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The Sources and Scope of Federal Procedural Common Law: Some Reflections on *Erie* and *Gasperini*

Wendy Collins Perdue*

I have been teaching *Erie*¹ for fifteen years and it does not seem to be getting any easier. The Supreme Court has not helped. *Burlington Northern Railroad v. Woods*,² *West v. Conrail*,³ *Stewart Organization, Inc. v. Ricoh Corp.*,⁴ *Chambers v. NASCO, Inc.*,⁵ and most recently *Gasperini v. Center for Humanities, Inc.*⁶ seem to create more questions than they answer. One curious phenomenon I have observed as I have guided students through this material is that the less they have heard about the Supremacy Clause and preemption, the easier *Erie* is to teach. Student confusion in this area probably reflects the way *Erie* cases are traditionally presented and understood. It is common to present *Erie* questions as if they are standard choice of law problems, that is, as if we had a valid federal rule on the one hand and a valid state rule on the other and we were picking between them.⁷ However, for students recently exposed to the Supremacy Clause, picking between federal law and state law would seem to be no choice at all—federal law is supposed to win.⁸

In *Hanna v. Plumer*⁹ and later *Stewart Organization, Inc. v. Ricoh Corp.*,¹⁰ the Supreme Court clarified that *Erie* did not eliminate the Supremacy Clause in diversity cases—where there is a valid Federal Rule of Civil Procedure or a valid federal statute on point, it applies. Despite *Hanna* and *Ricoh* and John Hart Ely's careful explanation,¹¹ this has been

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1. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
2. 480 U.S. 1 (1987).
3. 481 U.S. 35 (1987).
4. 487 U.S. 22 (1988).
5. 501 U.S. 32 (1991).
6. 116 S. Ct. 2211 (1996).
7. See, e.g., Comment, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477, 480-81 (1966).
8. See Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 314 (1980).
9. 380 U.S. 460 (1965).
10. 487 U.S. 22 (1988).
11. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

a difficult point for some courts. For example, in *Harvey's Wagon Wheel, Inc. v. Van Blitter*,¹² the Ninth Circuit, after finding that there was a valid Federal Rule of Civil Procedure on point, went on to determine whether applying the rule would violate *Erie*. Even more startling is *Kampa v. White Consolidated Industries*.¹³ In *Kampa*, the plaintiff brought suit in federal court under the Minnesota Human Rights Act.¹⁴ The plaintiff would not have had a right to a jury in state court, but the Eighth Circuit concluded she did have a right to a jury under the Seventh Amendment.¹⁵ The court then explained that "[t]he only remaining issue is whether the Seventh Amendment guarantee must be balanced against the mandate of the *Erie* doctrine."¹⁶ Ultimately, the court concluded *Erie* did not repeal the Seventh Amendment, but it reached this conclusion without citing the Supremacy Clause.¹⁷

The Eighth Circuit's suggestion that *Erie* might somehow override a provision of the Constitution is both shocking and an understandable by-product of current doctrine. While the Supreme Court has reaffirmed that federal supremacy operates when there is a Federal Rule of Civil Procedure, a statute, and, presumably, a constitutional provision that is applicable, the Court's decisions seem to suggest that federal supremacy operates differently in the case of the "typical, relatively unguided *Erie* choice."¹⁸ In these cases, courts are to focus on "outcome"¹⁹ or the "twin aims of the *Erie* rule,"²⁰ or to balance state and federal interests.²¹ Federal supremacy no longer seems relevant; indeed, some cases suggest an almost reverse supremacy for state substantive law. For example, in *Byrd*, the Court states that federal courts "must respect the definition of state-created rights and obligations,"²² implying that the presence of state law disables federal law.²³

One way that students sometimes reconcile the apparent supremacy (or at least co-equal status) of state law vis-a-vis federal court-made rules in *Erie* cases is to conclude that there is no federal common law, or that if it exists it is not preemptive, or that it does not preempt state substantive

12. 959 F.2d 153 (9th Cir. 1992).

13. 115 F.3d 585 (8th Cir. 1997).

14. See *id.* at 585.

15. See *id.* at 586.

16. *Id.* at 587.

17. See *id.*

18. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

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

20. *Hanna*, 380 U.S. at 468.

21. See *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958).

22. *Id.* at 535 (emphasis added).

23. See Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 364 (1977).

law at least in diversity cases. All of these conclusions are incorrect. *Banco Nacional de Cuba v. Sabbatino*²⁴ and *Boyle v. United Technologies Corp.*²⁵ highlight that federal courts can make federal common law that preempts state substantive law even in diversity cases.

Sabbatino and *Boyle*, along with *Clearfield Trust Co. v. United States*,²⁶ *United States v. Kimbell Foods, Inc.*,²⁷ and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,²⁸ are all what might be called "classic" federal common law cases.²⁹ The Court seems to consider *Erie* and the Rules of Decision Act irrelevant to these cases.³⁰ As the Court asserted in *Clearfield Trust*, "the rule of *Erie R. Co. v. Tompkins* does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."³¹

One explanation for ignoring *Erie* when dealing with classic federal common law cases is that on its face the Rules of Decision Act applies only where federal law is inapplicable—if there is pertinent federal common law, then that common law rule applies and the requirement to look to state law is irrelevant.³² As one article explains, the Rules of Decision Act "directs the federal courts to apply state law with regard to any issue that is not governed by a pertinent and valid federal rule. It reminds the federal courts that if a valid federal rule exists—whether constitutional, statutory, or judge-made—the federal rule shall govern."³³ Admittedly, some have argued that the Rules of Decision Act should be interpreted to limit the common law authority of federal courts, even in "classic" cases.³⁴ Whatever the strengths of these arguments, the federal courts continue to create and apply classic federal common law and for the most part do so without reference to the standard *Erie* tests.³⁵

24. 376 U.S. 398 (1964).

25. 487 U.S. 500 (1988).

26. 318 U.S. 363 (1943).

27. 440 U.S. 715 (1979).

28. 304 U.S. 92 (1938).

29. See RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE* 984 (2d ed. 1995).

30. See George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 238, 254 (1992).

31. *Clearfield Trust*, 318 U.S. at 366 (citations omitted); see also PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 858 n.2 (3d ed. 1988) (stating it is clear that *Erie* is inapplicable to issues under federal law).

32. See *DeCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973).

33. *Westen & Lehman*, *supra* note 8, at 315.

34. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 29-46 (1991).

35. As Professor Brown has explained, the usual way to reconcile federal common law with the Rules of Decision Act is "by finding that a federal statute is relevant enough to the problem at hand to satisfy the Act's reference to 'Acts of Congress.'" Brown, *supra* note 30, at 248.

