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NOTE

CLARIFICATION AND DISRUPTION: THE EFFECT OF *GASPERINI v. CENTER FOR HUMANITIES, INC.* ON THE *ERIE* DOCTRINE

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INTRODUCTION

For a federal court sitting in diversity, the *Erie*[1] question is omnipresent.[2] A guiding principle has developed through the Supreme Court's treatment of vertical choice-of-law issues: federal courts apply the substantive law of the forum state and the procedural law of the federal system.[3] Substance and procedure, however, often intermingle, leaving the court with the difficult choice of whether to apply state or federal procedure when the disputed procedure has a substantive effect.[4] Because every ruling a court makes, from when a claim must be filed to what a final judgment entails, contains a procedural aspect, the importance of the *Erie* doctrine is enormous.[5] As more state law is labeled "substantive" for *Erie* purposes, more state law flows into federal court. Conversely, as more federal law is labeled "procedural," more federal law affects state causes of action.[6]

To aid the resolution of *Erie* issues, the Supreme Court has fashioned some bright line rules that promote predictability. First, the United States Constitution may require that the federal courts apply a particular procedure.[7] Second, if there is a federal statute on point, and the statute is constitutional, then the rule provided in the federal

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1 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2 *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4503, at 24 (2d ed. 1996) [hereinafter WRIGHT & MILLER] ("It is impossible to overstate the importance of the Supreme Court's decision in *Erie Railroad Company v. Tompkins*.") (italics added).

The vast majority of *Erie* decisions arise in diversity actions, where every ruling a federal court makes contains an *Erie* question. *See* 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 124-1 (Daniel R. Coquillette et al. eds., 3d ed. 1997) [hereinafter MOORE]. However, *Erie* questions arise in cases other than those founded upon diversity jurisdiction. Whenever the cause of action is based on state law, regardless of how the parties came to federal court, an *Erie* question arises. *See* Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 278 (1989); Mallis v. Bankers Trust Co., 717 F.2d 683, 692 n.13 (2d Cir. 1983) ("[T]he applicability of state law depends on the nature of the issue before the federal court and not the basis for its jurisdiction. . . .").

3 *See, e.g.*, Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2219 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was . . . that . . . federal courts are to apply state substantive law and federal procedural law.").

4 *See, e.g., Gasperini*, 116 S. Ct. at 2219 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.") (footnote omitted).

5 The significance of the *Erie* doctrine in federal law may be inferred from the number of times federal courts cite it. A WESTLAW search conducted on September 24, 1997, of all reported federal cases found that *Erie* has been cited in 196 Supreme Court cases, 3005 circuit court cases, and 4678 district court cases.

6 *See generally* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1101 (1989) (describing how a survey of the development of the *Erie* doctrine "chronicles an ebb and flow of preference for federal law").

7 *See Erie*, 304 U.S. at 78.

statute governs.[8] As a corollary to the second rule, if there is a Federal Rule of Civil Procedure on point, and the rule is valid under the Rules Enabling Act, the federal rule governs.[9] However, the Supreme Court has met with debatable success in defining a workable standard for determining when federal judge-made rules (those rules not dictated by the Constitution or an act of Congress) govern in the face of contrary state rules.[10] In this situation, the federal court encounters an unguided *Erie* choice.[11] One of the more difficult problems in this area concerns the proper role of *Byrd v. Blue Ridge Rural Electric Cooperative*[12] in the *Erie* doctrine.[13] This Note examines the effect of the Supreme Court's recent decision in *Gasperini v. Center for Humanities, Inc.*[14] on the *Erie* doctrine regarding judge-made rules of procedure, paying particular attention to the effect of the decision on *Byrd*'s place in the doctrine. This Note also examines *Gasperini*'s effect on the long-settled rule that an on-point Federal Rule of Civil Procedure applies despite a contrary state rule.

In *Gasperini*, the Court was faced with two *Erie* issues: first, whether federal district court judges considering a motion for a new trial should apply the federal or state sufficiency of the evidence standard when determining the excessiveness of a jury's award of damages; and second, whether federal appellate courts should apply the federal or state standard when determining whether the trial judge correctly ruled on the new trial motion.[15] Despite prior indications from the Court itself that federal law would apply,[16] and despite the majority rule among the federal circuits and the prevailing opinion of commentators that the federal rule should apply,[17] the Court required the district court to apply the state sufficiency of the evidence

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8 *See id.* In *Stewart Organization, Inc. v. Ricoh Corp.*, the Court wrote that "when the federal law sought to be applied is a congressional statute, the first and chief question . . . is whether the statute is 'sufficiently broad to control the issue before the Court.'" 487 U.S. 22, 26 (1988). If Congress enacted the statute through a valid exercise of congressional power, then the statute controls in the face of a contrary state rule. *See id.* at 27. For a discussion of *Stewart Organization* and Congress's power to control the procedure of the federal courts, see Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 76-79 (1995).

9 *See infra* text accompanying notes 63-69.

10 *See, e.g.*, 19 WRIGHT & MILLER, *supra* note 2, § 4511, at 311; Ides, *supra* note 8, at 85.

11 *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965) (referring to the choice concerning judge-made rules of procedure as "the typical, relatively unguided *Erie* choice").

12 356 U.S. 525 (1958).

13 *See* 19 WRIGHT & MILLER, *supra* note 2, § 4504; John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 717 n.130 (1974); Ides, *supra* note 8, at 86 ("A big question is whether *Byrd* survived *Hanna*.").

14 116 S. Ct. 2211 (1996).

15 *Id.* at 2216-17.

16 *See infra* text accompanying notes 113-15.

17 *See infra* text accompanying notes 103-04.

standard.[18] Conversely, the Court ruled that the federal court of appeals must apply the federal standard in reviewing the trial judge's decision.[19] According to *Gasperini*, the problems of forum shopping and inequitable administration of the laws require application of the state standard at the trial court level, while countervailing federal interests require application of the federal standard at the appellate level.

This Note, in Part I, surveys general *Erie* law prior to *Gasperini* and subsequently, in Part II, analyzes *Erie* law as applied to sufficiency of evidence determinations. Part III discusses the facts and holding of the *Gasperini* decision. Part IV analyzes *Gasperini*'s effect both generally on the *Erie* doctrine, and as applied to sufficiency of the evidence determinations in particular. This Note asserts that *Gasperini* affects the *Erie* doctrine in two principal areas: first, *Gasperini* affirms *Byrd*'s place in the *Erie* doctrine, assuring the legal community of *Byrd*'s continuing relevance. Also, *Gasperini* increases the predictability of *Byrd*'s application in *Erie* analysis. Second, *Gasperini* undermines previous confidence in the rule that an on-point Federal Rule of Civil Procedure applies in federal court despite a contrary state rule. Consequently, *Gasperini* may signal an unwelcome development in the *Erie* doctrine by rendering uncertain a previously settled area of law.

I
GENERAL *ERIE* LAW PRIOR TO *GASPERINI*

A. From *Swift* to *Erie*

The *Erie* problem ostensibly presents an issue of statutory interpretation.[20] The Rules of Decision Act declares that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply."[21] The interpretational problem arises in determining what laws are "the laws of the several

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18 *Gasperini*, 116 S. Ct. at 2225.

19 *Id.*

20 Scholars have recounted the story of the *Erie* doctrine's development many times. *See, e.g.*, 19 WRIGHT & MILLER, *supra* note 2, §§ 4503-4504; Ely, *supra* note 13 (arguing that the development has led to a generally accepted view of *Erie* that treats the three distinct standards of the Constitution, the Rules Enabling Act and the Rules of Decision Act as a single command); Freer, *supra* note 6, at 1101-07 (describing why the development has not eliminated the sources of confusion in vertical choice of law); Ides, *supra* note 8, at 21-61; John R. Leathers, Erie *and Its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791, 794-819 (1974); Allan D. Vestal, Erie R.R. v. Tompkins*: A Projection*, 48 IOWA L. REV. 248, 250-64 (1963); Jan P. Patterson, Comment, *State or Federal Law in Federal Courts: The Rise and Fall of* Erie, 42 MISS. L.J. 89, 91-95 (1971).

21 At the time the Court decided *Erie*, the statute was a part of the Federal Judiciary Act, codified at 20 U.S.C. § 725. After a minor change in 1948, the statute now reads:

states." In *Swift v. Tyson*,[22] the Supreme Court, relying on the idea that there is a transcendental body of "true" law,[23] held that federal courts sitting in diversity need not apply the forum state's common law when that law conflicted with established principles of commercial common law.[24] Under *Swift*, federal courts followed the state rule only with regard to decisions on "local usages" and the "rights and titles to things having a permanent locality," such as matters involving real estate.[25] The Court in *Erie* suddenly abandoned prior interpretations of the Rules of Decision Act by rejecting the *Swift* doctrine.[26] Justice Brandeis, writing for the *Erie* Court, recognized "the mischievous results"[27] the Swift doctrine imposed on citizens of the forum state:

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not

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> 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.

28 U.S.C. § 1652 (1994).

22 41 U.S. (16 Pet.) 1 (1842).

23 *Id.* at 18. The Court stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." *Id.*

24 *Id.* at 18-19. The Court asserted:

> It never has been supposed by us, that 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, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

Id.

25 *Id.* The *Swift* doctrine expanded during its reign so that federal courts applied federal general common law on questions of tort liability, *see* Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893), and rights founded upon a deed to land, *see* Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). The doctrine had expanded from commercial law to the extent that the Court of Appeals in *Erie* held that federal common law provided the rule of decision for determining how much care a railroad owes to unauthorized persons on a railroad right of way. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70 (1938).

