and Justice Harlan made the argument famous in his concurring opinion in the Supreme Court.[150] But as Ely pointed out, to see *Erie* as a constitutional doctrine is to misread the Constitution. There is no constitutionally fixed area of state regulatory power forever inviolate against federal intrusion. The Tenth Amendment reserves to the states just those "pow-

147. The Decision Act makes an exception for situations in which the issue before the court is controlled by another act of Congress. *See* 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where . . . Acts of Congress otherwise require or provide, shall be regarded as rules of decision . . . ."). Rule 4 was promulgated pursuant to the authority of the Rules Enabling Act, an act of Congress, and thus comes within this exception.

148. *Hanna*, 380 U.S. at 464.

149. The Supreme Court summarized the syllogism at the heart of the argument made by Plumer, and accepted by the lower courts, in the following fashion:

> (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 [i.e., Plumer]. If, on the other hand, it should be held that Rule 4 (d)(1) is applicable, the litigation will continue, with possible victory for petitioner [i.e., Hanna]. (3) Therefore, *Erie* demands application of the Massachusetts rule. The syllogism possesses an appealing simplicity, but is for several reasons invalid.

Id. at 466.

150. *Id.* at 474-78. The fact that Justice Harlan was among those defending the "fixed enclave of states' rights" view no doubt has contributed to its popularity. *See* Ely, *supra* note 2, at 699. In fairness to Justice Harlan, the Supreme Court had applied *Erie* outside of the Decision Act context, see, e.g., Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), and he might reasonably have concluded from these cases that the decision was grounded in the Constitution.

ers not delegated to the United States by the Constitution, nor prohibited by it to the States . . . ."[151] This is a grant of residuary power left over after one determines the scope of federal power. Residuary power is by definition an amorphous and shifting realm, the content of which changes as the Court broadens or narrows its interpretation of federal enumerated power over the years.[152] Ely described the difference

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151. U.S. CONST. amend. X. For a discussion of earlier Tenth Amendment jurisprudence defining the relationship between state and federal power on the basis of principles of state sovereignty implicit in the constitutional enterprise as originally understood, rather than the specific language of the Constitution, see Gordon G. Young, *Enforcement of Federal Private Rights Against States After* Alden v. Maine*: The Importance of* Hutto v. Finney *and Compensation via Civil Contempt Proceedings*, 59 MD. L. REV. 440, 446-49 (2000); *see also* New York v. United States, 505 U.S. 144, 156-57 (1992).

> [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. at 157; *see also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.").

152. The latest evidence of this broadening and narrowing process is to be found in the Supreme Court's Commerce Clause jurisprudence of the last few years. Acknowledging that its "interpretation of the Commerce Clause has changed as our Nation has developed," United States v. Morrison, 529 U.S. 598, 607 (2000), the Court has recently cut back in a decisive and clear fashion on the scope of federal Commerce Clause authority. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (striking down the 1990 Federal Gun-Free School Zones Act as not supported by Commerce Clause power); *Morrison*, 529 U.S. at 598 (striking down the 1994 Federal Violence Against Women Act as not supported by Commerce Clause power). *But see* Reno v. Condon, 528 U.S. 141, 148 (2000) (finding that vehicle license information is an "article in commerce" and "its sale or release into the interstate stream of business is sufficient to support congressional regulation"); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (holding an Endangered Species Act regulation that limits taking of red wolves on private land substantially affects interstate commerce and is thus a valid exercise of Congress's Commerce Clause authority). In *Morrison*, in language eerily reminiscent of *Swift v. Tyson*, the Court rejected the argument that "Congress [may] regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on [interstate] employment, production, transit, or consumption." *Morrison*, 529 U.S. at 615. Such a view, the Court concluded, "[would] completely obliterate the Constitution's distinction between national and local authority," *id.*, and in effect, give the Commerce Clause a force analogous to that of federal general common law at the time of *Swift*. Since state residuary power exists in a sliding scale relationship with federal enumerated power under the Constitution, a decision that Congress may not regulate "intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce," *id.* at 618, also is a decision that states may regulate such violence. This is not because such regulation "has always been the province of the States," *id*, but because in a sliding scale relationship, when the authority on one side of the scale shrinks, the authority on the other side expands.

The revival of a states rights perspective on the Constitution also is evident in the Supreme Court's recent expansion of state immunity from suits in federal and state court. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress has no power under Article I alone to circumvent Eleventh Amendment restrictions of Article III federal jurisdictional power and create rights enforceable in federal court against unconsenting states); Alden v. Maine, 527 U.S. 706 (1999) (holding that states are free to refuse to open their own courts to a wide variety of suits brought against them by persons possessing rights under federal law); Fla. Prepaid

between a "federal checklist" and "state enclave" view of the Tenth Amendment in considerable detail, making it clear that no matter how sincerely and deeply held the belief in a fixed enclave of state power, the plain language of the Tenth Amendment does not support it.[153] For all of its simplicity, this has been one of the most difficult of Ely's points to have register.

Determining the pertinence, constitutionality, and validity of a Federal Rule can be complicated and difficult tasks, though not in *Hanna*. Rule 4 was pertinent to the issue before the Court because the issue was the adequacy of Hanna's service of process, and Rule 4 is a service rule. The Enabling Act had already passed constitutional muster in *Sibbach v. Wilson*;[154] and Rule 4 had been held to be "in harmony with the Enabling Act . . ." in *Mississippi Publishing Corporation v. Murphree*.[155] These conclusions are not difficult to understand. The Enabling Act grants "the Supreme Court . . . power to prescribe general rules of prac-

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Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that Congress has no power under Section 5 of the Fourteenth Amendment to expose states to patent infringement suits in the absence of evidence that the violation of federally created patent rights is systematic and intentional, and that state law remedies are inadequate); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that Congress has no power under Section 5 of the Fourteenth Amendment to expose states to unfair competition suits because unfair competition does not involve a deprivation of property that may be regulated by Congress under the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that provisions of the Age Discrimination in Employment Act of 1967 purporting to abrogate state immunity are beyond Congress's power of remediation under Section 5 of the Fourteenth Amendment); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that states are shielded from suit by disabled workers under the Americans with Disabilities Act because Congress had not identified a history and pattern of unconstitutional employment discrimination by the states against the disabled); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) (holding that a bankruptcy court discharge of a student loan debt does not implicate a state's Eleventh Amendment immunity); Sabri v. United States, 541 U.S. 600 (2004) (upholding a federal bribery law that makes it a crime to give anything of $5000 or more in value to influence a state or local official). This states' rights perspective has also expanded into the development of an anti-commandeering principle precluding Congress from compelling states to enforce federal law. *See* New York v. United States, 505 U.S. 144 (1992) (invalidating the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985); Printz v. United States, 521 U.S. 898 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act). For a self-described "enduring and constructive" manifesto of this new states' rights jurisprudence, see *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 893 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd*, *Morrison*, 529 U.S. at 598. For good discussions of this, in effect, continuation of the *National League of Cities/Garcia* debate, see Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000), and Young, *supra* note 151, at 446-55. There are other signs, however, that the federalism revolution of the Rhenquist Court has limits. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (permitting employees to sue states under the Family Medical Leave Act); Tennessee v. Lane, 541 U.S. 509 (2004) (upholding Congress's power to enforce anti-discrimination laws against the states when fundamental rights are involved).

153. *See* Ely, *supra* note 2, at 701-06.

154. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

155. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946).

tice and procedure . . . for cases in the United States district courts . . . ," as long as "such rules [do] not abridge, enlarge or modify any substantive right . . . ."[156] Service of process is part of the "practice or procedure of the district courts" since, for the most part, service simply starts the court's procedural apparatus in motion. It also is not difficult to understand how the authority to regulate practice and procedure is necessary for Congress to ordain and establish a system of federal courts. Without control over their own procedure, federal courts cannot be said to exist in any meaningful sense. As for the question of Rule 4's validity, a Federal Rule is valid under the Enabling Act, as the *Hanna* court famously put it, whenever it regulates "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[157] A service rule has many purposes such as giving notice to the defendant, limiting the lifetime of a claim, discouraging certain types of lawsuits, and providing a starting point for scheduling timetables, some of which are substantive and others procedural. Since any significant procedural purpose is enough to satisfy the Enabling Act, Rule 4 qualifies easily as a rule of practice and procedure.[158]

While *Hanna* is an Enabling (and not Decision) Act case, therefore, concerned principally with the questions of whether Rule 4 was pertinent, constitutional, and valid, in what is regarded as dicta, the Supreme Court reconsidered and refined the outcome determination test of *York*. Ironically, *Hanna* has perhaps become better known for this refinement of *York* (and *a fortiorari Erie*), than its decision on the merits. The

156. 28 U.S.C. § 2072 (2000).

157. Hanna v. Plumer, 380 U.S. 460, 472 (1965). *Sibbach* offers the not very helpful reformulation of the Enabling Act's "practice and procedure" requirement as "whether a rule really regulates procedure." *Sibbach*, 312 U.S. at 14. Ely's paraphrase of the same requirement is whether a rule is "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." *See* Ely, *supra* note 2, at 724. Justice Harlan inadvertently articulated perhaps the most well known paraphrase, when he criticized the Court for adopting an "arguably procedural, *ergo* constitutional" standard for evaluating Federal Rules. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring). Stripped of its constitutional underpinnings, this arguably procedural standard would hold that a rule is one of practice and procedure when it has any significant procedural purpose or effect.

158. *See* Ely, *supra* note 2, at 718-26. The Court famously did not consider the second half of the Enabling Act test or discuss whether Rule 4 abridged the plaintiff's substantive rights. *Id.* at 719-20. But if it had, arguments were available to suggest that the Rule did not do either of these. *Id.* at 733-37. The point is not without controversy however. *See* Chayes, *supra* note 5, at 751-52. Professor Burbank, in his extensive and highly regarded history of the Enabling Act, argues that the substantive rights part of the Act's standard was intended as surplusage, that it "served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence" of the Act. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1108 (1982).

Court explained, quoting a well known Fifth Circuit case,[159] that "[t]he purpose of the Erie doctrine . . . 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 mandate (the Rules) [i.e., the Rules Enabling Act] supported by constitutional authority."[160] Seeing *Erie* as a reaction to the practice of forum-shopping which had developed in response to *Swift*, the Court concluded that the outcome determination test had to be read with reference to "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[161] As a consequence, *Erie* required federal courts to apply state law when "it would be unfair for the character or result of a litigation materially to differ because the suit has been brought in a federal court."[162] This twin aims re-formulation of the outcome determination test, *Hanna*'s most well known contribution to the *Erie* doctrine, has proven difficult to interpret. Both commentators and judges give it different readings.[163] Reduced to its essentials, it consists of four distinct ideas, each independently important and all necessary.

The first important feature of what I, following Ely, will refer to as *Hanna*'s refined outcome determination test, is the requirement that the outcome determination question be asked about state law, not federal law or the relationship between the two. A federal court must ask whether the failure to apply state law will result in the kind of forum shopping that the Rules of Decision Act is designed to prevent. The court should not ask whether the application of federal law will encourage such forum shopping, nor how a federal court should choose between state and federal law. *Hanna* did not change the test in this regard, but over the years courts had slipped into the habit of describing the *Erie* issue as a choice between state and federal law, and requiring a direct collision between the two as a precondition of an *Erie* problem.[164]

159. Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963). It is interesting that the Court quoted the Lumbermen's case for this proposition rather than *Byrd*, which included an almost identical statement. Not using *Byrd* makes sense, however, if the Court was trying to repudiate *Byrd*, not only by expressly disavowing it, but also by refusing to use it as precedent even for a point still accepted as valid. See *infra* notes 168-75 and accompanying text for a discussion of the Court's decision to repudiate *Byrd*.

160. *Hanna*, 380 U.S. at 473 (alteration in original).

161. *Id.* at 468.

162. *Id.* at 467.

163. *See* Rowe, *supra* note 22, at 984-90 (discussing various meanings given to the "twin aims" formulation).

164. *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987). It was not until *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), that the Court finally acknowledged that a "'direct collision' between state and federal law" was not a necessary precondition to an *Erie* problem. *Stewart*, 487 U.S. at 26 n.4. The *Erie* question, pure and simple, is whether a state law

Hanna itself, in fact, used the language of "direct collision."[165] The Rules of Decision Act is not a standard for applying federal law, however, or for choosing between federal and state law. It is a standard for determining when a "law of the several states" shall be regarded as a "rule of decision" in courts of the United States. If federal law applies to an issue before the court, it is because the law is pertinent and constitutional. The Rules of Decision Act adds no force to a pertinent and constitutional federal law. Such a law governs because its own terms require it and because there can be no superior law. Most of the time asking whether state or federal law applies will involve substantially the same inquiry as asking whether state law applies, but occasionally it will not as, for example, when there is no qualifying federal or state law on point and a court has to make a common law rule to dispose of the issue or simply deny relief to the party relying on the rule. It is important then, to ask the *Erie* question in the form the Rules of Decision Act frames it.

The second feature of *Hanna*'s refined version of the outcome determination test, and probably its most important contribution since it solved the problem of overinclusiveness that had plagued the *Erie* standard since *York*, is what might be thought of as an *ex ante* requirement. Roughly stated, the *ex ante* requirement asks a federal court to consider whether the application of state law will encourage forum shopping for character or result as of the beginning of the lawsuit, when all options are open and it is still possible for a litigant to comply with both state and federal law.[166] The *ex ante* requirement is designed to narrow the sweep of the outcome determination test, and to prevent circularity. If one waits to ask whether state law is outcome determinative when it is no longer possible to comply with federal law and only the state rule will preserve the litigant's right to proceed, the state rule will be outcome determinative by definition. Since an *Erie* problem arises in only these circumstances, a test which asks the outcome determination question from the perspective of a litigant's present situation rather than from the perspective of the beginning of the lawsuit, always will find a state

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should be considered a "rule of decision" for a federal court sitting in diversity. What other law might apply in the event state law does not apply is no doubt an important question, but it is not part of the Decision Act inquiry. The Decision Act speaks only about state law.

165. *Hanna*, 380 U.S. at 472 ("Although this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State, courts of appeals faced with such clashes have rightly discerned the implications of our decisions.").

166. *See id.* at 469 ("Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum.").

law to be outcome determinative.[167]

Closely related to the *ex ante* requirement is *Hanna*'s third refinement of the outcome determination test. The question of whether the failure to apply state law will encourage a litigant to choose or avoid the federal forum must be seen as a question about a hypothetical, reasonable litigant, and not one about an actual party (usually the plaintiff) to the lawsuit. The subjective preferences of the particular litigants before the court cannot control the decision of whether a federal court must apply state law. The parties will give self-serving answers to this question, and understandably so. The forum shopping question is a question about the nature of state law and not one about the parties' personal preferences for a forum. It is expressed in the latter terms so as to identify the features of the state law which help determine whether it should be regarded as a rule of decision, but this framing of the question should not be misinterpreted; the outcome determination is a question about state law, and not one about the actual litigants' forum preferences.

Finally, to be outcome determinative under *Hanna*'s refined version of the test, a state law must have an effect on either the character or result of a lawsuit. A rule, or even more so, a practice, which makes litigation faster, cheaper, easier to understand, or more enjoyable to undergo, does not qualify.[168] State and federal judicial systems can and will differ in many respects, and often these differences can have a significant influence on the decision to litigate in one forum or the other, but the Rules of Decision Act has nothing to say about most of these differences. To qualify as a rule of decision, a state law must say something directly about whether a party will win or lose on the merits of the dispute. A rule which drops out as an influence on outcome once complied with, such as a paper-size rule, does not affect character or result, even though, under the right circumstances, such a rule might have a bigger influence on outcome than a rule of substantive liability. Only a rule which has a continuing influence on the question of winning and losing, such as a burden of proof rule, or a liability rule like the negligence standard in *Erie*, is a rule that affects character or result.

When the foregoing features of *Hanna*'s refined outcome determination test are combined and expressed in question format, they provide a near algorithm for doing a Rules of Decision Act analysis. After

167. *Id.* at 468-69 (finding that if a court waits until only one rule will allow a party's lawsuit to proceed, "*every* procedural variation is 'outcome determinative'"). For an excellent critique of the use of the *ex ante* concept to identify the difference between substantive and procedural rules, see Solum, *supra* note 21, at 16-19.

168. *Id.* at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

Hanna, a federal court sitting in diversity and presented with an argument for the application of state law must ask: "Is the state law the type of law that would cause a reasonable litigant to choose (or avoid) the state forum at the beginning of the lawsuit when both state and federal law can be complied with, because of the law's effect on the character or result of the litigation?" If the answer is yes, then the federal court must apply the state law. If the answer is no, it need not. This refined outcome determination test accomplishes what *Byrd* tried to do with balancing, that is, reign in the overly broad sweep of an unqualified outcome determination standard so that it does not swallow up large parts of the Federal Rules and make federal courts just "other courts of the state." And it achieves this end without resorting to a hopelessly indeterminate and subjective standard such as balancing. Thus seen, *Erie*, *York*, *Byrd*, and *Hanna* are four variations on a common theme. They consider the same doctrinal problem and resolve it with increasing degrees of success: first, with a general sentiment about the division of labor between state and federal court (substance/procedure); then with an overly broad operationalization of that sentiment (outcome determination); next, with an inadequately qualified version of the operational standard (balancing); and finally, with a workable test (refined outcome determination).

The only loose end in all of this analysis is the *Byrd* balancing rule. Many commentators and judges still question whether *Hanna* rejected balancing, and the Supreme Court itself is less than clear about the answer to that question. *Hanna* did not overrule *Byrd* explicitly, but it also did not have to. Even under a refined outcome determination test, the South Carolina rule requiring that a judge rather than a jury decide the issue of statutory immunity did not qualify as a rule of decision. It was not a liability rule like the negligence standard in *Erie*, a rule articulating a constituent element of the cause of action like the limitations rule in *York*, or a rule changing the type or amount of evidence needed to prove a prima facie case like the burden of proof rule in *Palmer v. Hoffman*[169] or the weight of the evidence rule in *Gasperini*.[170] It was, as the *Byrd* Court said, a rule providing "merely a form and mode of enforcing the immunity."[171]

That it agreed with the *Byrd* outcome, however, does not mean that *Hanna* agreed with the *Byrd* rationale. In every way imaginable short of overruling the decision, the Court in *Hanna* made it clear that it did not approve of balancing. The clearest repudiation appears in *Hanna*'s discussion of the First Circuit's rationale for applying the Massachusetts

169. Palmer v. Hoffman, 318 U.S. 109 (1943).

170. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

171. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958) (citation omitted).

service rule. In an unmistakable use of balancing, the First Circuit asked how important the interests protected by the Massachusetts rule were to the state.[172] This confused the Supreme Court; it could not understand "what sort of question the Court of Appeals was addressing . . . ."[173] As the Supreme Court saw it, the importance of state interests in the abstract was neither here nor there in a Decision Act analysis. The Court explained:

> *Erie* and its progeny make clear that . . . the importance of the state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would . . . be likely to cause a plaintiff to choose the federal court.[174]

In this language, the Court recast balancing in terms of refined outcome determination to make "effect on character or result" the important consideration and "generalized importance of the state interests" irrelevant. If a state law does not affect the character or result of the litigation, the importance of that law to the state is immaterial. Since an inquiry into generalized importance is relevant only to balancing, by rejecting such an inquiry the court also rejected balancing.[175]

In articulating its new standard for the Rules of Decision Act, it is significant to note that the Court chose to refine the outcome determination test of *York* rather than the balancing test of *Byrd.* Because there was no Rules of Decision Act issue before the Court in *Hanna*, it did not have to announce a refinement of the *Erie* test, yet it chose to do so anyway. It is always hard to be certain about the motives behind gratuitous, but considered, dicta. Here the Court simply might have been trying to clear up the considerable confusion the *Erie* standard had generated in lower federal court decisions.[176] It no doubt also was important that the Court now had a formulation of the Decision Act test that looked as if it would work. The Court had figured out how to restrict the reach of unqualified outcome determination without resorting to an open-ended balancing standard. If this is why the *Hanna* Court

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172. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1956).

173. *Id.*

174. *Id.*

175. *See* MARCUS, REDISH & SHERMAN, *supra* note 15, at 961 ("What, if anything, is left of *Byrd* after *Hanna*? . . . specifically [after] footnote 9 in the Court's opinion."); Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 714-15 (1967) ("Apparently abandoned [in *Hanna*] . . . is the notion derived from *Byrd* by several courts and commentators that competing state and federal practices must be balanced . . . .").

176. Perhaps the best evidence of this confusion is the fact that two highly respected federal courts, the two lower courts in *Hanna*, could not distinguish between a Decision Act problem and an Enabling Act problem.

addressed the *Erie*/Decision Act standard when it was under no obligation to do so, the only difficult question is why it did not repudiate balancing explicitly. The answer to this question is not clear. The Court may have been worried about *Gasperini*[177]-type cases down the road, and wanted to leave itself a doctrinal alternative if it turned out that refined outcome determination itself needed to be refined. Preserving doctrinal options is instinctive to the Court and it would not be surprising if was doing just that in *Hanna*. In addition, the Court did not know for certain that it had produced a stable version of the outcome determination test – that fact became clear only in retrospect as the test held up under scrutiny. Accordingly, the Court in *Hanna* may have equivocated on balancing simply to hedge its bets. Whatever its motives, there can be little doubt that *Hanna* repudiated balancing in everything but name. Since it is now clear that there is no reason to preserve it in any form, the Court should repudiate *Byrd* balancing in name also.

