NOT BAD FOR GOVERNMENT WORK: DOES ANYONE ELSE THINK THE SUPREME COURT IS DOING A HALFWAY DECENT JOB IN ITS *ERIE-HANNA* JURISPRUDENCE?

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I. INTRODUCTION

A tough crowd, those academic commentators. Especially, it seems, when the subject is a teaching favorite on which the professoriat can be expected to have strong views, such as the Supreme Court's decisions in *Erie Railroad v. Tompkins*[1] and its progeny. Throughout the six decades since the Court in *Erie* overruled *Swift v. Tyson*,[2] putting the federal courts out of the business of making general federal common law for matters that would have been decided under state common law if they were in the state courts, much of the

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1 304 U.S. 64 (1938).

2 41 U.S. (16 Pet.) 1 (1842).

law review commentary on the Court's *Erie* decisions has been critical[3]—and sometimes deservedly so.[4]

The first reactions to the Supreme Court's latest in the line of *Erie* and its progeny, the 1996 decision of *Gasperini v. Center for Humanities, Inc.*,[5] continue this pattern. Indeed, the criticisms come from such divergent and sometimes opposing standpoints that they might leave Justice (and onetime Professor) Ruth Bader Ginsburg, author of the *Gasperini* majority opinion, wondering if her former colleagues and students in the academy are determined to cut the Court no slack in this area no matter what it does. Solomonically, *Gasperini* calls for application of a *state* statutory review standard for excessiveness or inadequacy of jury awards rather than a federal decisional standard involving less intensive scrutiny, but follows practice under *federal* law in allocating responsibility for trial court application and appellate review of determinations under the state standard. That is too "state-friendly" for an anonymous student commentator in the *Harvard Law Review*'s annual Supreme Court issue,[6] who laments the Court's supposed abandonment of what the comment takes to have been the pre-

3 For an early example, see Arthur J. Keeffe et al., *Weary* Erie, 34 CORNELL L.Q. 494, 494 (1949) ("We think that the broad policy formulated by the Supreme Court in reversing *Swift v. Tyson* was based upon a misconception of the problems involved in diversity litigation."). Even in the modern literature one can find a call for abandonment of *Erie* and a return to *Swift* (a debate I will not get into in this article, *Erie* being the fixture that it is). *See* John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087, 1089 (1992) ("*Erie*, as currently applied, is not mandated constitutionally and . . . the costs of continued adherence to the doctrine are difficult to justify on policy grounds. The recommendation that follows is simple to state, though difficult to swallow: *Swift* should be viewed as a preferred alternative."); *see also, e.g.*, Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989) (criticizing the Supreme Court's decisions as interpreting positive federal law too broadly, thus overriding legitimate state concerns, and for providing unclear, manipulable standards for cases involving decisional federal law). Not all the commentary has been highly critical. *See, e.g.*, Henry J. Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

4 *See, e.g.*, Edward Lawrence Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 711–12 (1950) (criticizing the Supreme Court's decisions in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *and Cohen v. Beneficial Indusrial Loan Corp.*, 337 U.S. 541 (1949), "[p]ractising attorneys are unable to determine which of the Federal Rules will remain in full effect, and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law").

5 116 S. Ct. 2211 (1996).

6 *See The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 135, 263–66 (1996) (hereinafter *The Supreme Court, 1995 Term*). A student comment in the *Arkansas Law Review* echoes the assumptions and criticisms in the Harvard writeup. *See* Eva Madison, Case Note, *The Supreme Court Sets New Standards of Review for Excessive Verdicts*

viously governing balancing approach of *Byrd v. Blue Ridge Rural Electric Cooperative.*[7]

By contrast, Professor Douglas Floyd takes the Court to task for having "relied centrally on *Byrd*,"[8] and in its treatment of *Gasperini* having created great uncertainty over the weight to be given federal and state interests[9]—with the danger of "unwarranted subordination of substantive state objectives to ad hoc judicial perceptions of amorphous federal procedural 'interests.'"[10] From still another angle, a student note in the *Cornell Law Review* argues that "*Gasperini* affirms the *Byrd* balancing test's continuing vitality in the *Erie* analysis and clarifies the federal interests that have relevance in that balance[,]" but "undermines the holding of *Hanna* [*v. Plumer*[11]] by allowing state law to define the substance of a Federal Rule of Civil Procedure."[12] And a student piece in the *Pace Law Review*[13] largely endorses the position taken in Justice Scalia's *Gasperini* dissent,[14] arguing that the majority gave too little force both to the Seventh Amendment's reexamination clause and to Federal Rule of Civil Procedure 59(a) on new trials. *Gasperini* is beginning to seem like a palimpsest, into which one can inscribe almost any meaning (good or bad) of one's choosing.

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in Federal Court in Gasperini v. Center for Humanities, Inc., 50 ARK. L. REV. 591, 616–17, 626 (1997) (citing and quoting *The Supreme Court, 1995 Term, supra*).

7 356 U.S. 525 (1958); *see The Supreme Court, 1995 Term, supra* note 6, at 257 (describing *Byrd* approach of "balanc[ing] state and federal interests" as having been "the dominant precedent" for cases involving "the conflict between a state statute and a judge-made federal practice," with *Gasperini* signaling a "surprising change in *Erie* jurisprudence" leaving the method for resolving such conflicts "unclear") (footnote omitted); *id.* at 266 (criticizing Court for having "abandoned a useful analytical framework" by "refusing to follow *Byrd*," thereby "squander[ing] an opportunity to provide much-needed stability to a family of *Erie* conflicts that was, and remains, obscure").

8 C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 270.

9 *See id.* at 297 ("*Gasperini* provided the Court with a much needed opportunity to explore the foundations of *Erie*, to reconcile its disparate approaches in *Hanna* [v. *Plumer*, 380 U.S. 460 (1965),] and *Byrd*, and to explain, confine, or reject *Byrd*'s balancing approach in light of the uncertainties and criticism that it has spawned."); *id.* at 305 ("Rather than clarify and resolve, however, the Court's opinion confuses and confounds. *Byrd* still lives, but we know not why, or to what extent.").

10 *Id.* at 270.

11 380 U.S. 460 (1965).

12 J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 183 (1997).

13 Joseph B. Koczko, Note and Comment, Gasperini v. Center for Humanities, Inc.*: State Jury Award Controls Supplant Seventh Amendment Protections*, 18 PACE L. REV. 199 (1997).

14 *Gasperini*, 116 S. Ct. at 2230-40 (Scalia, J., dissenting).

The *Gasperini* majority opinion is not a shining model, but neither does it strike me as a severe muddle. And it does not appear to mark a major shift in the Supreme Court's *Erie* jurisprudence of the last third of a century. More broadly, however few of my colleagues in the legal academy may hold this view, it seems to me that since the Court decided *Hanna* in 1965 it has provided and maintained a reasonably stable, workable, and sensible structure for analyzing issues in what I like to call—because of *Hanna*'s importance—the *Erie-Hanna* area of state-federal law choice for federal courts. Lest I be taken as giving the Court more praise than it may deserve, I offer about one and a half cheers; significant problems do dog the Court's approaches and its applications of them, and it could do better. But it could do—and in some areas such as the fragmented, highly indefinite doctrine governing personal jurisdiction, has done[15]—far worse.

Because of the disagreement among commentators about where *Erie-Hanna* doctrine stood before *Gasperini*, Part II of this essay summarizes what the Supreme Court's case law appeared to say before *Gasperini* on the core matters of determining whether a state-federal law conflict existed and if so which law should prevail. (I put aside such significant further problems in this general area as choice between laws of different states when some state law will govern, and determining the content of applicable state law, neither of which *Gasperini* seems to affect.) Part III examines *Gasperini* with an emphasis on what it seems to leave unchanged, what may differ since that decision, and what remains unclear. Part IV concludes with some observations on the general state of *Erie-Hanna* lore—and on the relative merits of the performance of the Supreme Court and its academic critics in this field.

15 *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990) (upholding by unanimous judgment "transient" personal jurisdiction over nonresident individual served in state during temporary presence unrelated to matter in suit, but without any opinion or portion commanding votes of more than four Justices); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (striking down by unanimous judgment California personal jurisdiction over Japanese tire valve maker impleaded as third-party defendant by Taiwanese tube manufacturer to which valve maker had shipped component for incorporation into final product, with unanimous opinion only as to facts of case, and eight Justices agreeing on part of opinion holding exercise of jurisdiction unreasonable in light of evaluation of multiple factors in addition to third-party defendant's contacts with forum, but no majority opinion resolving recurring "stream-of-commerce" issue).

II. THE PRE-*GASPERINI* STATE OF *ERIE-HANNA* DOCTRINE

The *Erie-Hanna* commentary does not need another run-through of the major cases; that job has been ably done various times, most recently by Professor Allan Ides' survey of the area.[16] But the perplexing level of disagreement and apparent confusion over just what the Supreme Court has been saying about how to come at *Erie-Hanna* problems makes it worthwhile to explore whether the pre-*Gasperini* status of approaches in this area had been characterized more by clarity and stability or by obscurity and unsettledness. At the level of overall approach, *Erie-Hanna* doctrine seems to me—despite much of what has been said in the literature—to have been increasingly definite and stable (as well as sensible and usually administrable). The cases worth the Supreme Court's attention, not surprisingly, have been some of the hardest and those most lending themselves to disagreement over application of the Court's approaches. An understandable concentration on such trees or clumps may have made it too hard to keep the forest in focus; hence, I attempt a guided tour of the forest.

A. The Conflict-Determination Stage

Since the *Erie-Hanna* area involves state-federal law choice, in practical application a first issue will often be whether any choice need be made. As the Supreme Court has repeatedly put it in cases involving acts of Congress and Federal Rules of Civil and Appellate Procedure, the "first question must . . . be whether the scope of the [possibly applicable provision of federal law] in fact is sufficiently broad to control the issue before the Court."[17] This much seems en-

16 Allan Ides, *The Supreme Court and the Law To Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 21–74 (1995).

17 Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) (interpreting Federal Rule of Civil Procedure 3 not to speak to tolling for purposes of state statute of limitations applicable in diversity case in federal court involving potential clash between state statute requiring service of process within limited period after running of statute of limitations and Federal Rule 3 on filing of complaint effectuating commencement of action, thus leaving state requirement as governing law); *see* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 26 (1988) ("[W]hen the federal law sought to be applied is a congressional statute, the first and chief question . . . is whether the statute is 'sufficiently broad to control the issue before the Court.'" (quoting *Walker*, 446 U.S. at 749–50)); Burlington N. R.R. v. Woods, 480 U.S. 1, 4–5 (1987) ("The initial step is to determine whether, when fairly construed, the scope of Federal Rule [of Appellate Procedure] 38 is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court . . . ." (quoting *Walker*, 446 U.S. at 749–50 & n.9, and *Hanna*, 380 U.S. at 472)).

tirely unexceptionable and also applicable to cases in which the potentially governing federal rule of law is constitutional on the one hand or purely decisional on the other,[18] with the room for disagreement arising chiefly over the interpretation of the federal rule.[19]

A key subsidiary point at this conflict-determination stage is the approach to construction of the Federal Rule, on which the attitude at least until *Gasperini* appeared to involve not going out of the way to avoid finding a conflict. While finding no conflict in *Walker v. Armco Steel Corp.*[20] and emphasizing that the *Hanna* conflict-resolution analysis applies "only if [the] question [whether the scope of the Federal Rule is sufficiently broad to control] is answered affirmatively,"[21] the Court also stated: "This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules are to be given their plain meaning . . . ."[22] Indeed, the Court in all its other major *Erie-Hanna* decisions since 1965 involving federal statutes and rules had found the "direct collision" that triggers the *Hanna* analysis.[23]

Despite the frequency of conflict findings in the few cases that have reached the Supreme Court, the types of circumstances that can

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18 *See* Chambers v. NASCO, Inc., 501 U.S. 32, 52 (1991) (in a case involving judge-made federal rule, stating that "only when there is a conflict between state and federal substantive [sic] law are the concerns of *Erie* . . . at issue").

19 *See, e.g., Stewart Org.*, 487 U.S. at 34–38 (Scalia, J., dissenting) (criticizing majority's interpretation of 28 U.S.C. § 1404(a) (1994) on transfer of venue "[f]or the convenience of parties and witnesses, in the interest of justice," as governing whether to give effect to forum-selection clause in contract between parties, when law applicable in courts of state where suit was filed disfavored such clauses).

20 446 U.S. 740 (1980).

21 *Id.* at 749–50.

22 *Id.* at 750 n.9.

23 *See Stewart Org.*, 487 U.S. at 30 (finding direct conflict even though 28 U.S.C. § 1404(a) (1994) on venue transfer "and Alabama's putative policy regarding forum-selection clauses are not perfectly coextensive"); Burlington N. R.R. v. Woods, 480 U.S. 1, 7 (1987) (finding that Federal Rule of Appellate Procedure 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute [ALA. CODE § 12-22-72 (1986) (amended 1987)]"); Hanna v. Plumer, 380 U.S. 460, 463 n.1 (1965) (stating that although both federal and state service provisions aimed "to insure that executors will receive actual notice of claims . . . the Federal Rule reflects a determination that this goal can be achieved by a method less cumbersome than that prescribed" by state law); *id.* at 470 (federal rule "says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts"); *cf.* Business Guides, Inc., v. Chromatic Communications Enters., 498 U.S. 533, 540–54 (1991) (reading Federal Rule of Civil Procedure 11 to apply to signature of represented party as well as that of counsel, despite dissent urging narrower interpretation partly because of concern for possible incursion into domains of state law, *see id.* at 554–70 (Kennedy, J., dissenting)).

bring about an absence of conflict are several. Most fundamentally, after *Erie*'s negation of federal courts' power to create general common law,[24] at least in the absence of action by Congress pursuant to one of its enumerated powers there may be no federal law that can apply.[25] Second, as *Walker* illustrates by its construction of Federal Rule of Civil Procedure 3[26] not to address tolling for purposes of an applicable state statute of limitations, even federal and state rules that are very much in the same area may not speak to the same precise point, so that each may be given its different but non-conflicting effect. Third, state and federal provisions frequently track each other or, even if phrased differently, have the same effect, often because state rules are modeled on the Federal Rules of Civil Procedure or sometimes because the Federal Rule was inspired by state law.[27] In such cases a federal court need not reach choice issues and can follow the law as supplied by both systems. And fourth, sometimes federal procedure borrows at least part of its content from state law, which eliminates the possibility of conflict.[28]

B. The Conflict-Resolution Stage

Since *Hanna,* and Professor John Hart Ely's illuminating and deservedly influential article nine years later,[29] it has seemed clear that after a finding of a state-federal law conflict, the starting point is to identify the source or nature of the possibly applicable federal rule of law (to which I shall sometimes refer, for brevity, as the "candidate" federal rule). To embellish Ely's analysis slightly, for purposes of this area federal law comes in four types—the United States Constitution,

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24 *See Erie,* 304 U.S. at 78 ("There is no federal general common law.").

25 *Cf. Hanna,* 380 U.S. at 471–72:

> [N]either 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; in such areas state law must govern because there can be no other law.

26 FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

27 *See* FED. R. CIV. P. 68 advisory committee's note (citing statutes from Minnesota, Montana, and New York in connection with original promulgation of Rule 68 on offers of judgment).

28 *See, e.g.,* FED. R. CIV. P. 4(k)(1)(A):

> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
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> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . .

29 John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

acts of Congress, Federal Rules of procedure promulgated by the Supreme Court pursuant to the Rules Enabling Act[30] (including, for these three types, judicial constructions of the Constitution, federal statutes, and Federal Rules), or purely decisional federal law.[31] The type of the candidate federal rule in turn determines the approach to the validity of the federal rule, which if valid and contrary to state law governs under the Supremacy Clause.[32] The first three of these areas—Constitution, statute, and Federal Rule under REA authority—seem little affected by *Gasperini*, but a sketch can be useful to provide the overall framework.

1. Constitutional Rules

The Constitution provides some procedural rules applicable to civil cases in federal but not state courts, such as those derived from the Fifth Amendment's Due Process clause[33] and the Seventh Amendment's jury trial guarantee.[34] Whenever such a provision applies, *Erie-Hanna* approach issues are trivial because of the Constitution's universal-trump character; if the Seventh Amendment mandates a trial by jury in a particular type of case or on some issue in a case, it makes no difference even in a state-law case whether a state court would choose judge or jury trial.[35] In such cases, too, despite the general validity of

30 28 U.S.C. § 2072 (1994):

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including cases before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge, or modify any substantive right.

I follow Ely's practice of using initial capitals in referring to Federal Rules promulgated under the Enabling Act and lower-case letters in referring to federal rules of law of other types. *See* Ely, *supra* note 29, at 697 n.31.

31 Given the context and *Erie's* elimination of general, substantive federal common law, the federal rules in question here are those of a procedural or partly procedural nature.

32 U.S. CONST. art. VI, cl. 2.

33 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

34 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 reexamined in any Court of the United States, than according to the rules of the common law.

35 *Cf.* Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987) *cert. denied sub nom.* Avis Rent-A-Car, Inc. v. Marshall, 484 U.S. 1065 (1988) ("Since Puerto Rico, a civil law jurisdiction, never uses juries in civil cases, there is of course no Common-

the guideline that federal courts in cases involving claims under state law follow state substance and federal procedure,[36] because the Constitution is our paramount law it would be misleading and beside the point to engage in any classification of either the federal law or conflicting state law as substantive or procedural. If the federal rule is one of constitutional law, it governs, period.

2. Acts of Congress

For the many acts of Congress in Title 28 and elsewhere that govern various aspects of procedure in the federal courts, *Hanna*—a case involving a Federal Rule of Civil Procedure, not a statute—hinted heavily that such statutes had only to be constitutional under a broad view of congressional authority to regulate federal court procedure.

> [T]he 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. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316, 421.[37]

The Court's citation to Chief Justice Marshall's famously expansive view of congressional power in *M'Culloch*[38] emphasizes the scope

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wealth law on this subject. The Seventh Amendment, however, most decidedly affords litigants in federal court in Puerto Rico the right to trial by jury . . . .") (footnote omitted).

36 *See, e.g.*, *Hanna*, 380 U.S. at 465 ("The broad command of *Erie* was . . . identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.").

37 *Id.* at 472. The Necessary and Proper Clause specifically refers to Congress' power not only to make laws for carrying out its own enumerated powers, but also "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," U.S. CONST. art. I, § 8, cl. 18, leaving no room for doubt that Congress can legislate concerning such matters as federal court jurisdiction and procedure. The Court in *Hanna* went on to emphasize this point: "*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." *Hanna*, 380 U.S. at 473.

38 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819):

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted

Hanna affords for procedural statutes and seems to warrant Justice Harlan's characterization in his concurrence of the test for such provisions as "arguably procedural, *ergo* constitutional."[39] Harlan appears to have meant his phrase as a criticism of the majority's approach to the validity of a Federal Rule promulgated under the REA, but it seems both accurate and unproblematic when applied to an act of Congress.

The Court's leading post-*Hanna* case involving a procedural statute, *Stewart Organization v. Ricoh Corp.*,[40] strongly confirmed the approach sketched in *Hanna*:

> If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. . . . If Congress intended to reach the issue before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power."[41]

Having interpreted the federal venue-transfer statute before it in *Stewart Organization* to "control[ ] the issue before the District Court," the Supreme Court quoted the language from *Hanna* reproduced above and pronounced "[t]he constitutional authority of Congress to enact" the provision as being "not subject to serious question."[42] The statute being "doubtless capable of classification as a procedural rule," it therefore fell "comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause."[43]

The unqualified sweep of these statements can raise the question whether the Court fully means what it appears to have been saying, particularly after recent cases such as *United States v. Lopez*,[44] which place limits on other broadly construed congressional powers. Yet Chief Justice Rehnquist and Justices O'Connor and Kennedy, mem-

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> to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

(footnote omitted).

39 *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

40 487 U.S. 22 (1988).

41 *Id.* at 27 (citation omitted) (footnote omitted) (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967)).

42 *Stewart Org.*, 487 U.S. at 31–32.

43 *Id.* at 32.

44 514 U.S. 549 (1995) (striking down federal statute criminalizing possession of firearm in school zone as exceeding congressional authority under Commerce Clause, such possession not being economic activity with substantial impact on interstate commerce).

bers of the five-justice *Lopez* majority, all joined the opinion of the Court in *Stewart Organization*, and Justice Scalia's lone dissent appeared to stem largely from his disagreement with the Court's broad construction of the federal venue-transfer statute.[45] *Gasperini* provides no reason to expect a change in the Court's view of the breadth of Congress' power to legislate concerning federal court procedure, even though it held the New York verdict-excessiveness standard applicable; the case did not involve a federal statute, and the three main dissenters (Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas) ironically would have favored application of federal law.[46]

The realistic checks on Congress in this area accordingly seem to be those of politics and good sense, rather than constitutional limits. A federal statute of limitations governing state claims in federal court, overriding otherwise applicable state law, would thus be constitutional[47] (although a terrible idea and one that even Congress could be trusted not to adopt). Statutes of limitations, while serving the substantive concern of real-world repose and rightly treated as substantive for some *Erie* purposes,[48] are also "arguably procedural" given their housekeeping concern with defining what claims are and are not too stale for the courts to be obliged to entertain.[49] Likewise, a loser-pays

45 *See Stewart Org.*, 487 U.S. at 34–38 (Scalia, J., dissenting).

46 *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2236–40 (1996) (Scalia, J., dissenting) (arguing that the Seventh Amendment's re-examination clause, Federal Rule of Civil Procedure 59, and proper application of *Erie* jurisprudence would require federal trial courts to apply federal standard in reviewing size of jury verdict, without review by courts of appeals).

47 *See* Ely, *supra* note 29, at 726 ("Congress could constitutionally enact a statute prescribing a limitation period for diversity cases") (footnote omitted); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 294 (Congress' power to create inferior courts under Article III "implies a power (not yet exercised) to bar a claim as being too stale to be heard in its federal courts, although it would not be barred in the forum of the sovereignty that created the asserted right. Article III also may imply a power to direct a district court to hear a claim that would be deemed too stale to be heard in the forum of the sovereignty creating the asserted right. If valid, limitations law made pursuant to Article III is so because it is, at least, marginally procedural.") (footnote omitted).

48 *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109–12 (1945) (holding state statute of limitations controlling in equity case to enforce state-created right brought in federal court under diversity jurisdiction).

49 *See* Ely, *supra* note 29, at 726 ("[S]tatutes of limitation are passed not simply for the substantive purpose of relieving people's minds after the passage of the designated period, but also for procedural purposes, to keep down the size of the docket and to ensure that cases will not be tried on evidence so stale as to cast doubt on its trustworthiness.").

attorney-fee provision for diversity cases in the federal courts[50] could be constitutional under Congress' authority to regulate federal court procedure, even though the states generally do not treat attorney fees as a recoverable element of damages, at least if the purposes of such a provision included affecting forum choices and incentives for the bringing and conduct of litigation.[51]

If I am reading the cases correctly, Congress' power to legislate concerning procedure in the federal courts is very broad indeed.[52] That does not make irrelevant the *Erie* concerns for forum-shopping incentives and the integrity of state law. It does, though, mean that where these concerns should be taken into account is in the legislative process, with the adoption and framing of legislation governing the federal judiciary influenced by considering whether a potential federal law would create too much disparity between state and federal court practice or would undermine legitimate concerns of state law. Once Congress has acted, though, the breadth of its power and the Court's deferential approach mean that "arguably procedural" federal laws are valid and governing in federal court. That leaves no room for balancing, which Congress already has or should have done itself. It also limits the role of definitional debate over "substance" and "proce-

50 *See* Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 101 (1995) (proposed 28 U.S.C. § 1332(e)(1)) ("The district court that exercises jurisdiction in a civil action commenced under this section shall award to the party that prevails with respect to a claim in such action an attorney's fee . . . .").

51 *See Attorney Accountability: Hearings on H.R. 10 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 15 (1995) ("Overuse and abuse of the legal system impose tremendous costs upon American taxpayers, businesses, and consumers.") (statement of Hon. Jim Ramstad); *id.* at 17 ("[I]n order to discourage frivolous lawsuits and promote settlement of meritorious cases we have adopted a modified version of the English rule.") (statement of Hon. Jim Ramstad); *id.* at 22 ("Something must be done to stop the virulent spread of . . . abusive and wasteful litigation. That is why the central element of the Common Sense Legal Reform Act is the full recovery rule[,] . . . a necessary part of the cure to America's lawsuit epidemic. It expedites the resolution of strong cases and deters the filing of frivolous ones.") (statement of Hon. Christopher Cox); *id.* at 23 ("If I am a plaintiff and I believe my case is strong, I can file even my State claims in Federal court in diversity cases. By doing so, I can ensure that I will be made whole in the courts, and that my claim will be fully vindicated. On the other hand, if . . . I am risk averse, I can avoid the loser-pays rule by filing in State court.") (statement of Hon. Christopher Cox).

52 For a similar interpretation, see Ides, *supra* note 16, at 77:

> The lesson to be learned from *Ricoh* is that a federal procedural statute trumps contrary state law in a diversity case so long as the federal statute is designed to apply to the circumstances and so long as the federal statute can be classified as procedural. As to the latter, the test is, in essence, one of highly deferential rational basis.

dure." All that matters is that the federal statute pass the "arguably procedural" test; the "substantive" or "procedural" nature of any conflicting state law is irrelevant because constitutionally valid federal law is supreme and prevails whatever the source or character of the state law in question.[53]

3. Federal Rules Promulgated Under the Enabling Act

Since *Hanna* it has been clear that the validity of a candidate Federal Rule that covers the point at issue is to be judged by reference to the charter for the Federal Rules, the Rules Enabling Act.[54] As a unanimous Court later put it in *Burlington Northern Railroad Co. v. Woods*,[55] a Federal Rule that

> when fairly construed . . . is "sufficiently broad" to cause a "direct collision" with the state law or, implicitly, to "control the issue" before the court, thereby leaving no room for the operation of that law . . . must then be applied if it represents a valid exercise of Congress's rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act, 28 U.S.C. § 2072.
>
> The constitutional constraints on the exercise of this rulemaking authority define a test of reasonableness. Rules regulating matters indisputably procedural are *a priori* constitutional. Rules regulating matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," also satisfy this constitutional standard. [Quoting *Hanna*, 380 U.S. at 472.] The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not "abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072. The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U.S.C. § 2072, give

53 *See id.* at 77–78 ("If the federal statute is broad enough to cover the circumstances and is constitutionally valid as a procedural enactment the federal statute must be applied regardless of state law to the contrary.").

54 For the pertinent text of the Act, see *supra* note 30.

55 480 U.S. 1 (1987).

> the Rules presumptive validity under both the constitutional and statutory constraints.[56]

With the Court itself providing such an authoritative and reasonably comprehensive distillation, a temptation that an academic expositor must beware is that of embellishing too much. Still, there remain some implications and uncertainties worth considering. First, here as with federal procedural statutes, the Court's approach appears to leave little room, or far more likely none at all, for *Byrd*-style balancing of state interests.[57] The Court speaks of the REA's statutory authorization in § 2072(a), which now gives the Supreme Court "power to prescribe general rules of practice and procedure and rules of evidence,"[58] as if it is fully coextensive with the constitutional scope of Congress' broad authority to legislate concerning federal-court proce-

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56 *Id.* at 4–6 (footnote and some citations omitted).

57 *See* Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525, 535–40 (1958) (considering state rule on judge rather than jury determination of issue in question and "whether it is bound up with [state-created] rights and obligations in such a way that its application in the federal court is required" or is "merely a form and mode" of enforcement, and noting "affirmative countervailing consideration[ ]" of independent federal judicial system's "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," and "likelihood of a different result" from following federal rule). For a summary of the status of *Byrd* in cases involving a Federal Rule after *Hanna*, see 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 124.06, at 124-39 to -40 (3d ed. 1998) (footnote omitted):

> It appears that the Court intended the Rules Enabling Act analysis to supplant *Byrd* for cases involving a conflict between [F]ederal [R]ules and state law. Neither the *Hanna* opinion, nor the Court's later opinion in *Burlington Northern R.R. Co. v. Woods* . . . suggest[s] that balancing state and federal interest[s] has any role in the Rules Enabling Act analysis.

58 28 U.S.C. § 2072(a) (1994).

dure[59]—for which the Court focuses solely on whether the federal law in question is within the scope of that authority.[60]

If balancing were to have any role in this context, it could take place only because the REA goes on in § 2072(b) to place on rules promulgated by the Court the limit, which does not constrain Congress' power to make laws governing federal court procedure, that such rules "shall not abridge, enlarge or modify any substantive right."[61] Yet nothing in the Court's opinions since *Hanna* speaks as if balancing is how it means for federal courts to determine whether procedural rules promulgated under the REA have the forbidden substantive impact. And the statutory language, of course, forbids substantive effects, implying strongly that if any were found they would invalidate a Federal Rule at least as applied, rather than allow some substantive impact as long as it were not too great or seemed well enough justified. If it were to be concluded that federal procedural law *should* be able to "abridge, enlarge or modify" a substantive right under state or nonconstitutional federal law, after all, there is a straightforward and unquestionably valid way to do it: have Congress pass a statute.

All this leaves the question whether and if so under what circumstances the Supreme Court or the lower federal courts might or should find a Federal Rule promulgated under its REA authority to have the kind of substantive effect the REA appears to forbid. The

59 Professor Ides plausibly argues that the scope of the Court's REA authority to promulgate "general rules of practice and procedure and rules of evidence" might not encompass altering the jurisdiction of the lower federal courts, which of course Congress may do. Ides, *supra* note 16, at 81–82. He suggests a distinction between "rules that can be fairly characterized as housekeeping matters and rules more appropriately described as architectural or house building," while granting that "as a practical matter the federal rules are not likely to present a house building problem." *Id.* at 81. An intermediate form of rulemaking authority that Congress has recently granted, however, empowers the Supreme Court to promulgate rules affecting *appellate* jurisdiction—both rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. § 1291 (1994)]," 28 U.S.C. § 2072(c) (1994), and rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [28 U.S.C. § 1292(a)–(d) (1994)]," 28 U.S.C. § 1292(e) (1994).

60 *See supra* text accompanying note 53.

61 28 U.S.C. § 2072(b) (1994). Professor Ely argues that balancing "would be a good deal more defensible in the Enabling Act context" than with purely decisional federal rules because the REA is concerned "quite overtly, with *both* sides of the uneasy tension between federal procedural reform and state nonprocedural policies." He does not advocate a balancing approach under the REA, though, partly because "the statutory language provides no semblance of basis for any such interpretation." Ely, *supra* note 29, at 725 n.171.