If we accept that classic federal common law exists and that the test applied in *Erie* cases does not apply to classic federal common law cases, the *Erie* doctrine becomes even more mysterious. If *Erie* is irrelevant whenever a valid federal judge-made rule governs, when is the doctrine applicable? Consider, for example, *Chambers v. NASCO, Inc.*,³⁶ a case in which the Court assumes *Erie* is relevant. There the Court applied a federal judge-made rule on sanctions rather than state law.³⁷ But if *Erie* was irrelevant in *Clearfield Trust* because the issue in question was one that was governed by federal judge-made law, why was *Erie* not equally irrelevant in *Chambers*? In *Chambers* there was a pertinent and valid³⁸ federal judge-made rule. Therefore, the Court could have said, as it did in *Clearfield Trust*, that the issue is governed by federal common law and that *Erie* "does not apply."

One way to reconcile *Erie* with federal supremacy is to treat the *Erie* doctrine not as a rule for picking between state and federal law, but instead as a rule for determining whether there is a valid federal common law rule applicable in the area. This may be Justice Scalia's point in *Sun Oil v. Wortman*³⁹ when he observes: "It is never the case under *Erie* that either federal or state law—if the two differ—can properly be applied to a particular issue."⁴⁰ Thus, returning to *Chambers*, the *Erie* question in that case was not "shall we apply the federal common law rule or apply state law," but "shall we create a federal common law rule."⁴¹ Understood this way, *Erie* cases pose the same question that classic federal common law cases pose.⁴²

One might object that classic federal common law and *Erie* cases are not really the same, because the common law rules at issue in the two types of cases are quite different. Classic federal common law cases involve substantive law that is preemptive in state court. *Erie* cases, in contrast, involve federal common law that is more procedural in nature

36. 501 U.S. 32 (1991).

37. See *id.*

38. For a discussion of the difference between pertinence and validity, see Westen & Lehman, *supra* note 8, at 342.

39. 486 U.S. 717 (1988).

40. *Id.* at 727.

41. See Westen & Lehman, *supra* note 8, at 314 ("The real task under *Erie* . . . is not to choose between federal law and state law, but rather to decide if there really is a valid federal rule on the issue.").

42. See Richard N. Bourne, *Federal Common Law and the Erie-Byrd Rule*, 12 U. BALT. L. REV. 426, 468 (1983); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1958 (1991). Both Bourne and Stein argue that the proper approach in *Erie* cases is a version of the *Byrd* balancing test (rather than *Hanna*). In contrast, this Essay goes one step further and examines how so-called *Erie* cases would be analyzed if *Byrd* and *Hanna* were abandoned entirely and *Erie* cases were approached like classic federal common law cases.

and which does not apply outside of the federal courts.⁴³ It is true that the federal common law rules the Court applies in cases such as *Chambers* are procedural rules that would not preempt state law in a suit in state court. Nonetheless, these rules are no less common law rules and no less federal. There are federal statutes⁴⁴ and indeed constitutional provisions⁴⁵ that are procedural and apply only in federal court, but these are interpreted and applied like any other statute or constitutional provision. Federal common law could be approached the same way with one test, applied in all cases, regardless of whether the common law rule is substantive or procedural.

The traditional approach to classic federal common law is a two step inquiry.⁴⁶ First, the court determines whether the issue is properly subject to the exercise of federal power (the power prong). Second, the court considers whether as a matter of policy it is wise to adopt a federal rule rather than relying on state law (the choice prong). In *Clearfield Trust*, for example, the Court held that it had the power to create a federal common law rule and that a uniform national rule was appropriate.⁴⁷ In *Kimbell Foods*, the Court held that the area was properly governed by federal law, but that a uniform national rule was not required, and the Court therefore incorporated state law.⁴⁸

In this Essay I explore what traditional *Erie* cases would look like if we treated those cases just like classic federal common law cases.⁴⁹ I conclude that such an approach is consistent with *Erie* itself and is also

43. See, e.g., Brown, *supra* note 30, at 230-31 (excluding "matters of jurisdiction or procedure" from the definition of federal common law).

44. See, e.g., 28 U.S.C. §§ 1404, 1406 (1994).

45. See, e.g., U.S. CONST. amend. VII.

46. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 337 (2d ed. 1994); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 759 (1986); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 886 (1986) (questioning whether the test really is two steps); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964). Even if, as Professor Field argues, the two steps ultimately collapse into one, I think that the two step approach is helpful in illuminating traditional *Erie* cases. See Field, *supra*, at 950-53.

47. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

48. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

49. There has been extensive and interesting commentary on the scope of classic federal common law. See, e.g., REDISH, *supra* note 34, at 29-43; Brown, *supra* note 30; Donald L. Dornberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759; Field, *supra* note 46; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989). In this Essay, I will not engage that literature. Instead, my object here is to show how the standard approach to classic federal common law could be applied to *Erie* cases. A more extended analysis might examine the impact on *Erie* cases of some of the variations in the understanding of classic federal common law. This Essay does not undertake that more extended analysis.

consistent with many of the holdings, if not the language, of traditional *Erie* cases. This unified approach to substantive and procedural federal common law might have some advantages. In addition to providing conceptual uniformity, this approach would offer an escape from current *Erie* doctrine, which is confused and unsatisfactory. Under the current doctrine, the Court appears to vacillate between the balancing test of *Byrd* and the modified outcome test of *Hanna*. These two tests are largely inconsistent, and the Court has offered no explanation for how they interrelate. The Court's most recent *Erie* case, *Gasperini*, offers little guidance on how to reconcile these two conflicting tests. Instead of tinkering with *Byrd* and *Hanna*, maybe it is time to try something more dramatic. This Essay is an exploration of one such alternative approach.

