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FOREWORD

THE COMPROMISE OF '38 AND THE FEDERAL COURTS TODAY

*John H. Robinson**

In 1998 the legal community of the United States should stop and take stock of two epochal events in the history of the federal judicial system. One of those events, as readers of a procedure symposium do not need to be told, is the sixtieth anniversary of the introduction of the Federal Rules of Civil Procedure. I shall have more to say about that event presently, but I want first to devote a few paragraphs to a second event, one which proceduralists ignore at their peril. The event I have in mind is the initiation of a new era of federal constitutional adjudication. That era took definitive shape on April 25, 1938, when the Supreme Court announced two decisions of transcendent importance to the articulation of the role of the federal courts in American life in the modern era. Legal academia routinely assigns one of these decisions to the civil procedure course and the other to the constitutional law course, thereby obscuring from our students' view the significance that those two decisions have when they are considered together. The first of these decisions is *Erie Railroad Co. v. Tompkins*¹; the second is *United States v. Carolene Products Co.*²

Neither case dealt with a dispute of any newsworthiness at all. In *Erie*, a luckless pedestrian lost an arm to a passing freight train and

* Assistant Professor of Law and Philosophy, University of Notre Dame. In the pages that follow, I have taken excessive advantage of the freedom of assertion that law review editors usually grant to foreword-writers. I apologize in advance for the unsubstantiated boldness of several of the claims I make here. I hope to have an opportunity in later work to vindicate at least some of those claims. I would like to thank my brother, Bill Robinson, and my colleagues, Joe Bauer and Pat Schiltz, for their comments on earlier drafts of this Foreword. I would also like to thank Mark Cawley for his help with the several drafts through which this Foreword has gone.

1 304 U.S. 64 (1938).

2 304 U.S. 144 (1938).

sued for damages, alleging the railroad's negligence.³ At trial, Mr. Tompkins won a thirty thousand dollar judgment, in part because the trial court said that the railroad's duty to Tompkins was governed by a rule of law that the federal courts had created, and not by a conflicting rule of law that the Pennsylvania courts had created.⁴ On appeal, the Second Circuit affirmed the trial court on that question and upheld the judgment for Tompkins.⁵ The Supreme Court granted certiorari to determine whether federal judge-made law or Pennsylvania's "local law" governed in the case.⁶ In *Erie*, the Supreme Court reversed the lower courts, depriving Mr. Tompkins of his recovery and denying to the federal courts the power to declare rules of state tort law that run contrary to state decisional law.⁷ In *Carolene Products*, the federal government had indicted a company which had the audacity to put into interstate commerce a compound of condensed milk and coconut oil in violation of the federal Filled Milk Act of 1923.⁸ At that point, the company demurred to the indictment, asserting the unconstitutionality of the Filled Milk Act.⁹ The trial court sustained the demurrer, finding the statute to be an invasion of the police power of the states.¹⁰ On appeal, the Supreme Court reversed, saying that Congress had the power to prohibit the shipment of filled milk in interstate commerce.¹¹

Considered independently of each other, each case has substantial significance. *Erie* took the federal courts out of the business of articulating a federal "general common law" that honest and intelligent state courts would hue to by virtue of its providing the right answer to doctrinal questions that civil litigation is bound to produce.¹² *Erie* left the development of the general common law to the state courts, and it did this as a matter of constitutional law.¹³ To that extent, *Erie* was a crucial part of the Court's effort during the late-1930s to divest itself of powers that, in a previous generation, it had unwar-

3 See *Erie*, 304 U.S. at 69.

4 *Id.* at 70.

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

6 *Erie R.R. Co. v. Tompkins*, 302 U.S. 64 (1938).

7 See *id.* at 79-80.

8 42 Stat. 1486; see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145 (1938).

9 *United States v. Carolene Prods. Co.*, 7 F. Supp. 500, 501 (S.D. Ill. 1934).

10 *Id.* at 507-08.

11 See *Carolene Prods.*, 304 U.S. at 153-54.

12 See *Erie*, 304 U.S. at 78, 79-80 (reversing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

13 See *id.* (The Rules of Decision Act, 28 U.S.C. § 1652, was also involved in *Erie*, but I have omitted discussion of it here.).

rantly assumed¹⁴ and to return to the several states a power of self-regulation to which, under the Constitution properly conceived, they were entitled.¹⁵ *Carolene Products*, for its part, effected one trivial result and adumbrated the modern era of federal constitutional adjudication. What it effected was a reaffirmation of the power of Congress to use its commerce power to regulate interstate commerce.¹⁶ What it adumbrated was a tripartite sphere of judicial supremacy.¹⁷ In short, the Court in *Carolene Products* held that, where a state or federal legislature trenches upon First Amendment freedoms, or where it warps the electoral process to suit its own fell designs, or where it makes life particularly difficult for "discrete and insular minorities,"¹⁸ there the federal courts will exercise their power of judicial review to invalidate the laws that embody those objectives. For the rest, *Carolene Products* intimated that over a wide range of issues the federal courts were getting out of the business of policing legislatures with respect to alleged substantive due process violations, and that it was getting out of the business of policing the federal legislature with respect to all but the most expansive readings of the power of Congress under the Commerce Clause.¹⁹

Taken together, *Erie* and *Carolene Products* announce the inauguration of the modern era of federal judicial life. For those of us who

14 See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating on due process grounds a state's minimum wage law); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating a law that established a minimum wage for female workers); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating on due process grounds statutes that criminalized the discharge of certain workers because of their union membership); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating on due process grounds a statute that limited the number of hours that bakers could work in a week); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating on due process grounds a state law that set limits on who could conduct insurance business in that state). See also *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (applying *Hammer v. Dagenhart* to the Child Labor Tax Law and invalidating that law as in excess of the power of Congress under the Commerce Clause); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating a federal child-labor law as in excess of the power of Congress under the Commerce Clause).

15 See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

16 See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In *United States v. Darby*, 312 U.S. 100 (1941), the Supreme Court explicitly repudiated the restrictive reading of the power of Congress under the Commerce Clause that had animated the trial court's sustaining of the demurrer to the indictment in *Carolene Products*.

