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I. INTRODUCTION

At the end of the 1995 Term, the United States Supreme Court announced its decision in *Gasperini v. Center for Humanities, Inc.*,[1] in which the question was whether the New York or a federal standard should govern appellate review of a federal trial judge's refusal to order a new trial based on the excessiveness of the damages awarded by the jury.

Before 1986, both federal and New York trial courts had applied a "shock[s] the conscience" standard in determining whether a new trial motion should be granted on the ground of excessive damages.[2] Although the Supreme Court had not resolved the issue, the strong weight of authority in the federal courts of appeals had concluded that appellate review of a trial judge's decision to deny a new trial on the ground of excessiveness was consistent with the Re-examination Clause of the Seventh Amendment,[3] and that the proper standard of review was "abuse of discretion."[4] New York courts also applied an abuse of discretion standard of review.[5]

In 1986, as part of a "tort reform" effort, the New York legislature adopted a statute which provided that the appellate

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1. 116 S. Ct. 2211 (1996).

2. *See id.* at 2217.

3. The Seventh Amendment provides:

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

U.S. CONST. amend. VII.

4. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2820, at 210, 212-14 & nn.24-25 (2d ed. 1995).

5. *See Gasperini*, 116 S. Ct. at 2217 (citing Martell v. Boardwalk Enters., 748 F.2d 740, 750 (2d Cir. 1984)).

courts of the state should conduct a de novo review of trial court refusals to grant a new trial on the ground of excessive damages to determine whether the award "'deviates materially from what would be reasonable compensation.'"[6] New York judicial decisions subsequently held that trial courts in that state should apply the same standard in determining whether a new trial should be granted.[7] The apparent intent of the statute was to provide increased scrutiny of excessive awards and to reduce and stabilize the level of awards in medical and dental malpractice cases.[8] In *Gasperini*, the Supreme Court noted that "New York state-court opinions confirm that § 5501(c)'s 'deviates materially' standard calls for closer surveillance than 'shock the conscience' oversight . . . . The 'deviates materially' standard, . . . in design and operation, influences outcomes by tightening the range of tolerable awards."[9] One effect of the new standard was to require both New York trial and appellate courts to compare the award in question with approved awards in similar cases to determine whether it "deviates materially" from a reasonable award.[10]

In *Gasperini*, in an opinion authored by Justice Ginsburg, a five-member majority of the Supreme Court applied the *Erie*[11] line of decisions to conclude that the New York standard of appellate review was inapplicable in a diversity action in which New York substantive law applied. The majority concluded that the standard of appellate review for federal trial court decisions denying new trial motions on the ground of excessiveness was, under the "'influence—if not the command—of the Seventh Amendment,'"[12] an essential characteristic of the independent federal system of administering justice.[13] For that reason, the federal "abuse of discretion" standard of appellate review, rather than the de novo "materially deviates" standard pre-

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6. *Id.* (quoting N.Y. C.P.L.R. § 5501(c) (McKinney 1995)).

7. *See id.* at 2218 (stating that § 5501(c) "instructs state trial judges," in addition to appellate judges).

8. *See id.* at 2217-18 & n.3.

9. *Id.* at 2218-19.

10. *See id.* at 2218.

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

12. *Gasperini*, 116 S. Ct. at 2222 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

13. *See id.* at 2222-23 (holding that the "abuse of discretion" standard was "necessary and proper to the fair administration of justice").

scribed by New York law was controlling, even though the result might substantially affect the outcome of the litigation in particular cases.[14] At the same time, however, the Court concluded that New York's substantive interests could be "accommodated" by the federal trial court's application of the New York "materially deviates" standard in determining, in the first instance, whether a new trial should be granted.[15]

Four Justices dissented. Justice Stevens concluded that the New York "deviates materially" standard, like a statutory cap, was a substantive rule of state law that the federal courts were obligated to follow both at trial and on appeal.[16] Justice Scalia, for himself, the Chief Justice, and Justice Thomas, argued primarily that the Seventh Amendment prohibits any appellate review of trial court decisions denying motions for a new trial on the ground of excessiveness.[17] He went on, however, to argue that the Court's reasons for requiring application of a federal standard of appellate review—i.e., to preserve the "essential characteristic" of the relationship between trial and appellate courts in the federal system—applied with even greater force to require the application of the federal "shocks the conscience" standard by trial courts in order to preserve the "essential characteristic" of the judge-jury relationship in the federal system.[18]

The majority's broad-brush analysis in *Gasperini* evidenced little awareness of the difficult issues raised by the Court's previous decisions construing *Erie*, particularly *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*[19] and *Hanna v. Plumer*,[20] or of *Gasperini*'s implications for their resolution. On its face, the decision threatens to replace important aspects of existing *Erie* jurisprudence with an unwarranted and open-ended regime of "interest balancing" in determining whether federal or state law applies. Such an approach has great potential to distort the proper application of the Rules of Decision

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14. *See id.* at 2222 (acknowledging *York*'s "outcome determinative" test, Guaranty Trust Co. v. York, 326 U.S. 99 (1945), but relying instead on Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), as the basis for the decision).

15. *See id.* at 2224.

16. *See id.* at 2225-26, 2229-30.

17. *See id.* at 2230.

18. *Id.* at 2236-39.

19. 356 U.S. 525 (1958).

20. 380 U.S. 460 (1965).

Act,[21] leading to unwarranted subordination of substantive state objectives to ad hoc judicial perceptions of amorphous federal procedural "interests."

Years of debate over the proper delineation of "substance" and "procedure" have revealed the many senses in which that terminology has been used, not only in other contexts,[22] but in the application of *Erie* itself.[23] The majority in *Gasperini* paid scant attention to that critical issue in determining that New York's "materially deviates" standard should be viewed as "substantive" rather than "procedural." As discussed below, however, determining the sense in which a state rule of decision should be regarded as "substantive" should be the critical determinant of whether a competing federal rule should be applied.

The *Gasperini* majority relied centrally on *Byrd*, which it apparently assumed should be read as a charter for federal courts to dispense with "substantive" state rules whenever they conclude that "essential" federal interests are paramount. However, this question has been subject to considerable debate in the years following *Byrd*.[24] *Byrd* itself strongly suggests that it should not be read as an authorization to subordinate even procedural state rules where those rules evidence an important state policy external to the conduct of the litigation itself.[25] Moreover, some scholars have questioned whether *Byrd*'s interest-balancing approach is consistent with the core rationale of *Erie* as subsequently elaborated in *Hanna v. Plumer*.[26]

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21. 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

22. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (describing the relevance of the procedural/substantive distinction in "*ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws").

23. *See Hanna*, 380 U.S. at 465; *see also, e.g.*, 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4508, at 224-32 (2d ed. 1996); *id.* § 4509, at 267-69; John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 722-25 (1974); Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1101-02 (1989).

24. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 38-40; Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 364-65 (1977).

25. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535 (1958); *see also id.* at 536 (suggesting that state rules of "form and mode" should be applied if "bound up with the definition of the rights and obligations of the parties").

26. *See, e.g.*, Ely, *supra* note 23, at 717 & n.130; Redish & Phillips, *supra* note

Unfortunately, the majority in *Gasperini* did not allude to the unresolved debate about the vitality and meaning of *Byrd*.

Careful application of its previous decisions should have led the Court to require application of the New York rule both at trial and on appeal. Alternatively, the Court might have rationalized the application of the federal standards for determining and reviewing whether a new trial should be granted both at trial and on appeal. But no careful reading of the Court's previous decisions or of the policies underlying *Erie* and the Rules of Decision Act could justify the bifurcated approach to these issues adopted by the majority in *Gasperini*.

II. A BRIEF RECAPITULATION

In a series of decisions applying the *Erie* doctrine prior to *Gasperini*, the Supreme Court marked out a relatively well-defined mode of analysis for the recurring issue of whether the Rules of Decision Act[27] or Rules Enabling Act[28] require the application of state rather than federal law in a diversity case. Although this history is familiar and has been reviewed ably many times,[29] a brief recapitulation is essential to place *Gasperini* in proper light.

In *Erie*,[30] the matter at issue was "substantive" in any sense of the word. The question was the scope of the duty owed by a railroad to a person walking on its right-of-way beside the tracks. In this context, the Court overruled the decision in *Swift v. Tyson*,[31] which had been interpreted to authorize the federal courts to fashion "general" common law to resolve such "nonlocal" disputes. The Court concluded that new historical research cast doubt on *Swift*'s construction of the Rules of Decision Act.[32] It also cited the difficulties and uncertainties that had arisen in drawing the line between "local" matters gov-

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24, at 368-69.

27. 28 U.S.C. § 1652 (1994).

28. 28 U.S.C. § 2072 (1994).

29. *See generally* 19 WRIGHT ET AL., *supra* note 23, §§ 4501-4511 (providing a general background to *Erie* and an extensive discussion of subsequent cases refining the Court's *Erie* jurisprudence).

30. 304 U.S. 64 (1938).

31. 41 U.S. (16 Pet.) 1 (1842).