E. Garnishes, Flourishes, and Digressions

A number of other Supreme Court decisions expand or contract the *Erie/Hanna* doctrine in large and small ways. While none of these decisions works any major change to its central tenets, occasionally they illustrate what seem to be different levels of enthusiasm on the part of the Court for using the doctrine. In this section, I describe a few of these outlier cases and show how they fit within the framework just outlined.

1. *RAGAN* AND *WALKER*

First, are two pseudo *Erie/Hanna* cases, that is, cases which initially look as if they belong in the *Erie/Hanna* category but which, on second glance, do not. These two cases represent a small but important set of decisions in which the central question seemed to be[178] whether federal courts should read the Federal Rules narrowly in order to avoid conflicts with state law. In *Ragan v. Merchants Transfer & Warehouse Co.*,[179] and *Walker v. Armco Steel Corp.*,[180] the Supreme Court had to decide whether a federal court sitting in diversity should apply state law or Rule Three of the Federal Rules of Civil Procedure (hereinafter Rule 3) to determine when an action was commenced for purposes of complying with the state statute of limitations. In each case, state law provided that the action was commenced upon service,[181] and Rule 3 provided

177. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

178. *See, e.g., id.* at 428 n.7 (citing to *Walker* and *Ragan*).

179. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949).

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

181. Under each state statute, if a defendant was served within sixty days of filing, the action

that it was commenced upon filing. Each petitioner had filed an action, but had not served the defendant, within the applicable limitations period.

Ordinarily, one would not expect identical cases[182] out of the Supreme Court within a thirty year period, but many thought *Hanna* overruled *Ragan* in holding that the Rules Enabling Act, and not the Rules of Decision Act, was the proper standard for judging the applicability of a Federal Rule. The petitioners in *Walker* argued this to the Supreme Court.[183] The Court rejected the argument, however, and held, as it did in *Ragan*, that "the scope of the Federal Rule [is] not as broad as the losing party [urges], and therefore, there being no Federal Rule which [covers] the point in dispute, *Erie* [commands] the enforcement of state law."[184] In effect, the Court held that *Ragan* and *Walker* were not Enabling Act cases after all, even though each involved a question of the applicability of a Federal Rule.[185] Recall that for a federal court to apply a Federal Rule in the face of a contrary state law, the Federal Rule must be pertinent, valid, and constitutional. In *Ragan* and *Walker*, Rule 3 did not pass the pertinence test. As the *Walker* Court explained, Rule 3 did not cover the statute of limitations point in dispute.[186] In the Court's view, the Rule was not intended "to toll a state statute of limitations, much less . . . to displace state tolling rules . . . . [It simply] governs the date from which various timing requirements of the Federal Rules begin to run . . . ."[187] It was unnecessary, therefore, to ask whether the Rule was valid or constitutional, for even if it was, on its own terms it did not apply to the limitations issue before the court. *Ragan* and *Walker* are pertinence cases then, similar to but not the same as *Erie/Hanna* cases. Thus they contribute nothing to the *Erie/Hanna* doctrine as such, save for a partial glimpse of its outer boundary.

Some commentators question the Court's good faith in grounding *Ragan* and *Walker* on a pertinence rationale. They use the plain language of the title to Rule 3, "Commencement of Action," to argue that

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was deemed to have commenced at filing even if service occurred outside the applicable limitations period. *See Ragan*, 337 U.S. at 531 n.4; *Walker*, 446 U.S. at 743.

182. The Court called the cases "indistinguishable," in part, because the "predecessor to the Oklahoma statute [in *Walker*] was derived from the predecessor to the Kansas statute in *Ragan*." *Walker*, 446 U.S. at 748.

183. *Id.* at 749 ("Petitioner argues that the analysis and holding of *Ragan* did not survive our decision in *Hanna*."). Justice Harlan, in his concurring opinion in *Hanna*, also concluded that *Ragan* was no longer good law. *See* Hanna v. Plumer, 380 U.S. 460, 476-77 (Harlan, J., concurring).

184. *Walker*, 446 U.S. at 750 (alteration in original) (quoting *Hanna*, 380 U.S. at 470).

185. Or, as the Court put it: "Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

186. *Id.* at 750.

187. *Id.* at 750-51.

the Court willfully blinded its eye to the only reasonable interpretation to be given to the Rule. But this objection is weak. The Court gives reasons for its conclusion that Rule 3 is not a limitations rule, and while one could question the persuasiveness of these reasons, they are supported by detailed and well worked out arguments.[188] Moreover, there

188. Arguing that "[t]here is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules," *id.* at 750-51, the Court concluded that Rule 3 "governs the date from which various timing requirements of the Federal Rules begin to run . . . ." *Id.* at 751. The Advisory Committee Notes' discussion of the Rule was the only evidence of such intent mentioned by the Court. While that discussion acknowledged that the question of whether Rule 3 tolled a state statute of limitations could come up, it concluded only that the answer would "depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations." *Id.* at 750-51 n.10. The Notes and the Court in *Walker* expressed no view on this question. Commentators question the Court's good faith mostly because they believe this reading of Rule 3 in *Walker* cannot be reconciled with the equivalent reading of Rule 4 in *Hanna*, asking, for example, "[w]hy is Rule 4 read broadly, making a clash with state law 'unavoidable,' while Rule 3 is read to incorporate an implied exception for state statutes?" *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 406-07 n.2. One answer is that the two Rules are not comparable. For example, reading Rule 4 to avoid a clash with the Massachusetts service rule in *Hanna* would read Rule 4 out of existence. In *Hanna*, Rule 4 is a service rule pure and simple. The issue before the Court in *Hanna* was the adequacy of service. If Rule 4 did not apply there, it did not apply anywhere. But the same was not true with respect to Rule 3 in *Walker*. Rule 3 had a life of its own as a timing rule, both for other provisions of the Federal Rules and perhaps federal statutes of limitations (the Court withheld judgment on this issue, see *Walker*, 446 U.S. at 752 n.14), independently of whether it defined the point at which an action was commenced for purposes of a state statute of limitations. This, coupled with the Court's legitimate concern about modifying state substantive law (statutes of limitations were substantive after *York*) through a Federal Rule, which would have been contrary to the command of the Enabling Act, is more than enough to establish the reasonableness of the Court's reading of Rule 3.

Walker also is significant because it is one of the few decisions in the *Erie/Hanna* line of cases grounded explicitly in the second half of *Erie*'s twin aims rationale of "inequitable administration of the laws." *See Walker*, 446 U.S. at 753 ("[A]lthough in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an 'inequitable administration' of the law.") (citing *Hanna*, 380 U.S. at 468). *York* is another. Having determined that Rule 3 did not apply, the Court in *Walker* had to decide whether the Rules of Decision Act and *Erie* required the application of the state commencement of the action rule. A commencement of the action rule is not likely to encourage *ex ante* forum shopping for character or result. The rule drops out as a factor in a lawsuit once the suit is filed. Acknowledging this, see *Walker*, 446 U.S. at 753, the Court went on to point out that the failure to apply the state rule would result in "an inequitable administration of the law" because it would keep alive a lawsuit that would have been barred in state court. *Id.* There was "simply no reason" for this, the Court said, "solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* The Court has yet to confront squarely the principal issue raised by the second half of the Enabling Act standard, namely how to determine when a right is "substantive" and thus not able to be abridged by a Federal Rule. The issue was raised in *Sibbach* and *Hanna*, and the Court ducked it each time by focusing instead on the question of abridgement (whether the differences between the state and federal rules were insubstantial or trivial), rather than on the question of whether the right being abridged was substantive. Ely discusses this point best. *See* Ely, *supra* note 2, at 718-26. *Gasperini* may begin to deal with the issue, though it is difficult to be certain about anything in *Gasperini*. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); *see also* Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the*

is no separate repository of evidence on the Court's motives which one could consult to test the objection that the Court acted in bad faith. Any discussion of that issue inevitably must devolve into a "yes, it did - no, it did not" impasse. Even if the Court used a pertinence rationale in *Ragan* and *Walker* to avoid making a hard *Erie/Hanna* decision, exercising one of its so-called passive virtues, it seems best simply to accept this and move on, and in the process to remove *Ragan* and *Walker* from the *Erie/Hanna* category of cases. The Court does not duck hard *Erie/Hanna* questions often, and no important issue is taken off the table or made more difficult to resolve with *Ragan* and *Walker* out of the picture. There is simply no reason to fight the Court on this point. *Ragan* and *Walker* are interesting examples of statutory interpretation, not federalism, problems.

2. *STEWART*

Stewart Organization, Inc. v. Ricoh Corp.,[189] is another pseudo *Erie/Hanna* case representative of a small but important group of cases in which a federal court must determine whether to apply a federal statute. Stewart, an Alabama corporation, entered into a dealership agreement with Ricoh, a New Jersey corporation, to market the latter's copier products. "The agreement contained a forum selection clause providing that any dispute arising out of the contract could be brought only in a court located in Manhattan."[190] After business relations between the parties soured Stewart brought an action for breach of the dealership agreement, among other claims, against Ricoh in federal district court in Alabama. Ricoh moved to transfer the case to the Southern District of New York under 28 U.S.C. § 1404(a), or to dismiss for improper venue under 28 U.S.C. § 1406. The district court denied the motion to transfer and held that transfer was controlled by Alabama law, which did not enforce forum-selection clauses. A divided panel of the Eleventh Circuit, holding that venue was governed by federal law and that forum-selection clauses were enforceable under federal law,[191] reversed and remanded with instructions to transfer the case to the Manhattan

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Development and Application of the Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 82 (1995) ("Substantive law refers to that body of principles designed to regulate primary human activity; procedural law refers to that body of principles designed to provide a means for adjudicating controversies over rights derived from the substantive law.").

189. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

190. *Id.* at 24.

191. The court cited *The Bremen* for this proposition. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (enforcing an explicitly bargained-for forum selection clause in a commercial contract between two sophisticated companies dealing in international commerce). For an example of the Court's approach to a more representative form of a forum selection clause, see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

court.[192] The Supreme Court granted certiorari and affirmed on grounds not relied on by either of the courts below.

The Court's reasoning was straightforward and simple, and it did not involve an application of either the Rules of Decision Act or the Rules Enabling Act:

> A district court's decision whether to apply a federal statute such as § 1404(a) in a diversity action, however, involves a considerably less intricate analysis than that which governs the "relatively unguided *Erie* choice. . . ." Our cases indicate that when the federal law sought to be applied is a congressional statute, the first and chief question for the district court's determination is whether the statute is "sufficiently broad to control the issue before the Court." This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute.
>
> . . . .
>
> If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution . . . . 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 . . . ."[193]

This was familiar reasoning. It tracked quite closely the reasoning used in *Hanna* to explain when a federal court must apply a Federal Rule. The "sufficiently broad" issue identified by *Stewart*, sometimes called the scope issue, was a statutory version of the pertinence issue raised about Rule 4 in *Hanna* and Rule 3 in *Ragan* and *Walker*. The questions of validity and constitutionality are separate for a Federal Rule, but they merge into one when asked about a statute, since an act of Congress, unlike a Federal Rule, is tested directly against the Constitution. Just as with a Federal Rule, if a federal statue is pertinent, valid, and constitutional, that is "the end of the matter."[194] There is no higher authority.

The first question in *Stewart* then, was whether the federal transfer statute covered the issue before the court. This was an easy question. "The issue is whether to transfer the case to a court in Manhattan in accordance with the forum-selection clause."[195] The Alabama court's only authority to transfer the case came from the federal transfer statute. Thus, the statute covered the issue before the court. Since the statute

192. *See* Stewart Org., Inc. v. Ricoh Corp., 779 F.2d 643 (11th Cir. 1986). The full Eleventh Circuit Court of Appeals adopted the result and much of the reasoning of the panel opinion. *See* Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987).

193. *Stewart*, 487 U.S. at 26-27 (citations omitted).

194. *Id.* at 27.

195. *Id.* at 29.

also was constitutional,[196] the only remaining question was whether it authorized the transfer. The text of the statute authorized transfer "[f]or the convenience of parties and witnesses, [and] in the interest of justice."[197] This meant that the statute placed "discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness'" and "to weigh in the balance a number of case-specific factors" such as "the parties private expression of their venue preferences."[198] At first, the Court concluded that the transfer statute and the Alabama law were in direct conflict, and that the Alabama law had to give way,[199] seemingly as a simple matter of Supremacy Clause pre-emption. But then the Court reversed itself, acknowledging that the two rules "are not perfectly coextensive," and held that "the forum-selection clause . . . should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)."[200] As a "private expression of [the parties'] venue preferences," the Court said, the clause was one of the many factors which "figures centrally in the district court's calculus."[201]

This seeming compromise resolution not only failed to solve the *Stewart* problem, it made it worse. If the forum-selection clause was mere evidence of the parties' views on the convenience of the New York forum, the court would have needed to know what the parties had in mind in agreeing to the clause before knowing how much weight to give the clause as evidence of the parties' disposition towards New York. If Stewart, for example, thought that the clause would never be enforced

196. *Id.* at 31-32.

> The constitutional authority of Congress to enact § 1404(a) is not subject to serious question. As the Court made plain in *Hanna*, 'the constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. [citation omitted]. [S]ection 1404(a) is doubtless capable of classification as a procedural rule, and indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law. [citation omitted]. It therefore falls comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause. [citation omitted].

Id. at 32.

197. 28 U.S.C. § 1404(a) (2000).

198. *Stewart*, 487 U.S. at 29-30 (citations omitted). A court also is supposed to consider "the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of the 'interest of justice.'" *Id.* at 30.

199. *Id.* ("Our cases make clear that, as between these two choices in a single 'field of operation,' [citation omitted] the instructions of Congress are supreme.").

200. *Id.* at 30, 31.

201. *Id.* at 29, 30.

by an Alabama court (state or federal) and that agreeing to it was a meaningless act, he was not necessarily expressing any opinion about the convenience of the New York forum in signing the agreement. Parties often say things they do not mean when they think they will not be bound by them, particularly in bargaining situations when they have no leverage to change the terms of the agreement but still want to make the deal. If Stewart was wrong about the legal significance of the clause, on the other hand, and the clause was enforceable, he could have been held to have expressed the view that New York was a convenient forum, his mistaken understanding notwithstanding; ignorance of the law is no excuse. But to know whether this was the case, and thus to know how much evidentiary weight to accord Stewart's ostensible agreement to the New York forum, the Court would have had to perform a Rules of Decision Act analysis of the Alabama law, in order to determine whether a federal court sitting in diversity had to enforce it. The Court would have had to resolve an *Erie* issue, in other words, before it could resolve the statutory issue incorporating it. Only Justice Scalia raised a version of these concerns,[202] and even he did not play out the analysis to its logical conclusion. The *Stewart* case has an embedded *Erie* issue, therefore, but the Court's failure to identify and resolve it means that the case has no value as an *Erie* precedent. As a consequence, *Stewart* is a case about the application of an act of Congress in federal court and comes within one of the exceptions to the Decision Act command to apply state law. It is an exception to the *Erie* doctrine, not an application of it.

3. *GASPERINI*

Gasperini v. Center for Humanities, Inc.[203] is a complicated and strange case.[204] It is presumptively authoritative since it is the most

202. *Id.* at 38-41 (Scalia, J., dissenting).

203. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

204. One of the best indications of *Gasperini*'s difficulty is the way in which the opinion is edited (or not edited) for inclusion in the casebooks. Almost all of the books reprint the case nearly in its entirety, unusual for casebooks where space is always at a premium, making *Gasperini* the longest case in the *Erie/Hanna* section of most books. It is as if the casebook authors are not sure about what parts of the case, if any, will turn out to be important and what parts are safe to leave out, so they reproduce almost everything. Some of the newer editions have begun to change this pattern. *See, e.g.*, YEAZELL (6th ed.), *supra* note 15, at 245 (reducing the case to one paragraph). Babcock & Massaro reversed this pattern by including *Gasperini* as a short blurb in its first edition and a long case excerpt in its second. *Compare* BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 216-17 (1997) (hereinafter BABCOCK & MASSARO (1st ed.)), *with* BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 840 (2d ed. 2001) (hereinafter BABCOCK & MASSARO (2d ed.)). For commentary on *Gasperini*, see C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267; *Some Thoughts, supra* note 135; Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some*

recent Supreme Court *Erie/Hanna* decision and it discusses all (i.e., Decision Act, Enabling Act, and Constitutional) of the dimensions of the doctrine. As a consequence, one might reasonably expect it to articulate and be based on a mature, complete, and settled statement of the law. Unfortunately, the Court's analysis is often confusing and strangely organized, and its description of the relevant legal standards is frequently mixed up. Justice Ginsburg, a new player in the *Erie/Hanna* field, wrote the opinion of the Court and gave it many of the idiosyncratic linguistic twists and turns one associates with a new author going over familiar ground. In the process, she produced the type of precedent that, in retrospect, often turns out to be either the harbinger of a new doctrinal order, or an analytical wild card never heard from again; which one is impossible to say. One can only wait to see what the Court does with the decision down the road, therefore, to know whether *Gasperini* becomes an integral part of a new *Erie/Hanna* overview, or is forgotten as a doctrinal frolic and detour.[205]

Like *Erie/Hanna* cases generally, *Gasperini* arose out of a rather ordinary legal dispute. William Gasperini, a television and newspaper reporter, sued the Center for Humanities, Inc. (The Center) for losing three hundred slide transparencies which he had loaned to The Center to make an educational videotape. He filed his action in the federal district court for the Southern District of New York, invoked the Court's diversity jurisdiction,[206] and based his claim on several state law theories, including breach of contract, conversion, and negligence. The Center conceded liability for the lost transparencies and contested only the issue of damages. The damages issue was tried to a jury, and it awarded Gasperini $450,000 by assigning a value of $1500 to each of his slides, the same amount Gasperini's expert testified was the industry standard for a lost transparency. The Center moved for a new trial under Federal Rule 59 arguing among other things that the verdict was excessive. The Dis-

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Reflections on Erie *and* Gasperini, 46 U. KAN. L. REV. 751 (1998); Rowe, *supra* note 22; King, Note, *supra* note 18.

205. Professor Rowe, for one, thinks that *Gasperini* "does not appear to mark a major shift in the Supreme Court's *Erie* jurisprudence." *See* Rowe, *supra* note 22, at 966. *Gasperini* may also be evidence that the *Erie/Hanna* telephone game has come full circle and begun a second round. The Court's original articulation of the doctrine in the *Erie/York/Byrd/Hanna* sequence of cases, as reproduced (and modified) by casebook authors and then repeated (and modified once again) by lower federal court judges and clerks in new case opinions, may now have been ratified by the Supreme Court in *Gasperini* and sent back out for a second turn around the same cycle. It will be interesting to see what casebook authors and lower federal court judges do with *Gasperini* this time around. The decision in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), may provide a clue in this regard, though many of the casebooks do not yet discuss it, and those that do often say very little about it. *See, e.g.*, YEAZELL (6th ed.), *supra* note 15, at 250-51.

206. Gasperini was a citizen of California and the Center was incorporated and had its principal place of business in New York. *See Gasperini*, 518 U.S. at 419 n.1.

trict Court denied the motion without comment, but the Second Circuit vacated the judgment and ordered a new trial unless Gasperini agreed to a remitted award of $100,000.[207]

The principal question on appeal in the Supreme Court was what standard the New York federal courts, both trial and appellate, should use to determine whether the jury award was excessive. A New York statute authorized state courts to find a jury award excessive only if the award "deviates materially from what would be reasonable compensation."[208] Adopted in 1986 as part of a series of tort reform measures, this statute replaced the common law "shocks the conscience" standard previously in effect in both state and federal court in New York. According to the Supreme Court, the New York legislature adopted the "deviates materially" standard to ratchet up excessiveness review and, in the words of Governor Mario Cuomo, to "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State."[209] To decide whether an award "deviates materially" from "reasonable compensation," New York state courts were instructed to compare the award with awards in other, similar cases. Under the "shocks the conscience" standard, state courts also looked to analogous cases, but the "deviates materially standard "tighten[ed] the range of tolerable awards" considerably.[210] Whether federal courts in New York should apply the state statutory standard was unclear however, since the Seventh Amendment to the Constitution, applicable in federal but not state court, provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, [other] than according to the rules of the common law."[211] Because a determination of whether a jury award is reasonable in comparison with awards found by other juries arguably involves a re-examination of facts,[212] the "deviates materially" standard presumptively conflicted with the Seventh Amendment, or at least whether it did was a question the Supreme Court had to resolve.

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207. *Id.* at 420-21.

208. N.Y. C.P.L.R. LAW § 5501(c) (McKinney 1995).

209. *Gasperini*, 518 U.S. at 424.

210. *Id.* at 425.

211. U.S. CONST. amend. VII.

212. Justice Stevens disputed this point. While acknowledging that excessiveness review presents a mixed question of fact and law, he argued that it should be treated as a question of law since, in making such a decision, a court is required "to construe all record inferences in favor of the factfinder's decision and then to determine whether, on the facts as found below, the legal standard has been met." *Gasperini*, 518 U.S. at 443 (Stevens, J., dissenting). This does not involve a re-examination of any facts found by a jury, he argued, and thus does not trigger the re-examination clause prohibition. *Id.* at 439-48. The majority gave an oblique signal that it might agree with the general conceptual point, but dealt with the re-examination clause prohibition in other ways. *Gasperini*, 518 U.S. at 433.

