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# Choice of Law Within the Federal System Erie Versus Hanna

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# CHOICE OF LAW WITHIN THE FEDERAL SYSTEM: ERIE VERSUS HANNA

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*The author examines the unique device of diversity jurisdiction and its place among the federal-state interrelationships created by the Constitution, with particular consideration being given to the problem of characterization. He then concludes that the recent decision of Hanna v. Plumer, insofar as it tends to limit the doctrine of Erie R.R. v. Tompkins, works a partial return to the discredited doctrine of Swift v. Tyson. In so doing, he argues, it encourages forum-shopping, promotes discrimination against nondiverse parties, and effects an unconstitutional invasion of rights guaranteed to the states by the tenth amendment.*

Literature dealing with the diversity jurisdiction of federal courts has been scholarly and voluminous, particularly that written since the epoch-making opinion of Mr. Justice Brandeis in *Erie R.R. v. Tompkins*.[1] Recently, however, interest in the field has been sharply revived by the leading case of *Hanna v. Plumer*,[2] which threatens to restrict the applicability of *Erie* in cases where the Federal Rules of Civil Procedure are involved, and perhaps to replace it with something very much akin to the ancient and discredited doctrine of *Swift v. Tyson*.[3] This alarming prospect, which may lead to distortion of the federal system and interference with the constitutional rights and powers it seeks to protect, has prompted the writing of this article. Its purpose is twofold: *first*, to examine the unique constitutional device of diversity jurisdiction, the problems encountered over the years in seeking to satisfactorily employ this device, and the ways in which federal courts—particularly the Supreme Court—have attempted to solve these problems; and *second*, to present *Erie* and *Hanna* as opposites, the former serving as a source of reaffirmation and strength for the federal system and the latter as a source of alteration, sapping the strength from that system. Fulfillment of the first purpose will lay a foundation for consideration of the second.

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1 304 U.S. 64 (1938). The development of Erie has been extensively documented; see, e.g., Clark, "State Law In the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins," 55 Yale L.J. 267 (1946); Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 Yale L.J. 333 (1933); Friendly, "In Praise of Erie—And of the New Federal Common Law," 39 N.Y.U.L. Rev. 383 (1964); Tunks, "Categorization and Federalism: 'Substance,' and 'Procedure' After Erie Railroad v. Tompkins," 34 Ill. L. Rev. 271 (1939).

2 380 U.S. 460 (1965). For commentary on Hanna, see materials cited in note 78 infra.

3 41 U.S. (16 Pet.) 1 (1842). For a discussion of Swift, see text accompanying notes 26-28 infra.

## DIVERSITY JURISDICTION: CREATION AND AIMS

### A. *Characterization and Its Significance*

The basic problem is one of characterization.[4] This problem was created by the crucial placement of diversity jurisdiction at the very heart of the federal constitutional system. In the first three articles of the Constitution the powers specifically granted by the states to the federal government are set forth; in the tenth amendment, all *other* powers are explicitly reserved to the states or to the people.[5] The Constitution also provides[6] for suits in federal courts between parties of diverse citizenship upon rights created by the states under powers reserved to them in the tenth amendment. Under the Supreme Court's interpretation of the Constitution and the Rules of Decisions Act[7] in *Erie R.R. v. Tompkins*,[8] however, state law must govern the substantive rights of the parties. Federal law is thereby confined to the subordinate role of establishing the judicial mechanisms by which those rights are to be enforced. As a result, three interrelated key questions frequently arise in diversity cases: *first*, whether a given *issue* must be classified for purposes of diversity jurisdiction as "substantive," thereby requiring application of appropriate state law, or "procedural," and therefore properly governed by the diversity court's own rules;[9] *second*, whether a particular *right* created under state law is "substantive" in the *Erie* sense, and must therefore be enforced in the diversity court even though it does not exist under federal law; and *third*, whether use of a federal "procedural" law which is applicable in terms may impinge upon the state-created "substantive" right in issue and must therefore be denied application under *Erie*. The applicability of the Federal Rules of Civil

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[4] In the law of conflicts, "characterization" is the process of categorizing a particular case or issue as, e.g., either substance or procedure, tort or contract, in order to determine which jurisdiction's law is applicable.

[5] The tenth amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It has been partially implemented by the Rules of Decision Act, quoted in note 8 infra.

[6] Article III, § 2: "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ."

[7] 28 U.S.C. § 1652 (1964). That act, as amended, reads as follows:
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.

[8] 304 U.S. 64 (1938).

[9] The terms "substance" and "procedure" are misleading and difficult to live with, at least in the context of diversity jurisdiction. They cannot be avoided, however, for no satisfactory substitutes can presently be found to designate, respectively, issues of the parties' substantial rights and those concerning the mode of judicially enforcing those rights.

Procedure is of particular significance in considering the last of these questions.

The problems of diversity jurisdiction center upon the need for a constitutional and realistic means of attaining predictability. This need can be fulfilled only by a flexible yet reliable standard designed specifically to determine whether any given matter is "substantive" *in the diversity sense.*[10] Such a standard is difficult to establish, as the cases reveal.[11] One is necessary, however, in this area where state and federal constitutional powers often collide, in order to create a meaningful and constitutional division of function between federal laws that regulate the judicial mechanics of diversity courts and state laws that create the rights upon which actions are brought in those courts.

Any standard used to fulfill this function must be a subtle one, designed for case-by-case application rather than for general use, and taking account of the potentially-invaded state right, the state policy upon which that right is based,[12] and the degree to which application of the federal rule appears likely to invade the right in question. Unless general guidelines are embodied in legislation, the development of such a standard is bound to be a slow process. Since *Erie* and *Hanna* provide somewhat contradictory approaches to establishing a standard, the use-

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[10] The need for an individualized standard of "substance-procedure" characterization has been noted by several authors. For example, the late Professor W. W. Cook described eight different purposes for "substance-procedure" characterization and insisted that a different standard must be used for each. Cook, supra note 1, at 341-47.

[11] Justice Frankfurter, in his majority opinion in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), stated forcefully that the usual tests for distinguishing "substance" and "procedure" are worse than useless in the diversity context. He said:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.

Id. at 108.

Professor Leflar has illustrated the problem in this area by setting forth several kinds of issues whose characterization as either wholly "substantive" or wholly "procedural" is logically impossible, for, while they concern matters traditionally "procedural," their resolution is more than likely to have an important effect upon the parties' rights. His examples are (1) sufficiency of evidence to sustain a jury verdict, (2) need for a jury trial, (3) joinder or misjoinder of parties, (4) statutes of limitations, (5) measure of damages, (6) statutes of frauds, (7) the parol evidence rule, (8) rules regarding placement of the burden of proof, (9) conditions necessary to maintain an action, and (10) allowance of setoffs and counterclaims. Leflar, Conflict of Laws 106 (1959).

[12] But the policy behind the *federal* rule that otherwise would be applicable should *not* be considered. It was in the assertion that considerations of federal policy are relevant to the enforcement of state-created rights in diversity tribunals that the Court made its chief error in Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525 (1958); see text accompanying notes 60-63 infra.

fulness of these approaches must be considered. If only one basic policy is to be used, it would be preferable to continue the case-by-case development of *Erie* rather than to use *Hanna* to revive the ghost of *Swift v. Tyson.*

B. *Diversity Jurisdiction and the Federal Union*

Problems of characterization penetrate to the very heart of diversity jurisdiction, and involve policy as well as constitutional considerations. Therefore, in order to weigh the various possible solutions to these problems, one must understand something of the nature and requirements of our federal constitutional system and of the central role played in the system by diversity jurisdiction.

The first point to be noted is that the concept of diversity jurisdiction is indeed unique, arising as it does from the nature of the federal government as one of delegated powers. Within this context, one function of the Constitution was to establish interrelationships between the nation and the states at important points of contact. There are many such interrelationships, even apart from the federal government's power to supersede state legislation in areas of competence constitutionally delegated to the nation.[13] Article III, section 2 of the Constitution, which establishes the federal-state relation at issue in this article, provides for the creation of a federal judicial system which in some respects is both parallel to and a partner of those of the several states. The concept of "diversity jurisdiction" created by that section was subsequently implemented by the Rules of Decisions Act.[14] The constitutional connection between federal and state judicial systems thus established has disturbed the tranquility of federal courts almost since the day of its creation.

It is evident that diversity jurisdiction, lying as it does at the very center of the federal-state relationships created by the Constitution, is the principal point at which the judicial affairs of nation and states are inextricably intertwined. It is also evident that a carefully balanced maintenance of those relationships without constitutional distortion favoring the one or the other is essential to the preservation and proper functioning of our federal union. The full implications of that union and its operation are far outside the scope of this discussion, yet its nature, and the interrelationships of the state and federal courts that form a part of it, must constantly be considered for an adequate understanding of

[13] For example, this interrelationship is also evident in the constitutionally established method of electing United States Senators and Representatives and in the fact that state law often determines questions of legal status which arise in the exercise of federal taxation, interstate commerce, and bankruptcy powers.