32. *See Erie*, 304 U.S. at 72-73 (stating that "more recent research of a competent scholar . . . established that the construction given to [the Rules of Decision Act] by the Court [in *Swift v. Tyson*] was erroneous").

erned by state law and "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation."[33] Primarily, however, the Court cited two reasons for overruling *Swift*. First, by allowing the application of different law in federal diversity cases than in state court actions between co-citizens, *Swift* had permitted "grave discrimination by noncitizens against citizens" and had "rendered impossible equal protection of the law."[34] As a result, it created an improper incentive for forum shopping between federal and state court.[35] Second, the law-making power conferred on the federal courts under *Swift* unconstitutionally exceeded the powers of the federal government under our constitutional system of enumerated federal powers and reserved state powers.[36] The Court stated:

> 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.[37]

Swift was, in short, "'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'"[38] The Court made clear that absent this more fundamental issue touching on the respective powers of federal and state governments, it would have declined to overrule *Swift* merely to correct the inequitable administration of the laws to which its holding had given rise.[39]

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33. *Id.* at 71.

34. *Id.* at 74-75.

35. *See id.* at 76-77 (stating that the existence of federal common law which might be more favorable than state law would prompt removal from state to federal court).

36. *See id.* at 78-80.

37. *Id.* at 78.

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

39. The Court stated:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a

In *Guaranty Trust Co. v. York*,[40] the Court significantly expanded the scope of *Erie* by requiring a federal court in an equitable action to apply the governing state statute of limitations rather than the federal equitable doctrine of laches.[41] Justice Frankfurter's opinion for the Court recognized that the terms "substance" and "procedure" were not self-defining, and that statutes of limitations have been classified as both "procedural" and "substantive" for choice of law and other purposes.[42] Nevertheless, in something of an *ipse dixit*, he concluded that

> [t]he question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation *is a matter of substance in the aspect that alone is relevant to our problem, namely, 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?*[43]

The intent of *Erie*, he asserted, 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.[44]

This was said to he the "nub of the policy" underlying *Erie*.[45] The statute of limitations at issue in *York* was plainly "substantive" in this "outcome determinative" sense.[46]

York thus conferred overriding importance on the "consistent outcomes" rationale of *Erie*, all but ignoring the more fundamental "limited federal power" rationale that had provided

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century.

Id. at 77 (footnotes omitted).

40. 326 U.S. 99 (1945).

41. *See id.* at 108-10.

42. *See id.* at 108.

43. *Id.* at 109 (emphasis added).

44. *Id.*

45. *Id.*

46. *See id.* at 110 (holding that "matters of local law," such as a statute of limitations, should "be respected by federal courts" when the consequences of that local law "intimately affect[s a litigant's] recovery or non-recovery").

the ultimate basis for that decision. Although the statute of limitations issue in *York* itself might be argued to have implicated the scope of substantive powers reserved to the States,[47] the Court's broad "outcome determinative" formulation of the scope of *Erie* in *York* was not in any way tied to situations in which the application of a federal rule of decision would impinge on reserved state powers under the Constitution. Even purely procedural provisions with the sole purpose of controlling the manner and means by which litigation is conducted fall within *Erie* as interpreted in *York*, provided that their impact on the outcome of the litigation is substantial.

York thus carried *Erie* well beyond rules of "substance" as understood to encompass the prescription of rights and duties governing the primary conduct and relations of the parties[48] and even beyond the realm of "substance" as understood to refer to legal rules having objectives external to the fair and efficient conduct of the litigation process itself.[49] Under *York*'s "outcome determinative" test, *Erie* encompasses rules of procedure in their purest form—that is, "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[50] In so doing, *York* divorced *Erie* from its underpinnings and threatened to replace the separate federal system of administering justice with a clone of the state courts in diversity cases. This was true despite the fact that the grant of federal judicial power in Article III, together with the Necessary and Proper Clause,[51] clearly delegate power to the federal govern-

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47. *See, e.g.*, Ely, *supra* note 23, at 726-27.

48. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965); *see also* HERBERT WECHSLER ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 697-98 (2d ed. 1973) (describing, in the course of a discussion about "basic obligations," as defined by state law, the "basic character of those rules of law" which "guide people in everyday affairs, advising them, in advance of any dispute, what their primary duties and powers and corresponding rights and vulnerabilities are").

49. *See, e.g.*, S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 309 (7th Cir.), *cert. denied*, 116 S. Ct. 566 (1995); *see also* 19 WRIGHT ET AL., *supra* note 23, § 4509, at 267-69; Ely, *supra* note 23, at 725-26.

50. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1940).

51. U.S. CONST. art. I, § 8, cl. 18.

ment to control the processes and procedures of its own courts.[52]

The first of two significant corrections came over a decade later in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[53] which, as previously noted, provided the central support for the Court's decision in *Gasperini*. The question in *Byrd* was whether South Carolina procedure under which the judge determined the status of workers as employees or independent contractors in workers' compensation cases was controlling in a federal diversity action. Federal practice would have submitted the issue to the jury. The Court questioned whether the difference between a judge and a jury determination would be "outcome determinative" under the holding in *York*,[54] but held that, even on the assumption that it was, the federal jury trial right should apply.[55]

Before reaching that conclusion, however, the Court addressed a pivotal issue entirely overlooked by the majority in *Gasperini*—whether the state procedure at issue was an integral part of the substantive workers' compensation rights created by the state.[56] The *Byrd* Court reviewed South Carolina decisions showing that the practice of submitting the issue of coverage to the court rather than the jury had arisen because the issue was normally determined on judicial review of decisions of the Industrial Commission. The Court concluded that there was "*nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute.*"[57] The requirement was merely one of "form and mode of

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52. The Court, in *Hanna v. Plumer*, stated:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) 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.

380 U.S. 460, 472 (1965).

53. 356 U.S. 525 (1958).

54. *See id.* at 539-40.

55. *See id.* at 540 ("We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.").

56. *See id.* at 535-36.

57. *Id.* at 536 (emphasis added).

enforcing the immunity."[58] It was "not a rule intended to be bound up with the definition of the rights and obligations of the parties."[59] The case was thus distinguishable from *Dice v. Akron, Canton & Youngstown Railroad*,[60] in which the Court had required state courts to submit the issue of the validity of a release in an FELA action to a jury in accordance with federal practice, rather than to the judge as state practice required. In *Dice*, unlike *Byrd*, the right to a jury trial was "'part and parcel of the remedy afforded railroad workers under the Employers Liability Act.'"[61]

Only after first rejecting the claim that the determination by a judge was part and parcel of the state's workers' compensation remedy did the Court in *Byrd* conclude that the federal jury trial right should control. The Court held that even on the assumption that judicial rather than jury determination of coverage was "outcome determinative" within the meaning of *York*, that conclusion alone did not inexorably require the federal court to follow the state rule.[62] Instead, the Court held that "there are affirmative countervailing considerations at work" and that

> [t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule—*not bound up with rights and obligations*—which disrupts the federal system of allocating functions between judge and jury.[63]

As *Byrd* has come generally to be read, it mandates a federal court to balance the weight of the federal interest in the application of its procedural rule against the weight of the interest

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58. *Id.*
59. *Id.*
60. 342 U.S. 359, 369-70 (1952).
61. *Id.* at 368 (quoting Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943)).
62. *See Byrd*, 356 U.S. at 540.
63. *Id.* at 537-38 (citations and footnotes omitted) (emphasis added).

in "furthering the objective that the litigation should not come out one way in the federal court and another way in the state court."[64]

Although *Byrd* thus provides some room for state procedures to be displaced where the federal interest in the administration of its "independent system of justice" is weighty enough, it should not lightly be read to authorize the displacement of any and all state rules by an allegedly "weightier" federal interest.[65] *Byrd* makes clear that the Court was concerned only with a rule of pure "form and mode," which the Court had explicitly determined had no underlying substantive or extralitigation policy objectives. To carry this narrow principle further to permit an open-ended and undefined balancing process to displace state rules that do have important extralitigation objectives would be more than an unwarranted extension of *Byrd*. Such a result would erode the core holding of *Erie* itself—that it would be unconstitutional for Congress, and *a fortiori* the courts, to displace state law with a federal rule of decision in areas of legislative policymaking that the Constitution has reserved to the States.[66]

The last important chapter of the Court's *Erie* jurisprudence relevant to our subject was written in *Hanna v. Plumer*,[67] in

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64. *Id.* at 538; *see* 19 WRIGHT ET AL., *supra* note 23, § 4504, at 38; *see also id.* § 4511, at 313 (stating that *Byrd*'s balancing test survived *Hanna*).

> Some courts and commentators have read the *Byrd* opinion to establish a three-factor balancing test, under which (1) the significance or substantive character of the state rule under state law and (2) the likelihood of different outcomes, are to be weighed against (3) the importance of the federal interests or policies underlying the competing federal rule.

Id. § 4504, at 38.

65. *See Byrd*, 356 U.S. at 537-38 (suggesting that even when Seventh Amendment interests are implicated, state procedures "bound up with . . . rights and obligations" should be applied).