17 See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4. (1938).

18 *Id.*

19 For a celebrated, recent case in which the Supreme Court invalidated a federal statute as in excess of the power of Congress under the Commerce Clause, see *United States v. Lopez*, 514 U.S. 549 (1995).

are caught up in the constitutional battles of the present moment, and for our predecessors who were caught up in the constitutional battles of the preceding generation, it is easy to overlook both the astonishing success that the federal judiciary has enjoyed over the course of the past sixty years and the even more astonishing willingness of the Supreme Court, in particular, to risk the erosion of that success by a return to the very substantive due process adjudication that it swore off sixty years ago. It is to both of these phenomena that I now wish to call attention.

As the nation, and the rest of the world, lurched into the darkest years of the deepest depression anyone could remember, the role of the federal judiciary in American political life was a source of intense dispute—a dispute so bitter and so divisive that it shook the very foundations of the American constitutional order. The dominant faction in the federal judiciary in those days laid claim to extensive review prerogatives, and it exercised those prerogatives more ineptly than any of its predecessors had, saving only the signal disasters embodied in *Dred Scott*²⁰ and *Plessy*.²¹ Facing a judiciary of this sort, the executive branch threatened to bring it to heel by virtue of a court-packing plan that was as hostile to the very idea of the horizontal separation of powers as it was insulting to the Justices whom it targeted.²² What the times needed was compromise, and compromise is what *Erie* and *Carolene Products* produced.

Was there within the New Deal itself a monumental split between those who despaired of the vertical separation of powers implicit in our federalism and those who saw it as essential to recovery from the Great Depression and to the long-term health of the nation?²³ Yes, and in *Erie*, Justice Brandeis, the last of the great progressive federalists, put the federal judiciary squarely on the side of the federalists, at least where commercial law was at issue. Was there a need for an unelected and therefore freely counter-majoritarian vindicator of the speech rights of the unpopular, the electoral rights of the under en-

20 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

21 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

22 In response to the Supreme Court's invalidation of New Deal legislation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *United States v. Butler*, 297 U.S. 1 (1936), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), President Franklin Roosevelt proposed to "pack" the Supreme Court, thereby neutralizing the hostile forces that then controlled the Supreme Court. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

23 For a discussion of the struggle between New Deal centralizers and old Progressive decentralizers, see H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

franchised, and the civil rights of the millions of blacks who were subjected to second class citizenship from Florida to Texas and from Virginia to Kentucky? Yes, and in *Carolene Products*, Justice Stone put the federal judiciary squarely on the side of the victims of those three different sorts of oppression. But neither *Erie* nor *Carolene Products* made any attempt to reinsinuate the federal judiciary into the maelstrom of economic regulation—a maelstrom from which those courts had beaten an unseemly retreat only a year earlier.²⁴ Economic regulation was, subject to very weak constraints, to be the province of the state and federal legislatures.

That, in a nutshell, is the great compromise of 1938. Unlike the compromises that led up to the Civil War, it worked—not perfectly, of course (out of such crooked timbers as we are made, nothing straight can ever be built²⁵)—but tolerably well, astoundingly well in fact. The federal judiciary's vindication of the speech rights of the unpopular already had a history by 1938, but it was heavily one of defeat.²⁶ By 1943 the Supreme Court began to find its voice in this area,²⁷ and by 1964 the major battles for freedom for dissident speech had been won.²⁸ Nothing that has happened in that area in the past thirty-odd years represents a significant retreat from that victory.²⁹ The federal judiciary's vindication of electoral rights took longer to materialize than did its vindication of speech rights, but once it committed itself

24 See *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

25 See IMMANUEL KANT, *Idea for a Universal History with Cosmopolitan Intent* (1784), in *THE PHILOSOPHY OF KANT* (Carl J. Friedrich ed. & trans. 1993) ("One cannot fashion something absolutely straight from wood which is as crooked as that of which man is made."). Isaiah Berlin used these words as the epigraph for his book, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (1st Am. ed. 1991).

26 See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); but see *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927).

27 See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

28 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which extended First Amendment protection to those who without "actual malice" utter defamatory falsehoods about public officials, may be taken as the keystone of the modern Court's First Amendment jurisprudence. See generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

29 The vigor of the reasoning in *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997) is one of many testaments to the strength of the modern Court's First Amendment jurisprudence.

to the one-person, one-vote rule in 1962,³⁰ the Court never looked back.³¹ Finally the federal judiciary's vindication of the civil rights, first of blacks then of women, began almost as soon as *Erie* and *Carolene Products* were announced;³² from 1954 until at least 1973, the vindication of minority rights was both the central constitutional task of the modern federal judiciary and its major accomplishment.³³ Not since the death of John Marshall in 1835 has the Supreme Court succeeded in staking out as ambitious an agenda as this, and not since Marshall had the core of the agenda been so defensible in terms of democratic theory.³⁴ This is an accomplishment worthy of acknowledgment and admiration. It is also an accomplishment worthy of protection. Such was, however, not to be its fate.

Stability is more the exception than the rule in American political life, and a certain instability has afflicted the federal judiciary on each of the three fronts that I have just sketched. An informed observer might illustrate this instability by reference to the intense debate over the meaning of the Free Exercise Clause now that the Religious Freedom Restoration Act has been invalidated,³⁵ or to the apparent willingness of the Court to subordinate some speech rights to the interests of abortion providers and their clients.³⁶ Another observer might point to the debate now raging over the status of racially-coded

30 In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court invalidated a malapportioned state legislature on equal protection grounds. Several later cases extended the one person/one vote principle to several other settings. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

31 See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972) (subjecting attempts to infringe upon an identifiable group's ability to exercise the right to participate equally in the political process to strict scrutiny). Along similar lines, *Romer v. Evans*, 517 U.S. 620 (1996), is best read as an effort to vindicate the right of an identifiable group to equal participation in the political process.

