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The Still Unrepressed Myth of Erie

Darrell N. Braman Jr.
T. Rowe Price Group Inc.

Mark D. Neumann

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THE STILL UNREPRESSED MYTH OF *ERIE*

Darrell N. Braman, Jr.†
Mark D. Neumann‡

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† Attorney-Advisor, United States Securities and Exchange Commission, Division of Corporate Finance; B.A., 1985, Franklin & Marshall College; J.D., 1988, University of Maryland School of Law; Member, Maryland and District of Columbia Bars.

‡ Associate, Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; B.A., 1985, Franklin & Marshall College; J.D., 1988, University of Maryland School of Law; Member, Maryland and District of Columbia Bars.

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I. INTRODUCTION

Fifty years have passed since the Supreme Court of the United States decided the landmark case *Erie Railroad v. Tompkins*.[1] The "*Erie* doctrine," which emerged from the case, permits federal courts to apply federal procedural rules but requires that substantive issues of law be decided in accord with applicable state law.[2] Since 1938, the year *Erie* was decided, judges, lawyers, commentators, and law students alike have grappled with both the meaning and application of the *Erie* doctrine. Although subsequent Supreme Court pronouncements were intended to clear up the confusion, these decisions have produced the opposite result.

In 1974, in a further attempt at clarification, Professor John Hart

1. 304 U.S. 64 (1938).
2. Although it is easy to view *Erie* as a housekeeping rule for federal courts, the concerns underlying the doctrine are far more serious. The doctrine is premised upon principles of federalism, and it exemplifies the perpetual tug-of-war between the desire to uphold state-created rights and obligations and the need to provide a uniform and efficient federal judiciary. The *Erie* doctrine may indeed represent "the very essence of our federalism." Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974).

Ely published *The Irrepressible Myth of Erie*,[3] an article that is widely regarded as the definitive examination of the *Erie* doctrine. Celebrated commentators such as Martin Redish and Carter Phillips,[4] Abraham Chayes,[5] and Peter Westen and Jeffrey Lehman[6] have all lent support to Professor Ely's position. The Supreme Court, in *Walker v. Armco Steel Corp.*,[7] cited Ely's article, but the Court has yet to expressly embrace his or any other commentator's position. Nevertheless, to date, Professor Ely's views have not been effectively countered,[8] and it is indeed noteworthy that so many commentators have aligned themselves with his position in an area where confusion and dissension are so prevalent. Furthermore, even those commentators who take issue with Professor Ely's treatment of the *Erie* doctrine generally acknowledge the conventional wisdom of his analysis by specifically addressing his views. Thus, due to the stature of Ely's seminal article, and because of our concurrence with his views, the authors selected Professor Ely's analysis as the benchmark against which to judge lower federal court application of the *Erie* doctrine. The authors use Professor Ely's commentary as a benchmark rather than actual Supreme Court precedent because of the incisive manner in which Ely treats the complex and often divergent nature of the *Erie* line of cases.

Although Ely's article has gained a consensus among several leading commentators, the federal courts are far from clear on what the *Erie* doctrine means and how it should be applied. It is contended that the *Erie* doctrine is in a state of disarray. Different courts, even when located within the same circuit, rarely employ the same analysis when confronted with similar *Erie* issues. In fact, of the many cases since 1974

3. *Id.* Professor Ely was Chief Justice Earl Warren's law clerk at the time Hanna v. Plumer, 380 U.S. 460 (1965), one of the principal decisions in the *Erie* line of cases, was decided. *Id.* at 693 (introductory footnote).
4. Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 357-59 (1977) (arguing that Ely's interpretation of *Hanna's* "modified outcome determination test" is the proper analysis for purposes of the Rules of Decision Act, although unresponsive to the policy concerns underlying *Erie*).
5. Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974) (concurring with Ely's overall analytic framework but not with the results Ely reached when applying the *Hanna* test to several specific cases).
6. Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity*?, 78 MICH. L. REV. 311, 362-77 (1980) (concurring with Ely's construction of the *Erie* tests, but arguing that the Supreme Court's current analysis is unsupported by the terms of the Rules of Decision Act).
7. 446 U.S. 740, 751 & n.11 (1980).
8. Of course, as is the case with most legal theories, Professor Ely's views are not universally accepted. *See, e.g.*, Gelfand & Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT L. REV. 937, 966 nn. 82-83 (1988) (describing Ely's modified outcome-determinative test as "one that produces the results Professor Ely would choose"); Bourne, *Federal Common Law and the* Erie-Byrd *Rule*, 12 U. BALT. L. REV. 426, 464-68 (1982) (arguing that Ely's "thesis is flawed in . . . serious ways," including a failure to recognize the continued viability of *Byrd's* balancing of state and federal interests).

involving *Erie* disputes, only a handful have used an analysis that arguably tracks the Supreme Court's standard as interpreted by Professor Ely, or any other single standard for that matter. In essence, courts generally improvise when resolving *Erie* issues, and the tests they apply often appear tailored to reach a predetermined result. This article contends that the *Erie* doctrine is in need of further attention by the Supreme Court because the many nuances and subtleties of the doctrine have been lost by all but a microcosm of courts and commentators.

This article surveys federal *Erie* cases decided since 1974[9] and examines how the analyses employed by lower federal courts square with Professor Ely's standard. The article concludes with an assessment of why the *Erie* doctrine has proven so difficult for the federal courts to administer, and what this may indicate about the doctrine itself and the standard advocated by Ely.

"*Erie* problems" arise when a federal court is confronted with a direct conflict between a state and federal rule or policy. In the face of such conflicts, either the Rules of Decision Act of 1789 (RDA)[10] or the Rules Enabling Act of 1934 (REA)[11] governs. When a conflict exists between a state rule or policy and a Federal Rule of Civil Procedure (FRCP), the REA controls. When the conflict is between a state rule or policy and a federal rule or policy other than a FRCP, the RDA governs.

Professor Ely's thesis is that *Erie* problems are composed of inquiries having both statutory and constitutional bases. The United States Constitution, according to Ely, is "a sort of checklist," with state rights comprising everything remaining after the federal powers are checked off.[12] There is no "enclave" of state powers independent of those granted to the federal government under the Constitution.[13] In Ely's view, article III of the Constitution, by providing diversity jurisdiction, granted Congress the power to promulgate procedural rules to govern in-court proceedings.[14] The RDA and REA were intended to keep federal courts within their constitutional limits by authorizing application of federal procedural rules only.

9. *The Irrepressible Myth of Erie* was published in 1974. Ely, *supra* note 2. Thus, this article reviews cases decided since 1974 which cited Hanna v. Plumer, 380 U.S. 460 (1965).
10. 28 U.S.C. § 1652 (1982) [hereinafter RDA].
11. 28 U.S.C. § 2072 (1982) [hereinafter REA].
12. Ely, *supra* note 2, at 701.
13. *Id.* at 701-06. The "enclave theory" of state's rights is based upon the idea that there exists a body of independent rights reserved to the states other than those which remain after the enumerated federal powers. Ely believed that the "enclave theory" was repudiated by *Hanna* as contrary to the language of the tenth amendment to the Constitution. *Id.*
14. *Id.* at 703-04. Recently, the Court noted that "[a]rticle III . . . augmented by the Necessary and Proper Clause . . . empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts." Burlington N.R.R. v. Woods, 480 U.S. 1, 5 n.3 (1987).

Ely claims that both the RDA and REA established tests that are more restrictive than the Constitution itself. Thus, he contends, once these tests are met, the Constitution can "remain in the background" unless Congress enacts substantive rules of decision for diversity cases.[15] Relying upon Supreme Court interpretations of the RDA and REA, Ely concludes that the proper standard to apply for RDA problems is what he terms the "rejuvenated outcome determination test," while REA conflicts require application of the two-prong test of the REA.[16]

II. THE RULES OF DECISION ACT

A. *Supreme Court Decisions Interpreting the RDA*

1. The *Swift* Doctrine

The RDA provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[17] Prior to the *Erie* decision, the Supreme Court held that the phrase "laws of the several states" referred only to state statutes and state decisional law construing those statutes and affecting matters of "permanent locality."[18] As a practical matter, this construction of the RDA, known as the "*Swift* doctrine," permitted a federal court to create "federal general common law" based upon a court's own "independent judgment as to what the common law of the state [was] or should [have been]"[19] for all areas of conduct not regulated directly by state statute.

The underlying assumption of *Swift*, that there would someday be a uniform body of national substantive law, never materialized. This failure was in large part due to state court persistence in adhering to their own common law and the difficulty of distinguishing between "local" law and "general" law.[20] Moreover, diversity of citizenship jurisdiction, used in conjunction with the *Swift* doctrine, provided forum-shopping opportunities for noncitizen litigants, and the resulting discrimination worked

15. Ely, *supra* note 2, at 698.
16. *Id.* at 717-38. For further discussion of the two-prong test of the REA, see *infra* notes 265-77 and accompanying text.
17. 28 U.S.C. § 1652 (1982).
18. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17-18 (1842). Matters of "permanent locality" included rights and obligations with respect to property which were fixed or local in nature, such as those embodied in deeds and wills.
19. Erie R.R. v. Tompkins, 304 U.S. 64, 71 (1938). *Swift* was based upon the nineteenth century jurisprudential belief that law was discoverable by judges. A contrast was drawn between matters of "general law," which the federal courts were free to find for themselves, and matters of "local law," for which state decisions were binding. The federal "general common law" was perceived to be "a transcendental body of law outside of any particular state. . . ." Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 54 (4th ed. 1983) [hereinafter C. WRIGHT]; Schulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938).
20. *Erie*, 304 U.S. at 74.

against citizens of the states in which federal courts sat.[21] These concerns caused the Supreme Court to overturn the doctrine in the now famous case of *Erie Railroad v. Tompkins.*[22]

2. *Erie Railroad v. Tompkins*

In *Erie*, the plaintiff, Harry Tompkins, was injured by a train in Pennsylvania while walking alongside the railroad tracks. Tompkins brought suit against Erie Railroad, the owner of the train, in a New York district court.[23] The issue in *Erie* was whether a New York federal court sitting in diversity should apply state or "general" federal law in determining the status of the plaintiff as a trespasser on the property of the defendant railroad.[24] Under Pennsylvania law, which all parties agreed controlled, Tompkins would have been deemed a trespasser who was owed no duty of care. Under "general federal common law," however, Tompkins was a licensee and thus was owed a duty of care.[25]

The Supreme Court held that state common law was a "rule of decision" within the meaning of the RDA,[26] thus overturning the *Swift* doctrine.[27] In so doing, the Court acknowledged that "in applying the [*Swift*] doctrine this Court and the lower courts [had] invaded rights

21. Diversity jurisdiction was created to protect out-of-state citizens from the perceived discrimination and bias of local juries. Lumbermen's Mut. Casualty Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring); *see also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 18-19 (2d ed. 1973) [hereinafter HART & WECHSLER]. *Swift*, according to *Erie*, "introduced grave discrimination by noncitizens against citizens." *Erie*, 304 U.S. at 74. The most notable example of this phenomenon was presented in *Black & White Taxicab Co.*, where a federal district court sitting in Kentucky upheld, in the name of "general" law, a monopolistic contract that was unenforceable according to Kentucky state law. The Kentucky corporate plaintiff had reincorporated in Tennessee solely to establish diversity of citizenship with its rival. The absence of federal antitrust law allowed the company to maintain a monopoly contrary to state law. *Black & White Taxicab Co.*, 276 U.S. at 522-25.
22. 304 U.S. 64 (1938); *see also* Ely, *supra* note 2, at 702-05.
23. *Erie*, 304 U.S. at 69.
24. *Id.* at 71.
25. *Id.* at 69-70.
26. The Court did not address the question of whether choice of laws rules themselves were subject to an *Erie* analysis, although it did note that "the federal court in New York was [not] free to disregard the alleged rule of Pennsylvania common law." *Id.* at 71. In assuming that Pennsylvania common law controlled, the Court either relied on federal conflicts rules or determined *sub silentio* that a New York court in similar circumstances would have applied Pennsylvania law. This point was clarified in Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), where the Supreme Court held that conflict of law rules are not exceptions to the *Erie* doctrine, and courts are to apply whatever law would be applied by the courts of the state in which the federal court sits. *Id.* at 496.
27. Interestingly, neither party had challenged the *Swift* doctrine in their briefs. *See* Summary of Briefs in *Erie*, 304 U.S. at 65-69. Nevertheless, the *Erie* decision began by stating: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." *Id.* at 69.

which . . . are reserved by the Constitution to the several state[s]."[28] Although no constitutional provision was expressly noted, the *Erie* Court stated that "the unconstitutionality of the course pursued" compelled it to overturn *Swift*.[29] Thus the Court disclaimed the existence of "federal general common law"[30] and held that the RDA required federal courts to apply *all* the law of the states, including common law decisions of state courts, except in matters where federal law controlled.[31]

Erie was read by lower federal courts as producing a "substance/procedure" standard whereby substantive state law was to be applied by a federal court but procedural issues were to be governed by federal law.[32] Interestingly, however, *Erie* did not actually announce a "substance/procedure" test for its construction of the RDA. The only basis

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28. *Id.* at 80.

29. *Id.* at 77-78. The "course pursued" under *Swift* was unconstitutional because "nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*." Ely, *supra* note 2, at 703.

> Congress [and the federal courts have] 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.

Erie, 304 U.S. at 78. Thus, *Erie* rested on the Court's conclusion that Congress lacked the power to vest federal courts with authority to create "federal general common law," that Congress could not have delegated such lawmaking powers to the courts, and that the RDA could not be interpreted to permit such an unconstitutional result. Ely, *supra* note 2, at 703 n.62.

The constitutional issue in *Erie* could have been avoided by simply reinterpreting the RDA itself, and, in fact, it has been argued that *Erie*'s constitutional analysis was dictum. *See* C. WRIGHT, *supra* note 19, at 360; Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 273 n.27 (1946). The *Erie* Court relied on a much celebrated article by Professor Charles Warren, in which he disclosed the results of research that had led to his discovery of an earlier draft of the RDA. *Erie*, 304 U.S. at 72-73 (citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) [hereinafter Warren]). This earlier draft contained the words "the Statute law of the several states in force for the time being and their unwritten or common law now in use," in place of the words "laws of the several states." The difference between the earlier draft and the final act led Professor Warren to conclude that the *Swift* doctrine was not supported by the terms of the RDA, and that the "laws of the several states" were "not intended to be confined to 'statute laws' . . . but [were] intended to include the common law of a State as well as the statute law." Warren, *supra*, at 51-52, 85-86.

30. On the same day that *Erie* was decided, however, the Court grounded another decision on federal "common law." *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (apportionment of the waters of interstate streams governed by federal common law).

31. *Erie*, 304 U.S. at 78-79.

32. *See, e.g.*, Connecticut Indem. Co. v. Lee, 168 F.2d 420, 423 (1st Cir. 1948); Bergeron v. Mansour, 152 F.2d 27, 28-29 (1st Cir. 1945); Brown v. Cranston, 132 F.2d 631, 633-34 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); Cooper v. Brown, 126 F.2d 874, 877 (3d Cir. 1942); Black & Yates, Inc. v. Mahogany Ass'n, 129 F.2d 227, 232 (3d Cir. 1941), *cert. denied*, 317 U.S. 672 (1942); Waterman v. The Aakre, 122 F.2d 469, 474 (2d Cir.), *cert. denied*, 314 U.S. 690 (1941).

in the opinion to support such a test is the Court's statement that "Congress has no power to declare *substantive* rules of common law,"[33] and Justice Reed's statement in his concurrence that "[t]he line between procedural and substantive law is hazy, but no one doubts federal power over procedure."[34] The substance/procedure formulation is generally credited to *Sibbach v. Wilson & Co.*,[35] where the Supreme Court stated that Congress has the "power to regulate the practice and procedure of federal courts . . . but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state. . . ."[36] Reliance upon *Sibbach* by lower courts may have been misplaced, however, since the Court's use of the words "substantive" and "procedure" were largely in reference to the REA, not the RDA.[37] "Substance" and "procedure" proved to be elusive concepts, and the Supreme Court has made several reformulations of the *Erie* test, the first coming in the case of *Guaranty Trust Co. v. York*.[38]

3. *York* Outcome Determination

York was a class action suit in equity brought by investors alleging breach of trust by the defendant, Guaranty Trust Co. The issue facing the Court was whether the state statute of limitations barred the action in federal court.[39] Application of a substance/procedure analysis would have been troublesome, since substance and procedure are often intermingled to create an equity cause of action. Terming the substance/procedure dichotomy "immaterial" for purposes of the RDA, the *York* Court explained that *Erie* "was not an endeavor to formulate scientific legal terminology."[40] Instead, the Court noted that:

> [T]he intent of [the *Erie*] decision was to insure that, in all cases . . . 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.[41]

This so-called "outcome determination" test required federal courts exercising diversity jurisdiction to apply the state rule whenever failure to apply that rule would generate different outcomes in state and federal

33. *Erie*, 304 U.S. at 78 (emphasis added).
34. *Id.* at 92 (Reed, J., concurring).
35. 312 U.S. 1 (1941).
36. *Id.* at 9-10. Another decision relied upon by lower courts for a substance/procedure dichotomy was Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939), which was decided one year after *Erie*. The Court held that state law presumptions applied in diversity cases, and in dictum, distinguished issues relating to a "substantial right" from issues of "practice." *Id.* at 212.
37. *See generally* Ely, *supra* note 2, at 708.
38. 326 U.S. 99 (1945); *see also* Ely, *supra* note 2, at 701-02.
39. *York*, 326 U.S. at 100-01.
40. *Id.* at 109.
41. *Id.*

court.[42] In *York*, the Supreme Court applied this test to a state statute of limitations and found such a law to be outcome determinative since the litigation would have been time-barred in state court but not in federal court.[43] Because the state law was deemed outcome determinative, the federal court was obliged to apply it.

The *York* outcome determination test proved over-inclusive. *Erie* issues typically arise in a diversity action when a party complies with a federal rule, but fails to comply with the applicable state rule. Once the available state forum has been foreclosed because of noncompliance, any rule would literally affect the outcome of the litigation. Since any event can be said to affect the outcome, the result of applying the *York* text is that almost all laws are classified as outcome determinative.[44]

4. The *Byrd* Balancing Test

The Supreme Court attempted to correct the over-inclusiveness of the *York* test in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[45] In a diversity action brought in federal court for injuries resulting from alleged negligence, the defendant corporation asserted that it was the plaintiff's employer under South Carolina law, and that the plaintiff's exclusive remedy lay under the South Carolina Workers' Compensation Act.[46] Under state law, the issue of whether the plaintiff was a "statutory employee" was a question of fact to be decided by the judge, while federal law demanded that the jury act as fact finder.[47] Conceding that if " 'outcome' [were] the only consideration, a strong case might appear for

42. The Court framed the test as follows: "The question is whether . . . [the state rule] significantly affect[s] the result of a litigation for a federal court to disregard a law of the State that would be controlling in an action upon the same claim by the same parties in a State court?" *Id.* Underlying the outcome determination standard are basic notions of federalism—federal courts are not intended to be adjuncts of state courts and were created to provide a different and unbiased forum for out-of-state litigants. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Federal courts are not meant to provide a different set of legal rules, nor should they entertain an action which would otherwise be barred at the state level.

43. *York*, 326 U.S. at 110. Use of any *Erie* analysis was largely unnecessary, for "even before [*Erie*], federal courts relied on statutes of limitations of the States in which they sat." *Id.*

44. Under the *York* test, even a purely procedural rule could be outcome-determinative. As the Court in *Hanna* noted, the *York* outcome determination test would permit a diversity litigant to "insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts," rather than by the federal timetable, if employment of the federal timetable would bar him from bringing suit, and thus determine the outcome of the suit. *Hanna*, 380 U.S. at 468-69. Two commentators have even implied that a rule prescribing the size of the paper on which a complaint is filed could be outcome-determinative under the *York* formulation. *See* J. LANDERS & J. MARTIN, CIVIL PROCEDURE 244 n.2 (1981).

45. 356 U.S. 525 (1958).

46. *Id.* at 526-27.

47. *Id.* at 528-29. *Byrd* could have been grounded on the seventh amendment right to a jury for determining issues of fact. The Court refused to invoke the right to a jury trial, however, preferring to base its decision on *Erie* grounds instead. *Id.* at 537 n.10.

saying that the federal court should follow the state practice," the Court nevertheless found "affirmative countervailing considerations at work."[48] The Supreme Court held the federal rule applicable because the strong "federal policy favoring jury decisions of disputed fact questions" outweighed the state policy giving the judge fact finding powers.[49] As a result of this language, *Byrd* came to represent a balancing version of the *Erie* test; federal and state policy interests must be balanced against one another to determine which rule should control in a diversity action.

There are at least two ways of interpreting the *Byrd* balancing analysis. Under the more common two-stage *Byrd* balancing analysis, a court must initially determine whether the state rule is substantive or procedural. If the rule is "substantive" in the outcome determination sense, or, if the rule is "intended to be bound up with the definition of the rights and obligations of the parties," no balancing is required.[50] If, on the other hand, a state procedural law is implicated that "appears to be merely a form and mode of enforcing" the substantive rights of the parties, a balancing test must be applied and the stronger interest should prevail.[51]

Language from *Byrd* lends itself to another type of balancing involving "countervailing considerations."[52] This interpretation of *Byrd* requires the courts to weigh the federal interest respecting the influence state substantive law has on the outcome of litigation against other federal interests in promoting a uniform and efficient federal system.

The *Byrd* analysis, which attempted to place competing state and federal interests on a decision-making scale appropriate to common law, suffered from two inherent drawbacks. First, whereas there was a constitutional basis to *Erie*, no such foundation existed for the *Byrd* balancing test. Second, pushed to its extreme, the *Byrd* test could require results contrary to the spirit of *Erie*. If, for example, the state interests behind one of its purely procedural rules were found to outweigh federal interests behind a federal procedural rule, the *Byrd* test appears to mandate application of the state rule.

5. *Hanna* and Refined Outcome Determination

Recognizing the inherent difficulties in balancing substantive and procedural considerations, the Supreme Court rejuvenated the *York* outcome determination test in *Hanna v. Plumer*.[53] The issue in *Hanna* was whether the adequacy of service of process on the defendant was to be determined by FRCP 4(d)(1), which authorizes service on any responsi-

48. *Id.* at 537.
49. *Id.* at 538.
50. *Id.* at 536.
51. *Id.*
52. *Id.* at 537-38.
53. 380 U.S. 460 (1965); *see also* Ely, *supra* note 2, at 717-18. *Hanna* is the opinion principally relied upon by Professor Ely in formulating his thesis.

ble adult at the defendant's home, or by a Massachusetts rule[54] which required that the defendant be served in person.[55] Even though *Hanna* involved a conflict between state law and a FRCP, the Court, in dictum, reformulated the outcome determination test for RDA conflicts.[56] Narrowing the overly broad *York* formulation, the Court explained that the test could not "be read without reference to the twin aims of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[57] The majority noted that "not only are nonsubstantial, or trivial, variations [between state and federal rules] 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."[58] The *Erie* Court did not intend to preclude forum-shopping for purposes of efficiency, strategic advantage, or reduced cost—*Erie*'s target was forum-shopping for a result based upon differences in the applicable substantive law, since the decision sought to prevent "inequitable administration of the laws."[59]

Although the issue at hand in *Hanna* was one governed by the REA, the Court reasoned that the choice between the state in-hand service rule and FRCP 4(d)(1) "would be of scant, if any, relevance to the choice of a forum."[60] This was because the plaintiff "was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served."[61] The difference between in-hand service and service by mail would have no effect on a litigant's choice of forum at the start of the litigation, when all options are open, because the way in which a party is served has no bearing on the outcome of a lawsuit.