66. *See* John C. McCoid II, Hanna v. Plumer*: The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 903-08 (1965); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682, 1683-85 (1974). In this regard, it is not important whether the limits on the federal courts' ability to override state law having extralitigation objectives arise directly from the Rules of Decision Act or from limitations on the power of the federal judiciary to fashion federal common-law rules of procedure. *Compare* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity*, 78 MICH. L. REV. 311 (1980), *with* Martin H. Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980).

67. 380 U.S. 460 (1965).

which the Court clarified its previous decisions in two significant respects. At issue was whether the Massachusetts rule for service of process on the executor or administrator of an estate, which required "in hand" service, or the provisions of Federal Rule of Civil Procedure 4, which permitted service to be left at the defendant's residence with a person of "suitable age and discretion," should apply in a federal diversity action.[68] The Court first held that not every state rule of procedure, which, if it were violated, would determine the result of the litigation, falls within *York*'s "outcome determinative" category requiring the application of state law. Any rule of procedure, if not complied with, could be outcome determinative in that sense. The result would be wholesale replacement of federal rules of "form and mode" with those of the states in diversity cases.[69] Rather, the Court held, a rule is "outcome determinative" under *York* if compliance with the rule is sufficiently burdensome that it would be likely to influence significantly the choice between federal and state court.[70] In applying *Erie*,

> [n]ot only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.[71]

Because compliance with the Massachusetts rule rather than the Federal Rule on service of process would not be sufficiently burdensome to influence the choice of a federal or state forum, it was not outcome determinative in the relevant sense.[72]

Beyond this, however, the Court held that the issues presented in *York* and *Byrd*, which were governed by no provision of the Federal Rules of Civil Procedure, differed fundamentally from that in *Hanna*, which involved the application of a directly applicable and controlling Federal Rule.

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68. *See id.* at 461-63.
69. *See id.* at 468-69.
70. *See id.* at 468.
71. *Id.*
72. *See id.* at 469.

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions.[73]

The Court held that the Enabling Act's requirement that the Federal Rules shall not "'abridge, enlarge or modify any substantive right'"[74] is satisfied when the rule in question "regulate[s] matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[75] If a rule was rationally capable of being classified as regulating the "'judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them,'"[76] Congress had the power under Article III and the Necessary and Proper Clause to enact it, and the federal courts had no power to disregard it.[77]

Finally, *Hanna* made clear that in determining whether a matter was controlled by a Federal Rule of Civil Procedure, the critical question was whether there was a direct conflict between the state procedure and a Federal Rule.[78] In such cases of "unavoidable" conflict, the Federal Rule must be applied, provided it is valid under *Hanna*'s "arguably procedural" test.[79] On the other hand, where the Federal Rule at issue does not cover the precise point, the "outcome determinative" test of *York*, as refined in *Hanna* to include only "substantial" procedural varia-

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73. *Id.* at 471.

74. *Id.* at 464 (quoting the Rules Enabling Act, 28 U.S.C. § 2072 (1958)).

75. *Id.* at 472.

76. *Id.* at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

77. *See id.* at 472-74 (suggesting that the Federal Rules are a "'Congressional mandate'" when enacted under valid "'constitutional authority'" (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963))).

78. *See id.* at 469-70 (stating that no other decision, in which the Court applied the *Erie* analysis, had dealt with a direct conflict between state procedures and the Federal Rules of Civil Procedure; since "the clash [was] unavoidable" in *Hanna*, the inquiry was whether the particular Federal Rule of Civil Procedure was valid under the Enabling Act).

79. *See id.* at 470.

tions likely to induce forum shopping, determines whether state law should be applied.[80]

In his concurrence, Justice Harlan recognized that *Erie* was "more than an opinion which worried about 'forum-shopping and avoidance of inequitable administration of the laws.'"[81] At its core, *Erie* was "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems."[82] In his view, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens" and that "the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard."[83] Thus, whether or not a Federal Rule of Civil Procedure applies to the issue,

> the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural,"

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80. *See id.* (stating that where there was "no Federal Rule which covered the point in dispute," the *Erie* analysis, which includes the "outcome determinative" test, should apply).

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the plaintiff filed his complaint but did not serve process before the applicable Oklahoma statute of limitations expired. Under Oklahoma law, failure to serve process before the statute of limitations expired was not fatal to a claim so long as the complaint was filed before the deadline and process was served within 60 days of the filing. In *Walker*, the plaintiff conceded that he had not complied with Oklahoma's tolling provisions. However, the plaintiff argued that the statute had been tolled under Federal Rule of Civil Procedure 3, which states that a "'civil action is commenced by filing a complaint with the court.'" *Id.* at 750. The Court rejected the plaintiff's argument, stating that "[t]he first question must . . . be whether the scope of the Federal Rule [in question] in fact is sufficiently broad to control the issue before the Court." *Id.* at 749-50. The Court reasoned that

> [t]here is no indication that [Rule 3] was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.

Id. at 750-51 (footnotes omitted). Because the Federal Rule and the Oklahoma provision could "exist side by side, . . . the *Hanna* analysis [did] not apply." *Id.* at 752.

81. *Hanna*, 380 U.S. at 474 (quoting the majority opinion).

82. *Id.*

83. *Id.* at 474-75.

> is to stay close to basic principles by inquiring if the choice of rule would *substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.*[84]

Hanna's core holdings have been critical to the subsequent application of *Erie* and have given rise to considerable debate over the meaning and correctness of the Court's approach.[85] For the purpose of evaluating the Court's opinion in *Gasperini*, however, the most salient portions of *Hanna* are (1) the Court's crystallization of the vastly different meanings that the concept of "substantive" rules of decision has come to have in the application of *Erie* and (2) Justice Harlan's concurring opinion, taking a much different approach to that same issue. The majority opinion in *Hanna* underscored that both *Erie* and the Rules Enabling Act direct the federal courts to apply state substantive law and federal procedural law. However, as subsequent cases sharpened the distinction between substance and procedure, the line of cases following *Erie* diverged markedly from the line construing the Enabling Act.[86] In the absence of a directly controlling Federal Rule of Civil Procedure, *York*'s "outcome determinative" test "made it clear that *Erie*-type problems were not to be solved by reference to any traditional or common-sense substance-procedure distinction."[87] Thus, outcome-determinative state law was controlling even on matters of form and mode having no underlying substantive or extralitigation state policy objectives, subject perhaps[88] to *Byrd*'s overriding interest-balancing approach.[89] On the other hand, where a Federal Rule was directly applicable to the matter at issue, it was controlling if it was valid, and it was valid if it was "arguably procedural," i.e., if it regulated "'the judicial process for enforcing rights and duties recognized by substan-

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84. *Id.* at 475 (emphasis added).

85. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 40-50; Ely, *supra* note 23; Freer, *supra* note 23; Redish & Phillips, *supra* note 24; *see also* Redish, *supra* note 66 (debating the content and source of limitations on the federal courts' ability to fashion common law rules of procedure); Westen & Lehman, *supra* note 66.

86. *See Hanna*, 380 U.S. at 465.

87. *Id.* at 465-66.

88. *See* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 313; Ely, *supra* note 23, at 717 & n.130; Redish & Phillips, *supra* note 24, at 368-69.

89. *See Hanna*, 380 U.S. at 466.

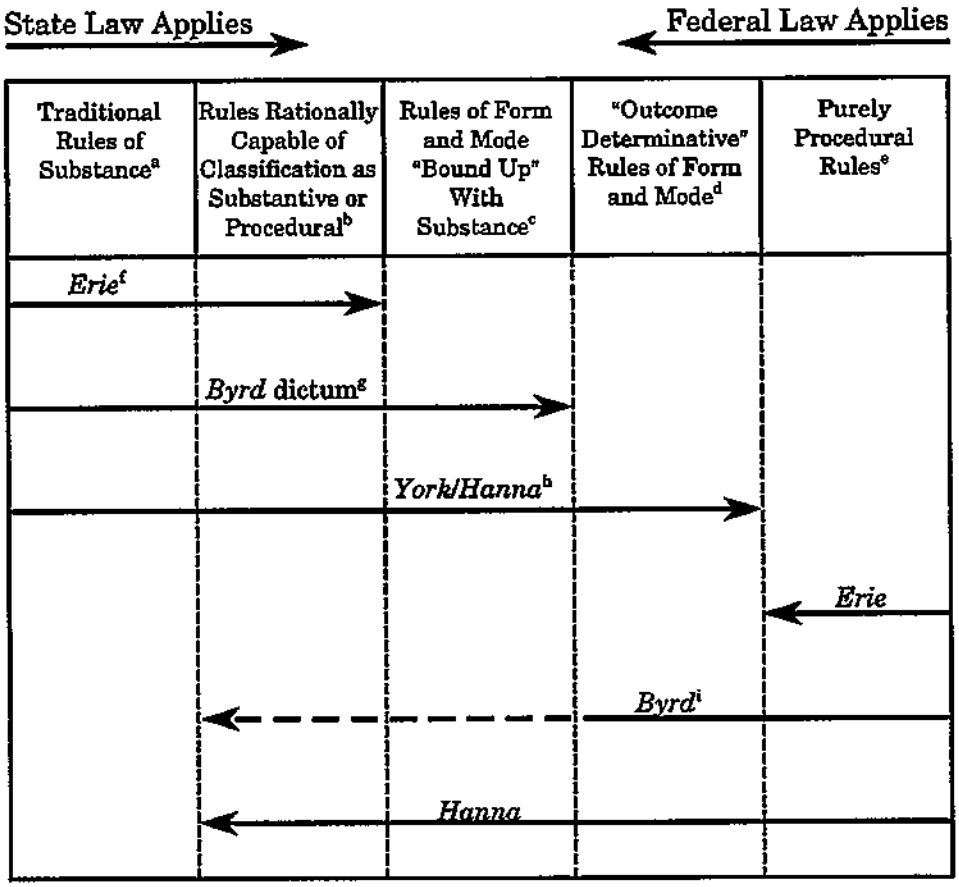
tive law and for justly administering remedy and redress for disregard or infraction of them.'"[90] Justice Harlan took sharp issue with the majority's bifurcated definition of "substance" on the ground that it went too far in the direction of honoring state rules in the absence of a directly applicable Federal Rule of Civil Procedure, and too far in the direction of honoring the Federal Rules in cases to which they applied.[91]