The Court vacated the judgment of the Second Circuit, holding that the *Erie* doctrine required the application of the state standard in federal court, and instructed the Court of Appeals to remand the case to the District Court for an application of that standard.[213] But then, in what can only be seen as an appellate version of a compromise verdict, the Court also held that in reviewing the District Court's application of the state standard on appeal, the Second Circuit was bound to follow federal and not state law. Thus, the Second Circuit could reverse the District Court's decision only if the latter's application of the deviates materially standard amounted to an abuse of discretion.[214] As the Supreme Court explained, "New York's law controlling compensation awards for excessiveness . . . can be given effect, without detriment to the Seventh Amendment, if the [state] review standard . . . is applied by the federal trial court judge, with appellate control of the trial court's ruling [governed by federal law]."[215] Justices Stevens and Scalia dissented separately, and Chief Justice Rehnquist and Justice Thomas joined in the Scalia dissent.

Justice Ginsburg's majority opinion is the most confusing of the three and also, as the opinion of the Court, the most important. Structurally, the opinion begins in an unusual manner. Ordinarily in an *Erie/Hanna* opinion a court takes up the legal questions in a preferred sequence. First is the question of whether the case can be resolved by the application of a constitutional rule. If the federal Constitution controls the issue before the court, it does not matter what other federal or state law may say to the contrary. If no constitutional provision applies, a court must determine whether a federal statute governs the issue for decision, as in *Stewart*. If it does, and the statute is constitutional, the only remaining question is what the statute requires. No other law can govern. If neither a federal constitutional provision nor a statutory rule applies, a court must ask whether a Federal Rule of Civil (or Appellate) Procedure is pertinent to the issue before it. If yes, the Court then asks whether that Rule is a valid exercise of Enabling Act authority. As with a federal statute, if a valid Federal Rule is pertinent to the issue for decision that is the end of the story. State law cannot apply.[216] Only when no valid federal constitutional provision, statute, or Rule governs

213. *Id.* at 439.

214. *Id.* at 438-39.

215. *Id.* at 419. Ironically, Justice Ginsburg fashioned this standard while at the same time criticizing Justice Scalia's alternative for being "sphinx-like," with a "state forepart [and] a federal hindquarter." *Id.* at 439 n.23. This trial/appellate contraption is an indication that Justice Ginsberg is not averse to constructing a legal satyr of her own.

216. This is true for the simple reason that a Federal Rule is not valid under the Enabling Act if it abridges substantive rights, including those created by state law.

does a federal court have to determine whether to apply state law under the command of the Rules of Decision Act. This is the preferred sequence of questions in a constitutional system in which federal power is enumerated and state power is reserved, but unfortunately, the majority opinion in *Gasperini* has the sequence reversed.

Following the Second Circuit, the Supreme Court characterized the issue for decision as whether the New York "deviates materially" standard was substantive or procedural for *Erie* purposes and concluded that it was both.[217] This being so, "the dispositive question," the Court said, was "whether federal courts can give effect to the substantive thrust of [the New York law] without untoward alteration of the federal scheme for the trial and decision of civil cases."[218] This way of framing the question is reminiscent of *Byrd*, in which the interests underlying conflicting state and federal rules, each arguably applicable to the case, were balanced against one another to determine which rule applied.[219] *Byrd*'s balancing formulation was abandoned in *Hanna,* however, so it is not clear whether the *Gasperini* Court was reviving *Byrd*, or whether it just failed to understand it. In addition, in concluding that the New York rule was in part substantive, the Court gave the rule a kind of presumptive applicability, subject to being overridden only by affirmative, countervailing federal interests. This manner of framing the issue makes the regulation of judicial review of jury verdicts a *quasi* enclave power of the states. Even if outweighed by federal power, the state rule still must be taken into account in identifying which excessiveness standard to apply. But there is no fixed enclave of state power protected by the federal Constitution; that was one of the lessons of *Hanna*. States possess only residuary power not granted to the federal government in the enumerated powers provisions of the Constitution. Thus, the question of whether the "deviates materially" standard was substantive should not have arisen until the Court first determined that no federal rule of any kind applied.

The Court should have begun its analysis by asking whether the Re-examination Clause of the Seventh Amendment defines the standard for federal court review of jury decisions as an essential characteristic of

217. *Gasperini,* 518 U.S. at 426.

218. *Id.*

219. Several commentators see *Gasperini* as reviving *Byrd* balancing. *See, e.g.*, COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 422 n.1. *But see* Rowe, *supra* note 22, at 1000 ("the Court . . . in *Gasperini* has continued to send . . . the message . . . that the place to start . . . is with the *Hanna* 'twin aims' formulation, and not with *Byrd*'s balancing approach."). The COUND book also has *Gasperini* reviving *York*'s outcome determination test, see COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 422 n.1, but *Hanna* had already done that. *See* discussion *infra* notes 159-67 and accompanying text.

the federal court system.[220] If yes, as the Court seemed to say, at least for federal appeals courts,[221] then it was beside the point that the New York excessiveness standard was substantive. If no, as the Court also in effect seemed to say in regard to federal trial courts,[222] then the Court needed to ask whether Rule Fifty-Nine of the Federal Rules of Civil Procedure (hereinafter Rule 59) provided a standard for trial court review of jury verdicts as excessive, and if so, whether that rule was a valid exercise of Enabling Act authority.[223] Justice Scalia recognized the importance of Rule 59 and argued at length for its applicability, but the majority ignored his argument, responding only perfunctorily in a footnote.[224] The majority seemed to believe that it had a duty to accommodate both state and federal interests whenever state and federal rules were arguably on point and the state rule was substantive. The Court did not indicate from where this duty came, and there is nothing in the *Erie/Hanna* doctrine which imposes it.

It would be surprising if the Court intended to ground its decision on the premise that the Tenth Amendment creates a fixed enclave of state power to regulate judicial review of jury action. The enclave view of the Tenth Amendment was Justice Harlan's well known but mistaken contribution to the *Erie/Hanna* debate. Justice Ginsburg's respect for Justice Harlan notwithstanding, the view simply has too much contrary

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220. *Gasperini* discusses this issue but not at the point in the opinion one would have expected. *See Gasperini*, 518 U.S. at 431 (citing Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)); Rowe, *supra* note 22, at 1002-13 (criticizing *Gasperini*'s "essential characteristic" discussion as "cryptic or unclear").

221. *Gasperini*, 518 U.S. at 434-35.

222. *Id.* at 431-33 (concluding that the Seventh Amendment applied to trial courts, but that it also incorporated state common law standards for court review of jury action).

223. The Court recognized that a pertinent and valid Federal Rule would apply, even in the face of a contrary state law, but believed that Federal Rules had been interpreted "with sensitivity to important state interests and regulatory policies." *Id.* at 428 n.7 (citing Walker v. Armco Steel Corp., 446 U.S. 740, 750-52 (1980)). This seems to be another way of saying that Federal Rules must be read narrowly in order to avoid conflicts with state law. This view, ironically, is the opposite of what the Court said in *Walker*:

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.

Walker, 446 U.S. at 750 n.9.

224. *Gasperini*, 518 U.S. at 437 n.22. Even Justice Scalia cut his Enabling Act analysis short, arguing only for the pertinence and not the validity of Rule 59, perhaps in response to the majority's similarly limited argument. The majority argued, in effect, that while Rule 59 permits a trial judge to set aside a jury verdict for excessiveness, it does not include a separate standard for determining when a verdict is excessive. Thus, there is nothing in Rule 59 that is pertinent to the issue of whether the *Gasperini* jury verdict should be set aside. Justice Scalia may have assumed that the majority did not contest the validity of Rule 59, but only its pertinence and therefore, responded in kind.

constitutional text to overcome to be persuasive. Perhaps the majority opinion was drafted by a law clerk who learned about the *Erie/Hanna* doctrine from one of the casebooks discussed in the next section and never quite understood the lessons of Ely's analysis.[225] Or, since the opinion has the appearance of having been assembled quickly, with a minimum of research, perhaps the Court was too pressed for time to iron out what it knew were substantial doctrinal wrinkles.[226] Absent a clearer statement of its reasoning, however, and a convincing argument for how its view is compatible with the Constitution, the opinion should not be interpreted as having resurrected the enclave view of the Tenth Amendment.[227]

Gasperini's mixed-up rationale notwithstanding, the decision's outcome is not necessarily wrong. One could justify the decision on Seventh Amendment grounds, as a case in which the Court, in effect, concluded that a federal trial court is permitted to re-examine jury verdicts for excessiveness because federal trial courts were permitted to do so at common law. The Seventh Amendment prohibition on fact re-examination makes an exception for common law practice.[228] Moreo-

225. Only Justice Stevens cites to Ely, and then only for a scrivener's point. *Id.* at 440 n.1 (Stevens, J., dissenting). The majority opinion is remarkably thin on citations generally, which is remarkable only because that is not typical for *Erie/Hanna* opinions.

226. Evidence of this less than diligent research is apparent in the text of the decision. For example, the Court quoted the "original" Rules of Decision Act as applying to "civil actions," instead of "trials at common law." *Gasperini*, 518 U.S. at 427 n.6. The civil action terminology was not added until the 1948 revision of the Act. 28 U.S.C. § 1652 note (2000) (Revision Notes and Legislative Reports).

227. For the same reasons, *Gasperini* also should not be seen as resurrecting *Byrd* balancing, though some commentators think it does. *See, e.g.*, King, Note, *supra* note 18, at 183-84. The *Gasperini* majority uses *Byrd* only to establish the uncontroversial point that the Seventh Amendment regulates the distribution of functions between judge and jury as an essential characteristic of the federal judicial system. *See Gasperini*, 518 U.S. at 431-33. Since the *Erie* and *Hanna* decisions are grounded in statutory rules, each is unquestionably subordinate to a federal constitutional command. *Gasperini*'s use of *Byrd* therefore, does not modify the *Erie/Hanna* doctrine in any way. To conclude otherwise is to make the familiar mistake of seeing the doctrine as a single, undifferentiated, constitutional rule. *See also id.* at 427-28 (where the *Gasperini* majority leaves *Byrd* out of its rendition of the history of the *Erie/Hanna* doctrine and thereby indicates that it did not view balancing as an integral part of that history).

228. For Justice Stevens, one need not get to the exception clause of the Seventh Amendment to conclude that the Amendment does not apply. He saw excessiveness review as raising a question of law rather than a re-examination of fact, and thus as outside the scope of the Amendment's basic prohibition altogether. *See Gasperini*, 518 U.S. at 441-44 (Stevens, J., dissenting). While not agreeing with this particular point, the majority agreed that trial court fact determinations can be so unreasonable as to be wrong as a matter of law. *See id.* at 435. *Gasperini* does make one new constitutional point. The Court holds for the first time that federal appellate review of trial judge decisions to set aside verdicts as excessive is "reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." *See id.* Until *Gasperini*, the Court had not formally approved this widespread lower federal court view.

ver, Rule 59, the Federal Rule authorizing re-examination of jury verdicts, does not contain an excessiveness standard itself, making Rule 59 not pertinent to the issue of whether the award is excessive, and a state excessiveness standard would seem to be outcome determinative in the refined *Hanna* sense. If all of this is true, it follows that the federal trial court must apply the state excessiveness standard. However, federal appeals courts cannot take advantage of the same Seventh Amendment exception for common law practice because at common law appeals courts were not permitted to re-examine jury verdicts.[229] Unfortunately, the Court equivocated in describing the role of the Seventh Amendment in justifying its decision.[230] Thus, while *Gasperini* may be best explained as a Seventh Amendment case, there is not much basis in the Court's opinion to read it this way.

If *Gasperini* is not a Seventh Amendment case, it must be either an Enabling Act case or a Decision Act case, but again the Court did not say which. On the one hand, if Rule 59 articulates a substantive standard for re-examining jury verdicts in addition to a procedural standard permitting such re-examination, *Gasperini* is an Enabling Act case and the Court needed to determine whether Rule 59 was a valid exercise of Enabling Act power. This issue was a principal point of contention

229. *See id.* at 450-55 (Scalia, J., dissenting). Justice Scalia viewed *Gasperini* as primarily a constitutional case. Oversimplifying just a little, his argument went like this: the Seventh Amendment prohibits federal court re-examination of facts found by juries except as permitted at common law. A determination that a jury verdict is excessive involves a re-examination of facts. Federal appeals courts were not permitted to re-examine facts at common law. Thus, the Second Circuit's decision to set aside *Gasperini*'s verdict as excessive was unconstitutional. One need not reach any *Erie/Hanna* issues to resolve the case. For federal trial courts the argument was a little different. Federal trial courts were permitted to re-examine verdicts at common law so they come within the exception to the Seventh Amendment prohibition. This review is regulated by federal law, and the relevant federal standard is that set out in Rule 59. Distinguishing between an "excessiveness" standard per se, and a "setting aside for excessiveness" standard (a distinction without a difference the majority might argue), Justice Scalia concluded that while "[s]tate substantive law controls what injuries are compensable and in what amount . . . [Rule 59] determine[s] whether the award exceeds what is lawful to such a degree that it may be set aside by order for new trial or remittitur." *See id.* at 464 (Scalia, J., dissenting). At the trial court level, in Justice Scalia's view, *Gasperini* was a *Hanna*/Enabling Act case involving the applicability and validity of Rule 59; it did not involve any *Erie*/Decision Act issue. Although Justice Scalia discussed the question of whether an excessiveness standard is outcome determinative in the refined sense, that discussion was not necessary to his analysis. Unfortunately, while he discusses the pertinence of Rule 59, he did not consider whether the Rule was a valid exercise of Enabling Act authority (i.e., was it a rule of practice and procedure, and did it abridge substantive rights), but that may be because the majority did not press this point.

230. *Gasperini*'s reference to "the federal system's division of trial and appellate court functions [as] an allocation weighted by the Seventh Amendment . . . sounds rather like *Byrd*'s reference to the Amendment's 'influence' along with its dodge of deciding whether the Amendment in the circumstance before the Court issued a 'command.'" Rowe, *supra* note 22, at 1006 n.175 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)) (alterations in original).

between the majority and Justice Scalia but it was not resolved conclusively. On the other hand, if Rule 59 does not contain a substantive excessiveness standard, *Gasperini* is a Decision Act case and the Court needed to discuss whether an excessiveness standard is outcome determinative in the refined sense described by *Hanna*. The majority made a feint at such an argument by analogizing the standard to a damage cap rule, which everyone agreed was substantive,[231] but Justice Scalia disputed this point.

In the final analysis, *Gasperini* is a seriously confused decision, particularly in its description of the relationships among the constitutional, statutory, and rule dimensions of the *Erie/Hanna* doctrine. It intertwines Seventh Amendment, Enabling Act and Decision Act issues in a manner reminiscent of *Byrd* and repudiated in *Hanna* and raises more questions than it resolves. Such an opinion cannot be said, at least without further development, to represent a change in the doctrinal universe, especially so longstanding and well-developed a doctrinal universe as *Erie/Hanna*. The principal difficulty with *Gasperini*, therefore, is in figuring out what it means, not in determining whether it makes a justifiable change in direction. The decision does not so much develop and explain the *Erie/Hanna* doctrine as reflect the confusing state into which the doctrine has sunk. Lower federal courts have been confused about *Erie/Hanna* case law for a long time, but now even the Supreme Court seems to be in on the confusion. *Gasperini* is an example of the excessiveness that has crept into *Erie/Hanna* opinions over the years, a kind of overdoing and making a mess out of what, at the core, is really a rather simple and straightforward set of statutory interpretation questions. This is ironic, since excessiveness was the legal issue raised by the plaintiff in *Gasperini*.

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What then can be said about the *Erie/Hanna* doctrine in general? First of all, it is more a line of cases than a doctrine, at least if one thinks of a doctrine as a concept-based, self-contained, court-created rule or set of rules applicable to a discrete area of legal regulation. If a federal court sitting in diversity must apply state substantive law and federal procedural law, the best candidate for a statement of the *Erie* doctrine, the source of this obligation is statutory rather than doctrinal. The obli-

231. *Id.* at 429. ("We think it a fair conclusion that CPLR § 5501 (c) differs from a statutory cap principally 'in that the maximum amount recoverable is not set by statute, but rather is determined by case law.' In sum, § 5501(c) contains a procedural instruction but the State's objective is manifestly substantive.") (quoting Brief for Amicus Curiae The City of New York at 11, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (No. 95-719)).

gation is located partly in the Rules of Decision Act, not the *Erie* decision, because *Erie* is a gloss on the Decision Act, and partly in the Rules Enabling Act, not the *Hanna* decision, because *Hanna* is an interpretation of the Enabling Act. There is a constitutional backdrop to the obligation, of course, since all statutes, federal and state, have force only when they are constitutional. However, the Constitution only permits the substance/procedure obligation to be imposed; it does not require it. The obligation itself comes from federal statutes. At a high enough level of abstraction the Decision Act and Enabling Act converge in a common purpose: that of prescribing a substance/procedure formula for federal and state judicial system coexistence within a single geographical jurisdiction. A common policy concern does not make for a legal rule, however, and at the foregoing level of abstraction the *Erie* doctrine is more a policy than a rule.

The fact that there is no *Erie* doctrine does not mean that the *Erie/Hanna* cases are unrelated or all separate tubs on their own bottoms. *Erie*, *York*, *Byrd* and *Hanna* are successive stages in a single, longstanding, interpretive project of the Supreme Court. Collectively, they articulate an increasingly sophisticated and ultimately stable interpretation of the different substance/procedure standards at the core of the Rules of Decision and Rules Enabling Acts. Throughout this interpretive project, the Court works with the same legal rules, pursues the same underlying policy interests, and is constrained by the same background constitutional limitations. The Court attempts to protect the rights of state and federal courts to create their own distinctive organizational forms, while at the same time preserve the right of individual litigants using these courts to be judged by a single, uniform system of justice, one in which the nature and extent of legal rights and obligations do not depend upon the fortuity of being in federal or state court. And it does all of this within a modern legal realist jurisprudential framework, one which sees law as originating from the command of a sovereign rather than a brooding omnipresence of reason in the sky.

Conflicts between the system-integrity and litigant-fairness interests protected by the doctrine have arisen over the years. The Court has resolved each of these conflicts by interpreting the Decision and Enabling Acts in progressively more complicated ways. When an interpretation developed in one context did not work well in another context, the Court adapted its reading of the statutes to the new situation. For example, when *Erie*'s substance/procedure standard did not help categorize the statute of limitations rule in *York*, the Court reformulated substance/procedure in functionalist outcome-determination terms. When an unqualified outcome-determination test threatened to sweep too broadly

into the federal domain, as in *Byrd* and *Hanna*, the Court reined it in, first with an overly elastic balancing standard, and then with a refined outcome determination test. Until *Hanna*, this interpretive project was principally a work in progress, with each new decision building cumulatively upon those that had come before, preserving what had worked and modifying what had not. Once the Court happened upon the refined outcome determination test in *Hanna,* however, its analysis reached a stable state.[232] Refined outcome determination deals clearly and fairly with all types of *Erie* problems, imagined and real, and needs only to be understood accurately, not replaced. Conceiving of the *Erie/Hanna* cases in this way, as multiple and increasingly sophisticated drafts of the same interpretive project, each of which tweaks rather than replaces the legal standard of the previous case, gives the cases an order and coherence they do not have when seen as different and competing formulations of a freestanding *Erie* rule. For this reason, if for no other, this is how the cases should be interpreted, studied, and presented in law school casebooks. But as we shall see in the next section, this is anything but the case.

III. THE CASEBOOKS

There are more than a dozen civil procedure casebooks available for use in American law schools,[233] each with a section on the *Erie/Hanna* doctrine, although the length and sophistication of these sections varies considerably from book to book. It would be unwieldy to describe each book's treatment of the doctrine in detail – such a discussion would loop back on itself many times over, and seem interminable in the process – but fortunately, it is not necessary to do this. With only a little distortion, the books can be sorted by their emphases into three

232. This is true only with respect to the *Erie*, or Decision Act, part of the *Erie/Hanna* standard. The Court still has quite a bit of work to do explaining the second half of the Enabling Act standard. *See supra* note 157.

233. *See, e.g.*, BABCOCK & MASSARO (2d ed.), *supra* note 204; ROBERT C. CASAD, HOWARD P. FINK & PETER N. SIMON, CIVIL PROCEDURE: CASES AND MATERIALS (2d ed. 1989); COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24; DAVID CRUMP, WILLIAM V. DORSANEO, III & REX R. PERSCHBACHER, CASES AND MATERIALS ON CIVIL PROCEDURE (4th ed. 2001); FIELD, KAPLAN & CLERMONT, *supra* note 18; RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (3d ed. 2001); HAZARD, TAIT & FLETCHER, *supra* note 37; A. LEO LEVIN, PHILIP SHUCHMAN & CHARLES M. YABLON, CIVIL PROCEDURE: CASES AND MATERIALS (2d ed. 2000); JOEL WM. FRIEDMAN, JONATHAN M. LANDERS & MICHAEL G. COLLINS, THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS (2002); MARCUS, REDISH & SHERMAN, *supra* note 15; MAURICE ROSENBERG, HANS SMIT & ROCHELLE COOPER DREYFUSS, ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS (1990); THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE (2004); SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69; LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE (3d ed. 2004); YEAZELL (6th ed.), *supra* note 15. My apologizes to anyone omitted.

general categories: "old-fashioned" or "traditional," "advocacy," and "practitioner" formats. A description of a representative book from each category will give a reader a relatively complete picture of the books as a whole.