According to Ely's interpretation of *Hanna*, a state law is deemed outcome determinative if, at the start of the litigation, before any available choices are foreclosed, the nature of the state law is such that its application would increase the plaintiff's chances of winning on the merits.[62] Framed in this way, outcome determination is no longer over-inclusive and leaves no room for the balancing of interests advocated by

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54. MASS. GEN. LAWS ANN., ch. 197, § 9 (West 1958).
55. *Hanna*, 380 U.S. at 461-63.
56. *Id.* at 467-69.
57. *Id.* at 468.
58. *Id.*
59. Professor Ely points out that "forum shopping is not an evil per se. It is evil only if something evil flows from it; indeed, the very idea of the diversity jurisdiction was to provide an alternative to state court." Ely, *supra* note 2, at 710.
60. *Hanna*, 380 U.S. at 469.
61. *Id.*
62. Ely, *supra* note 2, at 714. *Hanna* "overruled no prior application of the [outcome determination] test and indeed, by dusting it off and adding a couple of qualifications that should have been there all along, resurrected it from the uncertain situation in which *Byrd* had left it. There was nothing wrong with *York* but oversimplification." *Id.*

Byrd.[63]

The basis for Ely's claim that policy interests are no longer factors in the RDA formula is that *Hanna* can be read to reject the *Byrd* balancing test. In a note, the Court explained that under the *Erie* doctrine:

> [T]he importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.[64]

Thus, according to Ely, the strength of the policy interests behind a rule are to be given scant, if any, independent consideration, except to the extent that they affect the *outcome* of the litigation.[65]

B. Application of the RDA in the Federal Courts

In the many RDA cases decided since publication of Professor Ely's article in 1974, only a handful of courts referred to refined outcome determination, and even fewer actually employed the analysis. Furthermore, there are instances where refined outcome determination is cumbersome to apply or does not produce consistent results.

1. Issues Resolvable with Refined Outcome Determination

Most RDA conflicts arise when, in the absence of federal statutory law, a federal court is confronted with an applicable state law. Under such circumstances, the question whether the court is free to disregard the state rule is usually resolvable upon application of the refined outcome determination test.

a. Medical Malpractice Tribunals

One of the most common RDA disputes concerns whether federal courts must apply state laws which require that medical malpractice

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63. "When the RDA is interpreted in light of its fairness rationale . . . it becomes clear that there is no place in the analysis for the sort of balancing of federal and state interests contemplated by the *Byrd* opinion." Ely, *supra* note 2, at 717 n.130.

64. *Hanna*, 380 U.S. at 468 n.9.

65. The *Hanna* opinion, however, is not perfectly clear on this point because it also contains language which has prompted lower federal courts and commentators relentlessly to cling to the balancing test. *Byrd* was cited in the *Hanna* opinion for the proposition that the " 'outcome-determination' analysis was never intended to serve as a talisman," and some courts have relied on this language to justify the continued use of *Byrd* balancing. *Hanna*, 380 U.S. at 466-67. Such views, however, are contrary to a plain reading of *Hanna* as well as to the views of Ely and other leading commentators. *See supra* note 63; Redish & Phillips, *supra* note 4, at 369 (concurring with Ely's view that there is no place for the *Byrd* test after *Hanna*).

claims be heard initially by special state tribunals. These laws, enacted in response to the proliferation of medical malpractice suits, are meant to discourage frivolous claims and combat the increased costs of malpractice insurance.

Two district courts within the First Circuit have considered whether state laws requiring the presentment of claims to medical malpractice tribunals prior to litigation are applicable in diversity suits. In *Wheeler v. Shoemaker*[66] and *Byrnes v. Kirby*,[67] opposite conclusions were reached, and the Court of Appeals for the First Circuit then resolved the conflict in *Feinstein v. Massachusetts General Hospital.*[68]

In *Wheeler*, the District Court of Rhode Island held that a state law requiring referral of claims to a medical malpractice tribunal did not have to be applied in a diversity case.[69] The applicable Rhode Island statute provided that malpractice suits would be initially considered by a mediation panel consisting of a special master, a physician, and an attorney. The panel would conduct a full scale evidentiary hearing with the power to subpoena witnesses and appoint its own experts in order to review the merits of each malpractice claim. A panel opinion, reduced to writing, would state the grounds for the panel's conclusion and upon a finding of liability, the amount of damages as well. Either party could reject the panel's findings and continue the action in court. All the panel's findings, except those related to damages, were admissible as evidence in the subsequent trial. In rejecting the applicability of state law, the court reasoned that when the state rule would significantly alter the role of the jury in the federal system, the *Byrd* balancing approach was applicable.[70] Since the requirement of mandatory medical malpractice arbitration was intended to "strongly influence the jury verdict or circumvent jury trial altogether,"[71] the district court concluded that the state law conflicted with, and was outweighed by, the important federal interest in preserving the judge/jury relationship and procedural fairness,[72] notwithstanding that the panel was an important component of the state system.[73]

In *Byrnes*, the District Court of Massachusetts reached a result contrary to that of the District Court of Rhode Island in *Wheeler*. A Massa-

66. 78 F.R.D. 218 (D.R.I. 1978).
67. 453 F. Supp. 1014 (D. Mass. 1978).
68. 643 F.2d 880 (1st Cir. 1981).
69. *Wheeler*, 78 F.R.D. at 225-26.
70. *Id.* at 225.
71. *Id.* at 225-26.
72. *Id.* at 226-28. Although acknowledging that a failure to apply the panel procedures would result in inequitable administration of the laws and probably encourage forum-shopping, the court stated that the state law had "an appearance of unfairness to plaintiffs" which was an "evil" to be avoided by federal courts. *Id.* at 228. The *Wheeler* court also focused upon the administrative difficulties that pre-trial medical tribunals would bring to an already overburdened federal docket. *Id.* at 229.
73. *Id.* at 229; *cf.* Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979) (holding that state law was applicable on policy grounds and distinguishing *Wheeler*).

chusetts statute provided that if the tribunal found for the defendant, the plaintiff was required to post a bond as a prerequisite to pursuing the action further. The bond was to be payable to the defendant to cover court expenses should he prevail.[74]

The *Byrnes* court disregarded outcome determination entirely and held that the policy considerations announced in *Hanna* required that state law be applied.[75] The court found that failure to apply the malpractice law would entice plaintiffs to seek a federal forum to avoid the state screening process and bonding requirement. Thus, the court concluded that it would "simply be inequitable to permit some litigants to bypass the procedure of a tribunal hearing."[76] In addition, the *Byrnes* court undertook a *Byrd*-type balancing analysis and concluded that in the absence of federal policy opposing application of the state malpractice statute, substantive state policy would be "undermined" if the Massachusetts law were not applied.[77]

The inconsistent results reached by the federal district court in *Wheeler* and *Byrnes* were resolved by the First Circuit Court of Appeals in *Feinstein*, where the court, although acknowledging that the same state statute applied in *Byrnes* might "have a significant effect on the outcome of the litigation,"[78] nonetheless deemphasized the importance of the outcome determination test and held that the Massachusetts law must be applied.[79]

Apparently confused as to the proper test to apply, the *Feinstein* court relied upon the oft-cited "talisman" language of *Hanna*[80] as a springboard for a policy discussion devoid of any actual balancing of the respective state and federal interests.[81] The policies considered were those of *Hanna*: discouragement of forum-shopping and avoidance of inequitable administration of the laws. In reaching the conclusion that state law must be applied, the court stated that to do otherwise would

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74. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 1985). The Massachusetts tribunal consisted of a judge, a doctor, and an attorney. *Id.*

75. At one point, the court stated in passing that "[i]t is, of course, possible that the final 'outcome' of the litigation might be substantially the same for a medical malpractice action brought in federal court . . . as it would be for an action brought in the state court system." Byrnes v. Kirby, 453 F. Supp. 1014, 1019 (D. Mass. 1978). This is the only indication the court gave that it recognized the significance of the outcome of the litigation.

76. *Id.*

77. *Id.* at 1019-20. The court also relied upon Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) in finding that the state malpractice bond requirement was a substantive right of the defendant under Massachusetts law. *Id.* at 1019.

78. Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 886 (1st Cir. 1981).

79. *Id.*

80. *Id.* at 884.

81. *Id.* at 885-87. Apparently, the court was unsure as to whether the "weighing test articulated in *Byrd* should be applied in post-*Hanna* cases." *Id.* at 886 n.8. The court also relied upon *Cohen* in the same manner as the *Byrnes* court. *Id.* at 885-86; *see supra* note 78.

violate *Hanna's* "twin aims."[82] Such reasoning begs the question since the court simply assumed what it was trying to prove—that failure to apply the Massachusetts malpractice statute would lead to forum-shopping.

In *Edelson v. Soricelli*,[83] the Third Circuit Court of Appeals relied explicitly upon a policy analysis to hold that the application of a state medical malpractice law was required. The court formulated an *Erie* standard from a hodgepodge of policies gleaned from the *Erie* line of cases.

The *Edelson* court looked to the policies underlying *Erie* and *York* outcome determination and rejected the substance/procedure dichotomy as a framework which "contributes nothing to reasoned discourse."[84] Limiting the holding of *Byrd* to issues presenting affirmative countervailing federal considerations,[85] the court reached three conclusions: (1) the state malpractice arbitration panel law rested on "a strong and explicit state policy"; (2) there were no affirmative countervailing federal interests—in fact, the court found a federal policy favoring arbitration; and (3) outcome determination survived *Byrd*.[86] The court, relying upon *York* for guidance, was reluctant to treat federal plaintiffs differently from state plaintiffs,[87] and drew an analogy between statutes of limitation and the medical malpractice arbitration procedures, finding each to be "a condition precedent to entry into the state judicial system."[88] Thus, the court concluded that *Erie* demanded that federal courts give effect to this "condition precedent."[89]

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82. *Id.* at 886, 889.
83. 610 F.2d 131 (3d Cir. 1979).
84. *Id.* at 133.
85. The Third Circuit read *Byrd* narrowly, finding that "it implicate[d] no more than trial management in federal courts." *Id.* at 141.
86. *Id.* at 138-40. Why the court was concerned with whether outcome determination survived *Byrd* is unclear because the court of appeals never applied the test; in fact, in a subsequent case involving the same state medical malpractice law, the court explicitly disregarded the results of outcome determination. Stoner v. Presbyterian Univ. Hosp., 609 F.2d 109 (3d Cir. 1979). In *Stoner*, the court applied the test of *York* and found that the state law did "not affect the ultimate outcome of the litigation." *Id.* at 110. The court reasoned that the statute was not outcome-determinative because the law permitted any plaintiff who lost in arbitration to obtain de novo review. *Id.* Thus, even though the court found the state law to be "more procedural than substantive" and "not [to] affect the ultimate outcome of the litigation," it nonetheless concluded that the state law could not be disregarded in federal court. *Id.* Rather, the court relied upon the various policy considerations underlying *Erie* that were mentioned in *Edelson*. *Id.* at 110-11.
87. *Edelson*, 610 F.2d at 133. In the court's words: "Federal plaintiffs seeking medical malpractice damages may not have rights superior to state citizen plaintiffs because a fundamental notion underlying *Erie* is that a federal court sitting in diversity merely provides an impartial forum, not a different set of legal rules." *Id.* at 134 (citing Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 164 (3d Cir. 1976)).
88. *Id.*
89. *Id.* at 135. In another case, Kanouse v. Westwood Obstetrical & Gynecological Associates, 505 F. Supp. 129 (D.N.J. 1981), the district court was confronted with an issue similar to the one in *Edelson*. The state rule at issue was a New Jersey rule

Although *Edelson* was noteworthy for its recognition of the continuing viability of outcome determination, the court never actually applied the test. The state statute of limitations in *York* was substantive not because it was "a condition precedent" to state court entry, but because it altered the outcome of the litigation. Many procedural state rules, including pleading requirements and service-of-process rules, must be complied with to gain access into state court, yet *Erie* and its progeny make clear that a federal court need not apply these state rules.

In *Davison v. Sinai Hospital of Baltimore*,[90] a decision affirmed per curium by the Fourth Circuit, the District Court of Maryland was confronted with a state law which required that actions to recover more than $5000 from a health care provider be arbitrated before being brought into state court.[91] At the outset, while explaining that a proper *Erie* test entailed a policy analysis, the court rejected outcome determination as unworkable, and explained that *Hanna* stood for the proposition that the effect of a state rule on a suit's outcome was not "dispositive."[92] Nevertheless, the court proceeded to apply a quasi-outcome determination test.

The outcome determination analysis that the *Davison* court employed focused more upon the state rule's effect on the initial stages of litigation than on the actual outcome on the merits. The court explained that:

> [i]t is clear that the character of litigation would differ drastically if plaintiffs in Maryland state courts were required to submit their claims to an arbitration panel prior to bringing suit and plaintiffs in this [federal] court were not. Such a difference *may or may not ultimately affect the result or outcome of the litigation*. It certainly does, however, *change the nature* . . . of the trial, given that the findings of the panel are admissible in a trial de novo.[93]

Although this is obviously not a description of refined outcome determination, the court did recognize that medical malpractice arbitration stat-

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which, like the Pennsylvania law addressed in *Edelson*, set up procedures for screening medical malpractice cases. N.J. COURT RULE 4:21 (1988) (repealed as of January 2, 1989). The court correctly identified the difference between RDA and REA analyses, and properly described the refined outcome determination test. *Kanouse*, 505 F. Supp. at 130-31. The court explained that "[t]he prevailing test today is the modified outcome determinat[ive] test adopted by the Court in *Hanna*." *Id.* The court also relied upon Ely's commentary for much of this discussion. Then, however, rather than using the *Hanna* test that it had set forth, the court relied on the *Edelson* policy analysis to hold that the state malpractice statute must be applied. *Id.* at 132. The reason given by the court was that failure to apply the state malpractice statute would lead to forum-shopping and would therefore contravene the policies behind the state rule. *Id.* at 131.

90. 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) (per curiam).

91. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (1984).

92. *Davison*, 462 F. Supp. at 780.

93. *Id.* (emphasis added).

utes might "change the nature" of the litigation.[94] The court concluded that because arbitration could affect the outcome of the litigation, the state law must be applied in a diversity action.[95]

In *Hines v. Elkhart General Hospital*,[96] the Seventh Circuit was faced with a state law[97] that required panel review prior to instituting a medical malpractice suit.[98] Utilizing both a *Byrd* balancing test and a *York/Hanna* analysis, the court held that the state law must be applied in federal court. Consequently, the plaintiffs' case was dismissed for failure to file the complaint with a medical review panel.[99]

In its *Byrd* analysis, the court explained that "application of the [arbitration] Act in the federal district courts of Indiana neither detracts from the independence of the federal judicial system nor disrupts the federal system of allocating functions between judge and jury."[100] Furthermore, the court found that submission of a claim to a medical review panel was undeniably an "integral part of the rights and obligations established by the Act," and that, unlike the situation in *Byrd*, application of state law could deprive no one of a jury trial.[101] Citing *Hanna* solely for the proposition that the outcome determinative test must be read in conjunction with the twin aims of *Erie*, the court, without further explanation, concluded that application of the state law in federal court was "consonant with the promotion of these [*Erie*] objectives."[102]

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94. *Id.* The court's reasoning appears to have been derived from the *Hanna* Court's concern for the effect of the state rule on the "character or result of the litigation."
95. *Id.* In DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980), the Fourth Circuit applied an analogous Virginia medical malpractice arbitration statute but used a rationale which contrasted sharply with *Davison*. The state medical malpractice panel's opinion was "admissible as evidence in any action subsequently brought by the claimant in a court of law, but such opinion [would] not be conclusive." VA. CODE ANN. § 8.01-581.8 (1984). The court found that the requirements of the act were so "intimately bound up" with the rights and obligations of the parties as to mandate application of the state law in federal court. *DiAntonio*, 628 F.2d at 290 (citing Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63 (4th Cir. 1965)).

   Applying a *Byrd* balancing test, the court rejected as an "affirmative countervailing federal consideration" claimant's argument that the jury would be unduly influenced by the panel opinion. *Id.* Even though the *Byrd* test was employed, the court distinguished *Byrd* and explained that "[t]here is no exclusion of the jury as there was in *Byrd*. The panel opinion is admissible for the jury's consideration but it is not conclusive." *Id.* at 291.
96. 603 F.2d 646 (7th Cir. 1979).
97. IND. CODE ANN. § 16-9.5-9-2 (Burns 1983 & Supp. 1988).
98. *Hines*, 603 F.2d at 647.
99. *Id.*
100. *Id.* at 648.
101. *Id.*; *see also* Note, *Mandatory State Malpractice Arbitration Boards and the* Erie *Problem:* Edelson v. Soricelli, 93 HARV. L. REV. 1562 (1980) (*York* alone does not provide a solution; rather, *Byrd* balancing is necessary to resolve the issue of whether a federal diversity court should honor state malpractice arbitration requirements).
102. *Hines*, 603 F.2d at 649; *see also* Wells v. McCarthy, 432 F. Supp. 688 (E.D. Mo. 1977) (holding that a state professional malpractice rule must be applied according to the "twin aims of *Erie*").

State laws requiring that medical malpractice claims be heard by an independent panel differ both in the procedures employed and in the ultimate effect a panel's decision has on the outcome of a case. Because outcome determination is concerned only with results, however, the procedural differences between these state laws are irrelevant. The preclusive effect of the tribunal's decision is the only relevant factor under the refined outcome determination test.

The majority of state medical malpractice laws treat the panel's decision merely as additional evidence to be weighed by the jury.[103] These laws are not outcome determinative because the results of state tribunals do not prevent a plaintiff from suing, and thus do not affect a plaintiff's chances of winning on the merits prior to the initiation of suit. Forum-shopping to avoid the tribunal occurs primarily for the purpose of guarding against an unforeseen loss which might later tarnish the lawsuit, but not to increase one's chances of winning on the merits.[104]

A different result would occur if a state statute, such as that of Rhode Island,[105] required malpractice panels to render a determination as to the sufficiency of the evidence before trial. These panels are conducted in a formal trial setting, and their findings as to the merits of the case are preclusive because a finding against the plaintiff would result in dismissal with prejudice. Such laws essentially grant defendants an additional chance at a directed verdict; thus, any plaintiff would wish to sidestep these screening procedures. Avoidance of such laws decreases a plaintiff's chances of losing and thus increases the chances of winning on the merits. Not only should such state laws be deemed outcome-determi-

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103. *See, e.g.*, DEL. CODE ANN. tit. 18, § 6812 (Supp. 1988) (malpractice review panel opinion is admissible as prima facie evidence, but such opinion shall not be conclusive); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (D) (1989) (health care arbitration panel opinion is admissible as evidence at trial and presumed to be correct, with the burden of proving to the contrary being upon the party rejecting the panel's opinion); VA. CODE ANN. § 8.01-581.8 (1989) (malpractice review panel's opinion is only an item of evidence at the trial and not conclusive as to liability or damages).

104. Another reason for avoiding malpractice tribunals is convenience, but this type of forum-shopping is not prohibited under *Erie*. *See* Ely, *supra* note 2, at 710.

105. The United States District Court for the District of Rhode Island, in Hibbs v. Yasher, 522 F. Supp. 247 (D.R.I. 1981), reaffirmed Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978), under an entirely new and substantially different Rhode Island statute. The three-person panel was replaced by a judge who had the power *sua sponte* to subpoena records and individuals to supplement the evidence presented by the parties. State law required that the panel judge, prior to the start of litigation, make a "finding of fact as to whether the evidence, if properly substantiated and viewed in the light most favorable to the Plaintiff, would be sufficient to raise a legitimate question of liability appropriate for judicial inquiry," or whether plaintiff's case was merely an unfortunate medical result. *Hibbs*, 522 F. Supp. at 251. If the finding was one of unfortunate result, the action was dismissed with prejudice. Thus, unlike the state law applied in *Wheeler*, the new statute gave defendants an opportunity for a pre-trial directed verdict. The statute applied in *Hibbs* was subsequently declared unconstitutional by the Rhode Island Supreme Court in Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) and repealed by the state legislature in 1985.

native in the *Hanna* sense, but because the panels are "likely to [constitute] the decisive battle between the litigants,"[106] the laws also significantly affect the character of the litigation.

b. Door-Closing Statutes

In *Szantay v. Beech Aircraft Corp.*,[107] the Fourth Circuit Court of Appeals held that a South Carolina "door-closing" statute[108] did not bar suit in federal court although suit would have been barred if brought in state court.[109] The court announced a test for resolving the *Erie* issue that combined a *Byrd*-type balancing analysis with a *York* outcome determination test. First, the court, relying upon *Byrd*, deemed it necessary to determine if the state rule was "intimately bound up with a state right or obligation," for if it was, it would have to be applied. If the state rule failed this first prong, the *York* outcome determination test was then applied. If application of the state rule would substantially affect the outcome of the litigation, the court would have to apply the rule as long as there were no "affirmative countervailing federal considerations."[110] The *Szantay* decision is treated by district courts within the Fourth Circuit as the authoritative pronouncement on *Erie*.[111]

By placing such a great emphasis upon policy concerns, *Szantay* substantially undercut outcome determination, and at best, was a misconceived combination of *York* and *Byrd*.[112] The *Szantay* test, however,

106. *Wheeler*, 78 F.R.D. at 222.

107. 349 F.2d 60 (4th Cir. 1965).

108. The South Carolina "door-closing" statute prevents a nonresident plaintiff from suing a foreign corporation on a foreign cause of action in South Carolina state court. *Szantay*, 349 F.2d at 62 (discussing S.C. CODE ANN. § 10-214 (Law. Co-op. 1962)).

109. *Id.* at 63.

110. *Id.* at 63-64.

111. *See, e.g.*, Davison v. Sinai Hosp., 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980) (per curiam); Rollins v. Proctor & Schwartz, Inc., 478 F. Supp. 1137 (D.S.C. 1979), *rev'd*, 634 F.2d 738 (4th Cir. 1980); Richards & Assoc. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985).