Court has repeatedly nodded in its *Erie-Hanna* cases toward the "abridge, enlarge or modify" language[62] while adhering to its strong presumption of the validity of the Federal Rules, emphasizing that merely incidental effects are not proscribed[63] and upholding every challenged Federal Rule it has found to conflict with state law.[64] (This

62 *See* Business Guides, Inc. v. Chromatic Communications Enters., 498 U.S. 533, 551 (1991) ("The [Rules Enabling] Act authorizes the Court 'to prescribe general rules of practice and procedure,' but provides that such rules 'shall not abridge, enlarge, or modify any substantive right.'"); *Burlington Northern*, 480 U.S. at 5 ("The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not 'abridge, enlarge or modify any substantive right . . . .'"); *Hanna*, 380 U.S. at 464 (quoting text of REA); *id.* at 473 (reference to federal courts "measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution").

63 *See, e.g.*, *Burlington Northern*, 480 U.S. at 5 ("Rules which incidentally affect litigants' substantive rights do not violate [the REA's substantive-rights] provision if reasonably necessary to maintain the integrity of that system of rules."); *Hanna*, 380 U.S. at 465 ("Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.") (quoting Mississippi Pub. Co. v. Murphree, 326 U.S. 438, 445 (1946)). Thus, if federal discovery practice differed from that in state courts in such a way as to make a potentially outcome-affecting difference in the information accessible to litigants, without affecting the state substantive law governing the effect of that evidence, such an effect would not run afoul of the statutory ban on changing substance.

64 *See, e.g.*, *Burlington Northern*, 480 U.S. 1 (1987) (upholding discretionary frivolous-appeal sanction of Federal Rule of Appellate Procedure 38 over conflicting mandatory-affirmance penalty under state law); *Hanna*, 380 U.S. at 470 ("The *Erie* rule has never been invoked to void a Federal Rule."). Professor Stephen Burbank, drawing upon extensive historical study of the Rules Enabling Act, makes the logical point that the ban on affecting substantive rights goes to having the proscribed impact on rights under federal as well as state law. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1113–14, 1123–24 (1982). However, neither the Supreme Court nor, as far as I know, any lower federal court has ever dealt with a case involving a challenge to a federal rule as abridging, enlarging, or modifying a substantive right under federal as opposed to state law.

A threshold issue on which I have nothing to add to others' discussions is just what constitutes a "substantive" right. Professor Ely's concise and useful if somewhat circular definition is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, *supra* note 29, at 725 (footnote omitted). He goes on to note "the possibility that a rule can be both procedural and substantive, when it is informed by both procedural and nonprocedural purposes." *Id.* at 725 n.172. Professor Ides uses terms that also refer to the aims underlying a rule of law, in a definition that seems as if it would work in much the same way as Ely's: "Substantive law refers to that body of principles designed to regulate primary human activity; procedural law refers to that body of principles designed to provide a means for adjudicating controversies

issue of possible invalidity of a Federal Rule for affecting substantive rights is of considerable academic interest, including to the academic now at the keyboard. It is, though, a rarity in the real world and of limited practical significance. Readers who do not share the writer's interest may wish to skip to the beginning of Section 4 below.)

The disregard of incidental impacts makes it apparent that the number of situations that might even raise a serious problem of a Federal Rule, valid as "procedural" under the authorization of § 2072(a), having the substantive effect proscribed by § 2072(b) will in practice be extremely small.[65] Genuinely procedural rules do not do such things as, say, defining rights and defenses relating to primary conduct. Indeed, Professor Burbank's history of the Rules Enabling Act argues that the substantive-rights proviso was surplusage, in that the Act's framers did not see it as having independent force beyond the limits on the basic grant of procedural rulemaking authority: the proviso "served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence" of the REA.[66] This view would not necessarily mean that a valid procedural rule could affect substantive rights, for "the first sentence itself was thought to impose significant restrictions on court rulemaking."[67] Rather, the framers may not have conceived of the possibility that a legitimately procedural rule

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over rights derived from the substantive law." Ides, *supra* note 16, at 82. The Supreme Court seems to regard the purposes apparently animating a law as relevant in deciding on whether it should be regarded as substantive or procedural, for the *Gasperini* majority opinion spoke of the "manifestly substantive" character of "the State's objective" underlying New York's "deviates materially" standard of review for excessiveness or inadequacy of jury verdicts. *See Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2220 (1996).

65 The only appellate decision, and the only reported decision in the last twenty years, finding such a conflict that appears in the Westlaw annotations to 28 U.S.C.A. § 2072 is *Douglas v. NCNB Texas National Bank*, 979 F.2d 1128 (5th Cir. 1992). Texas law permits a lender with a contractual right to nonjudicial foreclosure to choose that remedy, even when sued by the borrower in state court and able to pursue judicial foreclosure by way of counterclaim. The Fifth Circuit characterized the lender's right to choose judicial or nonjudicial foreclosure as substantive, holding that applying Federal Rule of Civil Procedure 13(a) on compulsory counterclaims would abridge the lender's substantive rights and enlarge those of the debtor by letting it "force the lender to pursue a judicial foreclosure remedy." *Id.* at 1130.

The conflict between Federal Rule of Civil Procedure 15(c) on relation back and a more liberal state provision that led to the First Circuit's decision in *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974), to regard the state rule as substantive and follow it, has been eliminated by the 1991 amendment permitting relation back when it "is permitted by the law that provides the statute of limitations applicable to the action." FED. R. CIV. P. 15(c)(1).

66 Burbank, *supra* note 64, at 1108.

67 *Id.*

could at least in any objectionable sense "abridge, enlarge or modify any substantive right."[68]

But procedural rules can, in situations that will be rare but are not that hard to imagine, do exactly that. Such rules may, of course, affect outcomes by affording (or denying) in federal court a procedural opportunity lacking (or available) in state court; but such cases would present no more than the permitted incidental impact on substance. Especially given the broad power legitimated by the Supreme Court's "arguably procedural" approach, though, a rule that came within the procedural rulemaking power could collide directly with other law that merited treatment as substantive for REA purposes. Such other law would almost certainly itself be in a border area between substance and procedure, serving a mix of procedural and substantive purposes rather than defining primary rights, obligations, defenses, and so on, of the sort virtually certain not to clash directly even with an "arguably procedural" Federal Rule.

Perhaps the clearest example of a rule creating a direct conflict would be a "rule of limitations"—a hypothetical Federal Rule promulgated under the REA that defined limitations periods for state or, for that matter, federal claims in federal court. Probably in all applications, but at least to the extent that it kept claims alive by providing a period longer than that authorized by legislation (rather than just having a short period that forced claimants into state court[69]), such a rule would not incidentally but directly abridge substantive rights of the defendant and enlarge those of the plaintiff.[70] Despite the validity of

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68 The Supreme Court has never made it plain that it can conceive of the possibility, either, which provides a basis for some doubt whether it would be willing to strike down for violating § 2072(b) a Federal Rule that was at least "arguably procedural" and thus within the general § 2072(a) authority.

> [T]he possibility that a Rule could fairly be labeled procedural and at the same time abridge or modify substantive rights was one the Court [in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)] was unwilling to accept; by its lights, either a Rule was procedural *or* it affected substantive rights . . . . This construction has been widely accepted by the literature and has continued to inform the Court's discussions.

Ely, *supra* note 29, at 719–20 (footnotes omitted).

69 The problems created by removal in such a situation could be knotty, if a plaintiff filed in state court where a long statute of limitations governed and a defendant removed to federal court with the shorter "rule of limitations." But they would be so only if such a rule—whose proposal by the rulemaking process and promulgation by the Supreme Court seem inconceivable—were held valid, which it almost certainly should not be.

70 *See* Ely, *supra* note 29, at 726–27 ("[A] Federal Rule prescribing [a limitation period for diversity cases] would satisfy the Enabling Act's first sentence. It should not get by the second sentence, however, for the substantive rights established by state

such a provision if enacted by Congress,[71] it should be invalid under § 2072(b) if promulgated under the REA.

The breadth of the procedural rulemaking power, and the force of hypothetical examples such as the "rule of limitations,"[72] convince me that despite Professor Burbank's history the REA's substantive-rights proviso should not today be read as surplusage. Nor do I predict that it would be so read if the rare case of an unavoidable collision between a Federal Rule promulgated under the REA and a right under substantive law were to move beyond the realm of the hypothetical. Even moderate versions of plain-language interpretation would give weight to the existence of separate sentences of statutory text conferring the procedural rulemaking authority and imposing the substantive-rights limit—and avoidably reading independent meaning out of statutory language violates elementary construction canons.[73] Indeed, the Supreme Court's post-*Hanna* mentions of the substantive-rights proviso have emphasized its distinctness from the REA's general grant of authority to make procedural rules.[74]

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statutes of limitations would be abridged by applying such a Federal Rule.") (footnote omitted). For legislative history indicating that some framers of the Rules Enabling Act regarded limitations law as entirely outside the procedural rule-making power, see Burbank, *supra* note 64, at 1085–89. For an argument that legislative history should not be dispositive and that practice has sanctioned at least limitations-affecting provisions in Federal Rules such as those dealing with tolling in Rule 3 and relation back in Rule 15(c), see Carrington, *supra* note 47, at 307–10.

71 *See supra* note 47 and accompanying text.

72 *See also supra* notes 50–51 and accompanying text (asserting validity of loser-pays attorney-fee provision for diversity cases in federal court if enacted by Congress). A rule under the REA purporting to establish loser-pays fee shifting would conflict with many state and federal statutes creating different fee-award schemes, often linked to particular substantive areas. *See* Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 433 (1986) ("Animating some statutory attorney's fees provisions, notably in the civil rights area, is Congress' conviction that the vindication of substantive rights is inextricably linked to arrangements for fees.") (footnote omitted). Even absent such conflicts with fee-award statutes, general loser-pays fee shifting by a Federal Rule should be invalid under § 2072(b) in states where the background American rule of no fee shifting appeared to reflect a substantive decision against awarding fees as an element of compensatory damages, rather than just a procedural definition of what fell outside recoverable litigation costs.

73 *See* 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06, at 119–20 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

74 *See supra* note 62; Ides, *supra* note 16, at 82 ("The Court has expressly noted the relevance of [the substantive-rights] component as a separate concern in the determination of a rule's validity.").

Whether to give teeth to § 2072(b) in the narrowly defined circumstance of a direct collision between a procedural rule and a substantive right is a problem the Supreme Court may never face, but one that definitely could arise. A hypothetical can illustrate why according independent force to the substantive-rights proviso in such a case would yield a coherent interpretation of the REA consistent with existing Supreme Court approaches—and one not to be feared as threatening the general validity of the Federal Rules. If a state were to take personal privacy extremely seriously and pass a law of general application banning all involuntary mental and physical examinations in the state, Federal Rule of Civil Procedure 35[75] would conflict with the law and require a decision whether a federal court's ordering such an examination would violate the substantive-rights proviso. The state law's apparent purpose being general protection of personal privacy and not just control of court procedure by banning such examinations in state court, a decision not to regard the law as creating a substantive right whose abridgement by a Federal Rule violated the REA would constitute an unjustified refusal to give any effect to § 2072(b).[76]

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75 FED. R. CIV. P. 35:

> (a) Order for Examination. When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . .

Rule 35 is generally valid under § 2072(a) as a rule regulating federal-court procedure. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That [Federal Rule of Civil Procedure 35 is] such is admitted.").

76 It should make no difference whether the state had arrived at this policy by constitutional amendment, statute, or common law decision. Although the source of a candidate *federal* rule of law is crucial because the test for its validity differs depending on its derivation, these federal-law tests for whether a federal rule is valid and governs are indifferent—as they should be—to how a state has made a policy decision. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (abolishing distinction, for purposes of applicability of state law in federal court, between state statutory and common law). Further, in the text's hypothetical, it should make no difference for purposes of applicability of this particular state law whether a case was in federal court because of diversity or federal-question jurisdiction; the abridgment of a substantive state-law right would be the same, given the general applicability of the state law. *See* Ely, *supra* note 29, at 737 n.226 ("The Enabling Act, in limiting Federal Rules promulgated for civil actions, indicates no distinction between diversity and federal question cases."). Most of the time, of course, state law applicable under *Erie-Hanna* governs only in diversity cases or on the state-law aspects of claims in federal court under

The implications of this hypothetical may initially seem to pose an intolerable threat to the general validity and the governing force of the Federal Rules, but for several reasons there seems to be little real ground for concern. First, you have to come up with a pretty strained hypothetical to illustrate the possibility of a Federal Rule being invalid for violating § 2072(b), so such cases are likely to be vanishingly rare. Second, unlike a Federal Rule that overstepped the § 2072(a) authority to make procedural rules, invalidity of a Federal Rule for violating the substantive-rights proviso might be no more than as applied where a substantive state provision collided directly with the Federal Rule; the Rule would remain fully valid in other states lacking similar provisions.[77] Third, if a Federal Rule promulgated by the REA's subordinate form of law-making authority—involving judicial-branch committees and the Supreme Court, but not positive action by Congress[78]—directly affects state substantive rights or interests that a state regards as warranting protection by substantive law, the states *should* be able to override application of the Federal Rule. Finally, in the virtually inconceivable event that such an override took place to begin with, *and* it seemed an intolerable threat to the uniformity of federal-court procedure, Congress by using its power to legislate for procedure in the federal courts could override the state provision. That, I submit, is both the result of a sensible reading of the Enabling Act consistent with what the Supreme Court has said in its REA cases and a suitable allocation of power in a federalist democracy. The states can override by their substantive law a subordinate form of federal procedural rulemaking authority if they deem it important enough to

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supplemental jurisdiction, because it is substantive law governing state-law claims and defenses to them.

77 Indeed, the Federal Rule might remain valid in many applications even in the state with the conflicting substantive provision, depending on how widely applicable that provision was. Federal Rule of Civil Procedure 13(a), even if invalid when it would deprive a Texas lender of the right to choose nonjudicial foreclosure, *see supra* note 65, would be valid and governing in all other cases in Texas federal court, whatever Texas does about counterclaims generally in its state courts. A Federal Rule that was technically valid under § 2072(a) might, though, be so broad as to affect substantive rights impermissibly in all states, as would be the case with the hypothetical "rule of limitations." *See supra* notes 69–71 and accompanying text.

78 *See* 28 U.S.C. § 2074 (1994) (establishing that rules promulgated by the Supreme Court, which must be transmitted "to the Congress not later than May 1 of the year in which a rule prescribed under § 2072 is to become effective . . . take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law"—that is, unless Congress enacts a law preventing the rule from taking effect).

do so—but the highest national legislative body has final say over whether any such state override should stand.

4. Purely Decisional Rules Governing Procedure in Federal Courts

Prominent in the early development of *Erie* doctrine, perhaps too much so for purposes of students' understanding of the area today, were decisions involving judge-made procedural federal common law in conflict with the law that would govern in state court. Teaching materials often include as leading cases between *Erie* and *Hanna* the Supreme Court's opinions in *Guaranty Trust Co. v. York*[79] and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[80] These two decisions respectively pitted the federal equitable doctrine of laches against a state statute of limitations,[81] and federal practice allocating an issue to decision by a jury against state precedent committing it to the judge.[82] *York* and *Byrd* are identified with the "outcome-determination" and "interest-balancing" tests they seemed successively to espouse, and a reader of these decisions before later developments could well have come away thinking that the approach taken in each was meant to apply to a wide range of *Erie* problems.

All that changed with the Court's decision in *Hanna*, which first in dictum recast the *York* outcome-determination analysis for cases involving decisional federal law as the modern "twin aims" emphasis,[83] and then—in a part of the opinion that qualifies as a holding—went

79 326 U.S. 99 (1945).