[14] 28 U.S.C. § 1652 (1964), quoted in note 8 supra.

the problems of diversity jurisdiction. Furthermore, since every diversity case necessarily has a constitutional aspect as well as one involving conflict of laws, the constitutional implications of diversity jurisdiction must always be kept in mind.

C. *Possible Kinds of Uniformity in Diversity Courts*

The question of uniformity bears directly on the basic problem of characterization outlined above. Once diversity judges began to think in terms of some sort of uniform connection between diversity and other types of judicial jurisdiction, the question arose as to what the proper uniformity was. If it were concluded that the proper uniformity is intrastate uniformity of substantive result in each case, regardless of whether that case is tried in the local or diversity courts of the state in question, then the diversity court would face the problem of characterizing a given issue as "substantive" or "procedural." But if it were concluded, as in *Swift v. Tyson*,[15] that the preferable uniformity is a nationwide application of "federal general common law" to all state-created rights of general significance not governed by local statute, then the diversity court would avoid the problem of characterization.

Although state courts are also plagued by uniformity problems in conflict-of-laws cases,[16] the most difficult problems lie within the realm of federal diversity jurisdiction, where the close interplay of the national and state governments requires that careful, purpose-oriented regulation be combined with reliable judicial self-discipline. In this context intrastate uniformity of substantive result in each case appears to be the only permissible type of uniformity, for it alone guards against encroachment by federal courts upon the states' constitutionally reserved powers,

[15] 41 U.S. (16 Pet.) 1 (1842).

[16] To the extent that any decision or statute adopts a choice-of-law rule which anticipates the application of the law of another jurisdiction, it is at least partially concerned with uniformity. The nondiversity situation differs from the federal problem discussed in this article principally in that the former does not involve a tenth amendment issue.

Unequal enforcement in state courts of rights that involve interstate conflicts has resulted from application of varying choice-of-law rules to substantially identical situations. Tort law is, perhaps, the principal area of difficulty. The established choice-of-law rule for tort is that the law of the place where the wrong occurred—the "lex loci delicti"—governs the right of recovery. This rule often has the advantage of simplicity and predictability, but it has been criticized as rigid and arbitrary where the incident or parties were meaningfully connected with more than one jurisdiction. The result in some jurisdictions has been a partial or complete abandonment of the lex delicti rule in favor of a more realistic, if less predictable, one. See Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), 51 Cornell L.Q. 779 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964) (local law of state having "most significant relationship" determines rights and liabilities in tort). So long as choice-of-law rules are in a state of flux at the state level, as they presently are, they will create additional problems for diversity courts which, under the case of Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941), must apply the conflicts rules of the states in which they sit.

thereby preventing alteration of the intended nature of the federal union.

There is a second and perhaps more important reason for uniformity between the diversity court and the courts of the state in which it sits. Rights created by the states under their reserved powers are usually enforceable only in state tribunals, for diversity jurisdiction is but an optional privilege open to the comparative few. It is therefore important to parties unable to claim diversity jurisdiction that the results obtainable in the courts that are open to them be identical in all important respects to those available in identical actions in the diversity courts of the states in question. As the Supreme Court has frequently said, the accident of diversity of citizenship must not be permitted to work discrimination against nondiverse parties similarly situated.[17] This federal-state uniformity of judicial result is related to preservation of state reserved powers, because both are required by the Constitution and neither can be achieved unless diversity courts always determine the parties' full "substantive" rights under state law alone. Although this identity of result is now constitutionally assured to nondiverse parties under *Erie*'s soundly conceived extension of the equal protection clause,[18] other kinds of uniformity have been attempted in the past in the diversity courts. In all, three types have been sought.

1. *Uniform Application of "Federal General Common Law": Swift v. Tyson.* The earliest type of uniformity attempted by the Supreme Court, first enunciated in the leading case of *Swift v. Tyson*,[19] governed the decisions of diversity courts during the nineteenth century and the first third of the twentieth. In *Swift*, Mr. Justice Story announced as existing doctrine the rule that "substantive" issues involving rights that are of more than mere local importance, but which have been established by the states under judicial decision rather than statute, must be resolved by diversity courts under "federal general common law."[20]

Proponents of this rule had hoped that it would be applied even by the state courts when they were faced with "diversity" situations, so that nationwide uniformity of substantial result in every diversity case could thereby be secured. That hope proved futile, however, for the *Swift* rule was largely unworkable in practice. State courts declined to abandon their own laws, the lower federal courts frequently differed among themselves, and area after area to which *Swift* had originally

[17] See Angel v. Bullington, 330 U.S. 183, 192 (1947).

[18] While states alone are explicitly controlled by the fourteenth amendment, the Erie Court found the doctrine of Swift v. Tyson unconstitutional partly because it rendered impossible the equal protection of the laws guaranteed therein. Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).

[19] 41 U.S. (16 Pet.) 1 (1842).

[20] Id. at 18-19.

applied was withdrawn from its reach through enactment by the states of appropriate statutory regulation. Moreover, the *Swift* rule had the far graver defect of unconstitutionality. *First*, it required diversity courts to invade powers that were guaranteed by the Constitution to the states but had not yet been implemented by local statute. *Second*, it was the source of harmful and unconstitutional discrimination against parties unable to claim trial of their causes of action in diversity tribunals. This discrimination was made possible by the fact that diversity tribunals were bound to apply "federal general common law" to state-created rights while the state tribunals could apply their own law to the same situations. This promptly led to forum-shopping for favorable substantial results by those to whom diversity jurisdiction was available.

2. *Uniformity of Substantial Result Within the State: Erie R.R. v. Tompkins.* After hope for nationwide application of federal common law under *Swift v. Tyson* had diminished under the combined impact of attack and neglect, it was finally destroyed by the incisive opinion of Mr. Justice Brandeis in *Erie R.R. v. Tompkins*.[21] *Erie* overruled *Swift* upon the twin grounds of its unconstitutionality and its failure to achieve the objectives for which it had been decided. It did much more, however, by replacing the *Swift* rule with the requirement that diversity courts decide all "substantive" issues under appropriate state law. This requirement was designed to secure intrastate uniformity of result in all actions based upon state-created rights, regardless of the forum in which their enforcement might be sought, and thereby to prevent discrimination against parties unable to claim diversity jurisdiction. Since the uniformity prescribed in *Erie* is both constitutionally required and manifestly desirable, the opinion in that case must be regarded as the root of virtually all acceptable modern diversity doctrine.[22]

While the *Erie* opinion does not provide a guide for characterizing applicable law as either "substantive" or "procedural," the policies behind the case indicate that characterization should not be undertaken with jealous concern for the sanctity of the Federal Rules or any other federal "procedural" law as such, but should be used strictly to insure intrastate uniformity of result. Although the judicial precept that diversity courts are mere coordinate, forum-state tribunals is inaccurate and misleading as a general statement,[23] it is certainly true with regard to their ultimate function of deciding state-law actions under state "substantive"

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21 304 U.S. 64 (1938).

22 Not all commentators think so. For forceful criticism of Erie, see Keeffe, Gilhooley, Bailey & Day, "Weary Erie," 34 Cornell L.Q. 494 (1949).

23 But the Supreme Court has, on occasion, made that statement. See Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945); Angel v. Bullington, 330 U.S. 183, 191-92 (1947).

law and thereby removing all substantial advantage from the right to claim diversity jurisdiction.

3. *Uniform Application of the Federal Rules: Hanna v. Plumer.* The question of whether characterization standards developed under *Erie* are applicable where the Federal Rules of Civil Procedure are involved was not thoroughly discussed by the Supreme Court until 1965.[24] Then, in the leading case of *Hanna v. Plumer*,[25] the Court held that where a state "procedural" law and its counterpart in the Federal Rules are mutually antagonistic, and each is applicable in terms to an issue that can "rationally" be classified as either "substantive" or "procedural," the Federal Rule must govern despite its incidental "substantive" effect upon the rights of the parties. The uniformity admittedly sought in *Hanna* was a rigid, exceptionless application of the Federal Rules that took no adequate account of any consequent infringement upon state-created rights or discrimination against parties unable to claim diversity jurisdiction. It is submitted that *Hanna* thereby produced an unconstitutional and otherwise undesirable result, since diversity jurisdiction was designed to secure state-created rights in federal courts, and that purpose should not be thwarted in an effort to reach the relatively minor goal of federal "procedural" uniformity.