32 See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

33 Indeed, if *United States v. Virginia*, 116 S. Ct. 2264 (1996) is read with *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the harmony between the gender-discrimination cases and the race-discrimination cases becomes clear. The extremely persuasive case that *United States v. Virginia* requires with respect to gender-based state action has much the same meaning as the strict scrutiny of race-based state action acquired in *Adarand*. For a recent study of *United States v. Virginia*, see Catherine A. O'Neill, *Single-Sex Education after United States v. Virginia*, 23 J.C. & U.L. 489 (1997).

34 See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (providing one such defense).

35 See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

36 See *Schenck v. Pro-Choice Network of W. N.Y.*, 117 S. Ct. 855 (1997) (upholding certain restrictions on the speech interests of anti-abortion protesters in the vicinity of an abortion clinic); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (same).

affirmative action programs, both as a constitutional and as a statutory matter,³⁷ or to the debate over the constitutional status of majority-minority districting schemes in parts of the South.³⁸ Still another might point to the Court's inability to reconcile democratic theory with the role that money now plays in the political process.³⁹ With due regard for the earnestness with which these observers might argue their cases, it remains true that all of these difficulties pale in comparison to what may best be described as the decisional privacy wars of the past quarter century, and to the remarkable way in which the current Supreme Court has decided to resolve them.

Nowhere in the pages of American constitutional history can one find a greater irony than in the elaboration of the constitutional law of decisional privacy over the course of the past thirty-five years. From the epochal battles of the previous generation one might have assumed that the Justices of the mid-1960s would have learned that no provision of the Constitution provides a weaker textual warrant for the articulation of a constitutionally protected right against adverse state or federal legislation than do the Due Process Clauses of the Fifth and Fourteenth Amendments, where those amendments must be read substantively in order to provide the warrant that the right requires if it is to have any claim at all to be constitutional right.⁴⁰ Indeed, the pri-

37. See *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995). The Court's denial of certiorari in *Texas v. Hopwood*, 116 S. Ct. 2581 (1996), in *Coalition for Econ. Equity v. Wilson*, 118 S. Ct. 397 (1997), and in *Farmer v. University and Community College Sys. of Nevada*, 118 S. Ct. 1186 (1998), and the eleventh hour removal of *Piscataway Twp. Bd. of Educ. v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 117 S. Ct. 2506, and cert. dismissed, 118 S. Ct. 595 (1997), from the court's calendar have not contributed much to the clarification of this area of the law.

38. See *Shaw v. Reno*, 509 U.S. 630 (1993) (subjecting to strict scrutiny the deliberate creation of voting districts in which members of minority groups form an electoral majority); see also *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995). For a discussion of this issue, see Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225 (1997).

39. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating some of the limitations on campaign expenditures that were included in the Federal Campaign Act of 1974). For symposia on campaign finance reform, see 24 J. LEGIS. 167 (1998) and 6 J.L. & POL'Y 1 (1997).

40. I need here to make a distinction between two different senses in which the phrase "substantive due process" is used. In one sense, that phrase can be used to designate constitutional constraints, premised upon the Due Process Clauses of the Fifth and Fourteenth Amendments, on the conditions under which a person can be deprived of liberty by confinement in a state institution, or deprived of property by means of a punitive damage award imposed by a court. In *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), for example, the phrase is used that way with respect to the involuntary confinement of sexual predators. See *id.* at 2079. Similarly Justice Scalia, dissent-

mary lesson of the *Lochner* era seemed to be that for the most part the substantive use of those clauses was a formula for disaster, leaving the Court without an appropriate constitutional aegis as it sought to vindicate the right in question in the face of massive majoritarian hostility.⁴¹

When the states made laws that punished unpopular speech, that hassled unpopular religious groups, or that marginalized distinct minorities, the courts could shield themselves with the mantle of the First Amendment as they proceeded to invalidate those laws. That mantle, combined with powerful normative theories regarding the inappropriateness of governmental censorship or of religious or racial intolerance, proved to be enough to carry the day. But the near debacle that resulted in the Compromise of '38 should have demonstrated beyond doubt the danger implicit in using a substantive reading of the Due Process Clauses as the textual warrant for a new constitutional right. Those clauses read that way usually add almost nothing to the moral theory that ineluctably the Court must be relying on as it sets about the risky business of invalidating the products of state and federal majoritarian political processes. Where that theory is both internally coherent and (therefore) eminently defensible, there substantive due process adjudication is likely to succeed, as *Meyer*⁴² and *Pierce*⁴³ both suggest, but where that theory is either internally incoherent or intensely unpopular, there substantive due process adjudication is likely to fail, as the *Lochner* line of cases suggests.

The greatest irony of the modern American constitutional law of decisional privacy is that the first decision to announce that doctrine

ing in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996) refers to the Court's rejection of a punitive damage award on grounds of excessiveness as an instance of substantive due process adjudication. See *id.* at 1611. In *Hendricks* and *Gore*, there is a close nexus between substance (confinement, punitive damages) and process, at least in the important sense in which a judicial proceeding is intimately connected to the loss of liberty or property in question. In other cases, however, that nexus is absent. In those cases—the *Lochner* line of cases and the *Roe* line of cases are the ones that I have in mind—the judicial focus is not on the judicial proceeding in which liberty or property is taken away but on the very idea of a legislature's prohibiting a certain form of conduct. It may be true that at the end of the day this distinction cannot be maintained, but I do not think so. In any case, it is *Lochner/Roe* style substantive due process adjudication that I am discussing here, not *Hendricks/Gore* style substantive due process adjudication.

41 For a recent study of the use to which the Supreme Court has in recent years put the conceptual tools that were used in *Lochner*-era decisions, see Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. Rev. 605 (1996).