I. APPLYING THE TWO PRONG TEST TO *ERIE* CASES

A. *Defining Federal Common Law*

Before examining the test for classic federal common law, it is useful to clarify what I mean by "federal common law." I am using that term in a very broad sense. I include within federal common law any court-made rule in which "the substance of that rule is not clearly suggested by federal enactments."⁵⁰ This definition includes much that might be called "interpretation." However, as one article explains:

The difference between "common law" and "statutory interpretation" is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.⁵¹

Under the Supreme Court's current approach to *Erie*, it makes a big difference whether a rule is seen as a mere interpretation or is understood instead as a common law rule.⁵² If, for example, a Federal Rule of Civil Procedure is interpreted to be "on point," it applies. On the other hand, where there is no Rule on point and instead the court creates a common law rule, an entirely different analysis applies. The difficulty of this line

50. Field, *supra* note 46, at 890; see also Merrill, *supra* note 49, at 5.

51. Westen & Lehman, *supra* note 8, at 332.

52. For a discussion of the Court's unhelpful case law on this point, see Stein, *supra* note 42, at 1959-61.

drawing is well illustrated by a recent set of lower court decisions concerning the pleading of punitive damages.⁵³

Several states have enacted rules that prohibit plaintiffs from including claims for punitive damages in their original complaint.⁵⁴ Instead, the plaintiff must move for permission to include such a claim. For example, Florida law provides, "In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages."⁵⁵ Lower courts have split on the question of whether a federal court is required to follow such a rule.⁵⁶ Much of the analysis focuses on the meaning of Rules 8 and 9. My own view is that the satellite proceedings concerning punitive damages that these state rules require are indeed inconsistent with the Federal Rules of Civil Procedure, but I would be hard pressed to say whether my conclusion constitutes an "interpretation" of the Rules or a common law rule that is simply derived from the overall structure of Rules 8, 9, 11, and 15. Rather than attempt to differentiate between interpretation and common law, I, like many other commentators, use a very broad definition of common law.

B. *The Sources of Federal Power*

In classic federal common law cases, the first step is to identify the source of federal power. The question posed by the power prong reflects one of the central points of *Erie*—the exercise of federal power must be grounded in a federal enactment (*i.e.*, the Constitution, statutes, or treaties). The absence of relevant state law does not create federal power. Thus, even if *Swift v. Tyson*⁵⁷ were correct that the Rules of Decision Act refers only to state statutory law and state common law on "local" matters, this absence of state law does not create federal power to fill in the gaps. If we take seriously this central point of *Erie*, then every so-called *Erie* case should begin not with a discussion of the nature of the

53. Cases applying the state rule include: *Teel v. United Techs. Pratt & Whitney*, 953 F. Supp. 1534, 1537-39 (S.D. Fla. 1997); *Sanders v. Mayor's Jewelers, Inc.*, 942 F. Supp. 571, 575 (S.D. Fla. 1996); *Windsor v. Guarantee Trust Life Ins. Co.*, 684 F. Supp. 630, 633 (D. Idaho 1988); *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988). Cases not applying the state rule include: *Serfecz v. Jewel Food Stores, Inc.*, No. 92-C4171, 1997 U.S. Dist. LEXIS 13270 (N.D. Ill. Aug. 26, 1997); *Tutor Time Child Care Sys., Inc. v. Franks Inv. Group*, 966 F. Supp. 1188, 1193 (S.D. Fla. 1997); *NAL II, Ltd. v. Tonkin*, 705 F. Supp. 522, 527-28 (D. Kan. 1989).

54. See, e.g., FLA. STAT. ANN. § 768.72 (West Supp. 1998); IDAHO CODE § 6-1604(2) (1990); 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 1992); MINN. STAT. ANN. § 549.191 (West 1988); N.D. CENT. CODE § 32-03.2-11(1) (Supp. 1997).

55. FLA. STAT. ANN. § 768.72.

56. See *supra* note 53.

57. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

state law, but instead with a discussion of the source of federal authority. Of course, where there is a Federal Rule of Civil Procedure or a statute involved, the courts do begin by looking at that basis for federal authority. However, even if there is no enactment specifically on point and we are therefore within the realm of federal common law, courts should still begin by identifying the source of their common law authority.

There are a number of possible sources of relevant common law authority. One arguable source that *Erie* itself eliminates is the grant of diversity jurisdiction. Although one could argue that the grant of diversity jurisdiction confers common law authority on the federal courts, just as the grant of admiralty jurisdiction has been so construed,⁵⁸ *Erie* appears to reject this proposition.⁵⁹ Even eliminating diversity jurisdiction as a source of procedural federal common law, many others remain.

First, the court may make procedural common law in order to implement the substantive provisions of the Constitution, federal statutes, or of other federal common law. For example, in *New York Times v. Sullivan*,⁶⁰ the Court held that defamation cases must be proved with "convincing clarity."⁶¹ This burden of proof rule derived from the First Amendment.⁶² In *McDonnell Douglas Corp. v. Green*,⁶³ the Court created burden of proof rules for Title VII cases. More recently, in *Leatherman v. Tarrant County*,⁶⁴ the Court hinted that it might create federal common law rules of pleading as an augment to the federal common law doctrine of immunity.⁶⁵ Of course, in all of these examples, the common law rules, though procedural in some sense, are bound up with federal substantive rights and hence are likely to be applicable in both state and federal court.

Second, certain constitutional provisions and statutes may provide a basis for common law rule-making that is applicable only in federal court. For example, the federal courts have long recognized that they have "inherent power" to create common law rules concerning contempt

58. See *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95-96 (1981); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (stating that Congress has the ultimate power to determine maritime law); David Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 159 (discussing that federal law governs admiralty cases).

59. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973); Ely, *supra* note 11, at 713; Martha Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 306 (1992).

60. 376 U.S. 254 (1964).

61. *Id.* at 285-86.

62. See *id.* at 285.

63. 411 U.S. 792, 802 (1973).

64. 507 U.S. 163 (1993).

65. See *id.* at 166-87.

of court.⁶⁶ In addition, federal courts have created a federal common law doctrine of forum non conveniens applicable in federal court.⁶⁷ Although the Court has not been clear about its sources of authority for these doctrines, both doctrines may be based on the Article III "judicial power"⁶⁸ or the statutes creating the federal courts.⁶⁹

Finally, as *Hanna* recognized, there is federal authority to promulgate rules for the general operation of the federal courts.⁷⁰ This power extends to all rules "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."⁷¹ Relying on its power to create a federal court system and the Necessary and Proper Clause, Congress enacted the Rules Enabling Act, and the Court in turn has promulgated the Federal Rules of Civil Procedure.⁷² The Rules, just like any statute, provide a basis for common law law-making. As Professor Burbank has observed, "[i]n authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules."⁷³

The federal courts' power to make common law based on the Federal Rules of Civil Procedure carries a significant constraint. The Rules Enabling Act authorizes rules of "practice and procedure"⁷⁴ and prohibits rules that "abridge, enlarge or modify any substantive right."⁷⁵ Where courts are engaged in interstitial law-making and filling the gaps in the

66. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991) (discussing various inherent powers); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (noting the inherent power of a court to dismiss a case *sua sponte* for lack of prosecution); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (noting inherent power to fine for contempt).

67. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

68. U.S. CONST. art. III.

69. Absent statutory authority, Article III may grant limited inherent power over procedure to the federal courts. See Michael Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 186-93 (1979) (arguing that courts have inherent authority, without statutory authorization, to make procedural rules that are "indispensable to the court's functioning"); William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 129 ("Anything broader than a power deemed indispensable to enable a court to proceed with a given case appears to require statutory support.").

70. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

71. *Id.*

72. See *id.*

73. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 773 (1986).

74. 28 U.S.C. § 2072(a) (1994).

75. *Id.*

Federal Rules of Civil Procedure, the courts should be constrained by these limits of the Rules Enabling Act. As the Court observed in *Cooter & Gell v. Hartmax Corp.*,⁷⁶ "[w]e interpret [a Federal Rule of Civil Procedure] in light of the scope of the congressional authorization."⁷⁷

The Rules Enabling Act may constrain courts, even where they are not directly interpreting a Federal Rule of Civil Procedure but are instead creating a federal common law rule of "practice and procedure." As Professors Westen and Lehman argue, "the statutory prohibition on rules that abridge 'substantive rights' must be deemed to apply to judge-made rules too; otherwise, judges could do through common law adjudication what they cannot do through the carefully circumscribed and safeguarded mechanisms used to create the federal rule of civil procedure."⁷⁸ Thus, the constraints of the Rules Enabling Act should apply regardless of whether courts are interpreting a promulgated Federal Rule of Civil Procedure or creating a common law rule of procedure.

Some may recoil at this argument that jumbles Rules Enabling Act cases with Rules of Decision Act cases. After *Hanna* and Professor Ely made such progress in breaking them apart, it may seem like heresy to put them back together. As odd as this conjunction may seem, I think it flows from the simple step of focusing as an initial matter on the source of the federal common law authority. For example, consider *Hanna*. The Court asserts that even if the service of process issue in question were not governed by Rule 4,⁷⁹ federal common law could properly be applied.⁸⁰ But what would be the source of the Court's authority to make such a common law rule? If its source of authority is the general power to create rules for the court's operation, then such a common law rule should be constrained by the Rules Enabling Act.

With respect to promulgated Rules, the Court has in fact paid little attention to the limitations of the Rules Enabling Act. It has reasoned that in the promulgation process, the Rules were reviewed and approved by the Advisory Committee, the Court, and Congress, and that the Rules therefore carry a heavy presumption of validity.⁸¹ However, once we recognize that the Rules, like a statute, provide a basis for common law elaboration, the limitations of the Rules Enabling Act become more significant. While the literal text of the Rules may have been reviewed

76. 496 U.S. 384 (1990).

77. *Id.* at 391.

78. Westen & Lehman, *supra* note 8, at 365; *cf.* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.").

79. FED. R. CIV. P. 4.

80. See *Hanna v. Plumer*, 380 U.S. 460, 466 (1965).

81. See *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987).

in the promulgation process, the common law elaborations obviously have not been reviewed. Where common law rule-making is involved, courts should make a more careful inquiry, because the procedural safeguards of the promulgation process will not have been used.

There are two important limitations on what I have said so far. First, the fact that courts have the power to make a common law rule does not end the inquiry, it will still be necessary to decide whether to exercise that power (the choice prong). Second, the Rules Enabling Act does not limit all federal common law, only that which is based on the power to create general rules for court operations. Other federal statutes and constitutional provisions are possible sources of federal common law authority that would not be limited by the Rules Enabling Act.

C. *The Choice Prong*

If a court determines that it has a basis to create federal common law, that does not end the inquiry—the court next must decide whether to create a uniform federal rule or to apply state law. The choice prong is well illustrated by *DeSylva v. Ballentine*.⁸² In *DeSylva*, the Court applied a state law definition of “children” in construing the meaning of that word in the federal Copyright Act.⁸³ The Court noted that “[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”⁸⁴ Similarly, in *Kimbell Foods*, the Court applied state law in determining whether a federal government lien takes priority over a private lien when the government seeks to recover on a defaulted loan.⁸⁵ The Court explained:

Undoubtedly, federal programs that “by their nature are and must be uniform in character throughout the Nation” necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.⁸⁶

Professor Field well summarized the test for this stage: “federal rules will be made when there is a need for national uniformity that outweighs

82. 351 U.S. 570 (1956).

83. See *id.* at 580-82.

84. *Id.* at 580.

85. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

86. *Id.* at 728-29 (citations omitted).

the need for uniformity within a state; or when national interests require. But state law should apply whenever that result is not inconsistent with federal purposes."⁸⁷

Much of what has been described as the "Rules of Decision Act" analysis,⁸⁸ can be understood to fall under this choice prong. Thus, *Hanna*'s "twin aims of *Erie*" analysis and the *Byrd* balancing test can be seen as different approaches to the choice prong. Indeed, both *Hanna* and *Byrd* seem to reflect portions of the test used in other areas of federal common law and captured by Professor Field's synthesis quoted above. *Hanna* seems to focus on the need for intrastate uniformity; *Byrd* includes the idea that there may be a need for a national standard. But both *Hanna* and *Byrd* are inadequate tests for the choice prong and, of the two, *Hanna* is the least satisfactory.

Hanna explained that in deciding whether to apply a state or federal rule, courts should focus on the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁸⁹ The test appears to focus on the litigants and to prohibit federal courts from adopting common law rules that have a significant impact on litigants. Others have criticized this dicta in *Hanna*,⁹⁰ and I add my voice to that chorus.

The supposed focus on affecting choice of forum has always been unclear. In *Hanna* itself, the Court asserts that different service rules would not affect choice of forum, but this is not so obvious. Under the Massachusetts service rule, it was necessary to serve the executor in person.⁹¹ Under the federal rule, it was sufficient to leave process at the executor's place of abode.⁹² If there is little time left before the expiration of the statute of limitations, this difference could be significant to litigants.

Maybe the court is not supposed to focus on the specifics of the actual case, but to imagine an "average" case. But even this qualification does not help much. For example, a number of states now require that in particular types of actions, such as medical malpractice, attorneys must file affidavits stating that they have consulted an expert and the expert

87. Field, *supra* note 46, at 962.

88. Redish & Phillips, *supra* note 23, at 373.

89. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

90. See, e.g., Redish & Phillips, *supra* note 23, at 373-77; Stein, *supra* note 42, at 1946-53.

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

92. See *id.* at 461-62.

has found the case meritorious.⁹³ Federal district courts have split on whether these requirements should apply in federal courts.⁹⁴

The Tenth Circuit recently held such a state law requirement to be applicable in federal court because of forum shopping concerns.⁹⁵ The court explained: "A plaintiff alleging professional negligence is likely to seek a forum without the certificate of review hurdle either to avoid extra cost, to give himself or herself more time to build a meritorious case, or to increase the settlement value of his or her claims once litigation begins."⁹⁶ The court's analysis seems to assume that in most cases or in the average case, plaintiffs' lawyers do not consult experts early in the case and if they do when forced to do so, the expert is likely to find the case to be without merit. The court's analysis includes significant assumptions about what is normal practice and what changes are important enough to affect a litigant's choice of forum. These are empirical questions, yet, the courts show no particular interest in consulting empirical data. They rely instead on hunch and instinct concerning the factors that affect a lawyer's choice of forum. It is not surprising that courts have different hunches and, thus, reach different conclusions.