26 *See* 19 WRIGHT & MILLER, *supra* note 2, § 4503, at 18 ("With a remarkable suddenness and thoroughness, the Supreme Court in 1938 repudiated the entire body of jurisprudence based upon its 1842 decision in *Swift v. Tyson* . . . .") (italics added); Ides, *supra* note 8, at 24 (noting the surprise both litigants must have felt when the *Erie* decision came down); Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 356 (1977) (noting the abrupt change between *Erie* and *Swift*); Allen E. Smith, Blue Ridge *and Beyond: A* Byrd*'s-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 445 (1962) ("The reaction of all concerned must therefore have been one of surprise when, ninety-six years after announcing the *Swift* rule, the Supreme Court declared *Swift* to be unconstitutional, and did so *sua sponte*!").

27 *Erie*, 304 U.S. at 74.

> citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.[28]

To avoid making defendants potentially subject to two different sets of laws—the laws of the federal court and the laws of the forum state—Brandeis declared that

> [e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.[29]

This application of state law in federal court, Brandeis decided, fulfilled the goal of the Rules of Decision Act.[30]

Unfortunately, the simple pronouncement that state law applies in diversity cases did not solve the general vertical choice-of-law problem. The federal courts constitute a judicial system related to, yet sep-

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28 *Id.* at 74-75 (footnote omitted).

29 *Id.* at 78.

30 *Id.* at 72-73. Brandeis offered two other reasons for establishing this new reading of the Rules of Decision Act beyond the inequitable effects the *Swift* doctrine imposed on citizens of the forum state. First, relying on an article by Charles Warren, Brandeis wrote that the *Swift* doctrine was based on a mistaken historical reading, and that the *Erie* Court's reading was more faithful to the intent of the Act's authors. *Id.* at 72-73; *see also* Charles E. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). *But see* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 168-77 (Wythe Holt & L.H. LaRue eds., 1990) (arguing that Warren's research was flawed and that the legislators who enacted it did not intend the meaning Warren urged).

Second, Brandeis wrote that "the unconstitutionality of [*Swift*] has now been made clear." *Erie*, 304 U.S. at 77-78. Unfortunately, the Court did not explain exactly what constitutional doctrine *Swift* violated. For a discussion of the constitutional basis of *Erie*, see 17 MOORE, *supra* note 2, § 124 app.03; Ely, *supra* note 13, at 706; Alfred Hill, *The* Erie *Doctrine and the Constitution*, (pts. 1 & 2), 53 NW. U. L. REV. 427, 548 (1958). Although *Erie* itself was directed at interpreting the Rules of Decision Act, the doctrine has evolved to such an extent that the Act itself is rarely mentioned. It is unclear how much of the *Erie* doctrine is constitutionally required, how much the Rules of Decision Act requires, and how much of it reflects policy choices made by the Supreme Court regarding the role of the federal courts in the United States judicial system, where both the laws of the states and federal laws are enforceable in federal court. For a discussion of these issues, see, for example, Paul J. Mishkin, *Some Further Last Words on* Erie—*The Thread*, 87 HARV. L. REV. 1682, 1683-86 (1974); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 340-41 (1980). Because the holding of *Erie* could rest on the Court's reinterpretation of the Rules of Decision Act, it may be that the Court's constitutional analysis was dictum. *See* 17 MOORE, *supra* note 2, at 124-11.

arate from, the systems of the various states. If diversity courts are to be more than mirror images of the courts of the forum state, they must have control over their own administration of justice.[31] Justice Brandeis's opinion addressed substantive laws but did not address what law controls the administration of those substantive laws.[32] However, Justice Reed noted in his *Erie* concurrence that "no one doubts federal power over procedure."[33] The difficulty arises in determining whether to apply federal or state law when the laws at issue lie on the border between substance and procedure and are classifiable as either.[34] Because "procedural" rules often have a "substantive" effect, attempting to resolve the *Erie* problem by simple categorization is frequently unavailing.

B. The Outcome-Determinative Test and *Guaranty Trust*

Despite some indications that the Court would resolve the *Erie* question by simply classifying laws as either substantive or procedural,[35] the Court forwent this distinction in *Guaranty Trust Co. v. York*.[36] In that case, the Court had to decide whether to enforce a state statute of limitations in federal court.[37] Rather than attempt a substance/procedure characterization, Justice Frankfurter, writing for the majority, redirected the *Erie* inquiry toward outcome determination:

> And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is

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31 *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-39 (1958).

32 Though the *Erie* opinion did not explicitly set forth the substance/procedure distinction, the Court held that neither Congress nor the federal courts had the power to declare rules of substantive law in diversity actions. The opinion did not address procedural rules, and subsequent courts and commentators interpreted the decision to establish the distinction between substance and procedure. *See, e.g.*, cases cited *supra* note 3; *see also* 19 WRIGHT & MILLER, *supra* note 2, § 4504, at 28-29; Ely, *supra* note 13, at 708 ("[A]t least as of 1941, the Court was assuming that substance and procedure were the critical concepts."); Vestal, *supra* note 20, at 255.

33 304 U.S. at 92 (Reed, J., concurring); *see also* Hanna v. Plumer, 380 U.S. 460, 472 (1965) (reaffirming the federal power over procedure); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988) (same).

34 *See, e.g.*, 19 WRIGHT & MILLER, *supra* note 2, § 4504.

35 *See, e.g.*, Palmer v. Hoffman, 318 U.S. 109, 117 (1943); Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939).

36 326 U.S. 99 (1945). In noting the ambiguity inherent in the distinction, the Court wrote:

> 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.

Id. at 108.

37 *Id.* at 107-08.

> whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?[38]

According to Frankfurter, a federal court sitting in diversity should be considered "only another court of the State."[39] Therefore, a federal rule, whether ostensibly "procedural" or not, must yield to the state rule if the difference between the two would "significantly affect the result of a litigation."[40] This rule became known as the "outcome-determinative" test. Because application of the federal statute of limitations would allow the action to go forward, while application of the state statute would terminate the action, the state statute governed.[41]

Guaranty Trust's outcome-determinative test proved to be problematic. Carried to its limits, the rule meant that courts must resolve any differing procedure between federal and state courts in favor of the state rule.[42] To avoid carrying the rule to its limits, and to allow the federal courts to retain some institutional integrity, courts needed some way to determine whether the federal rule's effect would be "significant."[43] Unfortunately, determining if an effect is significant is virtually impossible.[44] *Guaranty Trust* thereby traded one difficult line-drawing problem—the difference between substance and procedure—for another—the difference between significant and insignificant, while injecting a great amount of state law into the federal courts.

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38 *Id.* at 109.

39 *Id.* at 108.

40 *See, e.g.*, 17 MOORE, *supra* note 2, § 124.01[2]; 14 WRIGHT & MILLER, *supra* note 2, § 4504; Ely, *supra* note 13, at 709.

41 *See Guaranty Trust*, 326 U.S. at 110.

42 *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* 19 WRIGHT & MILLER, *supra* note 2, § 4504, at 31; Ely, *supra* note 13, at 709; Smith, *supra* note 26, at 447 ("Since virtually every procedural rule may conceivably have a substantial effect upon the outcome of a case, it is difficult to determine how far the test announced is to be carried."). For a detailed list of questions the *Guaranty Trust* decision raises, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 714-15 (4th ed. 1996). Carried to its limits, the outcome-determinative test endangered the viability of the Federal Rules of Civil Procedure. *See* 17 MOORE, *supra* note 2, at 124-13.

43 *See* Ides, *supra* note 8, at 37-38.

44 *See id.*

C. The *Byrd* Balancing Approach

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[45] the Court provided a means to limit the outcome-determinative test and recognize federal interests. The *Byrd* Court had to determine whether a jury must decide a particular factual issue—as the federal system would have it—or a judge must decide the issue—as the courts of the forum state would require.[46] Justice Brennan, writing for the majority, recognized that "the outcome [might] be substantially affected by whether the issue . . . is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice."[47] However, rather than hold that the state rule must apply, Brennan noted that "affirmative countervailing" federal interests may sometimes counterbalance state interests.[48]

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.[49]

After finding the federal interest in distributing "trial functions between judge and jury" weighty, Brennan assessed the state interest involved. He found the rule that a judge must decide the factual issue merely a convenient custom and not "an integral part" of the parties' rights.[50] The state rule was "merely a form and mode of enforcing the [right], and not a rule intended to be bound up with the definition of the rights and obligations of the parties."[51] Additionally, although the outcome-determinative effect weighed in favor of application of the state rule, the outcome-determinative effect was slight.[52] Given the

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45 356 U.S. 525 (1958). In *Byrd*, the plaintiff, James Byrd, worked for a construction contractor who installed power lines for defendant Blue Ridge. *Id.* at 526. Byrd was injured on the job. *See id.* at 527. The South Carolina Workmen's Compensation Act requires that employees who fall under the statute must accept only statutory compensation for their injuries. *See id.* The parties disputed whether Byrd was a statutory employee. *See id.* It was this issue—Byrd's employee status under the Act—that the South Carolina courts would have a judge resolve. *See id.* at 534-35.

46 *See id.* at 533-34.

47 *Id.* at 537.

48 *Id.*

49 *Id.* (footnote omitted).

50 *Id.* at 536.

51 *Id.* (citation omitted).

52 *See id.* at 539-40.

heavy federal interest and the weak state interest, Brennan concluded that the federal rule would apply.[53]

It is important to note that *Byrd* is not a case about a direct conflict between the Seventh Amendment's right to a jury trial and a contrary state rule.[54] In such a situation, the Supremacy Clause would require application of any federal rule dictated by the Seventh Amendment.[55] Whether the Seventh Amendment would forbid the resolution of a single factual issue by a judge is uncertain.[56] However, irrespective of the constitutional question, the Supreme Court explicitly based its holding on the balance of federal and state interests. In fact, the Court reserved the Seventh Amendment question: "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue" asserted here.[57] In assessing the federal interests, the Court twice referred to the "influence of the Seventh Amendment,"[58] as if to emphasize that any Supremacy Clause question remained in the background.

