COMMENTS

Hanna v. Plumer: An Expanded Concept of Federal Common Law—A Requiem for Erie?

The Supreme Court posited a constitutional and statutory command to the federal courts to apply the federal rules in all cases, thereby obviating Erie's impairment of federal procedural uniformity. Moreover, the Court's rationale arguably confers such scope to "federal common law" as nearly to negate Erie's rigid circumscription of federal law-making power. However, the federal court's application of federal, rather than state, law is limited by the "fairness" requirements of due process of law.

THE FUNDAMENTAL reallocation of judicial rule-making power between the state and federal courts brought about by the nearly simultaneous promulgation of the doctrine of *Erie R.R. v. Tompkins*[1] and the Federal Rules of Civil Procedure[2] precipitated a con-

[1] 304 U.S. 64 (1938) (overruling Swift v. Tyson, 14 U.S. (16 Pet.) 166 (1842)). The evolution of the *Erie* doctrine has become common legal parlance. The basic statute construed in both Swift v. Tyson, *supra*, and *Erie* was § 34 of the Judiciary Act of 1789, 1 Stat. 92 (amended by Rules of Decision Act § 1652, 28 U.S.C. § 1652 (1964)). Swift v. Tyson, *supra*, had interpreted § 34 as merely requiring the federal courts to follow state statutes, decisions construing those statutes, and decisions as to "local" law, but leaving them free to make independent decisions as to matters of "general" law. See Sharp & Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L.J. 367, 370 (1929); Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519 (1941). See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 610-21 (1953). This doctrine, although followed for nearly a century, had become subject to ever-increasing criticism on several counts. First, the natural law theory and its concomitant that the courts "find" rather than "make" law was ridiculed by proponents of the emerging theory of judicial pragmatism. See, *e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting); GRAY, THE NATURE AND SOURCES OF THE LAW 241-59 (2d ed. 1927). *But see* Green, *The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts*, 19 ILL. L. REV. 217 (1924). Second, the *Swift* doctrine had failed to promote uniformity in the law. See 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 89 (rev. ed. 1935); Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 CORNELL L.Q. 499, 529 n.150 (1928). *But cf.* Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 881 n.23 (1931). Third, Professor Charles Warren had uncovered evidence from which he concluded the intent of Congress in enacting the Judiciary Act of 1789 was that the federal courts should apply both state statutory and state decisional law. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923). For criticisms of these conclusions see 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 867 (1953); Jackson, *"The Rise and Fall of Swift v. Tyson,"* 24 A.B.A.J. 609, 614 (1938); Shulman, *The Demise of Swift*

tinuing effort on the part of the Supreme Court to establish a workable line of demarcation between the two systems. Theoretically, *Erie* and the federal rules represented correlative commands: in diversity adjudications of state-created rights the federal courts shall apply state substantive law[3] and federal procedural law.[4] However, the inherent overlapping and interaction between "substance"

v. Tyson, 47 YALE L.J. 1336, 1345 (1938). Finally, the *Swift* rule enabled a noncitizen to discriminate against the citizens of the forum state and to avoid the forum state's laws. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting); Dobie, *Seven Implications of Swift v. Tyson,* 16 VA. L. REV. 225, 228 (1930); Fordham, *The Federal Courts and the Construction of Uniform State Laws,* 7 N.C.L. REV. 423, 430 (1929); Frankfurter, *supra* at 524-30; Shelton, *Concurrent Jurisdiction—Its Necessity and Its Dangers,* 15 VA. L. REV. 137 (1928). The intensity of the criticism of Swift v. Tyson, *supra,* precipitated the Court's abrupt overruling of it. See generally WRIGHT, FEDERAL COURTS § 54 (1963).

[3] The federal rules were promulgated pursuant to authority granted by the Federal Rules Act of 1934 (Enabling Act), 48 Stat. 1064 (now 28 U.S.C. § 2072 (1964)). Prior to 1938 federal court procedure had been governed by the Practice Conformity Act of 1872, ch. 255, § 5, 17 Stat. 197, which provided that federal procedure in cases other than equity or admiralty should conform as near as may be to practice in courts of the state wherein the federal court sat. As early as 1911, the American Bar Association had called for the repeal of the Conformity Act and the adoption of a uniform system of federal procedure. See Committee on Judicial Administration and Remedial Procedure, *Report,* 37 A.B.A. REP. 434, 435 (1912). See generally Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States,* 32 MICH. L. REV. 1116 (1934). In 1938, shortly before its decision in *Erie,* the Court promulgated the federal rules, which were subsequently approved by Congress. See generally WRIGHT, *op. cit. supra* note 1, § 62, at 222-25; Merrigan, *Erie to York to Ragan—A Triple Play on The Federal Rules,* 3 VAND L. REV. 711, 714-15 (1950).

[4] "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power upon the federal courts." 304 U.S. at 78. Thus, unless the right is one arising under one of the enumerated legislative powers of Congress, *Erie* commanded that the substantive rights of litigants in diversity suits *must* be governed by state law. See Friendly, *In Praise of Erie—and of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64-79 (1964); Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 509-10 (1954); Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427, 541 (1958); Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict,* 37 TEXAS L. REV. 549 (1959); *cf.* Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad Co. v. Tompkins?,* 26 MARQ. L. REV. 1 (1941). *Contra,* 1 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 903-16 (1953); Broh-Kahn, *Amendment by Decision—More on the Erie Case,* 30 KY. L.J. 3 (1941); Keefe, Gilhooley, Bailey & Day, *Weary Erie,* 34 CORNELL L.Q. 494, 497 (1949); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases,* 67 YALE L.J. 187, 188-204 (1957).

[5] Hanna v. Plumer, 380 U.S. 460, 465 (1965). See Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins,* 24 J. AM. JUD. SOC'Y 57 (1940); *cf.* Clark, *The Tompkins Case and the Federal Rules,* 1 F.R.D. 417 (1941) (disagreeing with Holtzoff's optimism as to the lack of conflict between *Erie* and the federal rules).

and "procedure" made the theoretical dichotomy difficult to maintain in practice.[5] This difficulty was compounded by the Court's repeated failure to determine whether the foregoing dichotomy was statutorily or constitutionally compelled.[6] In the recent case of *Hanna v. Plumer*[7] the Supreme Court has attempted to eliminate this confusion by refuting the correlation between the *Erie* doctrine and the federal rules. *Erie* was deemed irrelevant to an assessment of a conflict between federal rules and state requirements.[8] Rather, the rules are to be pre-eminent unless in their promulgation they have exceeded the terms of their constitutional and statutory mandate.[9]

In *Hanna,* an Ohio citizen had instituted a negligence action in a Massachusetts federal district court against the executor of a deceased Massachusetts citizen. Service of process was made on the executor in accordance with federal rule 4 (d) (1)[10] by leaving copies of the summons and complaint at his residence with his wife. However, a special Massachusetts statute dictated that either in-hand service or notice filed in the proper registry of probate would be requisite in a suit by a creditor of the deceased.[11] The district

[5] The advisory committee which drafted the rules recognized this inherent difficulty, ABA, PROCEEDINGS OF THE CLEVELAND INSTITUTE ON THE FEDERAL RULES 182 (1938), and conceded that some of the rules might be invalidated as impinging upon substantive law. *Id.* at 347.

The dividing line between "substance" and "procedure" is neither constant for all purposes nor susceptible of precise definition. See Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied,* 310 U.S. 651 (1940); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 138, at 592-93 (1960); Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 (1939); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules,* 39 IND. L. REV. 228, 231-32 (1964); Note, *The Erie Doctrine and Federal Rule 13(a),* 46 MINN. L. REV. 913, 926 (1962); *cf.* Morgan, *The Choice of Law Governing Proof,* 58 HARV. L. REV. 153 (1944). See generally 2 AUSTIN, LECTURES ON JURISPRUDENCE 611 (4th ed. 1879); 1 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE §§ 168, 171 (1911); HOLLAND, ELEMENTS OF JURISPRUDENCE 89 (11th ed. 1910); SALMOND, JURISPRUDENCE § 172 (7th ed. 1924); Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L.J. 333 (1933); Curd, *Substance and Procedure in Rule Making,* 51 W. VA. L.J. 34 (1948); Kocourek, *Substance and Procedure,* 10 FORDHAM L. REV. 172 (1941).

[6] See Hill, *supra* note 3, at 430; Whicher, *supra* note 3, at 550-53. See generally WRIGHT, *op. cit. supra* note 1, at § 56.