42 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

43 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

could have been a fairly straightforward addition to the “family rights” exception to the general prohibition, embodied in the Compromise of '38, against using a substantive reading of the Due Process Clauses as a warrant for invalidating state or federal legislation. What made *Meyer* and *Pierce* exceptions to the general rule against substantive due process adjudication was that they took it as a constitutive principle of American political life that marriage and the family enjoy an exemption from meddlesome legislation that no other institution enjoys except by virtue of an explicit provision of the Constitution that conveys such an exemption. Because that conception of the relationship between marriage and family, on the one hand, and meddlesome legislation, on the other, was in fact widely held at the time *Pierce* and *Meyer* were decided, and because a plethora of respectable and coherent theoretical justifications for such a conception were then available, the transparency of a substantive due process textual warrant to motivating political theory characteristic of *Pierce* and *Meyer* proved to be practically and theoretically unproblematic.⁴⁴ The real question in both *Meyer* and *Pierce* was how the deliberative processes of Nebraska and Oregon could have produced such vexatious laws as those that were at issue in those cases; and in *Pierce*, at least, a Court averse to substantive due process adjudication might have been able to use a more theoretically defensible and practically useful textual warrant for the results that were reached in them.⁴⁵

When the generation of Justices who had been appointed in the years following the Compromise of '38 confronted the first great decisional privacy issue to reach them—namely, the constitutionality of a state law that prohibited the use of contraceptives—their first instinct

44 From the Mormon cases in the late nineteenth century through the substantive due process family cases of the early twentieth century, the Court surely saw itself as predicating its holdings upon a proper understanding of the relationship between the monogamous family and democratic government. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879) (linking polygamy to despotism and monogamy to a free and prosperous polity); see also *Meyer*, 262 U.S. at 401–02 (linking, somewhat extravagantly, an English-only requirement in primary school to Plato’s utopian child-rearing scheme, in which parent-child ties would not exist). I am not for a moment suggesting that the theoretical warrant offered by either the *Reynolds* Court or the *Meyer* Court would stand up to contemporary scrutiny. That a theoretical vindication of family rights is available to us today seems to me to be highly likely. I cannot, however, undertake that vindication here.

45 With respect to *Pierce*, the Free Exercise Clause might have provided that warrant if there was substantial evidence that the law in question was the product of anti-Catholic sentiment. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

was to avoid the issue, and that's just what they did, at first.⁴⁶ In *Poe v. Ullman*, the latter of those issue-avoiding cases, the Court inferred from a history of unenforcement that Connecticut's anti-contraceptive law had been nullified and that therefore the Court was in no position to entertain disputes regarding it.⁴⁷ Dissenting, Justice Harlan proffered a reconstruction of substantive due process in which he attempted to steer a middle course between the self-destructive expansiveness of *Lochner*-era substantive due process and the fatal incoherence of Justice Black's incorporationist alternative to substantive due process adjudication.⁴⁸ He phrased that reconstruction in the following words:

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continually to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or lim-

46 See *Poe v. Ullman*, 367 U.S. 497 (1961); *Tileston v. Ullman*, 318 U.S. 44 (1943). Both cases involved challenges to the constitutionality of Connecticut legislation that prohibited the use of contraceptives. In both cases, the Court avoided the substantive issue raised by the cases, deciding in *Tileston* that the plaintiff lacked standing. *Poe* is discussed in the text.

47 See *Poe*, 367 U.S. at 502, 508-09.

48 What made Justice Black's approach to incorporationism incoherent was that he wanted simultaneously to be a strict textualist *and* to read the Due Process Clause of the Fourteenth Amendment as if it were an instruction to the federal courts to impose upon the states each constraint that the Bill of Rights imposes upon the federal government. Unfortunately for the success of this approach, a textualist reading of the Fourteenth Amendment cannot produce that incorporationist result.

ited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁴⁹

Never has the case for a substantive reading of the Due Process Clauses been more eloquently made, and perhaps in hands as able as Justice Harlan's, substantive due process adjudication of this sort would have been tolerable—surely the emphasis on tradition in Justice Harlan's formulation suggested a conservative function for substantive due process adjudication as he imagined it. But Justice Harlan was unable to convince a majority of his brethren, all of whom had lived through the upheavals of the 1930s, that the volatile mixture of judicial activism and restraint that was implicit in his formulation would not explode in hands more activist than his own.⁵⁰

When, therefore, in 1965, the Supreme Court finally did address the constitutionality of Connecticut's anti-contraceptive laws, it did not use substantive due process as a textual warrant for its result; it chose instead to rely on bizarre solar imagery, speaking of "penumbras, formed by emanations"⁵¹ that, taken together, create zones of privacy, one of which encompasses the sexual intimacies of married couples.⁵² So mannered a conceit as the one that Justice Douglas used to structure the invalidation of the Connecticut law did not survive the day of its creation.⁵³ By 1973, when *Roe v. Wade*⁵⁴ was decided, the Court was frankly acknowledging that its constitutional law

49 *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting) (citations omitted).

50 For a more activist reading of Justice Harlan's formulation, see Justice Souter's concurring opinion in *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275–93 (1997) (Souter, J., concurring).

51 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

52 *Id.* at 485–86.

53 I do not mean to suggest either that *Griswold* was wrongly decided or that something akin to penumbral decision-making is not justifiable. I do mean to say that subsequent decisional privacy cases were not decided on the basis of whether or not emanations had formed penumbras that created zones of privacy. On penumbral reasoning generally, see Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089 (1997).

54 410 U.S. 113 (1973).

of decisional privacy was nothing but substantive due process adjudication freed from the tradition-bound conservatism that Justice Harlan had attributed to it.

Since that day in 1973 when *Roe v. Wade* was decided, the Supreme Court has been involved in an epochal internal dispute about the constitutional propriety of substantive due process adjudication of the sort practiced in that case. By June of 1997, when the assisted suicide cases were decided,⁵⁵ the lineaments of a resolution to that dispute had become clear. The central feature of that resolution, adumbrated in *Hardwick*⁵⁶ and confirmed in *Glucksberg*, is the reining in of substantive due process adjudication. It still exists, but for now at least the Due Process Clause will be used to invalidate legislation because of its substantive intrusion upon individual liberty only if that intrusion amounts to a significant deviation from Anglo-American traditions of respect for individual dignity, privacy, and autonomy.⁵⁷ Efforts to thrust the federal judiciary into a leadership role with respect to the most hotly contested policy issues of the day, therefore, will fail except to the extent that those issues implicate values that are explicit or implicit in the Constitution, as it has been interpreted by the courts.