112. The Fourth Circuit has long been maligned for its understanding of the *Erie* doctrine. In large part, this is because of the Circuit's "laundry-list" paraphrase of the *Erie* doctrine in *Szantay*. The *Szantay* decision has been criticized by commentators and courts alike. Professor Ely cites *Szantay* for the proposition that the Fourth Circuit does not understand the *Erie* doctrine in light of *Hanna*. Ely, *supra* note 2, at 717 n.130. Two other commentators have said: "The important point to note from *Szantay* is the court's indiscriminate use of analysis derived from *Byrd* and *Hanna* without any overt concern for the fact that its discussion was invoking two different versions of *Byrd* and a potentially inconsistent one from *Hanna*." Redish & Phillips, *supra* note 4, at 370-71. Even one district court within the Fourth Circuit has noted its displeasure with the *Szantay* case. In *Rollins*, the United States District Court for the District of South Carolina only reluctantly followed *Szantay* in holding that the same door-closing statute at issue in *Szantay* was to be applied in diversity actions. Recognizing that *Szantay* "has sparked much debate among members of the bench and bar in South Carolina" the court hesitantly concluded that it was required to adhere to precedent "until modified by higher authority." 478 F. Supp. at 1149-52.

has been adopted by at least one other federal circuit.[113]

In *Miller v. Davis*,[114] the Court of Appeals for the Sixth Circuit was presented with the issue of whether to apply a state rule of subject-matter jurisdiction that prohibited the state courts from entertaining actions involving out-of-state trusts.[115] Recognizing the issue as an RDA problem, the court cited *Byrd* and *Hanna* and erroneously concluded that *Hanna* "laid to rest" strict application of the outcome determination test.[116] Relying upon the oft-criticized Fourth Circuit opinion of *Szantay*,[117] the court developed a tripartite test for determining whether a federal court should apply a state rule "when it is enforcing rights created by state law."[118] The court explained, "[i]n view of the federal interest favoring subject-matter jurisdiction and the minimal—if existent—state policy disfavoring it," the state law need not be applied by the district court.[119]

Courts in other circuits have also grappled with door-closing statutes. For example, in *American Sheet Metal v. EM-KAY Engineering Co.*,[120] which involved a suit between an unlicensed subcontractor and a contractor for breach of contract, the issue confronting the federal district court was whether to apply a California law that required contractors bringing suit for the collection of contractual obligations to prove that they were duly licensed.[121] Although the court found that the statute, on its face, "purports to deal with how actions are pled, and the

113. *See* Miller v. Davis, 507 F.2d 308 (6th Cir. 1974).
114. *Id.*
115. *Id.* at 310.
116. *Id.* at 313. The court cited to the section of the *Hanna* opinion containing the REA analysis for the proposition that outcome determination did not survive *Hanna*.
117. *See supra* notes 107-112 and accompanying text. The court also relied upon Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970) (en banc).
118. *Miller*, 507 F.2d at 314. The test the court adopted was quite similar to *Szantay*'s "laundry-list" approach:

    1. If the state provision is the substantive right or obligation being asserted, the federal court must apply it.
    2. If the state provision is a procedural rule which is intimately bound up with the substantive right or obligation being asserted, the federal court must apply it.
    3. If the state provision is a procedural rule which is not intimately bound up with the substantive right or obligation being asserted, but its application might substantially change the outcome of the litigation, the federal court should determine whether state interests in favor of applying the state rule outweigh countervailing federal considerations against application of the rule. If the state interests predominate, the state rule should be adopted.

    Id.
119. *Id.* at 318.
120. 478 F. Supp. 809 (E.D. Ca. 1979).
121. The California statute provides:

    > No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required . . . without alleging and proving that he was a duly licensed contractor.

    CAL. BUS. & PROF. CODE § 7031 (West 1975).

jurisdiction of the state court," it held nevertheless that the state rule tended not to discriminate against nonresidents and therefore should be applied.[122] Furthermore, although the court concluded that the state law was *not* outcome-determinative, it reasoned that outcome determination was not "rigid" and must yield in "appropriate cases."[123]

As an example of a circumstance when outcome determination must yield, the court pointed to service of process, a purely procedural act and one governed by the Federal Rules. This example reveals two ways in which this court's comprehension of the *Erie* doctrine departs from the dictum of *Hanna*. First, since refined outcome determination makes it clear that service of process rules are not outcome-determinative, the California district court appears to have used *York* outcome determination. Second, and more importantly, the fact that the court would consider using outcome determination to decide a conflict between a Federal Rule and a state rule indicates the court's misunderstanding of *Hanna* in general.

Nonetheless, even if the court had applied the refined outcome determination RDA test, it would have reached the same result. The door-closing statute was outcome-determinative because the plaintiff, who was an unlicensed contractor at the start of the litigation, was precluded from suing in state court. Thus *Erie* conflicts involving door-closing statutes will always involve cases where it is possible to sue in a federal forum but not in a state forum, and thus choice of the federal forum is always outcome-determinative in the *Hanna* sense.[124]

c. *Res Judicata Rules*

In *Harrison v. Celotex Corp.*,[125] a Tennessee district court was presented with the issue of whether to apply state or federal res judicata rules. While the federal rule conferred discretion upon the court to determine whether offensive nonmutual preclusion should be applied, the state rule required mutuality of estoppel before offensive collateral estoppel could be invoked.[126] After explaining that the issues were complex because many competing interests had to be balanced,[127] the court announced two separate tests to resolve the problem. The first was based on the *Byrd* balancing analysis, and the other was allegedly taken from *Hanna*.[128]

The court's *Byrd* analysis began with the explanation that the claim upon which plaintiff's motion depended was federally-created because it

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122. *American Sheet Metal*, 478 F. Supp. at 811.
123. *Id.*
124. *See* Ely, *supra* note 2, at 727-28.
125. 583 F. Supp. 1497 (E.D. Tenn. 1984).
126. *Id.* at 1498.
127. *Id.* at 1499.
128. *Id.* at 1501-02.

was based solely upon the preclusive effect of a prior federal judgment.[129] The court drew three conclusions: (1) because the right was federally-created, it could not be bound up with state-created rights and obligations; (2) there was a federal policy favoring federal court determination of the scope of its own judgments; and (3) refusal to apply the state law was not necessarily outcome-determinative.[130] In its only use of *Hanna*, the court was content to explain that application of federal law would not jeopardize the "twin aims of *Erie* as identified in *Hanna*," since there was no danger of forum-shopping and the application of federal law could not result in the inequitable administration of the laws.[131]

Two of these conclusions are flawed. The fact that a right was federally-created does not mean that it cannot conflict with state-created rights. Using the court's reasoning, *Erie* conflicts might never be found: any right of federal origin could not be bound up with state-created rights, and vice-versa. Such an "analysis" allows the court, in essence, to avoid the conflict itself.

While the *Harrison* court used an outcome determination test, its reliance on *Byrd* rather than *York* or *Hanna* is questionable.[132] *Harrison* is an example of a decision which interpreted *Byrd* as balancing the outcome-determinative effect of the state rules against the federal policies implicated.[133] Such an analysis implicitly rejects Ely's position that *Hanna* rejuvenated *York's* outcome determination test and dismissed *Byrd's* balancing analysis.

In *Hunt v. Liberty Lobby, Inc.*,[134] the Court of Appeals for the District of Columbia also was presented with an *Erie*/res judicata problem.[135] The state rule provided that the doctrine of res judicata would not bar a second suit while an appeal was pending,[136] yet the federal rule

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129. *Id.* at 1501. When applying an *Erie* analysis, courts tend to examine whether a right or cause of action was federal or state in origin. Although this might, at first glance, seem a logical way to begin the analysis, the origin of the right, assuming one exists, is of no practical relevance for the *Erie* test.
130. *Id.*
131. *Id.* at 1502.
132. The court stated that in *Byrd*, outcome determination "was not so strong as to require the federal policy to yield." *Id.* at 1501.
133. *See* Chladek v. Sterns Transp. Co., 427 F. Supp. 270 (E.D. Pa. 1977).
134. 707 F.2d 1493 (D.C. Cir. 1983).
135. Two other cases in the District of Columbia Circuit involve *Erie*/res judicata issues, but neither raise true *Erie* problems. *See* Answering Serv., Inc. v. Egan, 728 F.2d 1500 (D.C. Cir. 1984); Semler v. Psychiatric Inst. of Washington, D.C., 575 F.2d 922 (D.C. Cir. 1984). These cases presented conflicts between two *state* res judicata rules rather than between a state and a federal rule. Although the court found both cases to be governed by the *Erie* doctrine, the decisions should have been controlled by the Full Faith and Credit Clause. In fact, in a concurrence to *Egan*, then circuit court Judge Joseph Scalia noted that there was no reason for an *Erie* analysis because there was no conflict between a state and federal law. *Egan*, 728 F.2d at 1507 (Scalia, J., concurring).
136. The state rule was that of Florida, where a defamation action was initially brought by E. Howard Hunt against a newspaper publisher for an article linking him with the assassination of President Kennedy. *Hunt*, 707 F.2d at 1494.

barred such a suit.[137] Using a *York*-type outcome determination test, the court held that application of federal law to the issue would have no "substantial bearing on whether the litigation would come out one way in the federal court and another way in the state court."[138] Consequently, the court reasoned, the federal rule was not outcome determinative and must therefore be applied.[139]

The test employed by the court inverts the refined outcome determination test. Outcome determination is meant to be applied to state, not federal law; if the state law is not outcome determinative, then it need not be applied by a federal court. But in *Hunt*, the court found that because the federal law was not outcome-determinative, it must be applied in federal court.

The primary emphasis of the *Hunt* court was upon *Byrd* policy considerations. Applying a balancing analysis, the court of appeals noted that the strongest interest a federal judicial system "can have is that of determining the scope of its judgments."[140] Therefore, the court reasoned that the federal interest in maintaining an independent judiciary outweighed the rights and obligations of the parties under state law.[141]

When an *Erie* dispute involves res judicata issues, a particularly complex problem emerges. As the context of the problem varies, state res judicata rules can be outcome-determinative. An important question is when the refined outcome determination test should be applied: should a court look to the start of the original action in Forum I or to the subsequent action in Forum II. In diversity actions, different results may be obtained in cases brought first in state court (Forum I), with the subsequent action in federal court (Forum II) than in cases brought in two different federal courts.[142]

While a case is still in Forum I, the rules of res judicata can never be deemed outcome-determinative. At the initiation of litigation, a plaintiff's chances of winning on the merits cannot be affected by the use of that forum's res judicata rules. By definition, res judicata is only applicable when claims or issues are relitigated, and thus will not be considered when a plaintiff initiates suit.

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137. *Id.* at 1497.
138. *Id.* at 1496.
139. *Id.*
140. *Id.*
141. *Id.* at 1496-97. Some courts and commentators are of the view that the Full Faith and Credit Clause, not the *Erie* doctrine, controls the resolution of res judicata problems in *Erie*-type conflicts. *See, e.g.*, Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151 (5th Cir. 1974) (ignoring *Erie* and viewing the Full Faith and Credit Clause and 28 U.S.C. § 1738, the implementing statute, as controlling); Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 750-55 (1976) (*Erie* is a "red herring" in the context of res judicata; instead, the Full Faith and Credit Clause is controlling). The issue is further complicated by the Supreme Court's failure to confront it. *See* Heiser v. Woodruff, 327 U.S. 726, 731-32 (1946).
142. *See* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1725 n.10 (1968).

When the parties attempt to relitigate a case in Forum II, however, res judicata rules are more relevant. Any time state and federal preclusion laws conflict, and application of one would permit the second suit while application of the other would preclude it, the state law may be deemed outcome-determinative. Such a result is inevitable if refined outcome determination is meant to be applied at the start of the suit in Forum II. If, however, outcome determination is intended to be applied at the onset of *all* litigation, that is, at the start of suit in Forum I, res judicata rules are never outcome determinative for the same reasons they are not before judgment is rendered in Forum I.

d. *Terms in a Federal Rule of Civil Procedure Defined by State Law*

In *Kreindler v. Marx*,[143] an Illinois district court was confronted with an interesting RDA issue involving a derivative suit brought under FRCP 23.1. The court explained that FRCP 23.1 requires that a plaintiff be a shareholder both at the time the transaction at issue occurred and at the commencement of the action.[144] The question before the court was whether the status of a shareholder to maintain a derivative suit under FRCP 23.1 was a substantive issue to be determined by reference to state law.[145] Without explaining how state law defined "shareholder," the district court nevertheless held that state law governed that definition under FRCP 23.1.[146] In so doing, the district court disregarded Seventh Circuit precedent which had held that the issue was a procedural one to be controlled by federal law.[147] The *Kreindler* court reasoned, through the use of a *Byrd* analysis, that application of state law was "the better view because there [was] no strong federal interest in establishing a uniform federal definition of 'shareholder' for purposes of diversity suits."[148]

Although the *Kreindler* court reached the result supported by various commentators,[149] it did so without regard to the refined outcome determination test. Under an outcome determination analysis, the court would have also concluded that the state rule defining "shareholder" was substantive and therefore controlling in federal court, because at the onset, the plaintiffs' chances of winning a derivative suit on the merits would be nonexistent if they could not even be certified as "sharehold-

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143. 85 F.R.D. 612 (N.D. Ill. 1979).

144. *Id.* at 614.

145. *Id.*

146. *Id.*

147. H.F.G. Co. v. Pioneer Publishing Co., 162 F.2d 536 (7th Cir. 1947). The *H.F.G.* case, where the Seventh Circuit held that the definition of "shareholder" under Rule 23.1 was controlled by federal law, has been criticized by several commentators. *See* 3B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 23.1, at 17 n.14 (2d ed. 1985); 7A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1827, at 37-28 (1982).

148. *Kreindler*, 85 F.R.D. at 614 n.5.

149. *See supra* note 147.

ers" for purposes of FRCP 23.1. Thus the state rule here could easily be viewed as outcome-determinative.

e. Forum-Selection Clauses

In *Dick Proctor Imports, Inc. v. Sumitomo Corp.*,[150] a Missouri district court considered the enforceability of a contract's choice-of-forum provision.[151] A 118 year-old Missouri Supreme Court decision[152] had held that such clauses divested state courts of jurisdiction and were therefore against public policy.[153] In ignoring state precedent, the *Dick Proctor* court found the venue provision to be "a matter of procedure."[154]

The *Dick Proctor* court relied upon a substance/procedure dichotomy and held that federal common law governed the question of whether the provision was unreasonable or unjust.[155] By simply classifying the issue to be "a matter of procedure," the court avoided what should have been its first inquiry—determining "the favor with which Missouri courts would presently look upon venue limitation provisions."[156] If the Missouri Supreme Court, presented with the same issue, would have overruled its earlier precedent, no *Erie* conflict would have existed, as both federal and state law would have recognized the enforceability of forum-selection clauses.

Another forum-selection clause was examined in *Stewart Organization, Inc. v. Ricoh Corp.*,[157] in which a plurality of five judges of the Court of Appeals for the Eleventh Circuit held that contractual choice-of-forum clauses were enforceable in diversity actions even though such

150. 486 F. Supp. 815 (E.D. Mo. 1980).

151. *Id.* at 818.

152. Reichard v. Manhattan Life Ins. Co., 31 Mo. 518 (1862).

153. *Id.* at 521. The Supreme Court has taken a different view on the validity of forum-selection clauses:

> Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This [latter] view . . . is that such clauses are prima facie valid and should be enforced unless enforcement is shown . . . to be 'unreasonable' under the circumstances.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

154. *Dick Proctor*, 486 F. Supp. at 818.

155. *Id.* The court's conclusion, based on the idea of a general federal common law of contracts in diversity cases, contravenes *Erie*'s denial of the existence of a general federal common law. Without such common law, state law clearly governs. *See also* General Eng'g Corp. v. Martin Marietta Alumina, 783 F.2d 352, 357 (3d Cir. 1986) (holding that state law governs because "the interpretation of forum-selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law"); Snider v. Lone Star Art Trading Co., 672 F. Supp. 977, 982 (E.D. Mich. 1987) (relying upon *General Eng'g* in holding that the enforceability of forum-selection clauses was a contracts question to be governed by state law).

156. *Id.* It is important to note, however, that federal common law still governs the enforceability of choice-of-venue provisions in federal question and admiralty cases. *Bremen*, 407 U.S. at 14.

157. 810 F.2d 1066 (11th Cir. 1987) (en banc), *aff'd*, 487 U.S. 22 (1988).

clauses were violative of state common law.[158] The court determined that since "venue in a diversity case is manifestly within the province of federal law," choice-of-forum issues, which are analogous to those concerning venue, are likewise controlled by federal law.[159] No traditional *Erie* analysis was employed; rather, the court looked to the various federal rules governing venue, including federal statutes,[160] the Federal Rules of Civil Procedure,[161] and federal case law,[162] to demonstrate that there existed a federal interest in enforcing forum-selection clauses.[163]

The Supreme Court affirmed the Eleventh Circuit in *Stewart*, although "under somewhat different reasoning."[164] Finding that the federal diversity statute "was sufficiently broad to control the issue of venue," the court held that application of the federal statute was mandated by the Supremacy Clause.[165] Therefore, according to the Court, a state's common law prohibition against the enforcement of forum-selection clauses should simply be viewed as one of several factors that Congress has instructed federal courts to weigh in resolving motions for transfer of venue.[166] Because an Act of Congress was construed broadly enough to cover the dispute, the Court adeptly side-stepped the potential RDA conflict.[167]

158. *Id.* at 1067-68.
159. *Id.* at 1068.
160. The court pointed to 28 U.S.C. § 1391 (1982) (Congress has provided venue rules for the federal courts by statute). *Stewart*, 810 F.2d at 1068.
161. The court stated that Federal Rules 12(b)(3) and 41(b) "direct the federal courts as to the principles involved in deciding questions of venue." 810 F.2d at 1068.
162. *Id.* at 1068-69. The court cited two cases: National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311 (1964) and The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Although both *Szukhent* and *Bremen* stand for the proposition that federal courts may enforce "reasonable" forum-selection clauses, these cases are not controlling here. *Szukhent*, although a diversity action, concerned the propriety of a clause designating an agent for service of process in an adhesion contract and did not reach the issue of venue presented by a forum-selection clause. *Szukhent*, 375 U.S. at 313 n.2. *Bremen*, on the other hand, is an admiralty case whose general rule that forum-selection clauses are enforceable absent unreasonable circumstances may not be applicable to diversity suits. *Bremen*, 407 U.S. at 9-12.
163. *Stewart*, 810 F.2d at 1068-69; *see also* Allied Prod. Corp. v. Trinidad Petroleum Corp., 570 F. Supp. 1353 (N.D. Ala. 1983) (federal law governs issues concerning venue).
164. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988).
165. *Id.* at 26-27.
166. *Id.* at 30.
167. In a footnote the Court explained:

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

Id. at 27 n.6 (citations omitted).

Justice Scalia, in dissent, avoided the Supremacy Clause issue altogether. Rather, Justice Scalia, falling victim to a trap which has claimed numerous other prey, applied the so-called "twin aims test" to find that state law controlled the

Application of refined outcome determination in *Stewart* should have led to a different result than that reached by the Supreme Court and the Eleventh Circuit. A forum-selection clause is not outcome determinative, for, unlike door-closing statutes, it permits plaintiffs to have their day in court, albeit in a different forum. Forum-selection clauses are used primarily for convenience, so the outcome of the suit is unaffected by their enforcement. Furthermore, if forum-shopping for a favorable result is the chief evil *Erie* sought to preclude, then forum-shopping merely for convenience should not be prohibited.

f. Jury Size

Court of Appeals for the Tenth Circuit, in *Palmer v. Ford Motor Co.*,[168] was confronted with a conflict concerning jury size. A state law requiring a twelve-person jury in civil cases conflicted with a local district court rule permitting civil juries of six.[169] In holding federal law applicable, the court reasoned that the state rule on jury size was not bound up with state created rights and obligations, and therefore if it were applied, the state rule would "infringe on the functions and characteristics of the federal system."[170] The *Palmer* court also found that the failure to apply the state rule would neither affect the outcome of the litigation[171] nor violate the twin objectives of *Erie*, and noted that FRCP 48 favored application of the district court rule.[172]

From the factors weighed by the court, the issue was viewed as one controlled by the RDA. Under the RDA, a state jury-size rule is almost certainly not outcome-determinative. A litigant is no more likely to win or lose with a six-person jury than with a twelve-person jury, and thus, the size of the jury cannot significantly affect the result. The court therefore applied the correct rule, albeit for the wrong reasons.

Treating FRCP 48 as simply another interest to be considered, the court did not address the potential REA problem. Neither did it consider the more difficult issue brought to light: the potential REA conflict between FRCP 48 and state rules requiring twelve-person juries. If, pursuant to FRCP 48, the parties do not stipulate to a reduction in jury size, there is no conflict with the state rule, because application of either rule results in a jury of twelve. If, however, the parties do stipulate to less than twelve jurors under FRCP 48, they probably have waived their state right to a twelve-person jury. A conflict would exist only if the state

question of the validity of a forum-selection clause. *Id.* at 39-41 (Scalia, J., dissenting). The "twin aims" of *Erie* as announced in *Hanna*, however, simply represented the goals of a proper RDA analysis rather than an actual method of analysis.

168. 498 F.2d 952 (10th Cir. 1974).

169. *Id.* at 954.

170. *Id.* at 955.

171. "The outcome of the litigation will not be substantially different when the jury has six, rather than 12, members." *Palmer*, 498 F.2d at 955.

172. *Id.* Federal Rule 48 provides that "[t]he parties may stipulate that the jury shall consist of any number less than twelve."

rights were deemed unwaivable.[173]

g. Jury Vote

In *Masino v. Outboard Marine Corp.*,[174] a state rule requiring a five-sixths majority for a jury verdict conflicted with a federal rule requiring a unanimous verdict. The Court of Appeals for the Third Circuit, relying on *Byrd* and *York*, concluded that the strong federal interest in unanimity outweighed countervailing state policy considerations.[175] In holding the federal rule applicable, the *Masino* court noted that:

> The concern with forum shopping in this case is minimal because the appellants brought suit in federal court even though they had notice that the federal verdict requirement would very likely differ from the one they advocated. This action therefore demonstrates that the rule chosen is not so determinative as to dictate choice of forum.[176]

This type of Monday-morning quarterbacking turns the *York* outcome-determinative test on its head. Rather than looking to the potential outcomes to see if they would differ, the court begged the question by finding that the plaintiff's selection of federal court indicated an intention to be bound by federal law, and therefore, that state law was not outcome-determinative.

The *Masino* court also ignored a compelling argument that the state rule requiring a five-sixths majority was substantive under the refined outcome-determinative test and should be applied in diversity actions. With only a five-sixths majority needed to win, so the argument goes, the chances of winning in state court are mathematically better (and known to be so at the start of litigation) than the chances of winning in federal court. Thus the state law is outcome-determinative in the refined *Hanna* sense.[177]

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173. If the parties could not waive their rights to a jury numbering less than twelve, then it appears that an unavoidable REA conflict would be presented. Since it is doubtful that FRCP 48 would be found to "abridge, enlarge or modify" any state substantive rights under the REA, the Federal Rule would govern. For a discussion of the proper REA standard, *see infra* notes 252-277 and accompanying text.

174. 652 F.2d 330 (3d Cir.), *cert. denied*, 454 U.S. 1055 (1981).

175. *Id.* at 331-32. Curiously, the court of appeals explained that "[t]he federal interest in unanimity, although not rising to constitutional dimensions, is cloaked in a strong tradition. . . ." *Id.* at 332. This analysis makes apparent that the court chose to ignore *Hanna's* apparent break with "tradition."

176. *Id.* at 332.

177. A similar issue was avoided by the district court in Wieser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975). A state law which permitted a five-sixths jury vote was in conflict with the federal rule requiring a unanimous vote. The district court applied the federal rule based on the law of the case doctrine. *Id.* at 101. The court indicated, however, that if it were to have decided the issue, the principles of *Byrd* would have controlled its decision. *Id.*

h. Phantom Party Concept

Hefley v. Textron, Inc.[178] represents one of the rare RDA issues where there was an actual federal rule in conflict with a state rule.[179] Under a Kansas comparative negligence law,[180] joint tortfeasors could be joined as parties for purposes of measuring the extent of their liability notwithstanding that one or the other could be immune from suit. Textron, pursuant to state law, sought to join two immune third-party defendants to a products liability action in federal court.[181] Relying on the federal "phantom party" doctrine, the court refused to formally join the two immune defendants by name and permitted a determination of the phantom parties' proportionate liability.[182]

Textron had made a compelling argument that application of the federal doctrine would adversely affect the scope of its discovery "because discovery from a non-party is more limited than that available from a party. . . ."[183] In rejecting Textron's argument, the court explained that "to any extent that inclusion of the [immune parties] would allow more extensive discovery, which presumably would provide evidence that would persuade the jury to assign a lesser degree of fault to Textron, we conclude that the effect on the outcome of the case is trivial."[184]

Although the *Hefley* court recognized the continued viability of outcome determination after *Hanna*, it did not recognize the refined test.[185] The ultimate issue is whether state rules that permit the joinder of immune parties by name are substantive. Such rules could be considered outcome-determinative from defendant's standpoint in that the joinder of the immune parties may reduce defendant's proportionate share of liability, thus significantly affecting the result. The outcome determination test is applied from the plaintiff's point of view, however, because defendants have no initial opportunity to forum-shop.[186] The joinder of the

178. 713 F.2d 1487 (10th Cir. 1983).