What factors affect a litigant's choice of forum? Professor Casad authored an entire book on the subject.⁹⁷ In addition, there are a number of empirical studies on what affects choice of forum as between state and federal courts.⁹⁸ In these studies, the pace of litigation was a major factor

93. See generally Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 538-75 (1997) (analyzing various states' approaches to certification of medical malpractice actions).

94. Compare *Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988) (applying state law), with *Doe v. City of Chicago*, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994) (not applying state law), and *Boone v. Knight*, 131 F.R.D. 609, 611-12 (S.D. Ga. 1990) (not applying state law).

95. See *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1540-41 (10th Cir. 1996).

96. *Id.* at 1541.

97. See ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* (1988).

98. See Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y REV. 749, 749-74 (1980); James D. Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 BYU L. REV. 545, 550-53; Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 94-104 (1980); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315, 1352-71 (1984); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 392-423 (1992); Jolanta Perlstein, *Lawyers' Strategies and Diversity Jurisdiction*, 3 L. & POL'Y Q. 321, 327-36 (1981); Marvin R. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 933-40 (1962); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 180-95 (1965).

affecting choice of forum.⁹⁹ One study found that in the "rocket docket" of the federal district of Eastern Virginia, a whopping 71% of the attorneys indicated that the faster court process in federal court affected their choice of forum.¹⁰⁰ If we take seriously *Hanna's* concern about affecting choice of forum, then any court-made innovations intended to speed up the litigation process are suspect under *Erie*.¹⁰¹

Also suspect would be the Supreme Court's efforts to make summary judgment more readily available in federal court. In a study of removable cases, nearly half of the defense attorneys reported that the availability of summary judgment was an important factor in their forum choice.¹⁰² Of course the Federal Rules of Civil Procedure address summary judgment, but the Rules do not explicitly set forth the standard for granting summary judgment. Rule 56 provides that summary judgment shall be granted if there is "no genuine issue of material fact," but the Rule does not define "genuine." Some states consider the presence of a "scintilla of evidence" sufficient to create a genuine issue.¹⁰³ If we take seriously the concern about affecting choice of forum, then

99. See Bumiller, *supra* note 98, at 762-67; Marvell, *supra* note 98, at 1359; Miller, *supra* note 98, at 404-07; Perlestein, *supra* note 98, at 329.

100. Miller, *supra* note 98, at 406.

101. It may be the case that such docket control techniques are authorized by the Civil Justice Reform Act (CJRA) and therefore are valid regardless of the effect on litigant equality or forum shopping. *But cf.* Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261, 268 (5th Cir. 1997) (holding that a local rule concerning fee shifting is not within the scope of the CJRA). What is noteworthy about the CJRA is that it does not identify the effect on forum shopping as a relevant consideration.

Professor Ely argues "forum shopping is not an evil per se," but the presence of forum shopping constitutes good evidence that the difference between the state and federal rules is sufficient to produce unfairness between litigants who do and do not have access to federal court. Ely, *supra* note 11, at 710. He summarizes the twin aims of *Erie* test as follows:

[A] federal court may adhere to its own rules in diversity cases insofar, but only insofar, as they are neither materially more or less difficult for the burdened party to comply with than their state counterparts, nor likely to generate an outcome different from that which would result were the case litigated in the state court system and the state court rules followed.

Id. at 714. Applying this test, he argued that the service rules at issue in *Hanna* were not significantly different in burden. See *id.* at 717-18. He noted, however, that if "one of the time limits was so much shorter than the other that it rendered compliance on the part of a diligent litigant or attorney substantially more burdensome, the Court presumably would require that the state rule be followed." *Id.* at 714 n.123. This analysis would seem to apply equally well to docket control methods that substantially increased or decreased the time to trial. Yet, I think it unlikely the Court would ever find that such rules violate *Erie*.

102. See Miller, *supra* note 98, at 418.

103. See, e.g., *Brown v. Turner*, 497 So. 2d 1119, 1120 (Ala. 1986).

*Anderson v. Liberty Lobby, Inc.*¹⁰⁴ and *Celotex Corp. v. Catrett*¹⁰⁵ may be suspect under *Erie*.¹⁰⁶

The supposed concerns about litigant equality and affecting choice of forum also present another problem: it is difficult to explain why the Supreme Court and Congress are largely indifferent to this effect in the promulgation of the Federal Rules of Civil Procedure.¹⁰⁷ The discovery rules were a major innovation of the Federal Rules of Civil Procedure, and studies indicate that substantial differences in the availability of discovery affect choice of forum.¹⁰⁸ Why is it that a factor we think is dispositive with respect to a federal common law rule is irrelevant in the promulgation of the Federal Rules of Civil Procedure? One might reply that the legislature is in the best position to determine whether an effect on choice of forum is justified by other considerations. Congress reviews promulgated Rules, but has no opportunity to review common law rules. Therefore, courts, which are not as competent to make the value judgment, should be vigilant in preventing any such effect in common law rules. Yet I see little evidence that Congress or the Supreme Court, in promulgating the Rules, has paid much attention to the effect on choice of forum,¹⁰⁹ and therefore this theory does not ring true.

The *Hanna* Court purports to derive its focus on litigant equality from *Erie*.¹¹⁰ Although *Erie* does assert that *Swift v. Tyson* "rendered impossible equal protection of the law,"¹¹¹ the inequality the Court

104. 477 U.S. 242 (1986).

105. 477 U.S. 317 (1986).

106. Summary judgment rules may also affect ultimate outcome although it would be very difficult to determine how often this will be the case. Many plaintiffs who survive under the scintilla of evidence test may lose at trial—many, but surely not all. Moreover, a high percentage of these cases probably settle, but they may settle for amounts larger than zero, which is what the plaintiffs would receive if they lost on summary judgment.

107. As one article observes, "the forum shopping that is allowed under the Federal Rules of Civil Procedure is certainly awkward." Redish & Phillips, *supra* note 23, at 377 n.121.