Byrd aided the *Erie* analysis by providing a means for accommodating the federal interest in maintaining the federal courts' institutional integrity rather than becoming merely a duplicate state court system when hearing diversity cases.[59] However, *Byrd* complicated the analysis because "it provides ambiguous guidance as to when—aside from the precise circumstances present in the *Byrd* case—federal rules will prevail in the face of contrary state rules."[60] After *Byrd* and *Guaranty Trust*, two major difficulties remained: the *Guaranty Trust* problem of determining when the application of a federal rule will have a siguificant enough effect on the outcome of the litigation so as to require the application of the state rule;[61] and the *Byrd* problem of deciding when the federal interest outweighs the state interest and

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53 *Id.* at 538.

54 For a contrary reading, see Smith, *supra* note 26, at 450-51 (stating that the Court referred to the "influence of the Seventh Amendment" only to appear to skirt the constitutional issue, though the Seventh Amendment actually controlled the Court's holding).

55 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

56 *See* Smith, *supra* note 26, at 450.

57 *Byrd*, 356 U.S. at 537 n.10.

58 *Id.* at 537, 539.

59 *See, e.g.*, Ides, *supra* note 8, at 55 ("[I]n place of the ersatz federalism premise that had dominated earlier *Erie-York* decisions, the Court looked to the independent administration of justice as an alternative premise . . . .").

60 19 WRIGHT & MILLER, *supra* note 2, § 4504, at 36 (italics added); *see also* 17 MOORE, *supra* note 2, at 124-39 ("The *Byrd* opinion also provides no guidance for determining when a federal interest outweighs a state interest.").

61 *See* Ides, *supra* note 8, at 37.

requires application of the federal rule despite an outcome-determinative effect.[62]

D. The Modified Outcome-Determinative Test

The Court clarified the *Guaranty Trust* problem in *Hanna v. Plumer*.[63] The issue before the *Hanna* Court was whether Rule 4 of the Federal Rules of Civil Procedure,[64] governing service of process, should control in the face of a contrary state rule.[65] The Massachusetts rule required in-hand service of process.[66] Federal law instructed that service could be left at the defendant's dwelling with a "person of suitable age" residing at the dwelling.[67] Following the federal rule, the plaintiff in *Hanna* served the defendant's wife at the defendant's home.[68] The *Hanna* Court held that when a Federal Rule of Civil Procedure, properly promulgated pursuant to the Rules Enabling Act, directly conflicts with a state rule, the federal rule applies.[69]

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62 *See id.* at 55.

63 380 U.S. 460 (1965).

64 Federal Rule 4(d)(1) at the time of the *Hanna* decision is now Federal Rule 4(e)(2), reflecting the 1993 amendments. The relevant part of the Rule provides:

> Unless otherwise provided by federal law, service upon an individual . . . may be effected in any judicial district of the United States:
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> . . . .
>
> by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .

65 *See Hanna*, 380 U.S. at 461.

66 *See id.* at 462 n.1.

67 *See id.* at 461 (quoting then-Federal Rule 4(d)(1)).

68 *See id.*

69 *Id.* at 471. The central *Erie* problem is the interpretation of the Rules of Decision Act and the role of the federal courts when adjudicating matters that state law controls. *Hanna* faced a second interpretational problem—interpreting the Rules Enabling Act. In the Rules Enabling Act, Congress provided that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts" so long as those rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1994). Under authority of this statute, the Court promulgated the Federal Rules of Civil Procedure. Ostensibly, the statute presents a difficult problem of determining when a rule of procedure affects a substantive right too much to be valid within the statute, thus rendering the Federal Rule invalid. However, Chief Justice Warren wrote for the *Hanna* Court:

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

380 U.S. at 471 (footuote omitted). Justice Harlan interpreted the above language to mean that "[s]o long as a reasonable man could characterize any duly adopted federal rule as 'procedural,' the Court . . . would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens." *Id.* at 476 (Harlan, J., concurring). As it is unlikely that any Federal Rule is impossible to classify as

Although the facts of the case required the Court to construe only the Rules Enabling Act, the *Hanna* Court, in dicta, clarified its approach to the Rules of Decision Act and the outcome-determinative test.[70] Chief Justice Warren wrote that "[t]he 'outcome-determination' test . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[71] Additionally, courts must assess the likelihood of forum shopping at the time the litigants make their choice of forum, not at any later time.[72] Thus, a court making an *Erie* decision concerning a rule that neither an act of Congress, one of the Federal Rules of Civil Procedure, nor the Constitution governs must ask whether application of the federal rule would encourage forum shopping or inequitable administration of the laws, not whether application of the federal rule would have any effect at all on the outcome of the litigation.[73] Through this inquiry, a court may answer the *Guaranty Trust* question of whether a federal rule's effect on the litigation is significant enough to require application of the state rule.[74]

Although the *Hanna* Court in dicta helped clarify the outcome-determinative test and established in its holding that Federal Rules of Civil Procedure displace contrary state rules, the decision neither reaffirmed the significance of *Byrd* balancing in resolving *Erie* questions nor eliminated the balancing test from the *Erie* doctrine.[75] In fact,

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"procedural," it is unlikely that any Federal Rule will ever be found outside the bounds of the Rules Enabling Act. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 304 (2d ed. 1994) ("[T]here are no cases declaring any of the Federal Rules to be invalid as exceeding the authority of the Rules Enabling Act. As such, it can be safely stated that where there is an applicable Federal Rule it is to be applied by federal courts in diversity actions.") (footnote omitted).

70 The Court began its discussion of the outcome-determinative test by noting that the test would not require application of the state rule, "even if there were no Federal Rule" on point. *Hanna*, 380 U.S. at 466. But the Court found that "the clash [was] unavoidable" between the federal and state rules, making application of the outcome-determinative test unnecessary. *Id.* at 470.

71 *Id.* at 468.

72 *See id.* at 469 (emphasizing that the choice between methods of service, though significant after improper delivery of service, would not have affected the plaintiff's initial choice of forum).

73 *See id.* at 468 n.9.

74 Additionally, the *Hanna* Court re-injected the substance/procedure distinction into the *Erie* analysis. The Court wrote that the *Erie* rule roughly says "federal courts are to apply state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465. However, the test the *Hanna* Court formulates does not depend upon this distinction at all. Thus, it seems that labelling a rule "substantive" or "procedural" is merely an end result, and not a process which will independently resolve the *Erie* question. *See In re* Air Crash Disaster Near New Orleans, LA, on July 9, 1982, 821 F.2d 1147, 1155 (5th Cir. 1987) ("What we classify as 'substantive' are precisely those matters governed by state law—and as 'procedural' those matters governed by federal law—in federal diversity cases."), *vacated*, 490 U.S. 1032 (1989).

75 *See* 19 WRIGHT & MILLER, *supra* note 2, § 4504.

Hanna referred to *Byrd* only in passing.[76] Thus, as might be expected, *Hanna* did not explain how a court correctly weighs the federal and state interests at issue in the *Byrd* balancing approach. Some courts and commentators have interpreted this neglect to mean that *Byrd* is no longer relevant in *Erie* analysis.[77]

If *Byrd* remains good law, it follows that when a rule governing the administration of the federal courts is not dictated by the Federal Rules of Civil Procedure, a congressional act, or the Constitution—in other words, judge-made "procedural" law—a court must consider the *Byrd* countervailing federal interests as well as apply the modified outcome-determinative test.[78] *Byrd* is significant because it may require the application of a federal procedural rule despite outcome-determinative effects.[79] *Byrd* is problematic in that the Supreme Court has provided little guidance as to how to properly balance the federal and state interests.[80] It was not until *Gasperini* that the Supreme Court again addressed the role of *Byrd* in *Erie* analysis. *Gasperini* affirmed *Byrd*'s place in the analysis and clarified how federal courts should

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76 380 U.S. at 466 n.5.

77 *See, e.g.*, Gallagher v. Wilton Enters., 962 F.2d 120, 122 (1st Cir. 1992) (stating that *Hanna* overruled *Byrd*); 17 MOORE, *supra* note 2, at 124-38; 19 WRIGHT & MILLER, *supra* note 2, § 4504, at 48-49 ("'Outcome determination analysis' is not repudiated by the *Hanna* case; rather, it is refined by tying it to the policies of the *Erie* case.... The status of the *Byrd* case, however, is less certain.") (italics added); Ely, *supra* note 13, at 717 n.130 (stating that "there is no place in the analysis for the sort of balancing of federal and state interests contemplated by the *Byrd* opinion). Professor Ides writes:

> My view would be that *Byrd* is no longer useful law. It is quite difficult to imagine a judge-made rule that is outcome-determinative in the sense defined by *Hanna* and yet still applicable under *Byrd* without there being a federal interest strong enough to trigger the district court's authority to make federal common law. Typically, as in *Byrd* itself, the countervailing federal interest will derive from the United States Constitution or a federal statute, in which case the conflict really presents a [Supremacy Clause] type of problem.

Ides, *supra* note 8, at 86-87; *see also* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-hard Doctrine*, 65 MICH. L. REV. 613, 714-15 (1967) (writing that *Hanna* "abandoned" the *Byrd* balancing approach); Redish & Phillips, *supra* note 26, at 368-69, 384-401 (finding that *Hanna* undermined the *Byrd* approach, but arguing for application of a refined *Byrd* balancing approach).