## II

## The Principal Diversity Cases

### A. *Swift v. Tyson: Study of a Misguided Ideal*

In order to appraise these several uniformities in the light of major policy considerations, it is necessary to reexamine *Swift* and *Erie*. In *Swift*, the defendant Tyson had bought land from Keith and had accepted a bill of exchange drawn upon him for the purchase price. The bill was then assigned by Keith to Swift, a bona fide purchaser. The land proved to be much less valuable than represented to Tyson, and in addition Keith's title was defective. Tyson tried to raise these defenses when sued by Swift. Under the common law of New York, it was possible that this defense could be asserted against a bona fide purchaser, although the law was not clear. However, under United States decisional law, if it were applicable, it was clear that the plaintiff would prevail. The defendant asserted the Rules of Decision Act,[26] which provided that state "laws"

[24] Diversity cases involving the Federal Rules have, however, been before the Court on other occasions. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Sibbach v. Wilson & Co., 312 U.S. 1 (1941). These cases are discussed at text accompanying notes 64-77 supra.

[25] 380 U.S. 460 (1965).

[26] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). [Emphasis added.] The Rules of Decisions Act, substantially as asserted in Swift, is quoted in note 7 supra.

should be regarded as "rules of decision" in actions at common law in the federal courts, and he argued that the word "laws" included decisional law as well as state statutes. The Court, however, disagreed with this interpretation of the act and held for the plaintiff under federal common law. Mr. Justice Story stated that the word "laws" referred to local usages and state statutes alone.

> [T]he Courts of New York do not found their decisions [on the issue here involved] . . . upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from *the general principles of commercial law*. . . . It never has been supposed by us, that the [word "laws", as used in the Rules of Decision Act] . . . did apply, or was designed to apply, *to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation* . . . .[27]

It is clear, as previously discussed, that this decision is subject to severe criticism on many grounds. But not only was *Swift* unsuccessful in its own time; its philosophy is also especially unsuited to the needs of today's mobile society. Since state causes of action now arise much more frequently among parties of diverse citizenship, and since diversity of citizenship can often be fabricated for the occasion, a resurrection of *Swift v. Tyson* would lead to far more forum-shopping, and consequent discrimination, than it ever did in the nineteenth century.[28] As we shall

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[27] Swift v. Tyson, supra note 26, at 18-19. Justice Story, in holding that federal common law was applicable, announced his reliance in this connection upon the so-called "discovered law" theory, now in wide judicial disfavor. Pronouncement upon a subject so esoteric as the various theories regarding the origin of law is inappropriate here. It should be noted, however, that the "discovered law" doctrine seems peculiarly unsuited to a country like the United States, whose judicial decisions have a binding effect similar to that of statutes until they are overruled or superseded by legislation. In addition, it is difficult to understand how Justice Story reconciled himself to his insistence upon the "discovered law" theory so as to deny full effect to state-court decisions while at the same time obviously holding the view that United States Supreme Court decisions were binding *as law* upon all to whom they properly applied.

Justice Story's pronouncement in Swift that "laws of the several states" as used in the Rules of Decision Act does not include state-court decisions has been seriously questioned. See Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, 52, 81-88 (1923). See also Erie R.R. v. Tompkins, 304 U.S. 64, 72-73 (1938).

[28] Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) exemplifies the outrageous lengths to which some parties were prepared to go in forum-shopping under the rule of Swift. In that case, both parties had been Kentucky corporations when the claim under a contract unenforceable in Kentucky had accrued. Plaintiff, however, realizing it could win under federal common law, established its claim to diversity jurisdiction by reincorporating in another state prior to bringing the action. The Supreme Court found the contract enforceable under federal common law and accordingly held for plaintiff. This disposition drew a strong dissent from Justice Holmes, who said:

> [I]n my opinion the prevailing [Swift] doctrine has been accepted upon a subtle fallacy that never has been analyzed. . . . The fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States. . . . The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. . . . It is through this phrase that what I think [sic] the fallacy comes in. . . .
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> . . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless

see, this is precisely the fault of *Hanna v. Plumer*,[29] which effectuates a partial return to *Swift*, although in the guise of "federal procedural law" rather than "general federal common law."

As the era of *Swift v. Tyson* drew to a close, Congress anticipated its final demise. In the Rules Enabling Act,[30] it gave the Supreme Court authority to adopt the regulations now known as the Federal Rules of Civil Procedure, but limited that authority by a prohibition against its use at the expense of state reserved powers.[31]

### B. *Erie R.R. v. Tompkins: Source of Modern Diversity Doctrine*

The basis of modern diversity doctrine was laid in 1938 by the conjunction of two significant events—the Court's adoption under the Rules Enabling Act of a code of federal "procedure" designed to replace the state procedural laws which had previously bound diversity courts in common-law actions, and the ruling in *Erie R.R. v. Tompkins*[32] that diversity cases must be decided under state "substantive" law.[33]

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and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. . . . [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

. . . .

. . . . If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain.

Id. at 532-34 (dissenting opinion). For an earlier Holmes dissent to the same effect, see Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910).

[29] Supra note 25. Hanna indicates that a return to Swift is not a remote possibility. Hanna, of course, will not permit the broad forum-shopping encouraged by Swift, for the only federal law it directly involves is the Federal Rules. It shares with Swift, however, the unfortunate characteristic of arbitrary and virtually unreasoned insistence upon application of federal law at the expense of discrimination against nondiverse parties and infringement upon powers constitutionally reserved to the states. The close basic similarity of the two cases renders unimportant the fact that the federal laws involved are the Rules Enabling Act and the Federal Rules adopted thereunder, instead of the "general common law" involved in Swift.

[30] 28 U.S.C. § 2072 (1964).

[31] The statute provides, in part:

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in Civil actions.

*Such rules shall not abridge, enlarge or modify any substantive right* . . . .

[Emphasis added.] The Enabling Act, and the Federal Rules of Civil Procedure that were adopted under it in 1938, were designed to, and did, eliminate the confusion and inconvenience resulting from the fact that while equity suits in the federal courts were governed by a federal code of equity procedure, the Conformity Act of 1872 required conduct of actions at law under forum state procedural rules. See Clark, Code Pleading 33-34 (2d ed. 1947).

[32] 304 U.S. 64 (1938).

[33] Id. at 79-80. Many, including Justice Holmes, had believed that solution of the con-

In *Erie*, the plaintiff was struck by a train while trespassing upon Erie's Pennsylvania right-of-way, and sought recovery from the railroad in a New York diversity court. There was no pertinent federal or Pennsylvania statute. The degree of negligence proved against Erie, however, permitted recovery under federal common law but not under the law of Pennsylvania. Erie denied liability on the ground that Pennsylvania law was applicable because the injury had occurred in that state. Tompkins objected, contending that federal common law must govern under *Swift v. Tyson* in the absence of an applicable state statute. Speaking for the Court, Mr. Justice Brandeis sustained Erie's argument and reversed the judgment of the lower courts, thereby overruling *Swift v. Tyson*.[34]

While the *Erie* opinion did not deal with the Federal Rules,[35] it was written by a Court well aware that their application under some circumstances could produce the "substantive" effect forbidden in virtually identical terms by both the Enabling Act under which they had been adopted and *Erie* itself. It seems clear, therefore, that the policy of *Erie*, to prevent unconstitutional discrimination against local citizens and invasion of state powers, is applicable in all diversity cases whether they involve Federal Rules or not.[36] In applying that policy to the facts of the case before it, the *Erie* Court abolished the "spurious" uniformity of *Swift v. Tyson* and established in its stead a viable standard based upon uniformity of substantial result.[37] Though *Erie* has been criticized, as would any

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stitutional and practical problems presented by the aged and ailing rule of Swift v. Tyson did not require the harsh step of overruling the ninety-two year-old case itself. They believed that the rule was already dying a natural death and could readily be put to final rest by the more seemly means of a neglect that could be justified by finding it inapplicable under the facts of case after case. Cf. Erie R.R. v. Tompkins, 304 U.S. 64, 82-86 (1938) (concurring opinion of Justice Butler). The opinion of Justice Brandeis avoided the need for this lengthy procedure and thereby inaugurated a new chapter in diversity jurisdiction.

34 Some authors believe the constitutional language of Erie to be mere dictum, saying that the case could have been decided upon nonconstitutional grounds. See, e.g., Clark, supra note 1, at 278; Cook, "The Federal Courts and the Conflict of Laws," 36 Ill. L. Rev. 493 (1942); Currie, "Change of Venue and the Conflict of Laws," 22 U. Chi. L. Rev. 405, 468-69 (1955). For examples of the contrary view that Erie is a constitutional decision, see Broh-Kahn, "Amendment by Decision—More on the Erie Case," 30 Ky. L.J. 3, 5 (1941); Currie, "Change of Venue and the Conflict of Laws: A Retraction," 27 U. Chi. L. Rev. 341, 351 (1960); Friendly, supra note 1, at 402; Hill, "The Erie Doctrine and the Constitution," 53 Nw. L. Rev. 427, 439 (1958); Vestal, "Erie R.R. v. Tompkins: A Projection," 48 Iowa L. Rev. 248, 254 (1963).