108. See Summers, *supra* note 98, at 937-38; Note, *supra* note 98, at 188-90; see also CASAD, *supra* note 97, § 2.09.

109. One occasion in which Congress did consider the effect of a Rule on choice of forum was in connection with a proposed federal evidence rule of privilege. See 2 DAVID LOUISELL & CHRISTOPHER MUELLER, *FEDERAL EVIDENCE* § 200 (2d ed. 1985). The Rules Advisory Committee had proposed a uniform set of evidence rules that would have altered many evidentiary privileges as recognized by state law. See *id.* Congress ultimately rejected this proposal and drafted its own rule that recognized state privileges "where an element of a claim or defense [is one] as to which State law supplies the rule of decision." FED. R. EVID. 501. While a concern for forum shopping was one of the expressed reasons for congressional intervention, the Committee's proposed privilege rule was highly controversial on the merits because it would have eliminated certain well-recognized privileges. See 2 LOUISELL & MUELLER, *supra*, § 200. In any event, the attention to forum shopping in connection with Rule 501 stands as the exception rather than the rule.

110. See *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

111. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938).

focuses on is not different treatment of litigants but the fact that under *Swift v. Tyson* certain people were permitted to behave differently in the world.¹¹² This is evident from the examples of inequality that the Court gives: a party that was diverse was permitted to enter into an exclusive contract¹¹³ or to contract out of liability when a non-diverse party could not do the same.¹¹⁴ These examples suggest that it was the differing rules concerning what Justice Harlan later called "primary activity of citizens" that "give rise to a debilitating uncertainty in the planning of everyday affairs."¹¹⁵

The Supreme Court's decision in *Chambers v. NASCO, Inc.*¹¹⁶ provides a useful example. In *Chambers*, the district court, relying on its inherent power to sanction bad faith litigation conduct, ordered the defendant to pay all of the plaintiff's attorney fees, totaling nearly one million dollars.¹¹⁷ Although state law would not have permitted such an award, the Supreme Court upheld the sanction.¹¹⁸ The Court explained that the application of a different rule in federal court would not promote forum shopping, because imposition of the sanction "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."¹¹⁹ This supposed explanation simply ignores the possibility of forum shopping. The plaintiff who fears such conduct from the defendant may prefer federal court, the defendant who intends to engage in such conduct may prefer state court.

The Supreme Court does no better with the second of the twin aims. The Court writes: "Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed."¹²⁰ Here, the Court seems to say that there is no inequitable administration of the laws because the federal rule is fair. I believe this misconstrues *Hanna*. The "twin aims of *Erie*" test does not invite federal

112. See *id.* at 73-76.

113. See *id.* at 73.

114. See *id.* at 75.

115. *Hanna*, 380 U.S. at 474. Ely argues that the concern about uncertainty is overdrawn. See Ely, *supra* note 11, at 711; see also Stein, *supra* note 42, at 1951. He notes that in most cases the conflicting rules are not mutually exclusive and, therefore, one can comply with both rules by complying with the more demanding of the rules. See *id.* I believe that Ely underestimates the impact of conflicting rules. See Redish & Phillips, *supra* note 23, at 382. Imagine, for example, a highway with two different posted speed limits. Although people could simply comply with the lower limit (and thereby comply with both), I would expect a lot of confusion and additional accidents.

116. 501 U.S. 32 (1991).

117. See *id.* at 40-41.

118. See *id.* at 55-58.

119. *Id.* at 53.

120. *Id.*

courts to make an independent assessment of the fairness of a rule. Instead, it focuses on the differences between what the state and federal courts would do. The *Chambers* Court just ignores the fact that the same conduct in state court would not have cost a million dollars.

I believe *Chambers* is rightly decided but not for the reasons the Court gives. Analyzed under the choice prong, this is a case in which it is appropriate to apply a federal rule. A different federal sanction for litigation behavior may well alter the attractiveness of federal courts and can produce differences of great significance to the parties. However, different sanctions are unlikely to alter primary behavior or cause the kind of "confusion" about which *Erie* and the choice prong express concern. Thus, there is no particular need for intrastate uniformity. On the other hand, in order to function effectively, federal courts need to be able to control litigant misconduct.

*Byrd*¹²¹ comes closer to embodying the traditional choice prong for federal common law, but it too has problems. First, although *Byrd* is ambiguous, one plausible reading is that federal courts are prohibited from displacing a state substantive interest.¹²² I believe this interpretation is inconsistent with principles of federal supremacy. There may be some small enclave of state supremacy,¹²³ but that enclave does not include areas such as general tort or contract law. After *Boyle* and *Sabbatino*, there is no question that classic federal common law can displace state substantive law in these areas. It is necessary, of course, to determine whether there is a basis for federal common law, but having found such a basis, the scope of federal law should not be dependent on the existence of state law. The presence of a state substantive purpose is important, but not because it disables federal law. Instead, it is important because where a state rule is bound up with a state substantive right, there is likely to be a high need for intrastate uniformity.

To summarize, in deciding whether to apply a state rule or a federal procedural common law rule, a court should do what it would do in any federal common law case. First, it should identify the source of its common law law-making authority, along with any limitations that might accompany that source. Second, assuming there is a basis for a federal common law rule, the court should proceed to the choice prong and consider whether the national interest requires a federal rule or the need for national uniformity outweighs the need for uniformity within a state.

121. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958).

122. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 218 (2d ed. 1990).

123. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). But see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

II. *GASPERINI*

A. *The Supreme Court's Opinion*

The Supreme Court's most recent *Erie* case is *Gasperini v. Center for Humanities, Inc.*¹²⁴ Analyzed under more standard *Erie* doctrine, *Gasperini* seems confusing and unsatisfactory. On the other hand, I believe the proposed two prong approach can illuminate the case in ways that traditional *Erie* doctrine does not.

In *Gasperini*, the plaintiff brought a diversity suit based on tort and contract law, alleging that the defendant had lost photographic transparencies owned by the plaintiff.¹²⁵ The jury awarded \$450,000 in compensatory damages, and the district court denied a motion for a new trial.¹²⁶ On appeal, the Second Circuit held that the proper standard for reviewing the size of the verdict is the standard provided by New York law—whether the verdict “deviates materially from what would be reasonable compensation.”¹²⁷ The New York standard requires closer judicial review of verdicts than the standard traditionally applied in federal court of whether the verdict is “so exorbitant that it shocked the conscience of the court.”¹²⁸ The Second Circuit ordered a new trial unless the plaintiff agreed to an award of \$100,000.¹²⁹

The Supreme Court held that the federal trial court should have used the New York standard in reviewing the verdict.¹³⁰ It also held that federal courts of appeal should not independently review verdicts for reasonableness, as New York law requires, but should review under an abuse of discretion standard.¹³¹ Thus, the district court standard of review is governed by state law, while the appellate standard of review is governed by federal law.