80 356 U.S. 525 (1958).

81 Justice Frankfurter's opinion for the Court in *York* does not mention laches, but that federal equitable doctrine with its flexible emphasis on the reasons for delay in filing and possible prejudice from the delay must be the source of the problem of conflict with the bright-line state statute of limitations. *See* Ides, *supra* note 16, at 85–86 (discussing the relation between laches and statute of limitations in *York*). Justice Rutledge's dissent does refer to the doctrine and to statutes of limitations being generally less "rigidly applicable as absolute barriers to suits in equity [than] they are to actions at law." *York*, 326 U.S. at 114, 119 (Rutledge, J., dissenting) (footnote omitted).

82 For an example of a casebook including *York* and *Byrd* as the only two principal cases between *Erie* and *Hanna*, see STEPHEN C. YEAZELL, CIVIL PROCEDURE 262–69 (4th ed. 1996). I do not fault such treatment and indeed cover both *York* and *Byrd* when I teach Civil Procedure—but briefly, and emphasizing that they do not fully represent the modern approach or methods that can be applied generally across the range of *Erie-Hanna* issues.

83 *See Hanna*, 380 U.S. at 468 ("The 'outcome-determination' test . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.") (footnote omitted). The dictum portion of the *Hanna* opinion about cases involving decisional federal procedural law runs from page 466 to page 469.

on to distinguish cases in which a Federal Rule might apply.[84] Those latter situations, unlike ones involving decisional federal rules, are governed by the REA analysis discussed in the immediately preceding section of this essay. Since *Hanna*, the Court has regularly referred to the "twin aims" approach for decisional-law cases, which are often regarded as arising under (if at most loosely governed by) the Rules of Decision Act.[85] The clearest pre-*Gasperini* statement of the approach since *Hanna* came in dictum in the *Stewart Organization* case, which the Court viewed as one involving a governing federal statute:

> If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called "twin-aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." If application of federal judge-made law would disserve these two policies, the district court should apply state law.[86]

Only once in the three decades between *Hanna* and *Gasperini*, in *Chambers v. NASCO, Inc.*,[87] did the Court face what it treated as a case involving a conflict between state law and decisional federal procedural law—in *NASCO*, federal courts' inherent authority to impose sanctions for bad-faith conduct in a diversity case, even if the state courts would not act similarly. Justice White's majority opinion routinely invoked and applied the "twin aims" approach, finding no forum-shopping incentives or inequity and upholding the federal practice.[88] Also, years before in *Walker* the Court applied the "twin aims" analysis[89] even "in the absence of a federal rule directly on

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84 *Id.* at 469–74.

85 28 U.S.C. § 1652 (1994) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."). For commentary treating decisional-law cases as coming under the rubric of the Rules of Decision Act, see, for example, Ely, *supra* note 29, at 707–18, and Ides, *supra* note 16, at 83. The great generality of the Act's "in cases where they apply" phrasing concerning state laws in the federal courts gives little if any guidance as to when they *should* apply, leaving just how to make the "relatively unguided *Erie* choice," *Hanna*, 380 U.S. at 471, up to judicial interpretation of the sort the Court has provided in *Erie*, *York*, and *Hanna*.

86 *Stewart Org.*, 487 U.S. at 27 n.6. (quoting *Hanna*, 380 U.S. at 468, and citing *Walker v. Armco Steel Corp.*, 446 U.S. at 752–53).

87 501 U.S. 32 (1991).

88 *Id.* at 51–55.

89 *Walker*, 446 U.S. at 753 ("[A]lthough in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an 'inequitable administration' of the law." (footnote omitted) (quoting *Hanna*, 380 U.S. at 468)).

point,"[90] perhaps because failure to apply state law would require creation of federal decisional law to fill a gap.

In all these invocations of the *Hanna* "twin aims" test, the Court cited cases from before and after *Byrd*—chiefly *Erie*, *York*, and *Hanna* itself—but never referred to *Byrd*.[91] *Hanna* itself had cited *Byrd* but only for the general proposition that "[o]utcome-determination analysis was never intended to serve as a talisman."[92] Whatever the lower federal courts were doing,[93] the Supreme Court never returned to *Byrd*-style balancing; and the last time before *Gasperini* that a Court majority cited *Byrd* was in 1977, in a per curiam opinion, along with *Hanna* for the proposition that "[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law."[94] This treatment left *Byrd* in a puzzling limbo as a case never overruled but studiously avoided at the Supreme Court level; commentators were in disagreement over whether and to what extent it did and should survive.[95]

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90 *Id.* at 752.

91 *See also* Sun Oil Co. v. Wortman, 486 U.S. 717, 726–27 (1988) ("In the context of our *Erie* jurisprudence, . . . th[e] purpose [for which the "substance-procedure" dichotomy is drawn] is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits." (citing *York* and *Hanna* but not *Byrd*)); *Walker*, 446 U.S. at 747 (quoting "twin aims" from *Hanna*, 380 U.S. at 468, with references to *Erie* and *York* but no mention of *Byrd*).

92 *Hanna*, 380 U.S. at 466–67 (citing *Byrd*, 356 U.S. at 537).

93 *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4504, at 49–50 (2d ed. 1996) ("[A] number of courts since the Hanna case have continued to refer to the Byrd case and rely upon its interest-balancing approach, especially with regard to matters involving the judge-jury relationship in the federal courts.") (footnote omitted).

94 Donovan v. Penn Shipping Co., 429 U.S. 648, 649–50 (1977) (per curiam). *Donovan* "reaffirm[ed] the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Id.* at 650.

95 *Compare, e.g.*, Ides, *supra* note 16, at 86–87 ("My view would be that *Byrd* is no longer useful law . . . . But since *Byrd* has never been expressly overruled, the potential for *Byrd*-balancing must be considered an aspect" of the analysis for cases involving federal judge-made law.) (footnote omitted), *with, e.g.*, 19 WRIGHT ET AL., *supra* note 93, § 4511, at 312, 313, 314 (describing *Byrd* as "a good starting place for analyzing the Erie problem" in cases not involving a federal statute or Federal Rule, with neither its "interest-balancing technique nor the many other aspects of the Byrd decision" seemingly "weakened by Hanna," but noting that "[t]he most obvious context for applying the Byrd test is in cases involving conflicting state-federal attitudes regarding the relationship of judge and jury"). For a more extensive listing of views in case law and commentary on the status of *Byrd* after *Hanna*, see King, *supra* note 12, at 173 n.77.

For present purposes, since *Byrd* made a limited reappearance in *Gasperini*, there is no need to go into detail about how the tea leaves might most justifiably have been read beforehand. But for evaluating arguments made after the Court's latest *Erie-Hanna* decision about whether it did or did not mark a major departure, it is worth observing that anyone who in (at least) the last ten or so years had thought—or worse, taught—that *Byrd* was the dominant approach with current sanction by the Supreme Court for general application in cases involving judge-made federal procedural law had not been paying close attention to the Court's recent decisions. It would be one thing to argue for the virtues of *Byrd*-style balancing,[96] or to warn of the need to take *Byrd* into account where lower federal courts continued—however questionably—to invoke it.[97] It would be quite another if one overlooked the evidence of the *Hanna* "twin aims" dictum and its repeated invocation in *Walker*, *Stewart Organization*, and especially the *NASCO* holding to expect the Court to treat its virtually ignored *Byrd* decision as "the dominant precedent"[98] for this area.

Instead, the "twin aims" approach that has prevailed here is a refined version of the "outcome-determination" test originally articulated in the following terms by *York*:

> The question is whether [a statute of limitations] concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be con-

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96 *See, e.g.*, MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 211–46 (2d ed. 1990).

97 *See, e.g.*, Ides, *supra* note 16, at 86.

98 *The Supreme Court, 1995 Term*, *supra* note 6, at 257; *see* MARY KAY KANE, CIVIL PROCEDURE IN A NUTSHELL 280–81 (4th ed. 1996) (stating that for cases not involving a Federal Rule, a federal court "would proceed" by four-factor balancing analysis including substantive nature of state law, outcome determinative impact, federal interest in avoiding state law or applying federal law, and effect on federalism, with citations to *York* and *Byrd*); *cf.* Edie C. Grinblat, Comment, Gasperini *in Line with* Erie: *New York Law Determines Excessiveness of Verdict in Diversity Cases*, 13 TOURO L. REV. 675, 683 (1997) (footnote omitted):

> [I]nstead of applying *Byrd*'s more recent balancing test, the *Gasperini* Court utilized the "outcome-determination" test set forth in the earlier *Guaranty Trust Company* [case]. This only served to further confuse this already obscure realm of *Erie* jurisprudence, not only since *Byrd* was the more recent *Erie* precedent, but because it involved the most similar *Erie*-line conflict to *Gasperini*.

> trolling in an action upon the same claim by the same parties in a State court?[99]

Hanna steered away from more sweeping renditions of *York* that had seemed to threaten uniform application of the Federal Rules,[100] readings that had been questionable because they appeared to heed neither *York*'s acknowledgment of the possibility of a federal court's ignoring a state rule concerning "merely the manner and the means"[101] of enforcing rights nor its emphasis on avoiding, not all state-federal differences, but "[t]he operation of a double system of conflicting laws in the same State."[102]

In articulating the "twin-aims" gloss on the "outcome-determination" test, the *Hanna* majority explained with terms that both focus the test and implicitly counsel against general balancing:

> [W]hen a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, 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, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.[103]

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99 Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

100 *See, e.g., supra* note 4 (citing cases and commentary).

101 *York*, 326 U.S. at 109.

102 *Id.* at 112.

103 *Hanna*, 380 U.S. at 468 n.9. The Court has repeatedly spoken in its *Erie* cases of concern for discrimination against forum-state citizens, *see, e.g. Walker*, 446 U.S. at 745; *Erie*, 304 U.S. at 74, but that emphasis is only mostly right. Whoever controls a state-federal forum choice may be able to benefit from any differences between the two systems. While out-of-staters often control the forum choice through such means as deciding whether to bring a diversity case in federal court or in a state court from which a home-state defendant may not remove, *see* 28 U.S.C. § 1441(b) (1994), sometimes home-state plaintiffs may control the choice by either suing in federal court or joining a co-citizen defendant to destroy complete diversity and make a case unremovable from state court. It would therefore be more accurate to speak of discrimination in favor of parties who control the choice of forum—which is still a legitimate concern implicating the equity in law-administration to which the Court refers.

Similarly, stress on forum-shopping by itself can seem misplaced or exaggerated in a system that legitimizes forum choice by providing for concurrent state and federal court jurisdiction over many actions. The real problem appears to be whether litigants can gain unfairly from a difference in applicable law when they forum shop, so that the concern for forum shopping may best be considered not in isolation but in tandem with the concern to avoid inequitable administration of the laws. *See, e.g.*, Ely, *supra* note 29, at 710 ("[F]orum shopping is not an evil per se. It is evil only if something evil flows from it."); John C. McCoid II, Hanna v. Plumer: *The* Erie *Doctrine*

As Professors Wright, Miller, and Cooper sum it up, "Outcome determination analysis is not repudiated by the Hanna case; rather, it is refined by tying it to the policies of the Erie case, and it is limited to those genuine Erie cases in which the choice-of-law question does not involve a [F]ederal [R]ule."[104] Nor, of course, does *Hanna* repudiate *York*'s choice of the state statute of limitations to govern on a state claim in federal court. Under *Hanna*'s purposive version of the outcome-determination analysis, a party barred from state court by a state statute of limitations would have ample reason to choose federal court if the latter offered a chance to argue around a somewhat more flexible federal laches rule. And success in that effort would inequitably deprive the defendant of the repose meant to be assured by the state statute—repose that would be enjoyed by those whose prospective adversaries could not get into federal court.

5. Summary Chart

The multifaceted nature of *Erie-Hanna* analysis often leads academics to make up charts or tables in an effort to present the area to students and others in a form that may make it easier to grasp.[105] Before the *Gasperini* decision, my own effort appeared as follows:

Changes Shape, 51 VA. L. REV. 884, 889 (1965): ("[U]nfair-ness . . . result[ing] from the opportunity of some litigants to choose advantageously between two court systems applying different law . . . must be the sole ground of opposition to forum shopping so long as diversity of citizenship jurisdiction remains unabridged.") (footnote omitted); *cf. Walker*, 446 U.S. at 753 (finding reason to apply state law when inequitable administration would result, even if failing to follow state law might not lead to forum shopping).

104 19 WRIGHT ET AL., *supra* note 93, § 4504, at 48 (footnote omitted); *see also* Ely, *supra* note 29, at 717–18 (footnotes omitted):

> [B]y dusting [the outcome-determination test] off and adding a couple of qualifications that should have been there all along, [the *Hanna* Court] resurrected it from the uncertain situation in which *Byrd* had left it. There was nothing wrong with *York* but oversimplification; what was seriously wrong was its subsequent and understandably frightening transplantation to situations involving Federal Rules and even other statutes. But in the context of the Rules of Decision Act, a rejuvenated outcome determination test—augmented a little and clipped a little, so as to intercept the more preposterous implications of its earlier formulations—was just what was called for.

105 For other graphics, see, for example, Floyd, *supra* note 8, at 283; Ides, *supra* note 16, at 88.

SUMMARY OF MODERN *ERIE-HANNA* ANALYSIS

1) True conflict between federal and state rules?

2) If yes, then proceed from *source* of candidate *federal* rule:

Source of possible applicable federal rule	**Approach/test** to its validity and governing force	**State law relevant?** (to federal rule's validity)	**Examples**
Constitution	Governs, period	No	*Byrd* today? (if first impression)
Act of Congress	If constitutional, governs—"arguably procedural"	No (and no balancing)	*Stewart Organization*
FRCP, FRAP	Rules Enabling Act—*Hanna* holding	Yes? (issue of force of REA subsection (b))	*Hanna, Burlington Northern*
Decisional (purely—not including interpretations of positive law)	"Twin aims" from *Hanna* dictum	Yes—outcome effect; balancing?	*York, Byrd, NASCO*

The chart largely summarizes the preceding discussion and does not warrant extensive commentary. The reference to *Byrd* if it were to arise as a matter of first impression today, in the position of an example of a constitutional rule applicable in federal court, reflects that Seventh Amendment decisions over the last four decades may have constitutionalized the allocation to the jury of the issue in *Byrd*.[106] The question mark about the relevance of state law in REA cases reflects uncertainty over whether the Court would be willing to give independent force to the substantive-rights proviso in § 2072(b).[107] And the question mark with "balancing" in cases involving federal decisional procedural law reflects the doubt about the survival of *Byrd*'s approach[108]—before the Supreme Court used *Byrd* in part of its analysis in *Gasperini*.

106 For a suggestion that *Simler v. Conner*, 372 U.S. 221 (1963), by settling that the Seventh Amendment applies fully in diversity cases made *Byrd* a case for decision on constitutional grounds, see Ely, *supra* note 29, at 709. For more extensive discussion of the possible constitutional grounding of *Byrd*, see Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 344–52 (1980).

107 *See supra* text accompanying notes 65–78.

108 *See supra* text accompanying notes 91–98.