As was true in 1938, the specification of this role for the federal judiciary is not an admission of defeat or an acknowledgment of weakness. It is an attempt to bring judicial practice into closer accord with democratic theory and to allocate judicial resources to those areas where they are both most needed and most warranted; namely, the vindication of First Amendment rights, the prevention of the subversion of the electoral process, and the protection of vulnerable minorities from the tyranny of the majority. Stripped to its bare essentials, the abortion jurisprudence survives, like those Vietnam War memorials that both the hawks and the doves of yester-year can each claim as their own. That jurisprudence is a monument both to how far substantive due process adjudication once went and to how unlikely it is that it will ever go that far again. Putting the abortion jurisprudence to one side, however, the most important result of *Glucksberg* is to return the federal courts to the eminently successful and equally defensible agenda that the Supreme Court staked out for them sixty years ago.

55 *Vacco v. Quill*, 117 S. Ct. 2293 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

56 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

57 For a radically different reading of *Glucksberg*, see Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. BOOKS, Sept. 25, 1997, at 40-44.

For the rest, states are recovering some of the quasi-autonomous status that the Founders envisioned for them and that is essential to their serving as “laboratories of democracy”⁵⁸ with respect to public policy issues.⁵⁹ Subject to several constraints not relevant here, only when those experiments that become embodied in legislation encroach upon the spheres subject to heightened judicial scrutiny will the legislatures have to worry about federal judicial overrides of their efforts. *Erie* and its contentious progeny have their place here. For so long as diversity jurisdiction continues to be exercised (and for so long as supplemental jurisdiction exists after diversity is gone), the federal court will have an obligation to show the states and their laws the respect that they deserve. In doing this, they must neither sacrifice their own integrity nor ignore the authoritative command of the Constitution, of relevant federal statutes, or of the Federal Rules of Civil Procedure or Evidence when any of them address the ways in which federal courts are to resolve cases, even diversity cases.

58 The idea can be traced to *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

59 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) may be read as attempts on the part of the Supreme Court to restore some respect for the quasi-sovereignty of the states under the Constitution. *Seminole Tribe* denies to Congress any power to abrogate the immunity of the states from suit in federal court where Congress is acting pursuant to one of its Commerce Clause powers; *Coeur d'Alene Tribe* refused to give an expansive reading to one of the exceptions to the Eleventh Amendment prohibition against suits against states in federal court. Similarly, *Printz v. United States*, 117 S. Ct. 2365 (1997) may also be seen as indicative of heightened respect for the states. It invalidated a federal law that required state officials to conduct background checks on prospective gun purchasers until a national system is put into place. *United States v. Lopez*, 514 U.S. 549 (1995) may also be seen as protecting the states from intrusion upon their sovereignty. In *Lopez*, the Supreme Court invalidated a federal statute that made a federal crime out of the knowing possession of a firearm in a school zone. The Court said that the Commerce Clause did not provide a constitutional warrant for the statute and, for that reason, the act was unconstitutional. *Lopez* marks the only time in the past sixty years that a congressional attempt to predicate legislation on a Commerce Clause basis has been found wanting by the Supreme Court. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) may be seen as protecting the states from both the litigation costs that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, imposed on them and the diminution in their regulatory power that it entailed. See *id.* at 2171. Finally, *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996), may be read as an attempt on the part of the Court to emphasize the respect that the federal judiciary owes to the statutory schemes of the states, thereby correcting the tendency to refuse them that respect—a tendency that a superficial reading of earlier cases may have encouraged. I discuss *Gasperini* in more detail in the text at notes 70–75 *infra*. I do not mean to suggest here that a states rights counter-revolution has taken place recently. I do mean to say that the Supreme Court has been markedly more responsive to state sovereignty claims in recent years than it was a decade or two ago.

Time has proven this to be a tall order, in part because in the Supreme Court's first major attempt to wrestle with the tension between the right of the federal courts to their own procedures and the duty of the federal courts sitting in diversity to respect state laws, it reached the right result for ever so slightly a wrong reason. In *Guaranty Trust Co. v. York*,⁶⁰ the Supreme Court had to decide whether a determinate state statute of limitations or an indeterminate federal laches doctrine governed a case that had been brought in federal court on diversity grounds. The right answer, and the one that the Court gave, was that the state statute governed, but in its analysis the Court failed to point out that the point in time from which a federal court should assess the outcome-determinativeness of two competing rules, one state and the other federal, is the point at which diversity plaintiffs are about to choose between state and federal court—or, in rare cases, the point at which non-resident diversity defendants are about to choose between removal to federal court and letting the case stay in state court.⁶¹

Only if the court that must choose between differing state and federal practices assumes the perspective of the plaintiff who is about to file suit or of the defendant who is considering removal can it get its *Erie* analysis right. In *York*, for example, once the analysis is conducted from that perspective it becomes clear that a federal court animated by a desire to show the law of a particular state the respect that it deserves should, in the absence of an authoritative command that imposes the federal laches practice on the case, opt for the state practice. Following federal practice in such a case would provide diversity plaintiffs with an inappropriate incentive to choose the federal

60 326 U.S. 99 (1945).

61 The Court's reasoning in *York* was also adversely affected by a positivist understanding of law that was popular among early twentieth century progressives. As an attempt to win readers over to a positivistic account of law, *York* is virtually self-refuting. For Justice Frankfurter, the author of *York*, it was because positivism provides a better account of law than natural law theory does that federal courts should be submissive to the authoritative voice of the state whose substantive law the Court was applying. But he made this claim—a claim from which it took the federal system a generation to recover—in an opinion whose authority stems not so much from the pinnacle from which it was announced as from the persuasiveness of its argument, specious as I believe it to have been. *York*, that is to say, exhibits the teaching function of judicial decisions at the same time as it depreciates the teaching function of judicial decisions generally. For a recent study of the role that positivist presuppositions have played in efforts on the part of the federal judiciary to determine the content of state law, see Bradford R. Clark, *Ascertaining the Law of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459 (1997).

forum for their case and would undercut the state's effort to have its own law of repose.