78 One commentator summarizes the inquiry this way:

> First, is there a valid federal statute or Rule of Civil or Appellate Procedure on point? If so, the federal law is to be applied by the federal court deciding a diversity action. If there is not a valid, on point federal law, the second inquiry is whether the application of the state law is likely to determine the outcome of the litigation. If state law is not outcome determinative, then federal law is applied. But once it is concluded that state law is likely to determine the results, then the third question is whether there is an overriding federal interest. If so, then federal law controls; otherwise, the state law that is outcome determinative is applied.

CHEMERINSKY, *supra* note 69, § 5.3, at 308.

79 *See* Ides, *supra* note 8, at 55.

80 *See id.*

perform the balancing test.[81] Unfortunately, *Gasperini* undermined the *Hanna* holding, which required application of an on-point Federal Rule of Civil Procedure.[82]

II

THE *ERIE* PROBLEM OF SUFFICIENCY OF THE EVIDENCE STANDARDS PRIOR TO *GASPERINI*

A. The Structure of a Sufficiency of the Evidence Determination

Sufficiency of the evidence determinations arise when a judge must determine whether litigants have presented enough evidence to support a jury's factual finding.[83] These determinations may arise either before the judge presents the question to the jury or after the jury has made its finding, for example, upon a motion for summary judgment, a motion for judgment as a matter of law, a renewed motion for judgment as a matter of law, or a motion for a new trial.[84] In ruling on any of these motions, the trial judge must apply some legal standard to test the sufficiency of the evidence. If the case reaches federal court based on diversity jurisdiction, the federal judge must decide what legal standard to apply. Assuming that the federal and state standards differ, an *Erie* question comes into play.[85] The resolution of the choice-of-law question will determine how sufficient the evidence must be (unless the federal and state standards are the same, in which case the choice will not matter).[86] For example, must the judge say that no reasonable juror could find for the nonmovant on the issue before taking the factual inquiry away from the jury, or must the judge allow the jury to make the decision if there is a scintilla of

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81 *See infra* Part IV.A.1.

82 *See infra* Part IV.A.2.

83 *See generally* Steven A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible* Erie *Mystery?*, 47 SMU L. REV. 271 *passim* (1994) (discussing the *Erie* choice-of-law problem generally); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 *passim* (1986) (discussing how the sufficiency of evidence standards allocate fact-finding power between trial judges, appellate judges, and juries).

84 *See generally* Childress, *supra* note 83, at 275-89 (discussing the choice-of-law problem in different fact-finding contexts).

85 *See, e.g.*, 9A WRIGHT & MILLER, *supra* note 2, § 2525 (considering whether the state or federal standard is appropriate upon a motion for a judgment as a matter of law).

86 Sufficiency of the evidence standards are different from rules prescribing evidentiary levels. An evidentiary level determines how certain the fact-finder must be (i.e., the existence/absence of a particular fact is more probable than not). A sufficiency of the evidence standard determines whether a party has presented enough evidence for a fact-finder to find a particular fact. So, a judge might give a factual question to a jury if a party has presented a scintilla of evidence (the sufficiency standard) supporting the finding, and the jury would then determine if the party had established the fact by a preponderance of the evidence (the evidentiary level).

evidence in the nonmovant's favor? May the judge grant a new trial if he simply disagrees with the jury's decision, or may he grant a new trial only if the jury's determination shocks the conscience? In each instance, the *Erie* doctrine and the Federal Rules of Civil Procedure determine whether the trial judge should apply the state or the federal standard. Frequently, this determination will have a significant impact on the outcome of the litigation.[87]

B. *Erie* Determinations Regarding Sufficiency of the Evidence—Particular Situations

1. *Motion for Judgment as a Matter of Law*

In deciding a motion for judgment as a matter of law, the judge must ask whether sufficient evidence exists to raise a question of fact for the jury.[88] Prior to the 1991 amendments to the Federal Rules, determining whether the federal or state sufficiency standard governed presented the federal court with an unguided *Erie* question.[89] The federal circuits were split in resolving this issue.[90] In *Herron v. Southern Pacific Co.*,[91] the Supreme Court held that a federal judge may direct a verdict against a party according to the federal standard, even though the state standard would require that the jury decide cer-

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87 *See, e.g.*, Childress, *supra* note 83, at 274, 302-03 (underscoring the importance of this choice-of-law question).

88 Federal Rule of Civil Procedure 50(a)(1), governing motions for a judgment as a matter of law, reads:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable ruling on that issue.

FED. R. CIV. P. 50(a)(1). Federal Rule of Civil Procedure 50(b), governing renewed motions for a judgment as a matter of law, allows a party which previously moved for a judgment as a matter of law to "renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." FED. R. CIV. P. 50(b).

89 Resolution of the *Erie* question will also determine the related question of what evidence the judge may consider in ruling on the motion (i.e., one standard might not allow the judge to consider uncontradicted evidence unfavorable to the nonmovant). *See, e.g.*, Childress, *supra* note 83, at 293-95 (comparing the difference between the federal and Texas standards).

90 The majority of circuits applied the federal standard. *See* Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 (4th Cir. 1991); Jones v. Miles Labs., 887 F.2d 1576, 1578 (11th Cir. 1989); Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988); Miller v. Republic Nat'l Life Ins. Co., 789 F.2d 1336, 1340 (9th Cir. 1986); Gross v. Black & Decker (U.S.), Inc., 695 F.2d 858, 864 (5th Cir. 1983). Some circuits applied the state sufficiency standard. *See, e.g.*, City Nat'l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1314 (8th Cir. 1991); Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d 1373, 1382 (7th Cir. 1990), *reh'g and reh'g en banc denied* (May 24, 1990); Warkentien v. Vondracek, 633 F.2d 1, 6 (6th Cir. 1980); *see generally* 9A WRIGHT & MILLER, *supra* note 2, § 2525 (surveying the circuits); Childress, *supra* note 83, at 295-303 (same).

91 283 U.S. 91 (1931).

tain factual questions.[92] However, *Herron* predates *Erie*, and, in *Dick v. New York Life Insurance Co.*,[93] the Supreme Court hinted that this case is no longer controlling.[94] In *Dick*, the Court wrote:

> Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied.[95]

The Court granted certiorari on the choice-of-law question in *Mercer v. Theriot*.[96] However, the Court ruled that the evidence was sufficient to present a jury question under either the federal or state standard, thereby making a ruling on the choice-of-law question unnecessary.[97]

The 1991 amendments to the Federal Rules have apparently resolved this choice-of-law question in favor of a "reasonable jury" standard.[98] Federal Rule 50(a) allows a federal court to direct a verdict against a party when "there is no sufficient evidentiary basis for a reasonable jury to find for the party" on an issue essential to the party's defense or claim.[99] This federal standard would displace any state rule urging a different sufficiency standard, according to the holding of *Hanna*.[100] However, as discussed below,[101] the Court's analysis in *Gasperini* undermined the previously settled rule that a Federal Rule of Civil Procedure controls despite a contrary state rule. Thus, after *Gasperini*, the standard set forth in revised Rule 50 may not control.

2. *Motion for a New Trial*

When ruling on a motion for a new trial based on a claim of insufficient evidence to support the jury's verdict,[102] the judge must ask whether sufficient evidence existed to support the jury's determi-

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92 *Id.* at 94.

93 359 U.S. 437 (1959).

94 *Id.* at 444-45.

95 *Id.* (citations and footnote omitted).

96 377 U.S. 152 (1964).

97 *Id.* at 156.

98 The Advisory Committee Notes to the 1991 amendments state that revised Rule 50(a)(1) "articulates the standard for the granting of a motion for judgment as a matter of law." FEDERAL RULES OF CIVIL PROCEDURE AND SELECTED OTHER PROCEDURAL PROVISIONS 409 (Kevin M. Clermont ed., 1997); *see also* 17 MOORE, *supra* note 2, at 124-58, 159 (noting that this change will presumably force the federal courts to apply the federal standard).

99 *See supra* note 98.

100 *See supra* text accompanying notes 63-69.

101 *See infra* Part IV.B.2.

102 New trial motions, unlike motions for a judgment as a matter of law, may be based on reasons other than insufficiency of the evidence. *See* Childress, *supra* note 83, at 285.

nation.[103] Resolution of the *Erie* question determines if the judge should look to federal or state law for the appropriate standard.

Prior to *Gasperini,* the majority rule was that "[t]he grant or denial of a new trial is a matter of procedure governed by [the federal] rules and not by state law or practice."[104] Although the federal circuits, prior to the 1991 amendments to the Federal Rules, were split with regard to whether state or federal sufficiency standards applied upon a motion for a judgment as a matter of law, all the federal circuits agreed that the federal standard applied upon a motion for a new trial.[105] The traditional characterizations of the different motions may explain the uniformity here, as compared to the judgment as a matter of law context. Motions (and renewed motions) for judgment as a matter of law are generally termed questions of law, and therefore, are more suited to determination by the judge.[106] Rulings on motions for a new trial are usually described as factual determinations, and thus the Seventh Amendment limits the judge's discretion.[107] As Stephen Childress notes, "The distinction is not wholly convincing."[108]

> Jury review for [judgment as a matter of law] is at bottom a review of the *facts and evidence* supporting a verdict—the process is steeped in the record—and only its defining threshold uses (must use) the term *question of law.* In other words, a verdict is "legally" insufficient because the record support fails. While that process is stricter and less discretionary than is new trial review, it cannot be seen as defining any less the relationship between a federal court and its jury.[109]

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103 The relevant part of Federal Rule of Civil Procedure 59(a), governing motions for new trials, reads:

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

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

104 11 WRIGHT & MILLER, *supra* note 2, § 2802; *see also* 12 MOORE, *supra* note 2, § 59.04[1].