III. *GASPERINI* AND ITS EFFECTS ON *ERIE-HANNA* ANALYSES

A. Facts and Proceedings

Journalist William Gasperini lent the Center for Humanities, for its use in making an educational videotape, 300 original color slides he had taken in Central America. The Center made the tape and used many of the slides, but it lost all of them. Gasperini brought a diversity suit for damages in the United States District Court for the Southern District of New York; the Center conceded liability, and the damage issue went to a jury. Gasperini introduced testimony of an expert that the "industry standard" per slide for a lost transparency was $1,500. Although he had earned only about $10,000 total from his photography in the preceding decade, the jury multiplied the full industry standard by the total number of lost slides and awarded Gasperini $450,000. The trial judge, without comment, denied the Center's motion for a new trial, which included a challenge to the verdict for excessiveness.[109]

The Second Circuit reversed, holding applicable the New York statutory standard of review for alleged verdict excessiveness or inadequacy—whether an award "deviates materially from what would be reasonable compensation,"[110] rather than the more deferential federal decisional rule allowing a verdict to stand unless it "'shocked the conscience of the court.'"[111] Apparently regarding itself as empowered to consider verdict-excessiveness challenges and enter conditional new-trial orders on its own, instead of remanding for trial-court reconsideration, the court ordered a retrial unless Gasperini accepted a remittitur reducing the award to $100,000—$1,500 per lost slide for fifty of his photographs that may have been unique, and $100 for each of the remaining 250.[112]

Gasperini sought Supreme Court review rather than accept the remittitur, and the Court granted certiorari.[113] Despite the technical nature of some of the issues, the case presented an interesting ideological twist: the position most attractive to many political conservatives and advocates of damage-limiting "tort reform" would call for full affirmance of the Second Circuit, making the less deferential state verdict-excessiveness review standard not only applicable in federal trial

109 *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2215–16 (1996).

110 N.Y. CIV. PRAC. L. & R. § 5501(c) (McKinney 1995).

111 *Gasperini*, 116 S. Ct. at 2217 (quoting Consorti v. Armstrong World Indus., 72 F.3d 1003, 1012 (2d Cir. 1995), *vacated and remanded*, 116 S. Ct. 2576 (1996)).

112 *See* Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 428–31 (2d Cir. 1995), *vacated*, 116 S. Ct. 2211 (1996).

113 Gasperini v. Center for Humanities, Inc., 116 S. Ct. 805 (1996).

court but its application there seemingly subject to de novo review on appeal. Yet original-intent arguments based on the history of the Seventh Amendment's re-examination clause, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,"[114] could readily support limiting what federal appellate courts can review in jury cases to errors of law—thus precluding all challenges on appeal to juries' damage awards when federal trial judges left them standing or changed them less than the appeals court might have thought warranted.[115]

In the event, only Justice Stevens, often regarded as the most "liberal" member of today's Supreme Court, supported the position most congenial to the defense bar and voted for outright affirmance.[116] By contrast the Court's three staunchest "conservatives," with Chief Justice Rehnquist and Justice Thomas joining a dissent by Justice Scalia, took a position that would have been strikingly pro-plaintiff in its impact. They not only urged that the re-examination clause constitutionally barred any federal appellate court review of verdicts for alleged excessiveness, but also argued that the Court's *Erie-Hanna* jurisprudence and proper interpretation of Federal Rule 59 on new trials called for supremacy in federal court of the deferential federal verdict-review standard over New York's more intensive scrutiny.[117] Although the review standards apply to challenges for excessiveness and insufficiency alike, both *Gasperini*'s facts and the apparent political lineup on the issues[118] illustrate that the net effect of less deferential court review seems virtually certain to be many more reductions of than increases in jury awards.

The centrist majority opinion, written by Justice Ginsburg and joined by Justices O'Connor, Kennedy, Souter, and Breyer, agreed with the Second Circuit that the state-law "deviates materially" standard applied. However, it vacated the Second Circuit's judgment for application of the state standard by the trial court rather than on appeal, with appellate review allowed only for abuse of discretion. Because the choice of standard and the allocation of trial and appellate responsibilities for its application in federal court involve conflict between and accommodation of state law and judge-made federal procedural law, the main effects the case may have on *Erie-Hanna*

114 U.S. CONST. amend. VII.

115 *See* Marcia Coyle, *Tort Reform Tries One More Time: Supreme Court Will Hear a Photographer's Case that May End Verdict Reductions*, NAT'L L.J., Apr. 22, 1996, at A1.

116 *See Gasperini*, 116 S. Ct. at 2225–30 (Stevens, J., dissenting).

117 *See id.* at 2230–40 (Scalia, J., dissenting).

118 *See* Coyle, *supra* note 115; *supra* text accompanying notes 113-15.

approaches seem likely to be in the category discussed in part II.B.4 above—when the source of the candidate federal rule is purely decisional law. On the choice of standard the majority routinely and unsurprisingly—at least given that it did not regard the case as involving a standard provided by a Federal Rule[119]—invoked and applied the *Hanna* "twin aims" modification of *York*'s "outcome determination" test without mentioning *Byrd*.[120] On the matter of trial-appellate allocation, in the aspect of the case that seems most to call for explanation, the Court brought *Byrd* into play. In two respects, however, comments in *Gasperini* may drop hints about other *Erie-Hanna* issues. These warrant brief discussion before I turn to the heart of the case.

B. Conflict Determination

The main guidance for interpreting Federal Rules to determine if they conflict with possibly applicable state law had come from Justice Marshall's opinion for a unanimous Court in *Walker*. Even though the Court found no conflict in that case between Federal Rule of Civil Procedure 3 on an action being commenced by the filing of a complaint with the court, and state law tolling the statute of limitations only by service of process, the opinion spoke in terms that suggested no straining to avoid finding a conflict. That a court, in order for the *Hanna* analysis to apply, must answer affirmatively the threshold question

> whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court . . . is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.[121]

The same no-tilt attitude appeared in *Stewart Organization*, the Court's leading case involving a federal statute rather than a Federal Rule: the

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119 *See Gasperini*, 116 S. Ct. at 2224 n.22 (rejecting argument that FED. R. CIV. P. 59 on new trials supplies an applicable federal standard).

120 For discussion of the reasons why this use of the "twin aims" test without reference to *Byrd* should not have come as a surprise, see *supra* text accompanying notes 82–96. For a contrary view, see *The Supreme Court, 1995 Term*, *supra* note 6, at 262 (footnotes omitted):

> The *Gasperini* Court's reliance on [the *York*] line of cases presents a striking contrast to modern *Erie* trends. Even more surprisingly, the Court did not use the balancing test established in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, a case that involved a conflict similar to the one in *Gasperini*.

121 Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 & n.9.

determination "whether the statute is 'sufficiently broad to control the issue before the Court' . . . involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute."[122] *Stewart Organization* itself provided strong support for the view that the Court would read federal statutes and Rules with no deference to state law, for it interpreted § 1404(a) on federal venue transfers broadly—perhaps questionably so[123]—to preclude giving force in federal court to state-law hostility toward forum-selection clauses, which likely would have meant that such clauses would not have been enforced in state court.[124]

At two separate points, however, *Gasperini* speaks in terms that suggest somewhat more deferential interpretations of federal law to avoid federal-state conflicts. Summarizing the approach for cases involving a Federal Rule, Justice Ginsburg's opinion seizes on *Walker*—the Court's only case in this line since before *Hanna* to find no "direct collision"—as part of the basis for saying that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[125] Later, responding to Justice Scalia's dissenting view of Federal Rule of Civil Procedure 59 on new trials as supplying a "federal standard" excluding the operation of the New York verdict-review statute,[126] the majority quotes the grand-

122 Stewart Org. v. Ricoh Corp., 487 U.S. 22, 26 (quoting *Walker*, 446 U.S. at 749-50). Indeed, the Court went out of its way to avoid a possible misunderstanding that might undermine the supremacy of federal law, emphasizing that its reference to a "direct collision" was "not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand. . . . It would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point." *Id.* at 26–27 n.4.

123 *See id.* at 34–38 (Scalia, J., dissenting); Freer, *supra* note 3.

124 *See Stewart Org.*, 487 U.S. at 28–32; *see also supra* note 23 and accompanying text (showing "direct collision" found in all of Supreme Court's federal statute and Rule cases in *Erie-Hanna* line except *Walker*).

125 *Gasperini*, 116 S. Ct. at 2219 n.7. The Court also cites *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District.*, 60 F.3d 305, 310–12 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995), in which the Seventh Circuit found no conflict between Federal Rule of Civil Procedure 68 on offers of judgment by *defendants* and a state provision for formal settlement offers by *plaintiffs*, permitting application of the state rule.

126 *See Gasperini*, 116 S. Ct. at 2239 (Scalia, J., dissenting).

The recent *Cornell Law Review* Note argues that in this aspect of the case the *Gasperini* majority may have gravely undermined *Hanna*'s holding about the governing force of an on-point Federal Rule. *See* King, *supra* note 12, at 188–89. The Note suggests that the Court may have "purposefully allowed state law to define the content," *id.* at 188, of Federal Rule of Civil Procedure 59 on new trials, and that this approach could apply to "many other Federal Rules," making them "when not explicit . . . mere empty containers waiting to be filled in by state procedural rules." *Id.* at 189.

daddy of federal courts casebooks for the proposition, dubious in light of the dominant tendency in the Court's decisions from *Hanna* onward, that the Court had "'continued since [*Hanna*] . . . to interpret the federal rules to avoid conflict with important state regulatory policies.'"[127] The *Gasperini* Court's shift of emphasis—which should not be overread because the majority did not disavow the earlier statements about "plain meaning" and "straightforward . . . statutory interpretation"—takes on some special significance because it came in an opinion not joined by Chief Justice Rehnquist and Justices Scalia and Thomas, the three members of today's Supreme Court generally most inclined to favor the states on federalism issues. Their pro-federal view in *Gasperini's* somewhat unusual situation, involving cross-cutting arguments over fidelity to historical views of the Seventh Amend-

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As stated, the Note's point seems overdrawn and unlikely to command acceptance in the Supreme Court or the lower federal courts. First, the *Gasperini* majority almost certainly did not intend such far-reaching consequences. Second, the Note proceeds from the premise that Justice Scalia's view of Rule 59—rejected by the majority, *see Gasperini*, 116 S. Ct. at 2224 n.22—is correct. *See* King, *supra* note 12, at 188 (footnote omitted) ("As Justice Scalia pointed out in dissent, '[Rule 59(a)'s authorization for new trials in jury-tried cases "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States"] is undeniably a federal standard'"). While the majority's view of Rule 59 as not supplying a federal standard is contestable, not only did it reject Justice Scalia's reading; it made clear by using the *Hanna* dictum's "twin aims" approach that it viewed the case as involving not the interpretation of a Federal Rule, but choice between state law and a federal rule that the majority saw as purely judge-made.

The core of truth in the Note's point seems to rest on the fact that the Court will look, and so should lower federal courts, to state law deserving to be regarded as "substantive" when necessary to apply a federal procedural rule. In a state law case a federal court looks to state substantive law to determine whether allegations fail "to state a claim upon which relief can be granted" in dealing with a motion to dismiss under Federal Rule 12(b)(6), and what facts are "material" on a Rule 56 summary judgment motion. The question raised by *Gasperini* is whether the Court has carried that conceptually unproblematic practice troublingly far into one borderline area, with implications for others, by declining to regard Rule 59(a) as providing generally applicable content for federal court rulings on motions for new trials claiming excessiveness or insufficiency of a jury's damage award. Given the generality of Rule 59(a)'s language, the specificity of the *Gasperini* majority's focus on what it regarded as the substantive nature of the New York "deviates materiality" standard, and the lower federal courts' treatment of *Gasperini* thus far, *see infra* note 157 and *infra* text accompanying notes 156-57, I do not yet see serious ground for concern about problematically broad readings of *Gasperini* by the courts (as opposed to the academic commentators). But confident prophecy would be rash.

127 *Gasperini*, 116 S. Ct. at 2224 n.22 (opinion of the Court) (quoting RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729–30 (4th ed. 1996)) (footnote omitted).

ment,[128] probably does not signal any disinclination to join future readings of federal statutes and Rules that show some deference to state concerns in the interest of avoiding a "direct collision."

C. The Substantive-Rights Limitation

As part of its response to Justice Scalia's broad reading of Rule 59, the majority briefly mentioned § 2072(b)'s ban on affecting substantive rights.[129] In context, the Court seemed to be hinting that construing Rule 59 in such a way as to trump the state verdict-excessiveness standard just might raise a problem under the REA.[130] I would claim no more, and the majority avoided any federal-state clash problem here by rejecting Justice Scalia's view that Rule 59 itself provided a "federal standard."[131] The reference reads much like the passing acknowledgments of the substantive-rights proviso seen in previous opinions,[132] but the Court's use of § 2072(b) gives some tentative support to the view that it might be willing in an appropriate, albeit unusual, case to read real teeth into that part of the statute. For reasons I should not belabor,[133] I hope so.

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128 *Compare Gasperini*, 116 S. Ct. at 2231 (Scalia, J., dissenting) ("The practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791."), *with id.* at 2224 n.20 (opinion of the Court by Ginsburg, J.) ("If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, 'twelve good men and true.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *349)). *See generally* Coyle, *supra* note 115 (discussing policy and constitutional-history issues in *Gasperini* in an article published to coincide with the case's argument before the Supreme Court).

129 *See Gasperini*, 116 S. Ct.. at 2224 n.22 (opinion of the Court) (quoting 28 U.S.C. § 2072(a)–(b) (1994)).

130 *See Gasperini*, 116 S. Ct. at 2224 n.22 (quoting dissenting opinion of Scalia, J., on Federal Rule 59's providing a "federal standard" in "direct collision" with New York's verdict-review standard and "leaving no room for the operation of" the state standard, *id.* at 2239–40 (Scalia, J. dissenting)). The *Gasperini* Court continued: "Whether damages are excessive for the claim-in-suit must be governed by *some law.* And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York." *Id.* at 2224 n.22. The majority then cited and quoted the procedural-rules authorization of § 2072(a) and the substantive-rights limitation of § 2072(b). *Gasperini*, 116 S. Ct. at 2224 n.22.

131 *Compare id.* at 2224 n.22 *with id.* at 2239–40 (Scalia, J., dissenting).

132 *See supra* note 62 and accompanying text.

133 *See supra* text accompanying notes 72–78 (discussing the desirability of giving independent force to 28 U.S.C. § 2072(b)'s substantive-rights restriction).

D. General Analysis for Cases Involving Decisional Federal Rules

After sketching the New York "deviates materially" standard's background "as part of a series of tort reform measures"[134] meant to replace the "insufficient check on damage awards"[135] afforded by the "shock the conscience" test previously applied in both New York state and federal courts, the majority noted the state standard's effect "in design and operation [of] influenc[ing] outcomes by tightening the range of tolerable awards."[136] It acknowledged that the state statute was "both 'substantive' and 'procedural'"[137] for purposes of the general *Erie-Hanna* guideline that "federal courts sitting in diversity apply state substantive law and federal procedural law,"[138] framing the "dispositive question" as "whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."[139] To answer at least part of that question, the Court moved in segment III.A of its opinion to the point of departure that its every utterance on the subject starting with *Hanna* should have led one to expect in a case involving a federal decisional rule—*Hanna*'s "twin aims" modification of the *York* "outcome-determination" test.[140]

The majority's application of the test was straightforward and fairly brief, reaching a result that seems sensible. It analogized the verdict-excessiveness review standard to a statutory cap on damages, which petitioner Gasperini conceded "would supply substantive law for *Erie* purposes."[141] Although the state statute "contains a procedural instruction" directing the state appellate courts to apply the "deviates materially" standard, "the State's objective is manifestly substantive"; the statute "differs from a statutory cap principally 'in that the maximum amount recoverable is not set by statute, but rather is

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134 *Gasperini*, 116 S. Ct. at 2217.