179. Most RDA issues involve whether to apply a state rule or policy in the absence of a conflicting federal rule or policy.

180. KAN. STAT. ANN. § 60-258a(c) (1976).

181. *Hefley*, 713 F.2d at 1497. The two other parties were the United States Government and the Kansas Army National Guard. *Id.*

182. *Id.* at 1496-97. Under the Kansas comparative negligence statute, "an otherwise immune party may nevertheless be joined . . . for the purposes of assessing comparative fault." *Id.* at 1496. Joinder in such a situation, however, is not authorized under the Federal Rules. Stueve v. American Honda Motors Co., 457 F. Supp. 740, 750 (D. Kan. 1978). Thus, to fill the void left by the Federal Rules, the U.S. District Court in Kansas created the "phantom party" concept, allowing a jury to consider the proportionate fault of immune joint tortfeasors without formally joining those tortfeasors as defendants. *Hefley*, 713 F.2d at 1496.

183. *Hefley*, 713 F.2d at 1497.

184. *Id.* "As the [Supreme] Court stated in [*York*], and reaffirmed in *Hanna*, the outcome of a case should be substantially the same in state and federal court." *Id.* (citations omitted).

185. *Id.*

186. Under 28 U.S.C. § 1441 (1982), defendants have the opportunity to forum-shop by

"phantom parties" may potentially decrease the non-immune defendant's liability. Consequently, the plaintiff's chances of collecting more from the non-immune party are decreased if state law is applied and the "phantom parties" are joined by name. The state law is outcome-determinative in the refined sense since it significantly affects the outcome.

i. Notice for Wrongful Death Claim

In the recent case of *Lundgren v. McDaniel*,[187] the Court of Appeals for the Eleventh Circuit confronted an RDA issue involving a Florida wrongful death statute.[188] The state rule required that the plaintiff give written notice to the Florida Department of Insurance when bringing a wrongful death claim against the state; the Department then had six months within which to accept or reject the claim.[189] In *Lundgren*, the plaintiff gave written notice but filed suit prior to expiration of the six-month period.[190] The lower court permitted the plaintiff to amend the complaint in order to avoid a motion to dismiss for failure to abide by the notification requirement.[191]

The Eleventh Circuit affirmed the decision, admitting that it was unaware of how a state court would have treated the issue.[192] The court explained, however, that "even if Florida law requires . . . a trial court to dismiss a complaint filed less than six months after notice, such a Florida rule would be procedural for purposes of the *Erie* doctrine."[193] This conclusion was based upon the court's belief that failure to apply the state rule would not result in "forum shopping [or] inequitable administration of justice" since the complaint could be refiled if dismissed in state court for noncompliance with the notice requirements.[194]

Although the *Lundgren* result was in accord with the results obtained under the outcome determination test, the means employed by the court were not. The Florida notice requirement was passed for the purpose of conserving judicial resources by requiring a plaintiff to give the state time to offer a settlement and avoid litigation. Although these goals might have substantive ends, the state rule is not outcome-determinative.[195] At the onset of litigation, when all options are still available to a Florida plaintiff, the chances of winning in state court under the Florida wrongful death notice requirements are no different from the chances of

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removal of the suit from state to federal court. The outcome-determinative test, however, is only applied at the initiation of suit and not at this stage of the litigation.

187. 814 F.2d 600 (11th Cir. 1987).

188. *Id.* at 605.

189. FLA. STAT. ANN. § 768.28(6) (West 1986 & Supp. 1987).

190. *Lundgren*, 814 F.2d at 605.

191. *Id.*

192. *Id.* at 606.

193. *Id.*

194. *Id.*

195. *See, e.g.*, Ely, *supra* note 2, at 716 (rules which prescribe "the method by which an adversary is given notice" are not outcome-determinative).

winning in federal court without such requirements. The state rule only affects *when* suit can be brought in Florida court, not the results of the case.

j. Tolling Rules

In *Walko Corp. v. Burger Chef Systems, Inc.*,[196] the Court of Appeals for the District of Columbia Circuit, using a unique balancing test,[197] held that a state tolling rule must be applied by a federal court in a diversity case.[198] The court found that the policy concerns underlying state tolling rules were similar to those of the statutes of limitations which the tolling rules were designed to suspend.[199] If the state tolling provisions were not applied, the court reasoned that it "would be tampering with [the] policy choices" made when the state legislature determined the length of the state statute of limitations.[200] Moreover, the court concluded, the policies underlying *Erie*[201] would be subverted if federal courts were allowed to freely disregard state tolling rules.[202]

The result in *Walko* would have been different under the refined outcome determination test. At the outset of litigation, before any options concerning forums have been foreclosed, tolling rules generally do not influence the choice of a forum because such rules have no effect on a litigant's chances of winning on the merits. Therefore, state tolling rules need not be applied by a federal court.

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196. 554 F.2d 1165 (D.C. Cir. 1977).

197. The court's balancing test "hinge[d] on the degree to which state policies, other than those primarily directed to administration of the state judicial system, would be impeded by displacement of the state rule by federal common law." *Id.* at 1170; *cf.* Redish & Phillips, *supra* note 4, at 370-71 (*Walko* court employed "two wholly independent approaches—that of *Hanna* and that of *Byrd*—for deciding the [RDA] issue.").

The District of Columbia Circuit has on other occasions shown an affinity towards balancing policy interests. *See, e.g.*, Department of Defense v. Federal Labor Relations Auth., 659 F.2d 1140, 1151 n.64 (D.C. Cir. 1981) (citing *Byrd* for the refinement of the *Erie* doctrine, and *Hanna* for the proposition that the substance/procedure distinction is no longer adequate), *cert. denied*, 455 U.S. 945 (1982).

198. *Walko*, 554 F.2d at 1167.

199. *Id.* at 1171.

200. *Id.*

201. The policies identified were "the desire to forestall forum-shopping and the conviction 'that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.' " *Id.* at 1170-71 (quoting *Hanna*, 380 U.S. at 467).

202. *Id.* at 1172. The court explained that "nonresident defendants could gain advantage by removal . . . over their diverse adversaries" if federal courts held time-barred cases that would have been within the limitation period in state court. *Id.* Conversely, "if . . . federal courts hear diversity cases not timely by the lights of state tribunals, plaintiffs with large claims against diverse parties may escape the consequences of state law, thus faring better than those to whom the federal courts are closed." *Id.* These disparities, according to the court, would lead to forum-shopping. *Id.*

k. Security for Costs

In *Ilro Productions Ltd. v. Music Fair Enterprises*,[203] a district court devised a test of its own in deciding whether a New York state rule requiring security for costs[204] in suits brought by non-resident plaintiffs should be applied in a diversity action. Under the federal rule, the court, in its discretion, could deny defendant's motion for security for costs. Under the New York rule, however, defendant could claim security for costs as a matter of right.[205] Holding that the state rule applied, the court combined a tripartite policy test,[206] allegedly taken from *Hanna* and from Professor Ely's commentary,[207] with a *York*-like outcome determination test, to create a wholly original basis for its decision.[208]

Under refined outcome determination, the court's conclusion was clearly incorrect. Viewed from the start of the litigation, the difference between the two rules did not make the plaintiff's chances of winning on the merits in state court any greater than his chances of winning in federal court. Thus, the difference in the rules did not encourage forum-shopping and the federal rule should have been applied. The purpose behind the state rule was to discourage groundless suits brought by non-resident plaintiffs against New York citizens.[209] The state law was simply a procedural device which furthered this substantive policy by requiring non-resident plaintiffs to post a security bond when bringing suit. This rule in no way affects a plaintiff's chances of winning since the rules are merely prerequisites for bringing suit.

There appears to be one set of facts which may make this state law outcome-determinative. If an indigent plaintiff is required to post bond and cannot do so, suit could not be brought and then the plaintiff's chances of winning are nullified. It is only under the federal rule that the judge has the discretion to waive the security for costs.

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203. 94 F.R.D. 76 (S.D.N.Y. 1982).
204. N.Y. CIV. PRAC. L. & R. 8501-02 (McKinney 1981).
205. *Ilro*, 94 F.R.D. at 79.
206. The tripartite policy test was as follows:
   (1) elimination of the unfairness of permitting the character or result of a litigation materially to differ because the suit is brought in federal court;
   (2) nullification of the inducement to forum shop that was embodied in the rule of *Swift v. Tyson*; and
   (3) prevention of the undercutting of state policies as expressed in state laws relating to subjects other than the mere management of litigation.

   Id. at 80 (citations omitted).

   The first prong of the test is essentially a variation of the *York* outcome-determinative test. The second part of the test simply states one of the policy concerns of *Erie*. Prong three of the test was derived from *Byrd*'s balancing test.
207. *Id.* (citing Ely, *supra* note 2, at 712-17). It is inconceivable that the court could have relied heavily upon Ely and still have used a series of policy tests. Ely emphasized that there is no longer any room for the balancing of policy interests. *See* Ely, *supra* note 2, at 717 n.130.
208. *Ilro*, 94 F.R.D. at 80.
209. *Id.* at 81.

2. Issues Not Resolvable with Refined Outcome Determination

There are several *Erie* conflicts which are not resolvable within the rejuvenated outcome determination framework. Typically, such problems concern forum-shopping for state rules which have the potential to increase the amount awarded without affecting which party is ultimately victorious.

a. Prejudgment Interest

A difficult question arises when a federal court is confronted with the issue of whether or not to apply state prejudgment interest statutes. A Sixth Circuit district court noted the dilemma presented by prejudgment interest:

> Presumably, state law is followed because prejudgment interest supposedly affects the "outcome." The reason for this holding is not clear. In either state or federal court, a plaintiff is entitled to full compensation for the elements of damage . . . as those elements are defined by state law. Damages must be measured on a particular date. Damages sustained before that date should be increased, and damages sustained or expected after that date should be decreased, to reflect their value on that date. Interest should run . . . from the date selected. . . . Thus, under proper instructions, the matter seems procedural.[210]

In *Frenette v. Vickery*,[211] a district court in the Second Circuit was confronted with the question of whether or not to apply a state law which would have entitled the plaintiffs to twelve percent interest on the larger of two offers of judgment.[212] Without articulating a test, the court found the state law to "clearly create a substantive statutory right in persons suing in the Connecticut courts."[213] To support its decision, the court relied upon two oft-cited claims; that *Hanna* stated that the outcome determination analysis was never intended to be used as a "talisman," and that the "*Erie* goals" would be frustrated by failure to apply state law.[214]

In *Weitz Co. v. Mo-Kan Carpet, Inc.*,[215] the Court of Appeals for the

210. Bass v. Spitz, 522 F. Supp. 1343, 1353 n.23 (E.D. Mich. 1981) (citations omitted).
211. 522 F. Supp. 1098 (D. Conn. 1981).
212. CONN. GEN. STAT. § 52-192a(b) (Supp. 1988).
213. *Frenette*, 522 F. Supp. at 1100.
214. *Id.* Another similarly difficult RDA issue was presented in Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982), where the Court of Appeals for the Second Circuit applied a state breach-day rule rather than the federal judgment-day rule to compute damages in an action involving foreign currency. *Id.* at 867. Although the outcome-determinative test was never mentioned, the court recognized that a plaintiff would be tempted to forum-shop, based on these two damage rules, depending on whether a currency had appreciated or depreciated. *Id.* at 866. Again, as in *Frenette*, the refined outcome determination test is inadequate to address this situation.
215. 723 F.2d 1382 (8th Cir. 1983).

Eighth Circuit was faced with the question of whether federal or state law governed the awarding of prejudgment and postjudgment interest.[216] The federal postjudgment interest statute permits district courts to award interest from the date of judgment in civil actions at a floating rate that follows the yield on United States Treasury bills.[217] Separating the dispute into two issues,[218] the court held that federal law governed the award of postjudgment interest[219] while state law governed prejudgment interest.[220] The court treated the postjudgment interest issue as an *Erie* problem and resolved it by employing a substance/procedure test,[221] Justice Harlan's "primary private activity" standard,[222] an interest analysis,[223] and an "effects on forum-shopping test."[224] With regard to prejudgment interest, the *Weitz* court explained that since federal law was "silent" on the issue, state law must be applied.[225] In so holding, the court misconstrued the problem.

The *Weitz* court applied its homemade *Erie* test to the question of postjudgment interest where it was not called for, and neglected to apply an *Erie* test to the prejudgment interest issue where the test was appropriate. By the express terms of the RDA, the federal postjudgment interest statute, as an "Act of Congress," must be applied by a federal court

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216. The state law at issue was an Iowa postjudgment interest statute, but the rule was not cited by the court. *Id.* at 1385.
217. 28 U.S.C. § 1961(a) (Supp. 1983).
218. *Weitz*, 723 F.2d at 1385-87. This technique, known as *depecage*, is used most often by common law courts in deciding two or more conflicts issues. Depecage allows courts to apply the rules of different states to determine different issues in the same conflicts case. R. CRAMTON, D. CURRIE & H. KAY, CONFLICTS OF LAWS 362 (4th ed. 1987). Use of this practice in the *Erie* context is logical since similar rules can be "substantive" or "procedural" (*i.e.*, outcome-determinative) in different circumstances. *See, e.g.*, Sampson v. Channell, 110 F.2d 754, 756-58 (1st Cir.) (holding that the burden of proof respecting contributory negligence, although procedural according to state law, was substantive for *Erie* purposes), *cert. denied*, 310 U.S. 650 (1940).
219. *See, e.g.*, G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1542 (11th Cir. 1985) (holding that the federal postjudgment interest statute must be applied).
220. *Weitz*, 723 F.2d at 1386.
221. *Id.* at 1386.

> Even if the rate of interest that a judgment will bear is in some sense "substantive," in that it is a part of the damages recovered by the winning side, it is also easily susceptible of characterization as "procedural," since it has to do exclusively with events that occur after a dispute gets to court.

Id.
222. *Id.* "We doubt that anyone plans business conduct on the expectation that if a controversy erupts suit will be filed in federal court, rather than a state court, for the purposes of obtaining the benefit of a federal statute on post-judgment interest." *Id.*
223. *Id.* at 1386-87. The court explained that there was a clear federal interest in enacting a judgment interest statute—to deter frivolous appeals and to encourage prompt payment of judgments. *Id.* No *Byrd* balancing was employed because the court made no mention of possible state interests.
224. *Id.* at 1387. The court explained that applying federal law was "not likely to lead to forum-shopping" since there was no way to know what the interest rate would be until judgment was entered. *Id.*
225. *Id.*

sitting in diversity, notwithstanding contrary state law.[226]

In *Casto v. Arkansas-Louisiana Gas Co.*,[227] an Oklahoma district court showed little comprehension of the RDA in deciding whether a state prejudgment interest statute[228] had to be applied by a diversity court. Observing that there was no federal law on point, the court made note of a variety of tests, briefly discussed *Erie*, *York*, and *Hanna*,[229] and explained that *Erie* could not be reduced to a substance/procedure dichotomy.[230] The court then inexplicably relied upon *Klaxon Co. v. Stentor Electric Manufacturing Co.*[231] for the proposition that federal law was not controlling in the area of prejudgment interest.[232] *Klaxon*, however, was inapposite as it never addressed a conflict between state and federal prejudgment interest statutes. Rather, *Klaxon* stands for the proposition that conflicts of law problems are not exceptions to the *Erie* rule and that a federal court must look to state decisional law in deciding whether to apply another state's prejudgment interest rule.[233]

b. Jury Instructions & Evidentiary Rules Concerning Taxation of Damage Awards

In re Air Crash Disaster near Chicago, Illinois on May 25, 1979[234] involved two cases arising out of the same set of facts. At issue was whether a federal jury should be instructed that personal injury damage awards were non-taxable. In contrast to a federal common law rule, state law did not require that the jury receive an instruction on the tax consequences of personal injury awards.[235] In both suits, the Court of Appeals for the Seventh Circuit held that federal law controlled for reasons of policy, not as a result of any outcome determination analysis.[236]

In its policy analysis, the court identified the procedural interests

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226. 28 U.S.C. § 1652 (1982).

227. 562 F.2d 622 (10th Cir. 1977).

228. The Oklahoma statute provided for prejudgment interest on damages for personal injury from the date suit was filed until the date of verdict. The current version of the statute is codified as amended at OKLA. STAT. ANN. tit. 12, § 727(A)(2) (West Supp. 1989).

229. *Casto*, 562 F.2d at 624. The part of *Hanna* discussed by the court was the section devoted to the REA. *Id.*

230. *Id.*

231. 313 U.S. 487 (1941).

232. *Casto*, 562 F.2d at 624-25.

233. *Klaxon*, 313 U.S. at 497.

234. 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983) [hereinafter *Air Crash I*]; 803 F.2d 304 (7th Cir. 1986) [hereinafter *Air Crash II*].

235. *Air Crash I*, 701 F.2d at 1199 (applying Illinois law); *Air Crash II*, 803 F.2d at 313 (applying Arizona law).

236. *Air Crash I*, 701 F.2d at 1200; *Air Crash II*, 803 F.2d at 314-15. In *Air Crash I*, the court of appeals discussed outcome determination, but stated that the test was "inappropriate here, because we have already determined that increasing awards beyond compensation would be an improper outcome under state law." *Air Crash I*, 701 F.2d at 1200. The "improper outcome" referred to the court's belief that its job was to determine whether an outcome in federal court was contrary to state policy interests. *See id.* at 1199-1200.

underlying the relevant Illinois and Arizona rules.[237] These interests were aimed at preventing instructions which would complicate trials, improperly influence the jury, and invite a flood of cautionary instructions.[238] The court found these state interests to be procedural because "[b]y refusing the nontaxability instruction, [the state] simply [sought] to regulate the internal procedure of its courts . . . not . . . [the] primary conduct of its citizens. . . ."[239] Consequently, the state rule was held inapplicable in diversity actions.[240]

In *Turcotte v. Ford Motor Co.*,[241] the Court of Appeals for the First Circuit was presented with an interesting issue concerning the calculation of wrongful death damages. A federal rule excluding evidence of future income conflicted with a state rule which permitted projected income after taxes to be taken into consideration.[242] The state rule usually resulted in lower damage awards. Although the court applied an outcome determination test, it did not appear to be the refined test of *Hanna*. Rather, the court reasoned that no rational plaintiff would choose the state forum over the federal because "[t]he difference in wrongful death recoveries . . . would be staggering," and concluded that the state rule must be applied in a diversity action.[243]

In applying state law, the court explained that "[u]nder *Erie*, a state rule should be applied in a diversity case if it 'would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.' "[244] Although this statement of the test limits the analysis to the choices available to the plaintiff at the outset of the litigation, it fails to consider that the only type of forum-shopping prohibited is shopping for a favorable result.

c. *Penalties to Encourage Settlement Offers*

Another difficult *Erie* problem was presented in *Jarvis v. Johnson*.[245] There, the Court of Appeals for the Third Circuit was faced with a state law which required ten percent interest to be added to certain damage awards.[246] The rule applied when no settlement offer was made, or when the offer of settlement was twenty-five percent less than the jury verdict.

237. *Air Crash II*, 803 F.2d at 315.
238. *Id.*
239. *Id.*
240. *Id.*
241. 494 F.2d 173 (1st Cir. 1974).
242. *Id.* at 184 n.16. The federal rule was followed by at least three other circuits. *See* Boston & Me. R.R. v. Talbert, 360 F.2d 286 (1st Cir. 1966); Chicago & N.W. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944). All three of these cases were heard on grounds of federal question jurisdiction.
243. *Turcotte*, 494 F.2d at 185.
244. *Id.* (quoting *Hanna*, 380 U.S. at 468 n.9).
245. 668 F.2d 740 (3d Cir. 1982).
246. 42 PA. CONST. STAT. ANN. Rule 238 (Purdon 1987). The rule, which only applied

In holding that the state law must be applied, the court employed an analysis which balanced outcome determination and federal policy interests.[247] The court concluded that failure to apply the state rule in federal court would encourage forum-shopping, and that no countervailing federal interests were offended by application of the state rule.[248]

Although the *Jarvis* court did not use the refined outcome determination test, it was on a similar track. Relying upon *York* outcome determination, the court concluded that "the existence of [the state rule] has a clear and undeniable effect on the monetary outcome of a suit," and was thus outcome-determinative.[249] This was not a completely accurate use of refined outcome determination since it failed to recognize that the state law had no impact on who would win on the merits. The court's analysis, however, was far closer to Ely's framework than that of other courts that have dealt with similar problems. Recognizing that the state rule impacted upon the "monetary outcome" of the suit, the court found it to be outcome-determinative.

d. Application of Outcome Determination to RDA Conflicts Involving Monetary Differences

In cases such as *Frenette, Weitz, Casto, Air Crash, Turcotte* and *Jarvis*, it is difficult to fault the courts for failing to apply a traditional *Erie* analysis. It is understandable that courts choose to look at policy concerns since *Hanna's* refined outcome determination test looks at only the rules' effect on who wins or loses and thus does not resolve the conflict.

The difficulty with these issues under the traditional *Erie* analysis is that it is not clear whether the potential for a larger monetary award increases the chances of winning on the merits. A state law which provides a successful plaintiff with interest on an unaccepted settlement offer does not appear to increase a plaintiff's chances of winning on the merits; it simply increases the *amount* the plaintiff obtains if victorious.[250]

The issue is whether refined outcome determination precludes *only* result-oriented forum-shopping or limits forum-shopping for a larger monetary award as well. Language from the *Hanna* opinion suggests that the Court was concerned with both types of forum-shopping. The Court queried whether the state rule would significantly affect "the *char-*

to personal injury and property damage actions, was designed to encourage settlements and lessen docket congestion.

247. *Jarvis*, 668 F.2d at 745.

248. *Id.*

249. *Id.*

250. An argument also can be made that any state statute which awards interest on a judgment provides a successful plaintiff with an opportunity to "win" twice—once for damages and once for interest on those damages. Since two favorable outcomes are better than one, the plaintiff's chances of significantly affecting the "character and result of the litigation" can be viewed as greater under the state rule. *See Hanna*, 380 U.S. at 468 n.9.

acter or result of the litigation" as well as the "fortunes" of the litigants.[251] If forum-shopping for a greater award is also an evil *Erie* sought to avert, and if refined outcome determination is capable of managing such issues, then state rules which have the potential to increase monetary awards will always be outcome-determinative.

III. THE RULES ENABLING ACT

A. Hanna v. Plumer

The primary issue of *Hanna v. Plumer*[252] was whether a federal court, sitting in diversity, must apply a state in-hand service rule which conflicted with FRCP 4(d)(1). To resolve such a conflict, the Court held that the REA, and not the RDA, controlled.[253] The REA provides:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . .
>
> *Such rules shall not abridge, enlarge or modify any substantive right*. . . .[254]

As interpreted by Professor Ely, the REA requires a two-pronged analysis. First, the Federal Rule must be "procedural," that is, it must regulate practice and procedure. Second, it must "not abridge, enlarge or modify" any state substantive right.[255]

Laying to rest the fear that the *Erie* doctrine might be used to permit state law to displace large portions of the federal rules, *Hanna* condemned "the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure."[256] The *Erie* RDA analysis is not applicable when a FRCP is involved because by its own terms, the RDA provides that state rules of decision apply "except where . . . Acts of Congress otherwise require or provide."[257] As an "Act of Congress," the REA comes within this exception, and rules enacted pursuant to the REA are judged by its provisions and not those of the RDA. If this were not the case, important sections of the Federal Rules would be overridden by the RDA's outcome-oriented test. Consequently, the REA "must be geared not to the lawsuit's ultimate outcome,

251. *Id.* (emphasis added).
252. 380 U.S. 460 (1968).
253. *Id.* at 470.
254. 28 U.S.C. § 2072 (1982) (emphasis added).
255. Ely, *supra* note 2, at 718-38.
256. *Hanna*, 380 U.S. at 469-70. "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Id.* at 473-74.
257. 28 U.S.C. § 1652 (1982).

but rather to the character of the state provision that enforcement of the Federal Rule in question will supplant."[258]

Another outcome of *Hanna* is that unlike conflicts governed by the RDA, Federal Rules are given a presumption of validity under the REA.