Traditional books present the *Erie/Hanna* opinions in nearly complete form, as pure data, and with little selective editing or argumentative notes to suggest correct interpretations. Framed in general terms, the "Notes and Questions" sections of these books usually ask the reader to explain or discuss the cases, so that analysis takes its shape almost completely from the ideas of those carrying on the discussion rather than the authors of the books.[234] Advocacy books argue quite straightforwardly for single, correct, but not always identical, interpretations of the *Erie/Hanna* line of cases. Perhaps for marketing purposes, to differentiate themselves from competitors, or perhaps for pedagogical reasons, on the belief that argument is more instructionally engaging than data, advocacy books leave little doubt about how to interpret the *Erie/Hanna* cases. These books give the reader only one option: agreeing or disagreeing. Practitioner books present the *Erie/Hanna* cases as infinitely manipulable, capable of multiple and equally convincing, if not always consistent, interpretations. In a sense, these books combine the qualities of the first two types by arguing for particular meanings of cases, but in so numerous and varied a fashion as to cancel out one another and thus leave readers with the responsibility of determining for themselves what the cases mean.

Rarely, if ever, does a book fit into just one category. In all of the books, for example, a note arguing that a case stands for such-and-such a proposition often is followed by a more open-ended invitation to discuss or explain the case.[235] But any single book is likely to have an overall emphasis or general spirit, and in that sense, the books break down into the above categories. I will describe the *Erie/Hanna* section of a book from each of these categories and use that book's presentation of the doctrine to represent the other books of the same type. The three books I have chosen to represent these categories are widely adopted and thus

234. Traditional books also typically provide more extensive substantive commentary on the principal cases taken from treatises, law review articles, and other case decisions, than do either advocacy or practitioner books. For the best example, see HAZARD, TAIT & FLETCHER, *supra* note 37.

235. It is easy to see how multiple-author books could adopt more than one approach to the presentation of material. If each co-author worked on the entire book rather than on individual sections, editing and adding to the work of each other co-author from a different theoretical, pedagogical, or marketing perspective, and if these contributions were not then put into a proverbial single voice, the effect easily could be a book with a hybrid traditional/advocacy/practitioner perspective. This format is a little more surprising when it appears in a single author book.

presumably of great influence on American procedure instruction. They also are exceptionally skillful at carrying out their particular approaches.[236] Others could and probably would make different, and as effective, choices.

A. *Cound, Friedenthal, Miller & Sexton*

Cound, Friedenthal, Miller, and Sexton's *Civil Procedure: Cases and Materials* (hereinafter Cound),[237] now in its eighth edition, is one of the oldest of the procedure books in continuous existence,[238] perhaps the most old-fashioned,[239] and one of the most complete,[240] which is to say one of the longest.[241] These qualities make it an excellent baseline from which to compare all casebook treatments of the *Erie/Hanna* doctrine.

Cound[242] is one of the limited number of books which provides

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236. Necessarily, this must mean as I see it. Views about which books are the most skillful will be almost as numerous as there are procedure teachers in American law schools. Inevitably, some readers will argue that books I have left out do a better job of presenting the *Erie/Hanna* doctrine than do the books I have included. I agree that each book has its strengths and weaknesses. Some present *Erie* accurately but not *York*, while others overemphasize *Byrd*'s importance but get *Hanna*'s Decision Act/Enabling Act distinction right. Still others understand the lasting importance of the outcome determination test, but do not recognize *Hanna*'s refinement of it, and so on and so forth. My judgment about whether to discuss a book at length is based on my view of the book as a whole, and not on its presentation of any particular part of the doctrine.

237. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24. A ninth edition of the book, authored by Professors Friedenthal, Miller, Sexton, and Hershkoff, was published in August 2005, too late for discussion in this article.

238. Authorship of casebooks changes considerably over the years, so that the older the book the less likely it is to have any connection with its original authors. The oldest book, for example, is FIELD & KAPLAN, but Professor Field is now deceased and Professor (now Judge) Kaplan is retired. The COUND casebook, on the other hand, is still written in part by its original authors. The order of the age of the books is as follows: FIELD, KAPLAN & CLERMONT (formerly FIELD & KAPLAN) (1952), HAZARD, TAIT & FLETCHER (formerly HAZARD & LOUISELL) (1962), ROSENBERG, SMIT & DREYFUS (formerly ROSENBERG & SMIT) (1962), and COUND, FRIEDENTHAL, MILLER & SEXTON (formerly COUND, FRIEDENTHAL & MILLER) (1968).

239. I do not mean this in any pejorative sense, and it does not seem to have affected sales, as the COUND book is the second most widely adopted casebook, behind Yeazell, discussed *infra* Part III.B.

240. The book devotes fifty pages to the topic of "State Law in the Federal Courts," and another forty pages to the related topics of "Ascertaining State Law," "Federal Common Law," and "Federal Law in the State Courts." Only the MARCUS, REDISH & SHERMAN book at ninety-seven pages, *supra* note 15, HAZARD, TAIT & FLETCHER at ninety-six pages, *supra* note 37, and FIELD, KAPLAN & CLERMONT at sixty-two pages, *supra* note 18, treat the subject in greater or comparable detail. The Yeazell book, by contrast, devotes only thirty-two pages to the subject (down from forty-three in the fifth edition). There is no necessary correlation between the age of a book and length of its *Erie/Hanna* section. MARCUS, REDISH & SHERMAN, *supra* note 15, has the longest *Erie/Hanna* section but is one of the newest books.

241. HAZARD, TAIT & FLETCHER, *supra* note 37, is the longest book at 1443 pages, FIELD, KAPLAN & CLERMONT, *supra* note 18, has 1486 pages, and COUND, *supra* note 24, has 1376 pages.

242. I will refer to this and other multi-authored casebooks by the name of the lead author

sufficient historical context to give the reader a sense of just how radical a break *Erie* made with the nearly one hundred year old regime of *Swift v. Tyson*.[243] Unusual among procedure casebooks, the book quotes the *Swift* opinion at length, including its well known jurisprudential premise that the Rules of Decision Act,

> never has been supposed . . . to apply, to questions of a more general nature . . . 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 . . . just rule furnished by the principles of commercial law to govern the case.[244]

It also describes the economic, social, and intellectual conditions in place at the end of the nineteenth century, which had an identifiable influence on the Court's thinking. These conditions included a rapid increase in interstate commerce, a corollary demand for a uniform and stable national law of negotiable instruments, and a prevailing natural law jurisprudential world view that made the idea of a general law coherent.[245] Most procedure books make some reference to these factors, but Cound describes them in greater detail than most.

The book's nearly verbatim reproduction of the *Erie* decision is one of the most complete presentations found in any of the casebooks. In fact, except for *York*, the Cound authors omit very little of the *Erie/Hanna* decisions. In *Erie*, for example, each of the key sections of the opinion – the Court's description of the numerous failings of the *Swift* doctrine, the unconstitutionality of the "course pursued" in *Swift*, and even the Butler dissent and Reed concurrence,[246] – are reproduced almost in their entirety. This complete presentation ensures that no important discussion about the case is foreclosed because the information needed to carry it on is kept from the reader.[247] The "Notes and

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alone. No disrespect of the other authors is intended in the use of this shorthand. It is just that multi-author references can become cumbersome.

243. HAZARD, TAIT & FLETCHER, *supra* note 37, has the most detailed and informative note on *Swift* at six pages, while SUBRIN, MINOW, BRODIN & MAIN is at the other end of the spectrum with no introductory textual discussion of the *Swift* decision or the legal era in which it held sway. *See* SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69, at 723. The SUBRIN book relies on the *Erie* decision's discussion of *Swift* to inform the reader about the *Swift* rule. This is ironic, given that the subtitle to the SUBRIN book is "Doctrine, Practice, and Context." *See* SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69. In the *Erie/Hanna* section of the book at least, there is very little context.

244. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 373.

245. *Id.* at 374.

246. This is important because without Justice Reed's concurrence it is not possible to find a substance/procedure standard anywhere in the text of the *Erie* opinion. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) ("[N]o one doubts federal power over procedure.").

247. Reproducing the *Erie* opinion in its entirety is not difficult to justify. The opinion is not

Questions" following the case are equally comprehensive. Framed generally, the questions rarely argue explicitly for a particular interpretation of the case or push particular substantive criticisms of the Court. There is a tacit, substantive agenda implicit in the decision to ask some questions and not others, but that agenda is comprehensive enough to raise all relevant concerns. For example, the first set of questions asks about *Erie*'s constitutional status, the enclave/checklist debate about how to interpret the Tenth Amendment,[248] the relationship between the constitutional and statutory justifications for the decision, and the nature of the constitutional violation in *Swift*.[249] The second set asks about the unfairness problem illustrated by the *Taxicab* case and whether a better solution might use the collusive joinder provisions of the United States Code.[250] The third question set asks about the Charles Warren research relied on by the Court to support its modified construction of the Rules of Decision Act and whether that research supports the Court's conclusion.[251] This combination of constitutional, statutory, and fairness per-

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lengthy as modern opinions go, and just about all of it is needed to understand the full import of the Court's change in course.

248. For a discussion of the enclave/checklist debate see *supra* notes 148-52 and accompanying text.

249. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 380. Not only do these questions not suggest their own answers, they may even teach students not to look for clues to the answers in the structure of the questions themselves as many students have learned to do from courses preparing them to take standardized tests. For example, the first question after the case, "Is *Erie* a constitutional decision or does it rest on other grounds?" is framed as an either-or choice, but it does not take much thought to realize that it must be answered "yes" and "yes." *Id.* If the *Swift* doctrine is not found unconstitutional the problem will recur as a Supremacy Clause problem, and if the Rules of Decision Act is not held to include state decisional law, there will be no authorization to apply the Pennsylvania negligence standard. *See* discussion *supra* notes 58-59 and accompanying text. The Erie decision needs both its statutory and constitutional bases to be fully coherent.

250. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 380-81; *see also* 28 U.S.C. § 1359 (2000). It is not clear that the actions of the cab company were collusive. The Black & White Taxicab Company simply re-incorporated in another state, as it had a right to do, and it did not work in tandem or secretly with any other party to pull this off. If the company continued to operate from its Kentucky headquarters and existed as a Tennessee corporation in name only, its actions might be considered collusive, but the court's opinion in the case does not indicate, one way or another, whether this happened. For a fuller discussion, defending the actions of the cab company, see John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087, 1106-10 (1992).

251. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 381. Warren's research purported to shed new light on the question of whether the "laws of the several states" language in the Decision Act was intended to include state decisional law as well as state statutes. Warren found a previously unknown draft of the Act which explicitly included "common law now in use" in the text of the Act. What is not clear, and Warren's research does not help us here, is whether the more explicit language of the earlier draft was deleted from the Act because Congress thought the remaining language included state decisional law clearly enough or because Congress meant to exclude such decisional law from the idea of the "laws of the several states." For discussions of the Warren research, see *supra* notes 51-53 and accompanying text.

spectives reflects a comprehensive approach to examining *Erie* and helps one understand the case in most of its complexity. The section concludes with a selective list of articles discussing *Erie* and its progeny.[252]

The book's questions are queries only in the most general sense. They identify topics for discussion more than ask specific questions and are open-ended so as to serve a wide variety of interpretive objectives. Professors with radically different beliefs about how *Erie* should be understood would feel equally unconstrained by the questions' content; they are elastic enough to pursue any, and every, agenda.[253] The only omission, if it is one, is the book's lack of any substantial inquiry into the case's jurisprudential dimension. The book largely ignores the Court's discussion of the shift from a brooding omnipresence to a command theory of law. This is ironic given the fact that the Cound casebook provides better background detail for discussing this shift than most books, but a focus on doctrinal rather than jurisprudential issues is characteristic of Cound's treatment of the *Erie/Hanna* subject as a whole. Jurisprudential issues are not ignored altogether, as this would be impossible given the content of the cases. But these issues are not given equal emphasis, and readers are not asked specifically to identify and evaluate the Court's assumptions about the nature and origins of the

252. This mini-bibliography is sometimes more interesting for what it omits than for what it includes. While it includes a reference to the Redish/Phillips-Westen/Lehman debate, *see supra* note 41, it does not mention Ely's *Irrepressible Myth* article or the discussion it provoked in the Harvard Law Review between Professors Ely, Chayes, and Mishkin. *See supra* notes 2, 5. In one sense this is understandable. Professor Ely's article is about *Hanna* as much as *Erie* and fits as logically in the notes and questions following the *Hanna* decision as well as it does here. The COUND book does quote from it at that point. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 401. On the other hand, the Redish/Phillips-Westen/Lehman debate is indistinguishable from that between Professors Ely, Chayes, and Mishkin, so it is not clear why the book refers to one debate about the meaning of *Erie* and not the other. Even when the Ely article is finally mentioned, the responses of Professors Chayes and Mishkin are not.

253. For the best example of a nearly "pure questions" approach to the cases, and one with almost no commentary to supplement the *Erie/Hanna* decisions themselves, see SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69. Compare this approach with other traditional books, such as HAZARD, TAIT & FLETCHER, *supra* note 37; FIELD, KAPLAN & CLERMONT, *supra* note 18; and MARCUS, REDISH & SHERMAN, *supra* note 15, where case law excerpts, law review discussion, and original descriptive and analytical commentary, are used to varying degrees to supplement questions about the cases. The "Notes and Questions" section of each of these books along with that of COUND, FRIEDENTHAL, MILLER & SEXTON is filled with interesting and uncommon insights into the *Erie/Hanna* cases, as well as a compendium of critical scholarly commentary pointing out gaps, inconsistencies, and omissions in the Court's reasoning. While sometimes a bit didactic, and every now and then a little rhetorical, for the most part these "Notes and Questions" operate to provide rich background detail about what was going on at the time the *Erie/Hanna* cases were decided, both inside and outside of the Court, as well as a summary of the best commentary on the development of the doctrine over the years. The overall effect is to encourage reasoned examination of the cases rather than simple assent or disagreement with a proffered interpretation. These books use erudition to its best end.

Erie rule. This omission after the *Erie* decision could be explained by the fact that *York* discusses the abandonment of the brooding omnipresence view in detail and questions about that topic appear in the section of the book after *York*. At other times, however, the authors' reasons are not so evident.

For *York*, the Cound book summarizes the facts of the case rather than quote verbatim from the Court's opinion. Almost every procedure book provides its own summary of *York*, if not in the first edition, then from its second edition onward. Long and complicated, the *York* litigation involved numerous parties, extended through several stages, was carried on in multiple courts, and continued for many years, and these qualities contributed in major part to the statute of limitations problem at the heart of the case. One does not need to know most of this procedural history, however, in order to understand the case's contributions to the *Erie/Hanna* doctrine. Cound's summary of the *York* facts is as accurate as any and clearer than most. The book errs on the side of being overinclusive in deciding how much of *York*'s doctrinal and jurisprudential discussion to include. The full *York* opinion has three distinct sections: an explanation of the shift in jurisprudential philosophy underlying the move from *Swift* to *Erie*, an analysis of the special problems created under the Rules of Decision Act by an equity action,[254] and an articulation of the outcome determination re-formulation of the *Erie* substance/procedure standard. No book includes all of these sections in their entirety, and some include only the last. Cound includes a single paragraph from the opinion on the first of these topics, three paragraphs on the second, and seven paragraphs on the third, so that, as with its presentation of *Erie*, the emphasis is placed on *York*'s doctrinal rather than jurisprudential contributions to the *Erie/Hanna* standard.

The notes and questions following *York* address probably the two most important doctrinal issues in the case: the difficulty of applying a substance/procedure standard in an equity action where right and remedy interrelate and the problem of limiting the scope of the outcome determination rule so that it does not require the application of all state rules, including procedural rules, in federal court. Thought of in another way, the book's questions ask why *York* needed to reformulate the *Erie* standard and whether its reformulation is the final word. Doctrinally, it

254. At the time of the *York* decision, the Decision Act command to apply the laws of the several states was explicitly limited to "trials at common law." *See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 103-04 (1945). This seemed to make the statute inapplicable to an equity action such as *York*, but the Court ultimately concluded that the statute was not so limited, in part, because interpreting it in such a fashion would encourage artful pleading and undercut the federal judicial system's longstanding and independent grant of equity jurisdiction. *See id.* at 104-07. Most of the Court's discussion of this point is omitted from the Cound version of *York*.

is hard to find two more pressing concerns. The difficulty of applying the substance/procedure standard also is illustrated by the use of blurbs from the *Ragan, Cohen,* and *Woods* cases[255] — a frequently quoted trio of post *Erie* and pre-*Hanna* decisions in which the Court was still working out its understanding of the Decision Act and that Act's relationship to the Enabling Act.[256] The risk that an unqualified outcome determination test would swallow up the Federal Rules is addressed in a quotation from a 1950 article in which the author unpresciently concluded that "*York* . . . spelled death to the hope for a completely uniform federal procedure."[257] Each of these excerpts could be discussed in different ways but again, as throughout this section, Cound merely reproduces the excerpts and asks "What do you think?" or "Evaluate the following passage," rather than suggests how the analysis ought to come out.

Byrd is the first real test of a procedure book, not so much for requiring authors to abridge the case for inclusion in a book, but for forcing them to take a position on the case's place in the *Erie/Hanna* doctrine. By making the *Erie/Hanna* line of cases more confusing and the contours of the doctrine more difficult to sort out, *Byrd* serves as a litmus test for determining what one understands *Erie/Hanna* to be about. It is the decision in which casebook views about the content of the doctrine begin to diverge. It is also the case where the Cound book begins, ever so slightly, to abandon its agnosticism about the meaning of the *Erie/Hanna* doctrine. Cound includes almost all of the *Byrd* opinion, omitting only the Court's description of the lower courts' handling of the case and its discussion of the history of the South Carolina *Adams* rule.[258] The four or five possible bases for the decision[259] are described fully, allowing one to discuss the coherence problems involved in reconciling these sometimes confusing and not always consistent rationales.

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255. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

256. The three cases are all more complicated than this, of course. For example, the excerpt from *Ragan* raises the pertinence and validity problems involved when a Federal Rule of Civil Procedure conflicts with a state law. *See supra* notes 145-47, 152-57 and accompanying text. Since the three opinions pre-date *Hanna*, where many of the problems are finally resolved, it is not clear how much meaning the cases could or should have for the typical law student reader. The book uses them to illustrate the difficulties of distinguishing between substantive and procedural rules, but the Court's views on this subject changed substantially in *Hanna*, which makes the cases of limited usefulness for this purpose as well.

257. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 386 (quoting Edward Lawrence Merrigan, Erie *to* York *to* Ragan – *A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 717 (1950)).

258. Cound also omits the long concurring opinions by Justices Frankfurter and Whitaker that were procedurally specific to the *Byrd* case and had only limited implications for the general doctrine.

259. For a discussion of the possible *Byrd* rationales, see *supra* notes 110-134 and accompanying text.

The "Notes and Questions" section starts with a constitutional question, a familiar pattern in Cound. This time the question asks about the role of the Seventh Amendment in justifying the Court's decision to require the application of federal law.[260] The question seems somewhat rhetorical, perhaps suggesting that *Byrd* is best seen as a Seventh Amendment case — a position with which many commentators would agree.[261] The second question, a little more argumentative than expected from Cound, asks whether the South Carolina rule is substantive or procedural,[262] while simultaneously suggesting that worker compensation schemes in many states were adopted after "carefully balancing the equities involved in the typical workplace accident."[263] The third question set asks about balancing, its relationship to the outcome determination and substance/procedure tests, and how the process of balancing is carried out. These questions revert to the book's more familiar, open-ended format. Even though somewhat cryptic, these questions are rich enough to allow a skilled questioner to open up every-

260. The question asks about *Byrd*'s famous "influence if not the command" phrase and points out that if the Seventh Amendment commands the application of federal law then there is no need for its influence. However, if the Seventh Amendment does not command the application of federal law, then it is not clear why it should influence it. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 390 n.1. This phrase has puzzled many commentators, most of whom seem to think that *Byrd* would have been better off grounded on the Seventh Amendment. *See, e.g.*, Ely, *supra* note 2, at 709 ("[I]n *Byrd* . . . . [t]he question presented . . . could have been decided . . . on seventh amendment grounds pure and simple . . . . [but] [t]he court shunned this straightforward course . . . ."); MARCUS, REDISH & SHERMAN, *supra* note 15, at 948-49 n.4 ("How can a constitutional provision that does not dictate a particular result nevertheless 'influence' the outcome?").

The book also revisits another constitutional question allegedly raised in *Erie*, by asking "If *Erie* is constitutionally based, does Congress or do the federal courts have the power to establish jurisdictional standards for diversity actions?" Put another way, this asks "are jurisdictional rules substantive or procedural within the meaning of *Erie* and *York* . . . ?" COUND, FRIEDENTHAL, MILLER, & SEXTON, *supra* note 24, at 392. A number of judicial and academic commentators were pre-occupied with this question in the early 1960s, before the constitutional status of *Erie* was clarified, and while it seemed an important and difficult question at the time, it turns out not to be an *Erie* question. Whether Congress and the courts have power to establish jurisdiction conferring rules for diversity actions depends upon whether any provision of the Constitution conveys such power, but *Erie* is not about constitutional power.