III. A SYNTHESIS

In sum, in its foundational pre-*Gasperini* decisions, the Court had erected a complex analytical structure for application of the *Erie* doctrine, illustrated generally by the following chart, in which arrows moving from left to right indicate the application of state law, and arrows moving from right to left indicate the application of federal law:

90. *Id.* at 464 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
91. *See id.* at 475, 478 (Harlan, J., concurring).

Application of Federal vs. State Law in a Federal Diversity Case



Assuming *Byrd* survived *Hanna*—as the Court in *Gasperini* (in accord with the strongly prevailing view[92]) clearly did—uncertainty over whether and in what circumstances *Byrd*'s "interest balancing" approach permits the displacement of state rules of procedure having substantive underpinnings is illustrated by the dashed extension of the line representing *Byrd*.

This portrayal highlights several points of particular importance to the issue in *Gasperini*. Most notably, the Court has identified at least three significantly differing points at which the line between substance and procedure should be drawn in

92. *See* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 313; *see also* Redish & Phillips, *supra* note 24, at 369-72 & n.74.

Application of Federal vs. State Law in a Federal Diversity Case (Accompanying Notes)

a. The "traditional" rules of substance referred to are those described in *Hanna* and *Sibbach v. Wilson & Co.* as defining the underlying rights and duties of the parties, as opposed to procedural rules regulating "'the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" Hanna v. Plumer, 380 U.S. 460, 464 (1965) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)). Such rules substantially affect primary human activities or embody important policy objectives external to the conduct of the litigation itself.

b. This category includes rules rationally capable of classification as either substantive or procedural as those terms are defined in *supra* note a. *See Hanna*, 380 U.S. at 472. As such, they implicate both extra- and intralitigation objectives.

c. This category refers to the rules of procedure described in *Byrd*, in which an ostensible rule of "form and mode" is intended by the legislative authority to be "bound up with the definition of the rights and obligations of the parties." Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958).

d. This category includes nontrivial procedural rules of form and mode that so substantially affect the outcome of litigation that they would be likely to induce forum shopping between federal and state court. *See Hanna*, 380 U.S. at 466-68 (discussing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).

e. This category includes rules of form and mode of the conduct of litigation not included in *supra* notes c and d.

f. The *Erie* case itself dealt with a purely substantive rule as defined in *supra* note a, not with a rule having both procedural and substantive underpinnings as defined in *supra* note b. The assumption here is that the policies of *Erie* are fully implicated by such a rule, at least absent a countervailing Federal Rule of Civil Procedure as discussed in *Hanna*.

g. Although *Byrd* did not hold that a state rule of form and mode that was deemed by the state's legislative authority to be "bound up" with its underlying definition of substantive rights and duties must be followed by a federal court sitting in diversity, the clear implication of the opinion is that it must. *See Byrd*, 356 U.S. at 536-37.

h. Not every procedural rule which affects the outcome of the litigation must be applied. *See supra* note d.

i. The dashed line illustrates that *Byrd*'s authorization to "balance" important federal interests implicating the independent federal system of administering justice against the interest in achieving uniform outcomes does not clearly authorize stata procedural rules that are "bound up" with the underlying definition of substantive rights and duties, and which therefore have significant extralitigation objectives, similarly to be displaced. *See supra* notes a and g.

applying the *Erie* doctrine. (To this may be added a fourth based on Justice Harlan's separate analysis in *Hanna*.[93]) In the

93. Justice Harlan's contrasting approach can best be illustrated in a modified version of the chart in the text above. Areas shaded in gray correspond to areas in which state law applies, as defined by the arrows moving left to right in the chart

absence of a directly applicable Federal Rule of Civil Procedure, *Erie* and the Rules of Decision Act require any state rule which substantially affects the outcome of litigation in the *York/Hanna* sense to be applied by a federal diversity court. This is so even if that rule does not involve the underlying definition of the primary rights and duties of the parties and has no extralitigation policy objectives, but relates solely to the process by which those rights and duties are enforced in a court. Under *Byrd*, however, a sufficiently "essential" characteristic of the independent federal system of administering justice may "outweigh" the interest in the application of state law to achieve uniform outcomes.

As illustrated by the dashed line in this portrayal, the Supreme Court has not directly resolved whether such a balancing process may result in the displacement of "outcome determinative" state rules of procedure where those rules rationally may be viewed as also having substantive, extralitigation objectives

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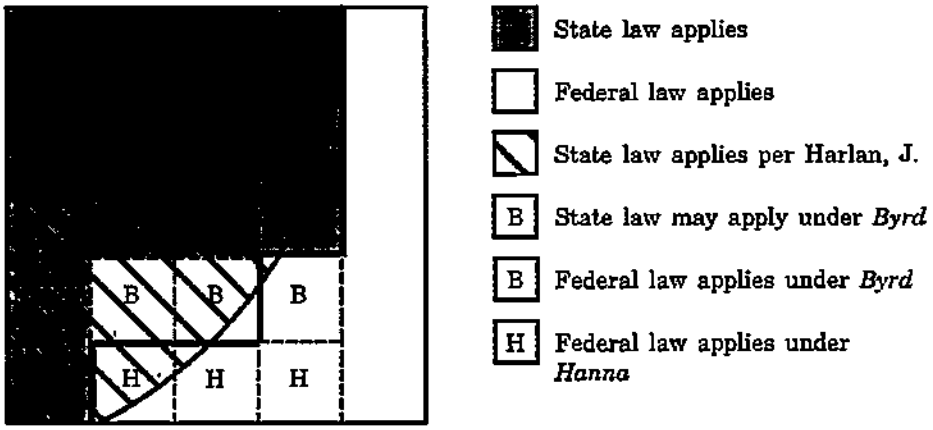
above. Areas in which federal law applies, as defined by the arrows moving right to left in the chart above, are shown here unshaded. The cross-hatched overlay illustrates the different boundary that Justice Harlan would draw between the application of federal and state law:



The overlay illustrates that some Federal Rules of Civil Procedure may so significantly affect the "primary stages of private activity" that they should, under Justice Harlan's concurrence in *Hanna*, give way to state law. This seems implicit in his argument that some outcome-determinative procedural rules should not be classified as substantive for *Erie* purposes because they would not affect "those primary decisions respecting human conduct which our constitutional system leaves to state regulation," *Hanna*, 350 U.S. at 475, and comports with his discussion of *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949), in which the Court applied state law requiring plaintiffs to post a bond in derivative actions.

or where they are "bound up" with the underlying substantive rights and duties themselves.[94] However, the structure of the Court's opinion in *Byrd* strongly suggests that such rules may not be balanced away, and this is the prevailing interpretation of *Byrd* in the courts of appeals.[95] This limit on the *Byrd* balancing test represents a second definition of the line between substance and procedure that diverges significantly from the "outcome determinative" test of *York* and that limits the ability to subordinate important state extralitigation policies to countervailing federal procedural interests. As such, it is closely tied to the fundamental federalism basis of *Erie*, which sought to preserve the proper allocation of lawmaking authority between federal and state governments.

Hanna's "arguably procedural" test for the validity of the Federal Rules under the Rules Enabling Act establishes yet a third line of demarcation between substance and procedure in determining whether federal or state law should be applied. This substance/procedure line differs from the previous two by substantially expanding the application of federal law, provided the rule in question is embodied in a directly controlling federal statute or provision of the Federal Rules. By sanctifying any federal rule of positive law, provided it is "arguably procedural," the Court's analysis in *Hanna* implicitly authorizes Congress and the rules drafters to displace state rules which are "arguably substantive." As Justice Harlan correctly recognized, this carries the potential application of federal law well beyond the range recognized in *Byrd* and threatens the fundamental basis of *Erie* itself.[96]

Consider, for example, the statute of limitations applicable to a state cause of action. Under *York*, state law controls in a diversity action asserting that claim. *Hanna*, however, raises the possibility that Congress or the rules drafters could attempt to adopt a uniform statute of limitations for all state-created causes of action asserted in federal court. Would this exceed the enumerated powers allocated to the federal government under

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94. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 38-39; Freer, *supra* note 23, at 1131-32; Redish & Phillips, *supra* note 24, at 364-65.

95. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 38-39; Redish & Phillips, *supra* note 24, at 364-65.

96. *See supra* pp. 279-81.

the Constitution or the Rules Enabling Act's limitation prohibiting the abridgement of "substantive" rights? Certainly it would frustrate the underlying extralitigation policy of repose that state statutes of limitation reflect.[97]

On the other hand, under the *Hanna* test, statutes of limitations also are "arguably procedural."[98] That is not simply because they have long been so regarded in conflicts of law where the issue is whether to apply the limitations law of the forum state rather than that of the state in which the events giving rise to the claim occurred,[99] but because they serve intralitigation objectives: to protect litigants and the courts from the necessity of resolving cases on the basis of stale evidence.[100]

The drafters of the Federal Rules have already taken a step toward displacing state limitations periods in diversity actions by incorporating in Federal Rule of Civil Procedure 15 "relation back" rules for amendments of complaints that may be more liberal than those of the states in which the federal court sits.[101] The consistency of this aspect of Rule 15 with the Rules Enabling Act and the federalism rationale of *Erie* is not free from debate.[102] At the very least, the limitations question illustrates that a court would tread on treacherous ground should it, ab-

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97. *See* Ely, *supra* note 23, at 725-27.

98. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4509, at 266, 272-88.

99. *See* Ferens v. John Deere Co., 494 U.S. 516, 519 (1990); Sun Oil Co. v. Wortman, 486 U.S. 717, 722-29 (1988).

100. *See, e.g.*, United States v. Kubrick, 444 U.S. 111 (1979). In *Kubrick*, the Court stated:

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Id. at 117.

101. Federal Rule of Civil Procedure 15(c) allows an amended complaint to "relate[] back to the date of the original pleading" when the claim in the amended pleading "arose out of" the same "conduct, transaction, or occurrence" as in the original pleading and when, with respect to amendments changing the name of a party defendant, certain additional requirements are met. These provisions apply whether or not the stete's procedures would allow relation back. *See* FED. R. CIV. P. 15(c)(1).

102. *See, e.g.*, McCoid, *supra* note 66, at 905-09, 912-14; *cf.* 19 WRIGHT ET AL., *supra* note 23, § 4509, at 263-66, 272-77.

sent some explicit congressional enactment or direction in the Federal Rules, undertake to displace some important aspect of state limitations law, such as a state's discovery rule, in a federal diversity action on the theory that a predominant federal interest requires the application of a uniform federal rule.

In short, just as the Supreme Court emphasized in *Hanna* that the line between "substance" and "procedure" differs markedly in cases involving the application of a Federal Rule of Civil Procedure from those in which no Federal Rule applies, it is equally true that the line between substance and procedure established by *Byrd* should differ significantly from the line established by *Hanna*. Whatever federal subordination of extralitigation state policy objectives might be consistent with the Constitution and otherwise appropriate where Congress or its delegate has acted, surely the extent of appropriate federal intrusion is less where the only warrant for displacing state law that furthers substantive state objectives external to the litigation process itself is a federal court's own perception of the weight of competing federal procedural "interests" at stake.[103]

The implications of *Erie* itself, as well as recent developments regarding the proper scope of federal common law, are opposed to any such expansive interpretation of *Byrd*. *Erie* involved the duties of an interstate railroad to persons present on its right-of-way. Despite the constraints of *United States v. Lopez*,[104] it is no doubt still true that Congress, under the Commerce Clause, would have the power to enact legislation establishing the scope of those duties. In the absence of such legislation, however, *Erie* compels the application of state law, not because the state's substantive law applicable to this issue is beyond the power of Congress to displace, but because both separation of powers and federalism considerations make it inappropriate for the federal courts to create a federal common law of tort liability.[105]

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103. *See* Mishkin, *supra* note 66, at 1686 ("[I]t is sound policy not to take constitutional principles as likely undercut by Congress (even if it should have ultimate power to do so) when Congress has not squarely and unmistakably taken the decision to do so.").

104. 514 U.S. 549 (1995).

105. *See* Mishkin, *supra* note 66, at 1684-85.

This conclusion is underscored by *Boyle v. United Technologies Corp.*,[106] the Supreme Court's most recent attempt to define the proper scope of the federal common law. The Court held that the making of federal common law is appropriate only in cases involving "'uniquely federal interests' . . . so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts,"[107] and even then only when the court finds that "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law' or the application of state law would 'frustrate specific objectives' of federal legislation."[108] Of course, *Boyle* dealt with limitations on the federal courts' ability to displace state rules of decision in areas of federal substantive concern. But even if any limits on the scope of the federal common law are viewed solely as implicit emanations of our constitutional structure, rather than as the explicit command of the Rules of Decision Act itself,[109] and even accepting that federal courts possess inherent power to adopt federal common law rules of procedure having outcome-determinative effects where no underlying substantive state interests are at stake, surely *Boyle* suggests the utmost caution where a federal court seeks to displace a state law that does have important extralitigation objectives with a purely procedural federal common law rule, absent any explicit direction by Congress that it should.[110]

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106. 487 U.S. 500 (1988).

107. *Id.* at 504 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

108. *Id.* at 507 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966), and United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)) (alterations in original).

109. *See* Westen & Lehman, *supra* note 66, at 364-77 (arguing that the Rules of Decision Act does not independently limit the power of federal courts to prescribe federal common law rules of procedure).

110. *See* McCoid, *supra* note 66, at 912 ("The policy of the Court, the mandate of Congress, and the command of the Constitution all require that state substance not be impaired in the absence of federal substantive competence."); *see also* 19 WRIGHT ET AL., *supra* note 23, § 4509, at 265.

IV. PROBLEMS WITH *GASPERINI*

A. Confusion at the Outset: "Substance" Undefined

The fundamental difficulty with *Gasperini* is that the majority of the Court applied *Byrd*'s "balancing" approach to displace the New York state standard for review of decisions denying new trial motions on the ground of excessiveness of damages without ever addressing the sense in which the New York state rule should be regarded as a "substantive" rule. That the Court did regard New York's standard as substantive is clear, but the basis for that conclusion is opaque. Closely examined, the Court's opinion suggests that the New York rule was "substantive" in two widely different senses, one of which would imply precisely the opposite result from the one the Court reached. Let us turn to the Court's Janus-like treatment of this central issue in the case.

At the outset, Justice Ginsburg described the background of New York's 1986 legislation adopting the "materially deviates" rule. In a footnote she cited legislative findings and declarations to the effect that "[t]he legislature sought, particularly, to curtail medical and dental malpractice, and to contain 'already high malpractice premiums.'"[111] She went on to note that New York lawmakers had found the existing "shock the conscience" standard to be "an insufficient check on damage awards,"[112] and quoted the Governor's remarks in signing the bill that "'[t]his will 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.'"[113] Standing alone, this history strongly suggests that the new appellate review standard was thought by the state legislature to have significant extralitigation objectives: namely, to reduce and stabilize malpractice awards and premiums, significantly affecting the practice of medicine in the state.

In Part III of her opinion, Justice Ginsburg explicitly addressed the substance/procedure distinction. Without any at-

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111. Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2217 n.3 (1996) (quoting LEGISLATIVE FINDINGS AND DECLARATION, N.Y. C.P.L.R. 7550 (McKinney 1996)).

112. *Id.* at 2217-18.

113. *Id.* at 2218 (quoting MEMORANDUM ON APPROVING L.1986, Ch. 682, N.Y. LAWS, at 3184).

tempt to identify the basis for her conclusion, the opinion asserted that New York's statute is "both 'substantive' and 'procedural': 'substantive' in that § 5501(c)'s 'deviates materially' standard controls how much a plaintiff can be awarded; 'procedural' in that § 5501(c) assigns decisionmaking authority to New York's Appellate Division."[114] Notably, the opinion made no effort to identify the sense in which the terms "substance" and "procedure" in this passage were used. Moreover, if, as this passage implies, the New York standard is analogous to a legislatively prescribed "cap" on damages,[115] and if, as the opinion implicitly assumes, such a "cap" should be classified as "substantive" for *Erie* purposes,[116] the Court offered no basis for concluding that the rule was any less "substantive" when applied on appeal than at trial. The very fact that the New York legislature addressed the amendments to the standard for appellate review[117] suggests that any substantive objectives it had were focused on the appellate rather than the trial stage of the case.

In Part III.A of its opinion, the majority did attempt to explain why the New York standard, at least as applied at the trial level, should be regarded as a "substantive" rather than a "procedural" rule.[118] In doing so, however, the Court interwove without distinction two very different ways in which these concepts have been used. After a brief review of *York* and *Hanna* focusing on *York*'s "outcome determination" test, the Court concluded that "[i]nformed by these decisions, we address the question whether New York's 'deviates materially' standard . . . is outcome-affective" in the *York/Hanna* sense.[119]

The Court then abruptly shifted gears, noting that Gasperini had acknowledged that a statutory cap on damages would be substantive.[120] The Court concluded that a statutory cap on damages differed from § 5501(c) in that the maximum

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114. *Id.* at 2219.