[7] 380 U.S. 460 (1965).

[8] *Id.* at 469-74.

[9] *Id.* at 471-72. See note 2, and authorities cited note 4 *supra.*

[10] "The summons and complaint shall be served together. . . . Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ." FED. R. CIV. P. 4 (d) (1).

[11] "Except as provided in this chapter, an executor or administrator shall not be

court granted the executor's motion for summary judgment, holding that the *Erie* doctrine required that the state-prescribed method govern the sufficiency of service. On appeal, the First Circuit concluded that the conflict posed between the state and federal rules involved "a substantive rather than a procedural matter," and unanimously affirmed.[12] The Supreme Court reversed, holding that the sufficiency of service was to be governed by rule 4 (d) (1) rather than the conflicting state procedure.[13] Further, the "outcome" test posited by post-*Erie* cases was deemed inappropriate to the resolution of such a conflict.[14]

The *Hanna* opinion encompasses a fundamental re-examination and renovation of federal choice of law. This metamorphosis proceeded on three analytic planes. First, the constitutional status of the federal rules, and indirectly, the *Erie* doctrine, was enunciated.[15] Further, the federal rules were freed from the fetters of the venerable "outcome" test and were, in effect, elevated to the stature of "a body of law inviolate."[16] Finally, in contexts other than conflicts involving the federal rules, the *Erie* test for determining when federal courts must apply state rather than federal substantive law was substantially reformulated.[17]

THE CONSTITUTIONAL BASIS OF ERIE

Perhaps the most perplexing and controversial aspect of the *Erie* decision was Justice Brandeis' statement in the majority opinion that "it was the unconstitutionality of the course pursued,"[18] and

held to answer to an action by a creditor of the deceased . . . unless . . . the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . ." MASS. ANN. LAWS ch. 197, § 9 (1958).

[12] 331 F.2d 157, 159 (1st Cir. 1964).

[13] 380 U.S. at 463-64.

[14] *Id.* at 469-74.

[15] *Id.* at 471-74.

[16] *Id.* at 475-76 (Harlan, J., concurring). See *id.* at 471-72.

[17] *Id.* at 466-69.

[18] 304 U.S. at 77-79. Brandeis summarized the new rule by asserting that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Id.* at 78. From these general principles Brandeis concluded: "In disapproving that doctrine [*Swift v. Tyson*] we do

not merely a reinterpretation of the Rules of Decisions Act,[19] that compelled the overruling of *Swift v. Tyson*.[20] The Rules of Decisions Act, said the Court, *required* federal courts to apply state statutory and decisional law when adjudicating state-created rights in diversity cases. The question posed but inadequately answered by Mr. Justice Brandeis' statement was whether the requirements of the act marked the *limits* of congressional authority to confer judicial power upon the federal courts, or whether the statute merely restricted the otherwise permissible scope of federal court power to formulate "substantive rules of common law applicable in a State."[21]

The assertion in the *Erie* opinion that "there is no federal general common law"[22] in diversity cases has been interpreted by some to imply that deference to state decisional law is constitutionally binding on Congress and the federal courts in matters outside the scope of the constitutional grants of legislative power to the federal government.[23] However, Brandeis' failure to enunciate fully the nature or extent of this ostensible constitutional restriction prompted the majority of commentators to dismiss the brief references to it as "unfortunate dicta."[24] Rather, the argument advanced by the concurring opinion of Mr. Justice Reed in *Erie*[25] was

not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 79-80. See generally WRIGHT, *op. cit. supra* note 1, §§ 55-56.

[19] The Rules of Decision Act provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Federal Judiciary Act of 1789, 1 Stat. 92 (now 28 U.S.C. § 1652 (1964)).

[20] 14 U.S. (16 Pet.) 166 (1842). See note 1 *supra*.

[21] 304 U.S. at 78. See generally WRIGHT, *op. cit. supra* note 1, § 55, at 191-93, § 56.

[22] 304 U.S. at 78.

[23] Friendly, *supra* note 3; Hart *supra* note 3; see Hill, *supra* note 3; Whicher, *supra* note 3.

[24] This opinion was expressed in 1941 by Mr. Justice Stone in a letter to Mr. Justice Roberts. See MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 481 n.† (1956).

For the view that *Erie* was not constitutionally compelled see Ahrens, *Erie v. Tompkins—The Not So Common Law*, 1 WASHBURN L.J. 343 (1961); Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law,"* 1 LA. L. REV. 161, 171 (1938); McCormick & Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 135 (1938); authorities cited as *"contra"* note 3 *supra*. However, this view was not unanimously shared. See Bowman, *The Unconstitutionality of the of the Rule of Swift v. Tyson*, 18 B.U.L. REV. 659 (1938); authorities cited note 23 *supra*.

[25] 304 U.S. at 90-92.

accorded the most currency by analysts.[26] Reed had urged that the grant of judicial power under article III *might*, when coupled with the necessary and proper clause, give the federal courts and Congress the power to establish substantive rules of decision for cases cognizable in federal courts.[27] This expansive view of article III would thus enable the federal government to exercise its power over "non-federal" matters litigated in the federal courts.[28]

Rejection of the thesis that *Erie* had no constitutional ramifications was short-lived, however. *Bernhardt v. Polygraphic Co.*[29] re-opened the question by implying that if a federal statute at issue in that case had purported to govern the substantive rights of litigants in diversity suits it might have been unconstitutional.[30] However, while *Bernhardt* convinced many critics that the Supreme Court had in fact intended to place *Erie* on a constitutional foundation, the continuing lack of judicial exposition of the issue perpetuated the confusion and controversy.[31]

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[26] See WRIGHT, *op. cit. supra* note 1, § 56, at 195-96, 197 n.13. See generally authorities cited as *"contra"* note 3 *supra*.

[27] 304 U.S. at 92. Thus, under Mr. Justice Reed's expansive interpretation of article III, as under the Brandeis rationale, the federal government was denied the authority to enact general legislation over matters subject to exclusive state jurisdiction.

[28] The *Erie* decision has been interpreted as leaving within federal rule-making power questions of federal interest. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943); Friendly, *supra* note 3, at 79-92; 1965 DUKE L.J. 828. However, the Reed thesis is more comprehensive in scope than the *Clearfield* doctrine. Under the former interpretation the federal government could establish rules of decision in prohibited non-federal interest areas insofar as the issues are litigated in the federal courts. For example, Congress could establish rules to govern tort claims so long as the rules thus promulgated applied only to suits in the federal courts.

[29] 350 U.S. 198 (1956), 45 CALIF. L. REV. 87 (1957), *The Supreme Court, 1956 Term*, 70 HARV. L. REV. 83, 137 (1957).

[30] The *Bernhardt* case involved a contract containing an arbitration clause for resolution of disputes arising from the agreement. Action was begun on the contract in a federal district court sitting in Vermont, and the defendant moved for a stay pending arbitration. Vermont law did not consider such clauses binding, while § 3 of the United States Arbitration Act, 9 U.S.C. §§ 1-3 (1964), if applicable, did. The Court reasoned that "if . . . [defendant's] contention is correct, a constitutional question might be presented. *Erie R. Co.* v. *Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. . . . We therefore read § 3 narrowly to avoid that issue." 350 U.S. at 202. Mr. Justice Frankfurter, concurring, added that "in view of the ground that was taken in . . . [the *Erie* case] for its decision, it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is between 'Citizens of different States . . . .'" *Id.* at 208.

[31] See Hill, *supra* note 3, at 607-09; Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 465-70 (1962); Whicher, *supra* note 3, at 550-54. See generally WRIGHT, *op. cit. supra* note 1, § 56, at 196-98.

In the meantime, the scope of *Erie* had been eroded by the expanding field of "federal common law" in areas deemed to involve a "dominant federal interest."[32] In matters "essentially of [a] federal character"[33] which have been found to necessitate a uniform national rule,[34] such as federal fiscal concerns,[35] interstate waterways,[36] patent and copyright law[37] and federal statutes in general,[38] federal decisional law has bourgeoned. The most pervasive

[32] See 1 BARRON & HOLTZOFF, *op. cit. supra* note 5, § 8, at 36-37; WRIGHT, *op. cit. supra* note 1, § 60, at 213-18; Friendly, *supra* note 3, at 79-92; Hill, *State Procedural Law in Federal Non-Diversity Litigation*, 69 HARV. L. REV. 66, 98-105 (1955); Comment, 69 YALE L.J. 1441 (1960); Note, 53 COLUM. L. REV. 991 (1953).