35 For a discussion of cases which touched upon the Federal Rules, see text accompanying notes 64-77 infra.

36 The *rule* and *policy* of Erie must be differentiated with clarity. The *rule* is not particularly useful, because it was established to deal with a situation in which no difficult issue of characterization was involved, and is therefore difficult to apply where such an issue is presented. On the other hand, Erie *policy*, forbidding diversity courts to usurp state powers and discriminate against nondiverse local parties, seems plainly to govern every diversity action. Indeed, it has been held applicable where federal jurisdiction was based upon grounds other than diversity of citizenship. See Maternally Yours, Inc. v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956).

37 This new uniformity will accordingly be termed "Erie uniformity."

opinion overruling judicial doctrine considered binding for nearly a hundred years,[38] its rule and policy are strongly established within their scope and are likely to remain so.

However, since the facts of *Erie* presented no real problem of diversity characterization, the development of the *Erie* standards was left for later cases. The courts achieved this objective concurrently with the process of extending *Erie* by characterizing certain doubtful issues[39] and laws[40] as "substantive" for diversity purposes. The following examination of cases extending the scope of *Erie* and developing standards for its application will show uniform adherence to the basic principle implicit in *Erie* itself: state powers may not be invaded by any means, including the often-attempted characterization as "procedural" of matters that may bear significantly upon rights of the parties.[41]

1. *Extending the Scope of Erie.* In *Ruhlin v. New York Life Ins. Co.*,[42] the first extension of the *Erie* rule, the Court readily concluded that suits in equity must be governed by *Erie* principles in the same manner as actions at law. In *Sampson v. Channell*,[43] the next case of importance, the First Circuit was faced with the difficult problem of "multistate diversity characterization." The court held that, for *Erie* purposes, the issue of which party had the burden of proving the plaintiff's contributory negligence was "substantive," and must therefore be decided under state law. It then turned to the choice-of-law rule of the forum state, Massachusetts, to determine whether the local law of the forum or of the place of the accident (Maine) applied, and held that under that rule the question of burden of proof was "procedural," and hence governed by the local law of the forum.[44] The First Circuit thus established a two-stage system of

[38] Criticisms of Erie range from mild to virulent. For examples of the former sort, see Clark, "Federal Procedural Reform and States' Rights; to a More Perfect Union," 40 Texas L. Rev. 211, 220 (1961); Corbin, "The Laws of the Several States," 50 Yale L.J. 762, 764 (1941); Vestal, supra note 34. For a thorough condemnation of Erie, see Keeffe, Gilhooley, Bailey & Day, supra note 22.

[39] E.g., placement of the burden of proof of contributory negligence.

[40] E.g., statutes of limitation.

[41] Mr. Justice Jackson enunciated that principle a decade after Erie was decided, saying:

> *Erie R.R. v. Tompkins* and its progeny have wrought a . . . far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law *in all except details related to its own conduct of business.*

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949). [Emphasis added.]

[42] 304 U.S. 202 (1938).

[43] 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

[44] Judge Magruder recognized the apparent inconsistency of a federal diversity court's being required by Erie to apply a forum-state law which the courts of that state considered procedural. He said:

> This result may seem to present a surface incongruity, viz., the deference owing to the substantive law of Massachusetts as pronounced by its courts requires the federal court in that state to apply a Massachusetts rule as to burden of proof which the highest state court insists is procedural only. The explanation is that reasons of policy, set forth in the *Tompkins* case, make it desirable for the federal court in diversity of citizenship

characterization, which the Supreme Court promptly applied in *Klaxon Co. v. Stentor Elec. Mfg. Co.*[45] There the Supreme Court held that, after an issue is classified as "substantive" in Stage I of the characterization process, so that forum-state law is to apply, then in a multistate case the diversity court must consult forum-state choice-of-law rules at Stage II in order to produce a result substantially the same as that available in the courts of that state.

In *Griffin v. McCoach*,[46] the Court held that *Erie* uniformity requires diversity courts to apply forum-state public policy.[47] This development was succeeded by *Angel v. Bullington*,[48] where the Supreme Court held that diversity tribunals must refuse to hear cases that would be barred from the courts of the forum state.[49] Finally, *Bernhardt v. Polygraphic*

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cases to apply the state rule, because the incidence of burden of proof is likely to have a decisive influence on the outcome of litigation; and this is true regardless of whether the state court characterizes the rule as one of procedure or substantive law. Certainly the federal court in Massachusetts cannot treat burden of proof as a matter of procedure in order to disregard the Massachusetts rule, and then treat it as substantive law in order to apply the Maine rule.

Sampson v. Channell, 110 F.2d 754, 762 (1940).

[45] 313 U.S. 487 (1941). Klaxon had been anticipated in an earlier opinion by Justice Holmes. Speaking for the Court in Union Trust Co. v. Grosman, 245 U.S. 412 (1918), he held that a Texas diversity court was required to apply Texas choice-of-law rules. That holding was in keeping with Holmes' consistent opposition to Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), pungently expressed in his dissent in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532 (1928); see note 28 supra.

Klaxon and Sampson require the diversity court to consult the "entire" law of the forum, including its choice-of-law rules, with the limitation that any reference from those rules can be made only to the law of a third jurisdiction, never back to the federal law. The doctrine thus created might be termed "diversity transmission renvoi"—surely an interesting product of our federal system.

Application of the "whole" law of the jurisdiction whose "substantive" rules are applicable has been approved in nondiversity cases as well. See Robertson, Characterization in the Conflict of Laws 103-04 (1940), and Richards v. United States, 369 U.S. 1 (1962), in which the Court held that the principal provision of the Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U.S.C. § 1346(b) (1964), requires the application of the whole law of the state in which "the act or omission occurred," including the choice-of-law rules of that state. This view imports renvoi, a doctrine that is less acceptable here than in Europe, but is paradoxically required by Erie in multistate diversity cases. For an enthusiastic general advocacy of renvoi in the United States, see the masterly and widely-cited article by Dean Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165 (1938).

[46] 313 U.S. 498 (1941).

[47] Professor Scoles, author of the fourth edition of Goodrich, Conflict of Laws (1964), has found Griffin "disturbing" because the Court there held that Erie governed in an action entered by some of the parties on interpleader rather than diversity. Id. at 25 n.135. While the question deserves examination, it would seem that Erie must govern in every federal trial of state-created causes of action, regardless of the means by which the parties have been brought before the court.

[48] 330 U.S. 183 (1947).

[49] In Angel, a forum-state "door-closing" statute barred actions for deficiency judgments by the holders of security interests in real property. Angel was soon followed by Woods v. Interstate Realty Co., 337 U.S. 535 (1949), which held that diversity courts must follow forum-state statutes barring actions by foreign corporations not qualified to do business in the state. The earlier opinion in Guaranty Trust Co. v. York, 326 U.S. 99 (1945) had laid the basis for Angel and Woods by holding that state law must be characterized as "substantive" if its application is likely to affect the outcome of a diversity case. In Angel and Woods, the Court found that state door-closing statutes qualified under that test. However, the opinion of Judge Sobeloff in the recent case of Szantay v. Beech Aircraft Corp., 349 F.2d

*Co. of America*[50] extended *Erie* to an issue involving the validity of a contract arbitration clause. The Court stated that the issue of the binding effect of the arbitration clause was "substantive," and accordingly held that *Erie* required the Vermont diversity court to grant the stay of an action brought in contravention of the clause. It reasoned that *Erie* forbade the diversity tribunal to deny arbitration under the contract clause in question unless the forum-state courts would have done likewise under their own law.

2. *Developing Standards for Erie's Application.* While *Erie* was thus being extended to various matters not involved in that case itself, the courts were necessarily engaged in a concurrent effort to establish standards by which *Erie* policy might rationally be applied in individual cases. The troublesome cases have naturally been those whose issues involved an intermingling of "procedural" and "substantive" elements, and could not, therefore, be placed with assurance upon one side of the line or the other under conventional "substance-procedure" tests.

The leading case of *Guaranty Trust Co. v. York*[51] concerned a diversity suit brought to compel Guaranty to purchase from the plaintiff certain notes that Guaranty had agreed to buy under a contract which had expired by its terms before plaintiff became the owner of the notes. Guaranty pleaded the state statute of limitations, but the district court and court of appeals both held for the plaintiff on the ground that the statute of limitations was not binding upon the diversity court. The Supreme Court reversed.