261. *See id*; *see also* Ely, *supra* note 2, at 709; Westen & Lehman, *supra* note 41, at 344-52.

262. The question reads: "Is Justice Brennan correct in asserting that the South Carolina rule . . . is 'merely a form and mode of enforcing the immunity * * * and not a rule intended to be bound up with the definition of the rights and obligations of the parties'?" COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 390 n.2.

263. *Id.* The book says: "Does it seem likely, then, that South Carolina randomly would have appropriated to the judge the function of defining a statutory employee?" *Id.* This is a hard question to answer without more background on the South Carolina rule, and the book does not provide any. The book's purpose here may be to encourage an examination of the substance/procedure distinction in general, and not the South Carolina law in particular. It may simply be trying to show that the substance/procedure distinction remains an important part of a Decision Act analysis, *Byrd*'s balancing language notwithstanding.

thing doctrinally distinctive and difficult about *Byrd*'s balancing test.[264] All that is missing, if the focus is purely doctrinal, is an inquiry into the relationship among the not-always-consistent *Byrd* reasons. This omission is important, since *Byrd* is difficult not in figuring out what it says line to line, but in figuring out what it stands for overall. As a whole, Cound's questions about *Byrd* are perhaps more didactic and argumentative than its questions about *Erie* and *York*. Both in tone and in language, its treatment of the case spots issues a little less and suggest answers a little more, not just asking a reader to "discuss and evaluate," but also hinting at how that evaluation ought to come out.

Cound treats *Hanna* more quizzically than didactically or argumentatively. Its abridged version of the case is nearly complete and leaves out only *Hanna*'s extended quotations from other cases and its citations to other authorities. It includes verbatim the Court's discussion of the differences between a Decision Act problem and an Enabling Act problem, its refinement of the outcome determination standard, its elaboration on *Sibbach*'s[265] interpretation of the Enabling Act's two part test for the validity of a Federal Rule,[266] and Justice Harlan's famous "arguably procedural, ergo constitutional" concurrence. This provides a full view of the case. The early questions after the case are also straightforward and unremarkable. The first asks about the relationship between the Decision Act and the Enabling Act and whether the two statutes impose contradictory obligations.[267] The petitioners' argument in *Hanna* was premised, at least tacitly, on the belief that they did. This is a good place to start an analysis of *Hanna* because it allows a reader to distinguish between the opinion's *Erie* and *Hanna* parts, specifically between its contributions to Decision Act analysis on the one hand, and Enabling Act analysis on the other. The two statutes cannot impose contradictory

264. The book also illustrates the difficulties of balancing with an interesting Seventh Circuit case raising the question of whether declaratory relief of non-liability was available to an insurance company in federal court when the same relief was not available in state court because of a state policy prohibiting direct actions against insurance companies. The Cound book uses the case to illustrate the difficulties of identifying and comparing state and federal interests, but the note also might be read as tacitly approving of the *Byrd* balancing standard. The note may breathe life into balancing in other words, by taking the test seriously and trying to make it work. As in many of the Cound book's notes and questions, the point of the example will depend almost completely on the understanding of the one using it.

265. Sibbach v. Wilson & Co., 312 U.S. 1, 9-11 (1941).

266. The Enabling Act requires that a Federal Rule be a rule of "practice and procedure," and that it not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (a), (b) (2000). The Cound book's discussion of the Enabling Act in this section is only as complete as the *Hanna* Court's, which famously did not address the question of how to define substantive in section (b) of the Act, except to say that it should not be defined the same way as in the Rules of Decision Act. *See* Ely, *supra* note 2, at 719-26 (discussing failure of the Court in *Hanna* to define the meaning of substantive rights and describing possible definitions).

267. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 399.

obligations since each makes an exception for the other,[268] but students often fail to see this. The Cound questions allow one to make this point clear right from the outset.

The second set of questions asks about the substance/procedure distinction and whether the terms have the same meaning in an Enabling Act context as they have in a Decision Act context.[269] The Court in *Hanna* says that they do not.[270] This point is crucial to understanding the difference between *Erie* and *Hanna* analysis. It also is often a difficult point to explain, and asking about it explicitly makes sense. Throughout this section, the book's questions are non-suggestive and non-argumentative. They simply raise issues and leave it to the reader to determine what to say about them.[271] But the next set of questions, dealing with *Hanna*'s effect on *York* and *Byrd*, is a little more confusing. The question about *York* is straightforward and manageable. It asks what *Hanna* does to the outcome determination test. However, the book then describes *Byrd* as articulating a "bound up with the rights and obligations," or substance/procedure, test and asks what consideration should be given to this test after *Hanna*. This is a partly understandable

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268. The Decision Act's command to apply the "laws of the several states" does not apply when the issue before the court is regulated by "Acts of Congress." 28 U.S.C. § 1652 (2000). The Enabling Act is an act of Congress. Similarly, a Federal Rule is not valid under the Enabling Act if it "abridge[s], enlarge[s] or modifie[s] any substantive right," and state laws which qualify under the Decision Act create substantive rights. 28 U.S.C. § 2072(a) (2000).

269. Only the Enabling Act uses the express terms "substantive" and "procedure," but the *Erie* decision has been interpreted as articulating a substance/procedure standard from the beginning. *See* 28 U.S.C. § 2072(a), (b) (2000); *see, e.g.*, *Sibbach*, 312 U.S. at 10-11; Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 105-12 (1945); Hanna v. Plumer, 380 U.S. 460, 471 (1965).

270. *See Hanna*, 380 U.S. at 471.

> The line between "substance" and "procedure" shifts as the legal context changes. "Each implies different variables depending upon the particular problem for which it is used." It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions.

Id. (quoting *York*, 326 U.S. at 108).

271. Take, for example, the book's questions "How does Chief Justice Warren treat the distinction between substance and procedure in *Hanna*? How does he define that distinction for purposes of the Rules Enabling Act? For purposes of the Rules of Decision Act? Are the definitions the same?" COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 399. The open-endedness of the questions permits a professor to raise the issue of what meaning should be given to the Enabling Act's prohibition on abridging substantive rights without suggesting how the issue should be resolved. With the exception of a few comments about non-substantial or incidental effects on substantive rights, see *Sibbach*, 312 U.S. at 11; Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445-46 (1946), the Supreme Court has ducked this question over the years, and many now act as if section (b) of the Enabling Act has expired for lack of use. Cound, to its credit, takes all of the language of the Act seriously, and even points out how the issue was left hanging in *Sibbach* by quoting the relevant language from the *Sibbach* opinion. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 399-400 n.2. Ely has the best discussion of the possible meanings for section (b) of the Enabling Act. *See* Ely, *supra* note 2, at 725-27.

way to put the point. *Byrd* did use a "bound up with rights and obligations" standard, but only as a first step in a four or five step analysis, in which balancing was the most important and overriding part. Ironically, the Court in *Byrd* did not definitively answer the question of whether the South Carolina rule was "bound up with rights and obligations." Or more accurately, it answered it both ways. But it also concluded that the answer was not necessary to the disposition of the case. It would not have been surprising, therefore, if Cound had asked what effect, if any, *Hanna*'s refinement of the outcome determination test had on *Byrd* balancing. This was the precise question that pre-occupied commentators after *Hanna* but the book does not ask that question, and by failing to do so it may encourage readers to assume that balancing is still good law.[272]

Cound asks next whether Justice Harlan, in his concurring opinion, succeeds in finding a middle ground between the outcome determination test of *York* and the refined outcome determination test of *Hanna*.[273] To describe a view as middle-ground suggests moderation, even-handedness, and tolerance, and can predispose a reader to approve of the view. But if the polar positions defining the spectrum on which the middle ground is located are themselves imbalanced, the expression is more of a rhetorical strategy than a description of fact, and that seems to be the case here. Outcome determination and refined outcome determination do not define opposite ends of a spectrum as much as represent marginally different articulations of the same idea. Each attempts to give meaning to the substance/procedure dichotomy at the heart of the Decision Act but with increasing degrees of precision and sophistication. As such, there is not much middle ground to find between them.

For Cound to see Harlan's view as half way between the two ideas is difficult to comprehend. Harlan's proposed rule would require the application of all state laws "substantially affect[ing] those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[274] Recall however, that the Tenth Amendment does not "leave to state regulation" any particular area of human conduct, it simply reserves to the states all powers not delegated to the federal gov-

272. Cound may assume that *Byrd* balancing has continuing validity, and even suggest that *Hanna* ratifies the balancing standard. *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 422 n.1. It also gives *Gasperini* credit for reviving *York's* outcome determination standard, but *Hanna* did that when it repudiated balancing. *Id.*

273. *Id.* at 400 n.4.

274. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring). This so-called primary conduct standard, if viable, would be a difficult one to define. For example, how does one say, in non-circular terms, what makes conduct "primary" (e.g., to say primary conduct is all conduct which is not secondary simply restates the problem). Since attempts to define primary conduct usually lead back to some form of a substance/procedure dichotomy, it would seem to be better to work with those terms in the first instance.

ernment, and this is a shifting enclave of regulatory power.[275] Because a primary conduct rule assumes the existence of a fixed enclave of state power, contrary to what the Constitution says, it is not a middle ground but instead off the spectrum defined by these two versions of an outcome determination rule. Perhaps Cound designed the questions to elicit this response, rather than favorable reaction to Harlan's "primary conduct" rule, though that does not seem to be the overall tone of the paragraph in which the question is asked. Instead, the book seems to support Harlan's idea that *Erie* announces a constitutional rule based on the Tenth Amendment, rather than a statutory rule based on an interpretation of the Decision Act. If so, it contributes to the misunderstanding surrounding the constitutional significance of *Erie*.

The last major[276] item in the notes and questions following *Hanna* is Cound's first reference to the Ely article. Cound quotes a little over a page from the introduction to the *Irrepressible Myth of Erie*, describing the "three distinct and rather ordinary problems of statutory and constitutional interpretation" which make up the *Erie/Hanna* doctrine: the Enabling Act problem, present when "the matter in issue is covered by a Federal Rule;" the Decision Act problem, present when the federal law in issue is "wholly judge-made;" and the constitutional problem, present when "Congress has passed a statute creating law for diversity actions."[277] Cound does not comment on the Ely excerpt, except to ask the reader to "[c]ompare [Ely's] . . . analysis with" an excerpt from a Westen and Lehman article describing the differences between the pertinence and validity issues in an Enabling Act analysis.[278] It is not clear how one would go about making this comparison, however, since there is no incompatibility between the two excerpts. They are about different subjects altogether, and complement rather than contradict one

275. For a discussion of the difference between the "enclave" and "checklist" views of the Tenth Amendment, see *supra* notes 101-54 and accompanying text. On the issue of how the scope of state and federal regulatory power shifts over time, see *supra* note 151.

276. The book also asks a somewhat obscure, but interesting question about whether the *Erie* doctrine was intended to protect institutional or party interests, that is, whether *Hanna*'s grounding in a concern for treating litigants fairly is compatible with *Erie*'s desire to protect the sovereign interests of the federal and state judicial systems to regulate their own manners of operating. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 400 n.5. This is a difficult question to answer without a great deal more background information about the two cases than the book provides. There is also a short blurb on *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974), an Enabling Act case involving the application of FED. R. CIV. P. 15(c) to an attempt to amend a federal complaint to change parties. The 1991 amendments to Rule 15(c), and the case of *Schiavone v. Fortune*, 477 U.S. 21 (1986), make this discussion largely academic.

277. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 401 (quoting Ely, *supra* note 2, at 697-98). Putting an excerpt from Ely's article, which is careful to differentiate between *Erie*'s constitutional and statutory dimensions, next to a question which runs *Erie*'s constitutional and statutory dimensions together is a particularly strange move.

278. *See* Westen & Lehman, *supra* note 41.

another.[279] Asking a reader to compare incommensurables and expressing approval of both Ely's and Harlan's (incompatible) views raise questions about the extent to which Cound understands Ely's analysis accurately.

At the outset, I described Cound's presentation of the *Erie/Hanna* doctrine as traditional (or old-fashioned) and perhaps now it is easier to understand why. Cound's treatment of the *Erie/Hanna* cases reminds one of the Langdellian vision, popular in the 1950s, of law study as science. As the raw data of the common law universe, court decisions[280] are presented in a minimally pre-digested form and examined through a series of conjectures and refutations to test tentative hypotheses about what the data (i.e., the cases) could mean. Cound reproduces this case data almost in its entirety and edits it minimally so as not to present a distorted picture of the *Erie/Hanna* universe. The book asks minimally suggestive or confining questions so as not to pre-determine reader inquiries or foreclose resolutions readers might find convincing. The authors spot issues, in the parlance of another era, and leave it to the reader to decide what to do with them. This is a familiar approach to constructing a casebook, but it is not as popular as it once was.[281] Mod-

279. There is perhaps one issue on which the two excerpts disagree. Ely argues that the Decision Act governs the issue of whether a federal court sitting in diversity must apply a federal common law rule in the face of a contrary state rule. Federal common law would have to give way, in Ely's view, to a contrary state rule that qualified as substantive under the Decision Act. Westen and Lehman, on the other hand, argue that "if a valid federal rule exists – whether constitutional, statutory, or judge-made – the federal rule shall govern," because of the Supremacy Clause of the Constitution. COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 401 (quoting Westen & Lehman, *supra* note 41). While Westen and Lehman may be correct in the abstract, that a valid federal common law rule is superior to a contrary state law under the Supremacy Clause every thing else being equal, but see *Sosa v. Alverez-Machain*, 124 S. Ct. 2739, 2770 (2004) (Scalia, J., concurring) ("General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties."), Congress's passage of the Decision Act arguably reversed that state of affairs by making state substantive law the rule of decision except in the face of an Act of Congress, treaty, or Constitutional provision. If so, Ely's position would be correct. *Stewart* seems to support Ely's view. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

> If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." If application of federal judge-made law would disserve these two policies, the district court should apply state law.

Id. at 27 n.6 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)). For additional discussion and references, see WRIGHT, *supra* note 8, at 411-21.

280. Not everyone views appellate court opinions as raw data of the legal universe. In fact, the selective and strategically manipulated information such opinions contain may make them one of the least representative sources of data about the day-to-day operation of the courts and lawyers.

281. The Field, Kaplan and Clermont book is perhaps the purest example of the law-as-science approach. It reprints more *Erie/Hanna* cases and in greater detail than any other book, asks

ern casebooks often have a message to get across – this is how they seem to separate themselves from one another – by offering explanations rather than descriptions of the legal universe. Books like Cound have their risks. They teach unevenly, for example, because they depend almost completely on the understanding readers bring to the analysis.[282] Experienced teachers get more out of a book like Cound than do novices. While Cound is not a book for everyone, therefore, of all the modern casebooks it is one which contributes the least to the popular misconceptions about the *Erie/Hanna* doctrine, if only because it takes fewer stands than most casebooks on what that doctrine requires.

B. *Yeazell*

Stephen Yeazell's *Civil Procedure* (hereinafter Yeazell),[283] provides an interesting contrast to Cound. Half as old and about five hundred pages shorter, Yeazell, unlike Cound, has undergone substantial transformations in its presentation of the *Erie/Hanna* doctrine as its authorship has changed during the first twenty years of its existence.[284] Its most recent edition devotes thirty-one pages to the doctrine, half as many as Cound,[285] and accords principal case treatment only to *Erie*, *York*, *Byrd,* and *Hanna*, although other major cases are reproduced in blurb form or summarized in notes following the principal cases. It cites to, or quotes from, scholarly discussions of the cases less than Cound and, as a consequence, is sometimes described as less erudite, or more accessible,[286] depending on one's preferences in euphemisms, or as

questions about the cases almost to the exclusion of commenting on their analytical soundness, and almost never argues for specific interpretations of the cases. Like Cound, its questions are open-ended and non-argumentative and probe the courts' reasoning for analytical errors, debatable factual assumptions, and hidden policy preferences. If there is such a thing as Socratic questioning in a casebook, Field, Kaplan and Clermont is an exemplar of it. The book does this less and less, however, as it gets further into the *Erie/Hanna* cases, so that by the end of its section on the doctrine it does little more than provide synopses of cases.

282. The most difficult book to teach from may be HAZARD, TAIT & FLETCHER, *supra* note 37. The book provides very few questions and leaves it to the professor to decide what to inquire about and how. This task is complicated by the fact that the book resolves most of the analytical difficulties in the cases in extensive textual notes. It is hard to think of a question that the book has not already resolved.

283. YEAZELL (6th ed.), *supra* note 15.

284. The book started as Landers and Martin in 1982 and became Landers, Martin, and Yeazell in 1988. After Professor Martin's untimely death the book turned into Yeazell, Landers and Martin in 1992, and then into Yeazell in 1996. As I understand it, Professors Martin and Yeazell were responsible for the successive versions of the book's chapter on the *Erie/Hanna* doctrine. As will become apparent in this section, their views on the doctrine seem to have differed considerably.

285. In fact, the book has devoted about ten fewer pages to the doctrine in each successive edition, so that what started as about an eighty page chapter is now down to about a thirty-two page chapter.

286. A book described as accessible often means that it is easy to understand, principally

more of a teaching than reference book. Yeazell is the most widely adopted procedure book in American law schools, however, and that fact alone means that it must be taken seriously as a major influence on the legal profession's understanding of the *Erie/Hanna* doctrine. If Cound is old fashioned, then Yeazell is *au courant.*

Yeazell's introductory section to the chapter on *Erie/Hanna* is a little more detailed than Cound's. It describes not only the way in which the late nineteenth century increase in interstate commerce and the corresponding pressure for a national law of negotiable instruments helped create the *Swift* doctrine, but also how federal courts used the doctrine to run roughshod over state law in favor of national business interests. This, in turn, produced the furor that resulted in *Erie.*[287] Federal courts, Yeazell explains, saw "*Swift* [as] a charter of judicial independence, a declaration that they could ignore state law even when sitting in cases that were not explicitly governed by federal law."[288] They used this independence to protect "mercantile and corporate interests [which were more likely to be national] against agrarian and workingmen's interests [which were more likely to be local] . . . ."[289] The book quotes extensively from the *Swift* opinion, although from a different part of the opinion than Cound does, to give the reader a sense of the jurisprudential climate that made a regime of a federal general law coherent. It repro-

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because it does not overwhelm one with references to supplementary material or critical commentary. This characterization is not always a compliment, but since the Yeazell book also is described as intelligent being accessible in its case is probably a plus. Traditional books tend to provide more extensive supplementary case law and secondary research material than advocacy and practitioner books. The latter seem less intrigued by the analytical intricacies of doctrine itself, almost as a matter of style or taste, and more concerned with transforming doctrine into a set of workable black-letter propositions that will be useful in argument. There is not always a correlation between style and age. The fourth edition of MARCUS, REDISH & SHERMAN, *supra* note 15, for example, published in 2005, has the longest *Erie/Hanna* section of any of the books and is filled with erudite references and critical commentary. Yet, the first edition of the book was published in 1989, making it a relative newcomer among procedure books.

287. YEAZELL (6th ed.), *supra* note 15, at 222-23. It is now commonplace for procedure scholars to provide detail about famous cases by describing the personal, social, political, and strategic background features of the cases not reported in the official opinions. There is even a new instructional text based on that format. *See* CIVIL PROCEDURE STORIES (Kevin M. Clermont, ed. 2004). For *Erie,* these articles appear in Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law, in* CIVIL PROCEDURE STORIES 21 (Kevin M. Clermont, ed. 2004); Younger, *supra* note 41; Rizzi, *supra* note 41. The articles report some of the more tragic aspects of the *Erie* case, including the fact that Tompkins eventually took nothing for his injuries, lost a $30,000 verdict, and rejected a $7500 (in 1937 dollars) settlement offer on the advice of his attorneys. *See supra* note 47. The *Erie* decision may have reached a correct outcome in some larger sense, but one would have had a hard time convincing Harry Tompkins that justice was served in his particular case.

288. YEAZELL (6th ed.), *supra* note 15, at 223.

289. *Id.* (quoting HOWARD FINK & MARK V. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 179 (2d ed. 1987)).

duces the *Erie* decision almost in its entirety, including parts not included in Cound.[290] But it also omits significant parts of the opinion, and the decision of what to omit and what to include, along with the book's persistent characterization of *Erie* as a "constitutional decision,"[291] are early indications of how Yeazell will differ from Cound. Unlike Cound, Yeazell argues for a particular view of *Erie* and the line of cases following in its wake. Rather than present the cases and ask readers to analyze them for themselves, Yeazell tells readers what the *Erie/Hanna* cases mean.