[33] United States v. Standard Oil Co., 332 U.S. 301, 307 (1947). The Court noted that *Erie* was not designed as a wedge for "broadening state power over matters essentially of federal character or for determining whether issues are of that nature." *Id.* at 307.

[34] See Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943), 43 COLUM. L. REV. 520, 18 IND. L.J. 311, 18 TUL. L. REV. 152. "The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." Clearfield Trust Co. v. United States, *supra* at 367. For criticism of the Court's reasoning in *Clearfield* see Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 828-32 (1957); Note, 53 COLUM. L. REV. 991, 1005-08 (1953).

[35] See National Metropolitan Bank v. United States, 323 U.S. 454, 456 (1945) (forged government check); Clearfield Trust Co. v. United States, *supra* note 34 (same); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455-56 (1942) (action by FDIC on note transferred by state bank as collateral); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940) (suit on a note against director of a national bank). See Friendly, *supra* note 3, at 82-85. "The *Clearfield* doctrine has spread into many other types of litigation over obligations by or to the United States." *Id.* at 83.

[36] See Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). *Cf.* Arizona v. California, 373 U.S. 546 (1963). The rationale for the application of federal law to controversies over interstate waterways is an aspect of the more general rule as to the application of federal law to govern controversies between states. See generally West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951); Connecticut v. Massachusetts, 282 U.S. 660, 670-71 (1931); Kentucky v. Indiana, 281 U.S. 163, 176-77 (1930); Kansas v. Colorado, 206 U.S. 46, 95-98 (1907); Kansas v. Colorado, 185 U.S. 125, 146-47 (1902); 21 HARV. L. REV. 132 (1907).

[37] See Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 175-76 (1942). See also De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956); T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827-28 (2d Cir. 1964) (Friendly, J., dictum), 1965 DUKE L.J. 828. As to the application of federal law to unfair competition in or affecting interstate commerce see, *e.g.*, Huber Baking Co. v. Stroehmann Bros. Co., 252 F.2d 945, 952-53 (2d Cir. 1958) (registered trademarks); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 650-51 (3d Cir. 1954) (false representation of goods in commerce); Stauffer v. Exley, 184 F.2d 962, 966 (9th Cir. 1950) (general national law of unfair competition exists under federal trademark laws). See generally Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949); Friendly, *supra* note 3, at 86-88; Note, *Developments in the Law-Trademarks and Unfair Competition*, 68 HARV. L. REV. 814 (1955).

[38] See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (NLRA); Illinois Steel Co. v. Baltimore & O.R.R., 320 U.S. 508, 510-11 (1944) (ICC approval

expansion of the scope of "federal interest" was instituted in *Banco Nacional de Cuba v. Sabbatino*.[39] That case involved a non-statutory rule, the act of state doctrine, which the Court deemed a matter of "intrinsically federal" common law binding upon state and federal courts alike.[40] The underpinnings of that decision are uncertain however, and the Court's lack of specificity in articulating the constitutional foundation of an "intrinsically federal" categorization poses several possible interpretations of permissible judicial power in the area of "federal interest." Under a broad but tenable reading of *Sabbatino*, the scope of matters classifiable as "intrinsically federal" has been vastly expanded to encompass all affirmative grants of constitutional power to *any* branch of the federal government.[41] At the very least, by deeming foreign rela-

of bills of lading gives the bills the force of federal law); Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963) (§ 10(b) of the Security Exchange Act and rule X-10b-5 of the SEC); Brown v. Bullock, 294 F.2d 415, 420-22 (2d Cir. 1961) (§ 15 of the Investment Company Act). See generally 1 LOSS, SECURITIES REGULATION 102-05 (1961); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Mishkin, *supra* note 34, at 814-20; Comment, 28 U. CHI. L. REV. 707 (1961); Note, 27 IND. L.J. 231 (1952).

[39] 376 U.S. 398 (1964).

[40] *Id.* at 427-28. "Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be effectively undermined as if there had been no federal pronouncement on the subject. . . . We are not without other precedent for a determination that federal law governs . . . . Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests." *Id.* at 426. See Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (1965).

[41] See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 818 (1964). *Contra*, Friendly, *supra* note 3, at 82; Mishkin, *supra* note 34, at 800 n.13. "Even clearly established legislative power would not automatically imply law-making competence in the federal courts." *Ibid.*

"The Court seems determined to assert that the power of the courts to make law —as in *Sabbatino*—is not derivative, or auxiliary to that of the political branches, but is an independent power of the federal judiciary under the Constitution. The Court does not insist that Act of State or foreign relations are special; it does not strive to avoid the impression that the independent power of the federal courts to make supreme federal law might reach anywhere in the federal domain." Henkin, *supra* at 806. Thus, under this expansive reading of *Sabbatino* the power of the federal courts to apply federal law is limited to matters within the broad panoply of powers granted to Congress and the executive, see notes 32-38 *supra* and accompanying text, but within that "federal domain" the courts are constitutionally empowered to develop federal common law independent of congressional direction. This rationale seemingly negates the interpretation of article III, such as that advanced by Professor Broh-Kahn, which viewed the grant of "judicial power" to the federal courts as an independent source of federal rule-making power, enabling the federal judiciary to apply decisional law to factual contexts which could not be reached under articles

tions an "intrinsically federal" area necessitating a uniform body of law, *Sabbatino* has demonstrated the increasing propensity of the federal common law to encroach on areas which have previously been viewed as arguably subject to state law.

Within this context of expanding judicial power over "intrinsically federal" matters, the *Hanna* decision has now begun a pincers movement upon the *Erie* reservation of state law-making power. One flank of the pincer is comprised of the expanding federal interest concept. The *Hanna* opinion in no way arrested this expansion, and its tenor arguably accorded it an added impetus by lending credence to the broader view of *Sabbatino*.[42] Further, *Hanna*

I and II. Professor Broh-Kahn, in what is perhaps the most comprehensive article advocating the foregoing "expansive view" of article III, argued that "it is not, therefore, by virtue of a power expressly delegated to Congress that federal courts exercise full judicial power and complete independence in causes to which their jurisdiction attaches. It is solely by virtue of the grant of judicial power in the Judiciary Article. This is as much an express delegation of complete power to the federal courts as the bankruptcy, commerce or any other power is expressly delegated to Congress." Broh-Kahn, *supra* note 3, at 27. See generally CROSSKEY, *supra* note 3, at 563-77, 711-937. See also Dodd, *The Decreasing Importance of State Lines*, 27 A.B.A.J. 78, 83 (1941).

While such a broad interpretation of *Sabbatino* has not been rejected, narrower interpretations are undoubtedly possible. It might be argued that the rationale of *Sabbatino* is rooted in the notion that the conduct of foreign relations inheres in the sovereignty of the federal government. See United States v. Curtiss-Wright Export Co., 299 U.S. 304, 315-18 (1936) (Sutherland, J.). However, such an interpretation fails to illustrate "why the intrinsically federal character of foreign relations . . . provides need or warrant for inferring an unusual, independent law-making power in the courts." Henkin, *supra* at 818-19 & n.45. Seemingly, a more plausible alternative interpretation is rendered by Henkin's notation that act of state is possibly a peculiarly judicial doctrine relating to conflicts of law and thus resolvable by the courts themselves. Given this plethora of possible rationales, Henkin concluded that perhaps the need for uniformity and federal supremacy in the field of foreign affairs weighed against the relatively minor state interest involved in questions concerning an act of state makes this area "intrinsically federal" and dictates that the courts need not "wait on the political branches and . . . [may] make law that should also bind the states and state courts." *Id.* at 819. Some support for this view was provided by a dictum of Judge Friendly in Republic of Iraq v. First Nat'l City Bank, *supra* note 40. Friendly read *Sabbatino* as asserting that "all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States." *Id.* at 51. "This law-making power in the federal courts derives by necessary inference from the Constitution itself." *Id.* at 51 n.2.