Pointing out that "substance" and "procedure" must be defined anew for use in each different context, and that definitions applicable elsewhere are worse than useless in diversity matters,[52] Mr. Justice Frankfurter discussed the standard that is required for the unique purpose of diversity characterization. State law must be considered "substantive" under *Erie*, he continued, where its application *vel non* significantly affects the result of the litigation. *Erie*, whose mandate governs all diversity cases:

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60 (4th Cir. 1965), 51 Cornell L.Q. 560 (1966) indicates that, with regard to door-closing statutes, the York "outcome-determination" test must be limited by applying federal instead of state law where the policy behind the federal law is stronger than that upon which the state counterpart rests. In Szantay, it was accordingly held that federal policy considerations relieved the diversity court of the need to enforce a forum-state statute which barred an action between a nonresident and a foreign corporation upon a claim having no connection with the state. Szantay, therefore, appears to go beyond the rule of Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525 (1958), and to implement the dictum in Hanna v. Plumer, 380 U.S. 460, 466-69 (1965); see text accompanying notes 60-64, 78-85, 107-112 infra.

[50] 350 U.S. 198 (1956).

[51] 326 U.S. 99 (1945).

[52] Id. at 108; see note 11 supra.

> [E]xpressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. . . . [T]he intent of that decision was to insure that, in all [diversity] cases . . . *the outcome of the litigation in the federal court should be substantially the same,* so far as legal rules determine the outcome of a litigation, *as it would be if tried in a State court.*[53]

Statutes of limitation are "substantive" in the diversity sense, Justice Frankfurter concluded, because such statutes can bar an action upon a valid state-created right. The fact that it is applied by the forum-state tribunal but not in the diversity court may well cause recovery upon any given right to depend upon the forum in which its enforcement is sought —a result forbidden by *Erie.*

*York,* decided in 1945, is the first case in which the *Erie* policy regarding Stage I characterization was thoroughly discussed. More significantly, it established a *standard* that virtually became a part of *Erie* characterization policy. It remained unmodified until *Byrd v. Blue Ridge Elec. Co-op.*[54] was decided in 1958. That standard, the "outcome-determination test," was defined by the Court in these words:

> The question is . . . whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation* for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?[55]

The *York* standard seems satisfactory because it is simple in statement, quite predictable in its effect upon any given issue, and fairly easy to apply. It is, however, much more. It is the only Stage I characterization standard that accords with both the tenth and fourteenth amendments and with *Erie* policy, now virtually a part of the Constitution. This is so because *York,* when applied strictly as the sole Stage I characterization test, assures the result that the tenth amendment and *Erie* demand—application of every forum-state law that is likely to bear in any important degree upon the substantial rights of the litigants, despite the fact that such application may result in possible infringement upon mere federal "procedural" requirements. Only the most hardy devotee of federal authority would argue that any aspect of federal procedure can compare in constitutional importance with the rights of diversity parties guaranteed by the tenth and fourteenth amendments and the Rules of Decisions Act.[56]

Mr. Justice Frankfurter's statement, that forum-state law must be ap-

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[53] Guaranty Trust Co. v. York. 326 U.S. 99, 109 (1945). [Emphasis added.]
[54] 356 U.S. 525 (1958); see text accompanying notes 60-64 infra.
[55] Guaranty Trust Co. v. York, supra note 53. [Emphasis added.]
[56] 28 U.S.C. § 1652 (1964), quoted in note 8 supra.

plied where the difference between that law and the corresponding federal rule "significantly affects the result"[57] in a particular diversity case, implies that *Erie-York*[58] is applicable only where such difference is sure to influence the substantial result. Neither subsequent treatment of the outcome-determination test, however, nor the facts of *York* itself, support any such limitation. Even in *York*, the Court was unable to say with assurance that the plaintiff would recover in diversity were the forum-state statute of limitations found inapplicable. The Court, therefore, has not limited the *Erie-York* test to cases where a difference in outcome is a certainty.

On the other hand, the Court obviously appreciated the value of federal procedural uniformity too keenly to apply that test where a difference in outcome under federal law instead of its forum-state counterpart was but a remote possibility. *York* must therefore be taken to require use of forum-state law where denial of its application is *reasonably likely* to prevent the federal-state judicial uniformity required by *Erie*. As a consequence, *York* is not the engine for nullification of federal procedure in diversity cases that some authorities have fearfully pictured.[59] The basis for this assertion is twofold: *First*, only a small fraction of diversity cases appears to involve issues of *Erie* uniformity, and *second*, the *York* standard is applicable only where there is at least a reasonable possibility that *Erie* uniformity will be destroyed under the corresponding federal law. In view of the foregoing, *York* appears to have established the only convenient and constitutional standard for Stage I diversity characterization.

3. *Reaction to the York Standard: Byrd v. Blue Ridge Elec. Co-op.* The characterization standard established by *Guaranty Trust Co. v. York* received apparent modification in *Byrd v. Blue Ridge Elec. Co-op.*,[60] where the Supreme Court indicated its growing resistance to the enforcement of forum-state rules in diversity suits at the expense of inconsistent federal law. In *Byrd*, the question was whether a diversity court could properly order a jury trial of the fact issue involved, as required by federal law, even though the state courts had held that the matter in issue must be settled solely by the judge. In holding that federal law governed, the Court stated that *York* "cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the

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57 Guaranty Trust Co. v. York, supra note 53.

58 Since the "outcome-determination" test of York has become assimilated with Erie as the primary standard for delimiting the latter's policy, it is frequently known as the "Erie-York" test and will be so termed in the balance of this article.

59 See, e.g., Clark, supra note 38, at 220-21.

60 356 U.S. 525 (1958).

federal system of allocating functions between judge and jury."[61] Thus, the Court indicated that where a strong federal policy is involved, state law, though applicable under the *Erie-York* test, must give way to that policy. The strength of the Federal policy in the present case was clear, since the federal judiciary had always favored jury trial of all fact issues, and this policy was reinforced by the constitutional requirement of jury trial in federal common-law actions.[62]

The objections to *Byrd*, and the "policy-balancing" modification of *Erie-York* for which it is cited, are so numerous and fundamental as to cast grave doubt upon its validity as precedent in cases where the facts materially differ from those involved in *Byrd* itself. The most serious objection concerns the basic position that federal policy considerations may properly be said to have a bearing upon issues of *Erie* uniformity. Where a case involves mutually exclusive federal and state rules, each of which is nevertheless applicable in terms, it appears fair enough at first glance that policy-balancing be employed as a basis for determining which of them shall govern a particular issue. A closer examination of the problem, however, reveals that the tenth amendment implicitly but clearly denies any force to federal policy as a standard by which to determine whether rights created under powers reserved to the states in that amendment may properly be infringed, in any way important to the parties, by application of federal "procedural" law in diversity courts. The mandate of the

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[61] Id. at 538. [Footnote omitted.]

[62] Although the Byrd Court adverted to the seventh amendment's provision for jury trials in federal common-law cases, it refrained from deciding the case before it on constitutional grounds. Those grounds appear at least arguably valid, however, and might well have been employed. The effect would have been to make Byrd a very limited modification of Erie.

Because of the unexamined constitutional issue in Byrd, Judge Friendly has questioned its precedent value in cases involving essentially different fact situations:

> Although some have seen *Byrd* . . . as a "landmark" case initiating a new trend as to procedural matters, the decision seems to have been so clearly called for by the Seventh Amendment as hardly to warrant this characterization, despite the opinion's peculiarly delicate reference to the Constitution.

Friendly, "In Praise of Erie—And of the New Federal Common Law," 39 N.Y.U.L. Rev. 383, 403 n.95 (1964). See Whicher, "The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict," 37 Texas L. Rev. 549 (1959).

Various conrts of appeal have acted differently in diversity cases involving inconsistent federal and state jury requirements. Federal practice was followed in Order of Commercial Travelers v. Duncan, 221 F.2d 703 (6th Cir. 1955); Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir.), cert. denied, 320 U.S. 777 (1943); McSweeney v. Prudential Ins. Co., 128 F.2d 660 (4th Cir.), cert. denied, 317 U.S. 658 (1942); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942); Gorham v. Mutual Benefit Health & Acc. Ass'n, 114 F.2d 97 (4th Cir. 1940), cert. denied, 312 U.S. 688 (1941). State requirements were found to govern in Rowe v. Pennsylvania Greyhound Lines, 231 F.2d 922, (2d Cir.), cert. denied, 351 U.S. 984 (1956); Pierce Consulting Eng'r Co. v. City of Burlington, 221 F.2d 607 (2d Cir. 1955); Prudential Ins. Co. v. Glasgow, 208 F.2d 908 (2d Cir. 1953); Gutierrez v. Public Serv. Interstate Transp. Co., 168 F.2d 678 (2d Cir. 1948), Cooper v. Brown, 126 F.2d 874 (3d Cir. 1942). In view of the inconclusive effect of Byrd, therefore, the whole matter of inconsistent federal and state jury requirements in diversity cases seems still very much open to debate.