105 *See* Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 208 (5th Cir. 1992); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 100 (4th Cir. 1991); Quality Foods, Inc. v. U.S. Fire Ins. Co., 715 F.2d 539, 542 n.2 (11th Cir. 1983); Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 970-71 (7th Cir. 1983); Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980) (noting that all sufficiency of the evidence determinations are governed by federal law); Pitts v. Electro-Static Finishing, Inc., 607 F.2d 799, 802 (8th Cir. 1979); Index Fund, Inc., v. Insurance Co. of North America, 580 F.2d 1158, 1163 (2d Cir. 1978), *cert. denied,* 440 U.S. 912 (1979); Vizzini v. Ford Motor Co., 569 F.2d 754, 760 (3d Cir. 1977); LaForest v. Autoridad de Las Fuentes Fluviales, 536 F.2d 443, 447 (1st Cir. 1976); Oldenburg v. Clark, 489 F.2d 839, 841 (10th Cir. 1974); Gault v. Poor Sisters of St. Frances Seraph of Perpetual Adoration, 375 F.2d 539, 549 (6th Cir. 1967). *See generally* 11 WRIGHT & MILLER, *supra* note 2, § 2802 (surveying the circuits); Childress, *supra* note 83, at 286-89 (same).

106 *See* Childress, *supra* note 83, at 287.

107 *See id.*

108 *Id.*

109 *Id.* at 323.

Regardless of the logic of the distinction, the Seventh Amendment constraint that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law"[110] applies only in federal court, the federal courts must determine what constitutes "the rules of the common law."[111] Because the Seventh Amendment constraint is built directly into Federal Rule 59, determination of what review "the rules of the common law" entails determines the meaning of Rule 59.[112]

The Supreme Court apparently decided the matter in favor of the majority rule in *Browning-Ferris v. Kelco Disposal, Inc.*[113] The Court inquired as to "whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion . . . for a new trial or remittitur."[114] The Court did not go through an *Erie* analysis, but stated:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.[115]

Browning-Ferris concerned only review of a punitive damages award, not review of the trial in full.[116] However, "the Court did not purport to limit its holding to [a] new trial on damages as such. It is thus apparent that similar analysis would be used as to more general new trial motions."[117] According to the federal courts and commentators, the *Erie* question regarding whether state or federal sufficiency of the evidence standards apply in federal courts upon motions for new trials was resolved in favor of the federal standard prior to *Gasperini.*[118]

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110 U.S. CONST. amend. VII.

111 *See* 11 WRIGHT & MILLER, *supra* note 2, § 2802, at 44-45 ("The incidents of jury trial are for the federal courts to decide for themselves, guided by the Seventh Amendment, and are not a matter on which state law should be given any effect."); *see also* Herron v. Southern Pac. Co., 283 U.S. 91 (1931) (ruling that the state practice of requiring a jury to always determine a particular issue may not disrupt the federal allocation of decisionmaking responsibility between judge and jury because federal practice controls the incidents of trial).

112 *See* 11 WRIGHT & MILLER, *supra* note 2, § 2802.

113 492 U.S. 257 (1989).

114 *Id.* at 278.

115 *Id.* at 278-79 (emphasis added) (footnote omitted).

116 *Id.* at 278.

117 Childress, *supra* note 83, at 288 (footnote omitted).

118 *See infra* text accompanying notes 187-95 for a discussion of how *Gasperini* changed this settled area of law.

III
THE FACTS AND HOLDING OF *GASPERINI*

A. Facts

William Gasperini, a CBS journalist, covered news in Central America from 1984 through 1990.[119] While there, he took slide transparencies of "active war zones, political leaders, and scenes from daily life."[120] Gasperini agreed that The Center for Humanities, Inc. ("Center") could use 300 of his over 5,000 slides to make an educational videotape, and the Center agreed to return the slides.[121] However, after completing the videotape, the Center lost the slides.[122] Gasperini, a citizen of California, filed a diversity action in the United States District Court for the Southern District of New York against the Center, a New York corporation with its principal place of business in New York.[123] He claimed the Center was liable for "breach of contract, conversion, and negligence," as well as other state law claims.[124]

At trial, the Center admitted liability for the lost slides, leaving for jury determination only the amount of damages.[125] Gasperini provided an industry expert who testified that the photographic publishing industry standard for the value of a lost slide transparency was $1,500.[126] The jury returned an itemized verdict, awarding Gasperini $450,000—$1500 for each of the 300 lost slides.[127] The Center moved for a new trial, claiming that the damage award was excessive.[128] The district court denied the motion without comment.[129]

On appeal, the Second Circuit set aside the $450,000 award and ordered a new trial unless Gasperini accepted a reduced damage award of $100,000.[130] In reaching its decision, the Second Circuit applied the sufficiency of the evidence standard set out in a New York statute.[131] This statute requires New York appellate courts, upon appeal from a grant or denial of a new trial, to "determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."[132]

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119 *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2215 (1996).
120 *Id.*
121 *See id.* at 2215-16.
122 *See id.* at 2216.
123 *See id.* & n.1.
124 *Id.*
125 *See id.*
126 *See id.*
127 *See id.*
128 *See id.*
129 *See id.*
130 *See id.* at 2217.
131 *See id.* at 2216. The statute is N.Y. C.P.L.R. § 5501(c) (McKinney 1996).
132 N.Y. C.P.L.R. § 5501(c). The text of the statute reads:

The Second Circuit followed New York Appellate Division rulings and found the award to Gasperini did "materially deviate[ ] from what is reasonable compensation."[133] The court noted that many of the slides were not unique and found, after resolving all doubts in Gasperini's favor, that their loss could not warrant an award of over $100 apiece.[134] Because Gasperini was not a reputed photographic journalist and had no concrete plans to use the slides in a book, only fifty of the slides warranted the $1,500 award.[135] Therefore, the Court of Appeals gave Gasperini the choice of accepting the $100,000 award or having a new trial.[136] Gasperini appealed, and the Supreme Court granted certiorari because the case presented "an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law."[137]

B. Holding

Because Gasperini appealed the Second Circuit's grant of the remittitur, the Supreme Court had to determine the appropriate standard for the Court of Appeals to apply when reviewing the trial court's denial of a new trial. However, the Seventh Amendment allows a federal court to grant a new trial only when doing so is consistent with "the rules of the common law."[138] Therefore, before ruling on the standard of review question, the Court first had to determine whether a federal appellate court could, consistently with the Seventh Amendment, review a district court's ruling on a motion for a new trial at all.[139] The Court ruled that federal appellate courts could review a district court's ruling on new trial motions.[140]

> The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Id. Although the statute is ostensibly directed at only the New York appellate courts, New York courts have construed the statute to apply to trial courts as well. *Gasperini*, 116 S. Ct. at 2218.

133 *Gasperini*, 66 F.3d at 431.

134 *Id.*

135 *See id.*

136 *Id.*

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

138 *See supra* notes 102-12 and accompanying text.

139 *See Gasperini*, 116 S. Ct. at 2223-24.

140 *Id.* at 2224. The majority and Justice Scalia (with Chief Justice Rehnquist and Justice Thomas joining in dissent) debated the issue of whether a federal appellate court may

The Supreme Court stated the *Erie* issue as "whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases."[141] However, two separate issues lie within this single issue: (1) Should the district court have applied the New York or federal sufficiency of the evidence standard in ruling on a motion for a new trial? (2) Should the Second Circuit have reviewed the district court's denial of a new trial according to the federal or New York standard?[142]

Before resolving the issues, Justice Ginsburg, writing for the majority, briefly outlined the development of the *Erie* doctrine through *Hanna*, acknowledging that "'discouragement of forum-shopping and avoidance of inequitable administration of the laws'" must guide the outcome-determinative test.[143] Again quoting *Hanna*, the Court formulated the *Erie* test this way: "Would 'application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose federal court?'"[144]

Applying this test, Ginsburg found that the New York standard "implicates . . . *Erie*'s 'twin aims,'"[145] and that "*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."[146] This finding would seem to require application of the New York standard. However, rather than order application of the New York standards at both the trial and appellate levels, the Court addressed the federal interests raised in

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review district court rulings on motions for new trials at all. Justice Scalia argued that the Seventh Amendment "'adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.'" *Id.* at 2231 (Scalia, J., dissenting) (quoting Dimick v. Schiedt, 293 U.S. 474, 487 (1935)). These 1791 common law rules "plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence." *Id.* (Scalia, J., dissenting). Scalia cited a long list of early Supreme Court precedent supporting this view. *Id.* at 2232 (Scalia, J., dissenting).

The majority did not directly attack Scalia's line of old precedent, but relied on indications in more recent case law that the issue was still open. *Id.* at 2223 (majority noting that the Court granted certiorari on the issue but declined to decide it in *Grunenthal v. Long Island Ry. Co.*, 393 U.S. 156, 158 (1968) and *Neese v. Southern Ry. Co.*, 350 U.S. 77, 77 (1955)). The majority wrote that the "fair administration of justice" required that appellate courts have some control over the discretion of the trial judge. *Id.* Every federal circuit court had decided that the Seventh Amendment allowed for federal appellate review of a trial court's ruling on the excessiveness of a jury's verdict. *See id.* The majority concluded that "'[N]othing in the Seventh Amendment . . . precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive.'" *Id.* at 2224 (quoting *Grunenthal*, 393 U.S. at 164 (Stewart, J., dissenting)) (alterations in *Gasperini*).

141 *Id.* at 2219.