[42] The Court stated in *Hanna* that "neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution . . . ." 380 U.S. at 471. By equating judicial power with that accorded to other branches by other sections of the Constitution, this statement is consistent with the broadest interpretation of *Sabbatino*—that federal rule-making authority encompasses *all* affirmative grants of power to *any* branch of the federal government. See note 41 *supra* and accompanying text. Moreover, the Court viewed federal power to prescribe procedural rules for the federal courts as permitting "'*uniformity* in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal

commenced a flanking movement on another of *Erie's* perimeters. The Court unambiguously asserted that Congress is empowered under article III, as augmented by the necessary and proper clause, to enact a rule which is rationally classified as procedural, even though that rule may affect state-created rights when said rights are adjudicated in diversity suits.[43]

The Court has in essence defined the federal rules as comprising an "intrinsically federal" area, thus elevating them to a preeminent position vis-a-vis state law. Therefore, coupling the *Hanna* decision with the broader interpretation of *Sabbatino,* the reach of federal interest has been so expanded that little scope is reserved to exclusively state law-making authority.[44] The only apparent restriction upon this expansion which has been consistently articulated is that of the vague and relatively ineffectual limitation of the necessary and proper clause.[45] Thus, these pincer-like en-

proceedings, an area in which federal courts have traditionally exerted strong *inherent power,* completely aside from the powers Congress expressly conferred in the Rules . . . .' " [quoting from Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963).] 380 U.S. at 472-73. (Emphasis added.) The Court thus appears to categorize federal procedure as an "intrinsically federal" matter to which federal law may be applied, thereby making the application of the federal rules in diversity suits merely another aspect of the "federal interest" concept. Given this interpretation of the quoted language in *Hanna,* a "federal interest" impliedly can arise not only in connection with the provisions of articles I and II, but may also emanate from the judicial powers conferred by article III.

[43] *Id.* at 472-73. See also note 88 *infra* and accompanying text.

[44] The expanse of "federal interest" appears broad enough to provide Congress and, perhaps, the federal courts, with a constitutional imprimatur should they choose to accord the federal courts power to make independent choice of law decisions in diversity cases. Such a course would entail the reversal of Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941), a progeny of *Erie* which presumably shares the same constitutional mantle. The requisite federal interest in federal choice-of-law rules is arguably inherent in the role of the federal judiciary as an intermediary in conflicts between the divergent interests of different states. As Professor Cavers noted in discussing the *advisability* of vitiating *Klaxon,* "In the independent federal judiciary we appear to have umpires made to our hand. If they cannot work out a system for the accommodation of conflicting state laws, how can one reasonably expect the state courts to do so?" CAVERS, THE CHOICE OF LAW PROCESS 217 (1965). See ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 35, 98 (Tent. Draft No. 1, 1963); Leflar, *Constitutional Limits on Free Choice of Law,* 28 LAW & CONTEMP. PROB. 706 (1963). See also Cavers, *The Changing Choice of Law Process and the Federal Courts,* 28 LAW & CONTEMP. PROB. 732 (1963).

[45] In *Hanna* the Court stated that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. at 472. Thus, the validity of an enactment challenged as a "substantive" encroachment upon state prerogative is ostensibly to be measured by the

croachments on their face appear to afford almost unlimited scope to the development and application of federal common law.

Some curtailment of this expansion may be implied from the language of *Hanna*, however. In discussing the dictates of the "outcome" test, the Court determined that the crux of the *Erie* rationale was the avoidance of forum-shopping and "inequitable administration of the law," both of which result in unfair discrimination against forum-state litigants.[46] The Court viewed such "unfairness" as characteristic of the "sort of *equal protection problems* which troubled the Court in *Erie*."[47] The allusion to equal protection is ostensibly imprecise because the fourteenth amendment is literally limited in its applicability to states and state courts.[48] However,

strictures of the necessary and proper clause, U.S. CONST. art. I, § 8 (18). Under such a test, Congress would be accorded complete discretion as to the effectuation of its constitutional powers, subject only to the caveat that there must be a rational nexus between the constitutional power being implemented and the means employed. See McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 413-21 (1819).

Such a holding constitutes a substantial reallocation of power both between Congress and the courts and between the state and federal governments. Although it was precisely the possibility of dual classification as substance or procedure that necessitated the Court's post-*Erie* attempts to determine the proper differentiation between the two categories, in *Hanna* the Court has relinquished this decision to Congress insofar as the federal rules are concerned. While the Court reaffirmed the constitutional prohibition against substantive federal law-making in "non-federal-interest" areas, 380 U.S. at 471-72, the *Hanna* decision necessarily implied that if a rule is "rationally capable of classification" as procedure, this classification is not a constitutional but merely a policy question subject to congressional alteration. The "rationally procedure" test in itself provides Congress with wide rule-making discretion. This latitude is augmented by the fact that the courts have traditionally given great deference to congressional exercises of power under the necessary and proper clause. See United States v. Oregon, 366 U.S. 643, 649 (1961); Adams v. Maryland, 347 U.S. 179, 183 (1954); Lichter v. United States, 334 U.S. 742, 757-65 (1948); Legal Tender Cases, 110 U.S. 421, 440-41 (1884).

Given such a broad delegation of power, the scope of federal common law could be expanded to embrace matters such as the parol evidence rule, which is arguably procedural but has a significant effect upon a litigant's substantive rights. Moreover, by finding federal power to legislate within the vagaries of substance and procedure, *Hanna* vested Congress with greater power than it had claimed in the Enabling Act, which disclaimed the right to promulgate "substantive rules."

[46] 380 U.S. at 467-69. See generally text accompanying notes 82-94 *infra*.

[47] 380 U.S. at 468. (Emphsis added.) Variations of this phrase recur throughout the opinion. " 'Thus, the doctrine rendered impossible equal protection of the law.' *Erie R. Co. v. Tompkins* . . . ." *Id.* at 467. "Moreover, it is difficult to argue that . . .[a difference between Massachusetts and federal service requirements] alters the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." *Id.* at 469. See Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Klaxon Co. v. Stentor Co., 313 U.S. 487, 496 (1941).

[48] "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. See generally, THE CONSTITUTION OF THE

there is a latent body of authority which would infer the rudiments of equal protection into the "fairness" requirements of the fifth amendment's due process clause.[49] Under this rationale, the requisites of equal protection might thereby be incorporated into the general rubrics of either substantive or procedural due process.[50]

Whether or not pristine "equal protection" may be so inferred,

UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1082-1214, 1279-1321 (Small ed. 1963). However, the fifth amendment does not contain an "equal protection" clause. See Detroit Bank v. United States, 317 U.S. 329, 337-38 (1943); Currin v. Wallace, 306 U.S. 1, 13-14 (1939).

[49] "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). See Detroit Bank v. United States, *supra* note 43 (dictum); Currin v. Wallace, *supra* note 43, at 13-14 (dictum); Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937) (dictum). Moreover, "relying upon public policy and its supervisory authority over federal courts, the Supreme Court has reached results similar to those arrived at under the equal protection clause of the Fourteenth Amendment . . . ." THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 974 (Small ed. 1963). See Hurd v. Hodge, 334 U.S. 24, 34-36 (1948); Petrillo v. United States, 332 U.S. 1, 8-9 (1947); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Steele v. Louisville & N.R.R., 323 U.S. 192, 198-200, 208-09 (1944); McNabb v. United States, 318 U.S. 332, 340-41 (1943); Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 361-65 (1949).

[50] In Bolling v. Sharpe, *supra* note 49, the issue was racial discrimination in District of Columbia public schools. While the issue was thus solely the inclusion of the guarantees of "equal protection" within the prohibitions of *"substantive* due process," the "equal protection—due process" interaction is not confined to this sphere. The "fairness" conduit by which equal protection was absorbed by the due process clause in *Bolling* also underlies the proscriptions of "procedural due process." See Palko v. Connecticut, 302 U.S. 319, 324-26, 328 (1937). Thus, the *Bolling* rationale would equally support the incorporation of the fourteenth amendment's "equal protection" requirements into that "procedural due process" guaranteed by the fifth.

"Fairness" in an "equal protection" sense has also been read into the "procedural due process" clause of the fourteenth amendment. See also Douglas v. California, 372 U.S. 353 (1963). It has been argued that this technique was applied by the Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956), involving a denial of counsel on appeal. "Discrimination is a part of denial of due process, just as it is a part of denial of equal protection. Denial to all equally of a privilege which due process does not in absolute terms exact, may come to violate due process if the denial is arbitrarily applied to some persons but not to others. And yet arbitrary discrimination is the traditional way of violating the equal protection clause. Thus, the two concepts overlap." Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment,* 43 CORNELL L.Q. 11, 22 (1957). See the discussions in Hyser v. Reed, 318 F.2d 225, 255 (D.C. Cir. 1963); *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 54, 172 (1962). Moreover, the non-discrimination prohibitions of "equal protection" may in one case have been transported into the "procedural due process" requirements of the fifth amendment. See Coppedge v. United States, 369 U.S. 438, 446-47 (1962) (dictum).

the *Hanna* Court's concern for the preservation of a basic standard of fairness suggests the conclusion that a due process standard has been enunciated.[51] Such an interpretation of *Erie* would comport with "the traditional notions of fair play and effective justice" imposed by procedural due process in analogous areas such as jurisdiction,[52] providing a test with established standards and prag-

[51] The *Hanna* Court views the concept of "fundamental fairness" as the underlying policy of the *Erie* decision. "The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." 380 U.S. at 467. The Court subsequently observed that "the 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 . . . ." *Id.* at 468 n.9. See also discussion in note 41 *supra*. Thus, whether the Court's references to "equal protection," see note 47 *supra* and accompanying text, are interpreted as incorporating the strictures of the equal protection clause (thereby implying a utilization of *Bolling v. Sharpe* rationale) or merely a capsulization of the general concept of "fundamental fairness," the Court's adoption of a due process standard seems clear. *But see* McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 890 (1965).