Constitution is plain: Under no circumstance must federal law be applied in significant derogation of rights created under power reserved to the states by the tenth amendment. It follows that where such rights are involved, federal policy considerations are constitutionally irrelevant.

Thus *Byrd* represents not only an attempt to modify the "outcome-determination" test of *York*, but also an attempt to undercut the *Erie* policy of uniformity. The Court attempted to avert such a contention by indicating that it was not clear under the facts that "the likelihood of a different result [was] . . . so strong [that *Erie* would have required] . . . the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome."[63] But this conclusion is difficult to justify, particularly since the Court, in its careful formulation of the "policy-balancing" test, so heavily relied upon the assumption that *Erie-York did* apply. *Byrd*, then, was a step in the direction of federal power taken at the expense of federalism; as such, it was a forerunner of *Hanna v. Plumer*, a case in which the likelihood of a different outcome resulting from application of federal law was blatantly obvious.

C. *Erie and the Federal Rules: A Prelude to Hanna*

It can readily be seen from the above cases that for many years (except in *Byrd*) the courts consistently applied the *Erie* policy to prevent discrimination against nondiverse parties, with the principal standard of application being that of *Guaranty Trust Co. v. York*. But the cases examined thus far as indicative of the nature and strength of *Erie* policy did not significantly involve the Federal Rules of Civil Procedure. Therefore we must now consider whether the involvement of the Rules measurably affected the Court's treatment of *Erie* even before the decision in *Hanna v. Plumer*. Three Supreme Court cases are of particular interest in this connection.

(1) *Sibbach v. Wilson & Co.*[64] *Sibbach* was an action brought in an Illinois diversity court to recover damages for bodily injury allegedly sustained in an accident in Indiana. The respondent, denying the allegations, moved under Federal Rules 35 and 37 for an order requiring that the petitioner submit to a physical examination to determine the nature and extent of her injuries. The requested order was granted, but the petitioner, asserting the court's lack of authority to grant it, refused compliance.

Petitioner argued that the "substantive-rights" limitation in the Rules

[63] Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525, 540 (1958).
[64] 312 U.S. 1 (1941).

Enabling Act must be interpreted in the general sense as referring to rights which are "substantial" or "important" to the parties. Since the issue involving physical examination was one of substantial importance to her, she continued, allowing the Federal Rules to govern that issue would violate the Enabling Act, even though the applicable rules were admittedly "procedural." The Federal Rules being inapplicable, the issue would have to be resolved under forum-state law.

The Court rejected the petitioner's argument and ruled that, since the issue in question was "procedural," the examination order had been properly granted. Admitting that the Federal Rules were confined under the Enabling Act to matters deemed "procedural," the Court queried:

> Is the phrase "substantive rights" confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? . . . The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination.[65]

It then continued:

> If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. 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.*[66]

The Court then presented another reason why the Rules involved were within the scope of the Enabling Act. They had, as had all the Federal Rules, been submitted to Congress for examination and approval as "procedural" under the act, and their acceptance indicated that Congress had implicitly found them to comport with the Enabling Act and the congressional policy reflected therein. This being so, the Rules must be applicable for purposes of diversity jurisdiction. The Court thus asserted that Congress is the ultimate arbiter of whether any given Rule is "procedural" in the diversity sense *under the facts of the particular case involved.* That conclusion seems unjustified. The required congressional examination of newly adopted Rules is necessarily a very general one, as

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[65] Id. at 13. The Court thus overlooked the fact that legal uniformity among the states is hardly germane in a particular diversity case. The question in such a case is not whether the issue involved is governed by the same law in every state; it is whether that issue affects the rights of the parties immediately concerned, and is therefore to be classified as "substantive" in the diversity sense.

[66] Id. at 14. [Emphasis added.] This "test" appears to be no test at all, at least so far as diversity jurisdiction is concerned. While rules may in terms provide solely for "administering remedy and redress," application of such rules has frequently affected the parties' "rights and duties recognized by the substantive law."

is the determination of whether they are valid as "procedural" under the Enabling Act. This does not, therefore, meet the *Erie* requirement that all classification for diversity purposes be done in light of the particular facts involved. Moreover, since the substance-procedure determination involves constitutional considerations arising under the tenth and fourteenth amendments, it is necessarily a matter for the courts, rather than Congress, to decide.

In *Hanna v. Plumer* the Court was to rely heavily upon *Sibbach* to show that *Erie* is inapplicable in diversity cases where Federal Rules are involved. It is therefore important to realize that, while *Sibbach* is indeed a diversity case in which Federal Rules were relied upon, it does not reject *Erie*. On the contrary, the *Sibbach* Court, in interpreting the "substantive-rights" language of the Enabling Act, implicitly used the guidelines set by *Erie's* "substance-procedure" dichotomy. That is, it is apparent that the Federal Rules at issue were in fact rules of procedure in the *Erie* sense.

Moreover, *Sibbach* lacked the obvious clash between state law and Federal Rules which is the crucial and assertedly unique feature of *Hanna*. Petitioner did not strongly argue that the Illinois rule which would disallow an examination was applicable under *Erie* as substantive law, nor could she have done so. Characterization of the rule as substantive would have led to application of Indiana law which permitted an examination, rather than to Illinois law, since Indiana was the place where the cause of action arose.[67] At any rate, whatever doubt existed as to whether the *Sibbach* court was applying *Erie* or drifting toward a *Hanna* approach was dispelled by the next case involving the Federal Rules.

(2) *Ragan v. Merchants Transfer & Warehouse Co.*[68] In *Ragan*, a complaint was filed in a Kansas diversity court in an action to recover for an automobile accident injury. The complaint was filed within two years after the claim accrued, but service of process had not been completed within that time. The Kansas statute of limitations permitted two years within which to bring such actions, and provided that tolling of the limitation period began only when service of process was complete. Federal Rule 3, which is not a statute of limitations, differs from the Kansas law by stipulating that actions are commenced when the complaint is filed. The defendant moved for summary judgment, contending that the Kansas

[67] See id. at 10-11. Evidently, had the medical-examination issue been classified as "substantive," then the old lex locus delicti rule would have been applied; see note 16 supra. Since Sibbach was decided prior to Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the case was not analyzed in terms of a difficult two-stage characterization problem; see Hanna v. Plumer, 380 U.S. 460, 472 n.15 (1965).

[68] 337 U.S. 530 (1949).

law was applicable and the action was barred. The diversity court denied his motion upon the ground that Rule 3 was applicable and therefore the action was timely commenced. The court of appeals reversed, ruling that the state law governed under *York*.

The Supreme Court affirmed. Speaking for the Court, Mr. Justice Douglas reasoned that a tolling provision is a part of the statute of limitations to which it applies, since it specifies what the plaintiff must do to avoid the bar of the statute. Were Rule 3 deemed to govern here, he continued, it would replace a portion of the Kansas statute of limitations with a different but equivalent provision.[69] The diversity court's application of Rule 3 would thus violate the *York* rule that *Erie* uniformity may not be infringed under a federal statute of limitations inconsistent with that of the forum state.

In *Hanna*, the majority opinion denied that *Ragan* had rejected a Federal Rule under *Erie* in favor of inconsistent forum-state law.[70] But a close analysis of *Ragan* clearly seems to indicate the opposite; that case required application of a state rule that was an essential part of the statute of limitations to which it applied, thereby barring application of the Federal Rule.[71]

(3) *Cohen v. Beneficial Indus. Loan Corp.*[72] The final case of this series, *Cohen*, also involved the application of *Erie* policy to a Federal Rules case. In *Cohen*, a shareholders' derivative action was brought against the corporate defendant in a New Jersey diversity court. The defendant moved that plaintiff, holder of a small number of defendant's shares, be required to post security for expenses before commencing the action. It based its motion upon a New Jersey statute requiring small shareholders to pay the reasonable expenses of unsuccessful derivative suits, and to post security for such payment prior to the action. Plaintiff argued that Federal Rule 23(b) governed instead of the New Jersey statute, since the Rule also laid down prerequisites to the bringing of a shareholders' derivative suit, but did not include a security-for-expenses provision. The Court held that the New Jersey statute was applicable.

Mr. Justice Jackson, speaking for the Court, reiterated that *Erie* had defined and narrowed the scope of federal "procedural" law in diversity actions to "details related to [the diversity court's] . . . own conduct of

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69 Id. at 533.

70 Hanna v. Plumer, 380 U.S. 460, 470 (1965).

71 For confirmation of this position, examine the articles criticizing Ragan's extension of Erie-York to the Federal Rules. E.g., Merrigan, "Erie to York to Ragan—A Triple Play on the Federal Rules," 3 Vand. L. Rev. 711, 718-19 (1950). See also Hill, supra note 34, at 431-33; Keeffe et al., supra note 38, at 531; Kurland, "Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases," 67 Yale L.J. 187, 194-95 (1957).