The book's most prominent argument, that *Erie* is a "constitutional decision," is made explicitly in section-headings, notes, and questions, and implicitly in the way the *Erie* decision is abridged for inclusion in the book. This view of *Erie* is controversial, as Yeazell acknowledges,[292] but the problem with the book's presentation of this view is not so much its controversy as its ambiguity. A decision can be constitutional in at least two senses of the term, one of which is coherent and unremarkable when applied to *Erie*, and the other of which is coherent but wrong. Unfortunately, Yeazell may have the second sense in mind. A decision is constitutional in a positive sense when it holds that a particular provision of the Constitution requires or prohibits a certain course of action. A holding that the Tenth Amendment requires the application of state negligence law in diversity actions, for example, would be such a decision. *Erie* is not a constitutional decision in this sense, since its command to apply Pennsylvania law was based on the Decision Act and not the Tenth Amendment.[293] A decision also can be constitutional in a negative sense as, for example, when it holds that the Constitution does not authorize a particular course of action, without commenting one way or another on whether any other particular course of action is constitutionally required or prohibited. This is *Erie*. *Erie* held only that the Constitution does not authorize the creation of federal general common law, and thus that the "course pursued" in *Swift* based on such law was

290. It is more accurate to say that the book used to do this, in its fifth edition, *see* STEPHEN C. YEAZELL, CIVIL PROCEDURE 265-70 (5th ed. 2000) [hereinafter YEAZELL (5th ed.)], but its treatment of *Erie* was cut nearly in half in the sixth edition. *See* YEAZELL (6th ed.), *supra* note 15, at 224-227.

291. YEAZELL (6th ed.), *supra* note 15, at 228-29.

292. Yeazell's acknowledgment that "lawyers and political scientists have argued about whether [*Erie* is] a constitutional decision," *id.* at 228, is evidence of some open-mindedness on the issue. However, the book also describes the *Erie* Court as "handing down a constitutional decision," *id.*, and the decision as "Constitutionalizing the Issue." *Id.* at 223. Yeazell describes opinions subsequent to *Erie* as changing the focus from the constitution to federal statutes. *Id.* at 237. It is hard to avoid the impression that Yeazell thinks of *Erie* as a constitutional decision.

293. The Decision Act has force because it is a valid exercise of constitutional power. In this attenuated sense *Erie* announces a constitutional rule. But under that conception of a constitutional decision, there would be no such thing as a statutory decision.

unconstitutional. To say this, however, is not to say anything about what law a federal court sitting in diversity should apply. *Erie* articulated no positive constitutional rule for making that decision. It did not have to, since Congress had acted with respect to that question in enacting the Rules of Decision Act.

Yeazell seems to see *Erie* as announcing a positive constitutional rule grounded in the Tenth Amendment. The book communicates this view in several different ways.[294] For example, it describes the *Swift* and *Erie* decisions in mutually exclusive terms, depicting *Swift* as a decision based on a statute (the Decision Act), and *Erie* as a decision based on the Constitution.[295] It characterizes *Erie* as "[c]onstitutionalizing the [i]ssue"[296] considered in *Swift* and asks why the Decision Act "won't work" as authority for *Erie*'s holding that the Pennsylvania federal court had to apply Pennsylvania negligence law.[297] The book seems to base this reading of *Erie* on the Court's response to Justice Reed's argument in his concurring opinion in *Erie*, that it was not necessary to "disapprove of *Swift*" in order to dispose of the case and that all that was needed was a re-interpretation of the Decision Act.[298] In response to Reed, Justice Brandeis, writing for the majority, stated: "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."[299] Justice Brandies explained the majority's position in this way:

> we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 [the Rules of Decision Act] or any other act of Congress. We merely declare that in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.[300]

This last sentence, particularly the phrase "rights . . . reserved by the Constitution to the several states," could be read as a tacit adoption of

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294. For example, the book's transition note from *Erie* to *York*, which states: "*Erie* holds only that 'general' federal common law may not displace that of the states in areas in which the Constitution grants lawmaking power to the states." YEAZELL (6th ed.), *supra* note 15, at 230. The statement that the Constitution reserves an "area of lawmaking power to the states" is the classic expression of the enclave view of the Tenth Amendment

295. The transition sentence from the book's *Swift* to it's *Erie* section states: "*Swift* reached its conclusion as an interpretation of the Rules of Decision Act, which Congress could have amended during. [sic] Congress did not amend the Act. The next step in the story [*Erie*] took matters out of Congress's hands." *Id.* at 223.

296. *Id.*

297. *Id.* at 227 n.2(b).

298. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 90-92 (1938) (Reed, J., concurring).

299. *Id.* at 77-78 (footnote omitted).

300. *Id.* at 79-80.

the enclave view of the Tenth Amendment, but this almost certainly was not the meaning the Court intended. Nothing else in the opinion expresses or relies on the enclave view, and the phrase "reserved to the states" could just as easily mean left over for the states after federal power is determined not to include it. Justice Brandeis does not otherwise shed light on the question of whether the reserved powers of the states is a fixed or shifting category of power, but this is not surprising given that *Erie* was not a constitutional case.

The Court was correct when it said that a re-interpretation of the Decision Act, by itself, would not dispose of *Erie*. Even if the Decision Act was construed to include Pennsylvania state decisional law, as Reed suggested it should be, so that it commanded the application of the Pennsylvania common law negligence standard, a federal court confronted with a conflict between a pertinent and valid federal common law rule on the one hand, and a qualifying (under the Decision Act) Pennsylvania law, statutory or decisional, on the other, would have to resolve the difficult Supremacy Clause question of which law controlled.[301] Only when federal general common law was eliminated as a possible source of authority in *Erie* was a re-interpretation of the Decision Act, by itself, enough to dispose of the case. To create this condition, however, the Court had to take up the constitutional question of whether federal courts had the power to make general common law. This constitutional issue was unavoidable in *Erie*. Once the Court decided that the Constitution did not grant federal courts the power to create federal general common law, the only remaining issue, whether the Pennsylvania negligence standard was a "rule of decision," was a statutory one. While it is true that *Erie* is a constitutional decision of sorts, it is neither primarily a constitutional decision nor the kind of constitutional decision Yeazell seems to think it is.[302]

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301. For different views on how such a question should be answered see, for example, Ely, *supra* note 2, at 697-98 (state law governs); Westen & Lehman, *supra* note 41, at 314-15 (federal law governs). The court would have to reconcile not just conflicting state and federal law, but conflicting federal laws as well, since the obligation to apply state law comes from a federal statute. The resolution of the Supremacy Clause question would depend upon the extent to which the statutory language "rule of decision" expressed the same idea as the constitutional language "law of the land." *See also supra* note 282.

302. The book's remaining notes and questions after *Erie* have to do with the constitutional limitations on the common law making power of the federal courts, the question of whether state conflict of laws rules are an exception to the *Erie* rule (resolved by *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941) as the book indicates), and the extent to which *Erie*'s concern about forum-shopping is justified. YEAZELL (6th ed.), *supra* note 15, at 227-30. The questions about constitutional limitations on common law making power are complicated, difficult, and well beyond the capacity and background of first-year law students to discuss. Justice Reed's concurring opinion in *Erie* contains a good discussion, see *Erie*, 304 U.S. at 91-92 (Reed, J., concurring), but that part of Reed's opinion is not reproduced in the book. The *Klaxon* note

Yeazell's transition from *Erie* to *York* illustrates once again the book's mixing and matching of *Erie*'s constitutional and statutory dimensions. In quick succession, the book describes the *Erie* doctrine as "having struggled with . . . constitutional ambiguities," characterizes *York*, *Byrd,* and *Hanna* as "decisions in which the issue is whether and how to apply the *Erie* doctrine," which in turn determines the circumstances under which federal courts sitting in diversity are "bound to replicate state practice," and points out that in making that determination "*Erie*'s . . . setting suggest[s] that . . . federal courts . . . should observe state substantive law."[303] Paraphrased, this sequence of propositions argues that the *Erie* doctrine begins as a constitutional rule and at some point transmogrifies into a substance/procedure standard emanating from the setting of the *Erie* case. How and when this happens is not clear. It is clear that it must occur, however, if Yeazell is to reconcile its view of *Erie* with *York*, *Byrd,* and *Hanna*. The latter three decisions are not constitutional cases in any *Erie* sense of the term,[304] yet, according to Yeazell, they are applications of the *Erie* doctrine, which is constitutional. There is no easy way for this to happen without, at some point, having the *Erie* doctrine shift its shape.

Yeazell does not seem to see *York* as an important case in the *Erie/Hanna* sequence. The book's excerpted version of the decision is among the shortest in all of the casebooks. It includes a paragraph from the Court's opinion on the repudiation of the brooding omnipresence view, two paragraphs announcing the outcome determination standard, and nothing on the equity/law issue raised by the "trials at common law" language then part of the Decision Act.[305] The notes and questions following the case are also brief. Among other things, they characterize

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provides useful information about the reach of the *Erie* doctrine, though why it, among all of the possible esoteric *Erie* extensions, is selected for presentation is not clear. *See* YEAZELL (6th ed.), *supra* note 15, at 229 n.4(b). The questions about forum shopping suffer from some of the same difficulties as the book's discussion of *Erie*'s constitutional dimension. They overstate the Court's view on forum-shopping, by describing it as an objection to all forum shopping for whatever reason, not just forum shopping for substantive legal rules affecting character or result. Yeazell then knocks down that straw man by pointing out that forum shopping is not always bad, and in fact to some extent, inevitable.

303. YEAZELL (6th ed.), *supra* note 15, at 231.

304. The Seventh Amendment played some, not fully defined role in *Byrd*, and Article III, Section 2 was the standard against which the Enabling Act was judged in *Hanna*. However neither of these constitutional issues involved an *Erie* question about the extent of a diversity court's duty under the Tenth Amendment, as Yeazell sees it, to apply state law.

305. The book's summary of the *York* facts contains a brief reference to the equity/law issue in the case, but none of the Court's discussion of the issue is reproduced. The book revisits the issue in a textual note following the case, in which it explains the Court's reasoning in greater detail. *See id.* at 232-34. This pattern of telling readers what a case means, rather than providing relevant data from the opinion and allowing readers to come to their own conclusions, is a familiar one in Yeazell.

Frankfurter's outcome determination standard as a ferocious and sharp attack on the proposition that state procedural rules are "not governed by the rule in *Erie*," but then criticize other parts of Frankfurter's opinion for being internally inconsistent with this (criticized) view.[306] Yeazell seems to see the unqualified outcome determination test as the final word on the Decision Act standard, rather than an interim draft in need of refinement. In addition, the book does not seem to recognize the connection between *York*'s outcome determination formulation and *Erie*'s substance/procedure test as variations on the same theme, or parts of a single doctrinal project, as opposed to free-standing and mutually exclusive rules. The principal difficulty with Yeazell's treatment of *York*, however, as with its earlier discussion of *Erie*, is not so much the accuracy of its analytical points as the one-dimensional and argumentative nature of its discussion. The book simplifies the *York* decision, both in the way it edits the Court's opinion for inclusion in the book and in the comments it makes about the opinion. In the process, it discourages readers from examining the case in all of its complexity for themselves.[307]

Yeazell treats *Byrd* even more perfunctorily than *York*. It reduces the case to two and one-half pages,[308] making it one of the shortest versions of *Byrd* in any of the procedure casebooks, and asks only one generally phrased[309] question about the opinion. The book also has a short, three-sentence note about the case, but the note simply makes the point that the Court in *Byrd* "seemed to be going out of its way to find another [i.e., different from *York*] analysis by which to approach *Erie* problems."[310] Then, in a transition paragraph to the *Hanna* decision, Yeazell repeats the theme that the "*Erie* questions" in *Byrd* are "constitutional matters."[311] The book summarizes *Byrd* in a note after the

306. *Id.* at 233 n.1.

307. The remaining notes and questions after *York* provide information on the debate over the accuracy of Justice Story's understanding of the Decision Act in *Swift*. They also describe the by now well-known paper size hypothetical, which many books use to illustrate the over-inclusiveness of an unqualified outcome determination test. *See* discussion *supra* note 24 and accompanying text. Yeazell summarizes *Ragan*, *Bernhardt*, and *Woods* by asking "whether all – or any – of [them] are correctly decided" under *Erie* and *Guaranty Trust*." *Id.* at 233-34 n.3. This last question mixes and matches Enabling Act, Decision Act, and pertinence issues without providing enough detail to resolve any of these questions with respect to any of the cases.

308. Until the latest edition of Yeazell, the number of pages did not tell the complete story. The first through fifth editions of the book were printed on nine inch paper and had forty-six lines of ten-point type to a page, whereas Cound, for example, has always been printed on ten inch paper and has fifty lines of ten-point type to the page. The sixth edition of Yeazell is now the same size as Cound and almost every other book.

309. The casebook asks the reader to, "State the holding of *Byrd*." *Id.* at 237 n.1.

310. *Id.* at 237 n.2.

311. *Id.* at 237. The fifth edition of the book also made the strange claim that "*Erie* . . . rejected the invitation to reach its decision as an interpretation of the Rules Enabling Act rather

Hanna case in a way that allows a careful reader to see the confusion in the opinion,[312] but since this note comes several pages after *Byrd* in the casebook it could easily be missed. Yeazell's version of *Byrd* makes it difficult for a reader to understand the opinion as a collection of all previous formulations of the Decision Act standard and to understand how those various formulations might be fit together into a single, coherent rule. The underlying purpose of *Byrd*, to reign in the overinclusiveness of an unqualified outcome determination standard, is not mentioned.

Next, Yeazell takes up *Hanna*. The decision, according to Yeazell, "reframes the [*Erie*] issue as one of statutory rather than constitutional interpretation."[313] This is misleading, since once the underbrush of federal general common law was cleared away, *Erie* was just a statutory decision, grounded in the Rules of Decision Act; no "reframing" needed to be done.[314] Yeazell reproduces the *Hanna* decision almost in its entirety, including Harlan's famous "arguably procedural, ergo constitutional" concurring opinion. Harlan's concurrence is the most eloquent articulation of the "enclave" theory of the Tenth Amendment and most casebooks use one example from the opinion to illustrate how Harlan goes off track. Reproducing the entire concurring opinion suggests that

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than the Constitution." YEAZELL (5th ed.), *supra* note 290, at 284. Yeazell no doubt meant to say Rules of Decision Act rather than Rules Enabling Act. Apart from its dubious constitutional status, *Erie* could not have been an Enabling Act case since no Federal Rule of Civil Procedure was in dispute. One would expect this type of typographical error to have been corrected long before the fifth edition of a casebook. The sixth edition has it right. *See* YEAZELL (6th ed.), *supra* note 15, at 237.

312. In Yeazell's words: "The *Byrd* Court assumes that if [a state practice is bound up with the definition of rights and obligations], state practice should prevail. The idea seems to be that some procedural practices are so much a part of the substantive law that they should be followed." YEAZELL (6th ed.), *supra* note 15, at 243. Taken literally, this summary of *Byrd* seems to contain a non-sequitur. How can a practice be "bound up with the definition of rights and obligations" and "procedural" at the same time? Being "bound up with the definition of rights and obligations" is an operational definition of being substantive. However, there is a way to make sense of this general point. *Byrd* can be read to say that federal courts must sometimes apply state procedural rules because the interests served by such rules are weightier than the countervailing interests served by contrary federal rules. This is one possible outcome of a simple balancing test. If *Byrd* meant to say this, the better view is that this interpretation is a mistaken reading of *Byrd*. The categories of substance and procedure are mutually exclusive categories, and while many rules have both substantive and procedural dimensions, they must be categorized as one or the other for purposes of the Decision Act.

313. *Id.* at 237. "Byrd is nuanced, 'soft,' and, in many cases, indeterminate – and grounds its analysis directly in the Constitution. Hanna is hard-edged and more determinate – and insists that a statute – the Rules Enabling Act – is as important as the Constitution in many *Erie* cases." *Id.* at 242.

314. The "reframing" point is misleading in another sense. *Hanna* was a constitutional decision as well as a statutory one. It re-introduced the Constitution to *Erie* doctrine analysis for the purpose of determining whether the Enabling Act, the source of federal court authority to promulgate Federal Rule Four, was a valid exercise of congressional power.

Yeazell either does not understand Harlan's mistake and assumes his opinion to be essentially correct, or wants to call attention to Harlan's gaffe as often as it can. The Yeazell book shows no evidence of being mean-spirited elsewhere, and its views on *Erie* are compatible with, if not dependent upon, the enclave theory of the Tenth Amendment,[315] so it is perhaps fair to conclude that Yeazell thinks Harlan's opinion is superior to that of the Court's.

Yeazell's summary of *Hanna*'s discussion of the Enabling Act standard also is somewhat confused. While it is true that the validity of a Federal Rule is tested against the Enabling Act, it also is true that the Act has two parts. The first, which Yeazell acknowledges, requires that a Federal Rule be a rule of "practice and procedure."[316] The second, which Yeazell does not mention, requires that the Rule not "abridge, enlarge or modify substantive rights."[317] The second half of the standard has been honored mostly in the breach, but it is still part of the Act and ought not to pass without mention or explanation.[318] In addition, if a Federal Rule fails either part of the Enabling Act test, so that it is invalid and cannot be applied by a federal court sitting in diversity, the court need not automatically apply the equivalent state rule, as Yeazell says it must.[319] Whether the federal court must apply the state rule will depend upon whether the rule qualifies under the Decision Act. It is conceivable, though not likely, that both a Federal Rule and the equivalent state rule would fail validity tests under the Enabling Act and Decision Act respectively. In that instance a federal court would have to make federal common law to resolve the issue before it or simply decide the issue against the person invoking the Rule, yet Yeazell does not discuss these possibilities.

Yeazell also asks whether a federal court would ever have a duty to follow a state practice or custom "not dictated by a specific statute or Rule," and suggests that *Byrd* and *Hanna* "approach that question in

315. *See, e.g.*, YEAZELL (6th ed.), *supra* note 15, at 242 (maintaining that *Erie* asserts that "Congress could not constitutionally dictate tort law to the states").

316. *Id.*

317. For Yeazell, the second half of the Enabling Act test for the validity of a Federal Rule is "whether the Rule itself if constitutional." *Id.* However, this standard is applied to the Enabling Act in its entirety to determine whether it is a valid use of governmental power. A statute is tested against the Constitution, but a Federal Rule is tested against the statute which authorizes it.

318. *Accord* Rowe, *supra* note 22, at 981 ("[T]he REA's substantive-rights proviso should not today be read as surplusage."). The Court has applied the second half of the Enabling Act standard after a fashion in cases such as *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 11 (1941), and *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946), under the rubric of allowing Federal Rules to have insubstantial or incidental effects on substantive rights. But these decisions focus more on the abridgement part of the Act's text than on the substantive rights part.

319. *See* YEAZELL (6th ed.), *supra* note 15, at 242.

different ways."[320] This is an easy question to answer if one remembers that the Decision Act obligates federal courts to apply only the "laws of the several states." A practice or custom "not dictated by a specific rule or statute" is not a law within the terms of the Act, and thus need not be applied. State and federal judicial practices may differ substantially. This is what makes for different judicial systems. These differences may have pronounced effects on forum selection choices but this fact, by itself, has no implications for an *Erie* analysis. The focus of the *Erie* doctrine is on state law, not state judicial practices. In the words of *York*, "the outcome of the litigation in the federal court should be substantially the same, *so far as legal rules determine the outcome of a litigation*, as it would be if tried in a State court."[321] *Byrd* and *Hanna* do not approach the question of whether a federal court must follow state practice "in different ways," as Yeazell asserts, because neither *Byrd* nor *Hanna* involved a question of state judicial practice.[322]

The remainder of the Yeazell book's notes and questions after *Hanna* contain a number of familiar errors. For example, the book points out that "*Hanna* did not overrule *Byrd*,"[323] which is true, but only if one adds the qualification "explicitly." *Hanna* repudiated *Byrd* in every other conceivable way.[324] It also claims that *Hanna* "cited [*Byrd*] with approval," and thus, that either case suggests an appropriate approach to an *Erie/Hanna* problem involving a federal practice.[325] This is a little disingenuous. It is true that *Hanna* cites *Byrd* twice, but neither reference supports the proposition that *Hanna* intended to preserve *Byrd*. The first citation is a "*cf.*" reference in a footnote citing principally to the *Ragan*, *Woods*, and *Bernhardt* cases for the proposition that "*Erie*-type problems [are] not to be solved by reference to any traditional or common-sense substance-procedure distinction," but

320. *Id.* at 243.

321. Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (emphasis added).

322. *See* YEAZELL (6th ed.), *supra* note 15, at 243 n.4. In *Byrd*, the state law in question for Decision Act purposes, was a common law rule created by the South Carolina Supreme Court providing a procedure for reviewing fact determinations of the South Carolina Industrial Commission. In *Hanna*, the state law was a Massachusetts statute providing a special service rule for executors of estates.

In the same note the book also seems to misunderstand the nature of the *Hanna* Court's forum shopping rationale for its refined outcome determination version of the Decision Act test. Yeazell seems to say that the Court sought to prohibit all kinds of forum shopping, for procedural and substantive advantages alike. But as *York* and *Hanna* make clear, the only kind of forum shopping the Court wanted to discourage was forum shopping for substantive legal rules that were likely to affect the character or result of the litigation. Seeing *Hanna* as a prohibition on forum shopping generally is the same mistake Harlan made in his concurring opinion.

323. *Id.* at 244.

324. *See* discussion *supra* notes 170-76 and accompanying text.

325. YEAZELL (6th ed.), *supra* note 15, at 244.

instead by reference to the question of "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"[326] Here, *Byrd* is used as authority for the outcome determination test, a creation of *York* and not of *Byrd*. *Hanna*'s second reference to *Byrd* is for the statement that " '[o]utcome-determination' analysis was never intended to serve as a talisman. [citation to *Byrd*]. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule. [citation to *York*]."[327] Here, *Byrd* is used to support the so-called "twin aims" rationale of *Erie*, again not a idea distinctive to, or created by, *Byrd*. To describe these references as an approval of *Byrd*, is like describing *Erie* as an approval of *Swift* because *Swift*, like *Erie*, held that the Rules of Decision Act controls the question of when a federal court sitting in diversity must apply state law.