142 *See id.* at 2225.

143 *Id.* at 2220 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

144 *Id.* (quoting *Hanna*, 380 U.S. at 468 n.9) (alterations in *Gasperini*).

145 *Id.* at 2221.

146 *Id.*

Byrd.[147] The Second Circuit, according to the majority, "did not attend to '[a]n essential characteristic of [the federal court] system' when it used § 5501(c)" as its standard of review.[148] This case, like *Byrd*, presented "countervailing federal interests." In such cases, the outcome-determinative test did not adequately protect those federal interests.[149]

The Court next examined the limits the Seventh Amendment places upon grants of new trials at both the trial and appellate levels.[150] It determined that federal trial judges have historically had the power to grant new trials.[151] In ruling on new trial motions claiming an excessive damage award, the federal trial courts grant the motion only if the award "shocks the conscience" of the court.[152] On the other hand, the Court noted that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development."[153] Apparently because the federal appellate courts' authority to review trial judges' rulings of motions for new trials is a more recent and uncertain "development," the Court approved of a very low standard of review—abuse of discretion.[154] Both these review standards—shock the conscience and abuse of discretion—are significantly different from the standard set out in N.Y. C.P.L.R. § 5501(c), which requires trial and appellate judges to compare the damage award in the present case with those given in similar cases to see if the award "deviates materially from what would be reasonable compensation."[155]

After determining the appropriate federal standard for a trial judge's ruling on a motion for a new trial and the appellate court's standard of review of that decision, the Court would then need to compare each of those federal standards to the New York standards and determine which to apply. However, the Court reached a compromise verdict: without directly addressing the conflict between the federal trial court standard and the New York trial court standard, the Court determined that the district court would apply the New York standard, but the court of appeals would apply the federal abuse of discretion standard.[156] The Court found this appropriate because the

147 *Id.* at 2221-23.

148 *Id.* at 2221 (quoting Byrd v. Blue Ridge Rural Elec. Corp., 356 U.S. 525, 537 (1958)).

149 *See id.* at 2222.

150 *Id.* at 2222-24.

151 *Id.* at 2222 (quoting *Byrd*, 356 U.S. at 540).

152 *Id.* at 2217.

153 *Id.* at 2223.

154 *Id.*

155 *Id.* at 2217 (quoting N.Y. C.P.L.R. § 5501(c) (McKinney 1996)).

156 *Id.* at 2224-25. The New York statute was addressed to the New York *appellate* courts, and New York courts had subsequently interpreted the statute to apply at the *trial*

Seventh Amendment allows for only the most deferential review of a trial judge's ruling.[157] Thus, the federal district court must grant a new trial if the damage award deviates materially from reasonable compensation (the New York standard), but the federal court of appeals may overturn the district court's ruling on the new trial motion only if the ruling demonstrates an abuse of discretion (the federal standard).

IV

THE EFFECT OF *GASPERINI* ON THE *ERIE* DOCTRINE

A. The Effect of *Gasperini* on the *Erie* Doctrine in General

Gasperini has two primary effects on general *Erie* doctrine. First, it both affirms the *Byrd* balancing test's continuing vitality in the *Erie* analysis and clarifies the federal interests that have relevance in that balance. Second, it undermines the holding of *Hanna* by allowing state law to define the substance of a Federal Rule of Civil Procedure. In this way, state procedure may displace federal procedure within the scope of a Federal Rule.

1. *Clarification of the* Byrd *Balancing Factors*

Byrd's relevancy in modern *Erie* analysis had been somewhat in doubt prior to *Gasperini*.[158] Allan Ides, in a recent discussion of the *Erie* doctrine, wrote that "[a] big question is whether *Byrd* survived *Hanna*."[159] Professors Wright and Miller noted that

> [t]he status of the *Byrd* case . . . is less certain. Although the only citation [in *Hanna* to *Byrd*] was one fleeting reference, the philosophy of the *Byrd* opinion is implicit in the emphasis the *Hanna* decision places upon federal rulemaking power and the need for procedural uniformity in the federal courts. Ignored, however, was the notion derived from the *Byrd* case by several courts and commentators that competing state and federal interests must be evaluated and balanced when deciding between two inconsistent rules of practice and procedure.[160]

Gasperini affirmatively confirmed *Byrd*'s place in the *Erie* analysis because the Court explicitly engaged in a *Byrd* balancing test when con-

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court level as well. Thus, it is ironic that *Gasperini* required application of the federal standard at the appellate level (the level about which the New York legislature was most concerned) and application of the state standard at the trial level (which applied the state standard in New York itself only because of interpretations of the statute by the New York courts).

157 *Id* at 2225. Moreover, as a matter of practice, trial judges are in a far better position than appellate judges to make factual rulings. *See id.*

158 *See supra* note 77.

159 Ides, *supra* note 8, at 86.

160 19 WRIGHT & MILLER, *supra* note 2, § 4504, at 48-49.

sidering whether the Second Circuit should apply the New York review standard.[161]

The Court proceeded in its *Erie* analysis by first asking whether the *Hanna* test indicated that the Court of Appeals should give effect to the New York standard. Finding that it should, the Court then engaged in a *Byrd* balancing test to see whether there were affirmative countervailing federal interests that outweighed the state interests and required the application of the federal standard at the appellate level. According to one commentator, "[b]y deferring its consideration of *Byrd*" until after engaging in the *Hanna* analysis, "the Court . . . eviscerated [*Byrd*'s] balancing test."[162] However, rather than eviscerate the balancing test, the Court reaffirmed that *Byrd* operates as a limit on *Hanna*. Although *Byrd* does not operate on its own, it allows for the application of federal law even though a *Hanna* analysis might indicate that state law should apply.

Additionally, the Court clarified what sort of federal interests qualify as federal countervailing considerations that may weigh in the *Byrd* balance. With regard to application of the New York standard at the district court level, the Court neither mentioned the federal interests nor weighed them against New York's interest. This omission gives rise to two possible readings of *Gasperini*. First, the Court may have silently engaged in *Byrd* balancing and simply found, without stating its reasoning, that the state interests outweighed the federal interests. This reading does not help to clarify *Erie* analysis, and, because the Court so deliberately weighed the federal and state interests present at the appellate level, it is unlikely that the Court neglected to do so at the trial level. However, according to a second reading, by not mentioning any federal interests at stake at the trial court level, the *Gasperini* Court implicitly recognized that there were no federal interests worth balancing. This reading of *Gasperini* limits the *Byrd* case so that federal interests requiring consideration arise only rarely.

A comparison of *Byrd* and *Gasperini* reveals when federal interests enter the *Erie* analysis. Both cases involved the Seventh Amendment, which reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[163]

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161 *Gasperini*, 116 S. Ct. at 2221-25; 17 MOORE, *supra* note 2, at 124-40.

162 *The Supreme Court—Leading Cases*, 110 HARV. L. REV. 135, 265 (1996) [hereinafter *Leading Cases*].

163 U.S. CONST. amend. VII.

Byrd involved the right to a jury trial to which the first half of the Seventh Amendment refers.[164] Both issues in *Gasperini*—the sufficiency of the evidence standard that the trial court should apply and the review of the trial court's determination at the appellate level—relate to the second half of the Amendment, the Re-examination Clause.[165]

Byrd left unsettled whether a judge, rather than a jury, could resolve a factual issue without violating the Seventh Amendment.[166] Thus, the Court resolved the *Erie* question "under the influence—if not the command—of the Seventh Amendment."[167] In *Gasperini*, the Court stated that, compared to the ability of the trial court to review jury determinations upon motions for a new trial, "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review was once deemed inconsonant with the Seventh Amendment's re-examination clause."[168] Later in the opinion, the Court referred to "Seventh Amendment constraints" that weigh against the appellate court's application of the more searching New York review standard.[169] Like the Court in *Byrd*, the Court here had to resolve the *Erie* question in the shadow of the Seventh Amendment. The *Gasperini* Court never stated that the Seventh Amendment *required* the deferential abuse of discretion review; instead, the Seventh Amendment's *influence* leads to the conclusion that the deferential federal standard should apply.

On the other hand, no one doubted that the trial court could review a jury's factual findings when ruling on a motion for a new trial. "In keeping with the historic understanding," the Court wrote, "the re-examination clause does not inhibit the authority of trial judges to grant new trials. . . ."[170] Because the constitutionality of such review was well-settled,[171] the Court needed only to resolve the issue of the appropriate review standard. Certainly the Seventh Amendment sets limits on the possible standards of review, but the Court apparently finds that the Amendment allows for much flexibility with regard to the standard the trial court should apply. New York's "deviates materially" standard, though different from the normal "shock the conscience" standard, is presumably well within the boundaries the Seventh Amendment sets, for otherwise the district court would not

164 *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).
165 116 S. Ct. at 2222.
166 356 U.S. at 537 n.10.
167 *Id.* at 537 (footnote omitted).
168 116 S. Ct. at 2223.
169 *Id.* at 2225.
170 *Id.* at 2222 (footnote omitted).
171 *See id.*

be constitutionally "capable of performing the checking function" of the New York statute.[172] Because the New York standard, as applied at the district court level, fits well within the Seventh Amendment's boundaries, there is no federal interest worth weighing in the *Byrd* balance, as there is at the appellate level.[173]

Thus, the *Gasperini* Court implies that resolution of an *Erie* question requires *Byrd* balancing only when a constitutional provision looms near. *Byrd/Gasperini* provides a way for federal courts to skirt the more divisive and far-reaching constitutional questions[174] while applying the federal rule. In this way, avoidance of answering a constitutional question weighs in favor of application of the federal rule in the *Byrd* balance.[175] If *Gasperini* does clarify *Byrd* in this manner, then the broader language in *Byrd* is siguificantly limited. The Court in *Byrd* wrote:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil com-

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172 *Id.* at 2224.