115. *See id.* at 2220 (stating that C.P.L.R. § 5501(c) is an "analogous control" to a "statutory cap on damages").

116. *See id.* ("Gasperini acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes.").

117. *See id.* at 2221 ("CPLR § 5501(c), as earlier noted, is phrased as a direction to the New York Appellate Division." (citation omitted)).

118. *See id.* at 2219-21.

119. *Id.* at 2220.

120. *See id.*

was not set by statute, but was determined by judicial decisions in comparison with other awards. "In sum, § 5501(c) *contains a procedural instruction, but the State's objective is manifestly substantive.*"[121]

This passage strongly suggests that the majority thought the state rule to be "substantive" in the sense that it furthered substantive state policies external to the conduct of the litigation itself. This reading is reinforced by the Court's discussion, at the outset of its opinion, of the extralitigation objectives that the New York legislature sought to achieve.[122] It is further reinforced by the Court's citation of a page in Judge Posner's opinion in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*,[123] which discussed the lack of a "clear criterion for deciding whether a particular state rule is 'substantive' for purposes of deciding whether *Erie* requires that it be enforced in federal diversity litigation."[124] Judge Posner pointed out that, in the absence of a controlling provision of the Federal Rules, a state rule is "substantive" where the state's goal is "to shape conduct outside the courtroom and not just improve the accuracy or lower the cost of the judicial process—though the means are procedural."[125] He then cited the very relevant hypothetical of a compulsory arbitration mechanism in medical malpractice cases designed to "cut down on litigation and reduce malpractice insurance premiums"[126]—the latter being one of the very objectives the New York legislature sought to achieve in *Gasperini*.

In the very next paragraph of *Gasperini*, however, the majority reverted to the unadorned "outcome determination" test of *York*, concluding that if the federal "shocks the conscience" rather than the state "materially deviates" standard were applied by federal diversity courts, "'"substantial" variations between state and federal [money judgments]' may be expected."[127]

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121. *Id.* (citation omitted) (emphasis added).

122. *See supra* notes 111-13 and accompanying text.

123. 60 F.3d 305 (7th Cir.), *cert. denied*, 116 S. Ct. 566 (1995).

124. *Id.* at 310, *cited in Gasperini*, 116 S. Ct. at 2220.

125. *Id.*

126. *Id.*

127. *Gasperini*, 116 S. Ct. at 2221 (quoting Hanna v. Plumer, 380 U.S. 460, 467-68 (1965)).

In sum, the majority in *Gasperini* never identified the sense in which the state rule before it was "substantive" rather than procedural. Was it solely because the rule was "outcome determinative" in the *York/Hanna* sense? Or was it because the rule, although "procedural" in form, had important extralitigation objectives and thus was "bound up" with the state's definition of substantive rights and duties in the sense of the Court's dictum in *Byrd*? The Court did not say.

B. Confusion Compounded: The Court's Application of Byrd

Having concluded that New York's rule was "substantive" in an undefined sense, the majority in *Gasperini* nevertheless held it improper for the Second Circuit to have applied it in reviewing the trial court's denial of a new trial.[128] Because no specific provision of the Federal Rules prescribes the standard for such review,[129] the majority's analysis involved a "relatively unguided *Erie* choice,"[130] which the Court rested on *Byrd* and on its conclusion that the standard for appellate review of denials of new trials on the ground of excessiveness was an "'essential characteristic of [the federal-court] system.'"[131] In reaching that conclusion, the Court first rejected the argument, endorsed by Justice Scalia in dissent, that the Re-examination Clause of the Seventh Amendment precluded any appellate review.[132] The correctness of that decision is not the subject of discussion here.

Having upheld the propriety of some appellate review, the Court then held that the federal "abuse of discretion" standard of review, rather than the state's more intrusive "materially

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128. *See id.*

129. Justice Scalia in dissent argued that the issue was controlled by Federal Rule of Civil Procedure 59. *See id.* at 2239. However, the majority appears to have had the better of this argument. Rule 59 prescribes the grounds on which new trials may be granted by reference to the common law, but does not specifically prescribe the standard by which excessiveness is to be determined or by which an appellate court is to review that determination. *See id.* at 2224 n.22; *see also* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 320-21.

130. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

131. *Gasperini*, 116 S. Ct. at 2221 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

132. *See id.* at 2224 ("'[N]othing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive.'" (quoting Grunenthal v. Long Island R.R., 393 U.S. 156, 164 (1968) (Stewart, J., dissenting))).

deviates" standard, must control.[133] The court of appeals was faulted for not taking into account the Court's previous decisions in *Donovan v. Penn Shipping Co.*[134] and *Browning-Ferris Industries v. Kelco Disposal, Inc.*,[135] which, in the *Gasperini* majority's view, established that "'[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law.'"[136] The Court stated:

> Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of § 5501(c)'s "deviates materially" check. Trial judges have the "unique opportunity to consider the evidence in the living courtroom context," while appellate judges see only the "cold paper record."[137]

However, the Court held that New York's interests need not be entirely subordinated to federal excessiveness review. Instead,

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133. *See id.* at 2223.

134. 429 U.S. 648 (1977) (per curiam). *Donovan* involved whether a Jones Act plaintiff who had accepted a remittitur under protest could seek reinstatement of the verdict on appeal. In that context, the Court stated that the federal rule precluding such appeals would apply, even in a diversity case, because "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law." *Id.* at 649. *Donovan* had little relevance to the issue in *Gasperini* because it did not address a case in which a contrary state rule could be shown to have substantive, extralitigation objectives. Further, *Donovan*'s dictum would mandate the application of federal law both at trial and on appeal, contrary to the holding in *Gasperini*.

135. 492 U.S. 257 (1989). *Browning-Ferris* rejected the argument that there is a federal common law standard for judging the excessiveness of punitive damages awarded by a federal antitrust jury on a pendent state tort claim. *See id.* at 278-80. In so doing, however, the Court stated that "[f]ederal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals" and that "[i]n reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." *Id.* at 278-79. However, as in *Donovan*, no state rule governing new trial standards having substantive extralitigation objectives was shown to have existed in *Browning-Ferris*. The case therefore had little relevance to the decision in *Gasperini*. Moreover, as Justice Scalia pointed out in his dissent in *Gasperini*, *Browning-Ferris*'s language would require the application of the federal new trial standard at trial as well as on appeal. *See Gasperini*, 116 S. Ct. at 2237.

136. *Gasperini*, 116 S. Ct. at 2224 (quoting *Donovan*, 429 U.S. at 649).

137. *Id.* at 2225 (citations omitted).

New York and federal interests could be "accommodated" by requiring district courts sitting in diversity to apply the state "materially deviates" standard, while permitting appellate review only for "abuse of discretion."[138]

> New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i.e.*, that court can apply the State's "deviates materially" standard in line with New York case law evolving under CPLR § 5501(c).[139]

The Court's internal inconsistency in attempting to "accommodate" New York's substantive interests as part of its "balancing" of federal and state interests is discussed below. The Court erred even more fundamentally, however, in its application of *Byrd*.

Initially, the Court failed to discuss the consistency of *Byrd*'s interest-balancing approach with *Hanna*'s focus on the "twin aims of *Erie*" in resolving Rules of Decision Act issues[140] or the criticism to which the indeterminacy of *Byrd*'s balancing approach has been subjected.[141] Although the *Gasperini* majority clearly assumed that *Byrd* survived *Hanna*, it did not explain why those expressing doubts about the continued vitality of *Byrd* have been wrong. Had the Court done so, it would have recognized that, whatever common-law tempering of the demand for consistent outcomes in recognition of "superior" federal procedural interests might be appropriate where only competing state rules of form and mode are at stake, a much greater impairment of the core federalism rationale of *Erie* would take place if *Byrd* were interpreted to permit the federal courts to balance away state rules having important extralitigation objectives as well.

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138. *See id.* at 2224.

139. *Id.*

140. *See* Ely, *supra* note 23, at 717 n.130; Redish & Phillips, *supra* note 24, at 368-69.

141. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 35-36, 39-40; *id.* § 4508, at 242 ("The major difficulty with the *Byrd* analysis stemmed from the fact that there is no scale on which the balancing process called for by the Court can take place."); *see also* McCoid, *supra* note 66, at 897.

Whether the appropriate limiting principle finds its source in the Rules of Decision Act itself or in implicit limitations on the power of the federal courts to make federal common law,[142] *Byrd* should not casually have been read to authorize the subordination of truly substantive state rules of decision to supposedly superior federal procedural interests governing the relationship between trial and appellate courts.[143] As previously pointed out, *Byrd*'s holding was limited to the displacement of state rules of *form and mode* which, in the federal court's view, are outweighed by procedures that are essential to the operation of the independent federal system of administering justice.[144] Before authorizing the displacement of the state's procedure in *Byrd*, the Court explicitly considered and rejected the possibility that South Carolina's judge determination practice had substantive underpinnings.