Moreover, the Court's treatment of the federal rules, see text accompanying notes 75-81 *infra*, adds credence to the foregoing interpretation of "fairness" to individual litigants as the limitation upon the expansion of federal interest. The imposition of a "rationality" limitation on federal procedural rule-making authority comports with the standard by which legislation is measured under an "equal protection—due process" analysis. See Tussman & tenBroeck, *supra* note 49, at 334-56. Thus, the Court, in the concluding paragraph of its opinion, 380 U.S. at 473, indicates that a congressional "command" to apply the federal rules in all cases cognizable by the federal courts is not, nor could it constitutionally be, absolute. Rather, while deference is to be accorded congressional determinations of whether a rule is procedural, if the effect of such a rule would be to permit an out-of-state litigant to "*unfairly* discriminate" against the forum-state litigant, the application of the federal rule would be unconstitutional as a denial of due process. *Cf.* note 81 *infra*.

[52] In outlining the permissible scope of state court jurisdiction the Supreme Court has asserted that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer*, 311 U.S. 457, 463. . . . See Holmes, J., in *McDonald v. Mabee*, 243 U.S. 90, 91 . . . ." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-16 (1950). The *International Shoe* due process standard has been applied to the federal courts with respect to service of process upon foreign corporations. See Woodworkers Tool Works v. Byrne, 191 F.2d 667, 672 (9th Cir. 1951) (federal courts are required by the fifth amendment to apply the *International Shoe* standard). See also Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 155 (5th Cir. 1954); Consolidated Cosmetics v. D-A Publishing Co., 186 F.2d 906 (7th Cir. 1951); Bach v. Friden Calculating Mach. Co., 167 F.2d 679, 681 (6th Cir. 1948); Scott v. Middle East Airlines Co., 240 F. Supp. 1, 4 (S.D.N.Y. 1965); Goldberg v. Mutual Readers Leagne, Inc., 195 F. Supp. 778, 782 (E.D. Pa. 1961); Note, 69 HARV. L. REV. 508, 514-15 (1956). *But see* Green, *Federal Jurisdiction in Personam of Corporation and Due Process*, 14 VAND. L. REV. 967 (1961).

matic flexibility.[53] If this interpretation is tenable, the outlines of the limitation imposed on the encroachment of federal common law on state prerogatives emerge into clearer focus: federal common law may not infringe upon state law-making power in such a way as to vitiate the fairness requirement of due process.

THE "OUTCOME" TEST DISTINGUISHED

Aside from the controversy emanating from the constitutional references in *Erie,* the federal courts in the post-1938 era became preoccupied with the collateral pragmatic problem of constructing a workable test for determining when *Erie* required the application of state law. The potential conflict between state law and a body of nationally uniform federal rules of procedure was a major source of friction. *Hanna,* by emancipating the federal rules from the strictures of the *Erie* doctrine, has authoritatively resolved the controversy by elevating the rules to prominence within their "procedural" sphere.

At the inception of the *Erie* test, it was assumed that if the doctrine was to work in harmony with the federal rules the Court would utilize the traditional substance-procedure dichotomy.[54] However, the lack of adequate analytic guidelines to determine what was procedure rather than substance within the *Erie* context almost immediately led to inconsistency and confusion among the federal courts, commentators and the bar.[55] In attempting to provide these guidelines, the Supreme Court quickly indicated that it did not intend to be bound by customary substance-procedure categorizations.[56] This trend away from mechanical classification had cul-

[53] A requirement that federal law be subservient where a conflict between the federal and state law results in "invidious" or "unfair" discrimination would both prevent a reversion to a mechanistic search for uniformity in outcome and allow a greater scope for the application of federal law, while preventing the federal government from substantially undermining state legislative prerogatives.

[54] Holtzoff, *supra* note 4, at 57; Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules,* 3 VAND. L. REV. 711 (1950); Note, 39 GEO. L.J. 600, 601 (1951); 29 GEO. L.J. 923, 924-25 (1941). See Clark, *supra* note 4, at 418-19; Driver, *The Federal Civil Rules in Diversity Cases,* 30 ORE. L. REV. 69-73 (1950).

The assumption that concepts of substance and procedure would be focal to an *Erie* analysis of the federal rules also received some judicial support in the early cases. *E.g.,* HFG Co. v. Pioneer Publishing Co., 162 F.2d 536, 539-40 (7th Cir. 1947); Perrott v. United States Banking Corp., 53 F. Supp. 953, 955-56 (D. Del. 1944).

[55] See 1A MOORE, FEDERAL PRACTICE ¶ 0.317 (8), at 3540-41; Keefe, Gilhooley, Bailey & Day, *Weary Erie,* 34 CORNELL L.Q. 494, 508 (1949); Weintraub, *supra* note 5, at 232-35; Note, 46 MINN. L. REV. 913, 926 (1962).

[56] See Merrigan, *supra* note 54, at 711; Weintraub, *The Erie Doctrine and State Conflict of Laws Rules,* 39 IND. L. REV. 228, 231-33 (1964).

minated in *Guaranty Trust Co. v. York*,[57] which held that pre-*Erie* labels were immaterial. For *Erie* purposes a rule of law was deemed "substantive" if application of the federal, rather than the state rule, would significantly affect the result of the litigation.[58] Further, the *Guaranty* court structured this "outcome" test to require that in adjudicating state-created rights in diversity suits, a federal court shall act as "only another court of the State."[59] Therefore, the federal courts could not afford a remedy if the state's courts would have refused it, nor could the federal courts "substantially affect the enforcement of the right as given by the State."[60]

In applying the *Guaranty* test, deference was accorded to state law "in matters which, for other purposes, are clearly procedural."[61] In *Cohen v. Beneficial Indus. Loan Corp.*,[62] for example, the Supreme Court held that in a diversity action adjudicating a stockholder's derivative suit, the federal courts must apply a New Jersey

[57] 326 U.S. 99 (1945), 44 MICH. L. REV. 477 (1945), 21 N.Y.U.L.Q. REV. 145 (1946), 31 VA. L. REV. 948 (1945).

[58] 326 U.S. at 106. See generally Driver, *supra* note 54, at 71-72; Weintraub, *supra* note 56, at 233-34; Note, 39 GEO. L.J. 600, 602 (1951); Note, 46 MINN. L. REV. 913 (1962).

Guaranty thus adopted a test previously proposed by Judge Magruder in Sampson v. Channell, 110 F.2d 754, 756-58 (1st Cir. 1940), by Professors Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271, 278 (1939), and Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 175-76 (1944). See Note, 39 GEO. L.J. 600 (1951).

[59] 326 U.S. at 108.

[60] *Id.* at 108-09.

[61] WRIGHT, FEDERAL COURTS § 58, at 208 (1963).

[62] 337 U.S. 541 (1949), 35 CORNELL L.Q. 420 (1950), 48 MICH. L. REV. 706 (1950), 35 VA. L. REV. 789 (1949). For earlier application and development of the "outcome" test see, *e.g.*, Angel v. Bullington, 330 U.S. 183 (1947); Hills v. Price, 79 F. Supp. 494 (E.D.S.C. 1948).