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[259]

Earlier *Erie* decisions interpreting the RDA, which appeared to place the Federal Rules in jeopardy, were distinguished by the Court on the grounds that "the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged."[260] In *Hanna*, however, the Court found the scope of

258. Ely, *supra* note 2, at 721-22.

259. *Hanna*, 380 U.S. at 471.

260. *Id.* at 470. Apparently, the Court was referring to three earlier cases, all of which had been decided on the same day in 1949. *See* Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

In *Woods*, the Court held that a Mississippi door-closing statute, which prohibited corporations not qualified to do business in the state from suing in state courts, must be applied in a diversity action. *Woods*, 337 U.S. at 538. The Court assumed that FRCP 17(b) (capacity of a corporation to sue is governed by the law of the state in which it is incorporated) did not apply, although several commentators have suggested otherwise. *See* HART & WECHSLER, *supra* note 21, at 755; Ely, *supra* note 2, at 728 n.186.

In *Cohen*, the Court held that a federal diversity court was bound to apply a New Jersey statute which required a plaintiff to post a bond securing payment of defense costs in order to bring a shareholder's derivative action. *Cohen*, 337 U.S. at 557. The Court rejected the argument that the state rule conflicted with FRCP 23 (now FRCP 23.1), the corresponding Federal Rule governing shareholder derivative actions. *Id.* at 556.

In *Ragan*, the Court held that FRCP 3 did not govern the manner in which an action was commenced in federal court for purposes of tolling a state statute of limitations. *Ragan*, 337 U.S. at 533. Therefore, the Kansas service rule controlled because it was "an integral part" of the state statute of limitations and *Erie* required that the Court not give the cause of action a "longer life in the federal court than it would have had in the state court." *Id.* at 533-34.

The *Hanna* majority took great care to distinguish *Ragan* as a case in which the Federal Rule had been construed narrowly in order to avoid a clash with the state law. *Hanna*, 380 U.S. at 470 n.12. Justice Harlan's concurrence in *Hanna*, however, placed *Ragan* in jeopardy, because he contended that the case was decided incorrectly. *Id.* at 477. The confusion prevalent among the lower federal courts should have been laid to rest by one of the most recent *Erie* decisions, Walker v. Armco Steel Corp., 446 U.S. 740 (1980), a case whose facts were indistinguishable from those of *Ragan*. In *Walker*, however, the Supreme Court reaffirmed *Ragan*. *See Walker*, 446 U.S. at 750-51.

FRCP 4 sufficiently broad to conflict directly with the Massachusetts rule.

Before the REA test is engaged, a "direct collision" between a Federal Rule and state law must exist.[261] In determining whether a "direct collision" exists, the Federal Rule should be given its "plain meaning" and not read narrowly simply to avoid a conflict with state law.[262]

In *Hanna*, the "clash" between FRCP 4(d)(1) and the state rule was deemed "unavoidable" so that application of the REA analysis was necessary.[263] In holding the Federal Rule valid and controlling, *Hanna* added little to existing REA interpretation. The first half of the REA standard—the requirement that the Federal Rule be procedural—had already been construed by the Court in *Sibbach v. Wilson & Co.*[264] The second prong of the statute, which requires that the Federal Rule not abridge state substantive rights, had never been interpreted by the Supreme Court and remained unconstrued after *Hanna*.

B. The REA Test

1. The First Prong of the REA

The *Sibbach* Court, in affirming the validity of Federal Rules 35 and 37, stated that procedural rules were those used "for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[265] *Hanna*, recognizing that a Federal Rule could have both substantive and procedural characteristics, held that the first prong of the REA is met if the Federal Rule is "rationally capable of classification" as procedural.[266] Justice Harlan, in concurrance, rephrased the first prong as an "arguably procedural" standard.[267] Because the Federal Rules are all "arguably procedural," the first prong of the *Hanna* test does not normally present an obstacle to the application of a Federal Rule.

2. The Second Prong of the REA

The *Hanna* Court did not discuss the "substantive" half of the REA test although such a discussion was warranted. In determining whether application of a FRCP will "abridge, enlarge or modify any substantive right," the initial inquiry is to define the term "substantive." The *Hanna*

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261. Walker v. Armco Steel Corp., 446 U.S. 740, 749-52 (1980).
262. *Id.* at 750 n.9.
263. Hanna v. Plumer, 380 U.S. 460, 470 (1965).
264. 312 U.S. 1, 10 (1940).
265. *Id.* at 14.
266. *Hanna*, 380 U.S. at 472. Professor Ely defines a procedural rule as "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *supra* note 2, at 724. This definition is consistent with the underlying policy of the REA itself, which is to regulate procedure "in the interest of speedy, fair and exact determination of the truth." *Sibbach*, 312 U.S. at 14.
267. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

majority, whether intentionally or not, advanced a definition of a substantive right as a rule not "rationally capable of classification" as procedural.[268] As Justice Harlan pointed out, this definition merely repeats the first prong of the REA analysis, and renders the second prong powerless by giving the Federal Rules an almost invincible quality.[269] Until *Hanna*, the Court had avoided this result by minimizing the substantive effects of state law,[270] or by narrowly construing the Federal Rules.[271]

Another possible way to define "substantive" is found in Justice Harlan's concurrence, where he defined such a rule as one having a "substantial impact on private primary activity"[272] or which "substantially affect[s] those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[273] A substantive law affects primary conduct when it influences one's expectations of how their affairs are to be conducted. In addition, certain nonconduct oriented laws fostering and protecting legal repose also could be classified as substantive laws.[274] Sovereign immunity laws and statutes of limitations are examples of such laws.[275]

Proper application of the second prong of the REA test requires an examination of the purposes and effects of the *state* rule. If the state rule is procedural, the Federal Rule must be applied. If a state law was passed to regulate primary private activity or to protect and foster repose, it is substantive and a Federal Rule which conflicts with it would

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268. *Id.*

269. Justice Harlan's concurrence expressed his apprehension that the majority's "arguably procedural, *ergo* constitutional" test was far too protective of the Federal Rules. *Id.*

270. *See, e.g.*, *Sibbach*, 312 U.S. at 1. Although the *Sibbach* majority rejected the petitioner's argument that application of FRCP 35 would violate her substantive state right to privacy, Justice Frankfurter's dissent indicated that the petitioner may have had a valid point: "That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person." *Id.* at 18 (Frankfurter, J., dissenting). Professor Ely claims that if a state law existed which granted "a right grounded in considerations of bodily privacy, . . . [the REA's] second sentence would preclude application of Rule 35." Ely, *supra* note 2, at 733-34.

271. *See, e.g.*, Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

272. *Hanna*, 380 U.S. at 477 (Harlan, J., concurring).

273. *Id.* at 475; *cf.* HART & WECHSLER, *supra* note 21, at 747 n.1 (substantive rules are "those rules which characteristically and reasonably affect people's conduct at the stage of primary private activity").

274. Ely, *supra* note 2, at 726.

275. Sovereign immunity is intended to immunize the government from liability in order for it to operate more efficiently. *Id.* The procedural goals relate to the management and control of the docket, and are of minor importance compared to their substantive aspects. Statutes of limitations, on the other hand, "are passed for the substantive purpose of relieving people's minds after passage of the designated period." *Id.* Thus, if Congress enacted a statute of limitations for diversity cases, a Federal Rule prescribing such a limitation would not satisfy the second prong of the REA. *Id.* at 726-27.

fail to satisfy the requirements of the second half of the REA. *Hanna* recognized that a state law could have both procedural *and* substantive aims. But such laws would not satisfy the second prong either, for there is no room in the REA for consideration of a state law's procedural aspects.

Recently, in *Burlington Northern Railroad v. Woods*,[276] the Supreme Court advanced what could be a possible exception to the second prong of the REA. The Court explained that even if a Federal Rule were to "incidentally affect litigants' substantive rights," application of that Rule would "not violate [the second prong] if reasonably necessary to maintain the integrity of [the Federal Rules]."[277]

C. *Application of the REA in the Federal Courts*

1. FRCP 2

In *Roberts v. Sears, Roebuck & Co.*,[278] the Court of Appeals for the Seventh Circuit identified a conflict between an Illinois state rule and FRCP 2. The state rule, grounded in the separation of law and equity, required plaintiffs to elect their remedies when filing suit,[279] but FRCP 2 had abandoned the law and equity distinction in federal courts. Roberts, who sought return of a patent, had initially chosen to try his case before a jury in a court of law, and was thereby barred under state law from also seeking a remedy from a state court of equity.[280] Holding that a federal court was not bound by the state "election of remedies" doctrine, the court of appeals cited to *Hanna* and reasoned that application of state law impermissibly violated FRCP 2.[281] For reasons which were unclear, the court explained that it viewed the problem as one controlled by the RDA.[282]

Roberts appears to present a straightforward REA conflict between a state rule and a Federal Rule. The state election of remedies doctrine, which requires that a plaintiff choose relief at law or equity, provides procedural rights by regulating the manner and means for recovery under a substantive cause of action. No substantive rights of the parties were abridged when the Federal Rules were more generous than the state rules by providing both legal and equitable relief. Consequently, since the state law was procedural, application of FRCP 2 did not violate the terms of the REA.

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276. 480 U.S. 1 (1987).
277. *Id.* at 970.
278. 573 F.2d 976 (7th Cir. 1978).
279. *Id.* at 985.
280. *Id.* at 980. In the second suit, plaintiff sought rescission of a contract, a remedy only available in equity.
281. *Id.* at 985.
282. *Id.* at 985 n.9.

2. FRCP 3

REA disputes involving FRCP 3, which states that an action is commenced upon the filing of a complaint, have been addressed in almost every circuit. This issue, which was decided by *Ragan v. Merchants Transfer & Warehouse Co.*,[283] but unsettled by *Hanna*, was finally laid to rest by the Supreme Court's decision in *Walker v. Armco Steel Corp.*[284] *Walker* held that there was no conflict between FRCP 3 and state commencement rules and thus no need for an *Erie* analysis.

One case from the Court of Appeals for the Second Circuit that viewed *Ragan* as overruled by *Hanna* was *Sylvestri v. Warner & Swasey Co.*[285] *Sylvestri* held that FRCP 3 governs the time of commencement of a diversity suit for purposes of a state limitations period.[286] In reaching this result, the court incorrectly used the refined outcome determination test,[287] rather than the REA standard.

In two later Second Circuit cases, *Bratel v. Kutsher's Country Club*[288] and *Zarcone v. Condie*,[289] the same district court reaffirmed *Sylvestri* on the basis of stare decisis. In fact, in *Zarcone*, the court stated that it was "convinced that the rule enunciated in *Ragan* must be followed by the district courts . . . until the Supreme Court directs otherwise."[290] The court explained, however, that for purposes of the present case, it was bound by the position taken by the court of appeals in *Sylvestri*.[291]

Decisions emanating from the Eighth Circuit exemplify the evolution of federal court treatment of the conflict between FRCP 3 and state statute of limitations, and until *Walker*, many courts incorrectly held that FRCP 3 governed the commencement of the limitations period. In *Prashar v. Volkswagen*,[292] for example, the Court of Appeals for the Eighth Circuit held that FRCP 3 was controlling on the issue of when a limitations period began to run, since the state commencement statute

283. 337 U.S. 530 (1949).
284. 446 U.S. 740 (1980).
285. 398 F.2d 598 (2d Cir. 1968).
286. *Id.* at 606. *But cf.* Worldwide Carriers Ltd. v. Aris S.S. Co., 312 F. Supp. 172 (S.D.N.Y. 1970) (concluding that *Sylvestri* and *Hanna* were not controlling, and looking to state law, based on FRCP 64, to determine the commencement date of a special proceeding required under a state provisional remedies statute).
287. It is significant that the court recognized that *Hanna* did "represent a modification, or at least a refinement of the 'outcome determination' test." *Sylvestri*, 398 F.2d at 605. In fact, this court may have been the first to acknowledge the new test. It is indeed paradoxical that in subsequent cases involving an RDA conflict, courts of the Second Circuit have failed to apply the refined test. *See, e.g.*, Frenette v. Vickery, 522 F. Supp. 1098 (D. Conn. 1981); Ilro Prod. Ltd. v. Music Fair Enter., 94 F.R.D. 76 (S.D.N.Y. 1982).
288. 61 F.R.D. 501 (S.D.N.Y. 1973).
289. 62 F.R.D. 563 (S.D.N.Y. 1974).
290. *Id.* at 570.
291. *Id.*
292. 480 F.2d 947 (8th Cir. 1973).

was not an "integral part" of the state statute of limitations.[293] Rather than taking the unsound position that *Hanna* overruled *Ragan*,[294] the court distinguished *Ragan* as a case where "Rule 3 was not controlling since the . . . commencement of action statute was so intimately bound up with the rights and obligations created by the state statute of limitations."[295] The court identified commencement rules as "housekeeping rules . . . dealing only with a mode of enforcing state-created rights," which were consequently incapable of encouraging forum-shopping or encroaching upon state interests.[296]

Prashar was the rule of the Eighth Circuit[297] until the court of appeals corrected itself in the first opportunity presented after the Supreme Court's decision in *Walker*. In *Fischer v. Iowa Mold Tooling Co.*,[298] the Eighth Circuit implicitly overruled *Prashar* and held that state law determined when an action was commenced for purposes of the statute of limitations.[299] The court relied exclusively on *Walker*, which "laid to rest the notion that Rule 3 can ever be used to toll a state statute of limitations."[300]

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293. *Id.* at 951.
294. Most courts which have favored FRCP 3 over the state commencement rule have taken the position that *Ragan* was overruled by *Hanna*. *See, e.g.*, *Walker*, 446 U.S. at 744 n.6.
295. *Prasher*, 480 F.2d at 951.
296. *Id.* at 952. In Chladek v. Sterns Transportation Co., 427 F. Supp. 270 (E.D. Pa. 1977), a district court employed another type of interest analysis to find that a Pennsylvania commencement rule was not an integral part of the state statute of limitations. *Id.* at 274-75. The court gave two reasons why FRCP 3 governed: first, "*Hanna* mandate[d] application of [FRCP] 3"; and second, the federal interest in applying the Federal Rule is "an affirmative, countervailing consideration which sufficiently offsets the possibility that application of the state rule could substantially affect the outcome of the litigation." *Id.* at 275 n.6. This latter analysis demonstrates a plausible, although inapplicable, interpretation of *Byrd* balancing—the state law's effect on the outcome must be weighed against any countervailing federal interests.
297. *See* Walden v. Tulsair Beechcraft, Inc., 96 F.R.D. 34 (W.D. Ark. 1982). This was an interesting decision because it was decided after *Walker*, but before the Eighth Circuit had overruled *Prashar*. The district abided by *Prasher*, and explained that "while we recognize that *Walker* is, of course, mandatory precedent, it is not on point. Rather, *Prashar* is the mandatory precedent practically identical to this cause." *Id.* at 41; *see also* Schinker v. Rudd Mfg. Co., 386 F. Supp. 626 (N.D. Iowa 1974) (adhering to the *Prasher* rule).
298. 690 F.2d 155 (8th Cir. 1982).
299. *Id.* at 156.
300. *Id.* at 157. The Fifth Circuit, in Calhoun v. Ford, 625 F.2d 576 (5th Cir. 1980), also correctly relied on *Walker* in one of the circuit's first *Erie*-type cases decided subsequent to publication of Professor Ely's article. The court was confronted with a case in which, under Louisiana law, the state statute of limitations would have barred the suit, while under FRCP 3, the suit would have been timely. *Id.* at 577. The court addressed the threshold issue of whether a conflict existed between state and federal law, and held that "there [was] no direct conflict because Rule 3 simply [did] not address itself to the question of when the prescriptive period [was] tolled." *Id.* The court noted that *Walker* "made it clear that federal courts should resort to the *Hanna* analysis only when there is a direct conflict between a federal rule and state law." *Id.* For the most part, other courts have ignored this issue, and the

The Court of Appeals for the Tenth Circuit has also had numerous opportunities to resolve conflicts involving FRCP 3. In contrast to the Second and Eighth Circuits, which until *Walker* viewed the Federal Rule as controlling over state law, the Tenth Circuit has consistently held that state tolling rules do not conflict with FRCP 3. Although the court of appeals acknowledged that *Hanna* may have overruled *Ragan*, it felt "compelled to uphold and follow the *Ragan* decision . . . since *Ragan* originated in this Circuit."[301] The *Walker* decision's post-*Hanna* approval of *Ragan* put to rest any concerns the court may have had.

In *Walker v. Armco Steel Corp.*,[302] for example, the court, presented with an alleged conflict between a state tolling provision[303] and FRCP 3, held that *Ragan* mandated application of the state rule.[304] Although the *Walker* court questioned whether *Hanna* might conflict with *Ragan*, it noted that in *Hanna*:

> [T]he outcome determinative test was rejected and the [FRCP] were ruled applicable. However, the court in a footnote distinguished *Ragan* even though *Ragan* had applied the outcome determinative test which the court was engaged in rejecting at least to the extent that pure procedural questions were being decided.[305]

Thus, the Tenth Circuit's adherence to *Ragan* seemed based more on loyalty to a local decision than on reasoning.[306]

3. FRCP 4(h)

In *Witherow v. Firestone Tire & Rubber Co.*,[307] the Court of Appeals for the Third Circuit addressed what it perceived to be a conflict between

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Fifth Circuit's head-on confrontation with the issue may be attributed, in part, to both Ely's article and *Walker.*

301. Rose v. K.K. Masutoku Toy Factory Co., 597 F.2d 215, 218 (10th Cir. 1979).

302. 592 F.2d 1133 (10th Cir. 1979), *aff'd*, 446 U.S. 740 (1980).

303. OKLA. STAT. ANN. tit. 12, § 97 (West 1978). This rule requires that a plaintiff timely file a complaint, as well as issue and serve a defendant with a summons, within the applicable limitations period.

304. *Walker*, 592 F.2d at 1136.

305. *Id.* at 1135-36. Although the district court reached the same result in *Walker*, it viewed the fact that *Hanna* distinguished *Ragan* as meaning that *Ragan* was still good law: "The United States Supreme Court has not been shy to overrule cases expressly, and the fact the Supreme Court not only did not overrule *Ragan*, but in fact distinguished it, in *Hanna*, persuades this Court that *Ragan* still controls." Walker v. Armco Steel Corp., 452 F. Supp. 243, 245 (W.D. Okla. 1978).

306. *Walker*, 592 F.2d at 1136. The court noted that "the Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*." *Id. But see* Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1123 (10th Cir.) (court of appeals properly distinguished FRCP 3 from an Oklahoma tolling provision and found no conflict to exist), *cert. denied*, 444 U.S. 856 (1979).

307. 530 F.2d 160 (3d Cir. 1976). The Third Circuit's *Erie* position is articulated in *Witherow* and Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979). *See supra* notes 83-89 and accompanying text for a discussion of *Edelson*.

state and federal service-of-process rules. The state rule provided that if suit was commenced by writ of summons, the writ had to be served upon the defendant within the applicable limitations period.[308] In contrast, FRCP 4(h) granted discretion to the judge to amend or perfect service of process, even after expiration of the limitations period, if it would not prejudice the rights of the party to be served.[309] When the plaintiff failed to reissue the writ before expiration of the two-year statute of limitations, he sought to amend his defective service under the Federal Rules.[310] Because the court found that the defendant had actual notice and would not be prejudiced by permitting the defective service to be amended,[311] it granted plaintiff's motion to amend.[312] The Court of Appeals for the Third Circuit reversed, holding that *Erie* required application of the state rule.[313]

In finding that the action was time-barred,[314] the court of appeals rejected what it termed the "mechanical interpretation" of *Erie* and its progeny.[315] Citing the "talisman" language of *Hanna*, the court began with a policy analysis comprised of three factors: forum-shopping, equal protection, and federalism.[316] Before finishing this analysis, however, the court shifted ground and found the state statute of limitations to be outcome-determinative because of the policy of repose embodied in the state law.[317]

Initially, the *Witherow* court framed the *Erie* issue in terms of a conflict between state and federal service-of-process rules. Surprisingly, however, it disregarded this problem and decided the case on statute of limitations grounds. Since the action was barred by the state statute of limitations, it is odd that FRCP 4(h) was even considered. Nevertheless, the court held that FRCP 4(h) applied only to formal errors and thus did not apply to a defective service.[318]

If the *Witherow* court had allowed an amendment to the original

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308. 42 PA. CONST. STAT. ANN. Rule 1007 (Purdon 1987). Normally, filing the writ tolled the limitations period for two years from the date of the issuance of the writ.
309. FED. R. CIV. P. 4(h).
310. *Witherow*, 530 F.2d at 162. The defendant, Firestone, removed the case to federal court pursuant to 28 U.S.C. § 1448 (1982). Why the defendant removed the case under these circumstances is unclear since the suit was time-barred by state law. Once removed though, plaintiff was permitted to attempt to cure the defective service by application of FRCP 4(h).
311. *Witherow*, 530 F.2d at 166.
312. *Id.* at 162.
313. *Id.* at 169. The court of appeals concluded that the action would have been time-barred had it remained in state court. *Id.* at 163.
314. *Id.* at 165-66.
315. *Id.* at 163.
316. *Id.* at 164.
317. *Id.* at 166. The court stated that "[w]hile we avoid mechanical application of the 'outcome-determinative' test, or any other single test, we observe that nothing could be more 'substantial' than to allow an action to proceed in federal court which would be time-barred in state court." *Id.*
318. *Id.* at 166-67.

service-of-process, it would have effectively circumvented the state statute of limitations. In situations such as *Witherow*, where state law would not permit a post-limitations period amendment to defective service, an amendment in federal court under FRCP 4(h) might well violate a defendant's substantive right to repose. Because state statutes of limitations are substantive, using a Federal Rule to extend the limitations period beyond that permitted under state law would modify a state substantive right. Thus, although the *Witherow* court did not confront the issue, this *Erie* conflict was one in which application of the Federal Rule might well have violated the terms of the REA Act.

4. FRCP 8(a)(3)

Szantay's[319] influence in the Fourth Circuit was evidenced in *Richards & Associates, Inc. v. Boney*.[320] At issue was a state pleading rule which forbade the stating of a precise monetary amount in malpractice suits seeking over $10,000 in damages.[321] This rule differed from FRCP 8(a)(3), which permits a plaintiff to request the precise amount "to which he deems himself entitled."[322] The *Boney* court held that although the state rule was "procedural," it was " 'intimately bound up' with a substantive state policy" and therefore must be applied in a diversity action.[323] Although the court noted that there was no conflict between the state and federal rules,[324] it nevertheless relied upon *Szantay* and looked to the policy concerns underlying the state rule.[325] Finding these concerns substantive, the court held that state law must be applied even though the rule itself was procedural.[326]

If in fact the court was correct in concluding that no conflict existed, *Erie* would have been inapplicable. The conflict between the state law and FRCP 8, however, seems undeniable here. In *Boney*, the plaintiff filed a complaint in federal court to recover $600,000 in a malpractice action. Specifying the damages was entirely consistent with FRCP 8, which permits plaintiffs to do so at their option. State law, on the other hand, did not permit precise reference to the amount of damages sought when that amount exceeded $10,000. Therefore, when the plaintiff specified damages to be $600,000, federal and state law unavoidably clashed.