The Court's discussion of New York's statute in *Gasperini* demonstrates that the statute did have significant extralitigation objectives.[145] To permit such a substantive state rule to be "outweighed" by a federal common law rule of form and mode focused on the respective competencies of trial and appellate courts cuts to the core of *Erie*'s protection of the reserved lawmaking powers of the States. In effect, the Court has authorized the displacement of state substantive law in diversity cases by a federal common law rule relating to the appropriate standard of appellate review without any showing, as required by *Boyle*,[146] that uniquely federal substantive interests such as those governing international relations, controversies between States, admiralty, and the proprietary transactions of

142. *See* Redish, *supra* note 66; Westen & Lehman, *supra* note 66.
143. *See* McCoid, *supra* note 66, at 903-08.
144. *See id.* at 895.
145. *See supra* notes 111-13 and accompanying text.
146. *See supra* notes 106-08 and accompanying text.

the United States are at stake,[147] let alone that the application of state law would significantly conflict with those interests.

The source of the Court's error lies ultimately in its failure to distinguish the vitally different senses in which the concept of "substantive" law had been used in its previous applications of *Erie*, and in its careless reading of the holding in *Byrd* which hinged essentially on that distinction. The majority's criticism in *Gasperini* that the court of appeals "did not attend to '[a]n essential characteristic of [the federal-court] system'"[148] was misdirected. Rather, the Court itself "did not attend to" the essential underpinnings of *Erie* and *Byrd*.

That is not to say that the proper interpretation of *Byrd* is so clear that agreement is compelled. Some commentators have suggested that *Byrd* can be read to authorize the federal courts to balance away state laws having extralitigation objectives with sufficiently "weighty" federal procedural rules.[149] But if the *Gasperini* majority intended to endorse this controversial reading of *Byrd*, it did so in a most curious way. Justice Ginsburg's opinion contains no discussion of the debate over the proper interpretation of *Byrd*, let alone any reason for resolving it one way or the other. *Gasperini* provided the Court with a much needed opportunity to explore the foundations of *Erie*, to reconcile its disparate approaches in *Hanna* and *Byrd*, and to explain, confine, or reject *Byrd*'s balancing approach in light of the uncertainties and criticism that it has spawned. Instead, the Court confounded the confusion by its studied indifference to the real issues presented by its invocation of *Byrd*.

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147. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where the Court stated:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Id. at 641 (footnotes omitted).

148. *Gasperini*, 116 S. Ct. at 2221 (quoting Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

149. See, for example, the discussion in 19 WRIGHT ET AL., *supra* note 23, § 4504, at 38, and Redish & Phillips, *supra* note 24, at 364-66. *See also* 19 WRIGHT ET AL., *supra* note 23, § 4505, at 72 (suggesting that *Hanna* implies federal judicial power to fashion federal common law rules in areas that are "arguably procedural").

C. Internal Inconsistency to Boot

If the majority's logic in *Gasperini* had been correct, it would have led inexorably to the application of the federal "shocks the conscience" test for the grant of a new trial motion on the ground of excessiveness by the trial court, as well as the federal "abuse of discretion" standard for review of that decision by the court of appeals. As Justice Scalia forcefully pointed out in dissent, the federal courts, in the wake of *Byrd*, have increasingly held that, just as the right to a jury trial itself is an essential characteristic of the federal court system, so the standard for taking away a jury's verdict is an essential component of that federal right.[150] "[C]hanging the standard by which trial judges review jury verdicts *does* disrupt the federal system, and is plainly inconsistent with 'the strong federal policy against allowing state rules to disrupt the judge-jury relationship in federal court.'"[151] Thus, the weight of authority holds that federal courts sitting in diversity must apply federal rather than differing state law governing the grant of a new trial or judgment as a matter of law in a diversity case,[152] and commentators agree that this is the result most consistent with *Byrd*.[153]

The majority's attempt to evade this conundrum rested on an oddly incomplete view of the Seventh Amendment. According to the majority, the holding in *Byrd* rested on the view that the right to a jury trial was an essential component of the Jury Trial Clause of the Seventh Amendment.[154] The majority concluded, however, that "[t]his case involves the second, the 're-

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150. *See Gasperini*, 116 S. Ct. at 2236-37.

151. *Id.* at 2237 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958)).

152. *See* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 314-19, 385 n.120 (suggesting that most federal courts of appeals have held that federal law governs the standards for directing verdicts, setting aside verdicts on the grounds on insufficiency of the evidence, or granting new trials); *see also* 11 WRIGHT ET AL., *supra* note 4, § 2802; Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery?*, 47 SMU L. REV. 271, 286-90, 295-98 (1994).

153. *See, e.g.*, 19 WRIGHT ET AL., *supra* note 23, § 4504, at 36-37 (arguing that even if *Byrd* is given a narrow construction, federal courts must apply federal procedures when deciding issues that implicate the right to a jury trial); *see also id.* § 4511, at 314-15 (discussing the *Byrd* analysis as it applies to judge/jury relationships).

154. *See Gasperini*, 116 S. Ct. at 2222 ("*Byrd* involved the first clause of the [Seventh] Amendment, the 'trial by jury' clause.").

examination' clause."[155] According to the majority, the Re-examination Clause historically did not prevent trial courts from granting new trials on the ground of the excessiveness of damages.[156] By contrast, the right to appellate review of decisions declining to set aside a jury's verdict on the ground of excessiveness was "a relatively late, and less secure, development" once thought to be inconsistent with the Re-examination Clause.[157] Although the majority ultimately rejected the argument that the Re-examination Clause prevented any appellate review of such denials, it concluded that the limited "abuse of discretion" standard for such review, rather than de novo review under the more intrusive "materially deviates" standard prescribed by New York law, was, under the "'influence—if not the command'"[158] of the Re-examination Clause of the Seventh Amendment, an essential characteristic of the independent federal court system's regulation of the relationship between trial and appellate courts.[159]

The majority's reasoning was fallacious in two ways. First, the majority concluded that the Seventh Amendment's clear command that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"[160] was irrelevant at the trial level because the common law historically had recognized the power of trial judges to grant new trials to prevent injustice.[161] That historic power, however, cannot be divorced from the standard which governs the decision to grant a new trial. The Re-examination Clause applies to "*any Court of the United States*," including trial as well as appellate courts.[162] Despite the historic

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155. *Id.*

156. *See id.*

157. *Id.* at 2223.

158. *Id.* at 2222 (quoting *Byrd*, 356 U.S. at 537).

159. *See id.* at 2223 ("As the Second Circuit explained, appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice . . . .").

160. U.S. CONST. amend. VII.

161. *See Gasperini*, 116 S. Ct. at 2222.

162. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2522, at 244 (2d ed. 1995) (stating that it is a "well-established principle of the common law that . . . questions of fact must be decided by the jury and may not be reexamined by the trial court"); *see also* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 320-21 (implying that even if Federal Rule of Civil Procedure 59 does not encompass the standard a federal trial court must apply when ruling on a

power of federal judges to grant new trials on the ground of excessiveness, it would surely be contrary to the Re-examination Clause for a trial court to grant a new trial based on its independent determination of what the proper level of damages should be. Thus, the majority was incorrect in concluding that, where the historic federal standard for granting new trials on the ground of excessiveness, deemed consistent with the Seventh Amendment, was whether the award "shocks the conscience," the Re-examination Clause would not be implicated by applying New York's concededly more intrusive "materially deviates" standard instead.

Second, regardless of whether the Re-examination Clause of the Seventh Amendment is relevant to the trial court's grant of a new trial on the ground of excessiveness, the Jury Trial Clause surely is. As courts and commentators have recognized, whether the right to a jury trial has been "preserved" as required by the Seventh Amendment turns integrally on the extent to which the trial court is permitted to take away the jury's verdict by the grant of a new trial or judgment as a matter of law.[163]

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new trial motion based on excessive damages, the Re-examination Clause of the Seventh Amendment does). In *In re Rhone-Poulenc Rorer, Inc.*, the Seventh Circuit stated:

> The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact. This would be obvious if the second finder of fact were a judge.

51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

163. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 652 (5th ed. 1994) ("The Seventh Amendment itself would seem to bar resort to state law here [governing the sufficiency of the evidence], since to follow the state rule would deprive the party of the verdict of a jury under circumstances where, at common law, it would have been entitled to go to the jury."); *id.* at 676-77 (recognizing that the standard governing the grant of a new trial may evade the right to trial by jury); 19 WRIGHT ET AL., *supra* note 23, § 4511, at 314. On this same point, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 547, 559 (2d ed. 1993). The federal courts have agreed. *See, e.g.*, Mayer v. Gary Partners & Co., 29 F.3d 330, 332-35 (7th Cir. 1994); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 107-08 (4th Cir. 1991); Holmes v. Wack, 464 F.2d 86, 88-89 (10th Cir. 1972); Boeing Co. v. Shipman, 411 F.2d 365, 368-70 & n.2 (5th Cir. 1969) (en banc), *overruled on other grounds by* Gautreaux v. Scurlock Marine Inc., 107 F.3d 331 (5th Cir. 1997) (en banc); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1065-66 (4th Cir. 1969); Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 353-54 (4th Cir. 1941); *cf.* Simler v. Conner, 372 U.S. 221, 222 (1963) ("Only through a holding that the jury-trial right is to be determined

In short, if the "influence" of the Seventh Amendment requires a federal court of appeals to apply the federal "abuse of discretion" standard, rather than the state's "materially deviates" standard when reviewing decisions refusing to order a new trial on the ground of excessiveness, it is equally true that the "influence" of the Seventh Amendment requires federal trial courts to apply the federal "shocks the conscience" standard, rather than the state's "materially deviates" standard, in determining whether a new trial should be granted. In *Gasperini*, however, the "influence" of the Seventh Amendment required neither because the New York standard was a substantive rule having important extralitigation objectives that the core rationale of *Erie* required to be applied both at trial and on appeal.