Up until the fifth edition, Yeazell included a note following the *Hanna* opinion which cited to, and quoted from, several scholarly discussions that mirrored Yeazell's mistaken understanding of the *Erie/Hanna* doctrine. For example, the note quoted with approval from a section of Erwin Chemerinsky's treatise on federal jurisdiction describing the need for a "direct collision" between state and federal law, something the Court had stopped saying after *Stewart*.[328] The note also characterized *Byrd* balancing as still good law but only for state laws that are outcome determinative,[329] and summarized Ely's *Irrepressible Myth* article in a manner that had Ely agreeing with Yeazell that *Erie* was a constitutional decision. Ely, said Yeazell, believed that "the rule in question – the standard of care owed by the railroad – was in no sense a procedural matter," and the Constitution "justifies the federal courts in

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326. Hanna v. Plumer, 380 U.S. 460, 465-66 (1965).

327. *Id.* at 466-67 (citations omitted).

328. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).

> Our cases at times have referred to the question at this stage of the analysis as an inquiry into whether there is a "direct collision" between state and federal law. Logic indicates, however, and a careful reading of the relevant passages confirms, that this language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the "direct collision" language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute. It would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point.

Id. at 26 n.4 (citations omitted).

329. STEPHEN C. YEAZELL, CIVIL PROCEDURE 283 (4th ed. 1996) [hereinafter YEAZELL (4th ed.)] (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 266-67 (1989)).

following [federal] rules that are in fact procedural."[330] "The Constitution, however, should stay in the background," said Yeazell again speaking for Ely, "until Congress prescribes a rule of decision in diversity cases by statute, because the Rules of Decision Act (as interpreted in *Erie* and *Guaranty Trust* [*i.e., York*]), protects state law to the same degree as does the Constitution."[331] This summary of Ely is misleading in several ways, but since the summary no longer appears in the casebook (Ely is not mentioned in the fifth and subsequent editions), it is not necessary to dwell on its errors.[332] Yeazell's inclusion of Ely

330. *Id.* at 284.

331. *Id.* at 284.

332. Taking the Ely article out of the book is a strange move. Not only do many books still cite to it, but the third edition of Yeazell called the article "incisive," and said it "cast considerable light on the '*Erie* problem,'" see STEPHEN C. YEAZELL, JONATHAN M. LANDERS & JAMES A. MARTIN, CIVIL PROCEDURE 264 (3d ed. 1992), and the fourth edition, when Professor Yeazell became the sole author, described the article as a "particularly influential exploration." *See* YEAZELL (4th ed.), *supra* note 329, at 283. It is in the fourth edition however, that one senses a change of heart with respect to Ely. The book's note on the *Irrepressible Myth* article is shortened, the citations to the Chayes and Mishkin responses are omitted, and the book's summary of the article begins to take on an *Erie* as constitutional rule theme that is characteristic of Yeazell's view about *Erie*, but not Ely's. The only mention in the fifth edition of the possibility that the *Erie/Hanna* doctrine may not be a unitary rule, but instead, as Ely pointed out, an amalgam of "three distinct and rather ordinary problems of statutory and constitutional interpretation," is in a note on "Determining the Scope of Federal Law: Avoiding and Accommodating *Erie*," only part of which survives from the Fourth Edition. *See* YEAZELL (5th ed.), *supra* note 290, at 295-96. Yeazell seems to regret that *Erie* is just a statutory rule, however, and either wants to deny it or argue that it should not be so. The fifth edition acknowledges, for example, that:

> Under *Hanna*'s reading of *Erie*, many '*Erie*' questions will not require resort to the Constitution because Congress by statute will have told federal courts what to do in the situation. So long as the statute is constitutional and one knows what the statute requires, the choice of law problem is solved.

Id. at 295. But "this route to the solution of *Erie* problems" is "too tempting" the book continues, *id.*, because a federal statute can be "a very thin fig leaf," as the Fourth edition of the book put it, YEAZELL (4th ed.), *supra* note 329, at 286 n.2(b), to give federal courts "maximum discretion," *id.* at 288 n.4, to deal with problems also regulated by state law. This result, Yeazell concludes, "would probably induce apoplexy in Justices Brandeis and Frankfurter." *Id.* Apart from the medical effects on Brandeis and Frankfurter, it is hard to know what is wrong with this view. *Hanna* did not interpret some disembodied phenomenon called *Erie*. The *Erie* decision enforced the Decision Act command to make state substantive law the rule of decision in federal courts. To the extent *Hanna* had anything to do with *Erie* it simply refined its description of what kind of state law qualifies as substantive under the Decision Act. In actuality, *Hanna* refined *York* and outcome determination more than *Erie*. Most of *Hanna* is concerned with the Enabling Act and the validity of Federal Rule Four. Moreover, if a federal statute is pertinent to an issue before a court, that is, if the statute by its own terms covers or applies to the issue in dispute, and the statute is constitutional, what possible basis could exist for arguing that state law is a higher authority? Certainly not the Tenth Amendment, which grants only residuary power to the states. A pertinent and constitutional federal statute leaves no residue. What then?

It may be that a judge, determined to expand federal power at all costs, will misinterpret a federal statute and find it pertinent when the better view would be otherwise. But the *Stewart* and *Burlington Northern* decisions are the only examples Yeazell gives of such federal imperialism,

always looked grudging at best, more like a mandatory citation to something too important to be left out, than a report on a truly compatible view. Anyone familiar with Ely's views would strain to reconcile them with Yeazell's.

Yeazell's pattern of arguing for particular interpretations of the *Erie/Hanna* cases rather than presenting the cases as data for examination causes the book to differ substantially from Cound. Whether this difference is explained by substantive or pedagogical reasons is not clear. Yeazell might think that provoking readers is the best way to stimulate critical thinking about the cases, and that modern law students have their best ideas when argued with rather than questioned in an open-ended or non-directive fashion. Frequently in the modern law school, the contest rather than the dialogue is the defining metaphor for instructional interaction and Yeazell may simply have extended the metaphor to casebook organization as well. On the other hand, the Yeazell book may be based on the belief that there are better and worse interpretations of the *Erie/Hanna* cases (no argument there) and that it has the better ones figured out (debatable). If this is what is going on, the book needs to explain its conclusions more clearly and describe their bases in greater detail.

C. *Babcock & Massaro*

Civil Procedure: Cases and Problems, by Barbara Babcock and Toni Massaro (hereinafter Babcock & Massaro),[333] takes what it describes as a problem approach to the civil procedure subject matter[334]

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and they do not make the case. YEAZELL (4th ed.), *supra* note 329, at 284-86; YEAZELL (6th ed.), *supra* note 15, at 244-45. *Stewart* was a complicated and difficult case, with an embedded Rules of Decision Act issue the Court did not discuss, see discussion *supra* notes 188-204 and accompanying text, but there can be little doubt that the federal transfer statute was pertinent to the issue before the court in that case. The issue in *Stewart* was whether the Alabama federal court should transfer the case to the New York federal court. The transfer statute was the Alabama court's only source of authority to order such a transfer. To whatever extent the federal court had to accommodate the Alabama law on forum selection clauses, it had to do so under the aegis of the transfer statute. In *Burlington Northern*, the authorization in Rule 38 of the Federal Rules of Appellate Procedure to assess damages and costs for frivolous appeals was a rule of practice and procedure, more incompatible with the equivalent Alabama state law than was the transfer statute in *Stewart*. Burlington N. R.R. Co. v. Woods, 480 U.S. 1 (1987). It abridged no substantive rights though this was a closer question. It is hard to see how the Court had any choice other than to apply the Rule. If Yeazell's point is the more general one, that federal courts will act systematically to expand the scope of federal authority and override state law whenever possible, an alter ego version of the objection raised in *Ragan* and *Walker*, the argument is just as much of a dead end in *Burlington Northern* as it was in *Ragan* and *Walker*.

333. BABCOCK & MASSARO (2d ed.), *supra* note 204. The book is the successor to PAUL CARRINGTON & BARBARA BABCOCK, CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION (3d ed. 1983), but it is a different book in many major respects.

334. BABCOCK & MASSARO (2d ed.), *supra* note 204, at xxx.

that is designed to teach about the "practical human significance"[335] of procedural rules and doctrines more than their analytical niceties. The book devotes fewer pages to the *Erie/Hanna* doctrine than most of the other casebooks[336] and provides very little information about the development of the doctrine outside of the Supreme Court cases themselves. It reproduces most of the cases, including major cases such as *York* and *Byrd,* in greatly abbreviated form – only *Erie, Hanna,* and *Gasperini* receive relatively complete treatment, and does not distinguish between the *Erie* (or Decision Act) and *Hanna* (or Enabling Act) halves of the doctrine in the notes following the cases. The authors ask few questions about the contents of the cases usually in the format of "How will party A argue for X, and party B argue for not X?", and the questions contribute little that is original to the cases' presentation of the doctrine. It is as if the authors thought that studying the doctrine for its own sake was unimportant and that the cases were useful only insofar as they could be turned into arguments that would help lawyers convince courts to rule in their favor. Whatever the reason, in the end, the book does little more than reduce *Erie/Hanna* to the soundbite synopses of substance/procedure and outcome determination.

The book's treatment of the *Swift* doctrine is brief and selective. It tells the story of *Swift* through an extended excerpt from Edward Purcell's book on diversity jurisdiction rather than the *Swift* decision itself.[337] Consistent with its practitioner perspective, it edits the Purcell excerpt to emphasize the role of strategic litigation maneuvering by large national corporations and their law firms in opposition to New Deal programs as a way of explaining *Erie's* repudiation of *Swift.* The role of non-practice factors, such as background intellectual currents evident in the jurisprudential shift from a brooding omnipresence to command theory of law, is not mentioned. The Purcell excerpt repeats some familiar misunderstandings of *Erie* and in so doing gives a hint of the approach to the doctrine the Babcock & Massaro book will adopt. For example, Purcell describes *Erie* as a Tenth Amendment case announcing a constitutional rule protecting a fixed enclave of state power forever

335. This language is taken from the introduction to the first edition of the book, but it seems a fair characterization of the approach of the second edition as well. *See* BABCOCK & MASSARO (1st ed.), *supra* note 204, at xxxii (citing the inspiration for this approach as EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, 249 (1992)).

336. Until its latest edition Yeazell devoted the fewest pages to the doctrine of any major casebook.

337. BABCOCK & MASSARO (2d ed.), *supra* note 204, at 813-19. *See also* PURCELL, *supra* note 335, at 226-230.

off-limits to federal intrusion,[338] and describes *York*'s unqualified outcome determination test as the final word on the meaning of the Decision Act command to apply state law. Purcell, to his credit, does not shrink from the full implications of this last point, and acknowledges that under certain circumstances, if effect on outcome is all that matters, a federal court may be required to apply state procedural rules.[339] He also does not seem to see how this must be wrong. The mistake is more difficult to understand given that Purcell wrote in 1992, long after the problem of how to qualify *York*'s outcome determination standard had been worked out in *Hanna* and explained by Ely. The Babcock & Massaro book does not provide this missing context, however, or ask the reader to consider whether Purcell has described the *Erie* rule correctly.

Babcock & Massaro's edited version of the *Erie* opinion is as complete as most and has enough in it to support a discussion of every important feature of the case. It is followed by a short note, perhaps the briefest post-*Erie* note in any of the casebooks, which raises the question of whether *Erie* announced a constitutional rule. The note makes two points: that Justice Brandeis suggested in *Erie* that the outcome of the case was "constitutionally required," and that "some [unidentified] scholars" argue that Congress's constitutional power to create a federal court system includes the power to create substantive law for diversity cases.[340] The point about Brandeis does not distinguish between a positive and a negative constitutional requirement. Brandeis suggested only that the "course pursued" in *Swift* was not constitutionally authorized,[341] not that the application of Pennsylvania tort law in *Erie* was constitutionally required. And the second point describes a straw man argument that few, if any, constitutional scholars have defended, at least in the scope adopted by Babcock & Massaro. The argument – that a grant of power to set up a procedural system is *a fortiori* a grant of power to make substantive law for that system to operate with – is hardly compelling. Taken to its logical conclusion, it obliterates all distinctions between procedure and substance and, as a consequence, collapses on itself. There is a more limited version of the argument which has greater force,[342] but the book does not describe this view.

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338. BABCOCK & MASSARO (2d ed.), *supra* note 204, at 817-18, 825 (quoting PURCELL, *supra* note 335, at 226-30).

339. *Id.* at 818 (quoting PURCELL, *supra* note 335).

340. *Id.* at 824.

341. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

342. This is the so-called "Lincoln Mills" argument, which most casebooks discuss. *See, e.g.*, COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 24, at 451; HAZARD, TAIT & FLETCHER, *supra* note 37, at 580-81; MARCUS, REDISH & SHERMAN, *supra* note 15, at 1008; YEAZELL (6th ed.), *supra* note 15, at 230-31. Justice Reed discusses a version of the argument, although not in

The book resolves the question of whether *Erie* is a constitutional case by concluding that the question is unimportant because the Supreme Court has interpreted "applicable congressional acts" (i.e., "the Rules of Decision Act, . . . and the Rules Enabling Act") to require the application of state law by federal courts sitting in diversity.[343] This is a confusing thing to say in at least two ways. First, it is not clear how the presence of federal statutes would make the question of *Erie*'s constitutional status unimportant. If federal courts have a constitutional obligation to apply state substantive law, it is the Constitution and not federal statutes that must be interpreted to determine the extent of that obligation. Second, it is not clear why the Enabling Act should be included along with the Decision Act in the list of federal statutes requiring the application of state law in federal court. The Enabling Act was not involved in *Erie*, and has nothing to say about a federal court's obligation to apply state law. It simply prevents a federal court from using a Federal Rule of Civil Procedure when that Rule would abridge a substantive right whether the right is created by state law or otherwise. Only the Decision Act commands the application of state law, and then only when the law is outcome determinative in *Hanna*'s refined sense of the term. The book's mistake here is a familiar one. It does not distinguish between the *Erie* or Decision Act, and *Hanna* or Enabling Act, halves of the *Erie/Hanna* doctrine. Instead, it combines two of Ely's "three distinct and rather ordinary problems of statutory and constitutional interpretation," into a single, unified (*Erie*) rule. The book acknowledges that its account of the *Erie/Hanna* doctrine is "grossly simplified,"[344] and that counts for something. But perhaps it would be better to present a more complex account in a book designed for novices with no prior understanding of the doctrine.

The book's treatment of *Guaranty Trust Co. of New York v. York* is perhaps the most questionable part of its section on the *Erie/Hanna* doctrine. It reproduces the *York* decision in blurb fashion, which makes it almost alone among procedure books in not treating *York* as a principal case. While it quotes from the *York* opinion, it quotes only the Court's reformulation of *Erie*'s substance/procedure standard in outcome determination terms.[345] The surrounding contextual information showing why such a reformulation was necessary – that a substance/procedure standard does not help categorize an equity rule in which right and remedy are mixed – is omitted. As a result, the *York* holding is reduced to

"Lincoln Mills" terms of course, in his concurring opinion in *Erie*. *See Erie*, 304 U.S. at 91-92 (Reed, J., concurring); *see also* WRIGHT, *supra* note 8, at 415.

343. BABCOCK & MASSARO (2d ed.), *supra* note 204, at 824-25.

344. *Id.* at 824.

345. *Id.* at 826.

an "unworkable bromide" in the book's terms, something the book says is "inevitable," and *York* is then criticized for failing to exclude "even the most relentlessly procedural rules."[346] Rather than present *York* as a partly successful step in an ongoing analytical project and the foundation of the modern *Erie* rule, the book reduces the decision to little more than an argumentative soundbite, a move in keeping with its practitioner approach to describing procedure doctrine.

Babcock & Massaro disposes of *Byrd* in almost as perfunctory a fashion. *Byrd* appears just once in the *Erie/Hanna* section of the book, among a list of one-paragraph case blurbs used to illustrate the Supreme Court's struggles with defining the substance/procedure and outcome determination standards.[347] The book quotes parts of four paragraphs from the *Byrd* opinion, principally those stating the Court's balancing and Seventh Amendment rationales, but strangely, it does not ask any questions about the case or comment on it in any way. Instead, it moves on immediately to examine *Hanna*. The *Byrd* Court's struggle with the task of synthesizing a coherent *Erie* rule out of several pre-existing formulations, the laundry list quality of the rationale it eventually adopts, and the Court's experiment with balancing as a check on the outcome determination standard, are all ignored. The common analytical concern which ties *Erie, York,* and *Byrd* together, that of formulating a functional statement of the substance/procedure standard which can be applied with equal effectiveness to all types of state law, and the way in which the Court's efforts finally come to fruition in *Hanna*, also are not mentioned. The instructional value of *Byrd* as a carefully documented failure is lost on a reader who does not already understand the lesson. The case is relegated to a kind of pre-historic status, an artifact of the *Cohen*, *Ragan*, and *Woods* era when the Court's understanding of the difference between substance and procedure was considerably more primitive. This treatment of *Byrd* makes a non-event of a major stage in the development of the *Erie/Hanna* doctrine and without any hint of this being done.

The book describes *Hanna* as "clarify[ing] the *Erie* doctrine by 'establish[ing] a powerful presumption in favor of federal courts' power to use the Federal Rules of Civil Procedure in diversity actions."[348]

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346. *Id.*

347. Compare this treatment of *Byrd* with that of HAZARD, TAIT & FLETCHER, and MARCUS, REDISH & SHERMAN, each of which devotes four and one-half pages to the decision. HAZARD, TAIT & FLETCHER, *supra* note 37, at 509-13; MARCUS, REDISH & SHERMAN, *supra* note 15, at 943-47.

348. BABCOCK & MASSARO (2d ed.), *supra* note 204, at 830. It is not clear how a presumption in favor of the application of the Federal Rules would resolve an *Erie* problem, since *Erie* did not involve a dispute over the application of the Federal Rules or an interpretation of the Enabling

While not an unfamiliar way to describe *Hanna*, this description is difficult to make sense of and even harder to reconcile with the language of the case itself. First of all, the question of whether a Federal Rule governs an issue before the court, because of a presumption or otherwise, is a *Hanna* or Enabling Act problem and not an *Erie* or Decision Act problem. The book continues to conflate these separate and distinct strands of the *Erie/Hanna* doctrine and talk about them as if they were two parts of a single rule.[349] *Hanna* itself does not draw on or even mention the idea of a presumption, either in favor of or against the application of the Federal Rules. Instead, it discusses only the so-called validity question of what is required for a Federal Rule to be a legitimate exercise of Enabling Act authority. It concludes, consistent with the terms of the Enabling Act, that to be valid a Federal Rule must regulate practice and procedure, and not abridge, amend or modify substantive rights.[350] If both valid and pertinent to the issue before the court, a Federal Rule must be applied by a federal court sitting in diversity, not because of some presumption in favor of its application but because its own terms require it and because there is and can be no higher law. Since federal courts honor the second half of the Enabling Act test mostly in the breach, and the first half is easily complied with, Federal Rules almost invariably are valid under an Enabling Act analysis. But to say that a Federal Rule is likely to be valid is not the same thing as to say that there is a presumption in favor of its application. The idea of presumption adds nothing to understanding *Hanna* or the Enabling Act and detracts from the decision's central lesson about determining the validity of a Federal Rule.

The book's edited version of the *Hanna* decision, which abbreviates the Court's discussion of the Enabling Act problem and emphasizes the Decision Act problem, also reinforces the idea of *Erie/Hanna* as a single, undifferentiated legal doctrine.[351] The notes following the case reinforce this perspective by running Enabling Act and Decision Act

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Act, although some commentators think that *Erie* created what amounted to a presumption in favor of the application of federal law generally. *See, e.g.*, John C. McCoid, II, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965).

349. The first edition of the book omitted most of the Court's Enabling Act analysis, while reproducing its Decision Act analysis almost verbatim. *See* BABCOCK & MASSARO (1st ed.), *supra* note 204, at 218-22. This made it difficult for a reader unfamiliar with the opinion even to recognize that there were two distinct parts to the decision. It is fair to say that the *Hanna* decision reproduced by the first edition of the book was a different decision from the one announced by the Court. The second edition of the book corrects this problem to a limited extent by including parts of the Court's Enabling Act discussion, although significant parts of the analysis are left out. However, the second edition still fails to distinguish fully between the different statutory interpretation problems presented by the two statutes.