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319. *See supra* notes 107-113 and accompanying text for discussion of *Szantay*.
320. 604 F. Supp. 1214 (E.D.N.C. 1985).
321. N.C. GEN. STAT. § 1A-1, Rule 8(a)(2) (1983). For example, the statute does not permit a plaintiff to request $600,000 in damages (as the plaintiff in *Boney* attempted); the request could only be stated as "a sum in excess of $10,000." *Boney*, 604 F. Supp. at 1217.
322. FED. R. CIV. P. 8(a)(3).
323. *Boney*, 604 F. Supp. at 1218 (quoting DiAntonio v. Northampton-Accomack Mem. Hosp., 628 F.2d 287, 290 (1980)).
324. *Id.*
325. *Id.* The substantive policy behind the state rule was to avoid adverse press attention which so often accompanies malpractice suits seeking large damage awards. Jones v. Boyce, 60 N.C. App. 585, 587, 299 S.E.2d 298, 300 (1983).
326. *Boney*, 604 F. Supp. at 1218.

Since FRCP 8 does not *require* a specification of damages, an REA conflict can only exist when a plaintiff fails to plead damages in accordance with state law. As a rule which governs the substance of the pleadings, FRCP 8 satisfies the first half of the REA test because it is at least arguably procedural, but it does not necessarily satisfy the second half of the test. Where, as in *Boney,* the state rule was designed to protect the reputations of the accused in malpractice actions, then application of FRCP 8 would abridge and modify state-created substantive rights of privacy for state health care providers, who are often faced with adverse publicity resulting from lawsuits. In such circumstances, state law must be applied in lieu of FRCP 8 to avoid violating the REA's pronouncement that Federal Rules not infringe upon state substantive rights.

5. FRCP 15(c)

The most widely litigated REA issue, and one that is particularly troublesome for federal courts, concerns FRCP 15(c). Federal Rule 15(c) specifies the conditions under which an amendment to a pleading relates back to the date of the original pleading. Courts are frequently presented with conflicts between FRCP 15(c) and state rules which provide alternative relation-back methods.

The First Circuit decision in *Marshall v. Mulrenin,*[327] is unique in that it *expressly* rejected Professor Ely's REA formulation. Declaring that it did "not accept the 'singularly hard-hearted' view [of Ely] . . . that *Hanna* commands that the Federal Rules be woodenly applied. . ."[328] the court announced what it considered to be the proper test for resolving a conflict between a state rule and a FRCP, one that followed the obsolete substance/procedure dichotomy.[329]

Many district courts, most notably those of the Second Circuit, have ignored the REA in resolving FRCP 15(c) disputes. For example, in

327. 508 F.2d 39 (1st Cir. 1974).

328. *Id.* at 44.

329. *Id.* The court described the test as follows: "We consider *Hanna*'s definitive holding to be contained in its disclaimer of an intent to effect substantive consequences. . . . It merely means that a rule is not to be applied to the extent, if any, that it would defeat rights arising from state substantive law as distinguished from state procedure." *Id.*

With this type of guidance from *Marshall,* perhaps it is not surprising that the district courts of the First Circuit have been somewhat confused. For example, in Covel v. Safetech, Inc., 90 F.R.D. 427 (D. Mass. 1981), the court relied upon *Marshall* to support its adherence to the state relation-back rule. In holding that FRCP 15(c) need not be applied, the court distinguished *Hanna* and argued that it had not changed the rule of *Erie*: "It has been argued [by Ely] that, in view of the stated holding of *Hanna*, the rule of *Erie* is irrelevant to the issue before a court confronted with a clash between a federal rule of civil procedure and state law." *Id.* at 431. The court then rejected this view, and opted for the "twin aims of *Erie*" rather than an REA analysis. Reasoning that the "Massachusetts rule would be relevant both to choice of forum and equitable administration of the laws," the court concluded that the state relation-back rule had to be applied in a diversity action. *Id.*

Holdridge v. Heyer-Schulte Corp.,[330] the court applied the Federal Rule but based its decision on a mixture of policy and generalities.[331] In *Florence v. Krasucki*,[332] in contrast, the court grounded its decision on the principle of stare decisis[333] and the finding that state interests were not impaired by application of the Federal Rule.[334] Finally, in *Applied Data Processing, Inc. v. Burroughs Corp.*,[335] the court applied FRCP 15(c) based upon the belief that *Hanna* had overruled *Ragan*. Adhering to *Sylvestri*,[336] the court reasoned that since FRCP 3 governed the question of when an action was commenced for statute of limitations purposes, similar considerations mandated that FRCP 15(c) govern the question of whether an amendment to a complaint would relate back.[337]

Two Fourth Circuit cases, *Davis v. Piper Aircraft Corp.*[338] and *Goodman v. Poland*,[339] recognized the REA's applicability, yet failed to follow

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330. 440 F. Supp. 1088 (N.D.N.Y. 1977).

331. *Id.* at 1093. The court stated four reasons for following FRCP 15(c): (1) "In general, if a question is covered by a provision of the Federal Rules of Civil Procedure, the federal rule, rather than state law will control"; (2) FRCP 15(c) fulfills "the primary purpose behind a state statute of limitations"; (3) Most other courts which had addressed the issue had also applied the Federal Rule; and (4) FRCP 15(c) was similar to the New York rule and "might very well lead to the same result." *Id.* at 1093 n.2.

If, in fact, the state and Federal Rules were the same or led to the same result, then no plain conflict as contemplated by *Walker* existed, and there was no need for an REA analysis. But the court never examined whether the two rules did in fact lead to different outcomes.

332. 533 F. Supp. 1047 (W.D.N.Y. 1982).

333. The case relied upon was Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). In *Ingram*, the Second Circuit again reaffirmed *Sylvestri* and emphasized that to overrule the decision would require a rehearing en banc. *Id.* at 568. The court stated that they had "no problem in finding that Fed. R. Civ. Proc. 15(c) applies in federal courts not withstanding a possibly more restrictive state practice." *Id.* at 570 n.5.

334. *Florence*, 533 F. Supp. at 1052.

335. 58 F.R.D. 149 (E.D.N.Y. 1973).

336. 398 F.2d 598 (2d Cir. 1968); *see also supra* note 285-287 and accompanying text for a discussion of *Sylvestri*.

337. *Applied Data*, 58 F.R.D. at 152. The *Applied Data* court made two erroneous assumptions. With hindsight, the court's major premise, that *Hanna* overruled *Ragan*, is no longer sound in light of the Supreme Court's decision in *Walker*. Furthermore, the court was mistaken in its conclusion that the same policy considerations form the foundation of both FRCP 3 and FRCP 15(c). State statutes of limitations are passed for the substantive purpose of offering "the right to breathe easy" to potential defendants, and statutes governing the time when an action is commenced are integral parts of limitations periods. Consequently, if FRCP 3 was interpreted as a commencement rule for state statutes of limitations, the second prong of the REA would be violated. Federal Rule 3 does not govern the commencement of an action for statute of limitations purposes because substantive policies of repose would be implicated. Twice, in fact, the Supreme Court has refused to extend the reach of FRCP 3. *See Ragan*, 337 U.S. at 533; *Walker*, 446 U.S. at 750-51. Federal Rule 15(c), on the other hand, governs the amendment of a filed complaint. A potential defendant already has received notice when FRCP 15(c) is applied; therefore, no substantive concerns of repose are presented.

338. 615 F.2d 606 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980).

339. 395 F. Supp. 660 (D. Md. 1975).

through with the requisite analysis.[340] Confronted with circumstances in which the Federal Rule would permit the amendments sought but state law would not, each court summarily concluded that FRCP 15(c) must be applied simply because that Rule violated neither the REA nor the Constitution.[341]

In *Johansen v. E.I. Du Pont De Nemours & Co.*[342] the Court of Appeals for the Fifth Circuit, in applying Rule 15(c) over an equivalent Texas relation-back statute,[343] employed an REA analysis similar to that championed by Professor Ely. The court explained that "Rule 15(c) is a truly procedural rule because it governs the in-court dispute resolution processes rather than the dispute that brought the parties into court,"[344] and therefore, was within the terms of the REA.[345]

Although its analysis was rather brief, the court covered all the necessary bases. While other courts have often used the term "procedural" in a loose sense, *Johansen* advanced a novel definition which was well within the constraints of *Hanna*, and one quite similar to Professor Ely's. Thus, even though Ely was not expressly cited, his influence can be seen. Surprisingly though, only two courts in the Fifth Circuit have ever cited to Ely, and these citations were of a general nature.[346]

Several REA cases in the Tenth Circuit have been decided solely on the grounds that *Hanna* demands a per se application of the Federal Rules in the face of any contrary state rule. In *American Bankers Insur-*

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340. *Davis*, 615 F.2d at 611; *Goodman*, 395 F. Supp. at 683.

341. *Davis*, 615 F.2d at 612; *Goodman*, 395 F. Supp. at 683. Interestingly, *Davis* contained a dissent grounded in the belief that the outcome determination test should have been applied, and that application of this test would have led the court to apply state law. *Davis*, 615 F.2d at 617. The dissent saw *Davis* as representative of a "classic" *Erie* issue.

342. 810 F.2d 1377 (5th Cir. 1987).

343. *Id.* at 1380. The district court had held that plaintiff's amendment to the complaint was time-barred under Texas law. *Id.* at 1379. The Texas law provided that an amendment could only relate back to the original complaint if it contained allegations "based on a new, distinct, or different transaction or occurrence." TEX. REV. CIV. STAT. ANN. art. 5539b (repealed 1985).

344. *Johansen*, 810 F.2d at 1380. Ely defines a "procedural rule" as "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *supra* note 2, at 724.

345. *Id.*

346. *See* Glazer v. J.C. Bradford & Co., 616 F.2d 167, 170 (5th Cir. 1980); Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1192 (5th Cir. 1977), *cert. denied*, 440 U.S. 907 (1979). The reasoning of the *Johansen* court can be contrasted with an earlier Fifth Circuit case, Welch v. Louisiana Power & Light Co., 466 F.2d 1344 (5th Cir. 1972). In *Welch*, a case decided two years prior to publication of Ely's *The Irrepressible Myth of Erie*, the court used the rather rudimentary "test" typical of most other circuits. Faced with a conflict between FRCP 15(c) and a similar state rule, the court held that the Federal Rule applied because of *Hanna's* "strong presumption" in favor of the Federal Rules, and because of the policy concerns supporting their application. *Id.* at 1345-46. The court stated that "the Supreme Court has established a strong presumption that the federal rules govern, rather than state law, in cases involving arguably procedural matters." *Id.* at 1345.

ance Co. v. Colorado Flying Academy, Inc.,[347] for example, the court was presented with a potential conflict between FRCP 15(c) and a state rule.[348] Rather than deciding whether a conflict existed, the court read *Hanna* as rendering any analysis unnecessary since "even if Colorado law did dictate a contrary result, this is a question of federal procedure that is not controlled by Colorado law."[349]

When state law and FRCP 15(c) conflict, the REA would not be infringed by application of the Federal Rule. Any rule which governs the substance of a pleading has procedural overtones, but the more difficult hurdle faced is the application of the substantive half of the REA. A party seeking to prevent an amendment might argue that FRCP 15(c) violates a substantive right of repose by permitting new elements to be included in the pleadings. Such a contention would fail, however, since an amendment under Rule 15(c) only relates back to the original filing if the party against whom an amendment is sought has already received notice within the applicable limitations period. Thus, by the terms of FRCP 15, feelings of repose cannot be impinged upon when a party "has received such notice . . . that he will not be prejudiced in maintaining his defense on the merits."[350] Consequently, no state substantive right is "abridged, enlarged or modified" by application of Rule 15(c).

An interesting twist to the typical Rule 15(c) conflict has been presented on several occasions in the Ninth Circuit, where a potential conflict has been thought to exist between the Federal Rule and a California "John Doe" statute. California law gives plaintiffs who institute an action against an unknown defendant three years from the commencement of the action to discover the identity of the defendant and amend the complaint accordingly.[351] This rule, in essence, serves to toll the applicable limitations period for up to three years. Federal Rule 15(c) requires that notice be given within the state limitations period. Consequently, since the state statute of limitations is incorporated within FRCP 15(c) and not altered by it, no REA conflict exists between the Federal Rule and state rules affecting the length of the limitations period.

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347. 93 F.R.D. 135 (D. Colo. 1982).

348. *Id.* at 137. The conflict was only a "potential" one because the court deemed it unnecessary to examine Colorado state law. Consequently, no specific state law was cited to in the decision.

349. *Id.* (citing *Hanna*, 380 U.S. 460 (1965)). Per se application of the Federal Rules is typical of other Tenth Circuit cases. *See, e.g.*, Smith v. Ford Motor Co., 626 F.2d 784, 797 (10th Cir. 1980) (Wyoming practice is irrelevant because *Hanna* requires that "[t]he Federal Rules of Civil Procedure control this diversity action even where there exists a conflict."), *cert. denied*, 450 U.S. 918 (1981); Saraniero v. Safeway, Inc., 540 F. Supp. 749, 751 (D. Kan. 1982) ("The Federal Rules of Civil Procedure . . . apply to all diversity cases even if they directly conflict with competing state cases."). *See also* Thomas v. Mitchell-Bradford Chem. Co., 582 F. Supp. 1373, 1375 (E.D.N.Y. 1984) (applying FRCP 15(c) without any REA analysis).

350. FED. R. CIV. P. 15(c).

351. CAL. CIV. PROC. CODE § 474, 583.210 (1979 & Supp. 1987).

In *Rumberg v. Weber Aircraft Corp.*,[352] a district court in the Ninth Circuit held that the state "John Doe" rule did not conflict with FRCP 15(c) because "[t]he California statute of limitations scheme . . . does not deal with the 'relation back' doctrine at all but rather extends or tolls the limitations period."[353] The court reasoned that FRCP 15(c) governed amendments sought *after* the limitations period had expired, but in no way affected the actual length of that period,[354] and consequently, no conflict between a federal rule and state rule existed. The court did not, however, consider whether under the RDA the John Doe rule had to be applied by a federal diversity court.

Rumberg has been cited favorably by other courts and commentators[355] and was ultimately adopted as the law of the Ninth Circuit in *Lindley v. General Electric Co.*[356] In addition, in *Brennan v. Lermer Corp.*,[357] another district court took the *Rumberg* analysis one step further and applied an *Erie* outcome determination analysis to the state John Doe rule. After concluding that no conflict existed between the state rule and FRCP 15(c),[358] the court looked to the "twin aims of *Erie*," rejected the refined outcome determination test,[359] and reasoned that failure to apply the state John Doe rule would lead to forum-shopping[360] and inequitable administration of the laws.[361]Accordingly, the court concluded, state law should be applied.[362]

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352. 424 F. Supp. 294 (C.D. Cal. 1976).
353. *Id.* at 300-01.
354. *Id.*
355. 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509, at 158-59 (1982).
356. 780 F.2d 797 (9th Cir.), *cert. denied*, 476 U.S. 1186 (1986). In *Lindley*, the Ninth Circuit rejected the claim that *Hanna* controlled because "the asserted conflict between Rule 15(c) and state Doe practice [was] 'bogus.' " *Id.* at 801. The court viewed the state John Doe rule as a tolling provision, and as such, an integral part of the state limitations period. *Id.*
357. 626 F. Supp. 926 (N.D. Cal. 1986).
358. *Id.* at 934-35. Up to this point, the court's *Erie* analysis was excellent. Relying upon *Walker*, the court recognized that there was no "direct conflict" between the two rules because FRCP 15(c) was "not concerned either with determining or altering the length of the limitations period. Rather, Rule 15(c) [spoke] to the question whether, and under what circumstances, a party may amend his or her complaint *after* the limitations period has already run." *Id.* at 934-35 (emphasis in original).
359. "*Hanna* eschewed the 'outcome-determinative' test, pointing out that *any* procedural differences [were] likely to result in a different outcome." *Id.* at 935 n.12 (emphasis in original).
360. "A device that effectively quadruples the tort statute of limitations can hardly be deemed a procedural triviality unlikely to lead to forum shopping." *Id.* at 936 (quoting Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 110 (1977)).
361. "[T]he disparity between the limitations period available in the two forums creates precisely the kind of inequity with which the *Erie* court was concerned." *Brennan*, 626 F. Supp. at 936.
362. *Id.* at 934-35. There have been several other Ninth Circuit cases involving FRCP 15(c). In Santana v. Holiday Inns, Inc., 686 F.2d 736 (9th Cir. 1982), the court of appeals, faced with a conflict between FRCP 15(c) and an analogous state rule, held without analysis that "*Hanna* commands application of Rule 15(c) in the face of a

The *Brennan* court's finding that the John Doe rule was "part and parcel of the [state] statute of limitations"[363] should have been sufficient to decide the issue. California's John Doe rule has the effect of extending the tort limitations period from one to four years in cases of unidentified defendants. The state rule is outcome-determinative because a plaintiff amending a complaint after expiration of the *original* limitations period would have no chance of winning in federal court in the absence of such a rule. Likewise, if the complaint could not be amended, the defendant could not be sued. Federal Rule 15(c) precludes the amending of a complaint if a defendant is not served with notice until after expiration of the limitations period. If, however, a plaintiff discovers a defendant's identity and is able to amend the original complaint within the applicable limitations period, no *Erie* conflict would exist; the result would be the same under both the state and Federal Rules, and the amendment would be permitted.

6. FRCP 17(a)

In *Shaner v. Caterpillar Tractor Co.*,[364] a district court addressed a conflict between two Federal Rules[365] which permit a defendant employer to be joined as a real party in interest, and a state law[366] which grants immunity to the employer. The court held that to include an em-

contrary state rule." *Id.* at 740. This decision, by giving the Federal Rules a formidable status, stands in direct contrast to the Ninth Circuit's use of *Hanna* in Olympic Sports Products, Inc. v. Universal Athletic Sales Co., 760 F.2d 910 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986). *See infra* notes 437-450 and accompanying text for a discussion of *Olympic Sports*.

A strange decision was handed down by a district court in Cabrales v. County of Los Angeles, 644 F. Supp. 1352 (C.D. Cal. 1986), *aff'd*, 864 F.2d 1454 (9th Cir. 1988), a federal question case brought under 42 U.S.C. § 1983 (1982). In deciding whether to apply FRCP 15(c) or the California John Doe rule, the court explained that:

> Under *Hanna*, state statutes rarely will be held to supersede the Federal Rules of Civil Procedure. This is true despite the fact that under *Erie*, where, as here, state law provides the rule of decision, the federal courts are to rule as would the state courts if the state courts heard the same case.

Cabrales, 644 F. Supp. at 1358 (citations omitted). The court went on to explain that special concerns are present in federal question cases where state law was less restrictive than FRCP 15(c). Touching upon a test akin to balancing, the court stated that in a federal question case, the "federal policies embodied in the Federal Rules of Civil Procedure are entitled to even more weight than they are in a diversity action." *Id.* at 1359. Nevertheless, relying upon *Lindley* and *Brennan*, the *Cabrales* court held that state law was applicable. *Id.* at 1360.

363. *Brennan*, 626 F. Supp. at 930.

364. 483 F. Supp. 705 (W.D. Pa. 1980).

365. FED. R. CIV. P. 17(a), 19.

366. 77 PA. CONS. STAT. ANN. § 481(b) (Purdon Supp. 1987). The statute states that an employer is immune from suit in an action by an employee against a third party to recover damages arising from employment-related injuries. These types of provisions are typically found in state workers' compensation laws and are designed to prevent third-party defendants from impleading employers on the basis of contribution and indemnity.

ployer as a party in the federal diversity action when that employer would have been immune from suit in a similar state action "would in every case produce a different substantive outcome" and invite forum-shopping.[367]

The *Shaner* decision might be explained by the fact that courts are unwilling to find a validly enacted FRCP in violation of the REA. Yet, on the facts of *Shaner*, a persuasive REA argument could be made that joinder of the employer as a party under the Federal Rules violated the terms of the REA. Federal Rules 17 and 19 "regulate matters which can reasonably be classified as procedural"[368] in that they regulate the litigation process by defining who is a real party and who can be joined as such. Immunity granted under state law serves to promote feelings of repose, much like statutes of limitations. A Federal Rule which strips away the substantive right of immunity granted to an employer under state law originally would "abridge, enlarge, or modify [a] substantive right" in violation of the REA.

7. FRCP 17(b)

Several cases have involved conflicts between FRCP 17(b) and state door-closing statutes. The Federal Rule directs the court to the appropriate state law in determining an individual or entity's capacity to sue or be sued. Courts have sometimes perceived *Erie* conflicts when a forum state's law differs from the state law which FRCP 17(b) deems applicable. This REA conflict is the same as the one overlooked by the Supreme Court in *Woods v. Interstate Realty Co.*[369]

In *International Society for Krishna Consciousness v. Lake County Agriculture Society*,[370] an Indiana district court insinuated that the second prong of the REA might have been violated if FRCP 17(b) had been applied. In that case, suit was brought by Hari Krishnas claiming that their first amendment right of free expression had been violated.[371] Indiana law[372] barred the plaintiff's suit because the plaintiff was a nonresident corporation, while FRCP 17(b) provided that a plaintiff's capacity to sue was to be governed by the state law under which the plaintiff was organized.[373] The court held that state law was inapplicable when sub-

367. *Shaner*, 483 F. Supp. at 709.

368. Burlington N.R.R. v. Woods, 480 U.S. 1, 8 (1987).

369. 337 U.S. 535 (1949); *see also supra* note 260.

370. 521 F. Supp. 8 (N.D. Ind. 1980), *vacated and remanded*, 703 F.2d 571 (7th Cir. 1983).

371. The alleged first amendment violation at issue was a decision by the Lake County Agricultural Society requiring that the Krishnas lease a booth at the fair for the purpose of disseminating religious information to the attending public. *Krishna Consciousness*, 521 F. Supp. at 11.

372. IND. CODE ANN. § 23-7-1.1-60(b) (Burns 1984).

373. Because the Hari Krishnas were incorporated in New York, its law would be controlling if this case were decided under FRCP 17(b).

ject-matter jurisdiction was based on a federal question.[374] The court noted, however, that if jurisdiction had been based on diversity or alienage, the door-closing statute would have been considered substantive under *Hanna*, producing a situation in which electing federal over state law would have violated the REA.[375]

McCollum Aviation, Inc. v. CIM Associates, Inc.[376] represents one of the rare cases that applied both prongs of the REA. Whereas the Federal Rule would have required application of the law of the state of incorporation,[377] the forum state's law[378] prevented a corporation from suing in the state courts unless it had obtained the authority to transact business there.[379]

The *McCollum Aviation* court began by explaining that the issue was governed by the REA.[380]

> Under the Enabling Act, Rule 17(b) faces a dual test. First, is it a rule of practice and procedure, as authorized by the Act? 17(b) would meet this test. Second, the Act mandates that rules promulgated under its authority (i.e., the Federal Rules) "shall not abridge, enlarge, or modify any substantive right. . . ." Therefore, the second prong of the test asks whether the Federal Rule abridges any existing substantive [state] right.[381]

Based upon Professor Ely's analysis and the *Hanna* framework, the court found the state law to have both procedural and substantive purposes.[382] The substantive good was to encourage business qualification for the benefit of state citizens.[383] Consequently, the court held that the state rule must be applied over FRCP 17(b) so as not to "abridge an existing substantive right."[384] This conclusion gives the *McCollum Aviation* court the distinction of being the only federal court to have found a Federal Rule to be in violation of the REA's second sentence.