The *Gasperini* Court begins its analysis with the assertion that “[u]nder the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”¹³² The Court noted that distinguishing between substance and procedure “is sometimes a challenging endeavor,”¹³³ and went on to describe the *Guaranty Trust* “outcome-determina-

124. 116 S. Ct. 2211 (1996).

125. *See id.* at 2216.

126. *See id.*

127. *Id.* at 2217 (citing N.Y. C.P.L.R. § 5501(c) (McKinney 1995)).

128. *Id.*

129. *See id.*

130. *See id.* at 2219.

131. *See id.* at 2223.

132. *Id.* at 2219.

133. *Id.*

tion test" and the *Hanna* "twin aims of *Erie*" test.¹³⁴ The Court summarized the appropriate test by quoting from *Hanna*: "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 the federal court?'"¹³⁵ Thus, the Court seems to suggest that the focus should be entirely on actual and would-be litigants, and that the appropriate test is whether the difference in rules is significant enough that it will influence the choice of those who have the option of federal court and will leave those who do not have such an option wishing that they did.

Despite the articulation of a litigant-focused test, the Court offers no analysis of how the difference in rules concerning standards for new trials would affect litigants. The Court's failure is probably not surprising, because such an analysis would be very problematic. The difference in standards is likely to affect only those cases in which the verdict is (or the lawyers predict it will be) greater than the "materially deviates" standard, but less than "shocks the conscience." The Court offers no analysis of how large this group of cases might be and indeed never even asserts that this is a difference that would affect choice of forum. Instead, the Court focuses its attention not on the litigants but on New York law and concludes that the statute is substantive: "In sum, § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive. It *thus* appears that if federal courts ignore [the New York standard] . . . "substantial" variations between state and federal [money judgments]' may be expected."¹³⁶ The use of "thus" in the above quote is quite striking. The Court simply asserts that because the state law is "substantive," it automatically follows that failure to apply that law will produce substantial variations.

The Court supports its conclusion of substantial variation by pointing to the fact that the Second Circuit significantly lowered the award.¹³⁷ There are two problems with this conclusion. First, the Court made no effort to distinguish *Chambers* in which a million dollars in attorney fees was not sufficient to trigger the application of state law. In *Gasperini*, in contrast, the difference between the jury's award and the Second Circuit's remittitur was a substantially smaller sum of \$350,000. Second, given the Court's conclusion about the standard of review for courts of appeal, it is odd to put much weight on the findings of the Second Circuit. The Second Circuit ordered the award remitted to \$100,000, but

134. See *id.* at 2220.

135. *Id.*

136. *Id.* at 2220-21 (emphasis added) (citations and footnote omitted).

137. See *id.* at 2221 n.11.

that was vacated by the Supreme Court.¹³⁸ In fact, on remand, the District Court applied the New York standard and ordered a remittitur of only \$75,000, lowering the verdict from \$450,000 to \$375,000.¹³⁹ The court explained that its analysis was based on the entire record, including review of exhibits that were not before the court of appeals because they were not in the record sent to that court.¹⁴⁰ With prejudgment interest of 9%, the total award was \$575,450.04, about \$10,000 more than the original judgment plus interest of \$564,750.¹⁴¹

The Supreme Court's analysis of the standard of appellate review presents different problems. In this portion of the opinion, the Court focused on *Byrd* and the Reexamination Clause of the Seventh Amendment.¹⁴² Interestingly, in this portion of the opinion, the Court made no reference to its prior conclusion that the state law was substantive. This omission is significant because *Byrd* implies that federal courts *must* apply state substantive rules and should consider countervailing federal interests only in the absence of a state substantive right.¹⁴³ The Court made no mention of this interpretation of *Byrd* and simply describes *Byrd* as holding that "the *Guaranty Trust* 'outcome-determination' test was an insufficient guide in cases presenting countervailing federal interests."¹⁴⁴ The Court then examined the countervailing federal interest presented by the Reexamination Clause.¹⁴⁵

As in *Byrd* itself, the Court is unclear as to whether the Seventh Amendment requires the result. Some have read *Gasperini* as holding that the Seventh Amendment prohibits de novo review.¹⁴⁶ However, if this were true, extended discussion of *Byrd* would be unnecessary. Indeed, any discussion of *Byrd* would be unnecessary. All the Court would have to do would be to state what the Seventh Amendment required and then cite the Supremacy Clause. With what seems to be deliberate ambiguity, the Court states that "practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the

138. See *id.* at 2225.

139. See *Gasperini v. Center for Humanities, Inc.*, 972 F. Supp. 765, 773 (S.D.N.Y. 1997).

140. See *id.* at 769.

141. See Letter from Samuel A. Abady to Wendy Collins Perdue (Oct. 17, 1997) (on file with the author). Given that the Second Circuit will be reviewing this award under an abuse of discretion standard, the remittitur may well stand.

142. See *Gasperini*, 116 S. Ct. at 2221.

143. See *id.* at 2221-22.

144. *Id.*

145. See *id.* at 2222-23.

146. See 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4511 (2d ed. Supp. 1997).

court of appeals, primary responsibility for application of § 5501(c)'s 'deviates materially' check."¹⁴⁷

Looking at the opinion as a whole, one interpretation might be that the Court has essentially adopted the approach set forth by Professor Chemerinsky. He has offered the following approach to *Erie* cases:

[I]f there is a conflict between federal and state law, in deciding whether to apply state or federal law, a three-step inquiry is used. 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.¹⁴⁸

If the Court meant to adopt this approach, it could have said so more clearly. For example, with respect to the district court's standard for reviewing verdicts, the Court gave no consideration to whether there were countervailing federal interests. One could argue that a lower standard for new trials may increase the number of trials in federal court and impose significant burdens. This may not be a sufficiently large or likely federal interest, but it would have been helpful for the Court to so state. Similarly, as to the standard for appellate review, the Court gave no consideration to whether this significantly affects outcome or choice of forum. The Court may have thought that its discussion of the effect of the trial standard extended to the standard for appellate review, though one could argue that differences in standards of review would not result in significant outcome differences or likely affect choice of forum.¹⁴⁹

I will not belabor the shortcomings of *Gasperini*, others have analyzed these in greater detail.¹⁵⁰ Instead, I will turn to how *Gasperini* would have been analyzed under the two prong analysis of federal common law.