Two other cases decided the same year as *Cohen* indicate the breadth of the deference to be accorded state law in diversity actions. In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), 35 CORNELL L.Q. 420 (1950), 38 GEO. L.J. 115 (1949), 48 MICH. L. REV. 531 (1950), service of process was required by state law in order to toll the state's statute of limitations. *Contra*, 337 U.S. at 557-61 (Rutledge, J., dissenting). Despite the fact that the mere filing of a complaint in accordance with rule 3 was sufficient to commence a suit in a federal court, the court held that the additional state law requirement must be met to toll the statute. Woods v. Interstate Realty Co., 337 U.S. 535 (1949), 35 CORNELL L.Q. 420 (1950), 44 ILL. L. REV. 533 (1949); 24 IND. L. REV. 418 (1949), 28 TEXAS L. REV. 444 (1950), held that a state statute which barred foreign corporations not qualified to do business in the state from suing in the state courts also operated to bar said corporation from suing in the federal courts sitting in that state. *Contra*, 337 U.S. at 338-40 (Jackson, Rutledge and Burtou, JJ. dissenting). See generally WRIGHT, *op. cit. supra* note 61, § 59, at 208-09; Driver, *supra* note 54, at 74-76; Weintraub, *supra* note 56, at 233-34; Note, 18 GEO. WASH. L. REV. 240 (1950); Note, 66 HARV. L. REV. 1516, 1517 n.5 (1953); 46 MINN. L. REV. 913, 928 n.80 (1962); 39 TEXAS L. REV. 680, 683 n.30 (1961).

statute[63] requiring the posting of security for payment of expenses as a condition of prosecuting the action, although federal rule 23 (b)[64] does not require such security. Thus, despite language to the contrary in *Hanna*,[65] the Supreme Court has applied an *Erie* test to cases posing an ostensible conflict between state law and the federal rules. Under the aegis of the "outcome" test, the rules were restrictively construed or subordinated throughout the federal court system.[66] This modified *Erie* test, therefore, appeared to have vitiated the goal of a uniform procedure in the federal courts.

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[63] N.J. Laws ch. 131, § 1, at 487-88 (1945).

[64] FED. R. CIV. P. 23 (b).

[65] "The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of 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, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U.S. at 470.

"[T]his Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State . . . ." *Id.* at 472.

[66] See Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 222 (N.D. Iowa 1952); 1A MOORE, FEDERAL PRACTICE ¶ 0.317 (8), at 3540-41 (2d ed. 1953). Illustrative of this conflict is the lower courts' treatment of sufficiency of evidence (rules 38, 39, 50). *Compare* Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575, 582 (5th Cir. 1957), *and* Ryan v. Adam Scheidt Brewing Co., 197 F.2d 614, 615 (3d Cir. 1952), *with* Lovas v. General Motors Corp., 212 F.2d 805, 807 (6th Cir. 1954), *and* O'Donnell v. Geneva Metal Wheel Co., 190 F.2d 59, 60 (6th Cir. 1950). A similar conflict in regard to direction of verdicts (rule 50) has also been posed. *Compare* Lowry v. Seaboard Airline R.R., 171 F.2d 625, 630 (5th Cir. 1948) *and* Guthrie v. Great Am. Ins. Co., 151 F.2d 738, 740 (4th Cir. 1945), *with* Baltimore & O.R.R. v. Henry, 235 F.2d 770, 772-73 (6th Cir. 1956), *and* Elder v. Dixie Greyhound Lines, Inc., 158 F.2d 200, 202 (8th Cir. 1946). For more extensive examinations of particular areas of conflict see Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. REV. 427, 432-37 (1958); Weintraub, *supra* note 56, at 234-35; Note, 39 GEO. L.J. 600, 604-05 (1951).

The interpretations given the "outcome" test by three 1949 decisions, *Cohen v. Beneficial Indus. Loan Corp.;* Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (see note 51 *supra* and accompanying text), prompted the draftsman of the rule to comment that "hardly one of the heralded Federal Rules can be considered safe from attack." Clark, Book Review, 36 CORNELL L.Q. 181, 183 (1950). See generally Clark, *Federal Procedural Reform and States Rights: To a More Perfect Union*, 40 TEXAS L. REV. 211, 220 (1961); Driver, *supra* note 48, at 76-77; Gavit, *State's Rights and Federal Procedure*, 25 IND. L.J. 1 (1950); Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 512-15 (1954); Merrigan, *supra* note 54, at 717; Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 447 (1962); Note, 39 GEO. L.J. 600, 602-06 (1951); Note, 39 TEXAS L. REV. 680, 683 (1961).

Numerous authorities called for the limitation of the *Erie* test so as to preserve the federal rules. See, *e.g.*, Broli-Kahn, *Uniformity Runs Riot—Extensions of the Erie Case*, 31 KY. L.J. 99, 119-21 (1943); Farinholt, *Angel v. Bullington: Twilight of Diversity Jurisdiction?*, 26 N.C.L. REV. 29, 49-50 (1947); Parker, *Erie v. Tompkins in*

Upon a thirteen-year foundation of experience under the "outcome" test, the Court introduced the concept of "affirmative countervailing considerations" in *Byrd v. Blue Ridge Rural Elec. Co-op.*[67] *Byrd* announced that the "outcome" test was not the sole criterion; "affirmative countervailing considerations" may dictate disregard of state practice regardless of "outcome."[68] The *Byrd* case involved a conflict between state and federal practice in regard to the nature of questions requiring jury determination.[69] While noting that a difference in outcome would not likely be caused by application of the federal rather than the state procedure,[70] the Supreme Court asserted that the courts were also to examine the policies behind the competing rules to determine if the state's policy was of sufficient importance to outweigh that underlying the federal rule.[71] The Court found a strong policy favoring exclusive federal control of the judge-jury relationship in the federal courts and held that the federal requirement should govern.[72] However, the *Byrd* opinion was replete with qualifications,[73] and this weak-

Retrospect: An Analysis of Its Proper Area and Limits, 35 A.B.A.J. 19, 86 (1949); Wolkin, *Conflict of Laws in the Federal Courts: The Erie Era,* 94 U. PA. L. REV. 293, 307 (1946); Note, 18 GEO. WASH. L. REV. 240, 250-51 (1950); 33 VA. L. REV. 739, 748-49 (1947). However, some commentators maintained that nearly all of the rules could be applied under the "outcome" test. See, *e.g.,* Friendly, *In Praise of Erie—And of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64, 78-79 (1964); *Federal Trials and the Erie Doctrine,* 51 NW. U.L. REV. 338, 342-43 (1959); Note, 62 HARV. L. REV. 1030, 1040-41 (1949); Note, 66 HARV. L. REV. 1516, 1518-25 (1953).

[67] 356 U.S. 525, 537 (1958), 44 A.B.A.J. 975 (1958), 72 HARV. L. REV. 147 (1958), 43 MINN. L. REV. 580 (1959), 28 U. CINC. L. REV. 390 (1959).

[68] 356 U.S. at 537-38.

[69] As a defense to a diversity action to recover for personal injury allegedly due to negligence, the defendant asserted that plaintiff was its employee for purposes of the South Carolina Workmen's Compensation Act, and that said act provided plaintiff an exclusive remedy. Under South Carolina law this defense must be determined by the judge rather than the jury, while under federal law plaintiff was entitled to have the issue decided by the jury. *Id.* at 528-31.

[70] *Id.* at 539-40.

[71] *Id.* at 537-38.

[72] *Id.* at 538-39.

[73] The Court in its opinion did not purport to be dispensing with the "outcome" test and any impetus for reform the decision may have had was weakened because of (1) the importance of the seventh amendment's guaranty of trial by jury to the decision; and (2) the Court's assertion that the "outcome" test would not have required the application of state law in any event. See Smith, *supra* note 66, at 449-70; Weintraub, *supra* note 56, at 235-37; Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict,* 37 TEXAS L. REV. 549, 554-63 (1959). *But cf.* 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 138, at 596; Degan, *The Feasibility of Rules of Evidence in Federal Courts,* 24 F.R.D. 341, 352 n.36a (1959). *But see* Meador, *State Law and the Federal Judicial Power,* 49 VA. L. REV. 1082, 1098-99 (1963); Storke, *Conflicts Erie Cases,* 32 ROCKY MT. L. REV. 20, 36 (1959).