72 337 U.S. 541 (1949).

business."[73] He then held that the New Jersey statute was "substantive" under *Erie* because it created "a new liability where none existed before . . . ."[74] As for Federal Rule 23(b), it was held not to be in conflict with the New Jersey statute. The Rules established certain prerequisites to commencement of the action, and the statute established others. All of them could be followed by the federal courts.[75]

The *Cohen* decision was far from unanimous, rumblings of revolt at this latest extension of *Erie-York* being evidenced by the Court's six-to-three division. Mr. Justice Frankfurter, author of the opinion in *York*, dissented in part with Mr. Justice Douglas.[76] Mr. Justice Rutledge, foreshadowing *Hanna v. Plumer*, dissented in a lengthy opinion which questioned the "substantive" classification of the New Jersey bond requirement as well as the application of *Erie* where Rule 23(b) seemed to govern.[77]

Thus it can be seen that the reaction to *Erie*, so evident in *Hanna*, has in reality been growing over a period of years. Although the major *Erie* policies—avoidance of federal invasion of powers guaranteed to the states by the tenth amendment, elimination of discrimination against non-diverse parties, and abolition of forum-shopping for favorable substantive results—were forcefully crystallized by the Court's opinion in the *York* case and subsequently carried out in the procession of cases outlined previously, the dissatisfaction with *Erie* uniformity stemmed from two sources. *First*, the *Byrd* case indicated a growing discontent with *York*. *Second*, the *Erie* policies, though applied in Federal Rules cases such as *Cohen* and *Ragan*, were never as thoroughly effectuated in these cases as they were in those not involving the Federal Rules. These somewhat overlapping points of dissatisfaction came to a head in *Hanna*.

### D. *Hanna v. Plumer: End of an Epoch?*

As foreshadowed by the dissent of three Justices in *Cohen*, the Supreme Court was ripe for revolt against the "dictatorship" of *Erie* when *Hanna v. Plumer*[78] came before it in 1965, presenting a direct conflict between state "procedural" law and the corresponding Federal Rule.

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[73] Id. at 555.
[74] Ibid.
[75] Id. at 556.
[76] Id. at 557 (Douglas, J., dissenting in part).
[77] Ibid. (Rutledge, J., dissenting).
[78] 380 U.S. 460 (1965). Hanna has provoked a great deal of scholarly comment; see Grooms, "Substantive or Procedure?" 27 Ala. Lawyer 5 (1966); McCoid, "Hanna v. Plumer: The Erie Doctrine Changes Shape," 51 Va. L. Rev. 884 (1965); Comment, "Choice of Procedure in Diversity Cases," 75 Yale L.J. 477 (1966); Notes, 51 Cornell L. Q. 551 (1966), 1966 Duke L. J. 142, 44 N.C.L. Rev. 180 (1965), 40 Tul. L. Rev. 202 (1965), 13 U.C.L.A.L. Rev. 41 (1966), 18 Vand. L. Rev. 2046 (1965).

*Hanna* marks a sharp turn away from *Erie*, and may well terminate or at least curtail the development and extension of that case.

(1) *The Facts and Rationale of Hanna.* The petitioner in *Hanna* filed her complaint in a Massachusetts diversity court. She sought recovery for automobile accident injuries from the respondent in his capacity as executor of a deceased Massachusetts resident, alleging that her injuries had been caused by the decedent's negligence. The respondent had been served with process which complied with Federal Rule 4(d)(1), but not with the law of Massachusetts, the forum state.[79] The one-year period allowed by Massachusetts law for amendment of service having expired, respondent moved to dismiss the complaint for noncompliance with forum-state service requirements. Petitioner argued that, since service is a "procedural" matter, it is governed by the Federal Rules. Both the district court and the court of appeals held that state law was applicable. The Supreme Court reversed and held that:

> [T]he adoption of Rule 4(d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and . . . the Rule is therefore the standard against which the District Court should have measured the adequacy of service.[80]

Speaking for the Court, Chief Justice Warren went on to discuss the relation between *Erie-York* and the Federal Rules. The *Erie-York* test, he asserted, does not govern the application of Federal Rules. The validity of particular Rules under the "substantive-rights" limitation of the Rules Enabling Act is determined instead under a separate line of cases beginning with *Sibbach v. Wilson & Co.*[81]

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so ouly if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[82]

Thus, although each standard employs a "substantive-procedural" test, the standard for characterizing the Rules differs from that governing other matters. That difference is justified by the fact that the Rules were promulgated under "congressional power to make rules governing prac-

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79 Mass. Gen. Laws Ann. ch. 197, § 9 (1955), which requires service upon executors by in-hand delivery.

80 Hanna v. Plumer, 380 U.S. 460, 463-64 (1965). [Footnote omitted.]

81 312 U.S. 1 (1941). Under Sibbach, "procedure" was defined as "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." Id. at 14, quoted in Hanna v. Plumer, supra note 80, at 464.

82 Id. at 471.

tice and pleading . . . which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[83]

The Court went even further than this holding. Chief Justice Warren indicated that, even if the *Erie-York* test were applicable, the Massachusetts diversity court might not have been required to follow forum-state procedure. The "twin aims" of *Erie*, he stated, were "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[84] Addressing himself to these issues he said:

> Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service . . . alters the mode of enforcement of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded.[85]

Justice Harlan, concurring in the result, disagreed with the majority on several grounds. His most serious objection was to the Court's exaltation of the Federal Rules over all other law. This is unconstitutional, he said, since it permits the Court to infringe upon state-created rights, thereby altering the constitutional distribution of powers between nation and state.[86] He next objected to the majority's apparent belief that *Erie* was primarily intended to discourage forum-shopping, and pointed out that its real purpose was to prevent invasion of state powers and the rights of nondiverse local parties, whether by forum-shopping or otherwise.[87] Finally, Justice Harlan suggested that the Court was incorrect in its statement that a Federal Rule had never before been rejected in favor of conflicting forum-state law. Both *Ragan v. Merchants Transfer & Warehouse Co.*[88] and *Cohen v. Beneficial Indus. Loan Corp.*,[89] he believed, would have supported a contrary result in the present case.[90]

Mr. Justice Harlan's own proposal for diversity characterization was more satisfactory.

> [T]he proper line of approach in determining whether to apply a state or a federal rule . . . is to stay close to basic principles by inquiring if the choice of rule would substantially affect *those primary decisions respecting*

[83] Id. at 472.
[84] Id. at 468.
[85] Id. at 469.
[86] Id. at 474-75 (concurring opinion).
[87] Ibid.
[88] 337 U.S. 530 (1949), discussed at text accompanying notes 68-71 supra.
[89] 337 U.S. 541 (1949), discussed at text accompanying notes 72-77 supra.
[90] Hanna v. Plumer, 380 U.S. 460, 476-78 (1965) (concurring opinion).

*human conduct which our constitutional system leaves to state regulation.* If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.[91]

(2) *Hanna: An Evaluation.* The thought that strikes one while reading the majority opinion in *Hanna* is its similarity to one handed down more than a century ago—the opinion in *Swift v. Tyson.*[92] In both cases, the Court attempted to achieve a specific uniformity at the double cost of invading state power and infringing indirectly upon the equal protection clause by discriminating against nondiverse parties. In *Swift* the Court's goal was a significant and important one—the equal enforcement of substantive rights wherever they might be asserted. In *Hanna*, on the other hand, the uniformity attained was merely the judicial convenience and certainty to be derived from the application of the Federal Rules to virtually all diversity cases. If the Court also expected its ruling to secure the much more worthwhile benefit of speedier disposition of business before the diversity courts, it neglected to mention that fact.

The Federal Rules are a justifiable object of judicial pride, and were adopted to resolve procedural difficulties that had always plagued the federal courts. Those who advocate their enforcement at the expense of constitutionally guaranteed rights, however, overlook the fact that procedure, no matter how important, is at best a consideration that is secondary to the rights it is designed to secure. The evil that will flow from invasion of state powers, through the application of federal law where it could have a "substantive" effect upon the rights of parties to diversity cases, was pungently summarized in *Sampson v. Channell*[93] by Judge Magruder.

> If the federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme Judicial Court and take its own view as a matter of "general law," then the ghost of *Swift v. Tyson* . . . still walks abroad, somewhat shrunken in size, yet capable of much mischief.[94]

The specific defects of *Hanna* are these:

*First*, the Court accomplishes an invasion of individual rights and state "substantive" powers through an unjustifiable elevation of the Federal Rules to a constitutional position above those rights and powers and other federal law.

*Second*, the Court's conclusion that *Erie* is inapplicable where Federal

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91 Id. at 475. [Emphasis added.]
92 41 U.S. (16 Pet.) 1 (1842), discussed at text accompanying notes 26-31 supra.
93 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 610 (1940).
94 Id. at 761.