Once *Hanna v. Plumer*⁶² had established both the point in time from which outcomes should be assessed⁶³ and the preemptive force of federal law-based commands,⁶⁴ the task of the federal judge who is forced to choose between differing practices in a diversity case became clear. The judge must first determine if a valid federal directive determines the choice. If so, that is the end of the matter,⁶⁵ if not, the judge should do what he or she can to remove inappropriate incentives to the use of federal court over the corresponding state court. Neither step in this process is algorithmic; with respect to both steps, reasonable minds can differ as to the propriety of a particular answer. Still, sometimes we can say with reasonable confidence what the right result is, and sometimes we can provide a reasonably convincing rationale for that result.

When, for example, a state requires prospective medical malpractice plaintiffs to submit their claims to a screening committee before initiating litigation, federal courts in that state should do the same if the absence of the screening requirement in federal court would encourage choice of the federal forum on the part of the prospective plaintiffs who, due to diversity of citizenship, have access to it. To the extent that diversity plaintiffs made that choice for that reason, they would frustrate the objectives that the state had sought to realize in imposing the screening requirement in the first place.⁶⁶ Nothing in

62 380 U.S. 460 (1965).

63 *Id.* at 468–69.

64 *Id.* at 469–74.

65 *Id.*; see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). Because of the clarity with which both *Hanna* and *Ricoh* speak to the preemptive effect of valid federal rules, I am inclined to think that in *Carota v. Johns Manville Corp.*, 893 F.2d 448 (1st Cir. 1990), the First Circuit may have erred. There the court had to choose between FED. R. EVID. 408, which precludes admission into evidence at trial of a party's having settled with persons or entities that are no longer parties to the suit, and Massachusetts case law that allows defendants to reveal to juries how much a plaintiff has recovered from non-parties with respect to the claim in question. The First Circuit chose to follow the state rule. *Id.* at 451. I have a similar concern about *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir. 1984). In *Moe*, the court had to choose between applying FED. R. EVID. 407, which bars the admission into evidence at trial of post-accident repairs where that evidence is proffered in order to establish the opposing party's negligence, and a contrary state practice. It chose to follow the state practice. *Id.* at 932–33. I freely admit that I could be wrong in finding error in these decision, but I have been unable to reconcile them with my understanding of *Hanna* and *Ricoh*.

66 See *Feinstein v. Massachusetts Gen. Hosp.*, 643 F.2d 880 (1st Cir. 1981); *Hines v. Elkhart Gen. Hosp.*, 603 F.2d 646 (7th Cir. 1979); *Woods v. Holy Cross Hosp.*, 591

the federal Constitution, statutes, or rules compels the federal court to refuse to employ the screening process—the best case for the claim that Rule 8 does so is quite weak⁶⁷—and by employing the state procedure in diversity-based cases, the federal court contributes to the realization of the *Erie* ideal: namely, a federal judiciary that gives the states the respect that under the Constitution they deserve.

Virtually identical considerations should motivate federal courts to accommodate state practices, where they can, so as to prevent inappropriate incentives to removal by non-resident defendants in state court actions that meet the other requirements for removal. If, for example, state law calculates prejudgment interest at a high, statutorily-determined rate, and the practice of the federal courts is to calculate it at a lower “market” rate, savvy defendants would, *ceteris paribus*, remove to federal courts whenever they could in order to avoid the potential additional costs that they would incur if judgment should be for the plaintiff. In those circumstances, therefore, the federal court should, if it can, adopt the state’s prejudgment interest rate, thereby eliminating the inappropriate incentive to removal and honoring whatever policies motivated the state to choose the pro-plaintiff rate in the first place.⁶⁸

F.2d 1164 (5th Cir. 1979). For a case that analyzes the extent to which deviating from a state-law mandated med-mal screening process would provide diverse plaintiffs with an inappropriate incentive to sue in federal court in order to avoid that process, see *Hum v. Dericks*, 162 F.R.D. 628 (D. Hawaii 1995). In *Hum*, the district court concluded that because the screening process would have very little effect, if any, on the outcome of a particular suit, no harm to any *Erie* interest would be done by by-passing it in diversity-based med-mal cases in federal court. *Id.* at 636. For a case in which a federal circuit chose to apply a state’s certificate of review requirement in diversity cases involving allegations of professional negligence, see *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996). Crucial to the Tenth Circuit’s ruling in *Trierweiler* was its realization that

[a] plaintiff alleging professional negligence is likely to seek a forum without the certificate of review hurdle either to avoid extra cost, to give himself or herself more time to build a meritorious case, or to increase the settlement value of his or her claims once litigation begins. If the certificate of review requirement applies in state but not federal court, the inequitable result would be a penalty conferred on state plaintiffs but not on those in federal court under diversity jurisdiction.

Id. at 1541.

67 See, e.g., *Braddock v. Orlando Reg’l Health Care Sys., Inc.*, 881 F. Supp. 580 (M.D. Fla. 1995) (refusing to apply Florida’s pre-suit requirements in medical malpractice cases that are to be tried under Florida law in federal court pursuant to that court’s diversity jurisdiction).

68 See *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764 (1st Cir. 1994) (choosing the state’s method of determining prejudgment interest over the federal method); see also *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d

From the *ex ante* perspective that I have espoused here, *Hanna* was quite uninteresting as a case simply because it was so easy to resolve. There was a valid federal rule at hand, a rule that set out the way in which service of process is to be effected in federal adjudication. For what it is worth, there was also no harm done to any state interest by the federal court's preferring its own *modus operandi* to that of the state court simply because no one can "seriously entertain the thought that one suing an estate would be led to choose the federal court because of a belief that adherence to [the federal rule regarding service of process] is less likely to give the executor actual notice than [the corresponding state law]."69 From the same *ex ante* perspective, *Gasperini*70 is much more interesting simply because it is so much more difficult to resolve.