135 *Id.* at 2218.

136 *Id.* at 2218–19.

137 *Id.* at 2219.

138 *Id.*

139 *Id.*

140 The post-*York* "pathmarking case" of *Hanna*, "qualifying" *York*,

> explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations [between state and federal rules]; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."

Gasperini, 116 S. Ct. at 2220 (quoting *Hanna*, 380 U.S. at 468).

141 *Gasperini*, 116 S. Ct. at 2220 (citing Reply Brief for Petitioner at 2, *Gasperini* (No. 95-719) and Transcript of Oral Argument at 4-5, 25, *Gasperini* (No. 95-719)).

determined by case law.'"[142] Federal-court adherence to the "shocks the conscience" test would leave standing some excessively large (and small) verdicts on state-law claims that would not survive post-trial review in New York's courts under the state's "deviates materially" standard, which the majority plausibly found to implicate *Erie*'s "twin aims."[143] Nonobservance of the state standard in federal court would both undercut the state's effort to control something that is very much a matter of state substantive law, the amounts of compensatory damages recoverable on state-law claims, and would discriminate against (usually) defendants whose adversaries could choose the federal forum—not to mention giving parties an incentive to try getting into federal court precisely to get a potential advantage if they wanted to seek in advance some protection for a potentially variant damage award.

More interesting than the particulars of the decision is the import of the Court's approach in this part of the opinion for *Erie-Hanna* doctrine. First, even though the Court goes on to make some use of *Byrd* for the first time in almost two decades, it is significant that the discussion in part III.A on the choice of review standard relies entirely on the *Hanna* "twin aims" rendition of *Erie* and *York* and—like every other Supreme Court invocation of the "twin aims" test[144]—conspicuously omits *Byrd*.[145] In short, *Hanna*'s "twin aims" formulation remains the general and dominant starting point for *Erie* cases involving judge-made federal law. The majority's approach here is not, as the district court characterized it after remand, "likely a reversion by the Supreme Court to prior *Erie* doctrine since abandoned, of which [*York*] is the outstanding example";[146] it instead confirms everything the Court had said on the point since it modified the *York* "outcome determination" test in *Hanna*.

Second, the majority's exclusive reliance on the *Hanna* rendition of *York* in part III.A shows that despite its later invocation of *Byrd*, use of that case's multi-factor balancing approach is to be confined to

142 *Gasperini*, 116 S. Ct. at 2220 (quoting Brief for City of New York as Amicus Curiae at 11, *Gasperini* (No. 95-719)).

143 *Gasperini*, 116 S. Ct. at 2221.

144 *See supra* note 91 and accompanying text.

145 *See Gasperini*, 116 S. Ct. at 2219–21.

146 Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765, 767 (S.D.N.Y. 1997) (citation omitted). For a similar (mis)characterization of *Gasperini*'s use of the "twin aims" approach, see Floyd, *supra* note 8, at 292: "[T]he majority reverted to the unadorned 'outcome determination' test of *York* . . . ."

some subset of this one category of the *Erie-Hanna* area.[147] The *Gasperini* Court does unhelpfully little to define just what that subset is, an effort saved here until after a sketch of the role *Byrd* plays in later parts of the Court's opinion.[148] This seeming limit on the scope of *Byrd's* applicability is all the more apparent because *Byrd* balancing would have been easy enough to apply in *Gasperini* and would have pointed toward the majority's result:[149] the New York rule does seem "bound up with" state substantive law, federal interests in the verdict-excessiveness review standard applied on a state claim are limited,[150] and the likelihood of an influence on outcomes—here, amounts ulti-

147 By speaking of the limited applicability of the *Byrd* balancing approach, I do not mean to exclude the possibility of using the single *Byrd* factor of the relation between a state procedural rule and state substantive rights as an aid in applying the *Hanna* "twin aims" approach. Asking whether a state rule with a procedural cast is "intended to be bound up with the definition of the rights and obligations of the parties," *Byrd*, 356 U.S. at 536, can be one sensible way of trying to figure out whether a state rule also has enough of a substantive nature that it would threaten "inequitable administration of the laws," *Hanna*, 380 U.S. at 468 (footnote omitted), were a federal court not to follow it. *See, e.g.*, Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1541 (10th Cir. 1996) ("[T]he Colorado certificate of review statute manifests 'a substantive decision by that State,'" and "is 'bound up' with the substantive right embodied in the state cause of action for professional negligence, and therefore it should apply to professional negligence actions brought in federal court under diversity jurisdiction" (quoting *Walker*, 446 U.S. at 751 (footnote omitted)); Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1047–48 (5th Cir. 1990) ("With respect to *Erie*'s second aim, the [state uncalled-witness] rule is not 'bound up with the definition of the rights and obligations of the parties' under state law so that denying the inference [that testimony of the uncalled witness would have been adverse] would result in different treatment between those parties suing in state court and those suing in federal court on the same cause of action" (quoting *Byrd*, 356 U.S. at 536) (footnotes omitted)).

148 *See infra* text accompanying notes 178–200.

149 *See The Supreme Court, 1995 Term*, *supra* note 6, at 265 ("[T]he Court could have justified the application of the state statute under the *Byrd* balancing test" by finding "the state interest to outweigh the federal interest.").

150 When a federal court reviews a jury award for excessiveness or inadequacy by a more intrusive state standard rather than by a less rigorous federal one, that does "affect the judge-jury relationship in the federal courts." *Byrd*, 356 U.S. at 538. But performing under a less deferential standard a review function that the court can perform in any jury-tried damages case disrupts that relationship much less than keeping a potentially dispositive defense from the jury and leaving it to the judge, which was the issue in *Byrd*.

The *Gasperini* Court speaks early in part III.B of its opinion, once it has resolved the choice of standard in favor of the state rule and moved on to the trial-appeal allocation of responsibility for the standard's application, of *Byrd*'s having said that the "'outcome-determination' test was an insufficient guide in cases presenting countervailing federal interests." *Gasperini*, 116 S. Ct. at 2222. The implication seems strong that the Court saw no federal interest sufficient to invoke *Byrd* in the content of

mately recovered rather than victory or defeat—is significant.[151] Instead, by precept and example, the Court before and in *Gasperini* has continued to send to the lower federal courts and lawyers practicing there, and to civil procedure professors and their students, the message still surprisingly often ignored that the place to start in a federal decisional-law case is with the *Hanna* "twin aims" formulation, and not with *Byrd*'s balancing approach.[152]

Third, thus far the lower federal courts seem to have had relatively little trouble with this aspect of *Gasperini*. For the most part they have straightforwardly applied its apparent prescription of following state verdict-excessiveness standards (at least to the extent they warrant characterization as substantive),[153] with just the occasional over-

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the standard itself in this case, as opposed to the allocation of responsibility for its application within the federal judicial structure.

151 *See supra* note 57 (summarizing *Byrd* factors).

152 Despite its revival of *Byrd* later in the opinion, the majority in *Gasperini* does seem to be limiting its possible applicability only to a subset of the federal-decisional-law area generally governed by *Hanna's* "twin aims" dictum, leaving no opening for *Byrd* to apply when the candidate federal rule is positive law such as a Federal Rule of Civil or Appellate Procedure. After granting that "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor," *Gasperini*, 116 S. Ct. at 2219 (footnote omitted), and just before it introduces the "outcome determination" test with its "twin aims" modification, the Court drops a footnote about Federal Rule cases that speaks in terms seemingly excluding any possibility of *Byrd* balancing:

> Concerning matters covered by the Federal Rules of Civil Procedure, the ["substance-procedure"] characterization is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies *regardless of contrary state law.*

Gasperini, 116 S. Ct. at 2220 n.7 (emphasis added) (citing holding portion of *Hanna*, 380 U.S. at 469–74, and *Burlington Northern*, 480 U.S. at 4–5); *see also supra* notes 57, 61 and text accompanying notes 57–61 (discussing exclusion of *Byrd* balancing from Rules Enabling Act analysis).

153 *See, e.g.*, Steinke v. Beach Bungee, Inc., 105 F.3d 192, 197 (4th Cir. 1997) ("The Supreme Court's mandate requires the district court to apply the substantive component of a state's law concerning the excessiveness of a verdict."). Professor Floyd raises the fair question whether *Gasperini* should be read as prescribing general applicability of state verdict-excessiveness standards on state claims in federal court or whether there should be case-by-case "inquiry into the substantive underpinnings of those rules." Floyd, *supra* note 8, at 304 (footnote omitted). *Compare Gasperini*, 116 S. Ct. at 2217–21 (considering substantive underpinnings and aim of the New York standard), *with id.* at 2221 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."). Although it may be unlikely that a state verdict-excessiveness standard, especially one more intrusive than the federal decisional "shocks the conscience" test, will lack any substantive purpose, Professor Floyd's query can serve as a reminder to counsel and judges—espe-

looking of its ruling on this point[154] or apparent misunderstanding of its scope.[155] And if they are reflexively extending *Gasperini* beyond applying state-law standards for verdict excessiveness or insufficiency on state-law claims, to such kindred but distinguishable points as the sufficiency of the evidence to go to the jury on a state-law claim in federal court in the first place—an issue on which the federal courts have been for some time and may remain divided[156]—I have not found such cases, and I have looked at every decision through mid-April 1998 that shows up under *Gasperini* in Westlaw's KeyCite service.[157] *Gasperini*'s implications for such issues may be more limited

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cially in light of the Supreme Court's focus on the "manifestly substantive" nature of "the State's objective" underlying the standard, *id.* at 2225—to consider whether the Court has prescribed a blanket outcome or a rule-by-rule inquiry.

154 *See* Miksis v. Howard, 106 F.3d 754, 764 (7th Cir. 1997) ("We use federal standards to determine excessiveness of verdicts in diversity cases."). *But see* To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 953 F. Supp. 987, 995 (N.D. Ill. 1997) (stating that on verdict-amount review, "Illinois law supplies the substantive standard"). The Seventh Circuit panel in *Miksis* did not cite *Gasperini* and may not have been aware of it; instead, it relied on a pre-*Gasperini* Seventh Circuit decision, *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994), which dealt with several points including summary judgment standards, appellate review, sufficiency of the evidence, verdict excessiveness, and availability of remittitur or additur. On all these issues, the court in *Mayer* held for the dominance of federal rules, a position that may survive in all respects—except the one, verdict excessiveness, on which the *Miksis* court followed *Mayer*. The district court in *To-Am*, by contrast, apprehended the import of *Gasperini* quite acutely, following the statement quoted above with a citation inviting the reader to compare *Gasperini* with *Mayer*.

155 *See* Torres v. Wendco, No. 95-1544, 1997 WL 135682, at *4 (D.P.R. Jan. 15, 1997) ("In the absence of a state statute governing awards that 'materially deviate' from awards in similar cases, Puerto Rico and other states in the First Circuit have no substantive state laws governing limitations in [*sic*] jury awards. I therefore turn to federal case law for guidance."). Although the heritage of Puerto Rico as a code-based, civil-law jurisdiction may underlie this disregard of possibly relevant common law from the Puerto Rico courts, the decision seems to make the error of treating the source of state, territorial, or commonwealth law as relevant for *Erie-Hanna* purposes. *See supra* note 76 (source of state, as opposed to federal, law is immaterial for *Erie-Hanna* analysis). For a decision rejecting *Torres* and following state common law standards, see *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 933 (M.D.N.C. 1997).

156 *See generally* Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery?*, 47 SMU L. REV. 271 (1994) (discussing federal court approaches to several types of decisions including review of summary judgments, new trial rulings, remittitur orders, and sufficiency-of-the-evidence determinations).

157 The *Cornell* Note asserts that "[i]n the wake of *Gasperini*, the federal courts have largely found that district courts must apply the state sufficiency of the evidence standard without engaging in an *Erie* analysis." King, *supra* note 12, at 190 n.193. This reading of the cases seems unnecessarily to assume that whatever goes for the choice of federal or state standard on verdict excessiveness or inadequacy must also go for

than one might initially think, because *Gasperini* involved application of the long-established "twin aims" approach to a situation involving pretty clearly substantive state concerns, which may not be present in related but distinct contexts—and those settings may also involve a Federal Rule, triggering a different analysis. If they do not, then they may involve countervailing federal interests, which means they are best saved until after consideration of the import of *Byrd's* limited revival in *Gasperini*, to which I now turn.

E. Byrd *Redux: How Do You Know an "Essential Characteristic" of the Federal Court System or a "Countervailing Federal Interest" When You See One?*

Having dealt on conventional *Hanna* "twin aims" grounds with the choice between state and federal standards, the Court in parts III.B and III.C of its *Gasperini* opinion turned to the allocation of authority between federal trial and appellate courts for administering the state standard—and made its first substantial use of *Byrd* since before *Hanna*. The New York statute setting the "deviates materially" standard speaks by its terms to the state's intermediate appellate courts rather than to trial courts,[158] although state-court construction of the law had read it as instructing trial judges also.[159] Yet direct

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the standard on sufficiency of the evidence—which usually refers to the input ruling on what suffices as a matter of law for a case to go to the jury, not the output decision on whether the jury award was excessive or inadequate. As to the latter, as *Gasperini* reflects, the purposes underlying state standards may be strongly substantive. The three cases the Note cites for its assertion all deal only with the narrow and distinguishable question of the source of a verdict-excessiveness standard, not broader new-trial or sufficiency-of-the-evidence issues generally. *See Steinke*, 105 F.3d at 197 ("The Supreme Court's mandate [in *Gasperini*] requires the district court to apply the substantive component of a state's law concerning the excessiveness of a verdict."); Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18 (2d Cir. 1996) ("Because we are holding today that the federal rule for determining damages in this case is furnished by Ohio law, the federal rule for excessiveness should also be furnished by Ohio law."); Imbrogno v. Chamberlin, 89 F.3d 87, 90 (2d Cir. 1996) ("[T]he trial court should have . . . looked to Connecticut substantive law to determine whether the jury award was excessive . . . .").

158 N.Y. CIV. PRAC. L. & R. § 5501(c) (McKinney 1995):

> In reviewing a money judgment in an action . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

159 *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2218 (1996) (citing New York Appellate Division cases dealing with application of the "deviates materially" standard in state trial courts).

application of, or de novo review under, the state standard by federal appellate courts in accord with the state statute might run afoul of the Seventh Amendment's re-examination clause.[160] The majority avoided this problem by what it viewed as an accommodation of state and federal interests within constitutional bounds, with federal trial courts applying the state verdict-excessiveness standard, but that application being subject to appellate review only under the deferential abuse-of-discretion criterion.[161]

Part of the Court's route to this conclusion involves its rejection of the constitutional argument that the re-examination clause bans federal appellate review of trial-court denials of motions to set aside verdicts as excessive,[162] a topic that is outside the scope of this essay on the modern contours of the *Erie-Hanna* doctrine.[163] Before and after

160 *See supra* text accompanying note 117. Indeed, Justice Scalia dissented in considerable part on the ground that the re-examination clause barred all federal appellate review, including for verdict excessiveness, of facts found by a federal jury. *Gasperini*, 116 S. Ct. at 2230–36 (Scalia, J., dissenting). Under this view, court review of juries' fact findings could take place only at the trial level, with trial judges' decisions not subject to appellate scrutiny even for abuse of discretion.