173 The reading of *Gasperini* offered here varies considerably from that found in C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267. Professor Floyd writes that if the New York standard "was 'substantive' for *Erie* purposes at the trial level, it was equally 'substantive' on appeal." *Id.* at 302. Alternatively, "[i]f *Byrd* or the Seventh Amendment required the application of a federal standard of appellate review, they equally required the application of the federal 'shocks the conscience' standard by the trial court." *Id.* The position of this Note is that the federal interests at the trial and appellate levels are significantly different. *See supra* text accompanying notes 166-72. Thus, the state standard may apply at the trial level while the federal standard applies at the appellate level without contradiction.

Additionally, because Professor Floyd believes that *Byrd*, properly construed, does not permit federal courts to apply federal, judge-made procedures when they conflict with "state procedures having important extralitigation objectives," he argues that the *Gasperini* Court should have ordered application of the state standard at both the trial and appellate level. Floyd, *supra*, at 302. Finding that a "state procedure [has] important extralitigation objectives," *id.*, seems to mean only that the procedure was designed to have a substantive effect, which returns the analysis to the substantive/procedure distinction. That the *Gasperini* Court required application of the federal standard at the appellate level—despite compromising New York's "extralitigation objectives"—demonstrates that characterizing a rule as "substantive," "procedural," or "procedural with a substantive effect" does not mean much in an *Erie* analysis. *See supra* note 74. Rather, accurate *Erie* analysis requires application of the *Hanna* modified outcome-determinative test and the *Byrd/Gasperini* balance.

174 In *Byrd*, the Court avoided answering whether the Seventh Amendment requires that every factual issue be tried by a jury. In *Gasperini*, the Court avoided answering whether the Seventh Amendment will allow more searching appellate review than "abuse of discretion."

175 Allen Smith writes that the *Byrd* "decision was in fact based solely on the constitutional ground, and that its effect is thus limited to questions relating to the right to a jury in a federal court." Smith, *supra* note 26, at 451. Smith's analysis avoids the fact that the *Byrd* Court explicitly said that it was *not* deciding the constitutional question. *See supra* text accompanying notes 54-58. The view offered in this Note is that the *Gasperini* decision clarifies the *Byrd* position in that a federal interest worthy of consideration must arise from constitutional influence.

> mon-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.[176]

According to the *Gasperini* gloss on this language, the distribution of fact-finding functions is an "essential characteristic" of the federal system only because of the constitutional influence. Any procedural difference that the federal system retains beyond that which the *Hanna* formulation, a federal statute, or a direct constitutional requirement allows must find support from constitutional influence. *Gasperini* thereby removed some of the mystery behind the *Byrd* "essential characteristic" language by indicating that federal interests arise only from constitutional influence.[177]

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176 356 U.S. at 537 (footnote omitted).

177 This interpretation of *Byrd* finds support in *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965). The Circuit Court in *Szantay* was confronted with a South Carolina door-closing statute that prevented nonresidents from suing foreign corporations on foreign causes of action in South Carolina courts. *Id.* at 62-63. Nonresident Szantay sued Beech, a foreign corporation, on a cause of action originating in Nebraska. *See id.* Beech moved to dismiss, claiming that the South Carolina statute bound the federal court. *See id.* The Fourth Circuit offered two reasons, each indicating a constitutional influence, why the door-closing statute should not control. First, the purpose of the constitutional grant of diversity jurisdiction "was to avoid discrimination against nonresidents"; however, the South Carolina statute allows residents to sue foreign corporations on foreign causes of action while preventing nonresidents from doing the same. *Id.* at 65. Second, the Full Faith and Credit Clause indicates a national interest in mutual enforcement of obligations created by other states. *See id.* The Fourth Circuit noted: "While the South Carolina 'door-closing' statute may not directly violate the demands of this constitutional principle, it is contrary to its implicit policy. . . ." *Id.* at 65-66 (footnote omitted). Thus, the Fourth Circuit found influence from two constitutional provisions, leading the court to hold that the federal interest outweighed the state interest. *Id.* at 66. The reading of *Gasperini* this Note presents is contrary to language found in *Masino v. Outboard Marine Corp.*, 652 F.2d 330 (3d Cir. 1981), *cert. denied*, 454 U.S. 1055 (1981). The court there had to decide whether a Pennsylvania statute providing for the entry of judgment upon a civil jury majority of five-sixths is applicable in a diversity action when the "long-standing federal policy" favored unanimous jury votes. *Id.* at 330. The court found that the federal interest in unanimous verdicts was not of constitutional magnitude, but as there was an insubstantial state interest in application of the rule to federal proceedings, the "strong tradition" behind the unanimity rule required application of the federal policy. *Id.* at 332. Under the reading of *Gasperini* this Note offers, the rationale of *Masino* is incorrect because the court there intimated that no constitutional provision influenced its decision. *Id.* at 332. However, the *Masino* court could have reached the same outcome by noting that the Supreme Court had held that the Seventh Amendment entitles parties to unanimous verdicts in civil cases tried before a jury. *See* Springville City v. Thomas, 166 U.S. 707, 708-09 (1897). Even if the *Masino* court could have pointed to reasons why *Springville* did not control the issue, at the least, the federal interest in unanimous jury verdicts arises in the shadow of the Seventh Amendment, and thereby qualifies, under this Note's reading of *Gasperini*, as a cognizable federal interest.

2. *Undermining the Holding of* Hanna

Although *Gasperini* clarified *Byrd,* it undermined the holding of *Hanna. Hanna* held that an on-point Federal Rule of Civil Procedure will apply in the face of a contrary state rule.[178] Federal Rule of Civil Procedure 59, the rule governing motions for a new trial, provides that new trials "may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[179] As Justice Scalia pointed out in dissent, "[t]hat is undeniably a federal standard,"[180] and when the federal standard conflicts with the state standard, as it did in *Gasperini,* "the court has no choice but to apply the Federal Rule."[181] Though the Rule does not set out exactly what the standard should be, it seems undeniable that the federal courts should have responsibility for interpreting the Rule, rather than allowing a state rule to displace the federal interpretation.[182]

The majority either misunderstood Scalia's argument or refused to directly address it. The Court wrote, "Whether damages are excessive for the claim-in-suit must be governed by *some law.* And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York."[183] But as Scalia noted, no one doubts New York's ability to set evidentiary standards (e.g., the jury must find by a preponderance of the evidence a certain fact, or the jury must find beyond a reasonable doubt a certain fact). The relevant question is what standard—federal or state—should determine whether the evidence presented is sufficient to justify the jury's verdict.[184] Contrary to the majority's statement, there is a very viable candidate for determining whether damages are excessive—the federal courts' interpretation of "the rules of the common law," which may determine whether sufficient evidence was presented to the jury to sustain the damage award.

Because the Court may have mistaken evidentiary levels for sufficiency of the evidence standards, it may have accidentally failed to follow the rule of *Hanna.*[185] However, if the Court purposefully al-

178 *See supra* text accompanying notes 63-69.

179 FED. R. CIV. P. 59.

180 Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2239 (1996) (Scalia, J., dissenting).

181 *Id.*

182 *See* 11 WRIGHT & MILLER, *supra* note 2, § 2802 (arguing that interpretation of the standard is a job for the federal courts).

183 *Gasperini,* 116 S. Ct. at 2224-25 n.22.

184 *See id.* at 2239 n.12 (Scalia, J., dissenting).

185 The Court may have mistaken this for a case where the Federal Rule simply does not reach far enough to cause a direct conflict with the state rule, as was the situation in *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). In *Walker,* the dispute concerned when a statute of limitations tolled. The state rule required the statute of limitations to toll only

lowed state law to define the content of a Federal Rule of Civil Procedure, then the decision greatly undermines the rule of *Hanna.* If the majority really construed Rule 59 as allowing for a state-law gap-filler because the Rule did not explicitly set the standard of review, then many other Federal Rules will be subject to similar preemption.[186] Such a change in *Erie* doctrine would undermine much of the predictability the *Hanna* holding provides and allow a great amount of state law into federal court. The Federal Rules, when not explicit, would serve as mere empty containers waiting to be filled by state procedural rules.

B. The Effect of *Gasperini* on Choice-of-Law Questions Regarding Sufficiency of the Evidence Determinations

1. *Motion for a New Trial*

Prior to *Gasperini,* the majority rule and the rule the *Browning-Ferris*[187] Court apparently adopted was that federal standards govern a trial judge's ruling on a motion for a new trial.[188] *Gasperini* rejected this majority rule, at least as applied to the facts of the case. In conducting its *Erie* analysis, the Court found that application of the federal standard of review would lead to both forum shopping and the inequitable administration of the laws, and thus, absent countervailing considerations, the state standard should apply.[189] The Court did not recognize the federal interest in controlling the distribution of fact-finding functions between judge and jury, even though this was the exact issue in *Byrd.*[190] As discussed above, this is because the New York "deviates materially" standard is well within the review standards per-

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after actual service upon the defendant. *See id.* at 742. Federal Rule 3 provided that "[a] civil action is commenced by filing a complaint with the court." *Id.* at 750. The Court decided that this Rule had no effect upon when the statute of limitations tolled, and thus there was no direct conflict with the state rule. *Id.* at 751-52. However, Federal Rule 59, which allows courts to grant new trials "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States," is certainly broad enough to cover the issue in *Gasperini,* and would cause a direct conflict between the Federal Rule and the state rule. FED. R. CIV. P. 59.