The federal judge who presided at the trial of William Gasperini's breach of contract suit against the Center for Humanities had to decide whether to employ a relatively differential federal standard or a relatively strict state standard in ruling on a motion for a new trial due to the alleged excessiveness of the verdict. Choosing the federal standard would undermine the state's objective of keeping jury verdicts in line, and a generalized choice on the part of the federal courts in that state to employ the federal standard in ruling on new-trial-for-excessive-verdict motions would lead skilled plaintiffs' attorneys to bring suit in federal court as often as they could. (Plaintiffs' attorneys favor loose judicial oversight of jury verdicts for roughly the same reasons that defense attorneys oppose it.) Offsetting these considerations and potentially making them irrelevant was the fact that Rule 59 speaks more or less directly to the conditions under which a new trial may be granted.71 There was also the fact that whenever a federal judge—trial or appellate—is asked to pass on the adequacy of a jury verdict,

305 (7th Cir. 1995) (following state law on consequences for defendants of rejecting plaintiffs' settlement offers). *Healy* is cited favorably in *Gasperini*. See *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2219 n. 7.

69 *Hanna v. Plumer*, 380 U.S. 460, 469 n.11 (1965); cf. *Harvey's Wagon Wheel, Inc. v. Van Blitter*, 959 F.2d 153, 157 (9th Cir. 1992) (choosing FED. R. Civ. P. 41(b), permitting dismissal for failure to prosecute, over a Nevada rule requiring dismissal for failure to prosecute after five years, in part because "[n]o rational plaintiff would file in federal court based on the expectation that after five years without a trial, dismissal would be discretionary rather than mandatory.").

70 *Gasperini v. Center for Humanities*, 116 S. Ct. 2211 (1996).

71 Rule 59(a) provides, in part:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. FED. R. CIV. P. 59(a).

the Seventh Amendment looms nearby, as icebergs do for unsinkable ships.⁷²

A very strong case can be made for choosing the federal standard in *Gasperini*-like situations.⁷³ When, however, the desirability of agreement between the state and federal systems as to how trial courts should go about deciding new trial motions is combined with the opacity of Rule 59, an even stronger case exists for requiring the federal courts sitting in diversity to use the stricter state standard.⁷⁴ Despite the analytic flaws in the majority opinion—and they are most troublesome in parts of the case that I have not discussed here—*Gasperini* provides a nice corrective to the pre-*Gasperini* tendency to downplay the respect that federal courts owe the states as those courts adjudicate diversity cases, and it offers a useful object lesson in the weight that should be accorded *ex ante* considerations in a federal court's vertical choice-of-law deliberations.

In his careful study of *Gasperini* and its predecessors that follows this Foreword,⁷⁵ Professor Thomas Rowe attempts to establish four claims: first, that from *York* to *Gasperini* there is a substantial doctrinal continuity; second, that the central case in that line of cases is *Hanna*; third (and by derivation from the first two claims), that *Gasperini* is in substantial accord with *Hanna*, and with *York* as *Hanna* corrected it; and fourth, that *Byrd* has since the day on which *Hanna* was announced played a distinctly subordinate (and ill-defined) role in *Erie* law. Collaterally, Professor Rowe sets out to chide his fellow academics for their hyper-critical approach to the efforts of the Supreme Court to get its *Erie* law right.

As I read his Article, I find that we are in substantial agreement on the extent to which *Hanna* corrected *York* with respect to the moment that a federal judge who is in a position to make a choice between conflicting state and federal practices should use as his or her reference point; that moment is the one at which a party to a case in which the requirements of the diversity (or removal) statute have been met is confronted with a choice between bringing the case in federal court (or removing it to federal court) or bringing it in state

72 See U.S. CONST. amend. VII:

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

73 See, e.g., *Gasperini*, 116 S. Ct. at 2230, 2236–39 (Scalia, J., dissenting). Cf. Mayer v. Gary Partners & Co., 29 F.3d 331 (7th Cir. 1994).

74 *Id.* at 2219–22.

75 See *infra* at 963.

court (or letting it remain there). We both find the *Gasperini* Court to have been appropriately sensitive to the obligation of the federal judge who is not bound by a relevant federal requirement to accommodate the substantive policy preferences embodied in state law in his or her handling of a case to which that law is relevant. We agree also on the irony involved in the division of the Justices in *Gasperini*. The Chief Justice, Justice Scalia, and Justice Thomas, ardent advocates of states rights, dissent in the most states-rights protective *Erie* decision of the past fifty years, while Justice Ginsburg, who is not known for her partiality to states rights, writes the majority opinion.

Professor Rowe goes well beyond me in a valiant effort to explicate that part of *Gasperini* that tells federal circuit courts how they are to review district court denials of motions for new trials because of the alleged excessiveness of the verdict where New York tort law provides the substance of a party's claim. I cannot here assess how well he has done that, nor am I in a position to assess the success of the Court's efforts to square its directives to the circuit courts with the requirements of the Seventh Amendment. All I can say with confidence is that Professor Rowe's observations on that part of *Gasperini* strike me as measured, sound, judicious, and (probably) correct.

In his contribution to this Issue,⁷⁶ Professor David Shapiro defends an entity model of group litigation over an aggregation model of it. He does this fully aware of the attractiveness of the aggregation model and of the autonomy costs of the entity model. In the end, however, the efficiencies attendant upon conceiving of the plaintiff class in some class action scenarios as an entity, and the loss of autonomy attendant upon litigation of all sorts, convince Professor Shapiro of the preferability of the entity model. He then seeks to tease out the implications of the entity model for the adjudication of those class actions to which it applies. These implications are significant; they include the relatively early certification of mass tort classes, a substantial relaxation of notice requirements and opt-out rights, a reconsideration of the responsibilities of the plaintiffs' attorney in class action litigation, a reevaluation of the role of the judge in class action litigation, and a rethinking of the substantive law that governs the case.