In *Weinstock v. Sinatra*,[385] a hotel owned by Frank Sinatra had been suspended from doing business in California for failing to meet its

374. *Krishna Consciousness*, 521 F. Supp. at 12. This action was brought under 42 U.S.C. § 1983 (1982).
375. *Krishna Consciousness*, 521 F. Supp. at 11 (citing Woods v. Interstate Realty Co., 337 U.S. 535 (1949)). The court's citation to *Woods* was inapt since the *Woods* decision assumed that there was not a conflict involving a Federal Rule.
376. 438 F. Supp. 245 (S.D. Fla. 1977).
377. The law of the state of incorporation determines a corporation's capacity to sue. FED. R. CIV. P. 17(b).
378. FLA. STAT. ANN. § 607.354 (West 1977).
379. *McCollum Aviation*, 438 F. Supp. at 247.
380. *Id.* The court also explained that outcome determination was relegated by *Hanna* solely to RDA issues.
381. *Id.*
382. *Id.* at 248.
383. *Id.*
384. *Id.*
385. 379 F. Supp. 274 (C.D. Cal. 1974).

franchise tax obligations.[386] Under state law, the suspension made it impossible for the hotel either to sue or to be sued in California courts, thereby giving rise to the question of whether a diversity suit could be maintained against the hotel in a California federal court.[387] Although FRCP 17(b) provides that the capacity of a corporation to be sued is determined under the law of the state of incorporation, the court nevertheless held that no REA conflict existed because FRCP 17(b) was applicable only in federal question cases.[388] In allowing the suit to be brought, the court reasoned that to permit an out-of-state defendant to shield himself from suit behind state law would be an "anathema to the philosophy of *Erie*, which purports to eliminate 'discriminations against citizens of the State in favor of those authorized to invoke diversity jurisdiction of the federal courts.' "[389] Without so much as a reference to the RDA or REA, the court gave the hotel the option to reinstate its corporate powers or suffer a default judgment.[390]

Although the *Sinatra* court chose to avoid the problem, FRCP 17(b)'s applicability in diversity cases may result in a direct conflict between that FRCP and state door-closing statutes. Federal Rule 17(b) directs the federal court to the law of the state of incorporation to decide the issue of a party's capacity to sue or be sued. It would be possible for there to be no conflict, even if FRCP 17(b) applied in diversity cases, if the law of the state of incorporation was identical to that of the forum state. If, however, such a conflict were to exist, then the court would have to conduct a difficult REA analysis.

The first prong of the REA is met because FRCP 17(b) is rationally capable of being classified as procedural—it simply directs a court to the applicable substantive law governing a party's capacity to sue or be sued. The second half of the REA, however, proves more troublesome. Professor Ely notes that a state door-closing statute is substantive because "a primary reason jurisdiction [is] denied by the state law [is] to encourage corporate qualification [to do business in the state]."[391] For example, in *Sinatra*, the requirement of corporate qualification was intended to promote payment of corporate taxes. According to Ely, "[t]hat is a substantive goal concerned with something other than the way litigation is to be managed."[392] Consequently, the Federal Rule would undercut a state substantive goal and violate the second prong of the REA.

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386. *Id.* at 275.

387. *Id.*

388. *Id.* at 277. The court cited Angel v. Burlington, 330 U.S. 183 (1947), and Woods v. Interstate Realty Co., 337 U.S. 535 (1949), for this proposition. *But cf.* Ely, *supra* note 2, at 728 (FRCP 17(b) "seems to be" applicable in diversity actions).

389. *Sinatra*, 379 F. Supp. at 277 (quoting *Woods*, 337 U.S. at 538).

390. *Id.*

391. Ely, *supra* note 2, at 728.

392. *Id.*

8. FRCP 25(a)(1)

In *Boggs v. Blue Diamond Coal Co.*,[393] the question presented was whether the time limits for substitution of a new party for a deceased party were controlled by federal or state law.[394] State law permitted substitution if made within one year of the death of a party,[395] while FRCP 25(a)(1) allowed substitution within ninety days after the suggestion of death appeared on the record.[396] In *Boggs*, the substitution would have been time-barred under state law but permitted under FRCP 25(a)(1).[397]

While it devoted much space to its *Erie* analysis[398] and surveyed the relevant cases and commentaries thoroughly, the *Boggs* court nevertheless formulated a convoluted *Erie* test. Although the court recognized that an REA analysis was required, it failed to grasp the significance of this conclusion and included both outcome determination and policy balancing in its REA standard.[399] The court then found balancing "difficult" to apply and likely to lead "to inconsistent results."[400] Similarly, it rejected outcome determination, explaining that:

> Although the "outcome test" has been virtually repudiated by subsequent decisions, its influence on so many cases was such that it continues to cause difficulty, because it is inconsistent with the approach the Court has taken in its more recent decisions, especially *Hanna* . . . and *Walker*. . . .[401]

The court pointed out the frequently-voiced criticism of the *York* outcome determination test, namely that it was over-inclusive because "[a]ny rule of procedure [would] affect the outcome of a case."[402]

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393. 497 F. Supp. 1105 (E.D. Ky. 1980).
394. *Id.* at 1109.
395. KY. REV. STAT. ANN. § 395.278 (Baldwin 1988).
396. Under the Federal Rules, the date of record of the death of the original party is immaterial. *Boggs*, 497 F. Supp. at 1109 n.13.
397. *Id.* at 1107.
398. *Id.* at 1107-24.
399. *Id.* at 1109-14.
400. *Id.* at 1116. It is interesting to note that the court referred to the balancing test in the past tense as if the test was no longer employed by federal courts. The court further explained that "[i]t is not clear whether *Walker* did not 'balance' because it rejected the interest analysis approach or because it found no countervailing federal policy to place in the scale." *Id.* at 1120 n.78. The reasons *Walker* did not balance were two-fold: the balancing analysis was not the proper test to employ in the event there had been an RDA or an REA conflict, and the *Walker* Court was not confronted with a direct conflict between a federal and state rule, so no *Erie* test was called for.
401. *Id.* at 1114-15 (footnotes omitted).
402. *Id.* at 1115. As an example of a recent "significant decision based on the outcome test," the *Boggs* court cited to Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979). Although *Edelson* relied in part on outcome determination, a large portion of the decision is based on policy analysis. *See supra* notes 83-89 and accompanying text for an analysis of the *Edelson* decision.

Apparently, the court did not recognize the possibility that *Edelson's* policy analysis had been made largely irrelevant by *Hanna's* rejuvenation of the outcome

Commenting on the "present state of the law," the *Boggs* court noted that "[i]t may be more feasible to mount an expedition in search of the end of the rainbow or the source of the Nile than to seek a practical, universal test for distinguishing substance from procedure."[403] Expressly rejecting what it viewed as Professor Ely's REA analysis,[404] the court embraced a hybrid of the outcome determination test[405] it had earlier found distasteful. Applying such a test, the court held that FRCP 25(a) must be viewed as procedural since "immediately prior to filing the suit the parties would not consider this rule in evaluating their rights and liabilities."[406] Of course, whether or not the court embraced outcome determination was irrelevant because this was an REA problem.

It does not appear that the *Boggs* court understood how to apply the REA test. The court concluded that, "[u]nder [Ely's] view, a rule would be substantive, and subject to the limitation of the second part of the Enabling Act, if it has any purpose that is non-procedural, even if it also has a procedural purpose."[407] This proposition correctly represents Ely's understanding of the first prong of the REA test. The *Boggs* court, however, reasoned that the problem with Ely's test was that any rule subjected to the *second* prong of the REA would automatically fail to pass its requirements. The court failed to recognize that prior to determining if a FRCP abridges, enlarges or modifies a state right, the initial inquiry of the REA involves first determining whether the state rule in question is substantive. When no state substantive rights are implicated, the terms of the REA cannot and will not be violated.

In a situation such as *Boggs*, where substitution for a deceased party could be made under federal but not state law, application of the Federal Rule appears to violate the terms of the REA. The first prong of the REA is satisfied because substitution for a deceased party is a procedural act which does not impact upon the underlying claim. But rules governing the substitution of deceased parties are intended to protect the repose of decedents' estates by preventing delays in the orderly distribution of assets[408] and thus such rules are also substantive, much like state

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determination test, correcting the overbreadth of the *York* formulation. In a note, the court quoted the *Hanna* outcome determination test, but failed to identify it as such. *Boggs*, 497 F. Supp. at 1116 n.54. In a later note, the court, with little further comment, cited to Ely "for advocacy of a 'rejuvenated outcome determination test.' " *Id.* at 1120 n.78.

403. *Id.* at 1118.

404. *Id.* at 1119. "[T]his court hereby holds that the test proposed by Professor Ely is not the proper one to be applied. The test proposed by the learned commentator is inconsistent with *Sibbach* . . . as reaffirmed in *Hanna*. . . ." *Id.*

405. The court's hybrid outcome determination test combined elements of *Hanna's* refined test and Justice Harlan's *Hanna* concurrence: "[A] substantive rule [is] defined as one which . . . would be meaningful in analyzing the rights and liabilities of parties to a dispute if they were to settle it on the day of filing suit. . . . If a rule does not fit this definition, it is procedural." *Id.* at 1120.

406. *Id.* at 1121.

407. *Id.* at 1119.

408. Cheramie v. Orgeron, 434 F.2d 721 (5th Cir. 1970).

statutes of limitation. If FRCP 25(a) extends the time allowed for substitution beyond that permitted by state law, a substantive state right of repose would be enlarged by application of the Federal Rule and thus would violate the terms of the REA.

9. FRCP 32

In *Frechette v. Welch*,[409] the Court of Appeals for the First Circuit upheld the application of FRCP 32(a)(3)[410] over a more liberal state rule which would have permitted a defendant to use a witness' deposition in lieu of actual testimony.[411] The court's reasoning was sparse, however, apparently because the parties had not raised the REA issue.[412] If they had, the issues would be easily resolved: the state rule, an evidentiary rule governing the admission of testimony in court, is purely procedural, and no state substantive rights were implicated.

10. FRCP 38

On several occasions, the Fifth Circuit has addressed an REA conflict involving state rules that impose mandatory penalties on unsuccessful appellants and a more lenient Federal Rule that leaves imposition of the penalty to the court's discretion. The purpose of such penalties is to "penalize frivolous appeals and appeals interposed for delay . . . and to provide 'additional damages' as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal."[413] Initially viewing the conflict as one governed by the RDA, the Fifth Circuit eventually came to recognize that the REA controlled.

In *Proctor v. Gissendaner*[414] and *Walters v. Inexco Oil Co.*,[415] the Fifth Circuit held that two state statutes,[416] each imposing a penalty

409. 621 F.2d 11 (1st Cir. 1980). This case was significant in that it marked the first time that the First Circuit recognized a distinction between REA and RDA analyses. *Cf.* Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974) (failing to distinguish between RDA and REA tests and rejecting Ely's version of the REA).

410. FRCP 32(a)(3) restricts the substantive use of deposition testimony to those instances where the witness is unavailable for a particular reason such as death or illness.

411. N.H. REV. STAT. ANN. § 517:1 (1974).

412. It is plausible that the parties never raised an REA issue because the First Circuit has yet to recognize the applicability of the REA.

413. Burlington N.R.R. v. Woods, 480 U.S. 1, 4 (1987).

414. 587 F.2d 182 (5th Cir. 1979).

415. 725 F.2d 1014 (5th Cir. 1984).

416. *Proctor* concerned an Alabama law which added ten percent to the damages when a judgment was unsuccessfully appealed. ALA. CODE § 12-22-72 (1975). *Walters* involved an analogous Mississippi penalty of fifteen percent. MISS. CODE ANN. § 11-3-23 (Supp. 1982). The constitutionality of the Mississippi statute was upheld in Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). The Court held that the appellate penalty statute did not violate the equal protection clause of the fourteenth amendment since it was reasonably tailored to achieve the state's legitimate interests of discouraging frivolous appeals, compensating appellees for intangible litigation costs, and conserving judicial resources. *Id.* at 80-85.

upon unsuccessful appellants, must be applied by a federal court.[417] In each case, the court concluded, without applying any formal test, that the state law was "substantive."[418]

Subsequently, recognizing that the state appellate penalties conflicted with FRCP 38, the Fifth Circuit overruled the *Walters* decision in *Affholder, Inc. v. Southern Rock, Inc.*[419] Whereas *Walters* viewed the conflict as one requiring an RDA analysis, *Affholder* correctly found that a direct conflict existed between the state rule and a FRCP because,[420] unlike the state rule, FRCP 38[421] precludes an automatic penalty and permits an appellate court to award damages against an unsuccessful appellant only when it finds an appeal to be frivolous.[422]

The *Affholder* court first determined that "[t]he 'plain meaning' of Rule 38 . . . brings it into 'direct collision' with state law, and the analysis developed from *Hanna* must apply."[423] After applying both prongs of the REA,[424] the court concluded that the state rule could not be applied in federal court. The Federal Rule, the court reasoned, was procedural, because the "[r]ules are not to be construed either to extend or to limit the jurisdiction of these courts in any way."[425] The "more difficult problem" facing the court "was whether rule 38 abridge[d] any 'substantive right,' " thus violating the second prong of the REA test.[426] Dismissing prior cases dealing with the definition of "substantive" for RDA purposes, the court recognized that what may be "substantive" for those purposes may not be necessarily "substantive" under the REA.[427] Thus, *Affholder* held that the second half of the REA was not violated by application of FRCP 38 since the state statute "was not a part of [appellant's]

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417. *Proctor*, 587 F.2d at 184; *Walters*, 725 F.2d at 1016.

418. *Proctor*, 587 F.2d at 184; *Walters*, 725 F.2d at 1017. For the most part, state laws assessing a penalty for unsuccessful appeals do not affect plaintiffs. This is because the penalty is based on a percentage of the damage award; a losing plaintiff who appeals has no damage award upon which a penalty can be assessed. The only plaintiffs possibly concerned with these laws are those who can anticipate being confronted with counterclaims for damages or court imposed sanctions. These state laws, however, are not outcome-determinative even for these "clairvoyant" plaintiffs because the penalty does not affect the actual outcome. Therefore, even if an RDA outcome determination analysis were the proper course, neither *Proctor* nor *Walters* was correctly decided. These state laws probably were not outcome-determinative in the refined sense. Prior to the initiation of any suit, when all forums were still available, a plaintiff's chances of winning on the merits would be no greater regardless of whether these state laws were applied.

419. 746 F.2d 305 (5th Cir. 1984).

420. *Id.* at 308-09.

421. The *Affholder* court referred to Federal Rule of Appellate Procedure 38, but noted that this rule was identical to FRCP 38. *Id.* at 307.

422. "The federal rule allows the appellate courts to make the determination of when the penalty should apply. . . . The Mississippi statute rejects this case-by-case and on-the-merits analysis, and ordains a mandatory penalty rule." *Id.* at 309.

423. *Id.*

424. This is one of few courts to apply the second prong of the REA test.

425. *Affholder*, 746 F.2d at 309.

426. *Id.* at 310.

427. *Id.*

original cause of action" and therefore could not be substantive.[428]

The *Affholder* court appears to have adopted Justice Harlan's definition of substantive: "Those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity."[429] When the *Affholder* court implied that substantive laws are those which help create the original cause of action, it was expanding upon Justice Harlan's definition.[430]

In *Burlington Northern Railroad v. Woods*,[431] the Supreme Court found the Fifth Circuit's analysis in *Affholder* "persuasive."[432] Confronted with an "unmistakable conflict" between FRCP 38 and an Alabama penalty statute,[433] the Court held that the FRCP governed.[434] As to the first prong of the REA, the Court found that "Federal Rule 38 regulates matters which can reasonably be classified as procedural, thereby satisfying the constitutional standard for validity."[435] Turning to the second prong, the Court held that the Federal Rule did not violate state substantive rights because its "discretionary procedure affects only the process of enforcing litigants' rights and not the rights themselves."[436] Thus, since both prongs of the REA were met, FRCP 38 overrode the Alabama statute.

11. FRCP 41(b)

In *Olympic Sports Products, Inc. v. Universal Athletic Sales Co.*,[437] the Court of Appeals for the Ninth Circuit set out what it considered to be the proper "*Erie* test." The court was presented with the issue of whether to apply FRCP 41(b) or a state rule governing the dismissal of a claim for lack of prosecution.[438] Although the court recognized that two lines of *Erie* cases existed, it failed to identify the distinction between RDA and REA problems or the different standards applied in each.

The *Erie* test articulated in *Olympic Sports* was separated into three parts. First, the court determined whether the federal rule[439] and state

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428. *Id.*

429. *Hanna*, 380 U.S. at 477 (Harlan, J., concurring); *see also* Rosales v. Honda Motor Co., 726 F.2d 259, 262 (5th Cir. 1984) (holding that the Federal Rule did not abridge substantive state rights as it had no effect on "people's conduct at the stage of primary private activity").

430. According to Ely, however, Justice Harlan's definition of "substantive" was not broad enough because it failed to take into consideration those laws which affect an individual's state of mind. Such laws include statutes of limitation and various immunization statutes which provide a sense of repose. Ely, *supra* note 2, at 726.

431. 480 U.S. 1 (1987).

432. *Id.* at 7.

433. *Id.*

434. *Id.* at 8.

435. *Id.*

436. *Id.*

437. 760 F.2d 910 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986).

438. CAL. CIV. PROC. CODE § 583(b) (1976) (repealed 1984).

439. The court used the term "federal rule" to refer to the Federal Rules of Civil Procedure, as well as all other federal rules and policies.

rule were "actually coextensive."[440] In other words, the court queried whether a conflict existed. Second, if a conflict did not exist, the court "would then apply the *Erie* analysis to determine if the federal court should enforce the state rule."[441] Finally, if the federal and state rules did conflict, the "*Hanna* analysis" was then applied.[442]

The court found that since both rules were "coextensive," the "*Hanna* analysis" was applicable. The Ninth Circuit reasoned that "both section 538(b) and rule 41(b) [were] discretionary dismissal statutes under which the trial court considers the housekeeping interests of the court and the reasonable diligence displayed by the parties."[443] The weakness of this reasoning is that if both rules were discretionary in nature and similar in effect, no *Erie* problem would exist, for there would be no conflict. The court in this case should simply have applied FRCP 41(b) without the aid of a "*Hanna* analysis."

The *Olympic Sports* opinion confused the *Erie* doctrine by combining both the REA and RDA lines of cases into a single test. According to the court, a Federal Rule must be applied under the "*Hanna* analysis" once it passes muster under the REA "unless the *Erie* considerations are so strong that they can justify interrupting the normal function of the federal court processes."[444] After assuming that the Federal Rule was valid under the REA,[445] the bulk of the court's analysis was devoted to determining whether "*Erie* considerations require [the court] to enforce the state rule in its place."[446] Applying the refined outcome determination test,[447] the court concluded that "it [was] difficult to conceive that a plaintiff, before filing a lawsuit, might choose a federal forum rather than a state forum in the expectation that rule 41(b) would lead to a different outcome,"[448] since both rules were concerned with the "post-filing conduct of all the parties. . . ."[449] Therefore, the court held, forum-shopping concerns were not present and FRCP 41(b) was applicable.[450] This conclusion is sound but the Ninth Circuit could have reached the same result with far simpler means had it recognized that no REA conflict existed.

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440. *Olympic Sports*, 760 F.2d at 914.
441. *Id.*
442. *Id.*
443. *Id.* at 915.
444. *Id.* at 914-15.
445. No REA analysis was attempted by the court because neither party raised the issue of the rule's validity. *Id.* at 916.
446. *Id.* The "*Erie* considerations" referred to were the oft-cited "twin aims of *Erie*": "the avoidance of forum shopping and unequal administration of justice." *Id.*
447. "The proper query is whether the difference between the two rules would be relevant to plaintiff's initial choice of a forum." *Id.*
448. *Id.*
449. *Id.*
450. *Id.*

12. FRCP 47

Perry v. Allegheny Airlines[451] presented the issue of whether FRCP 47(a) or a state statute governing voir dire was applicable in diversity suits.[452] A direct conflict existed between a Connecticut constitutional provision that gave a party the right to question each juror individually and a Federal Rule that permitted the court to conduct the examination itself. The court implicitly acknowledged and applied the first[453] but not the second prong of the REA test, holding that FRCP 47(a) represented a procedural rule, "essentially 'housekeeping' in nature."[454] No mention was made of the second prong of the test, although it seems that FRCP 47(a) would easily pass muster under the second part of the REA.

The jury selection process is procedural in the sense that it is a mechanism meant to rid the jury of bias and prejudice. Voir dire easily falls within Ely's definition of "procedural," since the rule is designed "to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[455] Consequently, FRCP 47(a) cannot be considered to "abridge, enlarge or modify [a state] substantive right."

It should be noted that although the state rule was set forth in an amendment to the state constitution, this alone does not make the rule substantive. State constitutions contain both procedural and substantive rules. The fact that a rule is found in a constitution may give it heightened stature, but it does not make the rule more substantive than it would be if established by statute or common law.[456]

13. FRCP 51

Platis v. Stockwell[457] involved a conflict between FRCP 51 and a state common law rule which held that failure to give a specific statutory instruction in comparative negligence cases[458] was reversible error, even in the absence of an objection by the parties.[459] Federal Rule 51, by con-

451. 489 F.2d 1349 (2d Cir. 1974).

452. *Id.* at 1351-52. A Connecticut statute amended the state constitution to give counsel an "inviolate" right to question each juror individually. CONN. CONST. art. I, § 19.

453. The only indication the court gave that it recognized the REA test was this statement: "These procedural rules [FRCP 47(a) and Federal Local Court Rule 12(c)] are essentially 'housekeeping' in nature. They transgress neither the terms of the Enabling Act, nor constitutional restrictions." *Perry*, 489 F.2d at 1352 (citations omitted).

454. *Id.*

455. *See* Ely, *supra* note 2, at 724.

456. *Id.* at 724-25 n.171.

457. 630 F.2d 1202 (7th Cir. 1980).

458. The Colorado comparative negligence statute provided that the trial judge must instruct the jury that the plaintiff would be unable to recover if he or she was found to be negligent in the degree of fifty percent or greater. COLO. REV. STAT. § 13-21-111 (1987).

459. *Platis*, 630 F.2d at 1202.

trast, requires that a party object at trial to the failure to give an instruction in order to preserve the error for appeal.

The *Platis* court first found FRCP 51 to be "sufficiently broad" to conflict with the state rule.[460] Applying an REA analysis, the court then held that "Rule 51 is within the ambit of the Enabling Act," because the failure to raise the objection was "not an enlargement, abridgement, or modification of the comparative negligence doctrine. . . ."[461] In holding FRCP 51 applicable, the court reasoned that the Federal Rule was "a procedural directive, aimed at augmenting the fairness and efficiency of the litigation process in federal court."[462]

The *Platis* decision represents an excellent example of a proper REA analysis, and is one of the few cases in which both prongs of the REA were applied. The *Platis* court identified the conflict, found the Federal Rule to be procedural, and determined that no state substantive rights were impinged. It then correctly concluded that application of FRCP 51 did not violate the terms of the REA. Objection rules clearly are guidelines meant to govern the manner in which a trial is conducted, and consequently, are by their nature procedural, even when contained within a substantive comparative negligence statute.