Compare the differing views as to the siguificance of *Byrd* expressed in Arrow-

ness limited the impact of the opinion as a seminal modification of the "outcome" test and clouded the general issue of when a state law must govern.[74]

Thus, the federal rules were still threatened with subversion by state law when the *Hanna* decision was rendered. That decision held the application of the *Erie* test inapposite to a conflict between the federal rules and state law. The Court ruled that while *Erie* and the Enabling Act both proscribed federal invasion of state-created "substantive" rights, they established distinct tests for determining whether this restriction is contravened.[75] In resolving a conflict between the *rules* and state law, the issue to the *Hanna* court was not whether the rule in question was "substantive" or "procedural," or whether "affirmative countervailing considerations" are to be assessed. Rather, the inquiry was to focus on whether a procedural rule so alters substantive rights as to transgress the restrictions embodied in the Enabling Act's proviso that the rules "shall not abridge, enlarge, or modify any substantive rights."[76] The Court noted that the test developed by the post-*Erie* cases was designed to determine *only* the "substance-procedure" characterization and is inapt as an interpretive technique for gauging the strictures of the Enabling Act.[77] The federal courts have been in-

smith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), by Judge Friendly, writing for the majority, *id.* at 230, and Judge Clark, dissenting, *id.* at 235-36.

[74] Several subsequent cases rely solely upon the "outcome" test without reference to *Byrd*. See, *e.g.*, Hardwick v. Smith, 286 F.2d 81, 82 (10th Cir. 1961); Aponte v. American Sur. Co., 276 F.2d 678, 680 (1st Cir. 1960); Summers v. Wallace Hosp. 276 F.2d 831, 833 (9th Cir. 1960); Sun Ins. Office, Ltd. v. Clay, 265 F.2d 522, 524 (5th Cir. 1959), *rev'd on other grounds*, 363 U.S. 207 (1960); Lee v. Jenkins Bros., 268 F.2d 357, 364 (2d Cir. 1959); Conn v. Young, 267 F.2d 725, 728 (2d Cir. 1959); Tarbert v. Ingraham Co., 190 F. Supp. 402, 404-05 (D. Conn. 1960).

The majority of courts that have had occasion to consider *Byrd* have applied it to the distribution of functions between judge and jury. See, *e.g.*, Dill v. Scuka, 279 F.2d 145, 147 (3d Cir. 1960); Walker v. United States Gypsum Co., 270 F.2d 857-60, 862 n.12 (4th Cir. 1959). However, some courts have extended *Byrd* beyond this limited context. See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508-13 (2d Cir. 1960); Monarch Ins. Co. v. Spach, 281 F.2d 401, 406-07 (5th Cir. 1960); Iovino v. Waterson, 274 F.2d 41, 48 (2d Cir. 1959), *cert. denied*, Carlin v. Iovino, 362 U.S. 949 (1960). See generally Smith, *supra* note 60, at 454-65.

[75] 380 U.S. at 471.

[76] Federal Rules Act of 1934, 28 U.S.C. § 2072 (1964).

[77] 380 U.S. at 471.

By liberating the federal rules from outcome-oriented post-*Erie* definitions of "substance" and "procedure" and reverting to the orthodox definitional approach typified by Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941), the Court has failed to delineate an adequate standard for interpreting the requirements of the Enabling Act. *Sibbach* formulated the test as "whether a rule really regulates procedure, —the judicial process for enforcing rights and duties recognized by substantive law

structed by Congress to apply the federal rules and may refuse to do so only if "the Advisory Committee, . . . [the Supreme] 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."[78]

Thus, the threat posed to the rules by the "outcome" test is ameliorated by simply removing them from the ambit of that test and by substituting a broad command to apply the rules regardless of the resulting conflict between federal and state adjudication of state-created rights. The Court indicated that this command is limited not only by the language of the statute but also by the dictates of the Constitution.[79] However, the Court's interpretation of the constitutional authorization for the federal rules reduces these limitations to virtual meaninglessness. Unless a congressional determination that a matter is procedural is so clearly erroneous as to be "irrational" that determination is conclusive.[80] Such a finding is so improbable that the rules, for all practical purposes, have been made unchallengeable unless certain vague dicta are given substance in future cases.[81]

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and for disregard or infraction of them." *Ibid.* Such a generalization provides, at best, minimal criteria for determining the question. See generally Driver, *supra* note 54, at 72; Tunks, *supra* note 58, at 277. Lower federal courts are thus faced with a variety of founts from which to derive characterizations of substance and procedure, with little indication of a test the Court would deem preferable. The Court specifically cites *Sibbach*, 380 U.S. at 470-71, with its adoption of the traditional conflict of laws demarcation, Note, 56 NW. U.L. REV. 560, 561-62 & n.15 (1961), and thereby, arguably, implies that this definition is the one to be utilized in determining whether a rule is "procedural." However, the Court deems permissible any rule "rationally capable of classification," 380 U.S. at 472, as procedure; the implication being that if the rule would be "procedural" under any possible definition of "procedure" it would be within congressional authority. The latter interpretation would appear to comport with the tenor of the decision which grants the widest possible scope to the application of federal law by the federal courts.

[78] 380 U.S. at 471.

[79] *Id.* at 471-72.

[80] In *Hanna* the Court stated that article III, §§ 1-2 of the Constitution, augmented by the necessary and proper clause, U. S. CONST. art. I, § 8 (18), not only grants Congress the power to establish procedural rules for the federal courts, but also confers the power to determine the proper classification of matter "which, though falling within the uncertain area between substance and procedure . . . [is] rationally capable of classification as either . . . ." 380 U.S. at 472. Thus the only judicial check upon congressional discretion is when the classification made it so arbitrary as to be "irrational."

[81] While the Court appears to be establishing a rather inflexible command to apply the federal rules in all cases, some of the language in the Court's concluding paragraph appears to leave the door open for later qualification. "Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow

THE "OUTCOME" TEST VITIATED

The uniform application of the federal rules, as pre-*Hanna* experience demonstrated, is essential for optimum efficiency in the federal court system and does not appear to be inconsistent with the constitutional restrictions on Congress' legislative power over state-created rights. The probability that *Hanna* will enable Congress to seriously impinge upon the law-making functions of the states through the guise of "procedural" rules would seem to be, at best, slight.[82] Nevertheless the inevitable result of the Court's holding

in state courts, Sibbach v. Wilson & Co., . . . [312 U.S. 1, 13-14 (1941)] it cannot be forgotten that the Erie rule . . . [was] created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S. at 473-74. This statement, taken in isolation, may imply that the federal rules are not to be wholly isolated from the *Erie* test. Rather, the evil is mechanical application of that test in such a way that every federal rule-state law conflict is resolved in favor of state law. A similar approach was used in Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764-65 (5th Cir. 1963); D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958), 34 NOTRE DAME LAW. 130 (1958), 6 U.C.L.A.L. REV. 332 (1959), cited with approval in *Hanna*, 380 U.S. at 472-73. *Hanna* could thus be interpreted as merely engrafting upon the outcome test a strong, but rebuttable, presumption in favor of the application of the federal rules. See generally Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417, 421 (1941) (advocating a presumption in favor of the rules). *Cf.* note 51 *supra*.

Moreover, the decision provides a ready ground for distinction for a lower court which desires to avoid the application of a rule. While both the district and circuit courts had held that the "outcome" test demanded the application of the state rule, the Supreme Court said: "it is doubtful that . . . the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure." 380 U.S. at 466. First, using a *Byrd*-type analysis, there was no actual conflict between the policies underlying the two rules: the policy of guaranteeing actual notice to the defendant is the common goal of both the federal and Massachusetts rules. *Id.* at 462 n.1. For an interpretation of the policies behind the Massachusetts requirement see Parker v. Rich, 297 Mass. 111, 113-14, 8 N.E.2d 345, 347 (1937). Secondly, under the Court's redrafted "*Erie* test," see text accompanying notes 82-94 *infra*, the effect upon outcome produced by the application of the federal rule would not be sufficient to necessitate the utilization of the state rule. 380 U.S. at 469. Such a situation not only reduces the necessity and value of finding further grounds for applying the federal rules, but provides a lower court, when confronted with a case in which the application of a rule would produce a substantial enough conflict with state procedure, a convenient distinction.