350. Hanna v. Plumer, 380 U.S. 460, 470-72 (1965).

351. *See supra* note 349.

examples and arguments together as if parts of the same state law/federal law topic. For example, they discuss the issues of effect on outcome and the procedural quality of a Federal Rule as if they could come up under the same legal standard, and fail to point out that the two statutes work with different understandings of key, common terms.[352] The authors seem to get closer to seeing the distinction between the two Acts in their movement from the first to the second edition of the book. In the second edition they remove a note on "Choosing Between RDA and REA Analysis," that described the Enabling Act as "govern[ing] choice of law issues in cases that involve duly enacted federal rules or statutes, whereas *Erie* and the Rules of Decision Act (RDA) govern cases that involve federal decisional law."[353] This is only partly correct. The Enabling Act authorizes the enactment of Federal Rules but not federal statutes, the Decision Act applies to state law but not federal law, and the issue of whether to apply a federal statute is governed by the Supremacy Clause of the Constitution. The first edition of the book also confused pertinence questions with Enabling Act questions in its discussion of Rule 68, but this discussion has been removed as well.[354] The first edition also confused *Stewart* questions about the applicability of a federal statute with *Erie* questions about the applicability of state law, and this discussion remains in the book.[355] In the end, Babcock & Massaro's treatment of the *Erie/Hanna* doctrine leaves a thoughtful reader more confused than comprehending, and with an understanding based more on terminology than ideas.[356]

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352. BABCOCK & MASSARO (2d ed.), *supra* note 204, at 839. It is strange that the book would so consistently run these two separate issues together since the *Hanna* decision, even as reproduced in the book, points out that "as [cases] subsequent [to *Erie*] . . . sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act. *Guaranty Trust v. York* made it clear the *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction." *Id.* at 832 (quoting *Hanna*, 380 U.S. at 465-66) (citations omitted). The book's version of *Hanna* leaves out other language which would have made this point more clearly. *See, e.g.*, *Hanna*, 380 U.S. at 471-72. Ely also explains the point in detail. *See* Ely, *supra* note 2, at 721-27.

353. BABCOCK & MASSARO (1st ed.), *supra* note 204, at 227; *see also* SUBRIN, MINOW, BRODIN & MAIN, *supra* note 69, at 755 ("In *Stewart* . . . the Court extended the *Hanna* Fed. R. Civ. P. friendly approach to federal statutory provisions as well."); *Mid-Life Crisis*, *supra* note 135, at 1115 ("[B]ecause a federal statute applied, the case was governed by *Hanna*.").

354. BABCOCK & MASSARO (1st ed.), *supra* note 204, at 228.

355. *Id.* at 227. *See* BABCOCK & MASSARO (2d ed.), *supra* note 204, at 840. The Subrin book also confuses these questions. *See* SUBRIN, MINOW, BRODIN, & MAIN, *supra* note 69, at 755.

356. The book's treatment of *Gasperini* also has undergone a radical shift from the first to the second edition. The first edition almost ignored the case altogether. It quoted small excerpts from three paragraphs of the opinion and characterized the decision generally as concluding that "New York law was not incompatible with the Seventh Amendment . . . . [and] [f]or federal courts sitting in diversity to ignore the New York law would create substantial variations between state and federal judgments, in violation of *Erie*'s 'twin aims.'" BABCOCK & MASSARO (1st ed.), *supra*

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The Cound, Yeazell, and Babcock & Massaro books provide a representative picture of the approaches taken in American procedure casebooks to the presentation of the *Erie/Hanna* doctrine. All procedure books combine traditional, advocacy, and practitioner perspectives to varying extents: sometimes they offer up unencumbered case decisions as pure data for open-ended analysis, other times they argue for particular interpretations of the decisions, and still other times, they turn the cases into black letter law soundbites for use in arguments with other lawyers. While not every book uses the same approach all of the time, therefore, each has a distinctive identity which distinguishes it from the other books in the field. For example, the books differ in their conceptions of the procedure subject matter. Some emphasize an understanding of doctrine and the manner in which it is manipulated. These books test the limits of a decision's core concepts and the flexibility of its language, usually by asking questions about future hypothetical applications. Other books emphasize the role of background factors from the world of ideas generally, including concerns of legal theory and legal method, in the development of legal doctrine. These books ask readers to question why and how legal rules change more than to determine the content of any particular rule regime. Still other books help readers learn how to think of, store, and retrieve cases in capsule form for making arguments in discussions with other lawyers.

Each of these types of books offers up slightly, and sometimes greatly, different versions of the major opinions, arguing directly or by implication, for specific, but different, understandings of the Decision and Enabling Act language, Tenth Amendment, and federal common law rules. Some of the books see the *Erie/Hanna* cases as mostly statutory decisions articulating different interpretations of the substance/procedure standards at the heart of the Decision and Enabling Acts, while others see the cases as announcing a constitutional doctrine grounded in the reserved powers clause of the Tenth Amendment. Within this latter

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note 204, at 217. It is not clear how literally the book's authors intended this characterization. The Decision Act does not require an identity of judgments between state and federal courts, just an identity of substantive legal standards. A federal and state court interpreting the same law could reach different conclusions about the law's application to a particular case without violating the *Erie/Hanna* doctrine. If this was not true we would be back to the so-called ventriloquist dummy problem, in which the federal court would become "just another court of the state." The second edition omits this particular characterization of *Gasperini*, quotes extensively from the opinion (with a disproportionate emphasis on Justice Scalia's dissenting opinion), and includes two pages of questions and comments about the case. The questions seem to restate a more complicated version of the ventriloquist dummy characterization, however, and the comments merely summarize law review criticisms of the case. The authors now seem to see *Gasperini* as a significant case, but don't yet know how they feel about it. Join the club.

category, each of the books has different ideas about how the Constitution defines the relationship between state and federal power. Some believe that states have a fixed enclave of traditional power forever free from federal interference, while others believe that state power is only residuary power left over after the checklist of federal enumerated powers has been identified fully.

Procedure books also differ with respect to their understanding of the role of federal common law and the Supremacy Clause in *Erie/Hanna* analysis. For some, a valid federal common law rule trumps state substantive law, notwithstanding the Decision Act command to apply such law. Others privilege the Decision Act command as superior to all except a valid federal statute. In some books, *Byrd*'s balancing test remains a viable standard. For these books the difficult doctrinal questions include what is balanced (rules, practices, policy interests), if rules, what types of rules (substantive, procedural, both), whose rules (federal, state), and how the balancing should be performed. In other books, *Byrd's* balancing test is dead in the water. The same is true for the outcome determination standard of *York*. Some books describe *York's* unqualified outcome determination test as the governing standard and view a federal court sitting in diversity hearing claims based on state law as just another court of the state. Others believe that the outcome determination standard was refined and qualified in *Hanna,* but disagree over whether the standard applies to all state judicial practices likely to have an effect on outcome, such as the promotion of settlement through mandatory pre-trial conferences, or only to properly enacted state laws.

Finally, the books also differ with respect to their understanding of the proper boundaries of the *Erie/Hanna* doctrine. Some view the question of whether to apply a federal statute in the face of a contrary state law as an *Erie/Hanna* problem. Either they treat the statute as a Federal Rule and require that it satisfy the two-part Enabling Act test, or they treat it as a state law and require that it satisfy the outcome determination standard of the Decision Act. The books also have different views about the origins and nature of the *Erie* doctrine. Some see it as a response to practical exigencies – changing modes of transportation, the development of interstate commerce, the growth of national law firms and interstate practice, interest group manipulation of jurisdictional rules and substantive law for strategic advantage – and provide background material on these and related subjects. Others see it as principally a consequence of intellectual and jurisprudential forces – the development of a professional social science, a movement from natural law to realist theories of truth, changing attitudes about the nature and source of law – and provide background information on these subjects. The snarl of sep-

arate and distinct questions that make up the doctrine, and that Ely so carefully disentangled, are re-jumbled in these presentations so that any sense of the doctrine as raising "three distinct and rather ordinary problems of statutory and constitutional interpretation" is lost. A person reading every procedure casebook would come away with a thoroughly confused understanding of the doctrine, while a person reading just one book would have a substantially different understanding of the doctrine than a person reading another book. The *Erie/Hanna* doctrine has taken on multiple personalities in the casebook world, in other words, and a person's understanding of it will depend almost wholly upon the book and teacher from which and whom it was first learned.

IV. WHAT DOES IT MATTER?[357]

It remains only to consider the effects of this highly differentiated presentation of the *Erie/Hanna* doctrine on lawyer learning and the development of legal doctrine. Does it matter that procedure casebooks describe the *Erie/Hanna* doctrine in different, inconsistent, and even contradictory ways? One expects legal scholars to have different views about the meaning of doctrine. Articulating original and idiosyncratic interpretations of cases and statutes is one of the things legal academics do to establish their views as distinctive, and in the academy distinction is often the holy grail. At first, the *Erie/Hanna* doctrine might seem an odd place to make an intellectual stand, given Ely's sensible deconstruction of it in the mid-1970s and the consequent agreement of most everyone else of note. But legal academics have a difficult time ceding a field completely, even in the face of knock-down arguments, and the passage of time can cause the memory of even definitive treatments to fade. This proclivity to disagree about the meaning of the *Erie/Hanna* doctrine makes for interesting law review writing, but its effects are less sanguine where casebooks are concerned. A casebook is a collection of time-tested legal puzzles, hypothetical and real, for provoking and shaping law student engagement with, and study of, the process of legal analysis. It is useful not so much for the informational detail it provides about specific legal rules, often it is out of date in that regard,[358] but more for the overview it offers of the general policy debates and conceptual structures that make up a particular area of law. If the law is in flux, confused, contested, or unclear, a casebook is better if it presents the

357. Think of this as the "Alfie" question. *See* BURT BACHARACH & HAL DAVID, *What's It All About, Alfie?*, (1966) (produced by Brad Wood & Susanna Hoffs 2002).

358. Supplemented yearly but fully updated only about every three or four years, casebooks inevitably are less current than digests, loose-leaf reporter systems, and on-line data bases, which update information on a monthly, weekly, daily, or even hourly basis. Being informationally incomplete or sometimes even wrong, is built into the nature of a casebook.

material with all of these qualifications. Describing more than one view of the meaning of a line of cases sometimes is not only a reasonable undertaking, it is a necessary one as well. A casebook should open up the realm of interpretive possibilities in a doctrine and help readers see the different approaches one could take to the subject. When a book argues for a single view instead, it closes down this interpretive universe and cuts off further learning. There is nothing wrong with shutting down learning when there is nothing more to be learned, but in such a situation it is particularly important that a book present the settled view. The books arguing for single views of the *Erie/Hanna* doctrine usually do the opposite, however, and promote idiosyncratic rather than consensus understandings of the doctrine.[359]

All of this would not matter much if casebooks did not play an important role in the way law students and lawyers understand the *Erie/Hanna* doctrine, and in some ways they do not. Students go beyond casebooks very quickly in their legal careers when they write memoranda and briefs about *Erie/Hanna* issues in moot court exercises, legal research and writing papers, and law firm work assignments. To do this work law students need a more sophisticated understanding of the doctrine than the skeletal one provided in casebooks, if only to tailor their discussions to particular jurisdictions, know what other jurisdictions say about the same point, and bring their analyses up to date. In the course of developing this more sophisticated understanding students must reconsider, test, and remake when necessary, the basic conceptual frameworks they took from their casebooks.[360] If law students and lawyers organize and explain the detail of the *Erie/Hanna* world in terms of the categories learned from casebooks, however, altering those catego-

359. Perhaps the authors of books with specific views expect law professors to compensate for the books' narrow perspectives by providing alternative viewpoints on their own, just as authors who ask only open-ended and non-directive questions inevitably rely on professors to sharpen the focus with more specifically tailored questions. At one level, both sets of expectations seem reasonable. Anyone using a casebook should always bring a critical perspective to the task by updating, amending, and expanding upon the book's material, factually and analytically, to the extent her or his understanding of the subject permits. Open-ended and non-directive questioning about cases forces a professor to do this. However, advocacy books can be taught at face value, out of ignorance, laziness, insecurity, or whatever, and thus are a risky choice.

360. This risk of a first impression becoming fixed and shaping further study is greater than ordinary with a doctrine like *Erie/Hanna*. *Erie/Hanna* problems are unusual, both in law school and practice. Because of this lawyers do not get many opportunities to refine their understanding of the doctrine. When opportunities do occur, they are usually infrequently and widely spaced. There is no incentive to keep up incrementally with such a doctrine. The return is not worth the investment, and there is always other more pressing work to do. So when lawyers read new *Erie/Hanna* cases they tend to do so all at once, within a short period of time, separated by long breaks from the last time they looked at the material. Under such circumstances, it is not unusual to fall back on default ways of thinking about the doctrine, and the default view of *Erie/Hanna* for most lawyers is the one they learned from a procedure casebook.

ries minimally at the margin when necessary to deal with persistent, non-conforming data of the legal world at large, casebooks will remain the single most important influence on their understanding of the doctrine. Students who do not understand the doctrine when they leave law school, therefore, are not much more likely to understand it in practice. Instead, they are likely to practice their mistakes.

Casebook presentations of the *Erie/Hanna* doctrine may even contribute to the general confusion about the doctrine manifest in the opinions of lower federal courts. Commentators have long criticized federal court *Erie/Hanna* opinions for failings that resemble the misunderstandings one finds in the casebooks. These failings include describing *Erie* as a constitutional rule, treating *Byrd* balancing as still viable, and believing that the outcome determination test must be applied to all types of state laws, procedural as well as substantive.[361] While this similarity of misunderstandings may be coincidental – federal judges may independently misread Supreme Court *Erie/Hanna* opinions in the same fashion as casebook authors – there is a way in which the two phenomena could be related. Clerks to federal judges might draft *Erie/Hanna* opinions based upon casebook views of the doctrine and judges might publish these drafts fundamentally unchanged, because they have nothing better to substitute. Federal judges do not get much practice at *Erie/Hanna* issues. The issues come up infrequently, and when they do judges rarely have the time to study the doctrine in detail, as other matters are usually more pressing. It is natural in such a situation for a judge to trust a clerk's thinking more than usual, since the clerk will have just come from law school where he or she presumably studied the doctrine in its most up-to-date form. We now know, however, that there is no such thing as a single up-to-date understanding of the *Erie/Hanna* doctrine. When clerks draft *Erie/Hanna* opinions they do so from a contested point of view and take sides in an ongoing doctrinal debate, whether they know it or not.[362]

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361. *See, e.g.*, Braman & Neumann, *supra* note 20, at 467-74; *see also* Ely, *supra* note 2, at 717 n.130.

> When the Rules of Decision Act is interpreted in light of . . . a desire . . . to minimize forum shopping . . . it becomes clear that there is no place in the analysis for the sort of balancing of federal and state interests contemplated by the *Byrd* opinion . . . . The Fourth Circuit seems not to have gotten the message, however. *See* Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (4th Cir. 1969); Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965).

Id.

362. It is not clear how one could prove a direct link between federal court *Erie/Hanna* opinions and casebook presentations of the doctrine. First person accounts by judges and law clerks of the drafting of *Erie/Hanna* opinions might be convincing evidence for some, but for many reasons, such accounts are not likely to be forthcoming. One might prove the point

What then, if anything, is to be done about the confusing mess made of the *Erie/Hanna* doctrine in procedure casebooks? The burden of straightening everything out inevitably must fall on individual procedure professors, if only because casebook authors have too much invested in the present configuration of their respective views to take the lead in any such undertaking. Like expert witnesses at trial, authors who change their minds about their understanding of the *Erie/Hanna* doctrine change their "testimony," in effect, and if they do this, also like witnesses at trial, they can expect to pay at least a short-term cost in lost credibility, which can mean lost sales. But the burden falls on the individual professor for another, more structural, reason. Practitioners, in this case, law professors, must always add nuance and qualification to received theory if the theory is to explain past events and help resolve future problems. This is the relationship of theory to practice. Practitioners fill in the "last twenty feet" above the ground, in Charles Fried's apt phrase.[363] They insure that theory is "seated firmly and concretely, [so that it is able to] shelter[ ] real human beings against the storms of passion and conflict."[364] If students are to understand the full range of perspectives on the *Erie/Hanna* doctrine, therefore, it will be because individual law professors introduce these perspectives into their teaching, either by shaping the open-ended and non-leading questions of traditional procedure books, or by proposing competing interpretations to those presented in advocacy books.

Books with extensive notes and comments, including those with references to multiple viewpoints, may help in this process, particularly if the references are balanced and representative. But no book presents all of the noteworthy perspectives on the doctrine, so law professors must supplement casebook discussions with additional readings and lecture. Students could read *The Irrepressible Myth of Erie* until they understood it – I have suggested this to students in the past and a few have taken the suggestion – but the article is difficult and does not give up its insights easily. Law professors have been known to complain about the difficulties of understanding Ely as well. If law professors do

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circumstantially, by showing a correspondence between the language of *Erie/Hanna* opinions and that of casebook presentations that is too close to be coincidental, but that would be a complicated undertaking requiring an article in its own right. Casebooks must play some role in the elaborate telephone game that produces a decision like *Gasperini*. It is improbable that a major source of influence on the way lawyers and judges form their first impressions of the *Erie/Hanna* doctrine would have no effect on the way the doctrine is developed in court opinions. Identifying the nature of that effect is work for another day. Here, I wish to suggest only that the conditions for such an effect are all in place.

363. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L REV. 35, 57 (1981).

364. *Id.*

not provide supplementary instruction, and do not round out casebook coverage of the doctrine with additional readings and discussion, they will add to, if not harden, the confusion surrounding the doctrine, and make this esoteric, but important, area of the law even more difficult to deal with. This may happen no matter what individual law professors do, but I choose to be an optimist. As Churchill asked, "What other choice is there?"

V. CONCLUSION

It is a common stereotype of academics, and this includes legal academics, that they are spectators rather than participants in the great moral and political controversies of their day. As facsimiles of Roosevelt's "cold and timid souls," they are at their best when pointing out how others have stumbled, and because they avoid the arena, they "know neither victory nor defeat."[365] Law professors as a class often reinforce this stereotype because most of them devote their public energy to commenting on rather than making or enforcing law.[366] A few participate directly in the lawmaking process when they serve on commissions, study groups, task forces, and committees charged with drafting and proposing legislation.[367] Others help make law by representing parties in public interest litigation or by developing theories of legal interpretation that judges use to give meaning to legal rules.[368] But these are the unusual cases. Most in the legal academy lead relatively

365. It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes up short again and again, because there is no effort without error or shortcoming, but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows, in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that his place shall never be with those cold and timid souls who knew neither victory nor defeat.

Theodore Roosevelt, Citizenship in a Republic, Speech at the Sorbonne, Paris (Apr. 23, 1910), *available at* http://www.theodoreroosevelt.org/life/quotes.htm; *see also* THEODORE ROOSEVELT & BRIAN THOMSEN, THE MAN IN THE ARENA: SELECTED WRITINGS OF THEODORE ROOSEVELT: A READER 11 (2004). This familiar piece of Roosevelt wisdom has become somewhat hackneyed, and yet it expresses remarkably admirable and important sentiments. It says, among other things, that it is not possible to create a society out of critics – that one would have all parasites and no hosts – and this point in particular seems to have been lost in our country sometime during the last thirty years. Parasites serve a function in life, of course, but they don't create it.

366. See, e.g., the "experts" who pronounce each night on network and cable news and talk shows, about the day's Warholian "case of the century." The lawyer gene pool for public intellectuals seems to have run nearly dry.

367. On occasion, some even take the initiative and propose legislation of their own, or represent groups that do, writing op-ed pieces to mobilize public support and lobbying elected representatives and officials to make the legislation a reality.

368. *Cf.* Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to*

quiet and cloistered lives, far from the rancor and boisterousness of contested elections, political logrolling, back room deal-making, courtroom argument, and even radio talk-shows. They exert their influence over the domain of the classroom, faculty lounge, learned society, and academic journal. When they speak on behalf of moral and political principles, as often they do, usually it is to other academics or students, in lectures, books, articles, speeches, and conversations.[369] For better or worse, it is the role of most legal academics to comment on and transmit law, rather than make or enforce it.

There are instances, however, when the distinction between transmitting and making breaks down, and casebook presentation of the *Erie/Hanna* doctrine is one of those instances. As we have seen, law is formed and put into operation in complicated and multi-faceted ways. It is promulgated by authoritative sources to be sure, or it does not exist, but it also is applied by thousands of individuals who understand those promulgations in a wide variety of ways. The content of these understandings, particularly for a doctrine as esoteric as *Erie/Hanna*, comes in major part from materials studied in law school. In a sense, law schools, for something like the *Erie/Hanna* doctrine, are an American form of the playing fields of Eton, where interpretive character and doctrinal understanding are set for generations to come. Control over this understanding is largely in the hands of a small group of individuals who construct the analytical frameworks within which the *Erie/Hanna* doctrine is studied, and the hundreds of law professors who direct this study. Without too much exaggeration, it is accurate to say that law professors, both as casebook authors and classroom interpreters, shape the contours of the *Erie/Hanna* doctrine for most legal actors. They do not write on a clean slate, of course, for there are the Supreme Court cases to contend with. But they influence how students understand those cases and the students in turn, first as clerks to judges, and then ultimately, as judges themselves, determine the form the doctrine takes in court decisions. In this process, and without being fully aware of it, lawyers and judges take sides in a longstanding competition between various contested versions of what the *Erie/Hanna* doctrine is really all about, and because casebook authors are vicariously implicated in this contest, they are

Speak Out, 55 So. Car. L. Rev. 253, 254-56 (2003) (describing law reform efforts of lawyers and arguing that law professors should be similarly engaged).

369. This is not to denigrate the power of pure academic thought. Holmes, better than anyone, described the "subtile [sic] rapture of a postponed power . . . more real than that which commands an army" in the "secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought." *See* Oliver Wendell Holmes, *The Profession of the Law*, *in* Speeches by Oliver Wendell Holmes 24-25 (1934). It is unlikely, however, that he had every academic conversation in mind.

every bit as much Roosevelt's men and women of action as those who participate more directly. It might be better if this process was more of a shared enterprise and less of a contest, but perhaps that is not possible, given the times.