14. FRCP 56

In *Reinke v. O'Connell*,[463] the Eleventh Circuit was faced with the issue of whether to apply a Georgia "contrary expert opinion" rule or the summary judgment standard of FRCP 56. Georgia common law required a plaintiff to produce contrary expert opinion after a physician, in a motion for summary judgment, stated that he was not guilty of malpractice.[464] The court identified the REA conflict and applied the following test: "If the subject matter of the Federal Rule [was] 'arguably procedural,' then the Rule [did] not overstep the REA and [was] therefore to be followed."[465] Because the court determined that the Federal Rule was "arguably procedural," it held that FRCP 56 was applicable.[466] By employing only the first half of the REA, the court came to the inevitable conclusion that the Federal Rule must be applied.[467]

Under the circumstances, however, the *Reinke* court did not have to look to the second part of the REA, which is invoked only when state substantive rights are implicated. The Georgia rule governed burden of proof, and such rules are not ones which tend to affect the primary conduct of state citizens, only the conduct of litigants. Consequently, state

460. *Id.* at 1205.
461. *Id.* at 1205-06.
462. *Id.* at 1206 (quoting Ely, *supra* note 2, at 725).
463. 790 F.2d 850 (11th Cir. 1986).
464. *Id.* at 851.
465. *Id.*
466. *Id.*
467. *Id.*

burden of proof rules are procedural, and if they conflict with FRCP 56 they need not be applied by a federal court.[468]

15. FRCP 62(d)

An intriguing REA problem arose in *Markowitz & Co. v. Toledo Metropolitan Housing Authority*.[469] Federal Rule 62(d) imposed a supersedeas bond requirement on all litigants under specified conditions, while Ohio law[470] exempted a "political subdivision" from posting such a bond.[471] In holding that FRCP 62 "overrode" the state law, the district court, without an REA analysis,[472] reasoned that the Federal Rule "in no way impinge[d] upon the substantive rights" of the appellant since "[j]udgment [had already] been rendered; the rights and obligations of the parties [had] been declared."[473]

Markowitz appears to have reached the correct result. The bond merely affects the timing of payment of litigation costs in the federal system. It is part of the *process* by which an appeal is taken, and thus, can readily be classified as "procedural." Similarly, a state supersedeas bond requirement is also a procedural rule, and a state law exempting certain groups from such a bond requirement is no more "substantive" than the bond requirement itself. The *Markowitz* court was correct in applying the Federal Rule because no state substantive rights were "abridged, enlarged or modified."

IV. CONCLUSION

More than fifty years after *Erie*, the *Erie* doctrine remains in a state of disarray. As one Fourth Circuit district court noted in frustration, "[i]f there has been a spell cast by these *Erie* incantations . . . it has produced more befuddlement than enchantment."[474] Furthermore, of the hundreds of cases involving *Erie* disputes which have arisen since

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468. It is interesting to note that state burden of proof rules would likely be deemed substantive under the RDA, since such rules tend to impact directly upon a plaintiff's chances of succeeding on the merits. *See* Ely, *supra* note 2, at 714.

469. 74 F.R.D. 550 (N.D. Ohio 1977).

470. OHIO REV. CODE ANN. § 2505.12 (Anderson Supp. 1988).

471. *Markowitz*, 74 F.R.D. at 550.

472. The only reference made to the REA was a quotation from the *Hanna* opinion which mentioned the Enabling Act. *Id.* at 551 (quoting *Hanna*, 380 U.S. at 473-74).

473. *Id.*

474. J. Aron & Co. v. Service Transp. Co., 515 F. Supp. 428, 435 n.8 (D. Md. 1981). The issue in *Aron* was whether the district court should give a prior judgment rendered in the same court res judicata effect under Maryland or federal law. The decision devoted nine full pages to a discussion on the *Erie* doctrine. Interestingly, the court noted that it was unnecessary to decide whether an *Erie* conflict existed. *Id.* at 439 n.16. This should have been the first issue addressed, because if no conflict existed, an *Erie* analysis would have been unnecessary. *See also* Haislip v. Riggs, 534 F. Supp. 95 (W.D.N.C. 1981) (court addressed *Erie*/res judicata issue without assessing whether any conflict between state and federal res judicata law existed).

1974, only a handful have employed either a RDA[475] or REA[476] analysis that arguably follows Ely's standard. Lower court *Erie* analyses generally consist of justifications and policy considerations, rather than inquiries about outcome determination or the two prongs of the REA. This trend may be attributable to the fact that courts are reluctant to exchange the flexibility inherent in policy analysis for the complexity and rigidity of Professor Ely's interpretations of the RDA and REA tests.

The RDA test employed most often is a policy analysis that courts have credited to *Byrd*. Since *Byrd* was decided, it has been misconstrued to the point where balancing no longer plays a primary role in the test. The present quasi-*Byrd* analysis usually entails an inquiry into *either* the state or federal interests behind a rule, yet stops short of actually balancing these competing interests as *Byrd* did.[477] *Byrd* requires a two-stage process whereby a court first decides whether the state rule at issue is substantive, and if so, whether the state interest behind the rule outweighs any countervailing federal interests.[478] In application, however, courts usually ignore the first stage of the test and scrutinize either the state *or* the federal interests implicated, or look to extraneous interests, such as the policies underlying the *Erie* doctrine itself.

As justification for the continued viability of *Byrd*,[479] or even for the

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475. *See* Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910 (9th Cir. 1985) (refined outcome determination as part of three-part test composed of a policy analysis), *cert. denied*, 474 U.S. 1060 (1986); Hefley v. Textron, Inc., 713 F.2d 1487 (10th Cir. 1983) (refined outcome determination only); Kanouse v. Westwood Obstetrical & Gynecological Assoc., 505 F. Supp. 129 (D.N.J. 1981) (refined outcome determination and policy analysis); Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105 (E.D. Ky. 1980) (refined outcome determination along with policy balancing and an assortment of other tests). While three of these four courts used the refined test in conjunction with other analyses, *Hefley* was the only case in which the court relied *solely* on the refined outcome-determinative test for its RDA analysis. Two cases recognized refined outcome determination prior to the publication of Ely's article. *See* Neifeld v. Steinberg, 438 F.2d 423, 426 (3d Cir. 1971); Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 605 (2d Cir. 1968).

476. Apparently there are only four cases which have applied both prongs of the REA. *See* Affholder, Inc. v. Southern Rock, Inc., 746 F.2d 305 (5th Cir. 1984); Platis v. Stockwell, 630 F.2d 1202 (7th Cir. 1980); International Soc'y for Krishna Consciousness v. Lake County Agricultural Soc'y, 521 F. Supp. 8 (N.D. Ind. 1980), *vacated and remanded*, 703 F.2d 571 (7th Cir. 1983); McCollum Aviation, Inc. v. CIM Assocs., 438 F. Supp. 245 (S.D. Fla. 1977).

477. *See In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983); Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1st Cir. 1981); Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979); Ilro Prod. Ltd. v. Music Fair Enter., 94 F.R.D. 76 (S.D.N.Y. 1982). For an example of a proper use of *Byrd* balancing, see Masino v. Outboard Marine Corp., 652 F.2d 330 (3d Cir. 1981); Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974).

478. Another plausible interpretation is that *Byrd* balancing required the weighing of the state law's *effect on the outcome* against any countervailing federal interests. *See* Harrison v. Celotex Corp., 583 F. Supp. 1497 (E.D. Tenn. 1984); Chladek v. Sterns Transp. Co., 427 F. Supp. 270 (E.D. Pa. 1977).

479. Many courts have simply assumed that *Byrd* balancing was the proper test, without considering *Hanna's* impact. Weiser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975), is representative of this class of cases. To decide whether a unani-

proposition that *Hanna* marked the death-knell of outcome determination,[480] courts have relied upon one of two excerpts from *Hanna*: (1) " 'outcome-determination' analysis was never intended to serve as a talisman;"[481] and (2) "[t]he outcome-determination test . . . 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."[482] But this approach requires a perverse reading of *Hanna*, because the quoted statements are from sections of the opinion condemning *York*,[483] and not from *Hanna's* discussion of how to conduct a proper RDA analysis.[484] Rather than formulating an actual test, the *Hanna* Court was explaining that "nonsubstantial" or "trivial" disparities between state and federal rules, which could be outcome-determinative under the *York* test, were not the type of variations with which *Erie* was concerned. Ironically, in the footnote immediately following the "twin aims of *Erie*" language, the Court appears to have abandoned the *Byrd* policy analysis altogether.[485]

The continued popularity of *Byrd* in the lower federal courts stems from the fact that it contains the least restrictive RDA test, but the standard has evolved into a policy analysis that has allowed courts to freelance to an extent certainly not envisioned by the Supreme Court. *Byrd* has become a catch-all authority for any *Erie* "test" remotely related to policy analysis. The judicial leeway which policy analysis affords is understandably attractive to judges who on a regular basis must reconcile the competing interests of separate sovereigns. But by its very nature, policy analysis tends to produce widely varied results, as individual judges, in varying contexts where different factors are salient, assign weights to the various state and federal interests implicated.[486] A good

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mous jury verdict was required in diversity cases, the court stated that "the question is one that appears to be controlled by the principles enunciated by the Court in *Byrd*." *Weiser*, 69 F.R.D. at 101; *see also* Rosales v. Honda Motor Co., 726 F.2d 259 (5th Cir. 1984); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983); *In re Air Crash Disaster*, 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983); Hines v. Elkhart Gen. Hosp., 603 F.2d 646 (7th Cir. 1979); Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975); Hibbs v. Yashar, 522 F. Supp. 247 (D.R.I. 1981); Kreindler v. Marx, 85 F.R.D. 612 (N.D. Ill. 1979); Byrnes v. Kirby, 453 F. Supp. 1014 (D. Mass. 1978); Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978).

480. Miller v. Davis, 507 F.2d 308 (6th Cir. 1974).

481. *Hanna*, 380 U.S. at 466-67.

482. *Id.* at 468.

483. *Id.* at 468-69.

484. Ely, *supra* note 2, at 717 n.130.

485. *Hanna*, 380 U.S. at 468 n.9.

486. Balancing places excessive discretion in the hands of judges, and in the process, decreases the likelihood of consistent results.

> The difficulty in applying the *Byrd* test probably stemmed from the fact that there is no scale in which the balancing process called for by that case can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the interest in preserving uniformity of result with the state court. Even if there were

example of the arbitrary nature of policy analysis may be found in a comparison of the tests employed in *In re Air Crash Disaster near Chicago, Illinois on May 25, 1979*,[487] and in the lower court opinion it overturned. At the appellate level, the Seventh Circuit held that, although state law did not require that the jury receive instructions on the tax consequences of personal injury awards, a federal common law rule which required that the jury receive such an instruction must be applied.[488] The Seventh Circuit's decision was based on state policy interests, which the court found to be procedural.[489] This decision overturned a district court ruling which had reached the opposite conclusion using a similar analytical framework:[490] failure to apply state law would violate the twin policy concerns underlying *Erie*.[491] The appellate court looked to the policy interests behind the state rule; the lower court scrutinized the policies promoted by the *Erie* doctrine itself.

Another route many courts have taken to solve RDA conflicts is to use *Hanna's* "twin aims of *Erie*" language as a test in and of itself. Such a mode of analysis is clearly incorrect because the "twin aims" represent motives behind the *Erie* doctrine, not an actual test. Outcome determination is meant to provide courts with the means to assess whether failure to apply a state law would lead to result-oriented forum-shopping. Thus the refined outcome determination test protects the underlying policies of the *Erie* doctrine, and it is fruitless for a court to apply the policies to a problem in lieu of the test itself.

Several methodologies have been employed by courts confronted with REA disputes. One type of analysis gives the Federal Rules an invincible quality by treating them as exceptions to the *Erie* rule or as per se applicable under *Hanna*. Many courts, particularly those of the Tenth Circuit, have read *Hanna* to mandate per se application of a Federal Rule in conflict with a state rule.[492] Courts relying on such reasoning have applied no analysis and occasionally have even failed to mention the REA.[493] Varying the per se approach, a few courts have viewed the Fed-

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> such a scale, the weights to be put in it must be whatever the judges say they are.

C. WRIGHT, *supra* note 19, § 59, at 382-83.

487. 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983).

488. *Id.* at 1200.

489. *Id.* at 1199-1200.

490. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 526 F. Supp. 226 (N.D. Ill. 1981), *rev'd*, 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983).

491. *Id.*

492. *See, e.g.*, Smith v. Ford Motor Co., 626 F.2d 784, 797 (10th Cir. 1980) (Wyoming practice is irrelevant because *Hanna* requires "[t]he Federal Rules of Civil Procedure control this diversity action even where there exists a conflict"), *cert. denied*, 450 U.S. 918 (1981); American Bankers Ins. v. Colorado Flying Academy, 93 F.R.D. 135, 137 (D. Colo. 1982) ("even if Colorado law did dictate a contrary result," FRCP 15(c) is per se applicable); Saraniero v. Safeway, Inc., 540 F. Supp. 749, 751 (D. Kan. 1982) ("The Federal Rules of Civil Procedure . . . apply to all diversity cases even if they directly conflict with competing state cases.").

493. *See, e.g.*, Santana v. Holiday Inns, Inc., 686 F.2d 736, 740 (9th Cir. 1982) (*Hanna*

eral Rules as falling within the purview of the exceptions clause of the RDA: state substantive law applies "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[494] Treating the Federal Rules as exceptions to the general rule of *Erie* again results in their automatic application.[495]

The most common approach taken by courts to resolve conflicts involving the REA has been to formulate standards which have utilized one or a number of elements borrowed from the RDA line of cases. Ignoring *Hanna's* mandate that only the REA is applicable to conflicts involving Federal Rules, courts often delve into an assortment of factors, including interest analyses and outcome determination.[496] Thus if the REA is relied upon at all, it is in conjunction with RDA tests. Some courts, however, have relied solely on the REA but have failed to apply the second prong of the test.[497] Since all the Federal Rules have an arguably procedural purpose, such an approach also results in per se application of the Federal Rules by failing to inquire whether such FRCP abridges, enlarges or modifies a state-created substantive right.

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demands application of Federal Rules in conflict with state rules); Seltzer v. Chesley, 512 F.2d 1030, 1036 (9th Cir. 1975) (without mentioning the REA or applying any analysis, the court held FRCP 51 to be applicable based on *Hanna*); Welch v. Louisiana Power & Light Co., 466 F.2d 1344, 1345 (5th Cir. 1972) (applying FRCP 15(c) due to the "strong presumption" established by the Supreme Court that the Federal Rules control); Thomas v. Mitchell-Bradford Chem. Co., 582 F. Supp. 1373, 1375 (E.D.N.Y. 1984) (applying FRCP 15(c) without an REA analysis).

494. 28 U.S.C. § 1652 (1982).

495. For example, in Kuzmickey v. Dunmore Corp., 420 F. Supp. 226 (E.D. Pa. 1976), the court was faced with a conflict between FRCP 23.1, which governed the practice and pleading of derivative actions in federal courts, and an analogous state rule. Finding that application of the Federal Rule "[fell] within the exception clause of the Rules of Decision Act," the court noted that the Federal Rule must be applied. *Id.* at 230 n.9.

In Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975), a district court also considered the Federal Rules to be "exceptions" to the general *Erie* rule. After explaining that *Erie* required application of substantive state law in a diversity action, the district court stated: "various exceptions to this general rule have been carved out, for example, where the particular issue substantially affects the distributions of trial functions between judge and jury (citing *Byrd*) or where the issue is specifically covered by the Federal Rules or federal law (citing *Hanna*)." *Id.* at 94.

496. *See, e.g.*, Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3d Cir. 1976) (relying on a three factor test in holding a state rule to be applicable over FRCP 4(h): forum-shopping concerns, equal protection under the laws, and federalism); Cabrales v. County of Los Angeles, 644 F. Supp. 1352, 1359 (C.D. Cal. 1986) (in federal question cases, federal rules must be given added weight in any policy balancing); Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985) (in holding FRCP 8(a)(2) applicable, the court looked to policy concerns underlying the state rule); Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105 (E.D. Ky. 1980) (employing policy balancing and outcome determination in holding FRCP 25(a)(1) applicable); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088 (N.D.N.Y. 1977) (considering, among other factors, whether FRCP 15(c) was consistent with the policies underlying a state rule).

497. *See, e.g.*, Reinke v. O'Connell, 790 F.2d 850 (11th Cir. 1986); Ringrose v. Engelberg Huller Co., 692 F.2d 403 (6th Cir. 1982); Perry v. Allegheny Airlines, 489 F.2d 1349 (2d Cir. 1974).

Why the *Erie* doctrine is in such a state of disorder is difficult to determine. *Erie* is not one of the more glamorous legal doctrines. Its intricacy and highly technical nature may lead many parties to overlook it, others to misunderstand it, and courts to avoid it. The manner in which the *Erie* doctrine has evolved has also contributed, in large part, to the lack of comprehension and uniformity throughout the federal system.

The principal Supreme Court cases—*Erie, York*, *Byrd* and *Hanna*—were each attempts to patch up problems associated with earlier forms of the *Erie* test. This corrective measures approach has resulted in the piling up of successive bricks on top of an already shaky foundation. Lower federal courts have been left with the responsibility of sifting through the wreckage to select the applicable *Erie* test: substance-procedure, outcome determination, policy balancing, refined outcome determination, or the two-prong REA test. Rather than choosing a single standard, courts have tended to fabricate analyses of their own. These homemade *Erie* tests often fail to distinguish between RDA and REA problems[498] and are concocted by combining several standards into one construct.[499] Stare decisis often plays a role by binding later courts to earlier versions of incorrect analyses.[500]

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498. *See, e.g.*, Olympic Sports Prod., Inc. v. Universal Athletic Sales Co., 760 F.2d 910 (9th Cir. 1985); Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3d Cir. 1976); Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974); Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985); Covel v. Safetech, 90 F.R.D. 427 (D. Mass. 1981); Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105 (E.D. Ky. 1980); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088 (N.D.N.Y. 1977).

499. *See* Weitz Co. v. Mo-Kan Carpet, 723 F.2d 1382 (8th Cir. 1983); *see also* Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979) (combining *York* outcome determination with the policy factors derived from *Erie* and *Byrd*); Hines v. Elkhart Gen. Hosp., 603 F.2d 646 (7th Cir. 1979) (employing *Byrd* balancing in conjunction with *York* outcome determination and *Hanna's* "twin aims of *Erie*"); Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165 (D.C. Cir. 1977) (balancing state and federal policy interests to give effect to the policies underlying *Erie*); Palmer v. Ford Motor Co., 498 F.2d 952 (10th Cir. 1974) (using *Byrd* balancing, *York* outcome determination, the "twin aims of *Erie*" and the state interest behind application of a FRCP to resolve an RDA issue); Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965) (applying a three-part analysis derived from components of *York* and *Byrd*); Harrison v. Celotex Corp., 583 F. Supp. 1497 (E.D. Tenn. 1984) (balancing the outcome-determinative effect of state rules against the federal policy interest implicated and also relying on the "twin aims of *Erie*"); W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS 260 (1985) (RDA test consists of outcome determination and policy balancing).

500. The Second, Fourth, and Eighth Circuits are particularly illustrative of this phenomenon. Although precedents have been respected, district courts have questioned the validity of the courses they were bound to follow. Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968), which held that FRCP 3 controlled the time of commencement for purposes of state limitations periods, was adhered to by Second Circuit district courts amidst questions concerning *Sylvestri's* correctness. *See, e.g.*, Zarcone v. Condie, 62 F.R.D. 563, 567 (S.D.N.Y. 1974) (questioning whether *Sylvestri* had been correctly decided, but explaining that precedent bound the court to the decision).

Similarly, courts of the Fourth Circuit have religiously followed the pre-*Hanna* opinion, Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965). The validity

The federal system's use of the *Erie* doctrine does not conform to Ely's formulation. If a test's validity could be measured by its use, then refined outcome determination is certainly not the appropriate standard for RDA purposes. Rather, policy analysis in one form or another, which ranks as the most popular test for resolving both RDA and REA conflicts, would be the proper RDA test based on popularity.

Despite the popularity of policy analyses, there is a major problem inherent in such tests. As *Hanna* explained, "[o]ne cannot meaningfully ask how important . . . [a state rule] is without first asking 'important for what purpose?' "[501] *Hanna* clearly indicated that the most significant "purpose" was to prevent opportunities for affecting the final *outcome* of the litigation through the initial choice of forum.[502] The refined outcome determination test took into account this important point, one which most lower courts have yet to grasp.

There are several reasons why refined outcome determination has failed to attract support. First, the test, if it exists at all, exists only by way of dictum from *Hanna*, and it was not until Professor Ely's article that the subtleties of the test were brought to light. Second, outcome determination is often extremely difficult to apply. An after-the-fact determination of the litigants' pre-trial ability to increase their chances of victory through forum-shopping requires one to look to the past in order to predict the odds for success in the future. Third, outcome determination is rigid and is incapable of offering solutions to all RDA problems. Because "outcome" is only measured in terms of the potential for victory, the test fails to weigh the impact of forum-shopping on other results such as additional monetary awards. Finally, refined outcome determination may be disfavored because it fails to "adequately accommodate[ ] all of the significant social interests to be served by both *Erie* and the [RDA]."[503] Such interests are steeped in federalism, because outcome determination may be overly protective of federal interests at the expense of the states.

For *Erie* conflicts invoking the REA, the two-pronged test has proven almost as troublesome to courts as its RDA counterpart. Although *Hanna* expressly bifurcated *Erie* conflicts into RDA and REA

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of *Szantay*, which held that state door-closing statutes were inapplicable in federal court under *Erie*, was also questioned. *See, e.g.*, Rollins v. Proctor & Schwartz, Inc., 478 F. Supp. 1137, 1152 (D.S.C. 1979), *rev'd*, 634 F.2d 738 (4th Cir. 1980) (reluctantly applying *Szantay*).

In the Eighth Circuit, Prasher v. Volkswagen, 480 F.2d 947, 954 (8th Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), which held that FRCP 3 determined when a state limitations period began to run, controlled for almost a decade until the court of appeals corrected itself after the Supreme Court's decision in *Walker*. In fact, after *Walker*, but before the Eighth Circuit overturned its earlier precedent, one district court recognized *Walker* but felt compelled to follow *Prasher*. Walden v. Tulsair Beechcraft, 96 F.R.D. 34, 41 (W.D. Ark. 1982).

501. *Hanna*, 380 U.S. at 468 n.9.

502. *Id.* at 468-69.

503. Redish & Phillips, *supra* note 4, at 372.

problems, courts appear reluctant to recognize the REA's exclusive applicability to issues involving Federal Rules. This may be due in part to the fact that *Hanna* represented, until recently, the Supreme Court's only expression of an REA analysis, and the Court has yet to accord the REA's second prong any significance. The lower courts have been left largely to their own devices in applying the second half of the test. Furthermore, courts may have difficulty in grasping the subtle differences between the meaning of the term "substantive" in the REA and RDA contexts. Finally, courts are naturally reluctant to find a FRCP in violation of the REA. This reluctance may account for the fact that only one court appears to have held a FRCP violative of the terms of the REA.[504]

Not since *Byrd* has the Supreme Court decided a case invoking the RDA, and little has been added since *Hanna's* demonstration of the REA analysis.[505] Much of the current confusion is due to both the lack of recent guidance and the reluctance of the Supreme Court to expressly overrule earlier versions of the *Erie* test. Although Professor Ely appears to have accurately described the current *Erie* standards, courts are nevertheless adamantly clinging to policy analyses purportedly verboten by *Hanna*. Thus, there has been a uniform failure of federal courts to accept either refined outcome determination or the two-pronged REA analysis. The current chaos of *Erie* in the federal courts makes the time ripe for Supreme Court reexamination of the doctrine.

504. *See* McCollum Aviation, Inc. v. CIM Assocs., 438 F. Supp. 245, 248 (S.D. Fla. 1977), discussed *supra* at text accompanying notes 376-384.

505. Recall that in *Walker* the Court found no conflict to exist between FRCP 3 and a similar state rule; thus, no REA analysis was mandated.