[82] Of the existing federal rules, rule 23(b) is perhaps most vulnerable to the argument that it usurps state legislative prerogatives. The rule provides: "In an action brought to enforce a secondary right on the part of one or more shareholders . . . the complaint . . . shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . . . The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." FED. R. CIV. P. 23(b). The existence of an additional state requirement for shareholder derivative suits,

is to guarantee greater federal control over diversity suits. However, so long as the "outcome" test retains its vitality, this increased federal control is diametrically opposed to the established federal policy favoring the application of state law in such suits. Therefore, in an extensive dictum, the Supreme Court completed its renovation of the federal choice of law problem by substantially reformulating the *Erie-York* test.[83] The Court stated that, henceforth, the "outcome" test is to be applied *only* as it relates to the twin aims of *Erie:* "discouragement of forum shopping and avoidance of inequitable administration of the laws."[84] The mere fact that the application of the state rule would put an end to the litigation while the federal law would not is insufficient per se to demand the application of the state rule. Rather, the determinative fact is whether such a conflict would affect the plaintiff's choice of forum. Thus, the fact that a suit would be barred in the state courts is relevant only if it was so barred at the time of filing in the federal court.[85] In addition, *Hanna* invalidates the underlying premise of

such as the posting of security for payment of expenses in *Cohen v. Beneficial Indus. Loan Corp.*, can always be reconciled as being outside the scope of the rule and thus capable of concurrent application. See 380 U.S. at 470 & n.12. The application of an additional federal requirement can also be justified on the grounds that (1) such application does not substantially alter the enforcement of state-created rights, *cf.* Steinberg v. Hardy, 90 F. Supp. 167 (D. Conn. 1950); 2 BARRON & HOLTZOFF, *op. cit. supra* note 73, § 565; and (2) "the Erie doctrine does not require the federal courts to entertain a suit, merely because such a suit might be brought in the state court." WRIGHT, *op. cit. supra* note 61, § 73, at 276 (1963).

Thus, this rule does not appear to seriously undermine the legislative functions of the states. Certainly the effect upon those rights by any of the other rules would be even less than that occasioned under rule 23(b). See generally authorities cited note 66 *supra.*

[83] See 380 U.S. at 466-69.

[84] *Id.* at 468.

[85] *Id.* at 468-69. Under the "outcome" test there were two aspects of the "door-closing" doctrine. The suit might be barred in the state court prior to the filing of the complaint in the federal court. Woods v. Interstate Realty Co., 337 U.S. 535-36 (1949); See *Guaranty Trust Co. v. York,* 326 U.S. at 107. In this situation, the plaintiff knows or may reasonably be assumed to know that he could not bring suit in the state court and thus if his suit is allowed by the federal courts there will be an obvious circumvention of state law. This situation would demand the application of state law under the *Hanna* test, though not because of its "outcome-determinative" nature. Rather, state law would apply in order to preclude the possibility of forum-shopping. 380 U.S. at 467-69. The second aspect of "door-closing" arises when access to the state courts is barred subsequent to the commencement of the suit in the federal court. See Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (state statute of limitation tolled after complaint filed in federal court but before summons served). In this situation, the plaintiff cannot be assumed to anticipate that the suit could not have heen successfully brought in the state court, and he is not necessarily engaging in forum-shopping to avoid the state law which bars his suit. Under

the "outcome" test by positing that the federal courts in all cases are an independent judicial system, not mere adjuncts of state courts.[86] The thrust of the holding would therefore appear to presage a more unfettered role for the federal courts in spheres where federal and state law conflict.[87]

Yet the test propounded by *Hanna* appears to be as superficial and prone to mechanical application as the "outcome" test it ostensibly replaces. Certainly forum-shopping is neither per se undesirable nor unconstitutional.[88] The *Hanna* decision itself, by assuring the universal application of the federal rules throughout the federal system, will promote forum-shopping. The Court does not purport to proscribe *all* reasons for which a plaintiff might pre-

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the test formulated by *Hanna*, the mere fact that the state courts are subsequently closed to the plaintiff is not sufficient to require the application of state law. Rather, for state law to apply, federal cognizance of the suit would have to result either in unfair discrimination against a citizen-defendant or produce an undesirable reason for forum-shopping. 380 U.S. at 466-69.

[86] *Id.* at 472.

Independent coexistence of the federal judiciary may be extrapolated from the constitutional and statutory power of the federal courts to apply an independent procedural system regardless of the resulting conflict with state enforcement of identical "substantive" rights. This underlying philosophy was clearly enunciated in Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963) (cited with approval in *Hanna*). "We said in Monarch [Ins. Co.] v. Spach: 'Not the least of these countervailing considerations is the indispensible necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause . . . . Investment of this profound power and duty carries with it the capacity if not the affirmative obligation, to prescribe such rules as will enable the federal district courts to fulfill these constitutional demands without at the same time trespassing upon others of equal and fundamental nature.'" *Id.* at 764-65.

[87] By guaranteeing the universal application of the federal rules and by liberalizing the *Erie* test to allow application of federal law in the face of conflicting state law, the *Hanna* decision will promote greater autonomy for federal courts and greater scope for the development of federal common law. When this decision is coupled with the expanding interpretation of "federal interest" questions, the scope given to the federal courts and Congress to govern "substantive" rights becomes increasingly clear. See notes 42-45 *supra* and accompanying text. *Cf.* Friendly, *supra* note 66, at 79-92; 1965 DUKE L.J. 828. See generally Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[88] The primary reason for the establishment of diversity jurisdiction was to provide an out-of-state litigant with a choice of forum. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch.) 61, 87 (1809) (opinion of Marshall, C.J.); Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad Co. v. Tompkins*, 26 MARQ. L. REV. 1, 7 (1941). The *Erie* opinion itself, when viewed in the context of diversity jurisdiction, promotes forum-shopping by allowing a plaintiff to select the federal court sitting in the state whose substantive rules are most favorable to his claim. See CHEATHAM, CONFLICTS OF LAWS—CASES AND MATERIALS 235-36 (1964). *Erie* also affords a plaintiff an opportunity to limit drastically the defendant's ability to argue an adverse state precedent on its merits by bringing suit in the federal courts. See Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 774-75 (1941); Keefe, Gilhooley,

fer the federal courts. Rather, the evils to be avoided are the use of the federal courts to circumvent state policies in areas of state law-making responsibility and the denial of due process to litigants residing in the forum state. However, the phrase "forum-shopping" is as susceptible of talismanic application as was "outcome-determination," thereby permitting the courts to determine the issue without reference to the purpose of the restriction.[89]

Similarly, *Hanna's* "unfair discrimination" test fails to provide an adequate yardstick. The venerable principle that equal administration of justice required decisional uniformity within a state, once regarded as well-settled,[90] has been modified in *Hanna* to admit "nonsubstantial, or trivial, variations, between state and federal litigation."[91] However, the Court's analysis fails to provide adequate criteria for determining what constitutes a substantial enough variation to warrant classification as "unfair discrimination." In fact, the Court's language seems to indicate that unless the variation in the character of result of the litigation was such as to cause the out-of-state plaintiff to choose the federal court instead of the state court, it would not constitute sufficient discrimination.[92] Therefore, since the Court has failed to provide adequate analytical guidelines for "unfair discrimination," the lower federal courts are likely to rely on the analogous "forum-shopping" test. This in turn increases the danger of a return to a mechanical, short-

Bailey & Day, *supra* note 55, at 518-19; Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031, 1036 (1962). *Cf.* Graves v. Associated Transport, Inc., 344 F.2d 894 (4th Cir. 1965), in which the court said that where there was no state authority "squarely in point" the federal court must decide the case as it believed "it would be decided by the highest court" of the state. *Id.* at 896.

[89] While *Hanna* restricts the "forum-shopping" test so as not to take into account "nonsubstantial or trivial" variations between federal and state rules, 380 U.S. at 468, the danger exists that the courts will utilize the phrase mechanically and lose sight of this restriction by not analyzing the reason for the "forum-shopping." This mechanistic pitfall is precisely the difficulty presented by the "outcome" test. See note 85 *supra*. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), *with* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

[90] See Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), 41 COLUM. L. REV. 1403, 40 MICH. L. REV. 126, 15 SO. CAL. L. REV. 95, 16 TUL. L. REV. 141, 8 U. PITT. L. REV. 60, 28 VA. L. REV. 279, holding that equal administration of justice required decisional uniformity within a state.

[91] 380 U.S. at 467-68.

[92] "Not only are nonsubstantial, or trivial variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie;* they are also unlikely to influence the choice of forum." 380 U.S. at 468. See *id.* at 468 n.9, 469. *Cf.* McCoid, *supra* note 51, at 896.

hand test,[93] the unworkability of which prompted the *Hanna* decision.[94]

While the *Hanna* decision succeeds in eliminating the threat to the federal rules created by *Erie* and its progeny, the decision fails to provide a workable judicial line of demarcation between the overlapping and often conflicting spheres of power of the federal and state governments. Thus, future friction and consequent reformulation appear inevitable, especially in view of the failure of the Court to delineate with precision the outlines of the reformulated *Erie* test and the requisite constitutional shackles which confine the tentacles of federal interest.

[93] See note 89 *supra* and accompanying text.
[94] See notes 60-82 *supra* and accompanying text.