186 For example, should state law now determine the reach of "transaction or occurrence" under Federal Rule 13(a), the compulsory counterclaim rule? FED. R. CIV. P. 13(a). Should state law determine when an error is "harmless" or when "refusal to [set aside a verdict is] inconsistent with substantial justice" under Rule 61? FED. R. CIV. P. 61.

187 492 U.S. 257 (1988).

188 *See supra* text accompanying notes 104-18.

189 *Gasperini,* 116 S. Ct. at 2220-21.

190 *Id.* at 2237 (Scalia, J., dissenting); *see also* 19 WRIGHT & MILLER, *supra* note 2, § 4511 (explaining that "[t]he most obvious context for applying the *Byrd* test is in cases involving conflicting state-federal attitudes regarding the relationship of judge and jury." (italics added)); *Leading Cases, supra* note 162, at 262.

missible under the Seventh Amendment.[191] With no constitutional provision looming, no federal countervailing considerations apply.[192]

As the majority rule no longer stands firm after *Gasperini*, it would seem that federal courts should approach the *Erie* question on a case-by-case basis.[193] According to the Court's *Hanna* analysis, it is no longer "beyond belief that parties would resort to forum shopping in order to have a more favorable rule on granting new trials."[194] When the federal standard of review of a jury's determination differs from the state's standard, the district court must engage in a largely unguided *Erie* analysis. The district court should ask whether the difference between the two standards is one that might lead to forum shopping and inequitable administration of the laws. Perhaps *Gasperini* may be of some help in this area because the Court determined that the difference between the federal "shock the conscience" test and New York's "deviates materially" test was sufficient.[195] Unless application of the state standard will give rise to a possible constitutional question, the federal interest in the application of the federal rule need not factor into the court's resolution of the *Erie* question. Even though Federal Rule 59 covers the motion for a new trial, if application of the federal standard implicates the twin aims of *Erie*, the state rule will apply. However, as in *Gasperini*, when the federal circuit court reviews the trial court's ruling, it will do so under the federal "abuse of discretion" standard.

2. *Motion For Judgment as a Matter of Law*

Prior to the 1991 amendments to the Federal Rules of Civil Procedure, the federal circuits were split regarding whether to apply the federal standard or a differing state sufficiency standard to motions for judgment as a matter of law.[196] Because the revised Rule 50(a)

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191 *See supra* text accompanying notes 170-73.

192 *See supra* Part IV.A.1.

193 In the wake of *Gasperini*, the federal courts have largely found that district courts must apply the state sufficiency of the evidence standard without engaging in an *Erie* analysis. *See* Steinke v. Beach Bungee Corp., 105 F.3d 192, 197 (4th Cir. 1997); Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18 (2d Cir. 1996); Imbrogno v. Chamberlain, 89 F.3d 87, 90 (2d Cir. 1996). However, some courts have recognized that not every deviation between state and federal sufficiency standards requires, after *Gasperini*, application of the state standard. *See* Mejias-Quiros v. Maxxam Property Corp., 108 F.3d 425, 427-28 n.1 (1st Cir. 1997) (limiting *Gasperini* to situations where "local law placed a substantive cap on . . . damages."); Torres v. Wendco of P.R., Inc., 1997 WL 135682, at *4 (D.P.R. 1997) (applying the federal standard and limiting *Gasperini* to situations in which a state sufficiency of the evidence standard is imposed by "a state statute governing awards that 'materially deviate' from awards in similar cases").

194 8 WRIGHT & MILLER, *supra* note 2, § 2802, at 45.

195 116 S. Ct. at 2221.

196 *See supra* note 90.

incorporates a federal standard, this split should be resolved.[197] However, because *Gasperini* allowed state law to flesh out the meaning of Rule 59, a similar argument could be made that state law should qualify the "reasonable jury" standard embodied in Rule 50(a). For example, a party could argue that the amount of evidence which a party must present before a reasonable jury could find a particular fact is a matter of state law. In other words, if the state standard requires a particular fact to be presented to the jury when there is a scintilla of evidence supporting the fact, then, under *Gasperini*, it could be argued that a reasonable jury could find that fact with only a scintilla of evidence presented.[198] In this way state law would qualify the federal standard.

Thus, if *Gasperini* did undermine the holding of *Hanna* and state law may qualify Rule 50, then the federal courts must again engage in an *Erie* analysis to determine whether the federal sufficiency standard or a differing state standard should control what a "reasonable jury" may find. The portion of *Gasperini* limiting the *Byrd* countervailing federal interests unsettles any prior certainty that may have existed regarding this choice-of-law question. One argument for applying federal standards follows from the *Byrd* statement that "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[199] Chief Judge Haynsworth of the Fourth Circuit compared the *Erie* problem regarding sufficiency standards upon directed verdict motions to *Byrd*:

> An equally grave disruption of the federal system would result from the application of state law rules as to the sufficiency of evidence to go to the jury. Indeed, it has been suggested, not without reason, that the Seventh Amendment commands application of federal rather than state law here. Faith in the ability of a jury, selected

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197 At least one federal court has ignored the sufficiency standard set forth in revised Federal Rule 50(a), and continued to engage in an *Erie* analysis to determine whether to apply federal or state sufficiency standards. *See* Mayer v. Gary Partners & Co., 29 F.3d 330, 333-35 (7th Cir. 1994). Other federal courts continue to apply the state sufficiency standard without acknowledging the change in Federal Rule 50. *See, e.g.*, Sokol Crystal Prods. v. DSC Communications Corp., 15 F.3d 1427 (7th Cir. 1994); Stephens, Inc., v. Geldermann, Inc., 962 F.2d 808 (8th Cir. 1992).

198 Alternatively, if the state employed the "against the weight of the evidence" standard, then, should state law qualify the "reasonable jury" standard, a reasonable jury could find the fact at issue only when doing so would not be against the weight of the evidence.

199 356 U.S. at 538. The Court had earlier stated that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935). Although these concerns were voiced before the amendments to Federal Rule 50, and thus arose when the federal courts had to consider whether the state or federal sufficiency standard should apply directly, they are also relevant when considering whether state law should qualify the federal "reasonable jury" standard.

> from a cross-section of the community, to choose wisely among competing rational inferences in the resolution of factual questions lies at the heart of the federal judicial system. That faith requires consistency within the system and does not permit the accommodation of more restrictive state laws.[200]

Unfortunately, after *Gasperini*, this argument carries little weight. Because the Seventh Amendment concerns are less weighty in the judgment as a matter of law context than in the new trial context,[201] courts resolve the Rule 50 *Erie* issue even farther from the constraints of the Seventh Amendment. The *Gasperini* Court neither acknowledged any "grave disruption" in application of the state standard nor expressly addressed the "[f]aith in the ability of a jury . . . to choose wisely among competing rational inferences . . . [that] lies at the heart of the federal judicial system."[202] There is no apparent reason why faith in the jury system should carry any more weight regarding motions for a judgment as a matter of law than regarding motions for a new trial. After *Gasperini*'s limitation of *Byrd*, no countervailing federal interest will require application of the federal sufficiency standard without qualification by a differing state standard.

CONCLUSION

One effect of *Gasperini* on the *Erie* doctrine is to assure *Byrd*'s relevance in *Erie* analysis and clarify the federal interests discussed thereunder. The *Gasperini* Court wrote:

> In *Byrd*, the Court faced a one-or-the-other choice: trial by judge as in state court, or trial by jury according to the federal practice. In the case before us, a choice of that order is not required, for the principal state and federal interests can be accommodated.[203]

To accommodate both interests, the Court ruled that the state standard must apply in the district court, but the federal review standard must apply at the appellate level.[204] But in doing so, the Court neglected to address the fact that the normal federal standard to be applied at the district court level is irreconcilable with the New York standard. In so neglecting, the Court indicated a difference between the considerations at the trial and appellate court levels. Also, while *Byrd* and *Gasperini* both faced vertical choice-of-law questions concerning the allocation of fact-finding authority between judge and jury,[205]

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200 Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061, 1065 (4th Cir. 1969) (footnote omitted). An approving discussion of this passage is found in 9A WRIGHT & MILLER, *supra* note 2, § 2525.

201 *See supra* text accompanying notes 106-12.

202 *Wratchford*, 405 F.2d at 1065.

203 116 S. Ct. at 2224 (footnote omitted).

204 *Id.* at 2225.

205 *See Leading Cases*, *supra* note 162, at 265.

they resolved those questions differently. An examination of these differences reveals that *Gasperini* clarifies the federal interests that *Byrd* first acknowledged. Only when application of a state procedural rule conflicts with a federal interest that a constitutional provision expresses should a judge faced with an unguided *Erie* question take into consideration the federal interest.[206] This change significantly decreases the amount of federal law that may apply in federal courts sitting in diversity.

A second effect of *Gasperini* is to undermine confidence in the reach of the *Hanna* holding.[207] *Hanna* held that on-point Federal Rules of Civil Procedure apply in the face of contrary state procedural rules.[208] *Gasperini,* however, required the application of a state sufficiency of the evidence standard even though Federal Rule 59 refers to a vague federal standard. If *Gasperini* indicates a turn in the Court's approach to the *Erie* doctrine, a Federal Rule will apply in the face of a contrary state rule only when the Federal Rule sets an explicit standard leaving the courts little room for interpretation, or when an unguided *Erie* analysis indicates that federal law should apply. This development will create uncertainty in the resolution of *Erie* questions and allow state procedure to control in federal court. Thus, the overall result of *Gasperini* is twofold: clarification of *Byrd* and disruption of *Hanna.*

206 *See supra* text accompanying notes 171-75.
207 *See supra* Part IV.A.2.
208 Hanna v. Plumer, 380 U.S. 460, 471 (1965).