B. *Gasperini Under the Two-Pronged Approach*

Under the proposed approach, the first question is: What is the basis for a federal rule? As to the standard for granting a new trial, an obvious source of authority is Rule 59.¹⁵¹ Justice Scalia argues in his dissent that

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

148. CHEMERINSKY, *supra* note 46, at 308.

149. See *infra* text following note 164.

150. See Richard Freer, *Some Thoughts on the State of Erie After Gasperini*, 78 TEX. L. REV. (forthcoming 1998).

151. FED. R. CIV. P. 59.

Rule 59 controls,¹⁵² but the Rule does not in fact explicitly state a standard for granting new trials. Nonetheless, the Rule does refer to the "reasons" for granting new trials,¹⁵³ and this provides a plausible basis for interstitial common law rule-making.

If Rule 59 is the source of federal authority for the "shocks the conscience" federal common law rule, the Court must next consider the limitations imposed by the Rules Enabling Act. Interestingly, although the Court in *Gasperini* purported to do a "twin aims of *Erie*" analysis, its actual focus was on whether the New York rule involves substantive rights. Thus, the Court's actual analysis can easily be understood as an inquiry into whether a federal standard for granting new trials would "abridge, enlarge or modify any substantive right."¹⁵⁴ If a federal common law rule that is based on Rule 59 violates the Rules Enabling Act, then that common law rule fails the power prong and the inquiry ends.

As the foregoing discussion highlights, the proposed two-pronged approach begins by focusing on the scope of federal authority rather than beginning with an examination of state law. The significance of this approach is illustrated by a recent post-*Gasperini* district court case. In *Torres v. Wendco of Puerto Rico, Inc.*,¹⁵⁵ the district court found that there was "no state statute" and no "substantive state laws governing limitations in jury awards," and it therefore applied the federal "shocks the conscience" standard of review in deciding whether to grant a remittitur.¹⁵⁶ But what is the source of federal authority to create the "shocks the conscience" standard? As I argued at the outset, a fundamental holding of *Erie* is that federal courts must have a basis for all exercises of federal authority. The absence of a state statute does not create federal authority. The square holding of *Gasperini* is that Rule 59 does not provide a standard for the grant of new trials. Moreover, if the interstitial creation of a common law rule violates the Rules Enabling Act, then *Torres* is clearly wrong.

The proposed analysis also illuminates an issue not addressed by *Gasperini*—the standard for new trials in federal question cases. Rule 59's silence on the proper standard for the grant of a new trial extends to

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

153. Rule 59(a) provides:

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

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

154. 28 U.S.C. § 2072(b) (1994).

155. No. 95-1844 (CCC) (JA), 1997 U.S. Dist. LEXIS 3182 (D.P.R. Jan. 15, 1997).

156. *Id.* at *11-*12.

federal question cases. If the federal courts are to use a federal standard in these cases, that standard would have to be a common law rule, and the critical first question is the source of authority for such a rule. In federal question cases, the court could derive a standard from the federal statute that provides the underlying cause of action. Under this approach, there may not be a uniform standard for all federal question cases because the analysis would have to be done statute by statute.¹⁵⁷ In addition, with respect to some or all federal statutes, the court could borrow the relevant state standard as is common with statutes of limitation.¹⁵⁸

Turning to the standard of appellate review, the federal courts have another possible source of common law authority—the Seventh Amendment.¹⁵⁹ Of course, if the Seventh Amendment requires a particular standard of appellate review, then that standard must be applied. *Erie* does not alter the supremacy of the Constitution. However, in *Byrd* and again in *Gasperini*, the Court refers to “the influence—if not the command—of the Seventh Amendment.”¹⁶⁰ This suggests that the Seventh Amendment may provide a basis for common law rule-making in which the court-created rule is not itself of constitutional dimensions.¹⁶¹ This is similar to the common law rule in *Sabbatino*, which, although based on the Constitution, could be altered by Congress.¹⁶² The Court has suggested that the same may be true of its rules concerning immunity.¹⁶³

Assuming that the Seventh Amendment provides the source of federal power to create a federal common law rule concerning the standard of review, the next step is the choice prong. This step requires an analysis of the need for a national standard versus the need for intrastate uniformity. The Court seems to interpret the Seventh Amendment as embodying a strong preference for jury trials and for trial, rather than

157. Cf. Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 705-08 (1988) (discussing federal question cases and Rule 3).

158. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 275 (1985).

159. U.S. CONST. amend. VII.

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

Id.

160. *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222 (1996) (quoting *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958)).

161. Cf. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

162. See 22 U.S.C. § 2370(e) (1994).

163. See *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982); *Butz v. Economou*, 438 U.S. 478, 500, 504 (1978).

appellate, determinations of fact. Against this strong national policy, the Court must next consider the need for intrastate uniformity. Although the Court does not frame its analysis in those terms, the Court does conclude that "New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function."¹⁶⁴

The Court seems to be suggesting that application of a different standard of review in federal court would not create confusion or other intrastate complications. This is a plausible conclusion. Even if the New York law requiring de novo review was intended to lower awards, the standard of appellate review may have very little impact on the aggregate size of awards. Under de novo review, the court of appeals is more likely to substitute its judgment for that of the trial court. This means that defendants have two opportunities to seek remittitur. It also means that if the trial judge orders remittitur, the plaintiff has a chance to *undo* that ruling. It is, therefore, difficult to predict the impact of the different standards of review without some theory about the relative deference to juries of trial courts and courts of appeal. Given a strong national policy and a weak showing of the need for intrastate uniformity concerning the standard of review, the choice of a federal common law rule seems justified.

The foregoing analysis suggests that *Gasperini* may have been correctly decided, but offers a different rationale to explain the holding. This conclusion highlights that applying the two-pronged approach of classic federal common law to *Erie* cases will not necessarily change the holdings of *Erie* cases. It does, however, offer a relatively straightforward approach that extricates the courts from the unanswered dilemma of when to use the approach of *Byrd* and when to use *Hanna*.

III. CONCLUSION

In posing hypothetical *Erie* cases, it is easy to frame the question to students as "should the court apply the federal rule or the state rule?" Such a formulation is misleading. It obscures the fact that valid federal law, even federal common law, is always supreme. The proper question is not "which rule should the court apply," but "is there an applicable (and valid) federal rule?" Understood this way, *Erie* cases are simply a small subset of preemption and federal common law cases, and they can be analyzed as such.

In this Essay, I have explored what *Erie* doctrine would look like if we treated *Erie* cases like classic federal common law cases and applied the traditional two-pronged test used for federal common law. I do not

164. *Gasperini*, 116 S. Ct. at 2224.

contend that under such an approach cases would always be easy. However, this approach would provide some doctrinal clarity and consistency. It might also be another step towards truly repressing the "myth of *Erie*."