Rules are concerned is justified neither by the Constitution nor by any but the most narrow and technical reading of *Erie* itself.

*Third*, the Court's conclusion that *Erie's* primary objective was to prevent forum-shopping led it to assert that the "substantiveness" of a given rule must be assessed at a time when action under both the rule and the applicable forum-state law is possible.[95] The primary purpose of *Erie*, however, was to insure equal enforcement of state-created rights throughout the state in which they are judicially asserted. This being so, it is difficult to determine why the *time* at which those rights are asserted has any bearing on the matter.

*Fourth*, the rule announced by the Court in *Hanna* is not really a rule at all, but merely an assertion that Federal Rules will always be applied when doubt exists. The Court has defined the area within which the Rules must be applied as that lying "between substance and procedure," where matters are "rationally capable of classification as either."[96] Is not this a mere orthodox description of the grey zone whose existence has plagued diversity courts since the Constitution was adopted? The Court has always felt obliged to characterize matters lying within that zone in a constitutionally meaningful way. It has now announced that where responsible characterization is difficult, it will instead apply the Federal Rules, even at the expense of rights guaranteed by the Constitution. Diversity courts following *Hanna* will have no guide within that zone, or even a description of its boundaries, other than the general statement that when they need a guide they are to bar state law and apply the appropriate Federal Rule.[97]

*Fifth*, even though at first blush the *Hanna* rule seems to have the virtue of easy application, the few decisions following and interpreting it suggest that this salutary effect is only apparent.

(3) *Hanna: Aftermath.* The *Hanna* decision leaves at least three problems unsolved. The first of these arises from the failure of the Court

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95 Hanna v. Plumer, 380 U.S. 460, 468-69 (1965).

96 Id. at 472.

97 While standards for diversity characterization undoubtedly need revision, that revision must be accomplished in the light of applicable constitutional principles. A safe general guide was voiced long ago by an English visitor who made himself an authority on characterization. Speaking not of diversity matters but in general terms, he said:

> While each system of law is clearly competent to decide for itself as it sees fit the question what rules *of its own law* are substantive and procedural, the whole foundation of the conflict of laws requires that a court should *restrict the field of its own procedure and be prepared to follow as far as possible the foreign substantive law.* . . . [W]hen "rights" have clearly arisen under some foreign law . . . the function of the conflict of laws is to give effect to . . . them, so far as they do not conflict with the public policy of the forum. *This function . . . is defeated by a wide extension of the procedural rules of the forum* . . . .

Robertson, Characterization in the Conflict of Laws 247 (1940). [Emphasis added.]

either to overrule or clearly distinguish *Ragan v. Merchants Transfer & Warehouse Co.*,[98] which some commentators felt had presented a "direct collision"[99] between Federal Rule 3 and forum-state law.[100] Specifically, this means that for purposes of tolling a statute of limitations, it is now unclear whether Rule 3 will be displaced by a state law providing that an action is "commenced" by the service of process.[101] More importantly, it is uncertain whether the *Hanna* rule will be given a narrow reading or whether it will be broadly construed to cover cases, such as *Ragan*, where arguably both the federal and state rule could be accommodated. Regardless of the scope of *Hanna*, it appears that the Court has replaced the uncertainty of the *Erie-York* test, as modified in *Byrd v. Blue Ridge Elec. Co-op.*,[102] with the uncertainty of a "direct-collision" test.

The second problem area left by *Hanna* is one which has existed since the adoption of the Federal Rules. Since the Rules were adopted under a congressional delegation of authority,[103] a particular provision can be attacked on the ground that it is either outside the scope of the delegated authority or outside the scope of congressional power.[104] These arguments existed even before *Hanna*, but now that an attack based on the *Erie-York* test is no longer available, they have become the sole arguments for application of a state law which conflicts with a Federal Rule. However, aside from the vague tests laid down in *Sibbach v. Wilson & Co.*[105] and reiterated in *Hanna*,[106] there is no standard for delimiting either Congress' power or the Court's authority. In fact, the *Sibbach-Hanna* treatment of these issues, insofar as it suggests that Congress can decide the

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98 337 U.S. 530 (1949).

99 The Hanna Court stated that it had "never before been confronted with a case where the applicable Federal Rule [was] . . . in direct collision with the law of the relevant State." Hanna v. Plumer, supra note 95, at 472.

100 See the authorities cited in note 71 supra.

101 See Sylvestri v. Warner & Swasey Co., 244 F. Supp. 524 (S.D.N.Y. 1965), and Callan v. Lillybelle, Ltd., 39 F.R.D. 600, 601-02 (S.D.N.Y. 1966), indicating that Hanna has overruled Ragan. But see Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), holding that Ragan had not been overruled. The position of the Sixth Circuit seems to be the correct one, in view of the fact that the Supreme Court stated specifically in Hanna that no prior case had presented a "direct collision" between a Federal Rule and state law. Moreover, in Hanna the Court alluded to Ragan, but gave no indication that it would be weakened by the case being decided. Hanna v. Plumer, 380 U.S. 460, 462-63 n.1, 466 n.5 (1965).

102 356 U.S. 525 (1958); see text accompanying notes 60-63 supra.

103 The Rules Enabling Act, 28 U.S.C. § 2072 (1964), quoted at note 31 supra.

104 An argument attacking congressional *power* to authorize a particular Rule would have to be based on the tenth amendment and show that the regulated area is not one specifically committed to Congress by the Constitution. An attack directed at the authority of the Court to adopt a particular Rule would ultimately resolve itself into construction of the Rules Enabling Act. In Sibbach and Hanna, the Court suggested that an attack on either ground is not likely to be successful; see Hanna v. Plumer, supra note 101, at 471; Sibbach v. Wilson & Co., 312 U.S. 1, 14-16 (1941).

105 312 U.S. 1 (1941).

106 Hanna v. Plumer, supra note 101, at 471 (1965).

scope of its own powers in promulgating federal "procedural" law, seems to foreclose effective attack on the rule-making power. In so doing it raises significant constitutional problems regarding the separation of powers.

Finally, the *Hanna dictum*[107] raises problems not only where the Federal Rules are involved, but in all diversity cases where there is a conflict between federal and state law. Under this latest modification of the *Erie-York* test, courts must examine each case, not solely in terms of "outcome," but also in terms of whether application of federal law will encourage forum-shopping or "alter the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise . . . equal protection problems . . . ."[108] This new standard, vague as it is, appears to go beyond the test of *Byrd v. Blue Ridge Elec. Co-op.*,[109] in that it does not require the existence of a "strong federal policy," in the *Byrd* sense, before a federal law will displace applicable state law.

The kind of problem presented by the *Hanna* dictum is particularly evident where state "door-closing" statutes are involved. Before *Hanna*, it was settled that such statutes were "substantive" for *Erie* purposes, because clearly outcome determinative. Therefore, they were applicable to suits brought in diversity courts.[110] In *Szantay v. Beech Aircraft Corp.*,[111] however, the Fourth Circuit asserted that the policy behind a particular door-closing statute must be examined and weighed against any countervailing federal policies. After such an examination, the court held that it was not bound by the applicable South Carolina statute.[112]

## CONCLUSION

The primary problem in the area of diversity jurisdiction is created by the constitutional requirement that diversity courts must apply state law to issues of "substance" but may use their own rules where matters of "procedure" are concerned. The problem lies in formulating a test or standard with which to draw a reliable line between these two basic but ephemeral areas. It is clear that new concepts of the two terms involved must be formed, and those charged with the formulation of the new characterization standard must keep three considerations in mind. *First*,

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107 Id. at 466-69; see text accompanying notes 84-85 supra.
108 Id. at 469.
109 356 U.S. 525 (1958).
110 Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Angel v. Bullington, 330 U.S. 183 (1947).
111 349 F.2d 60 (4th Cir. 1965), 51 Cornell L.Q. 560 (1966).
112 The Szantay case is distinguishable from Woods v. Interstate Realty Co., supra note 110, and Angel v. Bullington, supra note 110, in that in Woods and Angel there were strong state policies which favored application of the state door-closing statutes in the diversity courts. The Szantay court found no such countervailing state policy.

state-created rights were designed for the benefit of individuals, whether they are asserted in state or diversity courts. These rights must be fully protected unless they conflict with rights and powers constitutionally within the domain of the federal government. *Second*, the required standard must be reliable but flexible, and designed for case-by-case application; arbitrary rules are of no value in this area.[113] *Third*, all problems of diversity jurisdiction must be resolved in the light of our federal system; no solution is acceptable if it alters the rights and relationships existing within that system.

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113 See Cook, "'Substance' and 'Procedure' in the Conflict of Laws," 42 Yale L.J. 333, 343 (1933); Robertson, supra note 97, at 245.