161 *See Gasperini*, 116 S. Ct. at 2224–25. Professor Floyd's criticism of *Gasperini* reads at times as if it may fuse two distinct questions with which the Court dealt—the standard of scrutiny applicable when federal courts review jury verdicts on New York state-law claims for alleged excessiveness or inadequacy, and the standard of appellate review when a federal court of appeals considers a challenge to a federal district judge's application of the state "deviates materially" standard. Floyd, *supra* note 8, at 293–94 (The "[*Gasperini*] Court held that the federal 'abuse of discretion' standard of review rather than the state's more intrusive 'materially deviates' standard, must control.") (footnote omitted). The federal system may depart from the manner in which the state allocates judicial responsibility for applying the "deviates materially" guideline while still adhering to its applicability; the court of appeals is to assure that the district court did apply the state standard, and to review the trial court's action for abuse of discretion in applying that standard. Thus *Gasperini* did not "conclude that the New York standard of appellate review was inapplicable in a diversity action in which New York substantive law applied," *id.* at 268, unless applying "deviates materially" at the trial level in federal court does not count at all.

162 *See Gasperini*, 116 S. Ct. at 2223–24.

163 I cannot resist, though, noting one heavy hint that the majority drops, in the course of its Seventh Amendment discussion, about the possible constitutionality of additur in federal court. Under *Dimick v. Schiedt*, 293 U.S. 474, 486–88 (1935), remittitur—judicial denial of a defendant's new-trial motion for verdict excessiveness, conditioned on plaintiff's acceptance of a reduction in the jury's award—is constitutional under the Seventh Amendment, but the converse practice of additur to increase inadequate verdicts is not. The distinction has been heavily criticized. *See, e.g.*, Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 175 (1988) ("A distinction between remittitur and additur on grounds that a remittitur-reduced verdict is included in the jury verdict while an additur-increased verdict is not so included is specious.").

her treatment of this issue, Justice Ginsburg invokes *Byrd*—first to identify the trial-appellate "allocation of authority to review verdicts"[164] as "'[a]n essential characteristic of [the federal-court] system'"[165] and to say that "outcome determination" analysis is "an insufficient guide in cases presenting countervailing federal interests";[166] then to state that the "one-or-the-other" federal-state choice required in *Byrd* need not be made here, "for the principal state and federal interests can be accommodated"[167] by the combination of trial-court application of the state standard and appellate review for abuse of discretion. Thus the involvement of an "essential characteristic," or—what appears to be the same thing—a "countervailing federal interest" in the application of a federal decisional rule, can call for using something other than or in addition to the usual "twin aims"

In language that implies a suggestion to counsel to raise the constitutionality of additur for reconsideration, the *Gasperini* court notes the prestigious dissenters who fell one vote short of a majority in *Dimick*:

> Inviting rethinking of the additur question on a later day, Justice Stone, joined by Chief Justice Hughes, and Justices Brandeis and Cardozo, found nothing in the history or language of the Seventh Amendment forcing the "incongruous position" that "a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount," but may not condition denial of the motion on "the defendant's consent to a comparable increase in the recovery."

Gasperini, 116 S. Ct. at 2222 n.16 (quoting *Dimick*, 293 U.S. at 495 (Stone, J., dissenting)).

The Court's recent directions to lower courts, however, make it clear that they are not to anticipate any possible overruling in their own decisions.

> We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)). Lower federal courts since *Gasperini* have heeded this instruction, rejecting additur requests on the authority of *Dimick*. *See* Maier v. Lucent Techs., 120 F.3d 730, 737 (7th Cir. 1997); Douglas v. DynMcDermott Petroleum Operations Co., No. 95-1967, 1996 WL 560018, at *1 (E.D. La. Oct. 1, 1996). Plaintiffs counsel with a large enough stake, though, should continue to seek additur in lower federal courts to preserve the issue for Supreme Court review. "Adherence to . . . [the] teaching [of not anticipating overruling of Supreme Court precedents] by the District Court and the Court of Appeals . . . does not insulate a legal principle on which they relied from our review to determine its continued vitality." *Agostini*, 117 S. Ct. at 2017.

164 *Gasperini*, 116 S. Ct. at 2222.

165 *Id.* at 2221 (quoting *Byrd*, 356 U.S. at 537).

166 *Gasperini*, 116 S. Ct. at 2222.

167 *Id.* at 2224.

approach for cases involving such rules.[168] But it need not lead to the balancing employed in *Byrd* itself as a basis for choosing between state and federal rules, if the court can find some means of accommodating the interests underpinning both rules.

The Court's discussion in these parts of its opinion is cryptic or unclear in two important respects: first, concerning what might constitute an "essential characteristic" or "countervailing federal interest" sufficient to call for going beyond the *Hanna* "twin aims" analysis and to invoke *Byrd-Gasperini* balancing or accommodation, and second, about whether the trial-appellate allocation of responsibility required by *Gasperini* is constitutionally mandated or rather a matter of federal decisional law arrived at under at most some perceived influence from the Seventh Amendment. The second of these points is largely a question of Seventh Amendment interpretation with no direct bearing on general *Erie-Hanna* analyses, and warrants only brief discussion here. *Byrd* had made it clear that the federal rule in question in that case, assigning a particular decision to a federal court jury rather to the trial judge, was a decisional one based on "strong federal policy,"[169] and that while the Seventh Amendment exercised "influence"[170] on that allocation the Court was not reaching any constitutional question.[171]

By contrast, *Gasperini* speaks at one point as if it is reaching the Seventh Amendment issue and finding it dispositive: "The Seventh Amendment . . . *controls* the allocation of authority to review verdicts,

168 Whenever *Byrd* may provide the appropriate method of analysis, "outcome determination" considerations do not become irrelevant. The third type of factor weighed in the *Byrd* Court's balance, after examination of the state and federal interests involved, was the likelihood of an outcome-affecting impact resulting from the choice between the state and federal rules. *Byrd*, 356 U.S. at 539–40 (discussing reasons why rule choice might not lead to different results and concluding that "[w]e do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome") (footnote omitted). It is only logical that "outcome determination" analysis should remain a factor; *Byrd*, like *Hanna*, tries to implement *Erie*, and *Hanna* identified the forum-shopping and inequitable-administration concerns that guide application of the "outcome determination" test as "the twin aims of the *Erie* rule." *Hanna*, 380 U.S. at 468.

169 *Byrd*, 356 U.S. at 538.

170 *Id.* at 537.

171 *Id.* at 537 n.10:

> Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity [from suit in tort because of workers' compensation coverage] when asserted, as here, as an affirmative defense in a common-law negligence action.

the issue of concern here."[172] If that is so, all that is necessary is to interpret and apply the amendment, without mentioning *Byrd* or engaging in balancing or accommodation. Yet the opinion goes on to speak of still respecting "New York's dominant interest . . . without disrupting the federal system"[173] and then of "practical reasons combin[ing] with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility"[174] for applying the state standard. One cannot be sure, but in context the best guess may be that the majority might regard anything more than appellate review for abuse of trial court discretion as a violation of the re-examination clause,[175] while at least that much review is constitutionally per-

172 *Gasperini*, 116 S. Ct. at 2222 (emphasis added).

173 *Id.* at 2224.

174 *Id.* at 2225.

175 The Court does not, however, specify exactly what any "Seventh Amendment constraints" are, while it does spell out "practical reasons" for the federal trial-appellate allocation of responsibility:

> Trial judges have the "unique opportunity to consider the evidence in the living courtroom context" [quoting Taylor v. Washington Terminal Co., 409 F.2d 145, 148 (D.C. Cir. 1969)], while appellate judges see only the "cold paper record." [quoting Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 431 (2d Cir. 1995), *vacated*, 116 S. Ct. 2211 (1996)].
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> . . . "If we reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . We must give the benefit of every doubt to the judgment of the trial judge." (quoting Dagnello v. Long Island R.R., 289 F.2d 797, 806 (2d Cir. 1961)).

Gasperini, 116 S. Ct. at 2225. The lack of specificity about Seventh Amendment constraints leaves room for a later Court to treat *Gasperini* as having reserved decision on constitutional issues aside from the permissibility of abuse-of-discretion appellate review, although the practical reasons could continue to make it unnecessary to reach other Seventh Amendment questions. One other phrasing that may suggest avoidance of most constitutional decisions in *Gasperini* is the reference early in the opinion to "the federal system's division of trial and appellate court functions [as] an allocation *weighted by* the Seventh Amendment," *id.* at 2219 (emphasis added)—which sounds rather like *Byrd*'s reference to the Amendment's "influence" along with its dodge of deciding whether the Amendment in the circumstance before the Court issued a "command." *See Byrd*, 356 U.S. at 537 ("An essential characteristic of [the federal judicial] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.") (footnote omitted); *supra* note 171 and text accompanying notes 169–71; *see also* King, *supra* note 12, at 185 ("The *Gasperini* Court never stated that the Seventh Amendment required the deferential abuse of discretion review; instead, the Seventh Amendment's influence leads to the conclusion that the deferential federal standard should apply.").

mitted[176] and is desirable as a practical and policy matter[177] (like the judge-jury allocation as the Court viewed it in *Byrd*) but not constitutionally required. The later discussion therefore can be taken as qualifying the sweeping statement about Seventh Amendment "control" to make that control at most partial, leaving room for some accommodation of state interests.

More consequential for where *Erie-Hanna* analyses stand after *Gasperini* is the unanswered question of what can constitute an "essential characteristic" of the federal judicial system or a "countervailing federal interest" in a judge-made federal procedural rule, calling for consideration of state and federal interests as well as likely outcome effects and leading to balancing or accommodation. Justice Ginsburg's invocation of *Byrd* as a *deus ex machina,* with virtually no explanation of the occasions for or limits on its use, may be understandable as a matter of strongly case-focused judicial method.[178] Yet much as I may disagree with Professor Floyd when he asserts that "[t]he *Gasperini* majority relied centrally on *Byrd*"[179]—for the Court does not engage in *Byrd*-style balancing to decide on the allocation of trial- and appellate-level responsibilities, and *Byrd* plays no role in the choice of standard for verdict-excessiveness review—the opinion largely earns his criticism that "*Byrd* still lives, but we know not why, or to what extent."[180] About all we get from the *Gasperini* opinion is the apparent direction not to rely solely on "outcome determination" analysis in

176 *See Gasperini,* 116 S. Ct. at 2224 ("We now . . . make explicit [that] . . . '[N]othing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive.'" (quoting Grunenthal v. Long Island R.R., 393 U.S. 156, 164 (1968) (Stewart, J., dissenting)) (footnote omitted).

177 *See Gasperini,* 116 S. Ct. at 2223 ("[A]ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice.").

178 *See* Jeffrey Rosen, *The New Look of Liberalism on the Court,* N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60. Rosen describes Justice Ginsburg's judicial approaches with phrases like the following: "an affinity for resolving cases on narrow procedural grounds," *id.* at 62; one decision, "[l]ike all of Ginsburg's opinions, . . . resolves the question before the Court, while studiously refusing to speculate about other cases in the future," *id.* at 65; "Ginsburg's jurisprudence . . . is more concerned about case-by-case particularism than philosophical consistency," *id.*; "deciding only the case before her, and delaying related questions until they are ripe for decision," *id.* at 90.

179 Floyd, *supra* note 8, at 270.

180 *Id.* at 305; *see also id.* at 297:

> *Gasperini* provided the Court with a much needed opportunity . . . to reconcile its disparate approaches in *Hanna* and *Byrd,* and to explain, confine, or reject *Byrd*'s balancing approach in light of the uncertainties and criticism that it has spawned. Instead, the Court confounded the confusion

decisional-federal-law "cases presenting countervailing federal interests,"[181] whatever those may be. We know from the examples of *Byrd* itself, of the Court's last pre-*Gasperini* invocation of *Byrd* in *Donovan v. Penn Shipping Co.*,[182] and of *Gasperini* that "essential characteristics" involving such interests are present in the Seventh Amendment-shadowed area of allocation of decisionmaking authority among federal juries, trial judges, and appellate courts.

Beyond that (if there is a beyond, which there may not and perhaps should not be), we are left to our collective wits. When that is how we find ourselves, let us hope that resignation and despair need not be our only reactions. We can deduce first that the only relevant types of federal system characteristics or interests are those of a procedural nature such as to have led to a decisional rule, not dictated by constitutional interpretation or embodied in an Act of Congress or a Federal Rule promulgated under the REA. The federal interests for present purposes cannot be substantive, for *Erie* settled that making general common law is not the federal courts' business.[183] As Profes-

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by its studied indifference to the real issues presented by its invocation of *Byrd*.

181 *Gasperini*, 116 S. Ct. at 2222.

182 429 U.S. 648, 649 (1977) (per curiam) ("The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law." (citing *Hanna*, 380 U.S. at 466–69, and *Byrd* 356 U.S. 525). *Donovan* reaffirmed "the longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Donovan*, 429 U.S. at 650. Its citation to *Hanna* is to the dictum portion of the *Hanna* opinion, which includes both its citation to *Byrd* in support of the statement that "'[o]utcome-determination' analysis was never intended to serve as a talisman," *Hanna*, 380 U.S. at 466–67, and the "twin aims" recasting of the "outcome determination" test, *id.* at 468 & n.9. *Gasperini* relied on *Donovan*, quoting the sentence above about the "proper role of the [federal] trial and appellate courts," *Gasperini*, 116 S. Ct. at 2224, but in light of *Gasperini*'s choice of the state verdict-excessiveness standard, the reference to federal courts' "role" in *Donovan* seems to have to be read as referring to such matters as the allocation of federal trial and appellate courts' responsibilities vis-à-vis each other, and not necessarily to the standards they apply.

183 "There is no federal general common law." *Erie*, 304 U.S. at 78. The making of specialized federal substantive common law in areas of particular federal interest or unique federal competence, such as foreign relations, disputes between states, and federal proprietary interests, *see generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1–.3.2 (2d ed. 1994), can raise federal-state issues somewhat kindred to those that arise when state law with substantive overtones and judge-made federal procedural law conflict. *See, e.g.*, Slaven v. BP Am., Inc., 958 F. Supp. 1472, 1478 (C.D. Cal. 1997) (declining to apply ordinarily applicable California settlement statute in case involving both federal maritime and state claims because of effect on uniform application of federal maritime law and stating that "even when a state substantive law is generally

sor David Currie has described them, the relevant interests are those of a "forum disinterested in the merits . . . in the application of rules relating to the administration of justice."[184] Aside from recognizing such limits on what might constitute a relevant type of federal interest, at the moment all that we may be able to do with any confidence is to identify the terms of the argument and some possible specific areas in addition to that recognized in *Byrd* and *Gasperini*, and to give reasons for favoring broader or narrower approaches to what might be worthy of treatment as an "essential characteristic" or "countervailing federal interest" triggering *Byrd-Gasperini* balancing or accommodation.

Gasperini's reliance on *Byrd* could force more threshold consideration in lower federal courts of just what is an "essential characteristic" or whether a "countervailing federal interest" is present in cases involving conflict between state law with a substantive cast and decisional federal procedural law. So far, though, only a handful of post-*Gasperini* cases include substantial dealing with *Byrd*, and they sometimes appropriately find no "essential characteristic" involved or cast doubt on whether the inquiry is suitable in the situation before the court.[185] And in what may be a demonstration of the vagaries of bal-

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to be applied in a federal court, it nevertheless cannot be applied in those limited situations where 'there is a significant conflict between some federal policy or interest and the use of state law'" (quoting O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)). Although exploration of parallels and differences among these areas could well prove informative, *see* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 737 (1986), life and the patience of the reader are likely to be too short to warrant going further in this direction here.