One might attempt to justify the majority's bifurcated approach to the application of New York law on the ground that the Seventh Amendment's Re-examination Clause applies only to appellate courts, and the Seventh Amendment itself (rather than *Byrd*) required the application of the federal "abuse of discretion" standard of appellate review. This argument is unpersuasive. First, the majority in *Gasperini* did not purport to ground its result on the requirements of the Seventh Amendment, but rather on what it thought to be the requirements of *Byrd*'s interpretation of *Erie* under the "influence if not the command" of the Seventh Amendment. Had the majority rested its decision on the Seventh Amendment, its entire discussion of the *Erie* doctrine would have been unnecessary. Second, as previously discussed,[164] if the Seventh Amendment requires application of the federal "abuse of discretion" standard on appeal, it would, by the same logic, require application of the federal "shocks the conscience" standard at trial.

The majority's only real effort to support its result was the unsubstantiated assertion, at the outset of its opinion, that although New York's "deviates materially" standard should be regarded as a substantive rule analogous to a statutory "cap" on

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according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." (footnote omitted)); Galloway v. United States, 319 U.S. 372, 395 (1943) (stating that the use of different "labels" to describe the established common-law standard for directed verdict "cannot amount to a departure from 'the rules of the common law' which the [Seventh] Amendment requires to be followed").

164. *See supra* pp. 297-99.

damages at the trial level, the same rule should be regarded as a "procedural" allocation of functions between trial and appellate courts on appeal.[165] This conclusion cannot withstand analysis. If the New York "deviates materially" standard had extralitigation policy objectives in the trial court, those objectives were equally applicable to New York's statutory direction that the state's appellate courts apply that standard de novo in determining whether the trial court's denial of a new trial should be reversed. Indeed, the best evidence that New York's substantive objectives were fully implicated by the standard of appellate review was § 5501(c) itself, which is expressly directed to New York's appellate courts, not its trial courts.

In sum, if New York's law was "substantive" for *Erie* purposes at the trial level, it was equally "substantive" on appeal. If *Byrd* or the Seventh Amendment required the application of a federal standard of appellate review, they equally required the application of the federal "shocks the conscience" standard by the trial court. And if, as argued here, *Byrd* is not properly read to allow state procedures having important extralitigation objectives to be "outweighed" by a federal common law procedural interest in the manner and means by which state rights are enforced, New York law was controlling both at trial and on appeal.

D. And That Is Not All

The Court's superficial treatment of the *Erie* doctrine in *Gasperini* carries with it the potential for drastic constriction as well as expansion of *Byrd*. While the sacrifice of New York's substantive interests by application of the federal standard of appellate review is troubling in itself, the Court's purported "accommodation" of New York's interests by application of the New York standard at trial may have even greater consequences. That is not to say that the Court's decision to apply the "materially deviates" standard at trial was wrong. The Court was correct in respecting New York's substantive interests at trial, even if it erroneously disregarded them on appeal.

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165. *See Gasperini*, 116 S. Ct. at 2220-21, 2224 (holding that the New York "materially deviates" standard must be applied at the trial level, but at the appellate level, the federal courts must apply the federal "abuse of discretion" standard).

But the Court was right for the wrong reasons, and the result may be the unwitting undoing of *Byrd*.

As previously discussed, despite some authority looking the other way, most federal courts have recognized that *Byrd*'s holding requiring a federal court to afford a jury trial even where state law would not, provided the state's non-jury procedure is not "bound up" with the definition of substantive rights and duties, equally implicates the standard for control of the jury's verdict by the grant of a new trial or judgment as a matter of law.[166] That is because whether the right to a jury trial has been afforded cannot be divorced from the standard under which the jury's verdict may be taken away. For example, a rule permitting a trial judge to review the facts de novo not only would violate the Seventh Amendment in cases where it applies, but would seriously erode the function of the federal jury even absent the Seventh Amendment's command. For the same reason, application of a state procedural rule requiring more intrusive control of the jury's verdict than the federal law would permit unacceptably impairs an essential characteristic of the independent federal system of administering justice.[167]

These difficulties could have been avoided had the majority in *Gasperini* made clear that the reason for regarding New York's "deviates materially" standard as "substantive" at the trial level was that the statute had policy objectives extending beyond the conduct of the litigation itself. But, as noted above, the Court's opinion never came to grips with the sense in which New York's standard should be regarded as a "substantive" rule.[168] Much of the majority's analysis suggests that it believed the "materially deviates" standard should be regarded as "substantive" simply because it was "outcome determinative" in the sense of *Hanna* and *York*. If so, the opinion promises substantially to erode, if not entirely to negate, *Byrd*'s conclusion that the jury trial right is such an essential part of the independent federal system of administering justice that it should prevail

166. *See* 19 WRIGHT ET AL., *supra* note 23, § 4511, at 314, 385 n.120 (suggesting that the Seventh Amendment dictates that a federal court apply federal law when ruling on the sufficiency of the evidence, a directed verdict, or motion for a new trial).

167. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958).

168. *See supra* Part IV.A.

even in the face of a contrary, outcome-determinative state procedural rule.

Indeed, early indications are that *Gasperini* has had precisely that effect, resulting in the use of state standards governing the grant of new trials on the ground of excessiveness of damages without any inquiry into the substantive underpinnings of those rules.[169] Perhaps these decisions could be justified on the ground that the new trial standard for excessiveness is "substantive" in an extralitigation sense because it enters the calculus of benefits and burdens affecting primary human activity. But this argument is a stretch, and the courts have not justified their decisions in these terms. Although these decisions all involved the standard governing new trials on the ground of excessiveness of damages, they provide an early indication of *Gasperini*'s potential to displace federal rules governing the judge/jury relationship in federal court on a much wider range of issues in any case where a state rule of decision is viewed as "outcome determinative" in the *Hanna/York* sense. The result would be the effective overruling of *Byrd*, the very case on which the *Gasperini* majority grounded its decision.

That is not to say that *Byrd* is above criticism, or even that it should not be overruled. Moreover, some commentators have suggested that in cases where the Seventh Amendment does not require a jury trial "it is difficult to understand how the amendment can have any residual 'influence'" and that therefore "the federal rule [should not] apply in Rules of Decision Act cases simply because an issue concerns the division of functions between judge and jury."[170] But if such significant alterations in the Court's *Erie* jurisprudence are to be made, the Court should address those questions explicitly, with full awareness of what is at stake.

V. CONCLUSION

Gasperini presented the Supreme Court with an important opportunity to consider and resolve the central questions raised

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169. *See, e.g.*, Steinke v. Beach Bungee Corp., 105 F.3d 192, 197 (4th Cir. 1997); Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18 (2d Cir. 1996); Imbrogno v. Chamberlain, 89 F.3d 87, 90 (2d Cir. 1996). *But see* Mejias-Quiros v. Maxxam Property Corp., No. 96-1759, 1997 WL 104057, at *3 (1st Cir. Mar. 13, 1997).

170. Redish & Phillips, *supra* note 24, at 387.

by the evolution of its *Erie* jurisprudence in cases not specifically controlled by a Federal Rule of Civil Procedure, particularly those relating to the continuing vitality and meaning of *Byrd*. Rather than clarify and resolve, however, the Court's opinion confuses and confounds. *Byrd* still lives, but we know not why, or to what extent.

Gasperini may be read both to have expanded and to have contracted *Byrd*'s appointed sphere, on the one hand suggesting that *Erie* and the Rules of Decision Act provide no obstacle to a federal court's invocation of common-law rules of form and mode to vitiate truly substantive state rules, and, on the other, that the role of a federal jury may be altered significantly by purely procedural state rules of form and mode. But, if the Court's superficial and erroneous description of the New York standard as "substantive" at trial but "procedural" on appeal is accepted at face value, and if the Court's "substantive" characterization is further understood to refer to state rules having extralitigation objectives, rather than to those that merely determine the outcome of litigation, *Gasperini* may also be read consistently with the previously prevailing view that federal interests emanating from the Seventh Amendment may outweigh state rules of form and mode, but not those intruding upon the law-making sphere reserved to the States by the Constitution.

A Supreme Court opinion evidencing so little awareness of the issues that it confronts or of the consequences it portends easily may be read for too much or too little. Better in this case too little than too much, and that *Gasperini* be relegated to a passing footnote on the *Erie* jurisprudence chart.