When he moves from the practical implications of the entity theory to its somewhat more theoretical ramifications, Professor Shapiro finds himself considering a move away from litigation and towards administrative management of mass tort claims, with the necessary funds coming from one insurance scheme or another. He also finds himself engaged in the venerable debate between advocates of determinate

76 See *infra* at 913.

rules and advocates of less determinate standards as to *how* decision-makers should be governed as they resolve mass tort cases and in the equally venerable (and related) debate between advocates of judicial prerogative and advocates of legislative prerogative as to *who* should establish the controls over those decision-makers. Professor Shapiro comes down squarely on the side of legislative prerogative and of determinate rules. This leads him to question the correctness of such significant decisions as *Eisen v. Carlisle & Jacquelin*⁷⁷ and *Phillips Petroleum Co. v. Shutts*,⁷⁸ partially because their reasoning is unconvincing, partially because they frustrate the efficient litigation of class actions in which each plaintiff has suffered only a slight financial loss, and partially because they stand as potential obstacles to the congressionally mandated class action regime that he envisions.

For similar reasons, Professor Shapiro favors a version of Rule 23 that allows for low-cost notification procedures and substantial barriers to opting out of some class actions on the part of members of the plaintiff class. For Professor Shapiro, the central issue in class action cases ought to be whether or not proceeding with the case in that form will assure adequate representation to all of the class members. As one who worries about the ability of the federal courts to manage the class action cases with which they are now faced, I endorse Professor Shapiro's proposal. If massive class action suits are not to overwhelm the federal judicial system, we must think at least as boldly as Professor Shapiro does, and we must be as willing as he is to connect our theoretical reflection with the day-to-day exigencies of federal litigation.

In his contribution to this Issue,⁷⁹ Professor Geoffrey Hazard explores one of the most important implications of the globalization of commerce and of its attendant litigation. That implication is the potential for conflict between discovery American style and discovery as the rest of the world conducts it. The American approach to depositions and to the discovery (or disclosure) of documents is characterized by a capaciousness and by a freedom from judicial involvement that no other nation even attempts to imitate. In civil law jurisdictions, furthermore, the judge plays a more central and a more active role than judges do in common law countries, and juries play no part at all. In civil law countries, pre-trial—much the more time-consuming part of American litigation—does not exist, and there is no need for a climactic trial as a sequel to years of party-initiated discovery. In

77 417 U.S. 156 (1974).

78 472 U.S. 797 (1985).

79 See *infra* at 1017.

a civil law system, the trial can be split into several discrete parts, as the judge moves issue by issue towards his or her decision. For these reasons, Professor Hazard suggests civil law judges routinely experience American-style discovery as an invasion of their turf.

For these reasons also those judges are likely to experience the decision of the United States Supreme Court in *Société Nationale Industrielle Aerospatiale v. United States District Court*⁸⁰ as wrong-headed. In that case, the Supreme Court acknowledged the right of American judges to prefer American-style discovery procedures over those specified in the *Hague Convention on Taking Evidence Abroad* under certain conditions. In the most ambitious section of his article, Professor Hazard attempts to situate the civil law's commitment to judicially controlled litigation in French and German constitutional history. His goal throughout is to help American lawyers to understand how it is that a political order firmly committed to fair trials and just outcomes could be fiercely hostile to exactly those pre-trial efforts to get at the truth that American lawyers have come to think of as essential to the due process of law.

In her contribution to this Issue,⁸¹ Judge Diana Gribbon Motz reviews Judge Richard Posner's book, *The Federal Courts: Challenge and Reform*, a successor to his earlier book, *The Federal Courts: Crisis and Reform*. The "challenge" mentioned in the title of the book under review stems from the significant increase in the caseload of the federal courts in recent decades, and the "reform" mentioned in the title is a set of short-term and long-run strategies for meeting that challenge. When a system is faced with too many cases, its first response is to increase the number of judges while reducing the number of cases. We have more federal judges now than we have ever had, and we are taking steps to reduce the number of cases, but our judges are still overworked, and sometimes they are almost overwhelmed. Some judges rely too heavily on their clerks, and those judges' decisions are the worse for it. Some courts ration oral-argument parsimoniously, and most circuits use unpublished opinions as a time-saver.

Judge Motz has her own ideas about how federal appellate courts could satisfy litigants while saving time, but I am skeptical of her claim that abbreviated oral argument followed by summary disposition of the appeal would really give the losing party a sense that his or her argument had been given due consideration by the appellate court. Judge Posner, ever the economist, wants to see user fees increased until they come much nearer than they do now to equaling what it

80 482 U.S. 522 (1987).

81 See *infra* at 1029.

costs the federal system to process a case. Judge Motz, convinced of the positive externalities of litigation and committed to the ideal of an accessible government, opposes increased user fees. I myself would favor higher user fees, scaled back in the case of low-income litigants.

All parties to the continuing conversation about the role of the federal courts in American life today realize that the measures just discussed are micro-managerial devices that leave the larger questions unaddressed. As part of his contribution to that more serious conversation Judge Posner urges a heightened sense of self-restraint upon his fellow judges. Judge Motz is not convinced by Judge Posner's argument at this point in part because she sees it as unlikely to have much effect upon the actual conduct of federal judges. She is, however, in agreement with him on the need for federal judges to disagree with each other much more civilly than they sometimes do today. Judge Motz thinks that the decline in judicial civility lessens the esteem in which the judiciary is held by the public and makes consensus-building that much more difficult for judges. Like Judge Posner, she sees the Supreme Court as having contributed to judicial incivility of late, and we might all look to the Court for the beginning of a return to opinion-writing that states the other side's position as forcefully as it can be stated, then responds to it as respectfully as circumstances allow.

Whatever the merits of Judge Posner's proposals, I am convinced that several of the basic components of the federal judicial system need to be reconsidered. We need heightened pleading standards, even more control over discovery than recent rule changes gave us, a significant reduction in the diversity caseload, tighter control over those lawyers who waste judicial time with frivolous cases and dilatory tactics, an even more vigorous summary judgment regime than we have now, and a significant expansion of preclusion law. We need to find non-adjudicative ways of dealing with the mass tort claims that so concern Professor Shapiro in his contribution to this Issue, and we need to take advantage of the information revolution through which we are now living. Finally, and as Professor Hazard suggests in his contribution, we need to address the globalization of commerce and of law that is accompanying the information revolution. My hope is that this Foreword and the articles that follow it will help those who read it to come to terms with the brave new world that we now inhabit.