184 DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 221 (3d ed. 1990); *see also* REDISH, *supra* note 96, at 238:

> Certainly there is some legitimate interest in allowing a court to decide for itself how most fairly to conduct its procedures. A court's integrity is to a degree dependent upon its authority to control matters that are intimately bound up with its daily internal operations. In this sense, a court's power to determine the fairest procedures could be viewed as qualitatively different from its authority to develop principles of substantive law.

185 Two such cases deal with state laws requiring a "certificate of review" or "affidavit of merit" to bring an action alleging professional misconduct, and both hold the state provisions applicable. *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1540 (10th Cir. 1996) ("In this case, the imposition on the federal court—one additional filing with the court—is relatively minor. This is not a case where 'essential characteristic[s]' of the federal system would be altered if the state rule were applied."); RTC Mortgage Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co., 981 F. Supp. 334, 347 (D.N.J. 1997) ("[A]n 'essential characteristic' inquiry would seem at least somewhat redundant where that characteristic is already fully embodied in a federal statute or rule. Nonetheless, because the Court can conceive of no aspect of federal practice or procedure which might be altered by application of the Affidavit of Merit

ancing, the only post-*Gasperini* case I have found that identifies a "strong federal policy" behind a judge-made procedural rule—that on class-action tolling, from two Supreme Court decisions[186]—nonetheless holds a contrary state tolling rule to be an "integral part" of a state statute of limitations and therefore applicable.[187] From other decisions or commentary, a non-exhaustive list of specific areas that might involve "essential characteristics" and "countervailing federal interests" would include forum non conveniens law[188] and possibly interjurisdictional preclusion when not governed by the federal full-faith-and-credit statute.[189]

To try to do more than just pointing out examples, and to address instead the terms in which argument over the identification of "essential characteristics" and "countervailing federal interests" might most informatively be conducted: your leanings are likely to be affected strongly by your attitude toward balancing approaches. Whatever the problems of the "twin aims" test, those of balancing can be severe:

> [T]here is no scale on which the balancing process called for by the [*Byrd*] Court can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the value of preserving uniformity of result with the state court. Even if there were such a scale, the weights to be placed upon it must be whatever the judges say they are.[190]

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statute, because the issue is not covered by a federal rule, and because the state statute is outcome determinative, the state statute will apply.") (footnote omitted).

186 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

187 *See* Vaught v. Showa Denko K.K., 107 F.3d 1137, 1147 (5th Cir.), *cert. denied*, 118 S. Ct. 67 (1997).

188 *See In re* Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc) ("[T]he interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal forum non conveniens in diversity cases."), *vacated on other grounds sub nom.* Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989).

189 28 U.S.C. § 1738 (1994). *See generally* Burbank, *supra* note 183, at 787–97. Acknowledging that much authority favors judge-made federal preclusion law, Burbank expresses skepticism about treating the area of preclusion rules for federal diversity judgments in *Byrd's* terms and concludes, "Until such time as federal policy relevant to preclusion law is more clearly articulated, through processes providing safeguards against judicial parochialism, state law should provide the norm on most questions." *Id.* at 797.

190 19 WRIGHT ET AL., *supra* note 93, § 4508, at 242. *Compare, e.g., In re Air Crash Disaster*, 821 F.2d at 1159 ("[T]he integrity of our fact-finding processes must outweigh considerations of uniformity."), *with id.* at 1180–81 (Higginbotham, J., concur-

Such problems of comparative weighing are compounded by the initial difficulty of deciding whether a federal interest sufficient to trigger the *Byrd-Gasperini* analysis, beyond the interests already identified by the Court in the area of judge-jury and trial-appeal allocation of decisionmaking responsibility, exists in the first place. There is the further danger that federal courts "free to conjure up 'interests'" might fall prey to the "natural tendency of institutions to seize the moment to expand their power."[191]

Even Professor Redish, probably the leading academic proponent of balancing, identified only one major federal interest that he would regard as sufficient "to outbalance a truly significant competing state interest—that of avoiding significant cost or inconvenience to the federal courts that would accompany the application of a particular state procedural rule"[192]—and admitted that the courts had mostly not adopted that view.[193] The considerations counseling strong hesitancy to find federal "interests" that suffice to trigger interest analysis also find some support both in the Court's limit so far to areas under strong Seventh Amendment influence and in the language used in *Byrd* and *Gasperini*. Not just any federal interest should qualify, for presumably federal decisional rules are chosen because the federal courts regard them as better than the alternatives; yet finding a "countervailing federal interest" in the sheer rationale behind any judge-made federal procedural rule—which the Court has not done—would prove too much, for it would replace the "twin aims" analysis with balancing or accomodation in all cases. Further, the Court has referred not to "distinguishing" or "significant" characteristics of the federal judicial system, but to "essential" ones. The implicit requirement seems appropriately demanding.[194] Of sufficiently weighty federal "interests," beyond those established by the Constitution, acts of Congress, Federal Rules, and the Court's decisions already on the books, there should be few, if any.

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ring in judgment) ("Of course, federal courts have an interest in self-administration; they do in every *Erie* decision. But that interest must be viewed with caution when it lacks the support of the Rules Enabling Act mandate or an independent constitutional interest such as the seventh amendment . . . .").

191 Burbank, *supra* note 183, at 789–90.

192 REDISH, *supra* note 96, at 239 (footnote omitted).

193 *Id.*

194 *See* King, *supra* note 12, at 184 (the author argued that the *Gasperini* Court, by not mentioning federal interests in the choice of verdict-excessiveness standard to be applied at trial-court level, may have "implicitly recognized that there were no federal interests worth balancing. This reading of *Gasperini* limits the *Byrd* case so that federal interests requiring consideration arise only rarely.").

Even in several areas that deal with judge-jury relations or verdict review other than verdict excessiveness or insufficiency, *Gasperini* may not change analyses or results. Different approaches or outcomes should follow now, if I have read *Gasperini* right, only when judge-made federal decisional law could apply rather than the Constitution, a federal statute, or a Federal Rule, *and* an "essential characteristic" of the federal judicial system affecting a "countervailing federal interest" that may be sufficiently weighty to offset a conflicting state interest with substantive overtones is involved. If any of these factors is not present, other tests such as "arguably procedural" for a federal statute, the REA analysis for a Federal Rule, or the *Hanna* dictum's "twin aims" spin on "outcome determination" for most decisional-federal-law situations should apply now as before. That can leave such matters as summary judgment standards governed by Federal Rule 56,[195] appellate review of judge-tried fact questions governed by Rule 52(a)'s "clearly erroneous" standard,[196] and rulings on motions for judgment as a matter of law governed by Rule 50 as amended in 1991.[197] And if state-vs.-federal law issues arise about standards for new-trial motions

195 *See, e.g.*, Mayer v. Gary Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994).

196 *See, e.g., id.*

197 *See* 17 MOORE'S FEDERAL PRACTICE, *supra* note 57, § 124.07[7][c], at 124–59 (describing Federal Rule 50 as having been amended in 1991 "expressly to incorporate a standard of review into the rule") (footnote omitted); Childress, *supra* note 156, at 312; King, *supra* note 12, at 176 ("The 1991 amendments to the Federal Rules have apparently resolved this choice-of-law question in favor of a 'reasonable jury' standard. Federal Rule 50(a) allows a federal court to direct a verdict against a party when 'there is no sufficient evidentiary basis for a reasonable jury to find for the party' on an issue essential to the party's defense or claim.") (footnotes omitted).

If Rule 50 is not read as supplying a standard, then room for argument could remain on the much-controverted issue of whether the federal or state standard for sufficiency of the evidence to go to the jury should prevail on state-law matters in federal court when the two differ. *See generally Mayer*, 29 F.3d at 335 (abandoning previous circuit rule favoring state standard for sufficiency of evidence on motions during and after trial, on grounds that rule goes to whether judge or jury should evaluate sufficiency and that Supreme Court had mandated parallel standards for summary judgment, provided by Federal Rule 56, and judgment as matter of law during or after trial under Federal Rule 50); Childress, *supra* note 156, at 290–316 (surveying differences among circuits and arguing that basic *Erie* principles point toward federal standard).

The *Cornell* Note argues that *Gasperini* could be read as having undermined the view that the 1991 amendment to Rule 50 provides a governing standard: "[B]ecause *Gasperini* allowed state law to flesh out the meaning of Rule 59, a similar argument could be made that state law should qualify the 'reasonable jury' standard embodied in Rule 50(a)." King, *supra* note 12, at 191. The apparent clarity of the 1991 amendment's language and intent, plus the Rule 50-Rule 56 parallel pointed out by the *Mayer* court, *supra*, make it seem doubtful that the hitherto dominant reading of

(on grounds other than verdict excessiveness or inadequacy) in state-law cases under Federal Rule 59(a),[198] beyond state law's providing the guidance for what the court should assure that the jury was to consider in determining liability and damage amounts, strong precedent and the lack of a substantive state interest may dictate federal-law guidance for federal courts' decisions on whether to grant or deny a new trial.[199] My review of post-*Gasperini* cases in the lower federal courts does not indicate that they are doing otherwise.[200]

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amended Rule 50 is seriously vulnerable to such undermining. *See also supra* note 126 (discussing reasons for not expecting questionably broad readings of *Gasperini*).

198 FED. R. CIV. P. 59(a):

> 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 . . . .

See Gasperini, 116 S. Ct. at 2224 n.22 (rejecting argument that Rule 59(a) itself, at least in the verdict-excessiveness context that was before the Court, provides "a 'federal standard' for new trial motions").

199 *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278–79 (1989) (footnote and citations omitted):

> Review of the district court's order [refusing to grant a Rule 59 new-trial motion] involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.

See also Mayer, 29 F.3d at 334 ("When acting on motions for new trials in diversity cases, district judges use the same approach they apply in cases arising under federal law. States may prohibit discretionary awards of new trials or use their own standards, without effect on the conduct of federal litigation."); Childress, *supra* note 156, at 288 ("Courts of appeals should generally look to the federal standard of review on all new trial motions.") (citations omitted).

The *Cornell* Note reads *Gasperini*, because the Court chose state law on verdict excessiveness to govern when a federal trial judge must rule on a new-trial motion seeking remittitur, as meaning that this "majority rule" in the courts of appeals—that "federal standards govern a trial judge's ruling on a motion for new trial"—even though apparently adopted by the Supreme Court in *Browning-Ferris* "no longer stands firm." King, *supra* note 12, at 189, 190 (footnote omitted). This reading seems questionably to deny the possibility that verdict-excessiveness standards, which can readily have substantive overtones and which *Gasperini* considers largely on their own, can be treated distinctly from other issues concerning the source of law for new-trial standards. *See supra* note 156. The Note's view is also hard to square with *Gasperini* itself, which quotes *Browning-Ferris* favorably both as to matters that case held to be governed by federal law and issues on which *Browning-Ferris* said that state law governs. *See Gasperini*, 116 S. Ct. at 2224 & n.22.

200 *See supra* note 157 and accompanying text.

F. Summary and Update

Gasperini does suggest some changes in what the Supreme Court is saying about approaches to *Erie-Hanna* issues, but the basic framework for analysis that has prevailed since *Hanna* appears very much intact. The two differences of particular note seem to be a degree of emphasis on construing possibly applicable Federal Rules with sensitivity to important state interests to avoid "direct conflicts" with state law when possible, and more centrally the clear preservation of *Byrd* interest analysis in a subset of cases involving judge-made federal procedural rules. As best we may be able to tell on the basis of *Gasperini* itself and subsequent lower-court decisions, the *Hanna* "twin aims" approach remains applicable to such decisional-rule cases—*unless* an "essential characteristic" of the federal judicial system presenting a "countervailing federal interest" is involved. In such cases *Byrd* and *Gasperini* call for a broadening beyond the "twin aims" version of "outcome-determination" analysis to include consideration of the nature and weight of the state's interest in application of its own rule in federal court, with particular focus on whether it is "bound up with" clearly substantive state-law rights and an eye to whether the state or federal interest should prevail or if the two can be accommodated. It is too early to hazard more than a fairly tentative guess, but the size of the subset in which such federal interests—which can only be procedural, and in cases not governed by positive federal law—should be found may extend little or not at all beyond the Seventh Amendment-influenced area of allocation of functions among federal juries, trial judges, and appellate courts.

IV. CONCLUSION

This essay has not pushed back the frontiers of *Erie* scholarship by offering a new theory of how to approach state-federal law-choice issues. The essential outlines of what I have presented were developed in *Hanna* and elucidated almost a quarter of a century ago by Professor Ely.[201] In many respects, this very lack of novelty reflects a central point: while we academics cannot begrudge our colleagues and students their efforts to suggest better ways than those the Supreme Court has developed, the framework the Court has provided—in addition to being reasonably sensitive to federalist concerns and the nu-

201 He appears to have been speaking with some authority. His introductory footnote cautions, "In order to enable the reader to discount for possible bias, he is warned that the author was Chief Justice Warren's law clerk during the Term in which *Hanna v. Plumer* was decided." Ely, *supra* note 29, at 693 n.*. Chief Justice Warren delivered the majority opinion in *Hanna*.

ances of a somewhat complex area, and fairly comprehensible and workable in its broad outlines—has been remarkably stable through over three decades of case-law developments and persistent academic critique. The Court has even managed to produce an opinion for a clear majority in every one of its leading *Erie-Hanna* decisions, avoiding the fragmentation that plagues many other areas.

Collegiality makes me a bit hesitant to say so, but on the whole in this field it seems to me that the Court deserves higher marks than most of the academic commentators.[202] To be sure, the Court's work since *Hanna* has been far from flawless. Its apparent straining with applications of its framework in some cases[203] gives reason to wonder if it has decreed a degree of formalism with which it is reluctant itself to live. (Manipulability in borderline cases, though, is nothing new to the law; and those troubled by indefiniteness under the Court's current *Erie-Hanna* approaches should try general balancing instead.) Moreover, the Court's failure, with the notable exception of the *Hanna* dictum's "twin aims" recasting of *York*'s "outcome-determination" test, to be explicit about what in its prior decisions it is modifying or abandoning creates openings for uncertainty—witness some of my disagreements with other commentators—and for inconsistent applications in the lower federal courts. And the cryptic nature of key aspects of the *Gasperini* majority opinion leaves room for puzzled dissatisfaction.

Yet there is also room for puzzlement at what has sometimes been the obfuscatory performance of academic critics of the Court's *Erie-Hanna* line of decisions.[204] One explanation may be that this area combines inherent complexity and interest while being a key part of the rite of passage through which most of us went and continue to put our students; it may have such a hold on us that we can't leave well enough alone. The academic incentive structure may also conduce to hypercriticality; it probably helps to have had tenure for a good many years before setting out to say that the Court has done a halfway decent job and that its doctrines don't need a major overhaul. Still, to find grounds for understanding the academy's performance here

202 Given the length of this essay, it also earns higher marks at least for conciseness than this commentator.

203 *See, e.g., Stewart Org.*, 487 U.S. at 34–38 (Scalia, J., dissenting) (criticizing breadth of majority's statutory construction).

204 *Cf.* Ely, *supra* note 29, at 697–98 ("[T]he indiscriminate admixture of all questions respecting choices between federal and state law in diversity cases, under the single rubric of 'the Erie doctrine' or 'the Erie problem,' has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation.").

should not excuse any failures to read carefully what the Court has been saying, and to present it fairly and lucidly before we criticize and theorize. Doing so is part of our professional obligation, and above all we should try to stop misleading the courts and confusing our students.